AMERICAN BANKRUPTCY INSTITUTE

Winter Leadership Conference

When the Creditor Becomes the Debtor: Consumer Lenders in Bankruptcy and the Impact on Borrowers

Hosted by Business Reorganization & Consumer Bankruptcy Committees

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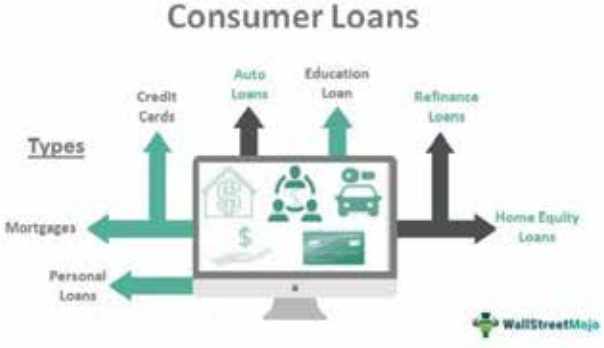
CONCURRENT SESSION

2024

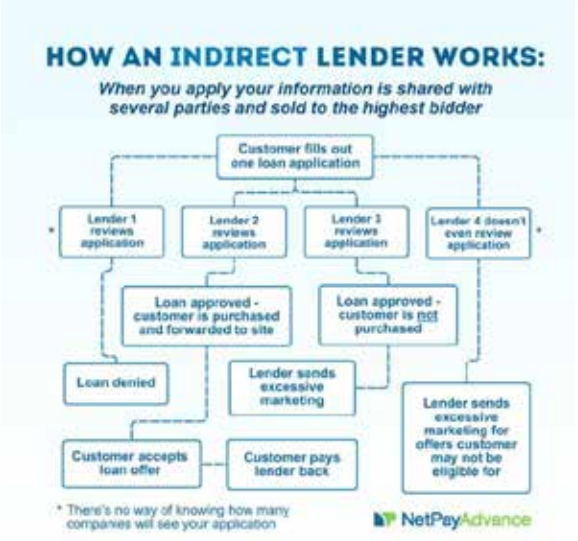
The Baseline

- What is a consumer loan?
  - Loans to individuals for personal use
- Changes to consumer lending
  - Technological advancements
  - Evolving consumer expectations
  - New financial models
  - Data security and privacy concerns



The Baseline

- What is the debtor's business?
  - Direct Lenders
  - Servicer
  - Indirect Lenders
    - Credit Services Organization ("CSO")
      - In exchange for a fee, assists consumer in (i) obtaining a loan or extension of credit or (ii) improving credit
    - Credit Access Business ("CAB")
      - Obtain credit for consumer from an independent third-party lender in the form of a deferred presentment transaction or a motor vehicle title loan, often called "payday loans" or "title loans"

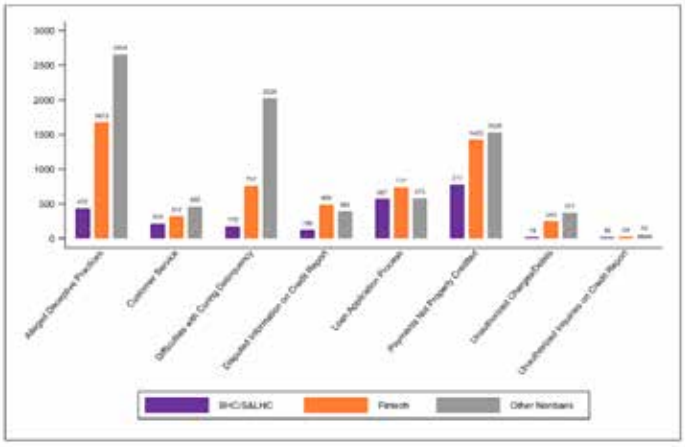


The Baseline

- How & why does the individual consumer get involved?
  - Ongoing/continued funding/servicing of any outstanding loan
  - Dispute/complaints with prior funding/servicing of loan

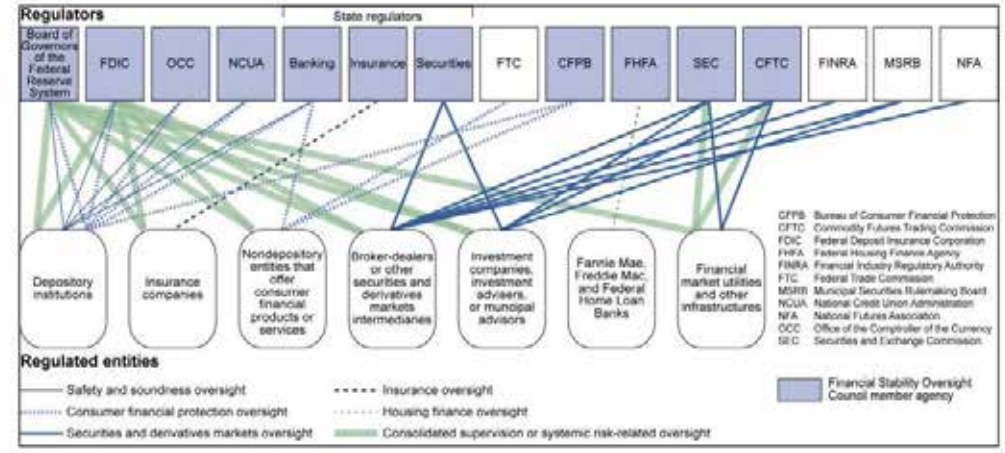
Visual: https://bpi.com/lender-performance-in-the-personal-loan-market-from-the-perspective-of-consumer-complaints/

Figure 4: Complaints by Lender Type and Issue Category (July-Dec 2017 through 2022)



Source: CFPB Consumer Complaints Database

Figure 1. Regulatory Jurisdiction by Agency and Type of Regulation



Source: Government Accountability Office (GAO), *Financial Regulation*, GAO-16-175, February 2016, Figure 2.

For Business Counsel: Pre-filing Issues and First Day Matters

- Do consumers require notice on the bankruptcy filing?
- Cash management issues unique to consumer lenders (digital payment systems, etc)
- Status of pending pre-petition consumer litigation, especially consumer class action litigation
- What government agencies require notice of the bankruptcy? Is the debtor subject to any consent orders?
- Do you need a consumer ombudsman? How do you protect consumers' PII?
- What is the goal/exit strategy of the bankruptcy? Sale vs Plan process

For Consumer Counsel: Claims Process

- Claim filing procedures
- Best practices to file claims to withstand scrutiny (examples)
- Class proofs of claim (Rule 7023)
  - Timeliness is critical
  - When are they appropriate?
  - Why filing both a proof of claim and a class action AP may be appropriate /necessary
- Negotiating for class certification as part of plan confirmation process

Example Proof of Claim

PLEASE TAKE NOTICE OF THE FOLLOWING:

1. On October 23, 2017, Think Finance, LLC and six (6) affiliated entities ("Debtors") filed petitions in the United States Bankruptcy Court for the Northern District of Texas seeking relief under chapter 11 of the United States Bankruptcy Code. These cases are jointly administered, meaning that all pleadings filed in these cases will be reflected on the case docket for Think Finance, LLC, Case No. 17- 33964.

2. On November 21, 2017, the Court entered an order ("Bar Date Order") establishing 4:00 p.m. (Central Time) on March 1, 2018, as the last day for filing proofs of claim against the Debtors by non-governmental units ("General Bar Date"). Pursuant to the Bar Date Order, each person or entity that wishes to assert a claim against any of the Debtors arising or deemed to have arisen prior to the Petition Date (a "Prepetition Claim") must file an original, separate, completed and executed proof of claim so that it is received on or before the General Bar Date at the following address:

By U.S. Postal Service:	By Private Delivery Service/Hand Delivery:
Think Finance, LLC, et al. c/o ALCS P.O. Box 23650 Jacksonville, FL 32241	Think Finance, LLC, et al. c/o ALCS 5985 Richard St., Suite 3 Jacksonville, FL 32216

3. Pursuant to the Bar Date Order, if you do not file a proof of claim by the General Bar Date you will be barred, estopped, and enjoined from asserting a Prepetition Claim, or filing a related proof of claim, against the Debtors or their property.

4. You are receiving this notice because you may have obtained a consumer loan from a sovereign Native American Tribal lender between April 5, 2011 and May 6, 2017, or, if you are a Pennsylvania resident, a ThinkCash consumer loan between February 1, 2009 and December 31, 2010 from First Bank of Delaware. Certain of the Debtors may have provided services to the lender and/or invested in an entity that may have purchased a participation interest in your loan. Certain parties have filed litigation asserting claims against one or more of the Debtors related to similar loans. The Debtors deny any liability and the fact that you are receiving this notice does not mean that you have a claim.

5. You may find out more information and obtain a proof of claim form by visiting www.americanlegal.com/TFConsumerBorrower, or by calling (800) 501-9541, or by writing to Think Finance, LLC et al., c/o ALCS, P.O. Box 23650, Jacksonville, FL 32241.

Sample Borrower Responses

I received a postcard about having a debt with a loan company and it list some of the loan companies on it. One of the loan company mentioned was First Bank of Delaware. I am willing to pay it back, could you tell me how much it was please? My contact number is [redacted]. I would like to pay whatever I owe. The loan amount I don't know. The postcard was addressed to [redacted]. I am willing to settle outside of court.

Claim 0100

1/26/18

THINK FINANCE,

I RECEIVED A CORRESPONDENCE FROM YOUR COMPANY. I DON'T REALLY UNDERSTAND WHAT THIS CARD MEANS. MY BANKRUPTCY CASE HAS BEEN DISCHARGED.

PLEASE WRITE ME CONCERNING THIS MATTER.

CASE # 17-33964 (HDH)

Committees

- Requesting the AUST to authorize formation of a separate official Consumer
- Creditors' Committee
  - Example of letter to AUST requesting formation of Consumer Committee
  - When are they appropriate?
  - What role can they play?
- Investigation and pursuit of estate causes of action to pay consumer claims
- Valuation of consumer claims

Coming out of Chapter 11/What Happens Next?

- How is the consumer impacted by a sale vs. a plan process?
- Disclosure Statement/Plan Review and Considerations
  - Third Party Releases
  - Plan injunction vs. discharge injunction
- Avoiding use of non-estate funds to pay estate expenses

When the Creditor Becomes the Debtor: Consumer Lenders in Bankruptcy and the Impact on Borrowers
Outline

I. The Baseline

a. What is a consumer loan?
b. What is the debtor's business? Servicer (CSO/CAB) vs. Direct Lender
c. How & why does the individual consumer get involved?
d. Regulatory Landscape

II. For Business Counsel: Pre-filing Issues and First Day Matters

a. Do consumers require notice on the bankruptcy filing?
b. Cash management issues unique to consumer lenders (digital payment systems, etc)
    I. Example- Cash Management Motion (First Guaranty Mortgage)
c. Status of pending pre-petition consumer litigation, especially consumer class action litigation
d. What government agencies require notice of the bankruptcy? Is the debtor subject to any consent orders?
e. Do you need a consumer ombudsman? How do you protect consumers' PII?
f. What is the goal/exit strategy of the bankruptcy? Sale vs Plan process

III. For Consumer Counsel: The Claims Process

a. Claim filing procedures
    I. Example- Limited Objection re: Proof of Claim Bar Date (Ditech)
    II. Example Consumer Proof of Claim Form (Think Finance)
b. Best practices to file claims to withstand scrutiny
    I. Example Completed Consumer Proof of Claim for Nationwide Class (Think Finance)
c. Class proofs of claim (Rule 7023)
    I. Timeliness is critical.
    II. When are they appropriate?
    III. Why filing both a proof of claim and a class action AP may be appropriate / necessary.
    IV. Negotiating for class certification as part of plan confirmation process.
    V. Class Proofs of Claim Associated Materials
        A. Adversary Proceeding Example (Think Finance)
        B. Representative case- In re TWL Corp. (debtor's former employee brought AP to recover for alleged violation of WARN Act and moved for certification of plaintiff class)
        C. Sample brief- Brief in Support of Motion to Authorize Bankruptcy Rule 7023 to California Plaintiff's Proof of Claims and to Certify Class of California Consumers (Think Finance)

D. Sample brief- Virginia, Florida and California Consumer Borrowers' Brief in Support of Motions to Authorize Bankruptcy Rule 7023 to Proofs of Claim (Think Finance)
E. Sample deck- Closing Arguments re: Motions to Authorize Bankruptcy Rule 7023 to Proofs of Claim (Think Finance)

IV. Committees

a. Requesting the AUST to authorize formation of a separate official Consumer Creditors' Committee
    I. Example of letter to AUST requesting formation of Consumer Committee
        A. Sample Letter - Letter to AUST Requesting Formation of Consumer Committee
    II. When are they appropriate?
        A. Example- Motion to Disband Consumer Creditors Committee (Ditech)
        B. Example- Transcript from Hearing Denying Motion to Disband Consumer Creditors Committee (Ditech)
    III. What role can they play?
        A. Special consumer counsel
            I. Example- Motion to Employ (Ditech)
b. Investigation and pursuit of estate causes of action to pay consumer claims
c. Valuation of consumer claims

V. Coming out of Chapter 11/What Happens Next?

a. How is the consumer impacted by a sale vs. a plan process?
b. Disclosure Statement/Plan Review and Considerations
    I. Third Party Releases: Opt out language & examples, with a focus on due process concerns with consumer constituents
    II. Plan injunction vs. discharge injunction
c. Avoiding use of non-estate funds to pay estate expenses

VI. Additional Materials

a. Example Postcard Notice to Consumers (ThinkFinance)
b. Example FAQ for Postcard Notice to Consumers (ThinkFinance)
c. Example Expert Report for "Plain Language" expert (ThinkFinance)

Example- Cash Management Motion & Order (First Guaranty Mortgage)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: FIRST GUARANTY MORTGAGE CORPORATION, *et al.*,[1] Debtors.	Chapter 11 Case No. 22-10584 (Jointly Administered)

MOTION OF THE DEBTORS FOR ENTRY OF INTERIM AND FINAL ORDERS: (I) AUTHORIZING USE OF CASH MANAGEMENT PROCEDURES, BANK ACCOUNTS, AND CERTAIN PAYMENT METHODS; (II) PROHIBITING SETOFFS AND FREEZING OF BANK ACCOUNTS; (III) MODIFYING REQUIREMENTS OF SECTION 345(b) OF THE BANKRUPTCY CODE; AND (IV) FOR RELATED RELIEF

First Guaranty Mortgage Corporation ("FGMC"), and the above-referenced affiliated debtors and debtors-in-possession (the "Debtors") under chapter 11 of title 11 of the United States Code, §§ 101 *et seq.* (the "Bankruptcy Code"),[2] in these chapter 11 cases (the "Chapter 11 Cases"), by and through the undersigned counsel of record, hereby file this motion (the "Motion"), pursuant to §§ 105(a), 345, and 363 of the Bankruptcy Code; Rules 6003 and 6004(h) of the Bankruptcy Rules; and Local Rules 2015-2(a) and 9013-1, for entry of an interim order (substantially in the form attached hereto as **Exhibit A**, the "Interim Order") and a final order (substantially in the form attached hereto as **Exhibit B**, the "Final Order") (i) authorizing the Debtors to continue to use (as such capitalized terms are defined below) their existing Cash Management System, Bank

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's tax identification number are: First Guaranty Mortgage Corporation (9575); and Maverick II Holdings, LLC (5621). The location of the corporate headquarters and the service address for First Guaranty Mortgage Corporation is 5800 Tennyson Parkway, Suite 450, Plano, TX 75024.

[2] All references to "§" or "section" herein are to sections of the Bankruptcy Code. All references to "Bankruptcy Rules" are to provisions of the Federal Rules of Bankruptcy Procedure. All references to "Local Rules" are to provisions of the Local Bankruptcy Rules of the United States Bankruptcy Court for the District of Delaware (the "Court").

Accounts, and certain Credit and Electronic Payment Methods; (ii) authorizing the Debtors to open or close Bank Accounts or establish new or different Credit and Electronic Payment Methods, all in the ordinary course of business; (iii) prohibiting applicable banks from offsetting against or freezing any of the Debtors' deposit accounts; (iv) modifying the requirements of § 345(b) of the Bankruptcy Code; (v) scheduling a final hearing; and (vi) granting related relief.

PRELIMINARY STATEMENT

1. The relief sought in this Motion is critical to ensure that the Debtors continue to have reliable and ready access to cash receipts so they can pay for the ordinary and necessary expenses of their businesses and to avoid harm to parties who have entrusted funds to the Debtors. Without this relief, the Debtors would suffer immediate and irreparable harm because they would not be able to access cash receipts in order to fund business operations, thereby harming their businesses and depleting value from their estates to the detriment of creditors. Granting this Motion, as well as other Motions, is necessary to ensure that the Debtors can pay their ordinary course operating expenses, and, ultimately, provide the Debtors with an opportunity to administer their business as a going concern.

2. In support of this Motion, the Debtors rely upon and refer this Court to the Declaration of Aaron Samples (the "Samples Declaration" or the "First Day Declaration").

3. As discussed in the First Day Declaration, market conditions, taken together with various other factors as more fully described in the First Day Declaration, resulted in a liquidity crisis for the Debtors, thereby precipitating the filing of these Chapter 11 Cases.

4. For these reasons, and as more fully explained below, the Debtors request that this Court grant the relief requested herein.

I. JURISDICTION AND VENUE

5. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b). The Debtors confirm their consent pursuant to Rule 7008 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules") to the entry of a final order by the Court in connection with the Motion to the extent it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution. Venue of the Chapter 11 Cases and related proceedings is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

6. The predicates for the relief requested are §§ 105, 345, and 363 of the Bankruptcy Code, Rules 6003 and 6004(h) of the Bankruptcy Rules, and Rules 2015-2(a) and (b) 9013-1(m) of the Local Rules.

II. STATEMENT OF FACTS

A. The Chapter 11 Cases

7. On June 30, 2022 (the "Petition Date"), the Debtors commenced their Chapter 11 Cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code with this Court.

8. The Debtors continue to operate their businesses and manage their properties as debtors and debtors-in-possession pursuant to §§ 1007(a) and 1108 of the Bankruptcy Code. To

date, no trustee, examiner, or statutory committee has been appointed in these cases by the United States Trustee (the "U.S. Trustee").

9. A description of the Debtors' capital and corporate structures, businesses, and the events leading to commencement of these Chapter 11 Cases, as well as the facts and circumstances supporting this Motion, are set forth in the Declaration.

B. The Debtors' Cash Management System, Bank Accounts, and Credit and Electronic Payment Methods

10. Prior to the commencement of these Chapter 11 Cases, and in the ordinary course of their businesses, the Debtors maintained centralized cash management and monitoring procedures (the "Cash Management System") to efficiently collect, monitor, transfer, and disburse funds generated by the Debtors' business operations.

11. The Cash Management System allows the Debtors to operate their business efficiently and meet their needs given their industry-specific needs as originators and sellers of collateralized residential mortgage loans. During the fiscal year that ended December 31, 2021, the Debtors sold mortgage loans totaling $10.613 billion in unpaid principal balance, comprised of (i) $2.165 billion of Fannie Mae conventional conforming loans, (ii) $2.63 billion of Freddie Mac conventional conforming loans, (iii) $3.986 billion of Ginnie Mae loans, and (iv) $1.832 billion of other loans.[3]

[3] As used in this Motion, "Fannie Mae" refers to the Federal National Mortgage Association, and "Freddie Mac" means the Federal Home Loan Mortgage Corporation. Fannie Mae and Freddie Mac are government-sponsored entities that buy and securitize mortgage loans originated by mortgage lenders. This enables the mortgage lenders access to liquidity that is, in turn, supported by demand for residential mortgage backed securities ("RMBS").

As used in this Motion, "Ginnie Mae" refers to the Government National Mortgage Association, a federal corporation within the U.S. Department of Housing and Urban Development ("HUD"). Ginnie Mae guarantees investors the timely payment of principal and interest on

Sources of Cash Receipts and the Flow of Funds

12. To assist the Court in understanding the Debtors' need to maintain their existing Cash Management System, a diagram reflecting the manner in which the Debtors have received funds and made disbursements is attached as **Exhibit C** (the "Cash Flow Diagram"). As reflected in the Cash Flow Diagram, which is intended to be representative of the manner in which funds have flowed into and out of the Debtors, the Debtors borrow funds from warehouse lenders[4] to use in the origination and purchase of residential mortgage loans. The Debtors' warehouse lenders (the "Warehouse Lenders") are Customers Bank, Flagstar Bank, Texas Capital Bank, and J.V.B. Financial Group LLC (three of which also function as Repo Lenders).[5]

13. For the Repo Lenders, the Debtors are short-term loan sellers and the Repo Lenders are loan buyers. The Debtors (as sellers) seek a source of funding for use in purchasing or originating and closing, as applicable, mortgage loans, and the Repo Lenders (as buyers) are willing to provide such funds to the Debtors for use in the purchase or closing of mortgage loans upon the terms contained in the relevant master repurchase agreement. To accomplish this goal, from time to time the parties hereto may enter into transactions in which the Debtors agree to transfer to a Repo Lender (as buyer) certain mortgage loans and the related assets against the

residential mortgage backed securities that, in turn, are backed by federally insured or guaranteed loans.

[4] Warehouse Lenders provide credit facilities to loan originators to pay for a mortgage that a borrower uses to purchase property. These loans are typically very short – from origination of the residential mortgage loan until such time as it is sold on the secondary market. As used by the Debtors in this Motion, "Warehouse Lenders" includes entities that purchase mortgages pursuant to master repurchase agreements (each a "Repo Lender" and collectively "Repo Lenders").

[5] As used in this Motion, the "Repo Lenders" are (i) Customers Bank, (ii) Texas Capital Bank, National Association, and (iii) J.V.B. Financial Group, LLC, as successor by merger to C&Co./PrinceRidge LLC (each a "Prepetition Repo Buyer" and, collectively, the "Prepetition Repo Buyers") and refers to a short-term lender to the Debtors with respect to certain purchased loans.

transfer of funds by the Repo Lender (as buyer), with a simultaneous agreement by the Repo Lender (as buyer) to transfer to Debtors (as seller) such mortgage loans and the related assets at a date certain against the transfer of funds by the Debtors (as seller).

14. Funds from the sale of loans are used to, among other things, repay the Warehouse Lenders and fund the Debtors' business operations.

15. At the same time, the Debtors are party to certain agreements with the Warehouse Lenders (the "Warehouse Agreements") under which the Warehouse Lenders advance and will finance the purchase of loans. Loans that will be sold to or guaranteed by a governmental agency (such as Fannie Mae, Freddie Mac, or Ginnie Mae) (the "Agency Loans") are financed at 100%. With respect to jumbo mortgage loans, Warehouse Lenders will finance between 95% and 99% of the loan, and with respect to non-qualified loans (*i.e.* also referred to as non-conforming), Warehouse Lenders will finance between 90% and 95% of the loan.

16. The Debtors also borrow funds from Repo Lenders, such as J.V.B. Financial LLC, to purchase loans that meet certain eligibility criteria. Deutsche Bank, in its capacity as a trustee, determines whether any specific loan meets the requisite eligibility criteria. If Deutsche Bank determines a specific loan meets the eligibility criteria, then Deutsche Bank will provide funds to the Debtors which, in turn, are sent to borrowers for immediate disbursement. The overall flow of funds is similar to the manner in which funds are disbursed by the Warehouse Lenders in that Repo Lenders send funds to the Debtors from an account over which Deutsche Bank is custodian, and then the Debtors send funds to the appropriate party.

17. Once originated or purchased, the Debtors then sell, on a permanent basis, the loans they originate or purchase to a number of parties including Fannie Mae, Freddie Mac, Ginnie Mae, and other private parties referred to as "Loan Purchasers" in the Cash Flow Diagram.

18. In addition to loan origination and purchasing, the Debtors have also engaged in hedging activities in an effort to reduce risk due to volatility in pricing for loans that are originated and sold in fluctuating market conditions. This has been necessary because there is a gap in time between the date a customer or borrower receives an interest rate lock at the time a mortgage loan commitment is issued and the date of settlement of the loan. As set forth in the Declaration, margin calls in the weeks leading up to the Petition Date had an adverse impact on the Debtors' cash position. The Debtors do not expect to be engaged in hedging activities post-petition.

19. Funds remaining with the Debtors for business operations are then used for disbursements to vendors, for payroll, and to loan servicers or subservicers (collectively, the "Servicers"), including for fees or expenses (such as appraisals and the like, as needed).

20. As events in the Chapter 11 Cases progress, the manner in which the Debtors receive funds may change.

The Bank Accounts

21. The Cash Management System is comprised of thirty-nine (39) bank accounts (the "Bank Accounts") maintained at seven (7) different financial institutions (the "Banks" and each individually a "Bank"). The Banks include Customers Bank; Flagstar Bank; Texas Capital Bank; Wells Fargo, N.A.; Deutsche Bank; Bank of America, N.A.; and Signature Bank. Texas Capital Bank; Wells Fargo, N.A.; Bank of America, N.A.; and Signature Bank are designated as authorized depositories by the Office of the United States Trustee for Region 3 (the "UST"), pursuant to the UST's Operating Guidelines and Reporting Requirements for Debtors in Possession and Trustees (the "Guidelines"). Customers Bank, Flagstar Bank, and Deutsche Bank are not designated as authorized depositories per the Guidelines.

22. The Bank Accounts are identified and described on a schedule (the "Bank Account Chart") attached as **Exhibit D** (the "Bank Accounts" or each individually a "Bank Account"). The Bank Account Chart contains key pieces of information about each of the Debtors' Bank accounts, including (a) the manner in which they are titled based on recent bank statements, which reflects the status of any specific Bank Account if used to hold funds for other parties; (b) last four digits for each account number; (c) the account type (*e.g.*, warehouse, checking, etc.); (d) the applicable Bank; (e) whether the accounts are subject to draft agreements (such as to fund customer property taxes) and the name of the drafting party; (f) recent balances; and (g) a short description of the purpose and use for each account. The three Bank Accounts at the bottom of the Bank Account Chart were established shortly before the Petition Date and include two accounts established for the benefit of the Debtors with account names of "Computershare Inc aaf KCC Client Funds" and naming "First Guaranty Mortgage Company" as the beneficiary (the "FBO Accounts"). The Debtors may open additional accounts immediately after the Petition Date to the extent needed.

23. The Bank Accounts can be grouped into several categories as indicated in the Bank Account Chart. These include (a) warehouse lending accounts (the "Warehouse Account"), where receipts from loan sales are deposited and from which the Debtors' participation in the loans is drafted; (b) operating accounts of the Debtors (the "Operating Accounts"), where disbursements are made for, among other things, ordinary business expenses; (c) custodial or restricted accounts (the "Custodial Accounts"), which hold funds over which the Debtors or a Servicer act as custodian

for other parties, such as HUD or borrower escrows; and (d) pledged accounts (the "Pledged Accounts"), serving as collateral for Warehouse Lenders.[6]

24. Certain of the Bank Accounts on the Bank Account Chart occasionally have in excess of $250,000.00 in the account depending on the timing of receipts and disbursements. The Bank Account Chart indicates recent balances shortly before the Petition Date.

Disbursement Processes

25. The Debtors use funds from the Bank Accounts to pay, among other things, the following items: (i) wages and employee benefits; (ii) amounts owed to contract counterparties and vendors; (iii) insurance premiums; (iv) taxes and fees; and (v) general operating costs.

26. As part of the Cash Management System, all disbursements are approved through the Debtors' standard procedures under which ultimate approval authority for disbursements is currently vested in the Debtor's Chief Executive Officer (the "CEO"), who also has check-writing authority. All disbursements over $20,000.00 require direct, rather than delegated, approval of the CEO. Using internal reports, including aged accounts payable summaries, the Controller or CEO directs the Debtors' financial accountants regarding which invoices to pay, in what amounts, and when to make such payments. The financial accountants then have the ability to select approved invoices for specific vendors that a Debtor intends to pay, and then batches of checks are run on a specific date based on the directives.

27. The Debtors' non-payroll disbursements are primarily, but not exclusively, made through a weekly check run. Subordinate employees requesting disbursements are required to get the appropriate level of approval prior to review and approval by the CEO of all disbursements.

[6] This Motion seeks authority for the Debtors to continue to engage in their usual and customary practices of disbursements with respect to funds for which the Debtors serve as a custodian or conduit. This relief is set forth in paragraph 9 of the Interim Order.

Checks are typically printed each Friday on check stock that the Debtors have and can edit as necessary.[7]

28. The Debtors have filed a separate motion requesting permission to pay outstanding payroll and benefits for employees (the "Payroll Motion"). The Payroll Motion provides a detailed description of the timing and manner of relevant disbursements. Suffice to say for this Motion, payroll is managed by the Debtors' human resources department with payroll disbursements made electronically to all employees every other Friday (twenty-six (26) times per year) and certain commission payments disbursed twice monthly (twenty-four (24) times per year).

29. The Bank Accounts are monitored daily for cash balances and placed in appropriate categories to show the Debtor's daily cash position. The Bank Accounts are reconciled monthly by a financial accountant and reviewed by the Controller. A financial accountant or the Controller maintains a spreadsheet to reconcile the general ledger to the Bank Accounts each month. Discrepancies are investigated by a financial accountant. It is critical that the Debtors monitor their cash balance carefully because the Debtors, particularly in the days leading up to the commencement of these cases, have operated on very narrow daily cash margins, meaning that a delayed receivable or unexpected disbursement could quickly disrupt business operations due to an inability to pay for critical supplies or services.

30. While the majority of disbursements are made by checks, the Debtors occasionally use credit or debit cards (collectively, the "Credit Cards") in the ordinary course of their business for certain vendor payments, and certain parties draft payments (as indicated in the Bank Account

[7] Because the Debtors' can easily edit their name on their check stock, they are not seeking permission to forgo indicating their status as debtors-in-possession on post-petition checks.

Chart). The Credit Cards are issued by American Express and Texas Capital Bank (Visa).[8] There are seven (7) American Express cards with total monthly disbursements of approximately $40,000.00 to $45,000.00. There is one (1) Visa card with five (5) employees having an extension with respect to such card and able to incur charges. Monthly charges for the Visa card total approximately $40,000.00. This motion requests authority to continue to use Credit Cards post-petition on an interim and then final basis, with monthly caps during the interim period equal to $45,000.00 for the American Express card and $40,000.00 for the Visa card.

31. The Debtors also use electronic funds transfers and automatic clearing house transactions (collectively, "Electronic Transfers" and together with the Credit Cards, the "Credit and Electronic Payment Methods") in the ordinary course of their businesses. Electronic Transfers are utilized in the funding and settlement process of residential mortgage loans.

32. As set forth in the First Day Declaration, the Debtors believe that their business operations and cash management capabilities would be negatively affected if they are required to modify their Cash Management System, close their Bank Accounts, and cease using Credit and Electronic Payment Methods. Opening new bank accounts and making disbursements solely by check would lead to delayed cash receipts and delayed disbursements—and the Debtors do not have sufficient cash reserves to maintain operations without a reliable and ready stream of cash receipts. Lastly, their business would further be negatively affected—and residential borrowers and investors would be harmed—if the Debtors are not able to maintain their ordinary and customary practices with respect to Custodial Accounts.

[8] The Credit Cards have the names of authorized users on the physical cards, but the bill is issued to the Debtors, and the Debtors are the party responsible for all charges.

III. RELIEF REQUESTED

33. By this Motion, the Debtors first seek entry of the Interim Order followed by scheduling of the Final Hearing and then entry of an order granting this Motion on a final basis.

34. Pursuant to the Interim Order, the Debtors request that the Court (i) authorize continued use of the Cash Management System, Bank Accounts, and certain Credit and Electronic Payment Methods; (ii) authorize the Debtors to open or close Bank Accounts or establish new or different Credit and Electronic Payment Methods, all in the ordinary course of business; (iii) prohibit the Banks from offsetting against or freezing any of the Debtor's deposit accounts; (iv) modify the requirements of § 345(b) of the Bankruptcy Code; (v) waive any applicable stay and enter the Interim Order on an emergency or expedited basis; and (vi) for related relief.

IV. BASIS FOR RELIEF

A. This Court Should Authorize the Debtors to Maintain Existing Bank Accounts

35. The UST Guidelines require debtors-in-possession to, among other things, close all existing bank accounts and open new debtor-in-possession bank accounts; open a new set of books and records as of the commencement of a case; and make all disbursements of estate funds by check with a notation representing the reason for the disbursement. These requirements are intended to provide a clear line of demarcation between prepetition and post-petition transactions and operations, and to prevent a debtor's inadvertent payment of prepetition claims.

36. The Debtors seek a waiver of the UST Guidelines' requirement for the closure of the Bank Accounts and opening of new post-petition bank accounts at depositories authorized by the UST. Maintenance of the Bank Accounts, Credit and Electronic Payment Methods, and the Cash Management System will greatly facilitate the Debtors' operations in chapter 11. The continued maintenance of the Bank Accounts, in particular, is of paramount importance because

the accounts are used to collect revenues and effectuate payments to employees and vendors, as well as to investors, taxing authorities, and borrower hazard insurance companies. Given the Debtors' narrow daily cash margins, strict enforcement of the UST Guidelines, including the requirement to close and open new accounts, would cause a severe disruption in the Debtors' activities and would impair the Debtors' ability to operate under chapter 11 if receivables are delayed and critical vendors cannot be paid in a timely manner as a result.

37. Moreover, requiring the Debtors to close all Bank Accounts and reestablish entirely new accounts—and to otherwise disrupt the Cash Management System to comply with the UST Guidelines—would require considerable time and expense to the Debtors' estates, while affording limited benefits. The commencement of the Chapter 11 Cases will already place a strain on the Debtors' relationships with their employees, customers, and vendors, all of whom are important to the Debtors' continued operations. Requiring the Debtors to replace all of their Bank Accounts by opening entirely new accounts and to change all payment information with their business partners would not only cause delay, confusion, and disruption in the Debtors' operations, but would also jeopardize the Debtors' relationships with these parties. Permitting the Debtors to continue using the Bank Accounts and the existing Cash Management Procedures is, therefore, essential to a smooth and orderly transition of the Debtors into chapter 11 and to avoid disruption of their businesses and operations.

38. To guard against improper transfers resulting from the post-petition honoring of prepetition checks, the Debtors will promptly notify the Banks not to honor checks drawn on the Bank Accounts before the Petition Date, except upon limited Court-approved exceptions, such as with respect to borrower-related disbursements (for example, for property taxes and hazard insurance) from Operating Accounts (including any FBO Account) and Custodial Accounts or

disbursements to loan investors as to which the Debtors are merely conduits or custodians. Subject to a prohibition against honoring prepetition checks or offsets without specific authorization from this Court, the Debtors request that they be authorized to maintain and continue the use of their Bank Accounts in the same manner and with the same account numbers, styles, and purposes as those employed prepetition.

39. Moreover, no parties-in-interest will be harmed by the continued use of the Bank Accounts because the Debtors have implemented appropriate mechanisms to ensure that the Debtors will not make unauthorized payments on account of prepetition obligations. In addition, parties-in-interest and the U.S. Trustee can adequately monitor the flow of funds into and out of the Bank Accounts through the required monthly operating reports or such other reporting as may be required or ordered in these cases. In light of such protective measures and the disclosure obligations, the Debtors submit that the relief requested herein is in the best interests of the estates and creditors, and that compliance with the UST Guidelines would be unnecessary and inefficient.

40. The Debtors further request that this Court authorize and direct the Banks to receive, process, honor, and pay any and all checks, electronic fund transfer, credit card, ACH payments, wires and other payment instructions, as well as drafts payable through, drawn, or directed on, such Bank Accounts after the Petition Date by holders, makers, or other parties entitled to issue instructions with respect thereto, irrespective of whether such checks, drafts, electronic fund transfers, credit card, or ACH payments are dated prior or subsequent to the Petition Date. With respect to the use of Credit Cards on an interim basis, the Debtors' request is limited to a monthly caps of $45,000.00 for the Debtors' American Express card and $40,000.00 for the Debtors' Visa card.

41. In light of these common realities, Courts in this and other districts have noted that

an integrated cash management system "allows efficient utilization of cash resources and recognizes the impracticalities of maintaining separate cash accounts for the many different purposes that require cash." *In re Columbia Gas Sys., Inc.*, 136 B.R. 930, 934 (Bankr. D. Del. 1992), *aff'd in relevant part*, 997 F.2d 1039 (3d Cir. 1993); *see also Southmark Corp. v. Grosz (In re Southmark Corp.)*, 49 F.3d 1111, 1114 (5th Cir. 1995) (finding cash management system allows a debtor "to administer more efficiently and effectively its financial operations and assets"). Indeed, the United States Court of Appeals for the Third Circuit has concluded that requiring a debtor to maintain separate accounts "would be a huge administrative burden and economically inefficient." *Columbia Gas*, 997 F.2d at 1061; *see also In re Southmark Corp*., 49 F.3d 1111, 1114 (5th Cir. 1995) (cash management system allows debtor "to administer more efficiently and effectively its financial operations and assets").

42. As a result, the Debtors request authority to continue to use their Cash Management System pursuant to §§ 105(a) and 363 of the Bankruptcy Code. More specifically, § 363(c)(1) of the Bankruptcy Code authorizes the debtor-in-possession to "use property of the estate in the ordinary course of business without notice or a hearing," 11 U.S.C. § 363(c)(1), and § 105(a) empowers this Court to "issue any order, process, or judgment that is necessary to carry out the provisions of this title," 11 U.S.C. § 105(a). The purpose of these sections is to provide a debtor-in-possession with the flexibility to engage in the ordinary transactions required to operate its business without undue oversight by creditors or a court. *See Med. Malpractice Ins. Ass'n v. Hirsch (In re Lavigne)*, 114 F.3d 379, 384 (2d Cir. 1997); *In re Roth Am., Inc.*, 975 F.2d 949, 952 (3d Cir. 1992); *see also In re Nellson Nutraceutical, Inc.*, 369 B.R. 787, 796 (Bankr. D. Del. 2007). Thus many courts have held that § 363(c) grants debtors authority to continue the routine transactions that are necessitated by their cash management system. *See Amdura Nat'l Distrib.*

Co. v. Amdura Corp. (In re Amdura Corp.), 75 F.3d 1447, 1453 (10th Cir. 1996); *Charter Co. v. Prudential Ins. Co. of Am. (In re Charter Co.)*, 778 F.2d 617, 621 (11th Cir. 1985).

43. As discussed above, the Debtors' Cash Management System was established and used consistently by the Debtors in the ordinary course of business prior to the Petition Date. Thus, continuing the use of the Cash Management System maintains the ordinary course of the Debtors' business rather than requiring radical alteration that could be expensive, burdensome, and disruptive at a time when the Debtors' businesses are fragile due to the transition into chapter 11.

44. Moreover, the Cash Management System provides the Debtors with appropriate tools to manage their funds – and businesses – during this case while also ensuring controls are in place to prevent assets from being used without adequate disclosure and permission. Indeed, as discussed above, the Cash Management System is not only predicated on the use of preexisting Bank Accounts and payment methods, but it also is premised on existing policies and procedures for when and how disbursements are authorized and made. Said another way, the Cash Management System already provides the type of controls necessary for chapter 11 while also being fully compatible with the transparency and disclosure that chapter 11 requires.

45. Accordingly, consistent with these provisions, the continued use of a banking and cash management system employed in the ordinary course of a debtor's prepetition business has been approved in a number of other cases in this District. *See, e.g., In re Clover Techs. Grp., LLC*, No. 19-12680 (KBO) (Bankr. D. Del. Jan. 21, 2020) (authorizing the debtors to continue using their prepetition cash management system); *In re Bumble Bee Parent, Inc.*, Case No. 19-12502 (LSS) (Bankr. D. Del. Dec. 18, 2019), ECF No. 152 (authorizing the debtors' continued use of existing bank accounts); *In re Anna Holdings, Inc.*, No. 19-12551 (CSS) (Bankr. D. Del. Dec. 3, 2019) (same); *In re Destination Maternity Corporation, et al.*, No. 19-12256 (BLS) (Bankr. D.

Del. Nov. 12, 2019) (same); *In re Dura Auto. Sys., LLC*, Case No. 19-12378 (KBO) (Bankr. D. Del. Nov. 19, 2019), ECF No. 335 (same); *In re Forever 21, Inc.*, Case No. 19-12122 (KG) (Bankr. D. Del. Oct. 28, 2019), ECF No. 334 (same); *In re Furie Operating Alaska, LLC*, No. 19-11781 (LSS) (Bankr. D. Del. Sept. 27, 2019) (same); *In re Blackhawk Mining LLC, et al.*, No. 19-11595 (LSS) (Bankr. D. Del. Aug. 8, 2019) (same); *In re Insys Therapeutics, Inc.*, Case No. 19-11292 (KG) (Bankr. D. Del. July 5, 2019), ECF No. 243 (same); *In re Mattress Firm, Inc.*, Case No. 18-12241 (CSS) (Bankr. D. Del. Nov. 7, 2018), ECF No. 758 (same).[9]

46. Even if any aspects of the Cash Management System and related relief would be considered outside of the ordinary course, the Court may approve it pursuant to § 363(b) of the Bankruptcy Code, which authorizes the Court to do so after notice and an opportunity for hearing. Relatedly, the Court has authority under § 105(a) of the Bankruptcy Code to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Moreover, the relief requested is not in direct contravention of any specifically enumerated restriction or prohibition elsewhere in the Bankruptcy Code and is necessary to avoid harm to the Debtors, their creditors, and borrowers and others who have entrusted funds to the Debtors.

47. Accordingly, the Debtors respectfully request that this Court allow them to maintain the Bank Accounts, maintain the Cash Management Procedures, and continue using their Credit Card and Electronic Payment Methods in the ordinary course as was done before the Petition Date and authorize and direct the Banks to process transactions in regard to the Bank Accounts. To the extent necessary, the Debtors request that the Court waive compliance with the UST Guidelines

[9] Because of the voluminous nature of the orders cited herein, such orders have not been attached to this motion. Copies of these orders are available upon request to the Debtors' proposed counsel.

B. This Court Should Prohibit the Banks From Attempting to Setoff Against or Freeze the Debtors' Cash

48. Subject to § 553 of the Bankruptcy Code, the Banks should be prohibited from offsetting, affecting, freezing, or otherwise impeding the Debtors' use of any funds deposited in the Bank Accounts on account of, or by reason of, any claim (as defined in § 101(5) of the Bankruptcy Code) that the Banks may have against either of the Debtors or any non-debtor affiliate that arose before the Petition Date, absent further order of this Court. Given the Debtors' narrow daily cash margins, setoffs or freezing the Debtors' funds would have serious adverse consequences to business operations and could harm borrowers who will then have unfunded mortgage loans. Consequently, on an interim basis, the Court should prohibit the Banks from offsetting, affecting, freezing, or otherwise impeding the Debtors' use of funds deposited in the Bank Accounts. *See, e.g., In re Gorham Paper and Tissue, LLC*, No. 20-12814 (Bankr. D. Del. Nov. 6, 2020) (interim order prohibiting bank from "offsetting, affecting, freezing, or otherwise impeding the Debtors' use of any funds deposited in the Bank Accounts on account of, or by reason of, any claim, as defined in § 101(5)) of any such Bank against the Debtors . . . absent further order of the Court.").

C. This Court Should Grant a Limited Modification of § 345(b) of the Bankruptcy Code on an Interim Basis for 45 Days

49. Section 345(a) of the Bankruptcy Code governs a debtor's cash deposits during a chapter 11 case and authorizes deposits of money as "will yield the maximum reasonable net return on such money, taking into account the safety of such deposit or investment." 11 U.S.C. § 345(a). For deposits that are not "insured or guaranteed by the United States or by a department, agency, or instrumentality of the United States or backed by the full faith and credit of the United States," § 345(b) requires the debtor to obtain from the entity with which the money is deposited a bond in

favor of the United States and secured by the undertaking of an adequate corporate surety, unless the Court for cause orders otherwise. 11 U.S.C. § 345(b).

50. Local Rule 2015-2(b) authorizes this Court to grant interim relief from § 345(a) and (b) until a hearing on the merits of the Debtors' request to waive the investment requirements. Specifically, the Local Rule provides:

> Except as provided in Local Rule 4001-3, no waiver of the investment requirements of 11 U.S.C. § 345 shall be granted by the Court without notice and an opportunity for hearing in accordance with these Local Rules. However, if a motion for such a waiver is filed on the first day of a chapter 11 case in which there are more than 200 creditors, or otherwise with cause shown, the Court may grant an interim waiver until a hearing on the debtor's motion can be held.

Local Rule 2015-2(b). Here, interim relief is warranted because the Debtors have over 200 creditors between them, and the Debtors operate a carefully managed cash management system.

51. Although Customers Bank, Flagstar Bank, and Deutsche Bank are not authorized depositories, the Debtors believe that the standards of § 345 are met because these banks are highly rated subject to supervision by federal banking regulators. Accordingly, the Debtors believe that any funds that are deposited with these banks are secure, and thus, in compliance with § 345(a) of the Bankruptcy Code.

52. Strict compliance with the requirements of § 345(b) would be inconsistent with § 345(a), which permits a debtor-in-possession to make such investments of money of the estate "as will yield the maximum reasonable net return on such money." 11 U.S.C. § 345(a). Thus, in 1994, to avoid "needlessly handcuff[ing] larger, more sophisticated debtors," Congress amended § 345(b) to provide that its strict investment requirements may be waived or modified if the Court so orders "for cause." 11 U.S.C. § 345(b), amended by 140 Cong. Rec. H10752-01, 1994 WL 545773 (1994).

53. Review of the factors analyzed by courts to determine whether "cause" exists to waive the requirements demonstrates that there is justification to extend the Debtors' time to comply with, or seek a waiver of, the requirements in § 345(b). To elaborate, courts consider the "totality of circumstances" in determining whether "cause" exists, with particular regard to the following factors: (a) the sophistication of the debtor's operations; (b) the size of the debtor's operations; (c) the amount of investments involved; (d) the reasonableness of the debtor's request for relief from § 345(b) requirements in light of the overall circumstances of the case; (e) bank ratings of the financial institutions where debtor in possession funds are held; (f) the complexity of the case; (g) the safeguards in place within the debtor's organization of insuring the safety of the funds; (h) the debtor's ability to reorganize in the face of a failure of one or more of the financial institutions; (i) the benefit to the debtor; and (j) the harm, if any, to the estate. *In re Serv. Merch. Co.*, 240 B.R. 894, 895 (Bankr. M.D. Tenn. 1999).

54. Here "Cause" exists to waive the requirements of § 345(b) on an interim basis for forty-five (45) days in these chapter 11 cases because Customers Bank, Flagstar Bank, and Deutsche Bank are highly rated, reputable, and well-capitalized institutions that are subject to supervision by national banking regulators.

55. Moreover, the process of satisfying the requirements of § 345(b) would lead to needless inconvenience and inefficiencies in the management of the Debtors' operations, and a bond secured by the undertaking of a corporate surety would be unnecessary. This extension, if granted, shall be without prejudice to the Debtors' rights to seek additional extensions on an interim or final basis in the future.

V. REQUEST FOR INTERIM AND FINAL HEARING

56. As set forth, the Debtors request that the Court hold a hearing and enter the Interim Order on an emergency or expedited basis and schedule a hearing and grant this Motion on a final basis.

VI. COMPLIANCE WITH BANKRUPTCY RULE 6003 AND WAIVER BANKRUPTCY RULES 6004(a) AND (h)

57. Lastly, the Debtors request that the Court determine that the relief requested in this Motion complies with Rule 6003 of the Bankruptcy Rules and that waiver of Rules 6004(a) and (h) of the Bankruptcy Rules is appropriate.

58. Rule 6003 provides:

> Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, grant relief regarding the following: . . (b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001.

59. The Third Circuit Court of Appeals has interpreted language similar to that used in Rule 6003 of the Bankruptcy Rules in the context of preliminary injunctions. In that context, irreparable harm has been interpreted as a continuing harm that cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation. *See, e.g., Norfolk S. Ry. Co. v. City of Pittsburgh*, 235 Fed. Appx. 907, 910 (3d Cir. 2007) (*citing Glasco v. Hills*, 558 F.2d 179, 181 (3d Cir. 1977)). Further, the harm must be shown to be actual and imminent, not speculative or unsubstantiated. *See, e.g., Acierno v. New Castle County*, 40 F.3d 645, 653-55 (3d Cir. 1994).

60. As described in this Motion and the Declaration, the Debtors have complex business operations that require reliable and ready access to cash receipts without interruption. Requiring the Debtors to discontinue use of the Cash Management System, switch Bank Accounts,

and otherwise alter payment systems would lead to significant disruption (without real benefit). The Debtors would, at least for a time, be unable to track cash receipts or disbursements—and, further, could enter a period without adequate liquidity to maintain business operations from disruptions in electronic collections arising from the sale of loans.

61. As a result, the Debtors respectfully submit that they have satisfied the "immediate and irreparable harm" standard of Rule 6003 of the Bankruptcy Rules and seek authority to continue to maintain their banking and cash management practices in the ordinary course of business.

62. The Debtors further seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Rule 6004(h) of the Bankruptcy Rules, "[an] order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." As set forth above, the Debtors submit that granting this Motion is essential to prevent irreparable damage to the Debtors' operations, going-concern values, and their efforts to pursue a sale or restructuring of the businesses.

63. Accordingly, the relief requested herein is appropriate under the circumstances and under Rules 6003 and 6004(h) of the Bankruptcy Rules.

64. Finally, should the Court be inclined to grant the Motion, the Debtors also seek a waiver of the notice requirements under Bankruptcy Rule 6004(a).

VII. NOTICE

65. The Debtors will provide notice of this motion to: (i) the Office of the United States Trustee for the District of Delaware, (ii) all alleged secured creditors, (iii) the thirty (30) largest general unsecured creditors appearing on the list filed in accordance with Rule 1007(d) (on a consolidated basis), (iv) the Banks, and (v) any parties requesting special notice. As this motion

is seeking "first day" relief, within two business days of the hearing on this motion, the Debtors will serve copies of this motion and any order entered in respect to this motion as required by Local Rule 9013-1(m).

VIII. CONCLUSION

WHEREFORE, the Debtors respectfully request entry of an order (i) granting the relief requested herein; and (ii) granting the Debtors such other and further relief as the Court deems just and proper.

Dated: June 30, 2022

PACHULSKI STANG ZIEHL & JONES LLP

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Proposed Counsel for Debtors and Debtors in Possession

EXHIBIT A

PROPOSED INTERIM ORDER

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: FIRST GUARANTY MORTGAGE CORPORATION, *et al.*,[1] Debtors.	Chapter 11 Case No. 22-10584 (Jointly Administered)

ORDER GRANTING, ON AN INTERIM BASIS, MOTION OF THE DEBTORS FOR ENTRY OF INTERIM AND FINAL ORDERS: (I) AUTHORIZING USE OF CASH MANAGEMENT PROCEDURES, BANK ACCOUNTS, AND CERTAIN PAYMENT METHODS; (II) PROHIBITING SETOFFS AND FREEZING OF BANK ACCOUNTS; (III) MODIFYING REQUIREMENTS OF SECTION 345(b) OF THE BANKRUPTCY CODE; (IV) AND FOR RELATED RELIEF

Upon consideration of the *Motion of the Debtors for Entry of Interim and Final Orders: (I) Authorizing Use of Cash Management Procedures, Bank Accounts, and Certain Payment Methods; (II) Prohibiting Setoffs and Freezing of Bank Accounts; (III) Modifying Requirements of Section 345(b) of the Bankruptcy Code; and (VI) Related Relief* [Docket No. ___] (the "Motion"), filed by the Debtors[2] and upon consideration of the Declaration, and the Court having jurisdiction over this matter pursuant to 28 U.S.C. 157 and § 1334(b) and the Amended Standing Order of Reference from the United States District Court for the District of Delaware dated as of February 29, 2012; and the Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), that the Debtors consent to entry of a final order under Article III of the United States Constitution, and venue of this case and the Motion in this district is proper pursuant to 28 U.S.C.

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's tax identification number are: First Guaranty Mortgage Corporation (9575); and Maverick II Holdings, LLC (5621). The location of the corporate headquarters and the service address for First Guaranty Mortgage Corporation is 5800 Tennyson Parkway, Suite 450, Plano, TX 75024.

[2] Capitalized terms not defined herein shall have the meaning ascribed to them in the Motion.

§§ 1408 and 1409; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and upon the record herein; and after due deliberation thereon; and good and sufficient cause, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that:

1. The Motion is GRANTED, as set forth herein.

2. The Debtors are authorized in the reasonable exercise of their business judgment, to: (i) utilize their existing Cash Management System and to designate, maintain, and continue to use, with the same account numbers, the Bank Accounts and Credit and Electronic Payment Methods, including Credit Cards, on an interim basis, subject to monthly caps of $45,000.00 for the Debtors' American Express card and $40,000.00 for the Debtors' Visa card; and (ii) treat such Bank Accounts for all purposes as accounts of the Debtors as debtors-in-possession and to maintain and continue using these accounts in the same manner and with the same account numbers, styles, and document forms as those employed prior to the Petition Date.

3. The Banks are hereby authorized to continue to service and administer all Bank Accounts as accounts of the Debtors as debtors-in-possession without interruption and in the ordinary course in a manner consistent with such practices prior to the Petition Date, and to receive, process, honor, and pay any and all checks, drafts, wires, or other electronic transfer requests issued, payable through, or drawn on such Bank Accounts after the Petition Date by the holders or makers thereof or other parties entitled to issue instructions with respect thereto, as the case may be; provided, however, that any such checks, drafts, wires, or other electronic transfer requests issued by the Debtors before the Petition Date may be honored only if specifically authorized by an order of this Court.

4. Further, the Banks may rely on the representations of the Debtors with respect to

whether any check, item, or other payment order drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this or any other order of this Court, and such Bank shall not have any liability to any party for relying on such representations by the Debtor pursuant to this Order.

5. The Debtors are authorized to make disbursements from the Bank Accounts other than by check, including, without limitation, via wire transfer, debit card, or other forms of electronic transfer, to the extent consistent with the Debtors' existing cash management practices.

6. The Debtors are authorized to open any new bank accounts or close any Bank Accounts as the Debtors may deem necessary and appropriate; provided, however, that prior to opening any new bank accounts or closing any Bank Accounts, the Debtors shall provide notice of the Debtors' intentions with respect thereto to the U.S. Trustee and any statutory committee of creditors appointed in these cases. Any new domestic bank account opened by the Debtors shall be established at an institution insured by the FDIC that is organized under the laws of the United States or any State therein, or in the case of accounts that may carry a balance exceeding the insurance limits set thereby, on the list of authorized bank depositories for the District of Delaware, except as may be ordered by the Court or consented-to by the UST.

7. The Banks are authorized to charge and the Debtors are authorized to pay and honor, or allow to be deducted from the applicable Bank Account, both pre-petition and post-petition service and other fees, costs, charges, and expenses to which the Banks may be entitled under the terms of and in accordance with their contractual arrangements with the Debtors (collectively, the "Bank Fees").

8. With regard to any Banks that are not authorized depositories pursuant to the Guidelines, within forty-five (45) days from the date of the entry of this Order, the Debtors shall

use their good-faith efforts to cause the bank to execute a Uniform Depository Agreement in a form prescribed by the U.S. Trustee.

9. The Debtors are authorized, but not directed, to continue the Cash Management System and related practices as used in the ordinary course prior to the Petition Date. This includes, without limitation, authorization for the Debtors to disburse through any means or for the applicable party as indicated on the Bank Account Chart to draft funds held in the Bank Accounts for borrower-related disbursements (*e.g.*, property taxes, hazard insurance, or similar disbursements from borrower funds) and other disbursements for funds held as custodian of or for another party, including loan investors who may have contractual entitlements to receipts received by the Debtors.

10. The requirements of § 345(b) of the Bankruptcy Code and the U.S. Trustee Guidelines are suspended on an interim basis for a period of forty-five (45) days from the Petition Date such that the Debtors are hereby permitted to maintain their deposits in their Bank Accounts in accordance with their existing practices without prejudice to the U.S. Trustee's right to seek further relief from this Court with respect to Bank Accounts in excess of amounts insured by the FDIC or Bank Accounts with Banks not party to the Uniform Depository Agreement upon expiration of the 45 days.

11. Subject to § 553 of the Bankruptcy Code, the Banks prohibited from offsetting, affecting, freezing, or otherwise impeding the Debtors' use of any funds deposited in the Bank Accounts on account of, or by reason of, any claim (as defined in § 101(5)) of any such Bank against the Debtors that arose before the Petition Date, absent further order of the Court.

12. This Order shall be without prejudice to the Debtors' rights to seek a further interim waiver from this Court of such requirements or to seek approval from this Court to deviate from

such requirements on a final basis.

13. Notwithstanding the relief granted herein and any actions taken hereunder, nothing contained in this Order, not any payment made pursuant to this Order, shall constitute, or is intended to constitute, an admission as to the validity or priority of any claim against the Debtors, a waiver of the Debtors' rights to subsequently dispute such claim, or the assumption or adoption of any agreement, contract, or lease under § 365 of the Bankruptcy Code.

14. Despite the use of a consolidated cash management system, the Debtors shall calculate quarterly fees under 28 U.S.C. § 1930(a)(6) based on the disbursements of each Debtor, regardless of who pays those disbursements.

15. To the extent applicable, the requirements set forth in Bankruptcy Rule 6003(b) are satisfied.

16. Notwithstanding any applicability of Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

17. The final hearing (the "Final Hearing") to consider the entry of a final order granting the relief requested in the Motion shall be held on _____ at ____ _.m. prevailing Eastern Time.

18. Any objection to the entry of a final order granting the relief requested in the Motion shall be filed with the Court and served on, no later than seven (7) days prior to the commencement of the Final Hearing, (a) the Debtors; (b) proposed counsel to the Debtors, (i) Dentons US LLP, 601 South Figueroa Street, Suite 2500, Los Angeles, California 90017-5704 (Attn: Samuel R. Maizel and Tania M. Moyron) or by e-mail at samuel.maizel@dentons.com and tania.moyron@dentons.com, and (ii) Pachulski Stang Ziehl & Jones LLP, 919 N. Market Street, 17th Floor, P.O. Box 8705, Wilmington, Delaware 19899-8705 (Attn: Laura Davis Jones) or

ljones@pszjlaw.com; (c) counsel to the [lender], (d) counsel to the official committee of unsecured creditors, if one is appointed; and (e) the United States Trustee for the District of Delaware, 844 King Street, Suite 2207, Lockbox 35, Wilmington, DE 19801, Attn: [ ] ([ ] @usdoj.gov).

19. This Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Order.

Dated: , 2020
Wilmington, Delaware

_____
United States Bankruptcy Judge

EXHIBIT B

PROPOSED FINAL ORDER

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: FIRST GUARANTY MORTGAGE CORPORATION, *et al.*,[1] Debtors.	Chapter 11 Case No. 22-10584 (Jointly Administered)

ORDER GRANTING, ON A FINAL BASIS, MOTION OF THE DEBTORS FOR ENTRY OF INTERIM AND FINAL ORDERS: (I) AUTHORIZING USE OF CASH MANAGEMENT PROCEDURES, BANK ACCOUNTS, AND CERTAIN PAYMENT METHODS; (II) PROHIBITING SETOFFS AND FREEZING OF BANK ACCOUNTS; (III) MODIFYING REQUIREMENTS OF SECTION 345(b) OF THE BANKRUPTCY CODE; (IV) AND FOR RELATED RELIEF

Upon consideration of the *Motion of the Debtors for Entry of Interim and Final Orders: (I) Authorizing Use of Cash Management Procedures, Bank Accounts, and Certain Payment Methods; (II) Prohibiting Setoffs and Freezing of Bank Accounts; (III) Modifying Requirements of Section 345(b) of the Bankruptcy Code; and (VI) Related Relief* [Docket No. ___] (the "Motion"), filed by the Debtors[2] and upon consideration of the Declaration, and the Court having jurisdiction over this matter pursuant to 28 U.S.C. 157 and § 1334(b) and the Amended Standing Order of Reference from the United States District Court for the District of Delaware dated as of February 29, 2012; and the Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), that the Debtors consent to entry of a final order under Article III of the United States Constitution, and venue of this case and the Motion in this district is proper pursuant to 28 U.S.C.

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's tax identification number are: First Guaranty Mortgage Corporation (9575); and Maverick II Holdings, LLC (5621). The location of the corporate headquarters and the service address for First Guaranty Mortgage Corporation is 5800 Tennyson Parkway, Suite 450, Plano, TX 75024.

[2] Capitalized terms not defined herein shall have the meaning ascribed to them in the Motion.

§§ 1408 and 1409; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and upon the record herein; and after due deliberation thereon; and good and sufficient cause, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that:

1. The Motion is GRANTED on a final basis, as set forth herein.

2. The Debtors are authorized in the reasonable exercise of their business judgment, to: (i) utilize their existing Cash Management System and to designate, maintain, and continue to use, with the same account numbers, the Bank Accounts and Credit and Electronic Payment Methods, including Credit Cards on a post-petition basis; and (ii) treat such Bank Accounts for all purposes as accounts of the Debtors as debtors-in-possession and to maintain and continue using these accounts in the same manner and with the same account numbers, styles, and document forms as those employed prior to the Petition Date.

3. The Banks are hereby authorized to continue to service and administer all Bank Accounts as accounts of the Debtors as debtors-in-possession without interruption and in the ordinary course in a manner consistent with such practices prior to the Petition Date, and to receive, process, honor, and pay any and all checks, drafts, wires, or other electronic transfer requests issued, payable through, or drawn on such Bank Accounts after the Petition Date by the holders or makers thereof or other parties entitled to issue instructions with respect thereto, as the case may be; provided, however, that any such checks, drafts, wires, or other electronic transfer requests issued by the Debtors before the Petition Date may be honored only if specifically authorized by an order of this Court.

4. Further, the Banks may rely on the representations of the Debtors with respect to whether any check, item, or other payment order drawn or issued by the Debtors prior to the

Petition Date should be honored pursuant to this or any other order of this Court, and such Bank shall not have any liability to any party for relying on such representations by the Debtor pursuant to this Order.

5. The Debtors are authorized to make disbursements from the Bank Accounts other than by check, including, without limitation, via wire transfer, debit card, or other forms of electronic transfer, to the extent consistent with the Debtors' existing cash management practices.

6. The Debtors are authorized to open any new bank accounts or close any Bank Accounts as the Debtors may deem necessary and appropriate; provided, however, that prior to opening any new bank accounts or closing any Bank Accounts, the Debtors shall provide notice of the Debtors' intentions with respect thereto to the U.S. Trustee and any statutory committee of creditors appointed in these cases. Any new domestic bank account opened by the Debtors shall be established at an institution insured by the FDIC that is organized under the laws of the United States or any State therein, or in the case of accounts that may carry a balance exceeding the insurance limits set thereby, on the list of authorized bank depositories for the District of Delaware, except as may be ordered by the Court or consented-to by the UST.

7. The Banks are authorized to charge and the Debtors are authorized to pay and honor, or allow to be deducted from the applicable Bank Account, both pre-petition and post-petition service and other fees, costs, charges, and expenses to which the Banks may be entitled under the terms of and in accordance with their contractual arrangements with the Debtors (collectively, the "Bank Fees").

8. With regard to any Banks that are not authorized depositories pursuant to the Guidelines, within forty-five (45) days from the date of the entry of this Order, the Debtors shall use their good-faith efforts to cause the bank to execute a Uniform Depository Agreement in a

form prescribed by the U.S. Trustee.

9. The Debtors are authorized, but not directed, to continue the Cash Management System and related practices as used in the ordinary course prior to the Petition Date. This includes, without limitation, authorization for the Debtors to disburse through any means or for the applicable party as indicated on the Bank Account Chart to draft funds held in Bank Accounts for borrower-related disbursements (*e.g.*, property taxes, hazard insurance, or similar disbursements from borrower funds) and other disbursements for funds held as custodian of or for another party, including loan investors who may have contractual entitlements to receipts received by the Debtors.

10. The requirements of § 345(b) of the Bankruptcy Code and the U.S. Trustee Guidelines are suspended for a period of forty-five (45) days from the Petition Date such that the Debtors are hereby permitted to maintain their deposits in their Bank Accounts in accordance with their existing practices for such time period without prejudice to the U.S. Trustee's right to seek further relief from this Court with respect to Bank Accounts in excess of amounts insured by the FDIC or Bank Accounts with Banks not party to the Uniform Depository Agreement upon expiration of the 45 days. All rights are reserved to the Debtors to request that the forty-five (45) day period during which the requirements of § 354(b) of the Bankruptcy Code and the U.S. Trustee Guidelines are suspended be enlarged on an interim or final basis by filing a separate motion.

11. Subject to § 553 of the Bankruptcy Code, the Banks prohibited from offsetting, affecting, freezing, or otherwise impeding the Debtors' use of any funds deposited in the Bank Accounts on account of, or by reason of, any claim (as defined in § 101(5)) of any such Bank against the Debtors that arose before the Petition Date, absent further order of the Court.

12. Notwithstanding the relief granted herein and any actions taken hereunder, nothing

contained in this Order, not any payment made pursuant to this Order, shall constitute, or is intended to constitute, an admission as to the validity or priority of any claim against the Debtors, a waiver of the Debtors' rights to subsequently dispute such claim, or the assumption or adoption of any agreement, contract, or lease under § 365 of the Bankruptcy Code.

13. Despite the use of a consolidated cash management system, the Debtors shall calculate quarterly fees under 28 U.S.C. § 1930(a)(6) based on the disbursements of each Debtor, regardless of who pays those disbursements.

14. To the extent applicable, the requirements set forth in Bankruptcy Rule 6003(b) are satisfied.

15. Notwithstanding any applicability of Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

16. This Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Order.

Dated: , 2020
Wilmington, Delaware

_____
United States Bankruptcy Judge

Exhibit C

Cash Flow Diagram

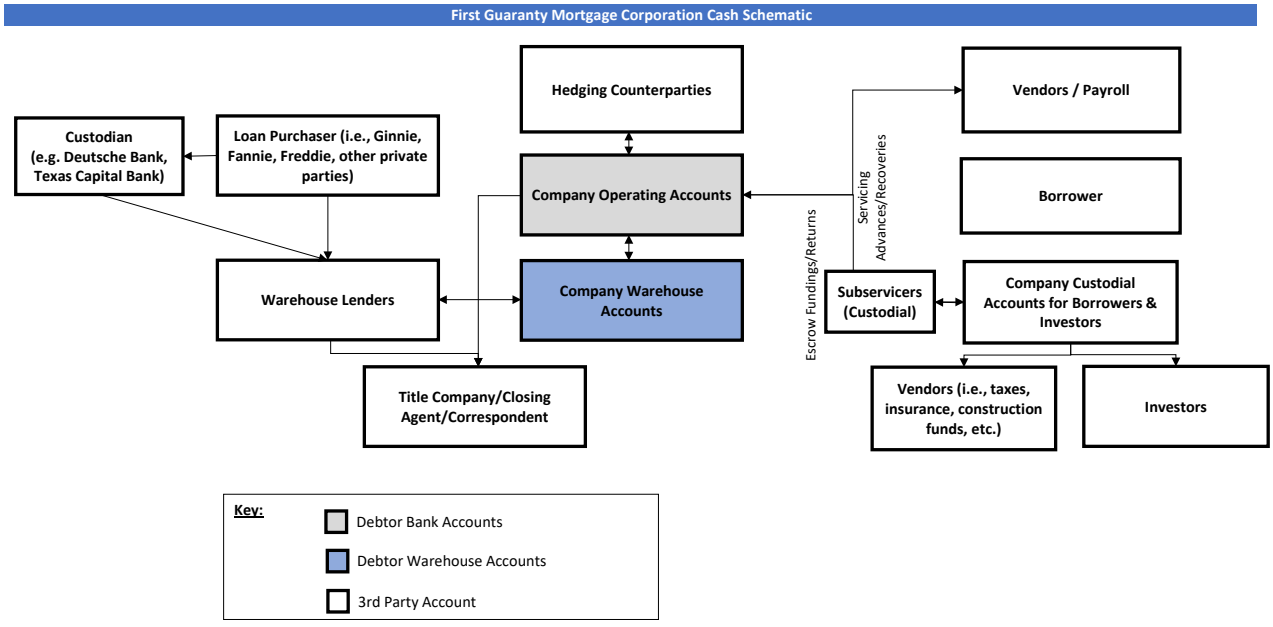
First Guaranty Mortgage Corporation Cash Schematic
Hedging Counterparties
Vendors / Payroll
Custodian (e.g. Deutsche Bank, Texas Capital Bank)
Loan Purchaser (i.e., Ginnie, Fannie, Freddie, other private parties)
Company Operating Accounts
Borrower
Servicing
Advances/Recoveries
Escrow Fundings/Returns
Warehouse Lenders
Company Warehouse Accounts
Subservicers (Custodial)
Company Custodial Accounts for Borrowers & Investors
Title Company/Closing Agent/Correspondent
Vendors (i.e., taxes, insurance, construction funds, etc.)
Investors
Key:
Debtor Bank Accounts
Debtor Warehouse Accounts
3rd Party Account

Exhibit D

Bank Accounts

Bank Statement Name	Bank Account # (Last 4)	Account Type	Bank Name	Draft Account? Yes/No	Drafting Party	Balance USD 6/28	Average Bank Fees Each Month	Estimated Amount of Bank Fees Due Pre-Petition
First Guaranty Mortgage Corporation	2029	Warehouse lending	Customers Bank	Y	Customers Bank	$ 1,012,756	$ 25,000	$ 25,000
First Guaranty Mortgage Corporation	2442	203K Master Account	Customers Bank	-	-	$ -	$ -	$ -
First Guaranty Mortgage Corporation PIMCO Extra Deposit	6097	PIMCO Extra Deposit	Customers Bank	Y	Customers Bank	$ 6,000,123	$ -	$ -
First Guaranty Mortgage Corporation	0749	Warehouse lending	Flagstar Bank	Y	Flagstar Bank	$ -	$ -	$ -
First Guaranty Mortgage Corporation	0814	Checking	Flagstar Bank	-	-	$ 178	$ 40	$ 40
First Guaranty Mortgage Corporation	0864	Pledged	Flagstar Bank	Y	Flagstar Bank	$ 501,598	$ -	$ -
First Guaranty Mortgage Corporation Participation Account	4101	Participation	Texas Capital Bank	Y	Texas Capital Bank	$ 43,054	$ -	$ -
First Guaranty Mortgage Corporation Remittance Account	4119	Remittance	Texas Capital Bank	Y	Texas Capital Bank	$ 1,523	$ -	$ -
First Guaranty Mortgage Corporation Operating	5230	Checking	Texas Capital Bank	-	-	$ 592,443	$ 13,000	$ 13,000
First Guaranty Mortgage Corporation Repo Funding Account	7482	Checking	Texas Capital Bank	-	-	$ -	$ -	$ -
First Guaranty Mortgage Corporation Payroll Account	7572	Checking	Texas Capital Bank	-	-	$ 671,510	$ -	$ -
First Guaranty Mortgage Corporation Escrow Holdbacks	4578	Escrow Master Account	Texas Capital Bank	-	-	$ 91,927	$ -	$ -
First Guaranty Mortgage Corporation	7855	Money Market	Texas Capital Bank	-	-	$ -	$ -	$ -
First Guaranty Mortgage Corporation FSA Reimbursements	9841	Custodial	Texas Capital Bank	Y	Cigna/FSA	$ 9,623	$ -	$ -
First Guaranty Mortgage Corporation Subserviced by Rushmore Loan Management Services LLC as Agent Trustee &/or Bailee for Fannie Mae &/or payments of	5659	Custodial	Texas Capital Bank	Y	FNMA	$ 9,843	$ -	$ -
First Guaranty Mortgage Corporation Subserviced by Rushmore Loan Management Services LLC as Agent Trustee &/or Bailee for Fannie Mae &/or payments of	5667	Custodial	Texas Capital Bank	Y	FNMA	$ 1,726,447	$ -	$ -
First Guaranty Mortgage Corporation as Custodian &/or bailee for Federal Home Loan Mortgage corp &/or var owners of int in mortgages &/or mortgage	6970	Custodial	Texas Capital Bank	Y	FHLMC	$ 93,375	$ -	$ -
First Guaranty Mortgage Corporation	0336	Certificate of Deposit	Texas Capital Bank	Y	Tysons' Corner Owner LLC	$ 55,090	$ -	$ -
First Guaranty Mortgage Corporation Certificate of Deposit	0342	Certificate of Deposit	Texas Capital Bank	Y	GNMA	$ 77,912	$ -	$ -
First Guaranty Mortgage Corporation Reserve Account	4910	Pledged	Texas Capital Bank	Y	Texas Capital Bank	$ 3,000,000	$ -	$ -
First Guaranty Mortgage Corporation Client's POC Trust Account	6371	Custodial	Wells Fargo	Y	Rushmore	$ 112,634	$ 500	$ 500
First Guaranty Mortgage Corporation Trustee of p&i custodial account or p&i disbursement account for various ginnie mae mortgage backed securities pools or loan packages	2109	Custodial	Customers Bank	Y	GNMA	$ 47,114	$ -	$ -
First Guaranty Mortgage Corporation central p&i clearing account in trust for Massachusetts Mutual Life Insurance Company mortgage loan portfolios	9355	Custodial	Texas Capital Bank	Y	Mass Mutual/Barings	$ -	$ -	$ -
First Guaranty Mortgage Corporation central p&i clearing account for various Everbank ebo portfolios	0064	Custodial	Texas Capital Bank	Y	Everbank/TIAA	$ -	$ -	$ -
First Guaranty Mortgage Corporation central p&i clearing account for various Everbank ebo portfolios	0072	Custodial	Texas Capital Bank	Y	Guaranty Bank	$ -	$ -	$ -
First Guaranty Mortgage Corporation Escrow Account	3944	Custodial	Texas Capital Bank	Y	FNMA/FHLMC	$ 150,578	$ -	$ -
First Guaranty Mortgage Corporation FHA VA USDA	0056	Custodial	Texas Capital Bank	Y	FNMA/FHLMC	$ 133,104	$ -	$ -
First Guaranty Mortgage Corporation trustee of servicer's escrow account for various mortgagors, Ginnie Mae mortgage backed securities	8199	Restricted	Wells Fargo	Y	Rushmore	$ 1,366,938	$ -	$ -
First Guaranty Mortgage Corporation trustee of servicer's escrow account for various mortgagors, Ginnie Mae mortgage backed securities	8207	Restricted	Wells Fargo	Y	Rushmore	$ 34,258	$ -	$ -
First Guaranty Mortgage Corporation Claims Clearing Account	4876	Restricted	Wells Fargo	Y	Rushmore	$ 191	$ -	$ -
First Guaranty Mortgage Corporation Securities Account Control Agreement	16SC.1	Restricted	Deutsche Bank	Y	Deutsche Bank	$ -		
First Guaranty Mortgage Corporation Securities Account Control Agreement	16SC.2	Restricted	Deutsche Bank	Y	Deutsche Bank	$ 46,354,805	$ 3,000	$ 3,000
First Guaranty Mortgage Corporation Securities Account Control Agreement	16SC.3	Restricted	Deutsche Bank	Y	Deutsche Bank	$ 89,529,806		
FGMC/ FGMC Master Trust V securities custody	17SC.1	Custodial	Deutsche Bank	-		$ -	$ -	$ -
FGMC/ FGMC Master Trust V securities custody	17SC.2	Custodial (Cash Proceeds)	Deutsche Bank	-		$ -	$ -	$ -
FGMC/ FGMC Master Trust V securities custody	17SC.3	Custodial (Sales)	Deutsche Bank	-		$ -	$ -	$ -
Computershare Inc aaf KCC Client Funds –Beneficiary for First Guaranty Mortgage Corporation(3584) [1]	5330	Operating	Bank of America	-		$ 3,951,827	$ -	$ -
Computershare Inc aaf KCC Client Funds –Beneficiary for First Guaranty Mortgage Corporation(3604) [1]	5330	Loan Funding	Bank of America			$ 126,218		
First Guaranty Mortgage Corporation [2]	2571	TBD	Signature Bank	-		$ -	$ -	$ -

[1] *Balances as of June 29, 2022*

[2] *Bank account set up is in process - "Know Your Customer" (KYC) pending*

Example- Limited Objection re: Proof of Claim Bar Date (Ditech)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
DITECH HOLDING CORPORATION, et al.,	:	Case No. 19-10412 (JLG)
Debtors.[1]	:	(Jointly Administered)

LIMITED OBJECTION TO THE DEBTORS' NOTICE OF PRESENTMENT REGARDING THE PROOF OF CLAIM BAR DATE

Creditors Richard and Gail Legans (together, "the Legans") file this limited objection to the notice of presentment filed by debtor Ditech Holding Corporation et al. (collectively, "Debtor" or "Ditech") proposing to extend the proof of claim filing bar date to April 19, 2019 because it is premature and no bar date should be established until Ditech (a) has filed its bankruptcy schedules and disclosures, and (b) provided notice of the bankruptcy and bar date to all known consumer creditors of Ditech, which it has failed to do.

I. INTRODUCTION/SUMMARY

This, Ditech's most recent bankruptcy, poses a very real threat to the home mortgages of consumers nationwide whose loans are currently serviced by Ditech, as well as to those, like Mr.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are Ditech Holding Corporation (0486); DF Insurance Agency LLC (6918); Ditech Financial LLC (5868); Green Tree Credit LLC (5864); Green Tree Credit Solutions LLC (1565); Green Tree Insurance Agency of Nevada, Inc. (7331); Green Tree Investment Holdings III LLC (1008); Green Tree Servicing Corp. (3552); Marix Servicing LLC (6101); Mortgage Asset Systems, LLC (8148); REO Management Solutions, LLC (7787); Reverse Mortgage Solutions, Inc. (2274); Walter Management Holding Company LLC (9818); and Walter Reverse Acquisition LLC (8837). The Debtors' principal offices are located at 1100 Virginia Drive, Suite 100, Fort Washington, Pennsylvania 19034.

and Mrs. Legans, whose home loans were service-transferred by Ditech to other mortgage servicers prior to Ditech's filing of the petition for relief in this Chapter 11 case.

Ditech's consumer creditors like Mr. and Mrs. Legans did not choose to have their loans serviced by Ditech, and they were powerless to prevent Ditech from mishandling the accounting on their loans, as it has done in a myriad of different ways for other consumer creditors like the Legans. These consumers, more so even than Ditech's trade creditors, need and deserve a fair opportunity to understand and participate in this case and to be heard by the Court in connection with its consideration of the merits of Ditech's proposed plan of reorganization. Legitimately-harmed consumers' claims against Ditech may be the only means for the extent of Ditech's servicing malfeasance to be revealed to the stakeholders in this case, such that their suppression through lack of proper notice undermines the legitimacy and integrity of the plan Ditech now seeks to confirm.

By choosing to file this bankruptcy, Ditech has elected to invoke a process that demands transparency. Yet, Ditech's attempt to unfairly fast-track claims filing deadlines is antithetical to the due process that the law requires and is potentially irreparably damaging to Ditech's customers – whose homes are on the line.

II. BACKGROUND

The Debtors filed petitions under chapter 11 of the Bankruptcy Code on February 11, 2019. On February 15, 2019, the Court ordered Debtors' claims noticing agent to "promptly" provide notice of the bankruptcy as required by the Bankruptcy Code and Rules. Debtors' noticing agent's affidavit of service indicates that the noticing agent served notice of Debtors' bankruptcy on

February 19, 2019, although the notice of bankruptcy that the Debtors' noticing agent served did not specify a claims filing deadline.

Pursuant to Court order of February 22, 2019, the bar date for the filing of claims against the Debtors was initially established as April 1, 2019 (the "Bar Date"). In the Bar Date order, the Court modified Debtors' proposed form of order to require Debtors to send Notice of the Bar Date to, among others, "all creditors and other known holders of potential claims as of the date of the order,"[2] and "all parties to pending litigation against the Debtors (as of the date of the entry of the Proposed Order). The order required the Debtors to send notice by first-class mail at least thirty-five (35) days prior to April 1, 2019. On March 1, 2019, Forrest Kuffer, Noticing Coordinator for Epiq Corporate Restructuring, LLC, ("Epiq") filed an Affidavit of Service, stating that on February 25, 2019, he caused the Bar Date Notice, Proof of Claim Form (POC), and Proof of Claim Instructions to be served on the parties listed in Exhibits D, F, and G by first class mail.

The Claims Filing Instructions are Misleading and Unreasonably Confusing

Debtors' claim filing instructions included with the bar date notice refer the recipient to the Debtors' *unfiled* bankruptcy schedules to determine whether the recipient will be listed as a holder of a claim against the Debtors. The instructions falsely state that "[c]opies of the Debtors' Schedules are available for inspection on the Bankruptcy Court's electronic docket . . . which is posted on . . . the website established by [Debtors' noticing agent] and on [] the Court's

[2] Debtors' originally-proposed form of order would have been limited Debtors' responsibility to provide notice of the bankruptcy to "known" creditors only. See modifications to order, Docket No. 90 (Case No. 19-10412), at p.8.

website . . . ." Neither of these statements was then or is presently true, as the Debtors have yet to file their schedules in this case.[3]

In combination with the confusing and false instructions directing consumers like the Legans to reference Debtors' phantom schedules, from a typical unsophisticated consumer's perspective, the instructions Ditech provided in the Bar Date notice are effectively impenetrable and useless. As such, the Bar Date notice is instead a "bar claim" near-guarantee for the Debtors, with respect to the likelihood of proofs of claims being filed by the overwhelming majority of legitimately aggrieved consumer creditors in this case.

Delayed Notice of the Bar Date for Parties with Pending Litigation

Creditors Richard and Gail Legans are residents of Texas and have a mortgage loan previously serviced by Ditech Financial, LLC. On November 1, 2018, Mr. and Mrs. Legans filed a lawsuit naming Ditech Financial, LLC as a Defendant, which is currently pending in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 18-03343, asserting violation of discharge injunction pursuant to §524, violations of the Texas Debt Collection Act, and seeking recovery of actual, statutory, and punitive damages.

Mr. and Mrs. Legans' counsel did receive a Notice of Ditech's Chapter 11 bankruptcy in late February, well after the Court entered its order establishing the initial April 1, 2019 Bar Date. The first affidavit of service filed by Debtors' noticing agent for the bar date notice (Docket No. 131) indicates that the bar date notice *was* provided to eleven creditors by overnight mail and email on February 22, 2019, but the Legans were not among that group. Debtors' noticing agent's

[3] Debtors had ensured that this would be so by filing a motion to extend the deadline to file their schedules, which was approved by Court order entered a full seven days before Debtors caused their claims noticing agent to serve the proof of claim instructions.

affidavit of service dated March 1, 2019 (Docket No. 142) states that the claims noticing agent served the bar date notice to thousands of other creditors on February 25, 2019, by first class mail and by email. The Legans did not receive notice of the Bar Date by email, and they did not receive the paper notice until March 7, which prompted their counsel to file a notice of appearance in this case.

Known Potential Creditors Not Included in the Service List

Ditech, in its capacity as mortgage servicer, is subject to the requirements of the Real Estate Settlement Procedures Act (RESPA). The Consumer Financial Protection Bureau ("CFPB") is the governmental regulator responsible for monitoring servicers' compliance with RESPA's requirements. As such, Ditech is required to maintain and follow procedures for compliance with RESPA's requirements. Section 2605(e) of RESPA provides consumer borrowers with important rights to help them resolve disputes with their mortgage servicers. Among these rights is a mechanism for borrowers to send correspondence providing the servicers with notification regarding errors in the servicing of borrowers' accounts, which is intended to help prevent needless litigation by giving servicers like Ditech advance notice of and an opportunity to cure servicing violations.

Specifically, Regulation X (which implements RESPA) establishes an error resolution procedure that is initiated by the borrower (or borrower's agent) sending a written "notice of error" to the servicer. Notices of error may, for example, identify 1) a failure to properly credit payments, 2) the imposition of an improper fee or charge, or 3) failure to provide accurate loss mitigation information to the borrower. Receipt of a notice of error triggers certain obligations on the part of the servicer. Failure to satisfy those obligations gives rise to a cause of action under RESPA.

Additionally, some mortgage loan documents and state laws, including UDAP[4] laws, require pre-suit notice and an opportunity to cure.

Borrowers that have sent such notices whose complaints are not addressed by correction of any servicing errors are known potential creditors, as they are asserting errors or claims with respect to the servicing of their loans. The CFPB requires servicers to track these claims, and the CFPB itself maintains a database of such claims, to the extent consumers file them with the CFPB. However, the following borrowers, who are also clients of the Legans' counsel, have notified Ditech of disputes regarding the servicing of their mortgage loans but have not been provided with the Bar Date Notice, POC Form, or POC Instructions:

> Dawn Davis, property located at 1425 River Ridge Road, Roanoke, TX 76262, loan number xxxxxx1225
>
> Joe Martinez, property located at 3519 Heritage Trail, Celina, TX 75009, loan number xxxxxx7553
>
> Matthew & Jazmin Bennett, property located at 4385 Ashley Lane, Grand Prairie, TX 75052, loan number xxxxxx5230
>
> Grace Carleton, property located at 815 E. Bethel School Road, Coppell, TX 75019, loan number xxxxxx2179

Even where Ditech has taken some remedial action with respect to its servicing violations for particular borrowers' accounts, oftentimes its obligations are continuing and require that it monitor and ensure that certain errors do not reoccur. By virtue of such commitments, Ditech is specifically aware that these borrowers are known potential creditors, and its failure to provide these customers with notice of the bar date is inexcusable.

[4] Unfair and deceptive acts and practices laws.

III. RELIEF

The Bar Date should be established pursuant to the procedural guidelines for the Southern District of New York, which provide:

> 1. An application for entry of a Bar Order must ordinarily be filed within thirty (30) days after the later of (i) the initial case conference and (ii) the filing of the debtor's Schedules of Assets and Liabilities and Schedules of Executory Contracts and Unexpired Leases. If counsel believes that entry of a Bar Order should be further delayed for any reason, counsel is urged to take up the matter at the initial case conference.

Accordingly, the bar date should not be established until Ditech files its schedules, at which time the bar date should be thirty days after the filing of such schedules.

Ditech also should be required to provide additional individual notice to every known and known potential consumer creditor, including every borrower who has, during the two years ended on February 11, 2019, sent Debtors a notice of error under RESPA, a notice to cure under the mortgage loan documents, a pre-suit notice required by state law, or similar correspondence. Prior to sending such notice, Ditech should be required to employ a qualified "plain English" expert to craft the language in the notice such that it is true, accurate, and reasonably accessible / understandable for an ordinarily sophisticated consumer. Such notice should be required to include a brief, plain English description of Ditech's current bankruptcy case, including why the Debtors have filed for bankruptcy, what the Debtors are seeking to do by filing this bankruptcy, how the Debtors intend to accomplish their goals in this bankruptcy, the roles of the principal stakeholders in the case, what Debtors anticipate will happen to the borrowers' loans in the bankruptcy, the effect of the bankruptcy on any errors in the servicing of the borrowers' loans and on the borrowers' rights to recover from the Debtors or any third party for any harms and losses caused by Debtors'

servicing errors. The supplemental notice should also include a plain English explanation of the automatic stay and the effect and scope of the order modifying the automatic stay.

It would also be reasonable and appropriate to authorize any consumer creditor filing a claim with respect to the servicing of their mortgage loan to file a single claim in any one of the Debtor's bankruptcy cases and to have such claim treated as filed for purposes of any of Ditech's bankruptcy cases to which it is applicable, rather than requiring the consumer to determine the one appropriate case in which to file a proof of claim, out of the fourteen related bankrupt debtors involved in this matter.

IV. Prayer

For the reasons stated, Creditors Richard and Gail Legans request that the Court set a hearing to determine the appropriate bar date for this case and to address the various deficiencies and defects in the bar date notification process in this case to date, and for such other and further relief as the Court determines to be just and equitable.

Respectfully Submitted,

KELLETT & BARTHOLOW PLLC

/s/ Theodore O. Bartholow, III ("Thad")

Theodore O. Bartholow II ("Thad")
State Bar No. 4306320
11300 N. Central Expressway., Suite 301
Dallas, Texas 75243
Phone: (214) 696-9000
Fax: (214) 696-9001
thad@kblawtx.com

Example Consumer Proof of Claim Form (Think Finance)

United States Bankruptcy Court **Northern District of Texas, Dallas Division**	**Consumer Borrower Proof of Claim**
In re Think Finance, LLC et al., Case No. 17-33964	**Deadline for Filing Proofs of Claim: March 1, 2018 4:00 pm (Central)**

Name of Lender From Which You Obtained a Loan. (Check one box - if you are asserting a claim based on loans from more than one lender, you must file a separate Proof of Claim for each such claim)

First Bank of Delaware
Great Plains Lending, LLC, a tribal lending entity wholly owned by the Otoe-Missouria Tribe of Indians
Plain Green, LLC, a tribal lending entity wholly owned by the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation, Montana
MobiLoans, LLC, a tribal lending entity wholly owned by the Tunica-Biloxi Tribe of Louisiana

1. **Full Name** _____

2. **Address**

_____
Address 1

_____ _____ _____
City State ZIP

Phone # ___ ___ ___ -- ___ ___ ___ -- ___ ___ ___ ___ Email _____

3. **List Four Digits of your Social Security Number** ____ ____ ____ ____

4. **Loan Number** _____

5. **Amount & Basis of Claim**

Amount of Claim $ _____

Basis for Claim _____

_____

6. **Sign Below**

The person completing this proof of claim must sign and date it. FRBP 9011(b).

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct

Executed on date_____
MM/DD/YY

_____
Signature

Submission of Proof of Claim Form: DO **NOT** SEND THIS FORM TO THE BANKRUPTCY COURT. Submit original proof of claim form to the following so that it is **received** by March 1, 2018:

If via USPS: Think Finance, LLC et al, c/o ALCS, P.O. Box 23650, Jacksonville, FL 32241

If via Private Delivery Service or Hand Delivery: Think Finance, LLC et al., c/o ALCS, 5985 Richard St., Ste. 3, Jacksonville, FL 32216

Instructions for Consumer Borrower Proof of Claim

In re Think Finance, LLC et al., Case No. 17-33964 (HDH)
United States Bankruptcy Court for the Northern District of Texas

12/15

These instructions and definitions generally explain how to prepare the Consumer Borrower Proof of Claim. You should consider obtaining the advice of an attorney, especially if you are unfamiliar with the bankruptcy process.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both.
18 U.S.C. §§ 152, 157 and 3571.

How to fill out the Consumer/Borrower Proof of Claim form

- **Fill in all of the information about the claim as of the date the case was filed.**
- **Check the box next to the name of the lender from which you obtained your loan.** If you are asserting a claim based on loans obtained from more than one lender, you must file a separate Consumer/Borrower Proof of Claim for each such claim.
- **Provide the loan number that was provided to you by your lender or appeared on your loan statements.**
- **Provide the basis for your claim.** You must allege a basis for your claim if you believe you have a claim against any of the Debtors. You may not have a claim solely because you received a loan from one of the lenders listed on the proof of claim form.
- **If you are attaching documents, do not attach any original documents as such documents will be destroyed at the conclusion of the bankruptcy case and will not be returned to you.**
- **Deadline for filing Consumer/Borrower Proofs of Claim: March 1, 2018, 4:00 pm (Central).** Send completed Consumer/Borrower Proof of Claim so that it is **received** by the

  Proof of Claim deadline via physical delivery to:

  by USPS: Think Finance LLC et al, c/o ALCS, PO Box 23650, Jacksonville, FL 32241

  by Private Delivery Service/Hand Delivery: Think Finance LLC et al, c/o ALCS, 5985 Richard St, STE 3, Jacksonville, FL 32216

Understand the terms used in the Consumer Borrower Proof of Claim form

Claim: A creditor's right to receive payment for a debt that the debtor owed on the date the debtor filed for bankruptcy. 11 U.S.C. §101 (5). The fact that you are receiving this proof of claim does not mean that you have a claim or that you will be entitled to any distribution in the bankruptcy cases.

Creditor: A person, corporation, or other entity to whom a debtor owes a debt that was incurred on or before the date the debtor filed for bankruptcy. 11 U.S.C. §101 (10).

Debtor: A person, corporation, or other entity who is in bankruptcy. 11 U.S.C. § 101 (13).

Proof of Claim: A form that shows the amount of debt the debtor owed to a creditor on the date of the bankruptcy filing. The form must be must be submitted according to the directions provided on the form and in these instructions.

Offers to purchase a claim

Certain entities purchase claims for an amount that is less than the face value of the claims. These entities may contact creditors offering to purchase their claims. Some written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court, the bankruptcy trustee, or the debtor. A creditor has no obligation to sell its claim. However, if a creditor decides to sell its claim, any transfer of that claim is subject to Bankruptcy Rule 3001(e), any provisions of the Bankruptcy Code (11 U.S.C. § 101 et seq.) that apply, and any orders of the bankruptcy court that apply.

Do not file these instructions with your Consumer Borrower Proof of Claim Form.

Instructions for Consumer Borrower Proof of Claim

In re Think Finance, LLC et al., Case No. 17-33964 (HDH)
United States Bankruptcy Court for the Northern District of Texas

12/15

These instructions and definitions generally explain how to prepare the Consumer Borrower Proof of Claim. You should consider obtaining the advice of an attorney, especially if you are unfamiliar with the bankruptcy process.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both.
18 U.S.C. §§ 152, 157 and 3571.

How to fill out the Consumer/Borrower Proof of Claim form

- **Fill in all of the information about the claim as of the date the case was filed.**
- **Check the box next to the name of the lender from which you obtained your loan.** If you are asserting a claim based on loans obtained from more than one lender, you must file a separate Consumer/Borrower Proof of Claim for each such claim.
- **Provide the date you obtained the loan**.
- **Provide the loan number that was provided to you by your lender or appeared on your loan statements.**
- **Provide your state of residence at the time you applied for and received the loan.**
- **Provide the basis for your claim.** You must allege a basis for your claim if you believe you have a claim against any of the Debtors. You may not have a claim solely because you received a loan from one of the lenders listed on the proof of claim form.
- **If you are attaching documents, do not attach any original documents as such documents will be destroyed at the conclusion of the bankruptcy case and will not be returned to you.**
- **Deadline for filing Consumer/Borrower Proofs of Claim: March 1, 2018, 4:00 pm (Central).** Send completed Consumer/Borrower Proof of Claim so that it is **received** by the Proof of Claim deadline via physical delivery to:

by USPS: Think Finance LLC et al, c/o ALCS, PO Box 23650, Jacksonville, FL 32241

by Private Delivery Service/Hand Delivery: Think Finance LLC et al, c/o ALCS, 5985 Richard St, STE 3, Jacksonville, FL 32216

Understand the terms used in the Consumer Borrower Proof of Claim form

Claim: A creditor's right to receive payment for a debt that the debtor owed on the date the debtor filed for bankruptcy. 11 U.S.C. §101 (5). The fact that you are receiving this proof of claim does not mean that you have a claim or that you will be entitled to any distribution in the bankruptcy cases.

Creditor: A person, corporation, or other entity to whom a debtor owes a debt that was incurred on or before the date the debtor filed for bankruptcy. 11 U.S.C. §101 (10).

Debtor: A person, corporation, or other entity who is in bankruptcy. 11 U.S.C. § 101 (13).

Proof of Claim: A form that shows the amount of debt the debtor owed to a creditor on the date of the bankruptcy filing. The form must be must be submitted according to the directions provided on the form and in these instructions.

Offers to purchase a claim

Certain entities purchase claims for an amount that is less than the face value of the claims. These entities may contact creditors offering to purchase their claims. Some written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court, the bankruptcy trustee, or the debtor. A creditor has no obligation to sell its claim. However, if a creditor decides to sell its claim, any transfer of that claim is subject to Bankruptcy Rule 3001(e), any provisions of the Bankruptcy Code (11 U.S.C. § 101 et seq.) that apply, and any orders of the bankruptcy court that apply.

Do not file these instructions with your Consumer Borrower Proof of Claim Form.

Example Completed Consumer Proof of Claim for Nationwide Class (Think Finance)

United States Bankruptcy Court **Northern District of Texas, Dallas Division**	**Consumer Borrower Proof of Claim**
In re Think Finance, LLC et al., Case No. 17-33964	**Deadline for Filing Proofs of Claim: March 1, 2018 4:00 pm (Central)**

Name of Lender From Which You Obtained a Loan. (Check one box - if you are asserting a claim based on more than one loan, you must file a separate Proof of Claim for each such loan)

- [X] First Bank of Delaware
- [X] Great Plains Lending, LLC, a tribal lending entity wholly owned by the Otoe-Missouria Tribe of Indians
- [X] Plain Green, LLC, a tribal lending entity wholly owned by the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation, Montana
- [X] MobiLoans, LLC, a tribal lending entity wholly owned by the Tunica-Biloxi Tribe of Louisiana

1. Full Name Nationwide Class Representatives on behalf of the Nationwide Consumer Borrower Settlement Class, *see* Attachment A

2. Address c/o Nationwide Class Counsel, Tycko & Zavareei LLP, 1828 L. St. NW Suite 1000
Address

Washington, DC (City) DC (State) 20036 (ZIP)

Phone # 202 -- 973 -- 0900 Email ahaac@tzlegal.com

3. Date Loan Received: Various **4. Loan Number:** Various

5. State of Residence When You Received Your Loan: Nationwide

6. Last Four Digits of Your Social Security Number ____ ____ ____ ____

7. Amount & Basis of Claim

Amount of Claim $ no less than 1.13 Billion

Basis for Claim See Attached Global Settlement and Restructuring Term Sheet ("Term Sheet") (also filed on June 7, 2019, at Dkt. 1405). This class proof of claim is intended to amend the previously timely filed class proofs of claim by the Nationwide Class Representatives listed on Attachment A in order to consolidate and incorporate the class claims into this claim pursuant to the Term Sheet. The basis for the amended class Proof of Claim remains the same.

8. Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct

Executed on date 06/11/2019
MM/DD/YY

Signature

Submission of Proof of Claim Form: DO **NOT** SEND THIS FORM TO THE BANKRUPTCY COURT. Submit original proof of claim form to the following so that it is **received** by March 1, 2018:

If via USPS: Think Finance, LLC et al, c/o ALCS, P.O. Box 23650, Jacksonville, FL 32241

If via Private Delivery Service or Hand Delivery: Think Finance, LLC et al., c/o ALCS, 5985 Richard St., Ste. 3, Jacksonville, FL 32216

ATTACHMENT A

Nationwide Class Representatives:

Stephanie Edwards

Patrick Inscho

Darlene Gibbs

Tamara Price

Sherry Blackburn

George Hengle

Regina Nolte

Lawrence Mwethuku

Lula Williams

India Banks

Jeri Brennan

JoAnn Griffiths

Alicia Patterson

Kimetra Brice

Jill Novorot

Earl Browne

Jessica Gingras

Angela Given

Vanessa Granger

Lilya McAtee

Beverly Kristina Miller

87

ATTACHMENT B

Gregory G. Hesse (Texas Bar No. 09549419)
HUNTON ANDREWS KURTH LLP
1445 Ross Avenue
Suite 3700
Dallas, TX 75209
Telephone: (214) 979-3000

Tyler P. Brown (admitted *pro hac vice*)
Jason W. Harbour (admitted *pro hac vice*)
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
Telephone: (804) 788-8200

Counsel to the Debtors and Debtors in Possession

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	**Chapter 11**
THINK FINANCE, LLC, *et al.*,	**Case No. 17-33964-11 (HDH)**
Debtors.[1]	**(Jointly Administered)**

NOTICE OF FILING OF SUPPLEMENTAL EXHIBIT B TO MOTION OF THE DEBTORS AND DEBTORS-IN-POSSESSION FOR AUTHORIZATION TO ENTER INTO TERM SHEET PURSUANT TO SECTIONS 105 AND 363 OF THE BANKRUPTCY CODE AND FEDERAL RULE OF BANKRUPTCY PROCEDURE 9019

PLEASE TAKE NOTICE that on June 6, 2019, the above-captioned debtors and debtors-in-possession (collectively, the "Debtors") filed the *Motion of the Debtors and Debtors-in-Possession for Authorization to Enter into Term Sheet Pursuant to Sections 105 and 363 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 9019* [Doc. No. 1402] (the "Motion")[2] with the United States Bankruptcy Court for the Northern District of Texas.

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Think Finance, LLC (6762), Think Finance SPV, LLC (4522), Financial U, LLC (1850), TC Loan Service, LLC (3103), Tailwind Marketing, LLC (1602), TC Administrative Services, LLC (4558), and TC Decision Sciences, LLC (8949).

[2] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

PLEASE TAKE FURTHER NOTICE that the Term Sheet attached hereto as Exhibit 1 (the "Supplemental Exhibit B") supplements and replaces the Term Sheet attached as Exhibit B to the Motion (the "Original Exhibit B").

PLEASE TAKE FURTHER NOTICE that the only changes from the Original Exhibit B to the Supplemental Exhibit B are: (i) the Supplemental Exhibit B contains executed signature pages; and (ii) the Supplemental Exhibit B includes the following sentence, which has been added to the end of the section titled "Press Release" that begins on page 3 of the Term Sheet: "For the avoidance of doubt, the foregoing is not intended to authorize any Settling Party to issue a press release that is deliberately misleading or knowingly inconsistent with the Material Terms."

PLEASE TAKE FURTHER NOTICE that a copy of Supplemental Exhibit B may be obtained at no charge at *https://www.americanlegal.com/TF* or for a fee at *https://ecf.txnb.uscourts.gov*.

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DATED: June 7, 2019

Respectfully submitted,

/s/ Gregory G. Hesse

Gregory G. Hesse (Texas Bar No. 09549419)
HUNTON ANDREWS KURTH LLP
1445 Ross Avenue
Suite 3700
Dallas, TX 75209
Telephone: (214) 979-3000
Email: ghesse@HuntonAK.com

-and-

Tyler P. Brown (admitted *pro hac vice*)
Jason W. Harbour (admitted *pro hac vice*)
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
Telephone: (804) 788-8200
Email: tpbrown@ HuntonAK.com
jharbour@ HuntonAK.com

Counsel to the Debtors and Debtors in Possession

Exhibit 1
Supplemental Exhibit B

Execution Version

THINK FINANCE, LLC, ET AL.

GLOBAL SETTLEMENT AND RESTRUCTURING TERM SHEET

June 6, 2019

This term sheet (together with the attachments hereto, the "Term Sheet")[1] sets forth the principal terms of a global settlement (the "Settlement") among (a) Think Finance, LLC, and its subsidiary debtors-in-possession (each a "Debtor," and collectively, the "Debtors") in the jointly administered cases styled *In re Think Finance, LLC, et al.*, Case No. 17-33964 (the "Chapter 11 Cases"), which are pending in the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court"), (b) the Consenting Plaintiffs, (c) the Official Committee of Unsecured Creditors appointed in the Chapter 11 Cases, (d) the GPLS Secured Parties, and (e) certain other non-Debtor parties who are receiving releases in exchange for making contributions to the Settlement (collectively, (a)-(e) are the "Settling Parties" and (b)-(d) are the "Consenting Stakeholders"), through a chapter 11 plan (the "Plan"). It is not intended to be a solicitation of a plan for purposes of section 1125 of the Bankruptcy Code.

THIS TERM SHEET DOES NOT CONSTITUTE (NOR SHALL IT BE CONSTRUED AS) AN OFFER WITH RESPECT TO ANY SECURITIES OR A SOLICITATION OF ACCEPTANCES OR REJECTIONS AS TO ANY EXCHANGE OR PLAN OF REORGANIZATION, IT BEING UNDERSTOOD THAT SUCH A SOLICITATION, IF ANY, SHALL BE MADE ONLY IN COMPLIANCE WITH SECTION 4(A)(2) OF THE SECURITIES ACT OF 1933, SECTION 1145 OF THE BANKRUPTCY CODE, AND ALL OTHER APPLICABLE STATUTES, RULES, AND LAWS.

THIS TERM SHEET IS SUBJECT TO THE FILING OF A PLAN AND DISCLOSURE STATEMENT IN FORM AND SUBSTANCE MATERIALLY CONSISTENT WITH THIS TERM SHEET AND OTHERWISE REASONABLY ACCEPTABLE TO THE DEBTORS AND CONSENTING STAKEHOLDERS; PROVIDED, HOWEVER, THAT

[1] Capitalized terms used but not defined throughout this Term Sheet have the meanings given thereto in Annex C.

THIS TERM SHEET IS ENFORCEABLE AGAINST THE CONSENTING STAKEHOLDERS AS SET FORTH HEREIN UNLESS THE PLAN ACTUALLY PROPOSED BY THE DEBTORS IS MATERIALLY DIFFERENT THAN THE TERMS CONTAINED HEREIN, OR, WITH RESPECT TO THE DEBTORS AND THE COMMITTEE, THEIR FIDUCIARY OBLIGATIONS REQUIRE OTHERWISE. THE SETTLING PARTIES EXPRESSLY AGREE THAT (1) THE ENFORCEABILITY OF THIS TERM SHEET AGAINST THE DEBTORS IS SUBJECT TO THE DEBTORS OBTAINING BANKRUPTCY COURT APPROVAL OF THEIR ENTRY INTO THIS TERM SHEET, AND (2) THIS TERM SHEET SHALL NOT BE BINDING AGAINST THE PUTATIVE NATIONWIDE CONSUMER BORROWER CLASS UNLESS AND UNTIL FULL AND FINAL APPROVAL OF THE SETTLEMENT PURSUANT TO FED. R. CIV. P. 23, PROVIDED THAT THIS TERM SHEET SHALL BE BINDING AGAINST THE CONSENTING PLAINTIFFS UPON EXECUTION OF THIS TERM SHEET.

THIS TERM SHEET HAS BEEN PRODUCED FOR DISCUSSION AND SETTLEMENT PURPOSES ONLY, AND IS SUBJECT TO RULE 408 OF THE FEDERAL RULES OF EVIDENCE AND OTHER APPLICABLE STATE AND FEDERAL STATUTES, RULES, AND LAWS.

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Global Settlement and Restructuring Summary	
Overview	Recognizing the benefits of a consensual, expedient resolution of the Chapter 11 Cases and the Pending Litigation (as defined in Annex B attached hereto), the Settling Parties have agreed to fully and finally resolve the claims and disputes between and among the Settling Parties and to support a Plan which includes the terms contained herein. As outlined below, the Settlement provides meaningful relief to the Debtors' stakeholders in exchange for the settlement of substantial, disputed claims against the Debtors and the Consenting Defendants, and presents the clearest path to an efficient, timely resolution of the Chapter 11 Cases. The Settlement will also incorporate the resolution of claims and issues, related to the Debtors and their business, between certain non-Debtor parties pursuant to Fed. R. Civ. P. 23(e), each of which is disputed and expressly denied by such non-Debtor parties. The Settlement ultimately will be effectuated through confirmation of the Plan, which must be consistent with this Term Sheet in all material respects unless the Debtors and all Consenting Stakeholders consent in writing to modify the terms contained in this Term Sheet. This Term Sheet identifies the Reorganized Debtor Assets, which comprise the only property of the Debtors' estates that will be vested in the Reorganized Debtors on the Effective Date. The Plan shall provide for the payment of, or establishing reserves for, certain claims on or as soon as reasonably practicable after the Effective Date, and for all other assets and property of the Debtors' estates to be administered by the Litigation Trustee on and after the Effective Date in accordance with the Plan and the Litigation Trust Agreement; provided, however, that claims against the Released Parties shall be released as set forth in greater detail below. The Settling Parties will negotiate, in good faith, any other documents reasonably required to consummate the Settlement.
Press Release	Excluding the Debtors and the GPLS Secured Parties with respect to any responsive press release, the Pennsylvania AG and the CFPB, no Settling Party shall issue or cause to be issued any press release regarding the settlement, the Debtors' chapter 11 plan, the mediation process, or other material document or material proceeding (collectively, the "Material Terms") unless

	(i) such press release is consistent in its entirety with the Material Terms and (ii) the language contained in such press release has been provided to the Debtors and the Consenting Defendants (including the GPLS Secured Parties) at least five (5) Business Days prior to the release or publication thereof. For the avoidance of doubt, the foregoing is not intended to authorize any Settling Party to issue a press release that is deliberately misleading or knowingly inconsistent with the Material Terms.
No Admission of Liability	Notwithstanding anything to the contrary herein, none of the Debtors or the Consenting Defendants (including the GPLS Secured Parties) admits to any wrongdoing, liability, fact, fault, assertion or illegality, each of which is expressly denied in its entirety by the Debtors and the Consenting Defendants (including the GPLS Secured Parties). The Settlement is entered into to resolve, settle and compromise disputed matters so as to avoid the cost, expense and effort associated with continuing the dispute. Nothing contained herein, the Plan, the Disclosure Statement or other related document shall be construed or used as an admission to any wrongdoing, liability, fact, fault, assertion or illegality by any of the Debtors or the Consenting Defendants (including the GPLS Secured Parties), each of which is expressly denied.
Settlement Timeline	The consummation of the Settlement is predicated upon the occurrence of the following events: • the execution of this Term Sheet by the Consenting Stakeholders and the Debtors, provided that such execution by the Debtors shall not be binding upon the Debtors until the Bankruptcy Court approves the Debtors' entry into this Term Sheet; • the Plan shall provide that, on the Effective Date, the GPLS Secured Parties shall cause all amounts in the GPLS Holdback Account, but no less than $7.5 million, to be transferred to the Escrow Account; • the Plan shall provide for the first $2 million from the Escrow Account to be transferred to the Pennsylvania AG on the Effective Date; • the Plan shall provide for all amounts remaining in the Escrow Account (after the $2 million transfer to the Pennsylvania AG set forth above) to be transferred to the Debtors' estates on the Effective Date, and all such funds not used to make payments or to fund reserves as

	required by this Term Sheet and the Plan shall be transferred to the Litigation Trust which shall receive all rights and interests in such funds from the Debtors and GPLS Secured Parties, for administration by the Litigation Trustee in accordance with the Plan and the Litigation Trust Agreement; • Notwithstanding any rights to the contrary set forth in the cash collateral orders entered in the Chapter 11 Cases, the GPLS Secured Parties shall not seek any further reimbursement or repayment of fees and expenses of the GPLS Secured Parties or otherwise from the Escrow Account, the GPLS Holdback Account, or otherwise; • Other than obtaining documents pursuant to (i) the 2004 Order entered concerning CBIZ and (ii) the 2004 Order entered concerning KPMG, the Committee shall continue any deadlines associated with any pending Bankruptcy Rule 2004 investigations of the Debtors and any other parties or entities. In addition, the Committee shall not seek authority to conduct any further or additional Bankruptcy Rule 2004 investigations unless and until this Term Sheet is terminated in accordance with its terms as it is the intention of the Settling Parties that the Committee will not conduct any other Bankruptcy Rule 2004 while the Settling Parties seek to confirm the Plan consistent with this Term Sheet. If, however, unforeseen events arise after the execution of this Term Sheet that do not result in the termination of this Term Sheet but cause the Committee to want to seek additional Bankruptcy Rule 2004 investigations, then the Committee shall only seek such additional Bankruptcy 2004 investigations with written consent from the Debtors, which consent shall not be unreasonably withheld; provided, however, for the avoidance of doubt, the Litigation Trustee shall succeed to the rights of the Committee in connection with such investigations on and after the Effective Date and the limitations stated herein on the Committee pursuing Bankruptcy Rule 2004 investigations shall not apply to the Litigation Trustee; • within five days following execution of this Term Sheet by the Settling Parties: • each Consenting Plaintiff shall move to stay, or

	otherwise confirm in writing to the Debtors and the applicable Consenting Defendant(s) its agreement not to proceed with, all actions currently pending against the Debtors, their estates, and all applicable Consenting Defendants, unless and until this Term Sheet is terminated in accordance with its terms; • proposed Nationwide Class Counsel shall file a motion, which shall be in a form reasonably acceptable to and not objected to by the Debtors, Committee, and all Consenting Plaintiffs and Consenting Defendants (the "Approval Motion"), seeking, among other things, (a) to amend and consolidate various proofs of claim; (b) to invoke Bankruptcy Rule 7023 to the extent necessary; (c) certification of the Nationwide Consumer Borrower Settlement Class for settlement purposes only; (d) to appoint 21 Nationwide Class Representatives; (e) to appoint Nationwide Class Counsel as class counsel; (f) preliminary approval of the Settlement pursuant to Fed. R. Civ. P. 23(e); (g) authorization of the release of funds from the Escrow Account to advance and pay noticing and related expenses in connection with the Settlement and the certification of the Nationwide Consumer Borrower Settlement Class; (h) to approve, among other things, the Class Administrator[2] and the form and manner of notice to be served on members of the Nationwide Consumer Borrower Settlement Class; (i) to establish a deadline, at least 45 days after entry of the Preliminary Approval Order, for Nationwide Consumer Borrowers to return notice of their desire to opt out of the Nationwide Consumer Borrower Settlement Class or object to the Settlement (the "Opt-Out Deadline"); and (j) to authorize the Class Representatives to vote on behalf of the Nationwide Consumer Borrower Settlement Class to accept or reject the Plan; • Kelly Guzzo, P.L.C., Consumer Litigation Associates, P.C. and Tycko & Zaveeri, P.L.C. shall file a Motion for Preliminary Approval pursuant to

[2] The Class Administrator shall be RSM, a nationally recognized class administrator acceptable to the Debtors, the Committee, the Consenting Plaintiffs, and the GPLS Secured Parties.

	Fed. R. Civ. P. 23 seeking certification of the same Nationwide Consumer Borrower Settlement Class in the Eastern District of Virginia in connection with a settlement funded by Great Plains Lending, LLC, Plain Green, LLC, MobiLoans, LLC and Mark Curry and his companies. The Committee, and all Consenting Plaintiffs and Consenting Defendants shall not object to the motion for preliminary approval. If the Virginia Class Settlement is preliminarily approved, it shall be coordinated with the Nationwide Consumer Borrower Settlement Class to the extent practicable and necessary so that the Class members (and others receiving notice) and the Bankruptcy Court can fairly evaluate the combined effect of both settlements, including the proposed remedies, relief and releases, and so that the expense, complexities and delays associated with the settlements can be minimized, all to the extent consistent with Federal Rule of Civil Procedure 23, Bankruptcy Rule 7023, CAFA, other applicable law, and due process. Notwithstanding the foregoing or anything else herein, the approval of the Virginia Class Settlement is not a condition precedent to the confirmation of the Plan or to the Effective Date; and • the Debtors shall file a motion seeking authorization to enter into this Term Sheet in a form acceptable to the Committee, the Consenting Plaintiffs, and the GPLS Secured Parties, which acceptance shall not be unreasonably withheld, which shall be attached to the motion (the "Term Sheet Authorization Motion"). • within 10 days after the filing of the Approval Motion and the Term Sheet Authorization Motion, the notice required by 28 U.S.C. § 1715 shall be provided by the Debtors and the Consenting Defendants or their designee, and such providing party shall rely upon the applicable usury limits for each of the Tier 2 states provided by proposed Nationwide Class Counsel in preparing such notice; and provided further that the Debtors shall consult with proposed Nationwide Class Counsel in connection with calculating the proposed distribution information for such notice; • within 40 days following execution of this Term Sheet the Bankruptcy Court shall have entered (i) an order substantially granting the relief sought in the Approval

	Motion (the "Preliminary Approval Order") and (ii) an order authorizing the Debtors to enter into this Term Sheet (the "Term Sheet Authorization Order"); • within 7 days following the execution of this Term Sheet, proposed Nationwide Class Counsel shall provide the proposed Class Administrator with the applicable usury rate for each of the Tier 2 states; • within 10 days following execution of this Term Sheet, the Debtors shall provide the proposed Class Administrator global historical loan level data for Eligible Tribal Loans sufficient to enable an analysis of state-by-state distribution percentages and for use in all other distribution calculations contemplated by this Term Sheet or by CFPB in connection with any distributions from its Civil Penalty Fund; • no later than 5 Business Days following entry of the Preliminary Approval Order and the Term Sheet Authorization Order, the Debtors shall file an amended Plan and Disclosure Statement reflecting the terms and conditions set forth in this Term Sheet and a motion seeking approval of the amended Disclosure Statement; • as soon as reasonably practicable, and in no event later than 45 days following entry of the Preliminary Approval Order, the Class Administrator shall mail and/or email the approved Class Notice as directed by the Preliminary Approval Order (including a special notice for Pennsylvania Borrowers that explains their separate classification and treatment), provided, that (i) the Debtors will provide all information necessary for the Class Administrator to generate a class list and utilize appropriate address update and location products and services, which update and location process will be conducted in consultation with the Debtors, and Nationwide Class Counsel, provided that the Debtors and Nationwide Class Counsel will cooperate in obtaining any collateral orders necessary to use such address update and location products services; (ii) to facilitate creation of this class list and for the additional purpose of effectuating this settlement including enabling their answering of questions from potential members of the Nationwide Consumer Borrower Settlement Class the Debtors will provide on a confidential basis to Kelly Guzzo, P.L.C. and Consumer Litigation Associates, P.C.

	(who will be the firms receiving calls from consumer borrowers), the name, last 4 digits of the social security number, state, and loan payment amount information for the consumer borrowers of the Eligible Tribal Loans, provided that Kelly Guzzo, P.L.C., and Consumer Litigation Associates, P.C. (a) shall not provide such information to any Entity other than such consumer borrower and/or the Class Administrator and shall not use such information for any other purpose and (b) agree to the entry by the Bankruptcy Court of a protective order that so limits the ability of Kelly Guzzo, P.L.C. and Consumer Litigation Associates, P.C. to provide such information to anyone else (together (a) and (b) are referred to the "PII Prohibited Use/Protective Order Provisions"); and (iii) to facilitate the Pennsylvania AG communicating with Pennsylvania Borrowers and/or serving as paying agent for allocations for Pennsylvania Borrowers, the Debtors, or at the request of the Pennsylvania AG either Kelly Guzzo, P.L.C., Consumer Litigation Associates, P.C., or the Class Administrator, will provide on a confidential basis to the Pennsylvania AG the name, last 4 digits of the social security number, and loan payment amount information for the Pennsylvania Borrowers, provided that the Pennsylvania AG (x) shall not provide such information to any Entity other than such Pennsylvania Borrower, the Class Administrator, and/or a service provider engaged by the Pennsylvania AG to assist the Pennsylvania AG in communicating with Pennsylvania Borrowers and/or serving as paying agent for allocations for Pennsylvania Borrowers, and shall not use such information for any other purpose and (y) agrees to the entry by the Bankruptcy Court of a protective order that so limits the ability of the Pennsylvania AG and any such service provider to provide such information to anyone else. After the Effective Date, the Reorganized Debtors shall, together with the Debtors, have the benefit of and right to enforce these provisions; • no later than 10 Business Days after the Opt-Out Deadline has passed, the Bankruptcy Court shall hold a hearing to determine whether to (a) approve the Disclosure Statement, (b) authorize the Debtors to distribute the Plan Solicitation Materials, and (c) approve solicitation and voting procedures, including authorizing the class representatives to vote on the Plan on behalf of

	the Nationwide Consumer Borrower Settlement Class; • within 5 Business Days following entry of the Disclosure Statement Approval Order, the Debtors shall distribute the Plan Solicitation Materials; • within 45 days following entry of the Disclosure Statement Approval Order, the Bankruptcy Court shall hold the Confirmation Hearing on the Plan contemporaneously with the Final Fairness Hearing, provided that the Final Fairness Approval Order shall contain the Class Action Injunction and Other Relief; • within 5 Business Days following the Confirmation Hearing, the Bankruptcy Court shall have entered the Confirmation Order and the Bankruptcy Court shall have entered the Final Fairness Approval Order, provided, however, that this 5 Business Day period may be extended as necessary so that the Final Fairness Approval Order is not entered less than 90 days after the mailing of any notices required by 28 U.S.C. § 1715; • within 30 days following entry of the Confirmation Order and the Final Fairness Approval Order, the Effective Date shall have occurred; and • on the Effective Date, in addition to other actions described herein or in the Plan, each of the following shall occur (except as the timing of such action shall be governed as otherwise set forth in this Term Sheet or other future agreement or modified by Bankruptcy Court order): 1. each Consenting Defendant (other than the GPLS Secured Parties) shall pay its Consenting Defendants' Cash Contribution to the Litigation Trust, in accordance with the terms of the settlement with such Consenting Defendant and/or the confirmed Plan, as applicable; 2. the GPLS Secured Parties will cause all cash in the GPLS Holdback Account to be transferred to the Escrow Account. The GPLS Secured Parties represent, warrant, and covenant that, immediately prior to the transfer of funds to the Escrow Account on the Effective Date, the GPLS Holdback Account will have no less than $7.5 million in immediately available funds;

	3. prior to any further transfers from the Escrow Account, $2 million shall be transferred to the Pennsylvania AG from the Escrow Account; 4. thereafter, all cash in the Escrow Account shall be transferred to the Debtors' estates, and then all such funds not used to make payments or to fund reserves as required by this Term Sheet or the Plan shall be transferred to the Litigation Trust which shall receive all rights and interests in such funds from the Debtors, for administration by the Litigation Trustee in accordance with the terms of the confirmed Plan and the Litigation Trust Agreement; 5. the reserve for Allowed Administrative Expenses, Priority Tax Claims and other Priority Claims shall be funded; 6. cash in the amount of the Professional Fee Amount shall be deposited into the Professional Fee Escrow by the Debtors; 7. the Reorganized Debtor Assets shall vest in the Reorganized Debtors, and the Reorganized Debtor Cash Contribution shall be paid to the Reorganized Debtors; 8. the reserve for the General Unsecured Claims Cash Pool shall be funded in the amount of $3 million, and it shall be held by the Litigation Trustee for distribution; 9. the reserve for the Substantial Contribution Fund shall be funded and disbursed; 10. the Litigation Trust shall be established in accordance with the Plan and the Litigation Trust Agreement, and all remaining cash and rights to payment in the Debtors' estates (after funding 5 through 9 above, and, other than as expressly stated herein) shall be transferred to the Litigation Trust; except for the funding of an expense reserve for the Litigation Trust in accordance with the terms of, and in the amount identified by, the Litigation Trust Agreement, the cash transferred to the Litigation Trust shall be reserved for the initial distribution to members of the Nationwide Consumer Borrower Settlement Class, and the

	Plan shall provide that such initial distribution shall occur within 30 days following the Effective Date or as soon thereafter as reasonably practicable in the Litigation Trustee's discretion;[3] 11. the Litigation Trustee, the Litigation Trust Oversight Board, and the Advisory Committee shall be appointed; 12. all Causes of Action shall be transferred to the Litigation Trust to be prosecuted solely by the Litigation Trustee in accordance with the Plan and the Litigation Trust Agreement; 13. the releases and exculpation attached hereto as **Annex A** (the "Releases") shall become fully enforceable and effective, except for (i) the releases from the Pennsylvania AG, which shall become effective upon entry of the order(s) contemplated by this Term Sheet settling the Pennsylvania Litigation (the forms of which order(s) and agreement(s) shall be mutually acceptable by and among the parties thereto and set forth in a Plan Supplement), (ii) the releases from the CFPB, which shall become effective upon entry of the order(s) contemplated by this Term Sheet, including the consent order at Annex D attached hereto, settling the CFPB Litigation, and (iii) except for the effectiveness of the releases from the Pennsylvania AG and the CFPB as set forth in (i) and (ii) above, the releases to the GPLS Secured Parties shall become effective upon the occurrence of the Effective Date and the applicable transfer(s) from the GPLS Holdback Account as set forth in this Term Sheet; 14. the (a) Consenting Plaintiffs other than the Pennsylvania AG and the CFPB shall take all steps necessary to dismiss the applicable Pending Litigation with prejudice (and obtain an appropriate Rule 54(b) order if necessary) in accordance with the paragraphs below, solely as to the Debtors (where applicable) and the

[3] The Litigation Trust Agreement is being drafted by counsel for the Committee and certain Consenting Plaintiffs and will be circulated to the Debtors separately. For the avoidance of doubt, the Litigation Trust Agreement will need to be acceptable to the Debtors, which consent shall not be unreasonably withheld.

	Consenting Defendants, (b) Pennsylvania AG shall seek and obtain all orders necessary to settle, with the entry of a Rule 54(b) separate final judgment, all claims in the Pennsylvania Litigation against the Debtors in accordance with the below Pennsylvania AG Settlement section, and (c) the CFPB shall seek and obtain all orders necessary to settle, with the entry of the consent order attached hereto at Annex D, all claims in the CFPB Litigation against the Debtors in accordance with the below CFPB Settlement section; 15. the Debtors and the GPLS Secured Parties shall take all steps necessary to dismiss the GPLS Litigation with prejudice; 16. the GPLS Secured Parties shall cause GPLS to assign the MobiLoans Note and related agreements to the Reorganized Debtors; 17. the GPLS Secured Parties shall release all interest in and rights to the Great Plains Reserve to Great Plains, which will be distributed in accordance with the terms of the settlement reached in Gibbs v. Great Plains, et al.; 18. the Reorganized Debtors shall reasonably cooperate, if needed, in efforts by the Settling Tribal Lenders to cause the Tribal Property to be transferred to the Litigation Trust in accordance with separate settlement agreements that may be reached with the Settling Tribal Lenders; provided, however, that since the Debtors are not currently aware of the extent of any cooperation required, nothing herein shall require the Reorganized Debtors to incur expenses to so cooperate without provision being made for reimbursement of reasonable and actual internal and external costs, for such cooperation to be paid to the Reorganized Debtors from the Litigation Trust; 19. the Restructuring Transactions shall be consummated; and 20. the Class Action Injunctive and Other Relief shall take effect.

Specific Components of the Settlement	
Reorganized Debtor Assets	On the Effective Date, the following Reorganized Debtor Assets (and for the avoidance of doubt, no other property of the Debtors' estates) shall be transferred to and vest in the Reorganized Debtors: • $5 million in cash (the "Reorganized Debtor Cash Distribution"); • that certain Subordinated Term Note, dated May 10, 2017, by MobiLoans for the benefit of GPLS (the "MobiLoans Note") with a face value of $6,795,000, and all directly related agreements, including that certain (a) Subordinated Loan Agreement, dated May 10, 2017, by and between MobiLoans and GPLS, (b) Security Agreement, dated May 10, 2017, by and between MobiLoans and GPLS, pursuant to which MobiLoans grants a subordinated security interest in substantially all of its assets, (c) Administrative Services Agreement, dated May 10, 2017, by and between GPLS and AHG Fund Investors, LLC, (d) Intercreditor Agreement, dated May 10, 2017, by and between GPLS and AHG Fund Investors, LLC, and (e) Subordination Agreement, dated May 10, 2017, by and between GPLS and the Senior Lender to such Subordination Agreement, and any principal payments received by or on behalf of GPLS on such MobiLoans Note between the execution of this Term Sheet and the Effective Date; • that certain Promissory Note, dated as of June 18, 2015, as amended, issued by Haynes Investments, Inc. to Think Finance, Inc., with a face value of $5,269,000 and an approximate remaining balance of $2,500,000, and any principal payments received by or on behalf of the Debtors on such Promissory Note between the execution of this Term Sheet and the Effective Date; • all intercompany receivables, the largest being (i) the Cortex service payments,[4] (ii) the Cortex note, and (iii) the TF Holdings debt; • all Intellectual Property of the Debtors, FF&E, and

[4] For the avoidance of doubt, Cortex service payments received by the Debtors prior to the Effective Date of the Plan would be treated like other general cash of the Debtors pursuant to the Plan, as contemplated by the first bullet point of the Conditions Precedent to the Effective Date section of this Term Sheet.

	employees (including business and employee contracts, leases and related matters, etc.), including assumed executory contracts (including employee contracts and leases), *provided* that the Reorganized Debtors shall be solely responsible for payment of all cure amounts to be paid in connection with any assumed executory contracts and leases; and • all of the Debtors' rights under their insurance policies, including any directors' and officers' policies, and under applicable law against their insurance carriers concerning such insurance policies, *provided* that any proceeds of such policies received by the Debtors as an insured after December 31, 2018, shall be transferred to and vest in the Reorganized Debtors, and *provided* further, for the avoidance of doubt, that the Plan shall be insurance neutral concerning contractual rights, if any, of any other person or entity under such insurance policies. For the avoidance of doubt, any and all other assets and property of the Debtors' estates not included above or otherwise addressed in this Term Sheet shall be transferred to the Litigation Trust and administered by the Litigation Trustee for the benefit of creditors, in accordance with the terms of the Plan, including, but not limited to, the Causes of Action, refunds, deposits, remnant assets, the General Unsecured Claims Cash Pool, the Professional Fee Escrow and the Debtors' interests in GPLS. Books and records and class member data are dealt with elsewhere in this Term Sheet.
Nationwide Consumer Borrower Settlement Class	The Nationwide Consumer Borrower Settlement Class shall be made up of all Nationwide Consumer Borrowers, *excluding* those Nationwide Consumer Borrowers who effectively opt out of the Nationwide Consumer Borrower Settlement Class. Distributions to members of the Nationwide Consumer Borrower Settlement Class shall be governed by the Plan and the Litigation Trust Agreement. Nationwide Class Counsel shall coordinate with counsel to the Pennsylvania AG in connection with any notices provided and distributions made to Pennsylvania Borrowers, which notices and distributions from the Litigation Trust shall be subject to approval by the Bankruptcy Court. If more than 1% in number of the Nationwide Consumer Borrowers opt out of the Nationwide Consumer Borrower Settlement Class, the GPLS Secured Parties may in their sole discretion terminate the Term Sheet without penalty. The Preliminary Approval Order shall provide that no member of the

	Nationwide Consumer Borrower Settlement Class can opt out on behalf of anyone other than himself or herself and must sign on his or her own behalf. The Plan and Litigation Trust Agreement shall include the following allocation of distribution for alleged damages among members of the Nationwide Consumer Borrower Settlement Class, which amount will be calculated by a formula that will use the allocation below to reasonably approximate the payment for each member of the Nationwide Consumer Borrower Settlement Class, based on the data and fields of information available to the Class Administrator and as further provided below: o Tier 1: the following states: Arizona, Arkansas, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Ohio, South Dakota, Vermont, Virginia, and Wisconsin. Tier 1 would receive 70% of the Litigation Trust Proceeds (the "Tier 1 Allocation"), □ Ã □ § `Z◌②聋□ o Tier 2: the following states: Alabama, Alaska, California, Delaware, Florida, Georgia, Hawaii, Iowa, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Washington, West Virginia, Washington D.C., and Wyoming. Tier 2 would receive 30% of the Litigation Trust Proceeds (the "Tier 2 Allocation"), in addition to injunctive and other relief in the form of the Class Action Injunctive and Other Relief. o Tier 3: states other than Tier 1 states and Tier 2 states. Tier 3 would receive only the injunctive and other relief in the form of the Class Action Injunctive and Other Relief and would include Nevada and Utah. • Allowance of Claim for Voting and Distribution. The Nationwide Consumer Borrower Settlement Class shall have an allowed unsecured claim in the amount of $1.13 billion solely for purposes of voting and distribution under the Plan. The Debtors dispute liability on the foregoing claim, and this allowance shall not be an agreement by the Debtors or Reorganized Debtors to the allowance of such claim for any other purpose. Consistent with the provisions below in the General Unsecured Claims section, neither the Debtors,

	Reorganized Debtors nor any Released Parties shall object to any Claims in these Chapter 11 Cases or have standing to be a party in the Claims objection process. The Plan shall separately classify one claim on behalf of all members of the Nationwide Consumer Borrower Settlement Class. No other claims of any members of the Nationwide Consumer Borrower Settlement Class shall be allowed except as otherwise set forth in this agreement for voting and distribution purposes only. The Pennsylvania AG proofs of claim and the CFPB proofs of claim shall be satisfied through the distributions on account of the single class claim of the Nationwide Consumer Borrower Settlement Class and the other relief provided in the Pennsylvania AG Settlement and the CFPB Settlement sections below.
	
	• Solely for purposes of the pro rata allocation of distributions to members of the Nationwide Consumer Borrower Settlement Class, the Plan and the Litigation Trust Agreement shall provide that:
	
	  • each member of the Nationwide Consumer Borrower Settlement Class in a Tier 1 state shall receive a pro-rata distribution of the Tier 1 Allocation calculated based on the total amount paid by such Class member on Eligible Tribal Loans (in interest, as to Great Plains or Plain Green installment loans, and charges, as to MobiLoans lines of credit) as reflected on the applicable Tribal Lender's books and records available to the Debtors, the GPLS Secured Parties (with respect to the GPLS Secured Parties, only to the extent any books or records are actually in the possession, custody or control of the GPLS Secured Parties) and/or the Settling Tribal Lenders. Additionally, the Pennsylvania Borrowers also may receive a portion of the other amounts paid to the Pennsylvania AG as part of the Settlement, or from any recoveries in the Pennsylvania Litigation identified in Annex B against Non-Consenting Defendants (the "Pennsylvania Borrower Additional Amounts"), less any allocations therefrom made by the Pennsylvania AG, at his sole discretion, to civil penalties or for reimbursement of expenses related to the Pennsylvania Litigation identified in Annex B.
	
	  • each member of the Nationwide Consumer Borrower Settlement Class in a Tier 2 state shall receive a pro-rata distribution of the Tier 2 Allocation calculated based upon the total amount of interest, as to Great Plains or

	Plain Green installment loans, and of charges, as to MobiLoans lines of credit, paid by such Class member on Eligible Tribal Loans, as reflected on the applicable Tribal Lender's books and records available to the Debtors, the GPLS Secured Parties (with respect to the GPLS Secured Parties, only to the extent any books or records are actually in the possession, custody or control of the GPLS Secured Parties) and/or the Settling Tribal Lenders, over the usury limit in such state applicable to unsecured installment loans issued by lenders subject to such state's laws in a similar dollar amount as the Eligible Tribal Loans; • members of the Nationwide Consumer Borrower Settlement Class in a Tier 3 state shall not receive any monetary distribution; and • notwithstanding the foregoing, distributions from the Litigation Trust to individual members of the Nationwide Consumer Borrower Settlement Class shall not exceed the amount each of those consumers paid in excess of principal on his or her loan. • Definition of Nationwide Consumer Borrower Settlement Class and holders of Consumer Borrower Claims shall include Pennsylvania Borrowers for all purposes including the class notice and approval process, provided that the aggregate amount of all allocations for Pennsylvania Borrowers shall be paid to the Pennsylvania AG. The Pennsylvania AG may determine, in his sole discretion, all matters relating to the timing of distributions to Pennsylvania Borrowers. • It is understood and acknowledged by the Settling Parties that the consumer borrowers are continuing their respective litigation against Non-Released/Non-Exculpated Parties (including but not limited to Kenneth Rees, Stephen Haynes, Haynes Investments, LLC., Sovereign Business Solutions, LLC, Mike Stinson, Linda Stinson (except to the extent released in her capacity as a former director or officer), The Stinson 2009 Grantor Retained Annuity Trust, 7HBF No. 2, LTD, Sequoia Capital Operations, LLC, Sequoia Capital Franchise Partners, LP, Sequoia Capital Growth Fund III, LP, Sequoia Entrepreneurs Annex Fund, LP, Sequoia Capital Growth III Principals Fund, LLC, Sequoia Capital Franchise Fund, LP, Sequoia Capital Growth Partners III, LP, Startup Capital Ventures, LP, Stephen J. Shaper (except to the extent

	released in his capacity as a former director or officer), John Drew (except to the extent released in his capacity as a former director or officer), TCV, LP, TCV Member Fund, LP, Technology Crossover Ventures, TCV V L.P., and Technology Crossover Management V, LLC) without limitation and that any judgment, proceeds from such judgment, or settlement with such remaining defendants are the sole property of the respective consumer(s) for distribution pursuant to further orders of the court in those matters and/or the Litigation Trust. • The Pennsylvania AG shall receive a separate distribution of $2 million from the Escrow Account in partial resolution of certain claims brought in the Pennsylvania Litigation against Released Non-Debtor Parties.
Nationwide Class Representatives and Class Counsel	Kelly Guzzo, P.L.C, Consumer Litigation Associates, P.C., Lowenstein Sandler, LLP, and Tycko & Zavareei, LLP shall serve as Nationwide Class Counsel for the Nationwide Consumer Borrower Settlement Class; Stephanie Edwards, Patrick Inscho, Darlene Gibbs, Tamara Price, Sherry Blackburn, George Hengle, Regina Nolte, Lawrence Mwethuku, Lula Williams, India Banks, Jeri Brennan, JoAnn Griffiths, Alicia Patterson, Kimetra Brice, Jill Novorot, Earl Browne, Jessica Gingras, Angela Given, Vanessa Granger, Lilya McAtee, and Beverly Kristina Miller shall serve as the Nationwide Representatives of the Nationwide Consumer Borrower Settlement Class. The service award to the Nationwide Class Representatives, which will need to be approved in accordance with Rule 23, is solely to compensate the Nationwide Class Representatives for work done on behalf of the class, to make up for any financial or reputational risk undertaken in bringing the action, and, as applicable, to recognize their willingness to act as a private attorney general. Each Nationwide Class Representatives' damages as alleged in the Pending Litigation and proofs of claim will be compensated based upon the same payment formula as all class members and reflected in this Term Sheet. The Nationwide Consumer Borrower Settlement Class shall be represented by the following firms: • Kelly Guzzo, P.L.C.; • Consumer Litigation Associates, P.C; • Lowenstein Sandler, LLP; and

	• Tycko & Zavareei, LLP. The following firms shall also serve as an advisory committee: • Kellett & Bartholow, PLLC; • Berman Tabacco; and • Gravel & Shea PC.
Litigation Trust	As set forth above in paragraph 8 of the Settlement Timeline section, on the Effective Date, or as soon as reasonably practicable thereafter, the Litigation Trust shall be initially funded with cash from the Debtors' estates deposited into an account controlled by the Litigation Trustee pursuant to the Litigation Trust Agreement. Additionally, all net proceeds of Causes of Action and rights to payment to be conveyed to the Litigation Trust pursuant to this Term Sheet and the Plan shall be deposited into or transferred to the Litigation Trust for distribution to the members of the Nationwide Consumer Borrower Settlement Class pursuant to the Plan and Litigation Trust Agreement. The Debtors shall not prosecute, settle, sell, transfer, assign, waive or release any of the Causes of Action, all of which are preserved for and shall be transferred to the Litigation Trust, except those otherwise released, waived or discharged hereunder and in the Plan, provided, however, that the Debtors are not intending hereby to agree to derivative standing with respect to any Causes of Action against the GPLS Secured Parties that the Debtors have pursued in the Chapter 11 Cases and that currently are subject to a forbearance agreement and are intended to be resolved by this Term Sheet and the Plan. To the extent not provided by the Debtors prior to the Effective Date, the Litigation Trustee shall provide on a confidential basis sufficient information to the Class Administrator, and any subsequently appointed class administrator, to make an initial distribution and any subsequent distributions in accordance with the Plan and Litigation Trust Agreement to the members of the Nationwide Consumer Borrower Settlement Class. After the Effective Date, Nationwide Class Counsel shall continue to fulfill and have the responsibilities ordinarily imposed by Fed. R. Civ. P. 23. The Litigation Trust shall be administered in accordance with the Plan and Litigation Trust Agreement, and Nationwide Class Counsel shall consult with the Litigation Trustee regarding such administration, as appropriate. The Litigation Trustee may retain attorneys and professionals pursuant to the terms of the

	Litigation Trust Agreement to, among other things, prosecute the Causes of Action, and the reasonable fees and expenses of such attorneys and professionals shall be paid from funds in or generated by the Litigation Trust. The Litigation Trustee shall be compensated in accordance with the Litigation Trust Agreement and the Plan. In connection with their good-faith efforts to formulate, promote, and execute the Settlement, the Nationwide Class Counsel shall be compensated as counsel for the Nationwide Consumer Borrower Settlement Class pursuant to the terms of the Litigation Trust Agreement, which shall be included in the Plan Supplement, and the respective settlement agreements executed between any Consenting Defendant and the Nationwide Consumer Borrower Settlement Class. Further, members of the advisory committee may be compensated for their post-confirmation services in accordance with the terms and conditions of the Litigation Trust Agreement. The Committee seeks derivative standing in order to preserve all Causes of Action for the benefit of creditors and the Estates that may expire if action is not taken in advance of the deadlines in 11 U.S.C. § 546(a). Accordingly, if the Plan is not confirmed by August 1, 2019, then the Debtors shall sign a Stipulation consenting to derivative standing for the Committee (without the Debtors being deemed to agree to the validity of any such claims) to prosecute and/or settle Causes of Action including, but not limited to, actions under 11 U.S.C. §§ 544, 545, 547, 548, 550 and/or 553 and their state law equivalents, to avoid having the deadlines in 11 U.S.C. § 546(a) expire; provided, however, that the Debtors are not intending hereby to agree to derivative standing with respect to any Causes of Action against the GPLS Secured Parties that the Debtors have pursued in the Chapter 11 Cases and that currently are subject to a forbearance agreement and are intended to be resolved by the Term Sheet and the Plan. The Committee shall file a Motion to Approve the Stipulation and the Debtors, the Consenting Defendants, and the Released Parties shall not object to such motion. After the Effective Date the Litigation Trustee will take over the prosecution of any Causes of Action filed by the Committee. The Committee may enter into Tolling Agreements to the extent it determines necessary. In connection with their good-faith pre- and post-petition efforts to formulate, promote, and execute the Settlement on behalf of all Nationwide Consumer Borrowers, the Nationwide Class

	Representatives and the named Plaintiffs in the Consumer Borrower Litigation shall receive service awards in the amount of $7,500 as representatives of the Nationwide Consumer Borrower Settlement Class pursuant to the terms of the Litigation Trust Agreement, which shall be included in the Plan Supplement. Nationwide Class Counsel, on behalf of the Nationwide Consumer Borrower Settlement Class, shall seek such orders as are necessary and appropriate to comply with Bankruptcy Rule 7023, Federal Rule of Civil Procedure 23, CAFA, other applicable law, and due process so that the Releases become effective and the Litigation Trust Agreement is implemented. For the avoidance of doubt, funding of the Litigation Trust shall not constitute or be deemed (i) any admission of wrongdoing or illegality or any alleged capacity of the Debtors as lenders on any of the Eligible Tribal Loans or (ii) a concession by Consumer Borrowers that the alleged wrongdoing or illegality did not occur.
Class Action Injunctive and Other Relief	As of the Effective Date, although the Debtors deny that they committed any wrongdoing and the Debtors deny that they own or were lenders on any of the Eligible Tribal Loans, as part of the agreement to resolve the disputes among the Settling Parties pursuant to this Term Sheet and the Plan, the Debtors agree to the following injunctive and other relief (collectively, the "Class Action Injunctive and Other Relief"): • while denying that they committed any wrongdoing and denying that they own or were lenders on any of the Eligible Tribal Loans, to the greatest extent permitted under applicable law, upon the agreement of the relevant Tribal Lenders or other owners of the loans, the Debtors shall consent to the unpaid principal, interest and fees of the Eligible Tribal Loans to members of the Nationwide Consumer Borrower Settlement Class being voided and adjusted to a zero balance. To the greatest extent permitted under applicable law, upon the agreement of the relevant Tribal Lenders or other owners of the loans, the Debtors consent to the notification of members of the Nationwide Consumer Borrower Settlement Class affected by the foregoing sentence that their Eligible Tribal Loans have been voided and adjusted to a zero balance (any costs of notification shall be funded from the Litigation Trust, and such notice may be made in the initial notice made to the Nationwide Consumer

	Borrower Settlement Class by a description as to the effect of any final approval); • while denying that they committed any wrongdoing, denying that they own or were lenders on any of the Eligible Tribal Loans, and denying that they were a furnisher to any consumer reporting agencies for any Eligible Tribal Loans, as long as Nationwide Class Counsel has provided the Debtors with acceptable evidence that the Settling Tribal Lenders agree to the deletion of such tradelines, the Debtors shall not object to a motion filed by the Consenting Plaintiffs for the entry of an Order requiring the deletion of all tradelines for any Eligible Tribal Loan from all consumer reporting agencies, except for Eligible Tribal Loans associated with a Tribal Lender that has not agreed to this removal; • to the extent of their current knowledge, and solely for the purpose of effectuating the Class Action Injunctive and Other Relief, the Debtors, or if the Debtors have not provided such information prior to the Effective Date then the Litigation Trustee, shall provide on a confidential basis to Kelly Guzzo, P.L.C. and Consumer Litigation Associates, P.C. a list of all Eligible Tribal Loans that have been sold or transferred to any third party, and the list will identify the loan numbers, the Tribal Lenders, the dates of sale, and the identity of such third parties, *provided* that any PII contained in such information shall be subject to the PII Prohibited Use/Protective Order Provisions; • upon the vesting of the assets in the Reorganized Debtors and the Litigation Trust, the Debtors shall no longer conduct business, and upon the later of the Effective Date, the entry of the order(s) resolving the CFPB Litigation, and the completion of their duties and obligations under this Term Sheet and Bankruptcy Court orders, the Debtors shall be dissolved; • the Reorganized Debtors (i) shall not use the PII provided by members of the Nationwide Consumer Borrower Settlement Class to the Tribal Lenders or to the Debtors (a) to market to such members or (b) to assess the value of marketing to such members; and (ii) except as expressly contemplated by this Term Sheet, shall not sell or transfer to any other Entity the PII provided by members of the Nationwide Consumer Borrower

	Settlement Class to the Tribal Lenders or to the Debtors for such Entity to use the PII to market to such members; and • For the avoidance of doubt, (i) the Class Action Injunctive and Other Relief shall not constitute or be deemed any admission of wrongdoing or illegality or any alleged capacity of the Debtors as lenders on any of the Eligible Tribal Loans and (ii) nothing in this Term Sheet, including, without limitation, the releases granted by the Nationwide Consumer Borrower Settlement Class, shall be contingent upon the Tribal Lenders' agreement to all, or any portion of, the Class Action Injunctive and Other Relief, except that the Debtors' (a) consenting to Eligible Tribal Loans being voided and adjusted to a zero balance, and related notices or (b) consenting to the deletion of certain tradelines, shall be effective only upon the satisfaction of the express contingencies identified above concerning the Tribal Lenders' consent or agreement.
GPLS Secured Parties' Settlement Contribution	As part of the Settlement and as consideration for the Releases, the GPLS Secured Parties agree to, on and as of the Effective Date, (i) waive and release all liens, claims, or other rights to any funds, accounts or other assets of GPLS or the Debtors, including, without limitation, the remaining funds in the Escrow Account and the GPLS Holdback Account; (ii) cause the release of all funds in the GPLS Holdback Account to the Escrow Account; (iii) consent to the release of funds in the Escrow Account to the Pennsylvania AG and the Debtors' estates as set forth herein; (iv) cause GPLS to assign the MobiLoans Note and related agreements to the Reorganized Debtors; (vi) release all interest in and rights to the Great Plains Reserve to Great Plains, which will be distributed in accordance with the terms of the settlement reached in *Gibbs v. Great Plains, et al.*; and (vii) agree to waive any and all claims and the collection of any further amounts owed based on participation interests owned by GPLS in Eligible Tribal Loans. The GPLS Secured Parties' legal fees and costs in connection with the Chapter 11 Cases unpaid as of or incurred on or after May 1, 2019 shall be the sole obligation of the GPLS Secured Parties and shall not be paid from or charged against the Debtors, any property of the Debtors' estates, the Reorganized Debtors, the Escrow Account, or the Litigation Trust. For the avoidance of doubt, all payments made prior to May 1, 2019 by the GPLS

	Secured Parties to their legal and professional advisors pursuant to the Cash Collateral Order are allowed and shall not be subject to challenge or disgorgement. The GPLS Secured Parties represent and warrant that no amounts have been paid to their legal and professional advisers pursuant to the Cash Collateral Order on or after May 1, 2019. For the avoidance of doubt, (i) the consideration provided by the GPLS Secured Parties for the Releases shall not constitute or be deemed an admission of any wrongdoing, liability, fact, fault, assertion or illegality or any alleged capacity of the GPLS Secured Parties as lenders on any of the Eligible Tribal Loans, each of which is expressly denied by the GPLS Secured Parties; and (ii) the GPLS Secured Parties shall not receive a Release until the occurrence of the applicable transfer(s) from the GPLS Holdback Account as set forth in this Term Sheet.
Consenting Defendants' Cash Contributions	On the Effective Date, each Consenting Defendant(other than the GPLS Secured Parties) shall pay its respective Consenting Defendants' Cash Contribution, if any, to the Litigation Trust consistent with the terms of the Plan and any separate settlement agreements with any Consenting Defendants and Nationwide Class Counsel pursuant to F.R.C.P. 23. For the avoidance of doubt, the Consenting Defendants' Cash Contributions shall not constitute or be deemed (i) any admission of wrongdoing, liability, fact, or illegality or any alleged capacity of the Debtors or the Consenting Defendants as lenders on any of the Eligible Tribal Loans, each of which are expressly denied by the Debtors and the Consenting Defendants or (ii) a concession by the Consumer Borrowers that the alleged wrongdoing or illegality did not occur.
Pennsylvania AG Settlement	As soon as reasonably practicable after the execution of this Term Sheet, the Pennsylvania AG shall report to the district court presiding over the Pennsylvania Litigation that the Pennsylvania AG and the Debtors have reached a settlement that will be final upon, but which is also contingent upon, the confirmation of the Plan, which Plan shall contain terms consistent with this Term Sheet. For the avoidance of doubt, if the Plan differs materially from this Term Sheet, then the Pennsylvania AG shall not be obligated to support such Plan. <u>Temporary Allowance of Claim for Voting</u>. The Plan shall separately classify one claim on behalf of the Pennsylvania AG. Solely for purposes of voting on the Plan, and in accordance with Federal Rule of Bankruptcy Procedure 3018(a), the Pennsylvania AG shall be allowed, temporarily for voting purposes, one claim

	in the Pennsylvania Regulatory Claim Class, in the amount of $200 million, which shall be the only claim in such Plan class. Allowance of Claim for Distribution. A single claim of the Pennsylvania AG shall be an allowed unsecured claim solely for distribution purposes under the Plan, provided that such allowed claim, and all proofs of claim filed by the Pennsylvania AG, shall be resolved and satisfied for all purposes pursuant to: (i) the treatment of the Pennsylvania Borrowers as members of the Nationwide Consumer Borrower Settlement Class as set forth above in the Nationwide Consumer Borrower Settlement Class section (Tier 1 treatment); (ii) the relief set forth in the Class Action Injunction and other Relief Section concerning Pennsylvania; (iii) the Pennsylvania Borrower Additional Amount; (iv) any additional funds the Pennsylvania AG is entitled to under the Unclaimed Distribution section herein; and (v) the treatment of Allowed Administrative Claims and other claims described below. Additional Payments by Third Parties. The Pennsylvania AG shall receive $2.0 million from the Escrow Account. Allowance of Administrative Claim. The Pennsylvania AG shall also receive the allowed substantial contribution claim of the Pennsylvania AG as described in the section entitled "Allowed Substantial Contribution Claim." On or as soon as reasonably practicable after, the Effective Date, the Pennsylvania AG shall seek and obtain all orders necessary to settle, with the entry of a Rule 54(b) separate final judgment (if the litigation continues with other, non-settling parties), all claims in the Pennsylvania Litigation against the Debtors. The Debtors and the Pennsylvania AG agree that one of such orders shall include injunction language that is substantively the same as the injunction language that will appear in the Final Fairness Approval Order or as otherwise agreed by the Pennsylvania AG and the Debtors, provided that such injunction language shall only address conduct concerning Pennsylvania residents and shall not address conduct concerning residents of other states or commonwealths. On or as soon as reasonably practicable after the Effective Date, the Pennsylvania AG shall enter into a stipulation of settlement in the Pennsylvania Litigation with the GPLS Secured Parties, which stipulation shall be set forth in the Plan Supplement and shall be mutually acceptable to the GPLS Secured Parties and the Pennsylvania AG.

	For the avoidance of doubt, the Pennsylvania AG Settlement shall not constitute or be deemed (i) any admission of wrongdoing, liability, fact, fault, assertion or illegality or any alleged capacity of the Debtors or the GPLS Secured Parties as lenders on any of the Eligible Tribal Loans, each of which is expressly denied in its entirety by the Debtors and the GPLS Secured Parties, or (ii) a concession by the Pennsylvania AG that the alleged wrongdoing or illegality did not occur. It is understood and acknowledged by the Settling Parties that subject to the court in the Pennsylvania Litigation staying the Pennsylvania Litigation against the Debtors and the Consenting Defendants (including the GPLS Secured Parties), the Pennsylvania AG may continue the Pennsylvania Litigation against the remaining defendants (Kenneth Rees and National Credit Adjusters, LLC) without limitation and that any judgment, proceeds from such judgment, or settlement with such remaining defendants are the sole property of the Pennsylvania AG for distribution pursuant to further orders of the court in the Pennsylvania Litigation. The settlement set forth in this section is referred to as the "Pennsylvania AG Settlement."
CFPB Settlement	Temporary Allowance of Claim for Voting. The Plan shall separately classify one claim on behalf of the CFPB. Solely for purposes of voting on the Plan, and in accordance with Federal Rule of Bankruptcy Procedure 3018(a), the CFPB shall be allowed, for voting purposes, one claim in the CFPB Regulatory Claim Class, which shall be the only claim in such Plan class. Allowance of Claim for Distribution. A single claim of the CFPB shall be allowed solely for distribution purposes under the Plan, provided that such allowed claim, and all proofs of claim filed by the CFPB, shall be resolved and satisfied for all purposes pursuant to (i) the treatment of the members of the Nationwide Consumer Borrower Settlement Class set forth above in the Nationwide Consumer Borrower Settlement Class section; (ii) the allowance of the Administrative Expense Claim identified in the following sentence; and (iii) the relief set forth in the consent order that has been agreed upon between the Debtors and the CFPB to settle the CFPB Litigation, which consent order shall be materially consistent with the consent order attached hereto as Annex D. As part of the agreement to resolve the disputes among the Settling Parties pursuant to this Term Sheet and the Plan, within 5 days after the Effective Date, the Litigation Trustee, for the Debtors, shall pay a Civil Money

	Penalty of $1 on behalf of each of the Debtors into the CFPB's Civil Penalty Fund, in compliance with the CFPB's wiring instructions, and the Plan shall provide that such claim is an allowed Administrative Expense Claim in the aggregate amount of $7.00. The Plan will provide that the Debtors and the Reorganized Debtors, as applicable, will consent to the entry of and comply with the terms of the consent order that has been agreed upon between the Debtors and the CFPB to settle the CFPB Litigation. Within 60 days after the Effective Date, or at such other time as mutually agreed upon prior to the Effective Date by the Debtors and the CFPB, the CFPB shall submit a consent order, which shall be in the form attached hereto as Annex D, to the Montana court and shall seek and obtain all orders necessary to settle the CFPB Litigation in accordance with the Term Sheet and consent order. For the avoidance of doubt, this Term Sheet and the Settlement are made in compromise of disputed claims. This Term Sheet and the Settlement do not constitute the withdrawal of the Debtors' denials and defenses in the CFPB Litigation or an admission by the Debtors of any facts or liability or wrongdoing, including, but not limited to, any liability or wrongdoing with respect to any allegations that were or could have been raised in the CFPB Litigation. This Term Sheet and the Settlement also do not constitute an admission by the CFPB that any claim is not well-founded, and nothing in this Term Sheet or the Settlement should be construed as, or deemed to constitute, approval, sanction, or authorization by the CFPB of any of the Debtors' actions or business practices. The Debtors neither admit nor deny any allegations in the complaint in the CFPB Litigation. Upon the execution of this Term Sheet by the Settling Parties other than the CFPB, the CFPB line attorneys will send an email to counsel to the Debtors indicating that the line attorneys will recommend the approval of the terms reflected in the Term Sheet and the consent order, attached hereto as Annex D, to the Director and that they have no reason to believe it will not be accepted. The CFPB line attorneys will appear at the hearing on the Term Sheet Authorization Motion, in person or by telephone, and state on the record that the line attorneys will recommend approval of the Term Sheet and the consent order to the Director. Notwithstanding anything else stated herein, the CFPB will not

	be bound by this Term Sheet because only the Director has the statutory authority to enter into settlements on the CFPB's behalf, provided that the CFPB line attorneys will recommend that the Director support a Plan materially consistent with this Term Sheet and the consent order for as long as those efforts are consistent with instructions from the Director. If (i) the CFPB line attorneys do not take the actions identified above in this paragraph, or (ii) the CFPB does not support the consent order and a Plan materially consistent with this Term Sheet, then the Debtors may terminate this Term Sheet. The settlement set forth in this section is referred to as the "CFPB Settlement."
General Unsecured Claims	The Plan shall provide for a cash distribution pool in a fixed amount (the "General Unsecured Claims Cash Pool") for distributions to holders of allowed unsecured non-priority claims against the Debtors other than the claims of Nationwide Consumer Borrowers ("General Unsecured Claims"). On the Effective Date, the General Unsecured Claims Cash Pool shall be funded with cash in an amount equal to $3 million. In the unlikely event that the amount in the General Unsecured Claims Cash Pool exceeds the allowed amount of General Unsecured Claims, then such excess funds after pro-rata payment of all allowed General Unsecured Claims shall be transferred to the Litigation Trust. The Committee (before the Effective Date) and the Litigation Trustee (after the Effective Date) shall have the sole authority and power to object to and/or settle General Unsecured Claims on behalf of the Debtors' estates. Neither the Debtors, Reorganized Debtors nor any Released Parties shall object to any Claims in these Chapter 11 Cases or have standing to be a party in the Claims objection. As soon as reasonably practicable after the execution of this Term Sheet, the Committee with the assistance of the Consenting Plaintiffs shall object to the claims of Ken Rees, John Drew, TCV, LP and TCV Member Fund, LP and any other defendants, or potential defendants, in current or future litigation involving the claims of Consumer Borrowers seeking indemnification from the Debtors. The Debtors shall not oppose the objections to these claims.

Post-Confirmation Asset Administration	The initial Litigation Trustee shall be Judge Russ Nelms. The Litigation Trust Oversight Board for the Litigation Trust (the "Litigation Trust Oversight Board") shall include representatives of each of the Consenting Plaintiffs other than the CFPB. The Litigation Trust Oversight Board shall have the right after the Effective Date to seek a replacement for the Litigation Trustee in accordance with the Litigation Trustee's retention agreement and the terms of the Plan and the Litigation Trust Agreement. The members of the Litigation Trust Oversight Board will not receive any additional compensation on account of serving in such capacity. The Litigation Trustee shall have sole authority consistent with the terms of the Plan and the Litigation Trust Agreement to determine whether to pursue any Causes of Action. Notwithstanding the forgoing, and for the avoidance of doubt, the Causes of Action transferred to the Litigation Trust shall not include claims or causes of action against any Released Party.
Debtors' Books and Records	The Reorganized Debtors shall receive possession of and the right to use and maintain the original of all of Debtors' books and records, whether hard copy or electronically stored information (the "Books and Records"). The Reorganized Debtors shall provide reasonable advance notice with reasonable specificity to the Litigation Trustee prior to destroying any Books and Records and provide the Litigation Trustee with the opportunity, at the Litigation Trust's expense, to review, and obtain, such Books and Records prior to such destruction. The Litigation Trustee shall have the unilateral right to destroy Books and Records received from the Debtors or Reorganized Debtors. For the avoidance of doubt, the Litigation Trustee and his professionals in their capacities as such shall have full reasonable access to all such Books and Records for the purpose of investigating and pursuing the Causes of Action, and the Litigation Trustee shall be deemed to share with the Reorganized Debtors in any attorney-client privilege, work product doctrine, or other privilege or immunity attaching to any such Books and Records necessary for investigating and pursuing the Causes of Action, or obtaining any right to payment, *provided, however,* that such sharing does not waive any such privilege or immunity. On the Effective Date, or as soon as reasonably practicable thereafter, (i) the Litigation Trustee shall receive a copy of the Debtors' Books and Records held by any litigation vendor, at the

	expense of the Litigation Trust, in a form and manner whereby it is commercially and technologically reasonable to obtain such copy; and (ii) if it becomes necessary for the Reorganized Debtors to incur significant internal or external costs in connection with providing access to the Debtors' Books and Records to the Litigation Trustee, then the Reorganized Debtors and the Litigation Trustee shall enter into a reasonable shared services agreement governing the reimbursement of such costs. If the Reorganized Debtors and the Litigation Trustee do not reach an agreement on the terms of such shared services agreement, then either the Reorganized Debtors or the Litigation Trustee may seek an order from the Bankruptcy Court establishing reasonable terms for such shared services. If the Litigation Trustee reasonably determines that the expense of such access and use of such Books and Records is greater than the expense of fully duplicating them, then the Litigation Trustee may elect to obtain a copy at the expense of the Litigation Trust. The term "Confidential Business Information" shall mean confidential PII, or any trade secrets or other confidential business information, in each case related to (a) shareholders except in connection with pursuing a Cause of Action, (b) financial information, statements, or records of the Debtors except in connection with pursuing a Cause of Action, (c) typical confidential employee information, (d) risk analysis products and methods (such as models, data and know how), (e) marketing services, strategies and methodologies, and (f) the technology platforms, systems, products and all other Intellectual Property, including without limitation software development and programs and related documentation, contained in the Books and Records. The Litigation Trustee shall not be permitted to disclose to any third-parties any Confidential Business Information without the consent of the Reorganized Debtors, and the Reorganized Debtors and the Litigation Trustee shall not be permitted to waive any privilege with respect to the Books and Records without the consent of the Litigation Trustee or the Reorganized Debtors, as applicable, in each case except in accordance with the following procedure: (i) the Litigation Trustee or the Reorganized Debtors, as applicable (the "Disclosing Party") shall provide written notice to the Reorganized Debtors or the Litigation Trustee, as applicable (the "Responding Party") of the Disclosing Party's intent to waive privilege and/or disclose privileged information or Confidential Business Information, which notice

	shall, among other things, identify the information at issue and the proposed use of such information; (ii) the Responding Party shall have three (3) business days after such notice is received to notify the Disclosing Party that the Responding Party objects to such disclosure or waiver; (iii) if the Responding Party timely objects in writing, then the Responding Party and the Disclosing Party shall meet and confer about such information and proposed use during the two (2) business days that follow the Responding Party's notification of the Disclosing Party of the objection; (iv) if the parties do not reach an agreement, the Responding Party shall have until two (2) business days after the meet and confer concludes to file a pleading with the Bankruptcy Court seeking an order restricting such privilege waiver or disclosure (a "Motion to Restrict"); (v) until such Motion to Restrict, or if the time for filing the Motion to Restrict has not yet run, then the applicable written notice, is resolved by agreement of the Responding Party and the Disclosing Party or order of the Bankruptcy Court, the Disclosing Party shall not waive such privilege or disclose such information, unless disclosing such information is unanticipated and necessary pursuant to Court order or Court or statutory deadline, and in such instances the Disclosing Party shall file such information under seal; and (vi) in ruling on a Motion to Restrict, the Bankruptcy Court may consider and weigh governing law as to privilege, confidentiality, and/or trade secrets, as well as the possible or intended use of such information and the interests of the Disclosing Party and the Responding Party concerning such disclosure or waiver. For the avoidance of doubt, this provision means that neither the Reorganized Debtors nor the Litigation Trustee have the right to unilaterally disclose to third parties or preclude the disclosure to third parties of privileged information on the basis that the Reorganized Debtors and the Litigation Trustee share such privilege. As of and after the Effective Date, to the extent the Reorganized Debtors receive a subpoena requesting documents produced by the Debtors in the Pending Litigation or in the Bankruptcy Case,

	the Reorganized Debtors shall agree that such previously produced documents shall be deemed produced under such subpoena as long as there is a protective order in place in the applicable litigation that provides equivalent protections to the Reorganized Debtors, including without limitation notice to the Reorganized Debtors, as those provided to the Debtors under the applicable protective order in the Pending Litigation or the Bankruptcy Case. Notwithstanding anything else in this Term Sheet or the Plan with respect to the Tribal Property, the Reorganized Debtors may retain the original of any data regarding any consumer borrowers owned by the Settling Tribal Lenders and maintained or otherwise held by the Debtors for or on behalf of the Settling Tribal Lenders, provided that the mutually acceptable shared services agreement with the Litigation Trustee shall address the Litigation Trustee's access to such data.
Substantial Contribution Fund	On the Effective Date, the Substantial Contribution Fund shall be funded with cash in an amount equal to $12,550,007.00, which shall be the only source of recovery for the following allowed claims for substantial contribution pursuant to 11 U.S.C. §§ 503(b)(3)(D) and 503(b)(4) (the "Allowed Substantial Contribution Claims"). For the avoidance of doubt, the Settling Parties and the Released Parties shall not object to or otherwise challenge the Allowed Substantial Contribution Claims. (1) Pennsylvania AG The Pennsylvania AG shall be allowed an administrative expense claim of $4,250,000 under 11 U.S.C. §§ 503(b)(3)(D) and 503(b)(4). This is a negotiated, compromise amount that takes into consideration the representations asserted by the Pennsylvania AG that it has incurred the following: a. Actual time expended by his outside, special counsel in the amount of $4,044,600; b. In-house expenses attributed to his investigation of and litigation against the Debtors in the Pennsylvania Litigation in the amount of $594,617; c. Other expenses, including payments to other professionals, in the amount of $423,413; and d. Payments made to his bankruptcy counsel in the amount of $236,420.11. The Pennsylvania AG asserts that these expenses constitute reimbursable administrative expenses under 11 U.S.C. §§

	503(b)(3)(C), 502(b)(3)(D), and 503(b)(4), and the Debtors dispute that the Pennsylvania AG is entitled to any such expenses. As part of the global settlement embodied in this Term Sheet and the Plan, the Settling Parties consent to Pennsylvania AG having an allowed substantial contribution claim under 11 U.S.C. §§ 503(b)(3)(D) and 503(b)(4) in the amount of $4,250,000. (2) CFPB The CFPB shall be allowed an administrative expense claim of $7.00 under 11 U.S.C. §§ 503(b)(3)(D) and 503(b)(4), which is the same $7.00 administrative expense claim discussed above in the CFPB Settlement section. (3) Counsel for the Virginia/Florida/California Claimants Counsel for the Virginia/Florida/California Claimants shall be allowed an administrative expense claim of $4,250,000 under 11 U.S.C. §§ 503(b)(3)(D) and 503(b)(4). This is a negotiated, compromise amount negotiated among counsel to the Consenting Plaintiffs that they represent takes into consideration the actual time expended, and actual costs in excess of $250,000 incurred in this Action. (4) Counsel for the Vermont/North Carolina/Nationwide Claimants Counsel for the Vermont/North Carolina/Nationwide Claimants shall be allowed an administrative expense claim of $4,250,000 under 11 U.S.C. §§ 503(b)(3)(D) and 503(b)(4). This is a negotiated, compromise amount negotiated among counsel to the Consenting Plaintiffs that they represent takes into consideration the actual time expended, and actual costs in excess of $250,000 incurred in this Action. (5) Committee Chair / Marlin & Assoc. Marlin & Assoc. shall be allowed an administrative expense claim of $50,000 under 11 U.S.C. §§ 503(b)(3)(D) and 503(b)(4). This is a negotiated, compromise amount negotiated among Marlin & Assoc. and counsel to the Consenting Plaintiffs that they represent takes into consideration the actual time and expenses by outside counsel, in-house expenses, and outside expenses.
Professional Fees, UST Fees, and Professional Fee Escrow	Costs of notice to the Nationwide Consumer Borrower Settlement Class shall be advanced from the Escrow Account pursuant to the Preliminary Approval Order.

	On the Effective Date, an escrow account (the "Professional Fee Escrow") shall be funded with cash in an amount equal to the unpaid fees and expenses of the professionals employed by the Debtors or the Committee plus an estimate for any post-Effective Date fees and expenses, which fund shall be available for payment of allowed Professional Fee Claims. Any surplus funds remaining in the Professional Fee Escrow after payment of all allowed Professional Fee Claims shall be deposited into the Litigation Trust.
Proposed Treatment of Claims and Interests Under the Plan	
Administrative Expenses, Priority Tax Claims, and Other Priority Claims	Each holder of an Allowed Administrative Expense Claim, Priority Tax Claim, or Other Priority Claim shall be paid in full in cash on the Effective Date, or otherwise receive treatment consistent with the provisions of Bankruptcy Code section 1129(a), in each case, as determined by the Debtors in consultation with the Consenting Stakeholders.
Professional Fee Claims	Each holder of an Allowed Professional Fee Claim shall be paid in full in cash from the Professional Fee Escrow on the later of the Effective Date or the allowance of such claim on a final basis. Notwithstanding the foregoing, after May 1, 2019, the Debtors shall not pay (i) the Committee's professionals specifically retained pursuant to an order of the Bankruptcy Court more than a total of $1.4 million; or (ii) the Debtors' professionals specifically retained pursuant to an order of the Bankruptcy Court[5] more than a total of $1.4 million; provided, however, that such caps do not apply to fees and expenses incurred in connection with work performed on unexpected extraordinary matters unrelated to obtaining approval of this Term Sheet, confirmation of the Plan, or related ordinary matters concerning concluding these Chapter 11 Cases. Provided the Effective Date occurs, no Settling Party shall object to any fees or expenses paid, in accordance with the interim compensation procedures approved by the Bankruptcy Court, prior to May 1, 2019, to the professionals identified in (i) or (ii) above.
Substantial Contribution	Each holder of a Substantial Contribution Administrative

[5] For the avoidance of doubt, such professionals do not include any professionals retained pursuant to the *Order (I) Approving Procedures for the Retention and Compensation of Ordinary Course Professionals, Including, but not Limited to, Expert Witnesses and (II) Authorizing Payment of a Prepetition Claim of a Certain Critical Ordinary Course Professional* (Docket No. 318).

Administrative Expense Claims	Expense Claim will recover its agreed-upon share of the Substantial Contribution Fund, which shall be paid in cash on the Effective Date. The Debtors, the Committee, Consenting Plaintiffs, and Consenting Defendants agree not to object to a request for Substantial Contribution as provided for in this Term Sheet.
GPLS Secured Claims	The GPLS Secured Parties assert the GPLS Secured Claims, and the Debtors dispute the validity of the GPLS Secured Claims. For purposes of facilitating the Settlement, the GPLS Secured Claims shall be allowed for purposes of the Plan, including for purposes of voting on the Plan and receiving releases under the Plan. The GPLS Secured Parties shall waive and release any and all claims including, but not limited to claims for indemnification, legal fees and expenses, against the Debtors, their estates, the Committee, the remaining funds in the Escrow Account, the GPLS Holdback Account, and any other funds held by GPLS, and the Reorganized Debtors, and such waiver and release shall operate as full and final satisfaction, compromise, settlement, release, and discharge of all GPLS Secured Claims, including but not limited to any claims, liens or interests in the Escrow Account and funds or other assets held by GPLS, the Debtors, their estates, or the Reorganized Debtors. The GPLS Secured Claims shall be resolved pursuant to the GPLS Secured Parties Settlement set forth above. For the avoidance of doubt, settlement of the GPLS Secured Claims shall not constitute or be deemed an admission that the GPLS Secured Claims are valid or secured claims.

Consumer Borrower Claims	The Consumer Borrower Claims have been asserted against the Debtors, and the Debtors dispute the validity of the Consumer Borrower Claims. The Consumer Borrower Claims shall be resolved as otherwise provided in this Term Sheet and the Plan. For the avoidance of doubt, settlement of the Consumer Borrower Claims shall not constitute or be deemed (i) any admission of wrongdoing or illegality or any alleged capacity of the Debtors as lenders on any of the Eligible Tribal Loans or constitute or be deemed an admission that the Consumer Borrower Claims are valid claims or (ii) a concession by the Consumer Borrowers that the alleged wrongdoing or illegality did not occur.
Pennsylvania Claims	The Pennsylvania Claims shall be resolved by the Pennsylvania Settlement.
CFPB Claims	The CFPB Claims shall be resolved by the CFPB Settlement.
General Unsecured Claims	Each holder of an allowed General Unsecured Claim shall receive, in full and final satisfaction, compromise, settlement, release, and discharge of and in exchange for such General Unsecured Claim, its pro rata share of the General Unsecured Claims Cash Pool.
Think Interests	All Think Interests shall be cancelled, disallowed, released, and extinguished as of the Effective Date or as of such later date to facilitate execution of the consent order that has been agreed upon between the Debtors and the CFPB, and will be of no further force or effect, and holders of Think Interests will not receive any distribution on account of such Think Interests; *provided*, *however*, that TF Holdings shall be the direct or indirect parent of the Reorganized Debtors.
Section 510(b) Claims	All Section 510(b) Claims, if any, shall be discharged, cancelled, released, and extinguished as of the Effective Date, and shall be of no further force or effect, and holders of allowed Section 510(b) Claims will not receive any distribution on account of such allowed Section 510(b) Claims.
Intercompany Interests and	There shall be no distributions on account of any interests or claims of one Debtor in another Debtor and such claims shall be

Claims	cancelled.
Unclaimed Distributions	The Class Administrator shall attempt to distribute all available funds that are distributable to members of the Nationwide Consumer Borrower Settlement Class pursuant to the Plan and Litigation Trust Agreement to class members that can be located. Any funds remaining in the Litigation Trust as a result of distribution checks remaining uncashed by members of the Nationwide Consumer Borrower Settlement Class 120 days after issuance thereof ("Unclaimed Distributions") shall be distributed as follows: (a) the first $5 million of Unclaimed Distributions shall be paid to the Pennsylvania AG for further distribution to Pennsylvania members who cashed their initial distribution checks and (b) the remaining Unclaimed Distributions shall be paid pursuant to the Tier 1 Allocation and Tier 2 Allocation to all other members who cashed their initial distribution checks. At the discretion of the Litigation Trustee and the Litigation Trust Oversight Board, one additional distribution to members (including Pennsylvania members and other members) may be attempted if reasonably practicable to do so. Thereafter any Unclaimed Distributions remaining unclaimed 120 days after the foregoing final re-distribution of Unclaimed Distributions shall be paid 50% to the Pennsylvania AG for further distribution to members in Pennsylvania and 50% to the CFPB Civil Penalty Fund. The $5 million paid to the Pennsylvania AG in the first redistribution shall be credited against distributions otherwise to be made by the Litigation Trustee to Pennsylvania Borrowers through the Pennsylvania AG from proceeds of future settlements or judgments obtained against Non-Released/Non-Exculpated Parties.
Discharge	Upon the Effective Date the debts of the Debtors shall be discharged pursuant to Section 1141(d) and the Reorganized Debtors shall receive the benefit of such discharge. The Nationwide Consumer Borrower Settlement Class shall have an allowed unsecured claim in the amount of $1.13 billion solely for purposes of voting and distribution under the Plan. The Debtors dispute liability on the foregoing claim, and this allowance shall not be an agreement by the Debtors or Reorganized Debtors to the allowance of such claim for any other purpose. Additionally, notwithstanding anything else herein, both the Plan and the Confirmation Order shall provide that nothing in the Term Sheet, the Settlement, the Plan, or the Confirmation Order shall constitute an admission or agreement by the Debtors concerning the solvency or insolvency of the

	Debtors.
Material Terms of the Restructuring	
Debtor Releases, Third-Party Releases, and Exculpation	The Plan will include the Releases in all material respects, and the Committee, Consenting Plaintiffs, and Consenting Defendants agree not to opt out of the Releases to the extent they have any ability to do so. The Releases shall be without prejudice to the prosecution of the Causes of Action transferred to the Litigation Trust or the Non-Estate Causes of Action that are not released, which shall be expressly stated in the Confirmation Order.
Conditions Precedent to the Effective Date	The occurrence of the Effective Date shall be subject to the following conditions precedent: • during the time period beginning January 1, 2019, through the Effective Date, Cortex shall have paid the Debtors service fees in the aggregate amount substantially equal to the total service fees incurred for the time period beginning January 1, 2019, through the Effective Date; • the approved Term Sheet shall remain in full force and effect; • the Preliminary Approval Order, the Disclosure Statement Approval Order, Final Fairness Approval Order, and the Confirmation Order, each consistent in all material respects with this Term Sheet shall have been entered on a final basis and not be subject to any stay or any further appeal; • the Nationwide Consumer Borrower Settlement Class shall have been fully and finally certified; • the GPLS Holdback Account shall contain at least $7,500,000 (immediately prior to transferring all amounts therein to the Escrow Account);[6] and • all payments and transfers of assets from the Debtors' estates, and all other payments, including but not limited to all transfers to the Litigation Trust, required under the Plan to be made before the Effective Date shall have been made in

[6] It is understood that the Committee and Consenting Plaintiffs in their sole discretion may elect to move forward with the Effective Date if the GPLS Holdback is not fully funded, and no other Settling Party may assert that such lack of funding is a basis for the non-occurrence of the Effective Date.

	accordance with the terms of the Plan.
Substantive Consolidation	For the purposes of the Settlement and confirming the Plan, the assets and liabilities of the Debtors and their estates shall be substantively consolidated.
Structure and Tax Considerations	The Restructuring Transactions shall be structured in a tax efficient and cost-effective manner as determined by the Debtors with the consent of the Consenting Stakeholders, which shall not be unreasonably withheld, and which shall have no effect on the Causes of Action, creditors, or Litigation Trust.
Effect of Plan Disapproval	If the Plan is not confirmed, whether by the Bankruptcy Court or as a result of any appeal, the provisions hereof shall be null and void, including that (i) no claimants shall be deemed to have allowed claims as a result of this Term Sheet or such Plan, (ii) none of the Releases contemplated by this Term Sheet or such Plan shall be effective, and (iii) the Settling Parties shall have all rights and defenses that they had prior to the entry into this Term Sheet.
Certain Defined Terms	The terms set forth in Annex C attached hereto shall be included in the Plan with the meanings given to such terms therein.

[*Remainder of Page Intentionally Left Blank*]

Representations and Agreement

By signing below, each of the parties hereto (the "Agreement Parties") represents that it has the full power and authority to agree and consent to matters expressly contemplated by this Term Sheet and hereby agrees to this Term Sheet, including the following; provided, however, that the Debtors will not be authorized to enter into and agree to this Term Sheet until the Bankruptcy Court enters the Term Sheet Authorization Order:

(a) During the Agreement Effective Period, each Agreement Party (severally and not jointly) agrees to:

(i) use commercially reasonable efforts to support and take all steps necessary and desirable to consummate the Restructuring Transactions, confirm the Plan in accordance with this Term Sheet, and obtain certification by the Bankruptcy Court of the Nationwide Consumer Borrower Settlement Class;

(ii) negotiate in good faith and use commercially reasonable efforts to execute and implement the Definitive Documents in accordance with, and on terms and conditions consistent with, this Term Sheet.

(b) During the Agreement Effective Period, each Agreement Party (severally and not jointly) agrees that it shall not directly or indirectly:

(i) object to or otherwise commence or join in any proceeding or litigation opposing any of the terms of this Term Sheet or the Restructuring Transactions, including confirmation of the Plan and certification of the Nationwide Consumer Borrower Settlement Class;

(ii) either itself or through any representatives or agents (x) solicit, initiate, encourage (including by furnishing information), induce, negotiate, facilitate, or continue any Alternative Restructuring Proposal from or with any Person or (y) propose, file, support, consent to, seek formal or informal approval of, or vote in favor of any Alternative Restructuring Proposal (and shall immediately inform the Agreement Parties of any notification of an Alternative Restructuring Proposal); or

(iii) consistent with the terms of this Term Sheet, directly or indirectly object to, delay, impede, or take any other action to interfere with the Debtors' ownership and possession of their assets, wherever located (including interfering with the automatic stay arising under section 362 of the Bankruptcy Code).

(c) During the Agreement Effective Period, each Agreement Party that is entitled to vote to accept or reject the Plan pursuant to its terms agrees that so long as the Plan is consistent in all material respects with this Term Sheet, it shall, subject to receipt by such Agreement Party of the Plan Solicitation Materials:

(i) timely vote, and not change, withdraw, amend or revoke its vote, with respect to each of its Debtor Claims/Interests to accept the Plan; and

(ii) support, and will not directly or indirectly object to, delay, impede, or take any other action to interfere with any motion or other pleading or document filed by an Agreement Party in the Bankruptcy Court that is required to implement this Term Sheet or the Plan, and does not seek other relief.

(d) Notwithstanding anything contained in this Term Sheet, and notwithstanding any delivery of a consent or vote to accept the Plan by any Agreement Party, or any acceptance of the Plan by any class of creditors, nothing in this Agreement shall:

(i) require any of the Debtors, the Committee, or their respective managers, members, or any similar governing body, as applicable, after consulting with counsel, to take any action or to refrain from taking any action with respect to the Restructuring Transactions to the extent taking or failing to take such action would be inconsistent with applicable law or its fiduciary obligations under applicable law, and any such action or inaction pursuant to such exercise of fiduciary duties shall not be deemed to constitute a breach of this Term Sheet;

(ii) be construed to prohibit any Agreement Party from contesting whether any matter, fact, or thing is a breach of, or is inconsistent with, this Term Sheet;

(iii) be construed to prohibit any Agreement Party from appearing as a party in interest in any matter to be adjudicated in these Chapter 11 Cases, so long as such appearance and the positions advocated in connection therewith are not materially inconsistent with this Term Sheet and are not for the purpose of delaying, interfering with, impeding, or taking any other action to delay, interfere with or impede, directly or indirectly, the consummation of the Restructuring Transactions;

(iv) require any Agreement Party to waive or forego the benefit of any applicable legal professional privilege; or

(v) prevent any Agreement Party from taking any action that is required by applicable law.

(e) It is understood and agreed by the Agreement Parties that money damages would be an insufficient remedy for any breach of this Term Sheet by any Agreement Party, and each non-breaching Agreement Party shall be entitled to specific performance and injunctive or other equitable relief (without the posting of any bond and without proof of actual damages) as a remedy of any such breach, including an order of the Bankruptcy Court or other court of competent jurisdiction requiring any Agreement Party to comply promptly with any of its obligations hereunder.

IN WITNESS WHEREOF, the Agreement Parties hereto have executed this Term Sheet effective as of June 6, 2019.

Agreement Party Signature Pages to
the Term Sheet and Addresses for Notice

GPLS Secured Parties

Name: Scott Zemnick
Title: Authorized Signatory

Victory Park Management, LLC
c/o Victory Park Capital Advisors, LLC
150 North Riverside Plaza, Suite 5200
Chicago, Illinois, 60606
Attention: Scott Zemnick
E-mail address: szemnick@victoryparkcapital.com

and

Squire Patton Boggs (US) LLP
2000 McKinney Avenue, Suite 1700
Dallas, Texas 75201
Attention: S. Cass Weiland and Travis A. McRoberts
E-mail address: cass.weiland@squirepb.com; travis.mcroberts@squirepb.com

and

Kirkland & Ellis LLP
300 North LaSalle Street
Chicago, IL 60654
Attention: Ryan Blaine Bennett and Justin R. Bernbrock
E-mail address: ryan.bennett@kirkland.com; justin.bernbrock@kirkland.com

Commonwealth of Pennsylvania

Judith W. Ross, subject to final approval of Attorney General of Commonwealth of Pennsylvania

Name: Judith W. Ross
Title: Attorney of Record

Ross & Smith, PC
700 N. Pearl Street, Suite 1610
Dallas, Texas, 75201
Attention: Judith W. Ross and Rachael L. Smiley
E-mail address: judith.ross@judithwross.com; rachael.smiley@judithwross.com

and

Commonwealth of Pennsylvania Office of Attorney General
Bureau of Consumer Protection
21 South 12th Street, 2nd Floor
Philadelphia, Pennsylvania 19107
Attention: Saverio P. Mirarchi
E-mail address: smirarchi@attorneygeneral.gov

and

Langer Grogan & Diver, P.C.
1717 Arch Street, Suite 4130
Philadelphia, PA 19103
Attention: Irv Ackelsberg and John J. Grogan
E-mail address: iackelsberg@langergrogan.com

Virginia, Florida, and California Consumer Borrowers

Name: Kristi C. Kelly
Title: Attorney

Kellett & Bartholow PLLC
11300 N. Central Expy, Ste 301
Dallas, Texas 75243
Attention: Theodore O. Bartholow, III and Karen L. Kellett
E-mail address:

and

Kelly Guzzo, PLC
3925 Chain Bridge Road, Suite 202
Fairfax, VA 22030
Attention: Kristi C. Kelly, Andrew J. Guzzo and Casey S. Nash
E-mail address: kkelly@kellyguzzo.com; aguzzo@kellyguzzo.com; casey@kellyguzzo.com

and

Consumer Litigation Associates, P.C.
763 J. Clyde Morris Blvd., Ste. 1-A
Newport News, VA 23601
Attention: Leonard A. Bennett and Elizabeth W. Hanes
E-mail address: lenbennett@clalegal.com; elizabeth@clalegal.com

and

Tycko & Zavareei LLP
1828 L Street, N.W., Suite 1000
Washington, DC 20036
Attention: Anna C. Haac
E-mail address: ahaac@tzlegal.com

Vermont, North Carolina, and Nationwide Consumer Borrowers

Name: Michael S. Etkin
Title: Lowenstein Sandler

Loewinsohn Flegle Deary Simon LLP
12377 Merit Drive, Suite 900
Dallas, Texas 75251
Attention: Daniel P. Winikka
E-mail address: danw@lfdslaw.com

and

Lowenstein Sandler LLP
One Lowenstein Drive
Roseland, New Jersey 97068
Attention: Michael S. Etkin, Andrew Behlmann, and Nicole Fulfee
E-mail address: metkin@lowenstein.com; abehlmann@lowenstein.com;
nfulfree@lowenstein.com

and

Gravel & Shea PC
76 St. Paul St., 7th Floor
Burlington, Vermont 05402
Attention: Matthew B. Byrne
E-mail address: mbyrne@gravelshea.com

and

Berman Tabacco
One Liberty Square
Boston, Massachusetts 02109
Attention: Kathleen M. Donovan-Maher and Steven J. Buttacavoli
E-mail address: kdonovanmaher@bermantabacco.com;
sbuttacavoli@bermantabacco.com

Vermont, North Carolina, and Nationwide Consumer Borrowers

Kathleen M. Donovan-Maher
Name: Kathleen M. Donovan-Maher
Title: Berman Tabacco

Loewinsohn Flegle Deary Simon LLP
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Attention: Daniel P. Winikka
E-mail address: danw@lfdslaw.com

and

Lowenstein Sandler LLP
One Lowenstein Drive
Roseland, New Jersey 97068
Attention: Michael S. Etkin, Andrew Behlmann, and Nicole Fulfee
E-mail address: metkin@lowenstein.com; abehlmann@lowenstein.com; nfulfree@lowenstein.com

and

Gravel & Shea PC
76 St. Paul St., 7th Floor
Burlington, Vermont 05402
Attention: Matthew B. Byrne
E-mail address: mbyrne@gravelshea.com

and

Berman Tabacco
One Liberty Square
Boston, Massachusetts 02109
Attention: Kathleen M. Donovan-Maher and Steven J. Buttacavoli
E-mail address: kdonovanmaher@bermantabacco.com; sbuttacavoli@bermantabacco.com

Vermont, North Carolina, and Nationwide Consumer Borrowers

Name: Matt Byrne
Title:

Loewinsohn Flegle Deary Simon LLP
12377 Merit Drive, Suite 900
Dallas, Texas 75251
Attention: Daniel P. Winikka
E-mail address: danw@lfdslaw.com

and

Lowenstein Sandler LLP
One Lowenstein Drive
Roseland, New Jersey 97068
Attention: Michael S. Etkin, Andrew Behlmann, and Nicole Fulfee
E-mail address: metkin@lowenstein.com; abehlmann@lowenstein.com;
nfulfree@lowenstein.com

and

Gravel & Shea PC
76 St. Paul St., 7th Floor
Burlington, Vermont 05402
Attention: Matthew B. Byrne
E-mail address: mbyrne@gravelshea.com

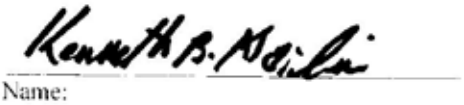
and

Berman Tabacco
One Liberty Square
Boston, Massachusetts 02109
Attention: Kathleen M. Donovan-Maher and Steven J. Buttacavoli
E-mail address: kdonovanmaher@bermantabacco.com;
sbuttacavoli@bermantabacco.com

The Address for Notice to the Consumer Financial Protection Bureau is as follows:

Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552
Attention: and Benjamin Vaughn, Patrick Gushue and Rebeccah Watson
E-mail address: Benjamin.Vaughn@cfpb.gov; Patrick.gushue@cfpb.gov; Rebeccah.watson@cfpb.gov

Official Committee of Unsecured Creditors



Name:
Kenneth B. Marlin
Title: Chairman of the Committee

Cole Schotz P.C.
300 East Lombard Street, Ste. 1450
Baltimore, MD 21202
Attention: Gary H. Leibowitz
E-mail address: gleibowitz@coleschotz.com

and

Cole Schotz P.C.
1700 City Center Tower II
301 Commerce Street
Fort Worth, TX 76102
Attention: Michael D. Warner
E-mail address: nwarner@coleschotz.com

Debtors

Name: Thomas D. Graber
Title: Secretary and General Counsel

Think Finance, LLC
7701 Las Colinas Ridge
Suite 650
Irving, TX 75063
Attention: Thomas D. Graber
E-mail address: TGraber@cortexplatform.com

and

Hunton Andrews Kurth LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
Attention: Tyler P. Brown and Jason W. Harbour
E-mail address: tpbrown@HuntonAK.com; jharbour@HuntonAK.com

and

Hunton Andrews Kurth LLP
1445 Ross Avenue
Suite 3700
Dallas, Texas 75209
Attention: Gregory G. Hesse
E-mail address: ghesse@HuntonAK.com

Annex A

Releases and Exculpation

"**Exculpated Parties**" means, collectively, (a) the Released Parties; (b) the Committee and its members; (c) American Legal Claims Services, LLC; (d) for the avoidance of doubt, each GPLS Secured Party; and (e) the following professionals: (1) Alvarez & Marsal North America, LLC; (2) Hunton Andrews Kurth LLP; (3) Goodwin Procter LLP; (4) Eversheds Sutherland (US) LLP; (5) Browning Kaleczyz Berry & Hoven P.C.; (6) Schnader Harrison Segal & Lewis LLP; (7) Teneo Capital LLC; (8) Cole Schotz P.C.; (9) Kelly Guzzo, P.L.C,; (10) Consumer Litigation Associates, P.C.; (11) Tycko & Zavareei, LLP; (12) Kellett & Bartholow, PLLC; (13) Lowenstein Sandler LLP; (14) Gravel & Shea PC; (15) Berman Tabacco; (16) Loewinsohn Flegle Deary Simon LLP; (17) Langer Grogan & Diver, P.C.; (18) Ross & Smith, PC; (19) FTI Consulting, Inc.; (20) Kirkland & Ellis LLP; (21) Squire Patton Boggs (US) LLP; (22) Katten Muchin Rosenman LLP; (23) Ballard Spahr LLP; (24) Primmer Piper Eggleston & Cramer PC; (25) Bush Ross, P.A.; (26) McGuireWoods LLP; (27) Thomson Reuters Corp.; (28) Lighthouse eDiscovery, Inc.; (29) Goldberg Kohn Ltd.; (30) Kaplan Leaman & Wolfe Court Reporters; (31) Gerson Lehrman Group, Inc. (32) Legalpeople LLC; (33) Smith Moore Leatherwood LLP; (34) Fox Rothschild LLP; (35) TransPerfect; (36) RANE Corp.; (37) Potter Anderson Corroon LLP; (38) Jackson Walker LLP; and (39) Huseby, Inc.

"**Non-Released Parties**" means Elevate Credit, Inc., Kenneth Rees, Stephen Haynes, Haynes Investments, LLC., Sovereign Business Solutions, LLC, Mike Stinson, Linda Stinson (except to the extent released in her capacity as a former director or officer), The Stinson 2009 Grantor Retained Annuity Trust, 7HBF No. 2, LTD, Sequoia Capital Operations, LLC, Sequoia Capital Franchise Partners, LP, Sequoia Capital Growth Fund III, LP, Sequoia Entrepreneurs Annex Fund, LP, Sequoia Capital Growth III Principals Fund, LLC, Sequoia Capital Franchise Fund, LP, Sequoia Capital Growth Partners III, LP, Startup Capital Ventures, LP, Stephen J. Shaper (except to the extent released in his capacity as a former director or officer), John Drew (except to the extent released in his capacity as a former director or officer), TCV, LP, TCV Member Fund, LP, Technology Crossover Ventures, TCV V L.P., Technology Crossover Management V, LLC, Alan H. Ginsberg, and any other Entity that is not defined herein as a Released Party. The Plan and Confirmation Order shall expressly provide as follows:

> **Notwithstanding anything to the contrary in the Plan, the Confirmation Order, or any other Plan Document, no Non-Released Party shall be a Released Party at any time or for any reason.**

"**Non-Released/Non-Exculpated Parties**" means the Non-Released Parties that are not Exculpated Parties. The Plan and Confirmation Order shall expressly provide as follows:

> **Notwithstanding anything to the contrary in the Plan, the Confirmation Order, or any other Plan Document, no Causes of Action or Non-Estate Causes of Action held by any Entity against any Non-Released/Non-Exculpated Party shall be released, waived, enjoined, or otherwise adversely**

impacted by any release, injunction, exculpation, or other provision of the Plan, the Confirmation Order, or any other Plan Document. For the avoidance of doubt, all of the Debtors' Causes of Action against the Non-Released/Non-Exculpated Parties constitute Causes of Action.

"**Related Non-Debtor Parties**" means, collectively, with respect to an entity (as defined in section 101(15) of the Bankruptcy Code and understood and intended to include a federally recognized Indian Tribe), other than a Released Debtor Party, such entity's current and former directors, managers, officers, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, predecessors, successors, assigns, parents, subsidiaries, affiliates, managed accounts or funds, partners, limited partners, general partners, principals, members, management companies, investment managers, fund advisers, employees, advisory board members, financial advisors, accountants, investment bankers, and consultants.

"Released Debtor Parties" means, collectively: (a) each Debtor and Debtor-in-Possession; (b) current directors and officers of the Debtors as of or after the Petition Date, provided that if any director or officer is added after December 1, 2018, and before the Effective Date, such director or officer shall not be a Released Debtor Party until either (1) 21 days after the Committee has been notified of such addition if the Committee does not object by such 21st day or (2) the Bankruptcy Court enters an order on an objection by the Committee that provides that the person should be a Released Debtor Party; (c) the Reorganized Debtors; (d) TF Holdings, Inc.; (e) Cortex Holdings, LLC; (f) Jora Credit Holdings, LLC; (g) TF Investment Services, LLC; (h) each of the subsidiaries of any of the entities identified in (c) – (g); and (i) former directors and officers of the Debtors, in their capacities as such, other than Ken Rees, provided, however, that (i) any such former director or officer of the Debtors shall not be released for purposes of imposing any liability on any shareholder / member solely in their capacity as a shareholder / member or former shareholder / member; and (ii) the releases for the Released Debtor Parties shall not release the Estates' claims and Causes of Action against TF Holdings, Inc. concerning tax refunds and/or NOLs, or against any non-Debtor transferee of such tax refunds to the extent of such transfer.

"**Released Non-Debtor Parties**" means, collectively, and in each case in its capacity as such: (a) each GPLS Secured Party; (b) Great Plains Lending, LLC; (c) Plain Green Lending, LLC; (d) MobiLoans, LLC; (e) Curry, Sentinel Resources, LLC, Red Stone Inc. (as successor-in-interest to MacFarlane Group), and SOL Partners, each solely in connection with his or each Entity's involvement with Great Plains Lending, LLC, and loans issued in the name of Great Plains Lending, LLC; (f) each other Consenting Defendant; (g) each Consenting Stakeholder and counsel for each Consenting Plaintiff; and (h) each Related Non-Debtor Party of each Entity in clauses (a) through (g) of this definition; provided, however, that no specifically identified Non-Released Party shall constitute a Released Non-Debtor Party.

"Released Parties" means, collectively, the Released Debtor Parties and the Released Non-Debtor Parties. The release of any Released Party shall not impact in any way the imputation of such Released Party's conduct to any other entity that is not a Released Party.

"**Releasing Parties**" means, collectively, and in each case in its capacity as such: (a) each GPLS Secured Party; (b) each Consenting Defendant; (c) each Consenting Stakeholder; and (d) all holders of Claims; provided, however, that members of the Nationwide Consumer Borrower Settlement Class are not Releasing Parties.

Releases by the Debtors. Pursuant to section 1123(b) of the Bankruptcy Code, for good and valuable consideration, on and after the Effective Date, each Released Party is deemed released and discharged by the Debtors and their Estates from any and all Causes of Action, whether known or unknown, including any derivative claims asserted on behalf of the Debtors, that the Debtors or their Estates would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of any Claim against, or Interest in, a Debtor or other Entity, based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the Debtors' businesses, business practices or operations, the Debtors' capital structure, the assertion or enforcement of rights and remedies against the Debtors, the Debtors' in- or out-of-court restructuring efforts, intercompany transactions between or among a Debtor and another Debtor, the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, or filing of the Disclosure Statement, the Plan, this Term Sheet, or any Restructuring Transaction, contract, instrument, release, or other agreement or document created or entered into in connection with this Term Sheet, the Disclosure Statement, or the Plan, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the issuance or distribution of securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement, or upon any other act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date; provided, however, nothing herein shall be deemed to release any of the Causes of Action being transferred to the Litigation Trust or any of the obligations or assets included in the Reorganized Debtor Assets.

Releases by Members of the Nationwide Consumer Borrower Settlement Class. As of the Effective Date, each member of the Nationwide Consumer Borrower Settlement Class is deemed to have released and discharged each Released Party from any and all Claims and Non-Estate Causes of Action, whether known or unknown, including any derivative claims asserted on behalf of the Debtors, that such Entity would have been legally entitled to assert (whether individually or collectively), based on or relating to, or in any manner arising from, in whole or in part, (a) the Claims, alleged facts and Non-Estate Causes of Action asserted or that could have been asserted against any of the Released Parties in any Non-Estate Cause of Action prior to the Effective Date, including the Pending Litigation, and (b) any current or newly asserted Claim or Non-Estate Cause of Action against the Released Parties arising from or related to the Debtors' business activities or operations prior to the Effective Date or the Released Parties' actual or alleged, direct or indirect, involvement in consumer lending directly or indirectly involving the

Debtors prior to the Effective Date. Notwithstanding anything to the contrary in the foregoing, the releases set forth above do not release any obligations in connection with the Class Action Injunctive and Other Relief or any rights or obligations in connection with the Restructuring Transactions, or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement the Plan.

Releases by Releasing Parties. As of the Effective Date, each Releasing Party is deemed to have released and discharged each Released Party from any and all Claims and Non-Estate Causes of Action, whether known or unknown, including any derivative claims asserted on behalf of the Debtors, that such Entity would have been legally entitled to assert (whether individually or collectively), based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the Debtors' business activities or operations prior to the Effective Date, the Debtors' in- or out-of-court restructuring efforts, intercompany transactions between or among a Debtor and another Debtor, the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, or filing of the Term Sheet, the Disclosure Statement, the Plan, or any Restructuring Transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Term Sheet, the Disclosure Statement, or the Plan, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the issuance or distribution of securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement, or upon any other related act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date, including without limitation, (a) the Claims, alleged facts and Non-Estate Causes of Action asserted or that could have been asserted against any of the Released Parties in the Pending Litigation or any other Non-Estate Cause of Action prior to the Effective Date, and (b) any current or newly asserted claim or Non-Estate Cause of Action against the Released Parties arising from or related to the Debtors' business activities or operations prior to the Effective Date or the Released Parties' actual or alleged, direct or indirect, involvement in consumer lending directly or indirectly involving the Debtors prior to the Effective Date. Notwithstanding anything to the contrary in the foregoing, the releases set forth above do not release any obligations in connection with the Class Action Injunctive and Other Relief or any rights or obligations in connection with the Restructuring Transactions, or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement the Plan. Notwithstanding anything to the contrary in the foregoing or stated anywhere else herein, the CFPB does not release any Claims or Non-Estate Causes of Action against Cortex or Jora except for Claims and Non-Estate Causes of Action arising from or in connection with the Debtors' activities alleged in the amended complaint in the CFPB Litigation in which Cortex also participated. Notwithstanding anything to the contrary in the foregoing or stated anywhere else herein, the CFPB does not release any Claims or Non-Estate Causes of Action against Katten Muchin Rosenmann LLP.

Exculpation. Except as otherwise specifically provided in the Plan, no Exculpated Party shall have or incur, and each Exculpated Party is released and exculpated from any Claim, Cause of

Action or Non-Estate Cause of Action related to any act or omission in connection with, relating to, or arising out of, the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, or filing of related prepetition transactions, the Term Sheet, the Settlement, the Disclosure Statement, the Plan, or any Restructuring Transaction, contract, instrument, release or other agreement or document created or entered into in connection with the Disclosure Statement or the Plan, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the issuance of securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement, except for claims related to any act or omission that is determined in a final order to have constituted actual fraud, willful misconduct, or gross negligence, but in all respects such Entities shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan. The Exculpated Parties have, and upon completion of the Plan shall be deemed to have, participated in good faith and in compliance with the applicable laws with regard to the solicitation of votes and distribution of consideration pursuant to the Plan and, therefore, are not, and on account of such distributions shall not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or such distributions made pursuant to the Plan.

Annex B
Pending Litigation

As used in the foregoing Term Sheet, "Pending Litigation" means all of the following cases:

Consumer Borrower Litigation:

- *Gingras et al. v. Rosette et al.*, Case No. 5:15-cv-00101-gwc (D. Vt.)
- *Gingras et al. v. Victory Park Capital Advisors, LLC et al.*, Case No. 5:17-cv-00233-GWC (D. Vt.)
- *Banks v. Rees, et al.*, Case No. 8:17-cv-02201-SDM-AAS (M.D. Fla.) and Adv. Proc. No. 18-03064 (HDH) (Bankr. N.D. Tex.)
- *Gibbs, et al. v. Rees, et al.*, Case No. 3:17-cv-00386-MHL (E.D. Va.) and Adv. Proc. No. 18-03069 (HDH) (Bankr. N.D. Tex.)
- *Brice et al v. Rees et al*, Case No. 3:18-cv-01200-MEJ (N.D. Cal.) and Adv. Proc. No. 18-03313 (HDH) (Bankr. N.D. Tex.)
- *Gibbs et al. v. Haynes Investments, LLC et al.*, Case No. 3:18-cv-00048-MHL (E.D. Va.) and Adv. Proc. No. 18-03072 (HDH) (Bankr. N.D. Tex.)
- *Granger, et al. v. Great Plains Lending, LLC, et al.*, Case No. 18-cv-00112-WO-JLW (M.D.N.C.)
- *Gibbs et al. v. Think Finance et al.*, Adv. Proc. No. 17-03117 (HDH) (Bankr. N.D. Tex.)
- *Browne et al. v. Think Finance et al.*, Adv. Proc. No. 17-03120 (HDH) (Bankr. N.D. Tex.)
- *Banks et al. v. Think Finance et al.*, Adv. Proc. No. 17-03121 (HDH) (Bankr. N.D. Tex.)
- *Brice et al. v. Think Finance et al.*, Adv. Proc. No. 18-03025 (HDH) (Bankr. N.D. Tex.)
- *Griffiths et al. v. Think Finance et al.*, Adv. Proc. No. 18-03026 (HDH) (Bankr. N.D. Tex.)
- *Price et al. v. Think Finance et al.*, Adv. Proc. No. 18-03319 (HDH) (Bankr. N.D. Tex.)

CFPB Litigation:

- *Consumer Financial Protection Bureau v. Think Finance, LLC et al*, Case No. 4:17-cv-00127-BMM (D. Mont.)

Pennsylvania Litigation:

- *Commonwealth of Pennsylvania v. Think Finance, Inc. et al.*, Case No. 2:14-cv-07139-JCJ (E.D. Pa.)

Annex C
Other Defined Terms

"Administrative Expense Claim" means a Claim against a Debtor for the costs and expenses of administration of the Chapter 11 Cases arising on or prior to the Effective Date pursuant to sections 328, 330, or 503(b) of the Bankruptcy Code and entitled to priority pursuant to sections 507(a)(2), 507(b), or 1114(e)(2) of the Bankruptcy Code, other than Substantial Contribution Claims.

"Agreement Effective Date" means the date on which the Debtors and each of the Consenting Stakeholders identified on the signature pages attached to the Term Sheet have executed and delivered counterpart signatures of this Term Sheet to counsel to the Debtors.

"Agreement Effective Period" means the period from the Agreement Effective Date to the Termination Date applicable to a Debtor or Consenting Stakeholder.

"Alternative Restructuring Proposal" means an inquiry, proposal, offer, bid, term sheet, or discussion with respect to a new money investment, restructuring, reorganization, merger, amalgamation, acquisition, consolidation, dissolution, debt investment, equity investment, liquidation, tender offer, recapitalization, plan of reorganization, share exchange, business combination, sale, or similar transaction involving any Debtor or the debt, equity, or other interests in any Debtor that is an alternative to one or more of the Restructuring Transactions identified in this Term Sheet.

"Business Day" means any day other than a Saturday, Sunday or other day on which commercial banks are authorized to close under the Laws of, or are in fact closed in, the state of New York.

"Cause of Action" means any action, Claim, cause of action, controversy, demand, right, action, Lien, indemnity, Equity Interest, guaranty, suit, obligation, liability, damage, judgment, account, defense, offset, power, privilege, license, and franchise of any kind or character whatsoever that are property of the Debtors' estates under 11 U.S.C. § 541, whether known or unknown, contingent or noncontingent, matured or unmatured, suspected or unsuspected, liquidated or unliquidated, disputed or undisputed, secured or unsecured, asserted or unasserted, assertable directly or derivatively, in contract or in tort, in law or in equity, arising under the statutes or administration regulations of any jurisdiction, or pursuant to any other theory of law. Such causes of action shall include, by example only and without limitation, (i) avoidance actions, (ii) actions under 11 U.S.C. §§ 544, 545, 547, 548, 550 and/or 553 and any state law equivalents, (iii) commercial tort claims, (iv) any right of setoff, counterclaim or recoupment, and (v) the right to object to Claims or Equity Interests (subject to the provisions of the Plan). These include, among others, (a) actions against entities which spun off from the Debtors between 2012 and the Petition Date totaling, the Committee asserts, in excess of $245.0 million, and (b) actions against all current and former shareholders and/or members of the Debtors totaling, the Committee asserts, in excess of $59.0 million. Notwithstanding anything else in the Term Sheet, the Plan or the Confirmation Order, Cause(s) of Action transferred to the Litigation Trust shall not include any Claims or Causes of Action against Released Parties or any of the obligations or assets included in the Reorganized Debtor Assets.

"CFPB" means the Consumer Financial Protection Bureau.

"Claim" means an actual or alleged (a) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured and calculated together with all applicable accrued interest, fees and commission due, owing or incurred from time to time or (b) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. For the avoidance of doubt, this Term Sheet's definition of "Claim" is no less broad than the definition of "claim" as defined in section 101(5) of the Bankruptcy Code.

"Class Notice" means the form of notice to be disseminated pursuant to the Preliminary Approval Order to Nationwide Consumer Borrowers, which, among other things, will permit Nationwide Consumer Borrowers to opt out of or object to the Nationwide Consumer Borrower Settlement Class and/or the Settlement.

"Committee" means the Official Unsecured Creditors' Committee appointed in the Chapter 11 Cases pursuant to *Amended Appointment of the Official Unsecured Creditors' Committee* [Docket No. 148].

"Confirmation Order" means an order of the Bankruptcy Court confirming the Plan.

"Consenting Defendants" means, collectively, the GPLS Secured Parties and any other defendants or potential defendants in the Pending Litigation who reach or have reached a settlement agreement acceptable to the Consenting Stakeholders and have agreed to be parties to this Term Sheet.

"Consenting Defendants' Cash Contribution" means the funds, if any, to be transferred to the Litigation Trust by any Consenting Defendants on the Effective Date in an aggregate amount to be agreed upon by the Consenting Plaintiffs and the Consenting Defendants in accordance with each such Consenting Defendant's agreed-upon payment allocation of the Consenting Defendants' Cash Contribution.

"Consenting Plaintiffs" means the plaintiffs in the Pending Litigation.

"Consumer Borrower Claims" means any Claim of any of the Nationwide Consumer Borrowers who are members of, and do not opt out from, the Nationwide Consumer Borrower Settlement Class, against any Debtor or any Consenting Defendant, including any claims arising under, derived from, based on, or related to any Consumer Borrower Litigation.

"Cortex" means Cortex Holdings, LLC.

"Debtor Claims/Interests" means, collectively, all Claims against, and Equity Interests in, the Debtors.

"Definitive Documents" mean the documents governing the Restructuring Transaction, which include (a) this Term Sheet; (b) the Plan (and all exhibits thereto); (b) the Confirmation Order and pleadings in support of entry of the Confirmation Order; (c) the Disclosure Statement and pleadings in support of approval of the Disclosure Statement; (d) the Plan Solicitation Materials; (e) any order of the Bankruptcy Court approving the Disclosure Statement and the other Plan Solicitation Materials; and (f) the Plan Supplement.

"Disclosure Statement" means a disclosure statement, including any exhibits, appendices, related documents, ballots, and procedures related to the solicitation of votes to accept or reject the Plan, in each case, as amended, supplemented, or otherwise modified from time to time in accordance with the terms hereof, and that is prepared and distributed in accordance with, among other things, sections 1125, 1126(b), and 1145 of the Bankruptcy Code, Rule 3018 of the Federal Rules of Bankruptcy Procedure, and other applicable law.

"Effective Date" means the date on which the terms and conditions required for the effective date of the Plan have occurred.

"Eligible Tribal Loans" means loans issued by Plain Green prior to June 1, 2016, Great Plains prior to May 6, 2017, or MobiLoans prior to May 6, 2017, in each case in which GPLS purchased a participation interest, provided, further, that each draw on loans issued by MobiLoans shall be treated as a separate Eligible Tribal Loan. In addition, this shall also mean loans to Pennsylvania Borrowers who obtained a consumer loan between February 1, 2009, and December 31, 2010, from First Bank of Delaware with respect to which loan certain of the Debtors provided services.

"Entity" means any "entity" as such term is defined in section 101(15) of the Bankruptcy Code, and for the avoidance of doubt is understood and intended by the parties to include a federally recognized Indian Tribe.

"Equity Interests" means, collectively, the shares (or any class thereof), common stock, preferred stock, limited liability company interests, and any other equity, ownership, or profits interests of any Debtor, and options, warrants, rights, or other securities or agreements to acquire or subscribe for, or which are convertible into the shares (or any class thereof) of, common stock, preferred stock, limited liability company interests, or other equity, ownership, or profits interests of any Debtor (in each case whether or not arising under or in connection with any employment agreement).

"Escrow Account" means that certain escrow account at Metropolitan Commercial Bank in the name of David Baker, Managing Partner, CTP, at Aurora Management Partners established

pursuant to the terms of the Agreed Order [APN 17-3016, Doc No. 22] entered by the Bankruptcy Court on October 31, 2017.

"FF&E" means all furniture, fixtures, equipment and interests therein, including without limitation, inventory, materials, supplies, writings, machinery, computers and accessories, servers, hardware, disk drives, office equipment, communications equipment, leased or owned vehicles, and other tangible personal property utilized in the Debtors' businesses. FF&E shall not include GPL and PGL Property. Books and records are addressed separately in the Term Sheet.

"Final Fairness Approval Order" means that Order granting final approval of the Settlement pursuant to Fed. R. Civ. P. 23(e) and/or Fed. R. Bankr. P. 7023(e).

"Final Fairness Hearing" means the hearing to consider granting final approval of the Settlement pursuant to Fed. R. Civ. P. 23(e) and/or Fed. R. Bankr. P. 7023(e).

"GPLS" means GPL Servicing, Ltd.

"GPLS Holdback Account" means, collectively, the three GPLS accounts at Citi Bank, N.A. that hold the "GPLS Holdback," as that term is defined in the *Order Granting Preliminary Injunction* [A.P. Doc. No. 73] (the "Preliminary Injunction Order").

"GPLS Insurance Carriers" means Endurance American Specialty Insurance Company (Policy Number FIP100101226400), XL Specialty Insurance Company (Policy Number ELU147084-16) Zurich (Policy Number EOC 0160733-00), and Arch Insurance Company (Policy Number AAX 9300313-00).

"GPLS Litigation" means that certain adversary proceeding *Think Finance et al. v. Victory Park Capital Advisors, LLC et al.*, Adv. Proc. No. 17-03106 (HDH) (Bankr. N.D. Tex.).

"GPLS Secured Claims" means any Claims against a Debtor of any of the GPLS Secured Parties, including any Claims arising under, derived from, based on, or related to any asserted right to payment under the GSA, or the proofs of claim filed by GPL Servicing, Ltd., GPL Servicing Agent, LLC, Victory Park Capital Advisors, LLC, or Victory Park Management, LLC.

"GPLS Secured Parties" means, collectively, (a) GPL Servicing, Ltd., (b) GPL Servicing Agent, LLC, (c) Victory Park Capital Advisors, LLC, (d) Victory Park Management, LLC, (e) the GPLS Insurance Carriers (solely with respect to the Releases), and (f) for each of the foregoing (a)–(e), their respective current, former, and future Related Non-Debtor Parties, including, without limitation, for avoidance of doubt, Scott Zemnick, Tom Welch, and Jeffrey Schneider. The use of the term "Secured" in the term "GPLS Secured Parties" is not an admission by any party to this Term Sheet that the "GPLS Secured Parties" in fact hold a secured claim.

"Great Plains" means Great Plains Lending, LLC.

"Great Plains Reserve Amount" means the amount alleged to be due from Great Plains to GPLS as the "Reserve Amount," as such term is defined in that certain Participation Agreement, dated as of December 1, 2015, between Great Plains and GPLS.

"GSA" means that certain Fourth Amended and Restated Guaranty and Security Agreement, dated as of April 2, 2013 (as amended from time to time).

"Intellectual Property" means without limitation all of the following: (i) all patents; (ii) all know-how, work product, trade secrets, inventions (whether patentable or otherwise), data, information, processes, techniques, procedures, compositions, devices, methods, formulas, protocols and information, whether patentable or not; (iii) all software, source code, object code, system diagrams and architecture, flow charts, algorithms and all other information technology; (iv) all works of authorship, copyrightable works, copyrights and applications, registrations and renewals; (v) all logos, trademarks, service marks, domain names, and all applications and registrations relating thereto; (vi) all other proprietary rights; (vii) all regulatory exclusivities, patent extensions, supplemental protection certificates or the like; and (viii) all copies and tangible embodiments of each and all of the foregoing utilized in the Debtors' businesses. Notwithstanding the above, Intellectual Property shall not include the GPL and PGL Property.

"Jora" means Jora Credit Holdings, LLC.

"Litigation Trust" means the trust established pursuant to the Plan to, among other things, hold assets, prosecute Causes of Action, object to Claims and make distributions pursuant to the Plan.

"Litigation Trustee" means the trustee (and any successor trustee) of the Litigation Trust.

"MobiLoans" means MobiLoans, LLC.

"MobiLoans Note" means that certain Subordinated Term Note, dated May 10, 2017, by MobiLoans in favor of GPLS.

"Nationwide Consumer Borrower" means any Person, including their successors and assigns and Persons holding or exercising any relevant legal rights of such Person, who received an Eligible Tribal Loan. The term shall be synonymous with member, when referring to members of the Nationwide Consumer Borrower Settlement Class. For purposes of this Term Sheet, each Nationwide Consumer Borrower shall be treated as a single member of the Nationwide Consumer Borrower Settlement Class but, for each Borrower who has not opted out, each Eligible Tribal Loan he or she received will be considered separately when making any distribution or providing any other benefit.

"Non-Estate Causes of Action" means any action, Claim, cause of action, controversy, demand, right, action, Lien, indemnity, Equity Interest, guaranty, suit, obligation, liability, damage, judgment, account, defense, offset, power, privilege, license, and franchise of any kind or character whatsoever that are not property of the Debtors' estates under 11 U.S.C. § 541, whether known, unknown, contingent or noncontingent, matured or unmatured, suspected or unsuspected, liquidated or unliquidated, disputed or undisputed, secured or unsecured, assertable

directly or derivatively, in contract or in tort, in law or in equity, or pursuant to any other theory of law.

"Other Priority Claim" means any unsecured claim entitled to priority in repayment pursuant to section 507 of the Bankruptcy Code that is not a Priority Tax Claim or Administrative Expense Claim.

"Pennsylvania" means the Commonwealth of Pennsylvania, which is the holder of the Pennsylvania Claims, or its designees.

"Pennsylvania AG" means the Attorney General of the Commonwealth of Pennsylvania.

"Pennsylvania Borrowers" means members of the Nationwide Consumer Borrower Settlement Class who resided in the Commonwealth of Pennsylvania at the time they obtained any Eligible Tribal Loans

"PII" means personal identifiable information provided by consumer borrowers prior to the Effective Date to Tribal Lenders or to the Debtors.

"Plain Green" means Plain Green, LLC.

"Plan Solicitation Materials" means all solicitation materials in respect of the Plan.

"Plan Supplement" means the compilation of documents and forms of documents, schedules, and exhibits to the Plan.

"Priority Tax Claim" means any Claim against a Debtor that is entitled to priority in right of payment under section 507(a)(8) of the Bankruptcy Code (determined irrespective of time limitations), including any related Claim for penalties.

"Reorganized Debtors" means one or more newly formed entities wholly owned by TF Holdings that are to receive on the Effective Date the property and rights identified in this Term Sheet, including the Reorganized Debtors' Cash Distribution.

"Reorganized Debtor Assets" means the assets identified in this Term Sheet that will vest in the Reorganized Debtors on the Effective Date.

"Restructuring Transactions" means the transactions on the terms specified in this Term Sheet, the Plan, and the other Definitive Documents.

"Section 510(b) Claim" means any claim against a Debtor subject to subordination under section 510(b) of the Bankruptcy Code.

"Settling Tribal Lenders" shall mean the Tribal Lenders who have entered into separate settlement agreements with one or more Consenting Plaintiffs.

"Subject Consumers" means those consumers who resided in one of the Subject States at the time of the formation of an installment loan agreement or a line of credit agreement.

"Subject States" means Arizona, Arkansas, Colorado, Connecticut, Illinois, Indiana, Kentucky, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Ohio, and South Dakota.

"Substantial Contribution Fund" means cash in an amount needed to fund payment of Allowed Substantial Contribution Claims.

"Termination Date" means the date on which termination of this Term Sheet occurs as to a Debtor or a Consenting Stakeholder.

"Think Finance" means Think Finance, LLC.

"Think Interest" means any Equity Interest in Think Finance.

"TF Holdings" means TF Holdings, Inc.

"Tribal Lender" means Plain Green, Great Plains, or MobiLoans.

"Tribal Property" means the ownership interests and/or rights that belong to the Settling Tribal Lenders that would be transferred to the Liquidation Trust pursuant to separate settlement agreements with the Settling Tribal Lenders, including without limitation any outstanding consumer borrower notes and any data regarding any Nationwide Consumer Borrower owned by a Settling Tribal Lender and maintained or otherwise held by the Debtors for or on behalf of the Settling Tribal Lenders..

Annex D

CFPB Consent Order

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

Consumer Financial Protection Bureau, *Plaintiff*, v. Think Finance, LLC, formerly known as Think Finance, Inc., Think Finance SPV, LLC, Financial U, LLC, TC Loan Service, LLC, Tailwind Marketing, LLC, TC Administrative Services, LLC, and TC Decision Sciences, LLC, *Defendants*.	Case No. 4:17-cv-00127-BMM Hon. Brian M. Morris

STIPULATED FINAL CONSENT ORDER

Plaintiff Consumer Financial Protection Bureau (Bureau) commenced this civil action against Think Finance, LLC on November 15, 2017 to obtain injunctive relief, damages and other monetary relief, and civil money penalties.

The First Amended Complaint (Complaint), filed on March 28, 2018, alleges violations of Sections 1031(a) and § 1036(a)(1) of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5531(a), 5536(a)(1)(B). The Complaint also names as defendants several wholly-owned subsidiaries of Think Finance, LLC, namely, Think Finance SPV, LLC, Financial U, LLC, TC Loan Service, LLC, Tailwind Marketing, LLC, TC Administrative Services, LLC, and

TC Decision Sciences, LLC. (collectively, the Think Entities). Dkt. No. 38. The Think Entities filed their answer on August 31, 2018, and in substance, denied the Bureau's Complaint and raised various affirmative defenses. Dkt. No. 81. Plaintiff and the Think Entities consent to the Court entering this Order.

THEREFORE, it is ORDERED:

FINDINGS

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. From 2011 through at least 2018, consumers in the Subject States obtained credit extended in the name of Great Plains Lending, LLC, MobiLoans, LLC, or Plain Green, LLC. For those loans where repayments exceeded the principal amount borrowed, consumers collectively paid at least $325,000,000 over the principal amounts borrowed. This figure does not account for loans in the Subject States where the total payments were less than the principal amount borrowed.

3. Plaintiff and the Think Entities agree to entry of this Order, without adjudication of any issue of fact or any adjudication of any remaining issues of law, to settle and resolve all matters in this dispute arising from the conduct alleged in the Complaint to the date this Order is entered.

4. The Think Entities neither admit nor deny any allegations in the Complaint, except as specifically stated in this Order. The Think Entities admit only the facts necessary to establish the Court's jurisdiction over the Think Entities and the subject matter of this Order.

5. The Think Entities waive all rights to seek judicial review or otherwise challenge or contest the validity of this Order. The Think Entities also waive any claims the Think Entities may have under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the Bureau's prosecution of the Bureau Litigation. Each party will bear its own costs and expenses, including without limitation attorneys' fees, in connection with the Bureau Litigation.

6. Entry of this Order is in the public interest.

DEFINITIONS

7. "Effective Date" means the date on which the Order is entered by the Court.

8. "Enforcement Director" means the Assistant Director of the Office of Enforcement for the Consumer Financial Protection Bureau, or her delegate.

9. "Plan" means the Chapter 11 plan of the Think Entities.

10. "Person" means any individual or entity, including any government, political subdivision, government agency or instrumentality, or Native American Tribe.

11. "Related Consumer Action" means a private action by or on behalf of one or more consumers or an enforcement action by another governmental agency brought against the Think Entities based on substantially the same allegations as described in the Complaint.

12. "Reorganized Debtors" means one or more newly formed entities wholly owned by TF Holdings, Inc. that are, by operation of the Plan, to receive the property and rights identified in the Plan.

13. "Subject States" means Arizona, Arkansas, Colorado, Connecticut, Illinois, Indiana, Kentucky, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, and South Dakota.

14. The "Think Entities" means Think Finance, LLC, Think Finance SPV, LLC, Financial U, LLC, TC Loan Service, LLC, Tailwind Marketing, LLC, TC Administrative Services, LLC, and TC Decision Sciences, LLC.

ORDER
I.
CONDUCT RELIEF

IT IS ORDERED that:

15. The Think Entities and the Reorganized Debtors (each an "Enjoined Party") are permanently restrained and enjoined from:

a. providing services to a Subject Lender that constitute extending credit to, servicing credit extended to, or collecting

on credit extended to, a consumer who has identified his or her residential address at the time of the advancement of funds as being in a Subject State; or

b. providing services directly to a Subject Lender, or to another Person for use of a Subject Lender, in connection with a Subject Lender's activities in extending credit to, servicing credit extended to, or collecting on credit extended to a consumer who has identified his or her residential address at the time of the advancement of funds as being in a Subject State, where the Enjoined Party knows or is reckless in not knowing that the entity is a Subject Lender.

c. For purposes of this Paragraph 15, a Subject Lender shall mean any entity or individual that makes a loan to a consumer who has identified his or her residential address at the time of the advancement of funds as being in a Subject State where such loan is either at an interest rate in excess of the Subject State's usury limit for that loan or the entity or individual lends without a license from the Subject State for that loan. For purposes of this paragraph 15c., the usury limit and licensing requirements referenced shall be those of the

consumer's state of residence which the consumer has identified at the time of the advancement of funds.

16. The conduct prohibitions in Paragraph 15 do not apply:

a. if the credit in question: (i) is originated or issued by a federally or state chartered depository institution or other entity and if the application of state or other law with respect to the loan is preempted under the Federal laws of the United States of America; or

b. to support services of a type provided to businesses generally or a similar ministerial service.

MONETARY PROVISIONS
II.
Order to Pay Civil Money Penalty

IT IS FURTHER ORDERED that:

17. Under Section 1055(c) of the CFPA, 12 U.S.C. § 5565(c), pursuant to the agreement of the parties as part of the Plan and by reason of the violations of law alleged in the Complaint and alleged to continue to the entry of this Order, and taking into account the factors in 12 U.S.C. 5565(c)(3), the Think Entities must pay a civil money penalty of $7 ($1 for each Defendant), jointly and severally, in favor of the Bureau. The Think Entities shall pay this penalty in accordance with their obligations in Paragraphs [XX] of the Plan.

18. The civil money penalty paid under this Order will be deposited in the Civil Penalty Fund of the Bureau as required by § 1017(d) of the CFPA, 12 U.S.C. § 5497(d).

19. The Think Entities must treat the civil money penalty paid under this Order as a penalty paid to the government for all purposes. Regardless of how the Bureau ultimately uses those funds, the Think Entities may not:

a. claim, assert, or apply for a tax deduction, tax credit, or any other tax benefit for any civil money penalty paid under this Order; or

b. seek or accept, directly or indirectly, reimbursement or indemnification from any source, including but not limited to payment made under any insurance policy, with regard to any civil money penalty paid under this Order.

20. To preserve the deterrent effect of the civil money penalty in any Related Consumer Action, the Think Entities may not argue that the Think Entities are entitled to, nor may the Think Entities benefit by, any offset or reduction of any compensatory monetary remedies in the Related Consumer Action because of the civil money penalty paid in this action.

III.
COMPLIANCE PROVISIONS
IV.
Reporting Requirements

IT IS FURTHER ORDERED that:

21. After the Effective Date, the Think Entities and the Reorganized Debtors must notify the Bureau of:

a. any future development that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other corporate reformation; or

b. the filing of any future bankruptcy or insolvency proceeding by or against the Think Entities and the Reorganized Debtors; or a change in name or address for the Think Entities and the Reorganized Debtors.

22. The Think Entities and the Reorganized Debtors must provide the notice required in Paragraph 21 as soon as practicable after learning about the development or at least 30 days before the development is finalized, whichever is sooner.

23. Within 7 days of the Effective Date, the Think Entities and Reorganized Debtors must:

a. designate at least one telephone number and email, physical, and postal address as a point of contact, which the Bureau

may use to communicate with the Think Entities and the Reorganized Debtors;

b. identify all businesses for which the Think Entities and the Reorganized Debtors are the majority owner, or that the Think Entities and the Reorganized Debtors directly or indirectly control, by providing all of the businesses' names, telephone numbers, and physical, postal, email, and Internet addresses; and

c. describe the activities of each such business, including the products and services offered, and the means of advertising, marketing, and sales.

24. The Think Entities and the Reorganized Debtors must report to the Bureau any change in the information required to be submitted under Paragraph 23 as soon as practicable or at least 30 days before the change, whichever is sooner.

V.

Notices

IT IS FURTHER ORDERED that:

25. Unless otherwise directed in writing by the Bureau, all notices, submissions, requests, communications, or other documents related to the Order must be in writing with the subject line, "CFPB v. Think Finance, LLC, et al." and directed as follows:

If to the Bureau:

By overnight courier (not the U.S. Postal Service), as follows:

Assistant Director for Enforcement
Bureau of Consumer Financial Protection
ATTENTION: Office of Enforcement
1700 G Street, N.W.
Washington D.C. 20552

And contemporaneously by email to Enforcement_Compliance@cfpb.gov.

If to the Think Entities:

Chief Executive Officer

Think Finance, LLC

7701 Las Colinas Ridge, Suite 650, Irving, TX 75063

With a copy to the General Counsel at the same address

If to the Reorganized Debtors:

Chief Executive Officer

TF Holdings, Inc.

7701 Las Colinas Ridge, Suite 650, Irving, TX 75063

With a copy to the General Counsel at the same address

VI.

Order Distribution and Acknowledgment

IT IS FURTHER ORDERED that:

26. Within 7 days of the Effective Date, the Think Entities and the Reorganized Debtors must submit to the Enforcement Director an acknowledgement of receipt of this Order, sworn under penalty of perjury.

27. Within 30 days of the Effective Date, the Think Entities and the Reorganized Debtors must deliver a copy of this Order to any employees or any Outside Counsel who will have responsibilities under this Order.

28. The Think Entities and the Reorganized Debtors must deliver a copy of this Order to any future executive officers, shareholders, partners, employees, and any other new agents and representatives who will have responsibilities related to the subject matter of the Order before they assume their responsibilities.

29. The Think Entities and the Reorganized Debtors must secure a signed and dated statement acknowledging receipt of a copy of this Order, ensuring that any electronic signatures comply with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq*., within 30 days of delivery, from all persons receiving a copy of this Order under this Section.

VII.

Cooperation with the Bureau

IT IS FURTHER ORDERED that:

30. The Think Entities must cooperate fully with the Bureau in this matter and in any investigation related to or associated with the conduct alleged in the Complaint. The Think Entities must provide truthful and complete information, evidence, and testimony. The Think Entities must cause their officers, employees, representatives, or agents to appear for interviews, discovery, hearings, trials, and any other proceedings that the Bureau may reasonably request upon 5 days written notice, or other reasonable notice, at such places and times as the Bureau may reasonably designate, without the service of compulsory process.

31. The Think Entities and the Reorganized Debtors must cooperate fully to help the Bureau determine the identity and location of each consumer borrower, and the amount each consumer borrowed and repaid on credit that was extended in the name of Great Plains Lending, LLC, MobiLoans, LLC, or Plain Green, LLC. The Think Entities and the Reorganized Debtors must provide such information in its or its agents' possession or control within 14 days of receiving a written request from the Bureau.

VIII.

Compliance Monitoring

IT IS FURTHER ORDERED that:

32. Within 14 days of receipt of a written request from the Bureau, the Think Entities and the Reorganized Debtors must submit requested non-privileged information related to the requirements of this Order, which must be made under penalty of perjury; provide sworn testimony related to the requirements of this Order and Think Entities and the Reorganized Debtors' compliance with those requirements; or produce non-privileged documents related to the requirements of this Order and the Think Entities and the Reorganized Debtors' compliance with those requirements.

33. The Think Entities and the Reorganized Debtors must permit Bureau representatives to interview about the requirements of this Order and the Think Entities and the Reorganized Debtors' compliance with those requirements any employee or other person affiliated with the Think Entities and the Reorganized Debtors who has agreed to such an interview. Nothing in this Order will limit the Bureau's lawful use of civil investigative demands under 12 C.F.R. § 1080.6 or other compulsory process.

IX.

Recordkeeping

34. The Think Entities and the Reorganized Debtors must create or, if already created, must retain for at least 5 years from the Effective Date all documents and records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Bureau.

35. The Think Entities and the Reorganized Debtors must retain the documents described in Paragraph 34 for at least 5 years.

36. Defendants must make documents identified in Paragraph 34 available to the Bureau upon the Bureau's request.

X.

Retention of Jurisdiction

IT IS FURTHER ORDERED that:

37. The Court will retain jurisdiction of this matter for purposes of construction, modification (including any request by any Party to modify the conduct prohibitions), and enforcement of this Order.

SO ORDERED AND ADJUDGED.

_____ _____

The Honorable Brian M. Morris DATE
United States District Judge

Adversary Proceeding Example (Think Finance)

B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)	**ADVERSARY PROCEEDING NUMBER** (Court Use Only)

PLAINTIFFS	**DEFENDANTS**
ATTORNEYS (Firm Name, Address, and Telephone No.)	**ATTORNEYS** (If Known)
PARTY (Check One Box Only) □ Debtor □ U.S. Trustee/Bankruptcy Admin □ Creditor □ Other □ Trustee	**PARTY** (Check One Box Only) □ Debtor □ U.S. Trustee/Bankruptcy Admin □ Creditor □ Other □ Trustee

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

NATURE OF SUIT

(Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)

FRBP 7001(1) – Recovery of Money/Property
- ☐ 11-Recovery of money/property - §542 turnover of property
- ☐ 12-Recovery of money/property - §547 preference
- ☐ 13-Recovery of money/property - §548 fraudulent transfer
- ☐ 14-Recovery of money/property - other

FRBP 7001(2) – Validity, Priority or Extent of Lien
- ☐ 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property
- ☐ 31-Approval of sale of property of estate and of a co-owner - §363(h)

FRBP 7001(4) – Objection/Revocation of Discharge
- ☐ 41-Objection / revocation of discharge - §727(c),(d),(e)

FRBP 7001(5) – Revocation of Confirmation
- ☐ 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability
- ☐ 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims
- ☐ 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
- ☐ 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 7001(6) – Dischargeability (continued)
- ☐ 61-Dischargeability - §523(a)(5), domestic support
- ☐ 68-Dischargeability - §523(a)(6), willful and malicious injury
- ☐ 63-Dischargeability - §523(a)(8), student loan
- ☐ 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)
- ☐ 65-Dischargeability - other

FRBP 7001(7) – Injunctive Relief
- ☐ 71-Injunctive relief – imposition of stay
- ☐ 72-Injunctive relief – other

FRBP 7001(8) Subordination of Claim or Interest
- ☐ 81-Subordination of claim or interest

FRBP 7001(9) Declaratory Judgment
- ☐ 91-Declaratory judgment

FRBP 7001(10) Determination of Removed Action
- ☐ 01-Determination of removed claim or cause

Other
- ☐ SS-SIPA Case – 15 U.S.C. §§78aaa *et.seq.*
- ☐ 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

□ Check if this case involves a substantive issue of state law	□ Check if this is asserted to be a class action under FRCP 23
□ Check if a jury trial is demanded in complaint	Demand $

Other Relief Sought

B1040 (FORM 1040) (12/15)

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR	BANKRUPTCY CASE NO.	
DISTRICT IN WHICH CASE IS PENDING	DIVISION OFFICE	NAME OF JUDGE
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF)		
DATE	PRINT NAME OF ATTORNEY (OR PLAINTIFF)	

INSTRUCTIONS

The filing of a bankruptcy case creates an "estate" under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor's discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 1040, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court's Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 1040 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and **Defendants.** Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DARLENE GIBBS, STEPHANIE EDWARDS, LULA WILLIAMS, PATRICK INSCHO, and LAWRENCE MWETHUKU, *on behalf of themselves and all individuals similarly situated*,	Related Case Nos: 3:17-bk-33964; 3:17-bk-33965
Plaintiffs,	Adversary Proceeding No. __
v.	
THINK FINANCE, LLC; THINK FINANCE SPV, LLC; TC ADMINSTRATIVE SERVICES, LLC; TAILWIND MARKETING, LLC; TC LOAN SERVICES, LLC; and TC DECISION SCIENCES, LLC,	
Defendants.	

CLASS ACTION COMPLAINT

Plaintiffs, Darlene Gibbs, Stephanie Edwards, Lula Williams, Patrick Inscho, and Lawrence Mwethuku (collectively, the "Plaintiffs"), *on behalf of themselves and all individuals similarly situated*, by counsel, file this class action adversary proceeding against Defendants/Debtors Think Finance, LLC, Think Finance SPV, LLC, TC Administrative Services, LLC, Tailwind Marketing, LLC, TC Loan Services, LLC, and TC Decision Sciences, LLC (collectively "Defendants"). In support thereof, Plaintiffs allege as follows:

INTRODUCTION

1. Most states have usury and licensing laws that limit the amount of interest that a lender can charge on a loan. To evade usury and licensing laws, payday lenders originated their loan products in the name of national banks, who were exempt from state interest-rate caps under the National Bank Act. *See* 12 U.S.C. § 85. Under these arrangements, the bank served as a conduit for the loans in exchange for a fee, but the payday lender funded, serviced, and collected the loans—a tactic known as "rent-a-bank." When federal regulators began cracking down on these rent-a-bank arrangements, the payday lenders developed a solution—they adapted the structure to use Native American tribal entities as the conduit to ostensibly cloak the loans in tribal sovereign immunity. *See, e.g.*, Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 Wash. & Lee L. Rev. 751, 785 (2012) (providing background on payday loans and describing the rent-a-tribe model as "the most recent incarnation of payday lending companies regulation-avoidance").

2. This case involves a rent-a-tribe enterprise established and operated by Defendants. After federal regulators shut down its rent-a-bank arrangement with First Bank of Delaware ("FBD"), Think Finance established rent-a-tribe enterprises with the Chippewa Cree Tribe and Otoe-Missouria Tribe (collectively the "Tribes"). Beginning in 2011, Defendants made high-interest loans to consumers in the name of Plain Green, LLC ("Plain Green"), and Great Plains, LLC ("Great Plains")—the tribal entities that served as fronts to disguise Defendants' role and to ostensibly shield the scheme from liability. Although Plain Green and Great Plains were held out as the actual lenders of these internet loans, the Tribes had minimal involvement in the day-to-day operations and received a nominal percentage of the revenues from the loans. On the other hand, Defendants received the majority of the profits; provided the infrastructure to market, fund, and collect the loans; and controlled the tribal entities' bank accounts.

3. Because of their comforts with the rent-a-structure, Defendants made loans in Virginia with annual percentage rates in excess of 440%—more than 35 times the 12% interest cap in Virginia for companies that are not licensed by the Virginia State Corporation Commission (the "Commission"). *See* Va. Code § 6.2-303(A). Over the past four years, Defendants collected more than $69.4 million dollars from Virginia consumers pursuant to these illegal loans.

4. Based on Defendants' conduct, Plaintiffs allege violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, which prohibits the "collection of unlawful debt." Defendants acted in concert and conspired with each other to repeatedly violate Virginia's lending statutes—resulting in the collection of an unlawful debt from Plaintiffs and the class members. Defendants are "persons" as defined in 18 U.S.C. § 1961(3), and the usurious debts they sought to collect and did collect are "unlawful debts" under 18 U.S.C. § 1961(6). Defendants' acts described herein are unlawful as set forth in 18 U.S.C. § 1962.

5. Plaintiffs also assert a class claim for violations of Virginia's usury laws and unjust enrichment. Because the loans exceed Virginia's 12% annual percentage rate ("APR") cap, such loans are null and void and neither the lender nor any third party may collect, obtain, or receive any principal, interest, or charges on the loans. 15 U.S.C. § 1541(A). Accordingly, Plaintiffs seek to disgorge all amounts paid by Virginia consumers, plus twice the amount of such usurious interest that was paid in the two years preceding the filing of this action. Va. Code § 6.2-305(A).

JURISDICTION

6. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

7. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A), (B), (E), (H), (J), and (O). Pursuant to Fed. R. Bankr. P. 7008(a), Plaintiffs state that to the extent the Court determines that any portion of this complaint is non-core, Plaintiffs consent to the entry

of final orders or judgment in this adversary proceeding by the bankruptcy judge if it is determined that the bankruptcy judge, absent consent of the parties, cannot enter final orders or judgment consistent with Article III of the United States Constitution. Further, to the extent that any court determines that the Bankruptcy Court does not have the authority to enter a final judgment on any cause of action set forth herein, Plaintiffs request that the Bankruptcy Court issue a report and recommendation for a judgment to the United States District Court for the Northern District of Texas on any such cause of action.

PARTIES

8. Plaintiff Darlene Gibbs ("Gibbs") is a natural person and resident of the Commonwealth of Virginia.

9. Plaintiff Stephanie Edwards ("Edwards") is a natural person and resident of the Commonwealth of Virginia.

10. Plaintiff Lula Williams ("Williams") is a natural person and resident of the Commonwealth of Virginia.

11. Plaintiff Patrick Inscho ("Inscho") is a natural person and resident of the Commonwealth of Virginia.

12. Plaintiff Lawrence Mwethuku ("Mwethuku") is a natural person and resident of the Commonwealth of Virginia.

13. Think Finance, LLC ("Think Finance") is a limited liability company with a principal place of business at 5080 Spectrum Drive, Suite 700 West Addison, TX 75001. Although the Tribes held themselves out as the actual lender of the internet loans, Think Finance ran the day-to-day operations of the lending enterprises described herein.

14. Think Finance SPV, LLC ("Think Finance SPV") is a limited liability company formed under the laws of Delaware with a principal place of business at 5080 Spectrum Drive,

Suite 700 West Addison, TX 75001-3232. Think Finance created Think Finance SPV as the special purpose vehicle to acquire shares of GPL Servicing, Ltd. ("GPLS")—"the fund created to allow investors to purchase interests in the consumer loans originated by Native American Tribal lending businesses." *See Think Finance, LLC, v. Victory Park Capital Advisors, LLC*, Case No. 17-03106 (Banc. Tex.) (Dkt. 1, Compl. at ¶ 24) (explaining Victory Park's creation of GPLS).

15. TC Administrative Services, LLC ("TC Administrative") is a Delaware corporation with a principal place of business at 5080 Spectrum Drive, Suite 700 West Addison, TX 75001-3232. As explained below, TC Administrative participated in the enterprise as an administrative service provider and, more importantly, as the entity who received Think Finance's share of the profits of the scheme. Pursuant to the parties' agreements, TC Administrative Services received the net income generated from the enterprises after accounting for the fixed return of 18-20% allocated to the investors who funded the scheme.

16. Tailwind Marketing, LLC ("Tailwind") is a limited liability company with a principal place of business at 5080 Spectrum Drive, Suite 700 West Addison, TX 75001-3232. As explained below, Tailwind participated in the enterprise as the marketing and technology arm of the enterprise.

17. Defendant TC Decision Sciences, LLC ("TC Decision Sciences"), is a Delaware corporation with a principal place of business at 5080 Spectrum Drive, Suite 700 West Addison, TX 75001-3232. As explained below, TC Decision Sciences participated in the enterprise as the website operator and software administrator for the rent-a-tribe enterprises. TC Decision Sciences also provided risk management, *i.e.*, it performed analysis to help predict payment risk and developed the lending criteria to ensure the profitability of the rent-a-tribe scheme.

18. TC Loan Services, LLC ("TC Loan Services") is a limited liability with a principal place of business at 5080 Spectrum Drive, Suite 700 West Addison, TX 75001-3232. TC Loan Services participated in the enterprise as the controlling member of Tailwind. TC Loan Services was created to further insulate Defendants from liability by adding an extra layer of corporate protection.

STATEMENT OF FACTS

A. Overview of tribal lending.

19. In a "payday" loan, a consumer who can't afford to wait until payday receives a cash advance and, in exchange, the lender subtracts a larger amount from the consumer's paycheck. Consumers renew the loans when they are unable to pay them off, creating a cycle of mounting debt.

20. Over the past ten years, payday lending has become "one of the fastest growing segments of the consumer credit industry," and as of 2005 "there were more payday-loan stores in the United States than McDonald's, Burger King, Sears, J.C. Penney, and Target stores combined." Martin & Schwartz, *supra* at 759 (quoting Karen E. Francis, Note, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Payday Loan Industry*, 88 Tex. L. Rev. 611, 611-12 (2010)).

21. It is no secret that "internet payday lenders have a weak history of complying with state laws." *Id*. at 764. Prior to the rent-a-tribe business model, some payday lenders, including Think Finance, entered into partnerships with national banks to avoid compliance with state law. *See, e.g.*, Jean Ann Fox & Edmund Mlerzwinkski, *Consumer Fed'n of Am. & U.S. Pub. Interest Research Grp.*, *Rent-a-Bank Payday Lending: How Banks Help Payday Lenders Evade State*

Consumer Protection at 17-22 (2001), available at http://www.consumerfed.org/pdfs/paydayreport.pdf.

22. Beginning in 2005, the Federal Deposit and Insurance Corporation began cracking down on rent-a-bank arrangements, and they were nearly eliminated by 2010—largely by the assessment of penalties and fines against the banks. *See, e.g.*, Creola Johnson, *America's First Consumer Financial Watchdog Is on A Leash: Can the CFPB Use Its Authority to Declare Payday-Loan Practices Unfair, Abusive, and Deceptive?*, 61 Cath. U. L. Rev. 381, 399 n. 16 (2012).

23. In response to the crackdown on rent-a-bank arrangement, several payday lenders reincarnated the lending model through associations with Native American tribes to avoid state laws. *Id.*; *see also* Martin & Schwartz, *supra* at 1.

24. Under the rent-a-tribe model, "online payday lenders register businesses on Native American lands and claim to be exempt from lawsuits and state usury caps under tribal sovereign immunity. Using this doctrine, lenders argue that because their businesses are located on or headquartered within the borders of a Native American reservation, they are bound by the laws of that reservation only, not the laws of the state in which the reservation is located or the state in which the borrower resides." *Id*.

B. Overview of Defendants' role in the enterprises.

25. RICO defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals *associated in fact* although not a legal entity." 18 U.S.C. § 1691(4) (emphasis added).

26. The Supreme Court has held that an association-in-fact enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583 (1981).

27. Defendants, Haynes Investments, Victory Park, the Chippewa Cree Tribe, the Otoe-Missouria Tribe, Plain Green, and Great Plains worked together for the common purpose of making and collecting the usurious loans.

28. Prior to the formation of Plain Green and Great Plains, a nearly identical venture existed where loans were originated through First Bank of Delaware ("FBD"), but it served as nothing more than a nominal lender on behalf of Defendants. (Ex. 1, May 1, 2009 Universal Fund Investor Overview).

29. After the FDIC shut down Defendants' arrangement with FBD—ordering it to terminate its relationship with "all third-party lending programs"[1]—Think Finance's chief executive officer, Kenneth Rees, sent a letter to the Chippewa Cree Tribe proposing that they participate in a similar arrangement with his company.[2]

30. Like the rent-a-bank format, the loans would be originated in the name of the tribe, but the tribe would serve as nothing more than a nominal lender.

31. Shortly thereafter, the key companies involved in the enterprise—the Chippewa Cree Tribe, Think Finance, Haynes Investments, and Victory Park (through GPLS)—entered into a term sheet dated March 11, 2011. (Ex. 2, Mar. 11, 2011 Term Sheet).

32. As part of this transaction, Think Finance agreed "to license its software to the Tribe pursuant to a software license agreement acceptable to the parties" and to also "provide risk

[1] *See, e.g., In the Matter of First National Bank*, Case No. FDIC-07-256b, Order to Cease and Desist, Order for Restitution, and Order to Pay (Oct. 9, 2008), available at https://www.fdic.gov/bank/individual/enforcement/2008-10-03.pdf.

[2] *See, e.g.*, Ben Walsh, Outlawed By The States, Payday Lenders Take Refuge on Reservations, Huffington Post (June 29, 2015, updated Sept. 8, 2015), http://www.huffingtonpost.com/2015/06/29/online-payday-lenders-reservations_n_7625006.html (last visited Dec. 15, 2017).

management, application processing, underwriting assistance, payment processing, and ongoing customer service support coterminous with the software license agreement." (Ex. 2 at p. 1).

33. On the other hand, the Chippewa Cree Tribe agreed to commit "its best efforts" to complete certain "critical path items" within 14 days, including establishing Plain Green, revising the Tribal Transaction Code to allow for the arrangement's lending products, setting up bank accounts and ACH processing for Plain Green, and obtaining separate originating and servicing addresses for Plain Green. (Ex. 2 at p. 3).

34. As compensation for serving as the front, the Chippewa Cree Tribe was paid 4.5% of the revenue received on the loans, reimbursed all expenses, and was advanced $50,000. (Ex. 2 at p. 2).[3]

35. On or around January 12, 2011, Think Finance pitched a similar rent-a-tribe arrangement to the Otoe-Missouria Tribe. (Ex. 3, Jan. 12, 2011 Great Plains Lending Meeting).

36. This presentation provided an overview of Think Finance's consumer finance products (Ex. 3 at TF-VA000918), the underwriting chain of command for the loans (Ex. 3 at TF-VA000921), the marketing strategy for the loans (Ex. 3 at TF-VA000922), the lending structure, and key contractual agreements, including a loan purchase agreement where GPLS would purchase loans originated by Great Plains within two days (Ex. 3 at TF-VA000923-924).

[3] Although Plain Green received 4.5% of the revenue on paper, these funds were diverted to tribal leaders such as Neal Paul Rosette and Billi Anne Morsette, the former "chief executive officers" of Plain Green who were sent to prison for accepting bribes in exchange for facilitating the award of tribal contracts and for helping another tribal member siphon over $55,000 in tribal monies, which were laundered through the predecessor company of Plain Green. The United States Attorney's Office, District of Montana, *Plain Green Officials Sent to Prison* (March 8, 2016), https://www.justice.gov/usao-mt/pr/plain-green-officials-sent-prison. As part of this investigation, the Montana Attorney General's office uncovered that Rosette, Morsette, and James Eastlick, Jr., each received $400,000 from a consulting company, Ideal Consulting, LLC, involved in the Plain Green operation. *Id*. In other words, the Chippewa Cree Tribe actually received far less than the 4.5% allocated to it under the agreement.

37. Great Plains did not exist prior to this meeting, and, as part of Think Finance's presentation, the next steps were "[c]reate tribal entity—Great Plains Lending, LLC," "setup tribal bank account at FBD," "review/approve consumer legal documents," and "[r]eview/sign contractual agreements." (Ex. 3 at TF-VA000927).

38. Like Plain Green, Great Plains also received a nominal amount of the revenue generated by the loans and did not need to invest any capital or resources to the operations.

39. Instead, GPLS deposited the initial $1 million used to fund the illegal loans made in the name of Great Plains. (Ex. 4, Flow of Funds Overview).

40. Similarly, through a credit agreement with Think Finance (not Plain Green or the Chippewa Cree Tribe), Haynes Investments provided the initial $2 million used to fund the illegal loans in the name of Plain Green. (Ex. 5, Mar. 2011 Credit Agreement).

41. Additionally, Defendants dictated the major policies of each of the tribal entities.

42. For example, Defendants controlled the application requirements, application processing timelines, the application rejection rules, when to resell loans, pricing and loan amounts, the states where loans would be offered, funding options, payment rules, and waiving of fees. (Ex. 6, Aug. 7, 2012 Loan Product Functionality, at TF-VA022202-22231).

43. Defendants also controlled the interest-rates that would be offered to consumers. (Ex. 6 at TF-VA022229-22230).

44. In short, although Plain Green and Great Plains held themselves out as the actual lenders of these internet payday loans, Defendants were the *de facto* owners and controlled the operations of the Plain Green and Great Plains.

45. Defendants also received the majority of the profits generated by the scheme other than: (1) the nominal percentage returned to the Tribes for the use of their name and (2) the flat-fee repaid to Victory Park and Haynes Investments for providing the capital to fund the loans.

46. Each of Defendants played an integral role for returning as much money as possible to Think Finance.

47. For example, TC Administrative participated in the enterprise as an administrative service provider and, more importantly, as the pass through entity who received Think Finance's share of the profits of the scheme. (Ex. 3 at TF-VA045853).

48. TC Administrative Services received the "net income" from the enterprises after accounting for the fixed return of 18-20% allocated to Victory Park for providing the capital to fund the loans through GPLS.

49. Pursuant to a servicing agreements, TC Decision Sciences participated in the enterprises as the website operator and software administrator for Plain Green and Great Plains.

50. As part of this role, TC Decision Sciences also handled customer service responsibilities, such as communications with consumers under the guise of Great Plains.

51. TC Decision Sciences received $55 for each loan funded, as well $5 a month for each active account with Plain Green and Great Plains. (Ex. 3 at TF-VA045853).

52. Tailwind Marketing handled the online and other advertisements for Great Plains. Tailwind Marketing also handled the lead generation used to identify and solicit potential consumers.[4]

[4] In order to find potential customers, internet lenders pay companies known as "lead generators," which are businesses that collect information on potential consumers to solicit for high-interest loans. Pew Charitable Trust, *Fraud and Abuse Online: Harmful Practices in Internet Payday Lending* (Oct. 2014), http://www.pewtrusts.org/~/media/assets/2014/10/payday-lending-report/fraud_and_abuse_online_harmful_practices_in_internet_payday_lending.pdf. Lead generators pay high fees to several sources, such as consumer reporting agencies, to acquire

53. Tailwind received $100 for every borrower provided to Plain Green and Great Plains. Tailwind's flat-fee was deducted from the nominal amount of the proceeds allocated to Plain Green and Great Plains. (Ex. 3 at TF-VA045853; Ex. 4 at ¶ 6).

C. Defendants' loans charged interest in violation of Virginia's usury laws and RICO.

54. Defendants, together with Haynes Investments, Victory Park, the Chippewa Cree Tribe, the Otoe-Missouria Tribe, Plain Green, Great Plains, and other members of the enterprise not yet known to Plaintiffs, marketed, initiated, and collected usurious loans in Virginia.

55. Under the terms of the standard loan agreements, the interest rates charged were significantly greater than 12% APR—often between 118% and 448%, if not higher.

56. Plaintiffs obtained loans in amounts ranging from $300.00-$3,000.00 from Plain Green and Great Plains.

57. For example, Gibbs' interest rate was 277.92%, Williams' interest rate was 247.88%, and Inscho had loans with interest rates of 448%. (Ex. 7, Ex. 8, & Ex. 9).

58. Absent several exceptions, Va. Code § 6.2-1541 prohibits any person from making such loans to Virginians in excess of 12% APR unless that company has obtained a consumer finance license from the Commission. *See* Va. Code § 6.2-1501.

59. Neither Defendants nor Plain Green or Great Plains had a consumer finance license when they made the loans to Plaintiffs; nor did they ever attempt to obtain such a license.

60. Under Va. Code § 6.2-1541(A), if a lender was not exempt from the provisions of those statutes and had not obtained a consumer finance license, yet nonetheless contracted to make a consumer loan and charged, contracted for, or received, interest, or other compensation in excess

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borrower information to determine whether a consumer has ever applied or received an internet loan or whether a consumer may be in need or qualify for an additional loan. *Id*.

of 12% per year, then the loan is null and void, and the lender is not able to collect, obtain, or receive any principal, interest, or charges on the loan.

61. Defendants received no less than $711.02 from Ms. Gibbs as a result of her illegal loan—most of which Defendants credited as payment for interest or other fees.

62. Defendants received no less than $15,369.15 from Ms. Edwards as a result of her illegal loans—most of which Defendants credited as payment for interest or other fees.

63. Defendants received no less than $1,858.67 from Ms. Williams as a result of her illegal loan—most of which Defendants credited as payment for interest or other fees.

64. Defendants received no less than $6,042.19 from Mr. Mwethuku as a result of his illegal loan—most of which Defendants credited as payment for interest or other fees.

65. Defendants received no less than $16,210.84 from Mr. Inscho as a result of his illegal loans—most of which Defendants credited as payment for interest or other fees.

66. Because Plaintiffs' loans were null and void, and it was unlawful for Defendants or any of their affiliated entities to collect or receive any principal, interest, or charges on the loans, including the amounts paid by Plaintiffs. Va. Code § 6.2-1541(A).

67. Over the past four years, Defendants collected more than $69.4 million dollars from Virginia consumers pursuant to these illegal loans. (Ex. 10, Think Finance's Interrogatory Responses at Int. Nos. 9 & 10 (indicating that $50,942,975.88 was collected from Virginia consumers on loans in the name of Plain Green; $18,498,414.81 was collected from Virginia consumers on loans in the name of Great Plains)).

68. Pursuant to Va. Code § 6.2-305(A), Plaintiffs and the class members are entitled to twice the total amount of interest paid on these loans.

69. Defendants' conduct also violated § 1962(c) of RICO, which prohibits the "collection of unlawful debt." 18 U.S.C. § 1962(c).

70. RICO defines "unlawful debt" as a debt that was incurred in connection with "the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." 18 U.S.C. § 1961(6).

71. Defendants charged an interest rate far in excess of the enforceable rate established by Va. Code § 6.2-1541(A), and, thus, Defendants violated RICO's prohibition against the collection of unlawful debt.

72. As a result of Defendants' participation in the enterprise and violations of RICO, Defendants are jointly and severally liable to Plaintiffs and the putative class members for their actual damages, treble damages, costs, and attorneys' fees pursuant to 18 U.S.C. § 1964(c).

COUNT ONE:
VIOLATIONS OF RICO, 18 U.S.C. § 1962(c)
(CLASS CLAIM AGAINST ALL DEFENDANTS)

73. Plaintiffs restate each of the allegations in the preceding paragraphs as if set forth at length herein.

74. Pursuant to Rule 7023 of the Federal Rules of Bankruptcy Procedure, Plaintiffs bring this action for themselves and on behalf of a class—the "Virginia RICO Class"—initially defined as:

> All Virginia residents who executed a loan with Plain Green or Great Plains where the loan was originated and/or any payment was made on or after May 19, 2013.
>
> Plaintiffs are members of the Virginia RICO Class.

75. **Numerosity. Fed. R. Civ. P 23(a)(1).** As reflected by the profits generated by Defendants, Plaintiffs allege that the class members are so numerous that joinder of all is impractical. The names and addresses of the class members are identifiable through the internal

business records maintained by Defendants, and the class members may be notified of the pendency of this action by published and/or mailed notice.

76. **Predominance of Common Questions of Law and Fact. Fed. R. Civ. P. 23(a)(2).** Common questions of law and fact exist as to all members of the putative class, and there are no factual or legal issues that differ between the putative class members. These common questions predominate over the questions affecting only individual class members. The common questions include: (1) whether Defendants, Haynes Investments, Victory Park, the Chippewa Cree Tribe, the Otoe-Missouria Tribe, Plain Green, and Great Plain constitute an "enterprise" under RICO; (2) whether Defendants conducted the affairs or participated in the enterprise's affairs; (3) whether the loans violated Va. Code § 6.2-1501 because the interest rates were too high; and (4) what is the proper recovery for Plaintiffs and the class members against each of Defendants.

77. **Typicality. Fed. R. Civ. P. 23(a)(3).** Plaintiffs' claims are typical of the claims of each putative class member. Plaintiffs are entitled to relief under the same causes of action as the other members of the putative class. Additionally, Plaintiffs' claims are based on the same facts and legal theories as each of the class members.

78. **Adequacy of Representation. Fed. R. Civ. P. 23(a)(4).** Plaintiffs are adequate representatives of the putative class because their interests coincide with, and are not antagonistic to, the interests of the members of the class that they seek to represent. Plaintiffs have retained counsel competent and experienced in such litigation, and they intend to continue to prosecute the action vigorously. Plaintiffs and their counsel will fairly and adequately protect the interests of the members of the class. Neither Plaintiffs nor their counsel have any interests that might cause them to not vigorously pursue this action.

79. **Superiority. Fed. R. Civ. P. 23(b)(3).** Questions of law and fact common to the class members predominate over questions affecting only individual members, and a class action is superior to other available methods for fair and efficient adjudication of the controversy. The damages sought by each member are such that individual prosecution would prove burdensome and expensive. It would be virtually impossible for members of the class individually to effectively redress the wrongs done to them. Even if the members of the class themselves could afford such individual litigation, it would be an unnecessary burden on the Courts. Furthermore, individualized litigation presents a potential for inconsistent or contradictory judgments and increases the delay and expense to all parties and to the court system presented by the legal and factual issues raised by Defendants' conduct. By contrast, the class action device will result in substantial benefits to the litigants and the Court by allowing the Court to resolve numerous individual claims based upon a single set of proof in a case.

80. **Injunctive Relief Appropriate for the Class. Fed. R. Civ. P. 23(b)(2).** Class certification is appropriate because Defendants acted on grounds generally applicable to the class, making appropriate injunctive relief with respect to Plaintiffs and the class members. Plaintiffs and the putative class seek an injunction ordering Defendants to divest themselves of any interest in the enterprise (including the receipt of any proceeds arising from the unlawful collection of debt) prohibiting Defendants from continuing to engage in the enterprise or selling the outstanding balances on the loans to any third parties.

81. As alleged above, Defendants violated § 1962(c) of RICO through the "collection of unlawful debt." 18 U.S.C. § 1962(c).

82. RICO defines "unlawful debt" as a debt which was incurred in connection with "the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." 18 U.S.C. § 1961(6).

83. All of the loans made to Virginia residents and collected by Defendants included an interest rate far in excess of twice the enforceable rate in Virginia.

84. This conduct began as early as 2011, continues to date, and will be repeated again and again in the future to the detriment of Virginia consumers.

85. Plaintiffs and the class members were injured as a result of Defendants' violations of 18 U.S.C. § 1962(c).

86. Accordingly, Defendants are jointly and severally liable to Plaintiffs and the putative class members for their actual damages, treble damages, costs, and attorney's fees pursuant to 18 U.S.C. § 1964(c).

COUNT TWO:
VIOLATIONS OF RICO, 18 U.S.C. § 1962(d)
(CLASS CLAIM AGAINST ALL DEFENDANTS)

87. Plaintiffs restate each of the allegations in the preceding paragraphs as if set forth at length herein.

88. Pursuant to Rule 7023 of the Federal Rules of Bankruptcy Procedure, Plaintiffs bring this action for themselves and on behalf of a class, initially defined as:

> All Virginia residents who executed a loan with Plain Green or Great Plains where the loan was originated and/or any payment was made on or after May 19, 2013.
>
> Plaintiffs are members of the Virginia RICO Class.

89. **Numerosity. Fed. R. Civ. P 23(a)(1).** Upon information and belief, Plaintiffs allege that the class members are so numerous that joinder of all is impractical. The names and addresses of the class members are identifiable through the internal business records maintained

by Defendants, and the class members may be notified of the pendency of this action by published and/or mailed notice.

90. **Predominance of Common Questions of Law and Fact. Fed. R. Civ. P. 23(a)(2).** Common questions of law and fact exist as to all members of the putative class, and there are no factual or legal issues that differ between the putative class members. These common questions predominate over the questions affecting only individual class members. The common questions include: (1) whether Defendants, Haynes Investments, Victory Park, the Chippewa Cree Tribe, the Otoe-Missouria Tribe, Plain Green, and Great Plain constitute an "enterprise" under RICO; (2) whether Defendants conducted the affairs or participated in the enterprise's affairs; (3) whether the loans violated Va. Code § 6.2-1501 because the interest rates were too high; and (4) what is the proper recovery for Plaintiffs and the class members against each of Defendants.

91. **Typicality. Fed. R. Civ. P. 23(a)(3).** Plaintiffs' claims are typical of the claims of each putative class member. In addition, Plaintiffs are entitled to relief under the same causes of action as the other members of the putative class. All are based on the same facts and legal theories.

92. **Adequacy of Representation. Fed. R. Civ. P. 23(a)(4).** Plaintiffs are adequate representatives of the putative class because their interests coincide with, and are not antagonistic to, the interests of the members of the class they seek to represent; they have retained counsel competent and experienced in such litigation; and they have and intend to continue to prosecute the action vigorously. Plaintiffs and their counsel will fairly and adequately protect the interests of the members of the class. Neither Plaintiffs nor their counsel have any interests which might cause them not to vigorously pursue this action.

93. **Injunctive Relief Appropriate for the Class. Fed. R. Civ. P. 23(b)(2).** Class certification is appropriate because Defendants acted on grounds generally applicable to the class,

making appropriate injunctive relief with respect to Plaintiffs and the class members. Plaintiffs and the putative class seek an injunction ordering Defendants to divest themselves of any interest in the enterprise, including the receipt of any proceeds arising from the unlawful collection of debt; prohibiting Defendants from continuing to engage in the enterprise or selling the outstanding balances on the loans to any third parties.

94. As alleged above, Defendants, along with other participants not yet known to Plaintiffs, violated § 1962(d) of RICO by entering into a series of agreements to violate § 1962(c), including: (1) the Term Sheet between the Chippewa Cree Tribe, Think Finance, GPLS, and Haynes Investments; (2) the Credit Agreement between Think Finance and Haynes Investments; (3) the marketing agreements between Tailwind, Plain Green, and Great Plains; and (4) the servicing agreements between TC Decision Sciences, Plain Green, and Great Plains.

95. As a result of Defendants' participation in the enterprise and violations of RICO, Defendants are jointly and severally liable to Plaintiffs and the putative class members for their actual damages, treble damages, costs, and attorney's fees pursuant to 18 U.S.C. § 1964(c).

COUNT THREE:
VIOLATIONS OF VIRGINIA USURY LAWS
(CLASS CLAIM AGAINST ALL DEFENDANTS)

96. Plaintiffs restate each of the allegations in the preceding paragraphs as if set forth at length herein.

97. Pursuant to Rule 7023 of the Federal Rules of Bankruptcy Procedure, Plaintiffs bring this action for themselves and on behalf of a class initially defined as follows:

> **Virginia Usury Class**: All Virginia residents who made a payment on any loan with Plain Green or Great Plains.
>
> **Virginia Usury Subclass**: All Virginia residents who made a payment on any loan with Plain Green or Great Plains on or after May 19, 2015.
>
> Plaintiffs are members of the Virginia Usury Class and Subclass.

98. **Numerosity. Fed. R. Civ. P 23(a)(1).** Based on the revenue collected from Virginia consumers, numerosity is easily satisfied. (*See* Ex. 10) Additionally, the names and addresses of the class members are identifiable through the internal business records maintained by Defendants, and the class members may be notified of the pendency of this action by published and/or mailed notice.

99. **Predominance of Common Questions of Law and Fact. Fed. R. Civ. P. 23(a)(2).** Common questions of law and fact exist as to all members of the putative class, and there are no factual or legal issues that differ between the putative class members. These questions predominate over the questions affecting only individual class members. The principal issues include: (1) whether the loans made to Virginia consumers violated Virginia Code Section § 6.2-1501 because their interest levels were too high; (2) whether Plaintiffs may recover from Defendants the amounts paid on the loans; and (3) what is the proper recovery for Plaintiffs and the class members against each Debtor.

100. **Typicality. Fed. R. Civ. P. 23(a)(3).** Plaintiffs' claims are typical of the claims of each putative class member. In addition, Plaintiffs are entitled to relief under the same causes of action as the other members of the putative class. All claims are based on the same facts and legal theories.

101. **Adequacy of Representation. Fed. R. Civ. P. 23(a)(4).** Plaintiffs are adequate representatives of the putative class because their interests coincide with, and are not antagonistic to, the interests of the members of the class they seek to represent. Plaintiffs have retained counsel competent and experienced in such litigation, and they intend to continue to prosecute the action vigorously. Plaintiffs and their counsel will fairly and adequately protect the interests of the

members of the class. Neither Plaintiffs nor their counsel have any interests that might cause them to not vigorously pursue this action.

102. **Superiority. Fed. R. Civ. P. 23(b)(3).** Questions of law and fact common to the class members predominate over questions affecting only individual members, and a class action is superior to other available methods for fair and efficient adjudication of the controversy. The damages sought by each member are such that individual prosecution would prove burdensome and expensive. It would be virtually impossible for members of the class individually to effectively redress the wrongs done to them. Even if the members of the class themselves could afford such individual litigation, it would be an unnecessary burden on the Courts. Furthermore, individualized litigation presents a potential for inconsistent or contradictory judgments and increases the delay and expense to all parties and to the court system because of the legal and factual issues raised by Defendants' conduct. By contrast, the class action device will result in substantial benefits to the litigants and the Court by allowing the Court to resolve numerous individual claims based upon a single set of proof in a case.

103. All of the loans made to Virginia consumers in the name of Plain Green and Great Plains used an interest rate greater than 12%.

104. As explained above, Defendants were the *de facto* lenders and received the majority of the profits and revenues generated on the loans.

105. Accordingly, Plaintiffs and the class members are entitled to recover all amounts repaid on the void loans, plus twice the amount of such usurious interest that was paid in the two years preceding the filing of this action and their attorney's fees and costs. Va. Code § 6.2-1541; Va. Code § 6.2-305(A).

COUNT FOUR:
UNJUST ENRICHMENT
(CLASS CLAIM AGAINST ALL DEFENDANTS)

106. Plaintiffs restate each of the allegations in the preceding paragraphs as if set forth at length herein.

107. Pursuant to Rule 7023 of the Federal Rules of Bankruptcy Procedure, Plaintiffs bring this action for themselves and on behalf of a class—the "Virginia Unjust Enrichment Class"—initially defined as follows:

> **Virginia Unjust Enrichment Class**: All Virginia residents who executed a loan with Plain Green or Great Plains where any amount of principal, interest, fees, or other charges were repaid.

Plaintiffs are members of the unjust enrichment class.

108. **Numerosity. Fed. R. Civ. P 23(a)(1).** Based on the revenue collected from Virginia consumers, numerosity is easily satisfied. Additionally, the names and addresses of the class members are identifiable through the internal business records maintained by Defendants, and the class members may be notified of the pendency of this action by published and/or mailed notice.

109. **Predominance of Common Questions of Law and Fact. Fed. R. Civ. P. 23(a)(2).** Common questions of law and fact exist as to all members of the putative class, and there are no factual or legal issues that differ between the putative class members. These questions predominate over the questions affecting only individual class members. The principal issues include: (1) whether Plaintiffs and the class members conferred a benefit on Defendants; (2) whether Defendants knew or should have known of the benefit; (3) whether Defendants retained an unjust benefit because the loan was void; and (4) what is the proper recovery for Plaintiffs and the class members against each of Defendants.

110. **Typicality. Fed. R. Civ. P. 23(a)(3).** Plaintiffs' claims are typical of the claims of each putative class member. In addition, Plaintiffs are entitled to relief under the same causes of

action as the other members of the putative class. All claims are based on the same facts and legal theories.

111. **Adequacy of Representation. Fed. R. Civ. P. 23(a)(4).** Plaintiffs are adequate representatives of the putative class because their interests coincide with, and are not antagonistic to, the interests of the members of the class they seek to represent. Plaintiffs have retained counsel competent and experienced in such litigation, and they intend to continue to prosecute the action vigorously. Plaintiffs and their counsel will fairly and adequately protect the interests of the members of the class. Neither Plaintiffs nor their counsel have any interests that might cause them to not vigorously pursue this action.

112. **Superiority. Fed. R. Civ. P. 23(b)(3).** Questions of law and fact common to the class members predominate over questions affecting only individual members, and a class action is superior to other available methods for fair and efficient adjudication of the controversy. The damages sought by each member are such that individual prosecution would prove burdensome and expensive. It would be virtually impossible for members of the class individually to effectively redress the wrongs done to them. Even if the members of the class themselves could afford such individual litigation, it would be an unnecessary burden on the Courts. Furthermore, individualized litigation presents a potential for inconsistent or contradictory judgments and increases the delay and expense to all parties and to the court system because of the legal and factual issues raised by Defendants' conduct. By contrast, the class action device will result in substantial benefits to the litigants and the Court by allowing the Court to resolve numerous individual claims based upon a single set of proof in a case.

113. All of the loans to Virginia consumers in the name of Plain Green and Great Plains were void and unenforceable.

114. Plaintiffs conferred a benefit on Defendants when they repaid the void loans; Defendants knew or should have known of the benefit; and Defendants have been unjustly enriched through their receipt of any amounts in connection with the unlawful loans.

115. Accordingly, on behalf of themselves and all other Virginia consumers similarly situated, Plaintiffs seek to recover from Defendants, jointly and severally, all amounts repaid on any loans with Plain Green and Great Plains.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the Court enter judgment for themselves and the class they seek to represent against Defendants, including for:

A. Certification of this matter to proceed as a class action;

B. Declaratory and injunctive relief as pled herein;

C. Compensatory relief in an amount no less than $69.4 million;

D. Treble damages pursuant to 18 U.S.C. § 1964(c);

E. Attorney's fees, litigation expenses, and costs of suit; and

F. Any further relief the Court deems proper.

TRIAL BY JURY IS DEMANDED

Respectfully submitted,
PLAINTIFFS

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Representative case- In re TWL Corp.
(Debtor's former employee brought AP to recover for alleged violation of WARN Act and moved for certification of plaintiff class)

712 F.3d 886
United States Court of Appeals,
Fifth Circuit.

In the Matter of TWL CORPORATION, Debtor.
Frank Teta, Appellant
v.
Michelle Chow, Appellee.

No. 12–40271.
|
March 29, 2013.

Synopsis
Background: Former employee of Chapter 11 debtor brought adversary proceeding to recover for debtor's alleged violation of requirements of the Worker Adjustment and Retraining Notification Act (WARN Act), in failing to provide requisite notice of layoff, and moved for certification of plaintiff class. The United States Bankruptcy Court for the Eastern District of Texas entered an order denying motion for class certification and granting trustee's motion to dismiss. Appeal was taken. The District Court, Rodney Gilstrap, J., 2012 WL 469872, affirmed. Ex-employee again appealed.

Holdings: The Court of Appeals, King, Circuit Judge, held that:

[1] it was not impermissible for bankruptcy court, in deciding whether to certify class of former employees to pursue WARN Act claims against Chapter 7 debtor-employer, to consider, among other relevant matters, factors related to bankruptcy case, but

[2] bankruptcy court's conclusory statement was insufficient to permit appellate court to determine whether the record supported bankruptcy court's decision and necessitated remand for entry of necessary findings and conclusions.

Vacated and remanded.

James E. Graves, Jr., Circuit Judge, concurred in judgment only and filed opinion.

West Headnotes (21)

[1] **Bankruptcy**
Scope of review in general

On appeal from district court's decision in its bankruptcy appellate capacity, the Court of Appeals applies same standard of review to bankruptcy court's decision as was applied by district court.

1 Cases that cite this headnote

[2] **Bankruptcy**
Discretion

Bankruptcy court's class certification decisions are reviewed for abuse of discretion.

1 Cases that cite this headnote

[3] **Bankruptcy**
Discretion

Bankruptcy court abuses its discretion, where it applies improper legal standard or rests its decision on findings of fact that are clearly erroneous.

1 Cases that cite this headnote

[4] **Bankruptcy**
Conclusions of law; de novo review

Whether bankruptcy court applied the correct legal standard in reaching its decision on class certification was legal question, that the Court of Appeals would review de novo.

1 Cases that cite this headnote

[5] **Bankruptcy**
Parties

In appropriate situation, class adversary proceedings may be commenced in bankruptcy case, provided that requirements of Federal Rule of Civil Procedure governing class actions are satisfied. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Cases that cite this headnote

[6] **Bankruptcy**
Parties
Bankruptcy
Who May File

Federal Rule of Civil Procedure governing class actions is automatically applicable in adversary proceedings in bankruptcy court; there is no need to seek its application as is required in the claims allowance process. Fed.Rules Bankr.Proc.Rule 7023, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Cases that cite this headnote

[7] **Bankruptcy**
Who May File

While Federal Rule of Civil Procedure governing class actions may perhaps be applicable within proofs of claim process, bankruptcy court has discretion whether to authorize its application to proof of claim. Fed.Rules Bankr.Proc.Rule 9014, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

2 Cases that cite this headnote

[8] **Bankruptcy**
Parties

It was not impermissible for bankruptcy court, in deciding whether to certify class of former employees to pursue WARN Act claims against Chapter 7 debtor-employer, to consider, among other relevant matters, factors related to bankruptcy case. Worker Adjustment and Retraining Notification Act, § 2 et seq., 29 U.S.C.A. § 2101 et seq.; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

1 Cases that cite this headnote

[9] **Federal Civil Procedure**
Class Actions

By its terms, Federal Rule of Civil Procedure governing class actions creates a categorical rule entitling plaintiff whose suit meets specified criteria to pursue his claim as class action. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Cases that cite this headnote

[10] **Federal Civil Procedure**
Impracticability of joining all members of class; numerosity

Number of members in proposed class is not determinative of whether joinder is impracticable, and of whether the numerosity requirement for certification of proposed class is satisfied. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

16 Cases that cite this headnote

[11] **Federal Civil Procedure**
Impracticability of joining all members of class; numerosity

In deciding whether numerosity requirement for

certification of proposed class is satisfied, courts must not focus on sheer numbers alone; rather, assessing numerosity also entails consideration of geographical dispersion of class, ease with which class members may be identified, nature of action, and size of each plaintiff's claim. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

16 Cases that cite this headnote

[12] **Federal Civil Procedure**
Superiority, manageability, and need in general

In assessing, for class certification purposes, superiority of class litigation to other available methods for fairly and efficiently adjudicating controversy, court may consider the following nonexhaustive list of factors, along with whatever other factors the court in its discretion deems to be relevant: (1) class members' interests in individually controlling prosecution or defense of separate actions; (2) extent and nature of any litigation concerning the controversy already begun by or against class members; (3) desirability or undesirability of concentrating litigation of claims in particular forum; and (4) likely difficulties in managing class litigation. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

4 Cases that cite this headnote

[13] **Bankruptcy**
Parties

Superiority of class litigation to other available methods for fairly and efficiently adjudicating a controversy, as one basis for certifying proposed class in case in which numerosity, commonality, typicality, and fair and adequate representation requirements were satisfied, necessarily suggested a comparative process, so that it was not improper for bankruptcy court to consider availability and ease of proof of claim process in determining whether class adversary proceeding was superior method for fairly and efficiently adjudicating controversy. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

6 Cases that cite this headnote

[14] **Federal Civil Procedure**
Superiority, manageability, and need in general

Analysis of whether class litigation provides superior method for fairly and efficiently adjudicating a controversy is fact-specific and will vary depending on circumstances of any given case. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

3 Cases that cite this headnote

[15] **Bankruptcy**
Parties

In deciding whether to certify proposed class based on superiority of class litigation to other available means of fairly and efficiently adjudicating controversy, bankruptcy court should consider cost to debtor's estate of class adversary proceeding simply because the expense of adjudicating controversy via class action depletes debtor's assets, which in turn diminishes funding available to creditors, including, possibly, the very claimants pursuing class action. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

3 Cases that cite this headnote

[16] **Bankruptcy**
Parties

To determine whether to certify proposed class based on superiority of class litigation to other available means of fairly and efficiently adjudicating controversy, bankruptcy court should consider availability and ease of proof of

claim process. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

Cases that cite this headnote

[17] **Federal Civil Procedure**
Superiority, manageability, and need in general

Analysis as to whether class litigation provides superior method of fairly and efficiently adjudicating controversy requires an understanding of relevant claims, defenses, facts, and substantive law presented in case. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

Cases that cite this headnote

[18] **Labor and Employment**
In general; employment loss
Labor and Employment
Defenses

To prove WARN Act claim, plaintiff must demonstrate: (1) that defendant was "employer"; (2) that defendant ordered "plant closing" or "mass layoff"; (3) that defendant failed to provide plaintiff with 60 days notice of closing or layoff; and (4) that plaintiff is "aggrieved" or "affected" employee; if plaintiff establishes these requirements, then defendant may avoid liability by proving that it qualifies for the Act's "faltering company" exemption, or that closing or layoff resulted from unforeseen business circumstances or natural disaster. Worker Adjustment and Retraining Notification Act, §§ 3, 5, 29 U.S.C.A. §§ 2102, 2104; 20 C.F.R. § 639.9.

Cases that cite this headnote

[19] **Bankruptcy**
Remand

Bankruptcy court's conclusory statement that, because putative class representative was only person to have filed WARN Act claim in Chapter 7 case of his former employee, it would be waste of estate's limited resources to allow WARN Act cause of action to move forward as class proceeding, and that claims allowance process could more expeditiously address any WARN Act claim, with no indication by bankruptcy court as to whether trustee had or intended to assert any WARN Act defenses, and no finding as to time and complexity of adjudicating these claims, was insufficient to permit appellate court to determine whether the record supported bankruptcy court's denial of motion to certify proposed class and necessitated remand for entry of necessary findings and conclusions. Worker Adjustment and Retraining Notification Act, § 2 et seq., 29 U.S.C.A. § 2101 et seq.; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

2 Cases that cite this headnote

[20] **Bankruptcy**
Remand

When, due to absence of findings of fact or conclusions of law, appellate court cannot determine whether the record supports lower court decision, it should remand action for entry of findings of fact and conclusions of law.

1 Cases that cite this headnote

[21] **Bankruptcy**
Determination and Disposition; Additional Findings
Bankruptcy
Remand

Bankruptcy court's grant of motion to dismiss complaint filed by Chapter 7 debtor's former employee for debtor's alleged violation of the WARN Act in failing to provide requisite 60 days' notice of mass layoff, with no indication as to why allegations in former employee's

complaint did not state plausible WARN Act claim, simply because employee was only dismissed employee to have filed WARN Act claim, and because, in bankruptcy court's estimation, it would be waste of estate's limited resources to allow adversary proceeding to move forward and not to handle ex-employee's claims as part of claims allowance process, did not permit appellate court to determine whether the record supported bankruptcy court's dismissal, and necessitated vacation of dismissal order and remand for reconsideration. Worker Adjustment and Retraining Notification Act, § 2 et seq., 29 U.S.C.A. § 2101 et seq.

Cases that cite this headnote

Attorneys and Law Firms

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Jack A. Raisner, Rene S. Roupinian, Outten & Golden, L.L.P., New York, NY, Jeff Philipp Prostok, Forshey & Prostok, L.L.P., Fort Worth, TX, for Appellant.

Appeal from the United States District Court for the Eastern District of Texas.

Before KING, SOUTHWICK, and GRAVES, Circuit Judges.

Opinion

KING, Circuit Judge:

TWL Corporation and its primary subsidiary, TWL Knowledge Group, Inc., filed for bankruptcy in 2008. Appellant Frank Teta, a former TWL employee, commenced a class action adversary proceeding within TWL's bankruptcy suit, alleging violations of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101–2109. The bankruptcy court denied Teta's related motion for class certification and dismissed the adversary proceeding. The district court affirmed. Because the reasons for the bankruptcy court's order are unclear, we VACATE the orders below and REMAND to the district court to remand to the bankruptcy court for reconsideration in light of this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Prior to filing for bankruptcy, TWL Corporation and its primary subsidiary, TWL Knowledge Group, Inc. (collectively "TWL"), were in the business of providing workplace learning, training, and certification programs. Appellant Frank Teta served as a vice president of TWL. On September 8, 2008, TWL allegedly laid off the majority of its workforce, including Teta. On October 19, 2008, TWL filed a voluntary petition for bankruptcy under ***890** Chapter 11.[1] The bar date for filing proofs of claim against TWL was February 19, 2009.

On November 4, 2008, Teta filed within TWL's bankruptcy case a complaint against TWL, thereby initiating the adversary proceeding underlying this appeal. In that complaint, Teta—who claims to be acting on behalf of himself and other terminated employees—alleges that TWL violated the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. §§ 2101–2109, by failing to give its employees sixty days written notice of their termination.[2] Teta seeks to recover for himself and the class sixty days of wages and benefits under the Act. He asserts that such claims are entitled to be paid as administrative claims under 11 U.S.C. § 503(b)(1)(A) or, alternatively, as priority unsecured claims under § 507(a)(4) and (5). TWL moved to dismiss Teta's adversary complaint on February 9, 2009.

In addition to the aforementioned adversary complaint, Teta also filed, on February 18, 2009, a class proof of claim against TWL on behalf of all former TWL employees. The same day, Teta filed a motion seeking class certification[3] and an order naming Teta as the lead plaintiff.[4] On March 23, 2009, the bankruptcy court granted a motion filed by Teta to stay consideration of the class proof of claim until the court ruled on TWL's motion to dismiss the adversary proceeding. At the parties' request, the court abated the adversary proceeding until October 6, 2009. The hearing on the motion to dismiss and the request for class certification subsequently was continued several times because the parties informed the court that they did not wish to proceed with the adversary proceeding until the size of the estate was determined.

In the meantime, because TWL's reorganization efforts were unsuccessful, the court converted the bankruptcy case to Chapter 7 and appointed Appellee Michelle Chow ("Trustee") as trustee of the estate. The last day to file proofs of claim in the converted case was December 10, 2010. Creditors ultimately filed 86 claims against the estate of TWL Corporation, and 107 claims against TWL Knowledge Group, Inc. According to the bankruptcy

court's estimation, only 34 of those claims were filed by individuals, of which, fewer than 20 appeared to relate to unpaid wages, salaries, or commissions.

On March 23, 2011, the bankruptcy court denied Teta's motion for class certification and granted the Trustee's motion to dismiss the adversary proceeding.[5] The ***891** district court affirmed the bankruptcy court's order *in toto* on February 13, 2012. Teta now appeals.

II. STANDARD OF REVIEW

[1] [2] [3] [4] We apply the same standard of review to the bankruptcy court's decision as applied by the district court. *In re Amco Ins.*, 444 F.3d 690, 694 (5th Cir.2006). We thus review class certification decisions for abuse of discretion. *In re Wilborn*, 609 F.3d 748, 752 (5th Cir.2010). A bankruptcy court abuses its discretion when it applies an improper legal standard or rests its decision on findings of fact that are clearly erroneous. *In re Babcock & Wilcox Co.*, 526 F.3d 824, 826 (5th Cir.2008). Whether the lower court applied the correct legal standard in reaching its decision on class certification is a legal question that we review de novo. *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 408 (5th Cir.1998).[6]

III. ANALYSIS

At the outset, we underscore the limited scope of this appeal. In particular, while Teta filed a class proof of claim against TWL, that matter is not currently before us, and we expressly decline to address the merits of that claim. Rather, this appeal concerns only the bankruptcy court's order denying Teta's class certification motion in his adversary proceeding, and its related dismissal of that proceeding. Teta submits that the bankruptcy court abused its discretion by applying an improper legal standard to the class certification question. To fully appreciate Teta's objections, a brief discussion of the bankruptcy court's order, and the federal bankruptcy rules implicated by it, is warranted.

A. The Bankruptcy Court's Order

In denying class certification, the bankruptcy court held that Teta did not satisfy Rule 23's numerosity and superiority requirements. With respect to numerosity, the court observed that "[e]ven if all 130 members of the putative class elected to pursue WARN Act claims—which seems unlikely given their lack of participation in the claims allowance process to date—that number certainly would be manageable." This conclusion was informed by the court's finding that, although each putative plaintiff could have asserted WARN Act claims "simply by filling out a proof of claim form," none had done so. Because the bar date for filing proofs of claim already had passed on two occasions, the court explained that "class certification would negate the bar date by permitting those who missed the deadline to interpose claims into [the] case without establishing ... excusable neglect." Moreover, the court expressed that "the expense of allowing [the] adversary proceeding to go forward so that Teta can offer certain creditors a third bite at the proverbial apple is a factor that weighs against class certification." This fact seemed especially weighty to the court, given its conclusion that "[e]ven without considering Teta's WARN Act claims," TWL's estate was "insufficient to pay all of [its] creditors in full." Thus, the court held that "under the facts of this case, Teta has failed to establish the numerosity required to prosecute a class claim."

As for superiority, the court explained that it was unconvinced "that a class action would be a 'superior method' of adjudication as required by Rule 23(b)(3)." The court stated that the "Bankruptcy Code ***892** already concentrates any WARN Act claims in [the bankruptcy court] by requiring former employees to seek allowance of such claims in order to share in any distribution from [TWL's] estate[ ]." Accordingly, the court concluded that "it would be a waste of [TWL's] limited assets to move forward with [the] adversary proceeding when Teta is the only individual who has asserted a timely WARN Act claim, and the claims process can more expeditiously move Teta's claims down a parallel track."

Aside from these general references to the parallel proofs of claim process, the bankruptcy court did not offer an explanation for its decision to grant the Trustee's motion to dismiss Teta's adversary proceeding.

B. Applicable Bankruptcy Rules

The court issued its order against the backdrop of the procedural rules governing a bankruptcy case. Those rules provide that once a debtor files a bankruptcy petition, a creditor may file a "proof of claim" to establish a claim against the debtor. Fed. R. Bankr.P. 3002. If objected to, the proof of claim becomes a "contested matter." Fed. R. Bankr.P. 9014 advisory committee's note ("Whenever there is an actual dispute, other than an adversary proceeding, ... the litigation to resolve that dispute is a

contested matter."). An "adversary proceeding," on the other hand, is a *lawsuit* filed within the bankruptcy case. *See* Fed. R. Bankr.P. 7001; *see also* 10 Collier on Bankruptcy ¶ 7001.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010) ("Adversary proceedings are separate lawsuits within the context of a particular bankruptcy case and have all the attributes of a lawsuit...."). Adversary proceedings are initiated with the filing of a complaint. Fed. R. Bankr.P. 7003; Fed.R.Civ.P. 3.

[5] Pursuant to Rule 7023—which falls within Part VII of the Federal Bankruptcy Rules—Rule 23 of the Federal Rules of Civil Procedure "applies in adversary proceedings."[7] Fed. R. Bankr.P. 7023. Thus, "[i]n an appropriate situation, class adversary proceedings may be commenced in a bankruptcy case provided that the requirements of the various subdivisions of Rule 23 are satisfied." 10 Collier on Bankruptcy ¶ 7023.01; *see also In re Wilborn*, 609 F.3d at 754 ("[C]lass action proceedings are expressly allowed in the Federal Bankruptcy Rules, which provide that the requirements for class actions under Federal Rule of Civil Procedure 23 apply in adversary proceedings.").

Rule 23 does not necessarily apply, however, to a class proof of claim. First, our circuit has not addressed whether a *class* proof of claim even is permissible. Second, Rule 9014, which governs contested matters, provides that only certain procedural rules automatically apply when an objection is lodged to a proof of claim. *See* Fed. R. Bankr.P. 9014. Rule 7023 is not designated as one of these automatically applicable rules, but Rule 9014 does state that "[t]he court *may* at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply." Fed. R. Bankr.P. 9014 (emphasis added).

Given this discretion, Rule 23's operation in contested matters involves a two-step process. 10 Collier on Bankruptcy ¶ 7023.01. "First, the court must exercise its discretion [under Rule 9014] as to whether to apply Rule 23 to the contested proceeding." *Id.* Second, if the court decides to apply Rule 23, it then must determine ***893** whether the Rule's requirements for class certification have been satisfied. *Id.* In considering whether to apply Rule 23 in the first instance:

> the court will consider a variety of factors relating to the bankruptcy case. These include: (1) whether the class was certified pre-petition, (2) whether the members of the putative class received notice of the bar date, and (3) whether class certification will adversely affect the administration of the case, especially if the proposed litigation would cause undue delay.

Id. The court also may consider the benefits and costs of class litigation to the estate. *In re Computer Learning Ctrs., Inc.*, 344 B.R. 79, 86 (Bankr.E.D.Va.2006).

[6] [7] There is thus a distinction between Rule 23's operation in an adversary proceeding and its operation in the claims process. In an adversary proceeding, Rule 23 is automatically applicable: "there is no need to seek its application as is required in the claims allowance process." *Id.* at 92 n. 17. In contrast, although Rule 23 perhaps may be applicable within the proofs of claim process, under Rule 9014, the bankruptcy court has discretion whether to authorize its application to a proof of claim.

C. Class Certification

With this foundation in mind, we turn to Teta's challenge to the bankruptcy court's denial of class certification. In essence, Teta contends that instead of simply analyzing the class certification issue under Rule 23, the bankruptcy court improperly "based its decision to deny certification on a body of discretionary determinations under Rule 9014, none of which have any bearing on class certification in adversary proceedings."

[8] We agree with Teta that the bankruptcy court appears at times to have erroneously conflated rules applicable in an adversary proceeding with those applicable in a contested matter. Nevertheless, under de novo review, we reject Teta's ultimate contention that it is impermissible for a bankruptcy court addressing a class certification motion under Rule 23 to consider, among other relevant matters, factors related to the bankruptcy case. As we will discuss, however, in this instance, although the bankruptcy court adopted the proper legal standard in assessing Rule 23's superiority requirement, it failed to explain with sufficient particularity its rationale for denying class certification. Accordingly, we must remand for the court to enter the specific findings of fact and conclusions of law necessary to support the order it issues on remand. *See Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1204 (5th Cir.1989).

1. Rule 23's Requirements

[9] Rule 23 states that class actions may be maintained if:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). Additionally, the suit must fit into one of the three categories set forth in Rule 23(b)—one of which, as relevant here, requires that the court "find[ ] that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." ***894** Fed.R.Civ.P. 23(b)(3). "By its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S.Ct. 1431, 1437, 176 L.Ed.2d 311 (2010); *see also id.* at 1438 (rejecting defendant's assertion that a court has discretion whether to certify a class where the Rule's requirements are met).

In this case, the bankruptcy court concluded that Teta failed to satisfy the numerosity and superiority prongs of Rule 23. Because "a plaintiff's request for class certification must fail if any one of Rule 23's requirements is not met," we address these requirements in turn. *Vizena v. Union Pac. R.R. Co.*, 360 F.3d 496, 503 n. 1 (5th Cir.2004) (per curiam).

2. Numerosity

[10] Under Rule 23(a)(1), a class action is proper where "the class is so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). On this score, Teta argues that we previously have held that a putative class of 100 to 150 members "is within the range that generally satisfies the numerosity requirement." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir.1999). Teta neglects, however, that we also explained in *Mullen* that "the number of members in a proposed class is not determinative of whether joinder is impracticable." *Id.*

[11] Indeed, leading commentators note that "there is no definite standard as to what size class satisfies Rule 23(a)(1)." 7A Charles Alan Wright et al., Federal Practice and Procedure § 1762 (3d ed. 2005) (collecting cases in which numerosity was satisfied with as few as 25 putative class members, but not satisfied with as many as 350, and explaining that this inconsistency "graphically demonstrates that caution should be exercised in relying on a case as a precedent simply because it involves a class of a particular size"). For this reason, we have counseled that "courts must not focus on sheer numbers alone." *Pederson v. La. State Univ.*, 213 F.3d 858, 868 n. 11 (5th Cir.2000). Rather, assessing numerosity also entails consideration of "the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim." *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. Unit A July 1981); *see also* William B. Rubenstein, 1 Newberg on Class Actions § 3:12 (5th ed. 2012) (explaining that courts also consider "judicial economy arising from the avoidance of a multiplicity of actions"); *accord Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir.1993).

Here, the bankruptcy court recognized that the putative class contained 130 members. Nonetheless, for the reasons set forth in Part III.A, it found this number insufficient to satisfy Rule 23's numerosity requirement. Like Teta, we question whether some of the considerations cited by the court have any bearing on whether Teta satisfied Rule 23's numerosity requirement.[8] We do note, however, that, given *Zeidman* 's direction that a court addressing a class certification motion must consider the "nature of the action" at issue, 651 F.2d at 1038, we cannot accept his more general argument that bankruptcy-related factors have no role to play in a bankruptcy court's consideration of a class certification motion.

***895** Here, for instance, the bankruptcy court expressly noted that "[e]ven if all 130 members of the putative class elected to pursue WARN Act claims—which seems unlikely given their lack of participation in the claims allowance process to date—that number certainly would be manageable." While the putative members' lack of participation in the claims process does not appear to be relevant to Rule 23's numerosity analysis for reasons that will be discussed *infra,* the court's reference to the size of the class certainly is. Outside the bankruptcy context, a putative class with only 130 members already might present a close question as to numerosity, depending on the particular circumstances of the case. *See Jaynes v. United States*, 69 Fed.Cl. 450, 454–55 (Fed.Cl.2006) (finding that a class with as many as 258 putative members failed to satisfy numerosity because the class members all had worked in the same area and easily could be identified and located). Within the bankruptcy context, because "[i]t is not unusual for large numbers of claims to be filed, objected to and allowed or disallowed," even

larger putative classes may not be so numerous as to make joinder impracticable. *In re Woodmoor Corp.*, 4 B.R. 186, 189 (Bankr.D.Colo.1980) (concluding that Rule 23's numerosity requirement was not satisfied where putative class consisted of approximately 900 members, because their proofs of claims, which were then pending before the court, could "be conveniently and expeditiously managed by following normal bankruptcy procedures"); *see also In re First Magnus Fin. Corp.*, 403 B.R. 659, 663–64 (D.Ariz.2009) (affirming the dismissal of a WARN Act adversary proceeding with a putative class of over 5,000 members because "the normal bankruptcy claims procedure was adequate to handle the claims").

As Teta correctly points out, however, it is not possible on the record before us to determine to what extent the court's numerosity ruling was influenced by these permissible factors, and to what extent it may have been influenced by factors that are irrelevant to whether joinder was impracticable. Thus, because we are unable to affirm the orders below on the bankruptcy court's numerosity analysis, we turn to its consideration of Rule 23's superiority requirement.

3. Superiority

Under Rule 23(b)(3), a court must find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3).

[12] The matters pertinent to these findings include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Id. "[T]his list is not meant to be exhaustive and the court has discretion to consider whatever other factors it deems relevant to the determination."[9] ***896** 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1777 (3d ed. 2005).

Here, for the reasons explained in Part III.A, the court held that it was unconvinced that "a class action would be a 'superior' method of adjudication as required by Rule 23(b)(3)." Again, Teta complains that the court's order evidences that the court erred by considering discretionary bankruptcy-related factors relevant under Rule 9014, but not relevant under Rule 7023 or, by incorporation, Rule 23. In advancing this argument, however, Teta unduly limits the factors a bankruptcy court must consider when analyzing Rule 23's superiority requirement.

[13] [14] In requiring a court to find "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," Fed.R.Civ.P. 23(b)(3), Rule 23 necessarily suggests a comparative process, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir.1998). This plain reading of the Rule is reinforced by an associated advisory committee's note, which states that the court "ought to assess the relative advantages of alternative procedures for handling the total controversy." Fed.R.Civ.P. 23(b)(3) advisory committee's note to 1966 amendment. "As is the case with Rule 23(b)(3) generally, the superiority analysis is fact-specific and will vary depending on the circumstances of any given case." *Robertson v. Monsanto Co.*, 287 Fed.Appx. 354, 361 (5th Cir.2008) (per curiam) (unpublished).

Within a bankruptcy case, a leading authority suggests that the superiority inquiry assumes added import: "Comparison should be made with respect to the requirements of treating the action as a class suit with the advantages and disadvantages that could result from prosecution of the claims by other means, especially in the bankruptcy context." 10 Collier on Bankruptcy ¶ 7023.03[3]. For this reason, it is notable that certain bankruptcy-related factors—including "whether class certification will adversely affect the administration of the case"—are "relevant to, and have been considered in the determination of, whether the requirements of Rule 23 have been met." *Id.* ¶ 7023.01. In *Computer Learning Centers,* for example, the court concluded that, in that case, a class action was not superior "to the ordinary operation of [the related] bankruptcy case." 344 B.R. at 92 (addressing a class proof of claim).

[15] [16] In our view, a bankruptcy court *should* consider the cost to the debtor's estate of a class adversary proceeding simply because the expense of adjudicating the controversy via a class action depletes the debtor's assets, which in turn diminishes the funding available to creditors, including, possibly, the very claimants pursuing the class action.[10] Such a consideration is particularly

relevant in a case such as this, a Chapter 7 bankruptcy with insufficient assets to pay existing creditors. As a corollary, we also conclude that a bankruptcy court *should* ***897** consider the availability and ease of the proof of claim process when determining whether a class adversary proceeding is a superior method for fairly and efficiently adjudicating a controversy.[11] A court's consideration of bankruptcy-related factors not only generally serves to inform its assessment of the comparative merits of one adjudication method over another, but in a case like this—where a comparable class proof of claim has been filed—assessing these factors also is perfectly in keeping with Rule 23's requirement that the court consider "the extent and nature of any litigation concerning the controversy already begun by or against class members." Fed.R.Civ.P. 23(b)(3)(B). As the court here explained, it may well be the case in the bankruptcy context that "the claims process can more expeditiously move [a claimant's] claims down a parallel track."

Our conclusion that a bankruptcy court assessing Rule 23's superiority prong may take into account certain bankruptcy-related factors is not to say, of course, that a class adversary proceeding never can be superior. As will be clear from the following discussion, the facts presented in each particular situation must be assessed on a case-by-case basis to determine whether the requirements of Rule 23 have been met. We simply say that, here, the bankruptcy court adopted the correct legal standard in assessing Rule 23's superiority prong.

4. Application of the Proper Legal Standard

[17] [18] Having determined that the bankruptcy court did not improperly consider bankruptcy-related factors in assessing Rule 23's superiority prong, we must now resolve whether, in this case, it abused its discretion in denying class certification. We begin with the premise that "superiority analysis requires an understanding of the relevant claims, defenses, facts, and substantive law presented in the case." *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 525 (5th Cir.2007) (internal quotation marks omitted). As noted, this class adversary proceeding concerns a claim pressed under the WARN Act. To prove a WARN Act claim, a plaintiff must demonstrate that: (1) the defendant was "an employer"; (2) the defendant ordered a "plant closing" or "mass layoff"; (3) the defendant failed to give to the plaintiff sixty days notice of the closing or layoff; and (4) the plaintiff is an "aggrieved" or "affected" employee.[12] 29 U.S.C. §§ 2102, 2104. If a plaintiff establishes these requirements, the employer may avoid liability by proving that it qualifies for the Act's "faltering company" ***898** exemption, or that the closing or layoff resulted from "unforeseen business circumstances" or a "natural disaster." *See* 20 C.F.R. § 639.9.

[19] Here, the bankruptcy court generally acknowledged these elements of, and defenses to, a WARN Act claim. However, it entered no findings or conclusions as to the relative complexity, in this case, of adjudicating the claims. There is no indication in the court's order, for instance, of whether the Trustee has or intends to assert any defenses, and, if so, whether those defenses are colorable. This is significant because if defenses are to be asserted, the need for attorneys both to assert the claims and to defend against them becomes greater and, in spite of the associated costs, may be important to the ability of the claimants to recover and of the debtor to defend.[13] On the other hand, if the Trustee does not intend to assert any defenses, it may be the case that resolution of the claims would be relatively uncomplicated and inexpensive.[14] Nevertheless, we simply have no insight into these and related matters, as the only explanation the court provided for its superiority holding was the conclusory declaration that "it would be a waste of [TWL's] limited assets to move forward with [the] adversary proceeding when Teta is the only individual who has asserted a timely WARN Act claim, and the claims process can more expeditiously move Teta's claims down a parallel track."

[20] With just this conclusory statement to rely on, "we are unable to determine ... the thought processes of the court below." *Velasquez v. City of Abilene*, 725 F.2d 1017, 1021 (5th Cir.1984). "When because of absence of findings of fact or conclusions of law, an appellate court cannot determine whether the record supports the [lower] court decision, it should remand the action for entry of findings of fact and conclusions of law." *Vizena*, 360 F.3d at 503 (quoting *Complaint of Ithaca Corp.*, 582 F.2d 3, 4 (5th Cir.1978)). Accordingly, we must vacate the orders below and remand for entry of these necessary findings and conclusions.

5. The Pending Class Proof of Claim

Although, as noted, we are unable on this record to affirm the bankruptcy court's order, Teta advances an additional argument urging us to reverse that is not necessarily dependent on the absent findings and conclusions. Specifically, Teta implies that by declining to reverse the court's denial of class certification in the adversary proceeding, we effectively foreclose any right the putative class members may have to recover under the WARN Act. In reaching this conclusion, Teta speculates that because the bankruptcy court denied class certification in the adversary proceeding, we may infer that it will do so again on remand, and that it will do the same in

connection with the class proof of claim. Teta posits that denial of class certification in connection with the proof of claim is especially likely given the broader ***899** discretion the court has under Bankruptcy Rule 9014 to deny class certification in contested matters.

While Teta's arguments are not facially without force, we ultimately do not share his concern. First, with this opinion, we vacate the bankruptcy court's denial of class certification in the adversary proceeding. While we offer no view as to how the bankruptcy court should resolve that matter on remand, we cannot assume—as adoption of Teta's argument would require—that it necessarily will once again deny class certification in the adversary proceeding. Moreover, although we likewise take no position on the propriety of Teta's class proof of claim, we nevertheless are unwilling to conclude that the court necessarily will prevent that claim from moving forward. The bankruptcy court has yet to rule on that matter, and it would be improper for us to speculate about what the court *might* do in relation thereto.

Further, even assuming that the bankruptcy court again denies certification in the adversary proceeding, and also finds the class proof of claim impermissible, the rights of putative class members associated with that proof of claim seemingly would be protected by the reasoning underlying *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983). There, the Supreme Court explained that "[t]he filing of a class action tolls the statute of limitations 'as to all asserted members of the class.' " *Id.* at 350 (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974)). Applying this reasoning in the bankruptcy context, a sister circuit has explained that if a "bankruptcy court denies [a class certification] motion, it should then establish a reasonable time within which the individual putative class members are allowed to file individual proofs of claim." *Gentry v. Siegel*, 668 F.3d 83, 91 (4th Cir.2012); *see also In re Am. Reserve Corp.*, 840 F.2d 487, 493 (7th Cir.1988) ("If the bankruptcy judge denies the request to certify a class, then each creditor must file an individual proof of claim....").

"Stated otherwise, by recognizing class actions, the Bankruptcy Rules also recognize that putative class representatives can keep the class action process alive until the court decides the issue." *Gentry*, 668 F.3d at 90; *see also Sheftelman v. Standard Metals Corp.*, 839 F.2d 1383, 1387 (10th Cir.1987) (per curiam) (leaving unresolved "the class action claims issue," but requiring instead that notice be given to the putative class members, and that a new bar date be established to allow them to file individual proofs of claim); *In re Entergy New Orleans, Inc.*, 353 B.R. 474, 483–84 (Bankr.E.D.La.2006) (discussing the complicated issues surrounding notice when a class proof of claim is denied after the bar date has passed, and when "most if not all of the putative class members are likely unaware that they have a potential claim," but eventually resolving the case on other grounds). Thus, although the bankruptcy court appears repeatedly to fault the putative class members for not filing individual claims, Teta's class proof of claim—which was filed well prior to the bar date—was filed on their behalf, and therefore appears to preserve their claims pending resolution of the class certification issue.[15]

***900** However, because Teta's class proof of claim currently is not before us, we need not resolve these matters. We raise them merely to explain our rationale for rejecting Teta's contention that, by declining to reverse the orders below, we effectively foreclose any right the putative class members may have to recovery. As is evident, to the extent the putative class members have viable WARN Act claims, they also appear to have multiple avenues by which they may press those claims. We leave to the bankruptcy court, in the first instance, the determination of how those claims should be addressed.

D. Dismissal of the Adversary Proceeding

[21] As explained, the bankruptcy court also granted the Trustee's motion to dismiss Teta's adversary proceeding. Unfortunately, the court's findings and conclusions as to why it did so are even more bare than those associated with its treatment of Teta's class certification motion. In fact, the only line in the court's ten-page order that even peripherally addresses the court's dismissal states: "Similar to *In re First Magnus Financial Corp.*, ... the [c]ourt believes it would be a waste of [TWL's] limited assets to move forward with this adversary proceeding when Teta is the only individual who has asserted a timely WARN Act claim, and the claims process can more expeditiously move Teta's claims down a parallel track."

Although the bankruptcy court's order does not indicate on what basis the Trustee sought dismissal of Teta's adversary proceeding, the record is clear that the related motion was filed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.[16] Nevertheless, nothing in the court's order offers insight into why it agreed that Teta's adversary complaint failed to state a claim for relief, or why dismissal otherwise was proper. *Cf. In re Dewey & LeBoeuf LLP*, 487 B.R. 169, 174 (Bankr.S.D.N.Y.2013) (explaining that an adversary complaint seeking class WARN Act claims stated a claim

for relief because "it assert[ed] that the Debtor terminated Plaintiff and other employees in the month before the bankruptcy filing, and it allege[d] that Debtor failed to comply with the WARN Acts' notice requirements").

Moreover, the bankruptcy court's citation to *First Magnus* is less helpful than might at first might be apparent. In *First Magnus,* the court dismissed the adversary complaint pursuant to Rule 41(b) rather than Rule 12(b)(6). 403 B.R. at 663; *see also* Fed.R.Civ.P. 41(b) ("If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it."). There is thus no evidence to indicate that the *First Magnus* court believed the complaint there did not state a claim for relief, nor is there evidence here to suggest that Teta failed to prosecute his claim, or failed to comply with applicable rules or court orders.

Thus, we again are left without adequate findings of fact and conclusions of law by which we may determine whether the record supports the bankruptcy court's dismissal of Teta's adversary complaint. We therefore are compelled to vacate the orders below insofar as those orders granted the Trustee's motion to dismiss Teta's adversary proceeding. *See Vizena,* 360 F.3d at 503.

IV. CONCLUSION

Because the reasons for the bankruptcy court's order are unclear, we VACATE *in* ***901** *toto* the orders below and REMAND to the district court to remand to the bankruptcy court for reconsideration in light of this opinion. We express no view as to the outcome the bankruptcy court should reach on remand in reconsidering Teta's motion for class certification and the Trustee's motion to dismiss the adversary proceeding.

JAMES E. GRAVES, JR., Circuit Judge, concurring in the judgment only:

I would reverse the district court's affirmance of the bankruptcy court's denial of class certification and dismissal of this class adversary proceeding. Nevertheless, I concur in the judgment insofar as it requires the bankruptcy court to reconsider its holding.

In its Federal Rule of Civil Procedure 23 "numerosity" and "superiority" analyses,[1] the bankruptcy court erred as a matter of law in applying bankruptcy-related factors such as the expense to the estate in litigating a class adversary proceeding.[2] There is a distinction between: (a) the necessity of the district court's strict adherence to Rule 23's "specified criteria"[3] in class *adversary proceedings;* and (b) the district court's discretionary ability to consider other factors under Federal Rule of Bankruptcy Procedure 9014 in contested matters, which include *proofs of claim.* The Eleventh Circuit has explained this distinction in simple terms: "Rule 23 may be invoked in two circumstances: in an adversary proceeding and in a contested matter. Pursuant to the terms of Bankruptcy Rule 7023, Rule 23 applies in any adversary proceeding. Also, under Bankruptcy Rule 9014, the bankruptcy judge may at his discretion apply Bankruptcy Rule 7023, and by extension Rule 23, in a contested matter." *In re Charter Co.,* 876 F.2d 866, 873 (11th Cir.1989).

Indeed, the Supreme Court has held that Rule 23 "says that if the prescribed preconditions [i.e. Rule 23's specified criteria] are satisfied 'a class action *may be maintained* ' (emphasis added)—not '*a class action may be permitted.*' " *Shady Grove Orthopedic Assocs.,* 130 S.Ct. at 1438 (2010). The Court continued, "[c]ourts do not maintain actions; litigants do. The discretion suggested by Rule 23's 'may' is discretion residing in the plaintiff: He may bring his claim in a class action if ***902** he wishes." *Id.* Here, even the Trustee appears to have acknowledged that the bankruptcy court lacks discretion to consider criteria unrelated to the enumerated Rule 23 factors in its class certification determination of this adversary proceeding:

> Court: "In making the determination about whether or not to certify a class, are you saying that's not a *pure* Rule 23 analysis in a bankruptcy proceeding?"
>
> Trustee: "In a lawsuit [i.e. bankruptcy adversary proceeding], it is a *pure* Rule 23 analysis."

Oral Argument at 31:50.

As Judge King correctly recognizes, we are called to adjudicate the denial of class certification in the WARN Act adversary proceeding, not the WARN Act class proof of claim. Therefore, it is undisputed that this requires a pure Rule 23 analysis. Considering bankruptcy-related factors such as the expense to the estate in litigating a class adversary proceeding is a departure from a pure Rule 23 analysis because those factors fall outside of Rule 23's "specified criteria" of, *inter alia,* the four factors enumerated in Rule 23(b)(3)(A)–(D). The bankruptcy court thus erred as a matter of law.

I.

Following a pure Rule 23 analysis, I would reverse the bankruptcy court's denial of class certification. Because Judge King bases her holding on the Rule 23(b)(3) "superiority" analysis, I focus on that.[4]

Judge King's opinion explicitly addresses only one of the four enumerated Rule 23(b)(3) "superiority" factors: "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." Fed.R.Civ.P. 23(b)(3)(B). This factor supports class certification. The related WARN Act class proof of claim was simply filed as a precautionary measure, and bankruptcy courts have held that the class adversary proceeding is a preferable way to adjudicate WARN Act claims, as opposed to the proof of claim process. *See, e.g., In re Taylor Bean & Whitaker Mortg. Corp.*, 2010 WL 4025873, *3 (Bankr.M.D.Fla. Sept. 27, 2010) (unpublished) ("resolving the WARN Act claims collectively through a class action adversary proceeding will be more efficient than handling them in a piece-meal fashion through the claims process."); ***903** *In re First NLC Fin. Servs., LLC*, 410 B.R. 726, 730 (Bankr.S.D.Fla.2008) ("if the class is certified, the Court finds that as between an adversary proceeding and the claims process, an adversary proceeding has the potential to provide a less protracted and more efficient litigation framework.").

Lending further weight for class certification under this factor, the Bankruptcy Court for the Southern District of Texas has held that the "greatest indication that a class action [adversary proceeding] would be superior to other available methods of adjudication" is a "negative value suit." *In re Wilborn*, 404 B.R. 841, 868 (Bankr.S.D.Tex.2009) (citations omitted), *vacated on other grounds*, 609 F.3d 748 (5th Cir.2010)[5]; *see also In re Charter Co.*, 876 F.2d at 871 ("[T]he effort and cost of investigating and initiating a claim may be greater than many claimants' individual stake in the outcome, discouraging the prosecution of these claims absent a class action filing procedure."); Collier on Bankruptcy ¶ 7023.03(3) (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) ("It could be economically impossible for each class member to proceed on an individual basis."). Since this is clearly a "negative value suit"—the cost to each worker to litigate his or her own WARN Act proof of claim would almost certainly outweigh the value of the claim[6]—it only makes sense to pursue the claims as a class in an adversary proceeding.

Additionally, the Bankruptcy Court for the Southern District of Florida has explained why the class adversary proceeding is more efficient and fairer to putative WARN Act class members than the proof of claim process: "resolution of the WARN Act claims will be expedited and handled more efficiently in a class adversary proceeding because [it] will also require the Trustee to state any objections to claims that she may have more promptly than would be required in the normal claims objection process." *In re First NLC Fin. Services, LLC*, 410 B.R. at 730. Even in a *class* proof of claim, which Judge King concedes may not even be available in this circuit, the trustee would still be able to delay consideration of the class proof of claim to the detriment of the putative WARN Act creditors,[7] while a class adversary proceeding would require the trustee to consider the claim earlier.

Each of the other three enumerated Rule 23(b)(3) "superiority" factors also supports class certification of the adversary proceeding. The first factor, "the interest of members of the class in individually controlling the prosecution or defense of separate actions," Fed.R.Civ.P. 23(b)(3)(A), favors class certification. No former employee other than Teta filed a WARN Act proof of claim, indicating that the interest of putative class members in individually controlling the case would be low. The second factor, discussed above, falls in favor of class certification. As for the third factor, "the desirability or undesirability of concentrating the litigation of the claims in the particular forum," Fed.R.Civ.P. 23(b)(3)(C), no one disputes the propriety of concentrating the litigation of the claims in the bankruptcy court. And the fourth factor, "the difficulties likely to ***904** be encountered in the management of a class action," Fed.R.Civ.P. 23(b)(3)(D), supports class certification because, as further discussed below, WARN Act claims are especially well-suited for class treatment. *Gomez v. Am. Garment Finishers Corp.*, 200 F.R.D. 579, 584–85 (W.D.Tex.2000) (holding that there is no manageability problem related to the class in a WARN Act claim); *see also Finnan v. L.F. Rothschild & Co., Inc.*, 726 F.Supp. 460, 465 (S.D.N.Y.1989) ("The WARN Act seems particularly amenable to class litigation.").

II.

Assuming *arguendo* that it is proper to consider the bankruptcy-related factors stated by Judge King in determining whether Rule 23(b)(3)'s "superiority" requirement is satisfied, those factors also weigh in favor of granting class certification of this adversary

proceeding. Among the bankruptcy-related factors Judge King deems appropriate for consideration are: (1) the cost to the debtor's estate of a class adversary proceeding, and (2) class counsel's fee in a class adversary proceeding.

With respect to the cost to the debtor's estate, courts have recognized that treating WARN Act claims as a class adversary proceeding actually is the *best* way to preserves the estate's assets. In granting class certification of a WARN Act adversary proceeding, the Bankruptcy Court for the Northern District of Alabama wrote "it is in the best interests of the putative class members, judicial economy, and *even [the debtor's estate]* to an extent to adjudicate these matters in one single action." *In re Bill Heard Enters., Inc.*, 400 B.R. 795, 803 (Bankr.N.D.Ala.2009) (emphasis added). The court continued, "principles of judicial economy and preservation of the bankruptcy estate require this Court to select one of the adversary proceedings to resolve the WARN Act claims rather than allowing each of the actions involving the same claims to proceed." *Id.* at 804 (citing *In re Protected Vehicles, Inc.*, 397 B.R. 339, 346 (Bankr.S.C.2008)). Indeed, the expense of litigating multiple proofs of claim, not to mention the costs the Trustee has already incurred in fighting these relatively low-value WARN Act claims, appear to present more of a risk of unnecessarily depleting the estate's assets than anything else.

There is no need to remand the case for the bankruptcy court to enter its findings of fact and conclusions of law on the relative complexity of adjudicating the claims, including "whether the Trustee has or intends to assert any defenses." The Trustee has *already* complicated the WARN Act class proof of claim, as demonstrated by the following three defenses she has asserted to the class proof of claim: (1) "class claims are not allowed in bankruptcy," *In re TWL Corp.*, Ch. 7 Case No. 08–42773, Brief in Support of Trustee's Objection to Teta's WARN Act Class Proof of Claim 3, Bankr. E.D. Tex. ECF No. 401; (2) even if class claims were allowed, Teta did not timely file for class treatment of the WARN Act claim, *id.* at 5–6; and (3) even if class claims were allowed, the WARN Act class claim should be disallowed for the very same reasons the bankruptcy court denied class certification of this adversary proceeding (numerosity and superiority), *id.* at 6–11. These defenses are material to the class certification analysis in this WARN Act adversary proceeding because they attest to the superiority of the class adversary proceeding over the proof of claims process.[8]

The Trustee's defenses will require attorneys to litigate the issues, especially since Judge King's opinion acknowledges that the class proof of claim may not even ***905** be an option. Workers cannot be expected to proceed *pro se* in the claims process and Teta's counsel, which has litigated roughly 100 WARN Act cases, states that individually-filed WARN Act claims are simply unheard of. Appellant's Reply Br. at 6; Oral Argument at 14:50. Indeed, as this case has demonstrated with only one individual WARN Act proof of claim filed, the average worker that has just lost his or her job does not read a bankruptcy court's notice to creditors and decide to file a WARN Act proof of claim. If he or she can decipher the language of the notice, she would then need to: (1) be familiar with the WARN Act, which is nowhere referenced in the notice; (2) know that she has a potential WARN Act claim and navigate the proof of claim form; and (3) be prepared to litigate the claim when her former employer's estate contests it. This may be a reasonable expectation of commercial creditors, but for an ordinary worker owed a few thousand dollars in back wages, it is a formidable task.

With respect to class counsel's fee in an adversary proceeding, the fee does not deplete the assets in the bankruptcy estate. The class counsel's fee derives from any funds awarded to class members, and is not awarded in addition to the damages that the estate pays to the class members. If anything, then, the only fees depleting the estate's assets are those charged by the Trustee and her attorneys.

III.

Class WARN Act filings in bankruptcy are not new, and while some courts have opted to adjudicate them through the bankruptcy claims process, just as many or more have found the class adversary proceeding a superior adjudication structure for the reasons articulated above. *See* 2 Employee and Union Member Guide to Labor Law § 10:14 (Labor and Employment Law Committee, National Lawyers Guild 2012) (surveying courts' recent treatment of WARN Act class filings; "WARN Act claims are very often handled by bankruptcy courts in adversary proceedings, though some courts have dismissed adversary proceedings in favor of adjudication through the bankruptcy claim allowance/disallowance process.").

I would reverse the denial of class certification and dismissal of the adversary proceeding because, under a pure Rule 23 analysis or even applying bankruptcy-related factors, joinder would be impracticable and the class adversary proceeding would

be the superior way to handle the putative plaintiffs' WARN Act claims. Nevertheless, I concur in the judgment insofar as it requires the bankruptcy court to reconsider its denial of class certification.

All Citations

712 F.3d 886, 163 Lab.Cas. P 10,583, 57 Bankr.Ct.Dec. 210, 38 IER Cases 1324

Footnotes

1 Although each entity filed its own petition, the bankruptcy court has jointly administered the cases. For the sake of convenience, we therefore refer to the cases and their associated duplicative filings and rulings in the singular.

2 "The WARN Act prohibits employers from ordering a 'plant closing or mass layoff until the end of a 60–day period after the employer serves written notice' of the closing or layoff to its employees." *Hollowell v. Orleans Reg'l Hosp. LLC,* 217 F.3d 379, 382 (5th Cir.2000) (quoting 29 U.S.C. § 2102(a)). Employers who violate the Act's notice provision are required to provide "back pay for each day of violation." 29 U.S.C. § 2104(a)(1)(A).

3 It is unclear whether Teta's motion was filed in his adversary proceeding, his class claim, or both. The court's order clearly is directed, however, to his adversary proceeding.

4 Also on February 18, 2009, Teta filed an individual proof of claim for $5,472.77 in unreimbursed expenses and 401k plan contributions.

5 After her appointment, the Trustee assumed administration of the case.

6 We do not discuss with particularity our standard of review for the bankruptcy court's dismissal of Teta's adversary proceeding. As we explain in Part III.D, the bankruptcy court did not clearly articulate its rationale for dismissing Teta's adversary proceeding.

7 "Part VII of the Federal Rules of Bankruptcy Procedure applies to litigated matters that arise during the pendency of a bankruptcy case and that are denoted adversary proceedings." 10 Collier on Bankruptcy ¶ 7000 (footnote omitted).

8 Nevertheless, as we explain *infra,* certain of these factors may influence a court's superiority inquiry.

9 Thus, to the extent Judge Graves implies that we endorse anything other than a "pure Rule 23 analysis," we reject that notion. To the contrary, we merely hold that bankruptcy-related factors are relevant *as part of* a bankruptcy court's Rule 23 analysis. We therefore similarly reject, as other courts have, Judge Graves's suggestion that Rule 23(b)(3)(A)–(D) exhaustively lists the considerations pertinent to a court's superiority analysis. *See, e.g., Esplin v. Hirschi,* 402 F.2d 94, 98 n. 7 (10th Cir.1968), *cert. denied,* 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459 (1969) (explaining that a court assessing the predominance and superiority requirements "is directed to weigh four *non-exhaustive* factors" (emphasis added)); *see also* Fed.R.Civ.P. 23(b)(3) advisory committee's note to 1966 amendment ("Factors (A)–(D) are listed, *non-exhaustively,* as pertinent to the [predominance and superiority] findings." (emphasis added)).

10 We note, however, that it would be error for a bankruptcy court to neglect other important factors related to the superiority inquiry by placing too much emphasis on the cost to the estate of the class proceeding.

11 On this score, the Trustee emphasizes the simple and inexpensive nature of the claims process. The claims form is a mere three pages in length, including instructions. *See* Official Bankruptcy Form B–10, Proof of Claim. Moreover, aside from postage, there is no fee incurred to file a proof of claim. *See* 28 U.S.C. § 1930. In contrast, counsel's fee in a class adversary proceeding is derived from the class members' recovery. Thus, although Judge Graves is correct that counsel's fee does not deplete the bankrupt's estate, it nevertheless reduces a claimant's ultimate recovery. Counsel's fee is therefore an expense that the bankruptcy court properly may consider in analyzing Rule 23's superiority requirement, because filing a proof of claim (class or otherwise) may be a more efficient and cost-effective method for a claimant to collect on a claim. *See First Magnus,* 403 B.R. at 663–64 (affirming the dismissal of a WARN Act adversary proceeding because "the adversarial process was duplicative of the normal bankruptcy claims procedure" and "the normal bankruptcy claims procedure was adequate to handle the claims").

12 "Employer," "plant closing," "mass layoff," and "affected employee" are all terms defined by the Act. 29 U.S.C. § 2101.

13 With this in mind, we underscore that we agree with Judge Graves that the Trustee's litigation costs may deplete the estate, and we thus conclude that a bankruptcy court properly may consider the effect of those costs when assessing Rule 23's superiority prong.

14 Although Judge Graves correctly observes that the Trustee has filed an objection to Teta's class proof of claim, as we already have explained, that claim currently is not before us, and we express no view as to its merits. We note, however, that contrary to Judge Graves's suggestion, the fact that the Trustee has objected to Teta's class proof of claim sheds no light on the complexities that may be introduced into this adversary proceeding were the Trustee to assert an affirmative defense to the underlying WARN Act claim.

15 Judge Graves similarly contends that "[n]o former employee other than Teta filed a WARN Act proof of claim, indicating that the interest of putative class members in individually controlling the case would be low." Again, this neglects that Teta's class proof of claim obviated the need for other individuals to file their own claims at this point in the litigation.

16 Federal Rule of Civil Procedure 12(b)(6) is made applicable to adversary proceedings by Bankruptcy Rule 7012(b). *See* Fed. R. Bankr.P. 7012(b).

1 As relevant to this case, Rule 23 states that class actions may be maintained if: "the class is so numerous that joinder of all members is impracticable," Fed.R.Civ.P. 23(a)(1) (numerosity), and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3) (superiority). The following enumerated factors are to be considered in the "superiority" analysis:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed.R.Civ.P. 23(b)(3).

2 Of course, in determining whether to certify a class adversary proceeding, it is impossible to avoid considering some factors related to the bankruptcy—Teta filed this adversary proceeding in the midst of TWL's Chapter 7 bankruptcy proceeding. Therefore, I use the term "bankruptcy-related factors" to specifically reference factors unrelated to those four factors enumerated in Rule 23(b)(3)(A)–(D), as well as factors that are not applicable under Rule 23(a)(1).

3 *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S.Ct. 1431, 1437, 176 L.Ed.2d 311 (2010) (Scalia, J.) ("By its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.").

4 The Rule 23(a) "numerosity" analysis also favors class certification of this adversary proceeding. Judge King is correct that courts "must not focus on sheer numbers alone" in determining whether joinder is impracticable. *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 868 (5th Cir.2000) (citations omitted). Nevertheless, we have ruled that a class of "100 to 150 members [ ] is within the range that generally satisfies the numerosity requirement." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir.1999) (citation omitted). Moreover, the putative class here contains 130 plaintiffs, and bankruptcy and district courts—including at least one court in our circuit—have certified WARN Act classes of between 50 to 160 putative plaintiffs. *See, e.g.*, *Grimmer v. Lord Day & Lord*, 1996 WL 139649, *11–12 (S.D.N.Y.1996) (unpublished) (certifying WARN class of 92); *Finnan v. L.F. Rothschild & Co., Inc.*, 726 F.Supp. 460, 465 (S.D.N.Y.1989) (certifying WARN class of 127); *In re CQMS Razer (U.S.), LLC*, Ch. 7 Case No. 11–13291, Adv. Pro. No. 12–01003 (Bankr.W.D.La. Oct. 2, 2012) (certifying class of approximately 160 and approving WARN Act settlement); *In re Spring Ford Indus., Inc.*, 2004 WL 231010, *6 (Bankr.E.D.Pa. Jan. 20, 2004) (unpublished) (holding that "alleged class size of 150 to 270 terminated employees clearly meets the greater-than-forty requirement of [the Third] [C]ircuit."); *In re Kaiser Group Int'l, Inc.*, 278 B.R. 58, 64 (Bankr.D.Del.2002) (certifying WARN class of 47). This putative class fits well within that range.

5 "A negative value suit is a case in which the costs of enforcement in an individual action would exceed the expected individual recovery." *Id.* (quotations omitted).

6 Teta asserts that each individual claim would be minimal—"60 days wages is all, it's a couple of thousand dollars for most people." Oral Argument at 8:12.

7 As discussed below, however, the Trustee here has already objected to the WARN Act class proof of claim for the very reason that a class proof of claim is not allowed in this circuit.

8 Moreover, the Trustee's first defense—that the class proof of claim is not even an option for Teta—lends further support to adjudicating the WARN Act claims as a class adversary proceeding, which the Trustee concedes is permissible.

End of Document

Sample Brief- Brief in Support of Motion to Authorize Bankruptcy Rule 7023 to California Plaintiff's Proof of Claims and to Certify Class of California Consumers (Think Finance)

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	:	
	:	
THINK FINANCE, LLC, *et al*.,	:	Chapter 11
	:	
	:	Case No. 17-33964 (HDH)
Debtors.	:	
	:	(Jointly Administered)
	:	

BRIEF IN SUPPORT OF MOTION TO AUTHORIZE BANKRUPTCY RULE 7023 TO CALIFORNIA PLAINTIFF'S PROOF OF CLAIMS AND TO CERTIFY CLASS OF CALIFORNIA CONSUMERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

SECONDARY SOURCES

BRIEF IN SUPPORT OF MOTION TO AUTHORIZE BANKRUPTCY RULE 7023 TO CALIFORNIA PLAINTIFF'S PROOF OF CLAIMS AND TO CERTIFY CLASS OF CALIFORNIA CONSUMERS

On January 21, 2017, Earl Browne ("Plaintiff") filed an Adversary Proceeding against the Defendants/Debtors ("Defendants"). (Dkt. No. 1). Plaintiff seeks to commence class proceedings on behalf of California consumers against Defendants. On the same day as this filing, Plaintiff filed a Motion for Class Certification (Dkt. 25) in the Adversary Proceeding pursuant to Rule 7023 of the Federal Bankruptcy Rules. Fed. R. Bank. P. 7023 (establishing that the class action procedures in Rule 23 of the Federal Rules of Civil Procedure apply "in adversary proceedings").

On January 25, 2018, Defendants moved to dismiss the Adversary Proceeding, arguing that the claims asserted by Plaintiff "should be determined through the claims administration process, not through adversary proceedings." (Dkt. 17 at 1). While Plaintiff disagrees and intends to oppose Defendants' Motion to Dismiss, Plaintiff hereby move pursuant to Rule 9014 of the Federal Bankruptcy Rules to apply Rule 23 to Plaintiff's Proof of Claims and to certify a class of California consumers defined below.

Similar cases have been certified by other courts, including approval of a Virginia class settlement providing more than $15 million dollars in relief to Virginia consumers who were victims of a rent-a-tribe scheme. *Hayes v. Delbert Servs. Corp.,* 3:14-cv-258 (JAG), Dkt. 193 (June 30, 2017); *see also Inetianbor v. CashCall, Inc.*, No. 13-cv-60066-JIC, Doc. 284 at 17–18 (S.D. Fla. Sept. 19, 2016).

I. FACTUAL BACKGROUND

A. Statutory and Regulatory Background.

"Usury—the charging of excessive interest rates—is an ancient concept dating back to the earliest commercial civilizations."[1] Robert R. Rickett, *California's Model Approach to Usury*, 18 Stan. L. Rev. 1381 (1966). California, which was founded in 1850, has regulated maximum interest rates since 1872. *See id.* at 1385. Currently, the law of usury in California is based upon California Constitution article XV, section 1, which limits the interest payable "[f]or any loan or forbearance of any money." *Sw. Concrete Products v. Gosh Constr. Corp.*, 798 P.2d 1247, 1249 (Cal. 1990) (quoting Cal. Const. Art. XV § 1).

Thus, "unless a lender falls into one of the exemptions approved by the state legislature, it may not charge more than 10% interest per annum on a loan." *Dev. Acquisition Group, LLC v. ea Consulting, Inc.*, 776 F. Supp. 2d 1161, 1164 (E.D. Cal. 2011) (citing Cal. Const. Art. XV § 1). "An interest rate in excess of 10% is usurious, and if a lender negotiates a loan at a usurious rate absent a qualified exemption, the agreement shall be void and the lender will have no action at law to recover any interest." *Id.* (citing Cal. Civ. Code § 1916–2).

California's usury laws "are primarily designed to penalize those who take advantage of 'unwary and necessitous borrowers.'" *See id.* at 1166 (quoting *Fox v. Peck Iron and Metal Co., Inc.*, 25 B.R. 674, 692-93 (Bankr. S.D. Cal. 1982)). Thus, when a lender receives interest at a

[1] Usury laws are not unique to California or the United State of America. In fact, about "a dozen Biblical passages suggest that usurious lending, especially to the poor, is a grave sin." Christopher L. Peterson, *"Warning: Predatory Lender"—A Proposal for Candid Predatory Small Loan Ordinances*, 69 Wash & Lee L. Rev. 893, 896 n.9 (2012). Echoing these sentiments, Pope Francis recently explained that "Usury is a serious sin: it kills life, tramples on the dignity of people, is a vehicle for corruption and hampers the common good. It also weakens the social and economic foundations of a country." Pope Francis, Address to National Anti-Usury Council (Feb. 3, 2018), available at https://zenit.org/articles/pope-francis-usury-humiliates-and-kills.

usurious rate, the borrower may recover treble the amount of interest paid to the lender within one year of the bringing of the action, the cancellation of all future interest, and a declaration that the contract is void. *See* Cal. Civ. Code §§ 1916-2, 1916-3; *Dev. Acquisition Group*, 776 F. Supp. 2d at 1165; Rickett, *supra*, at 1391.

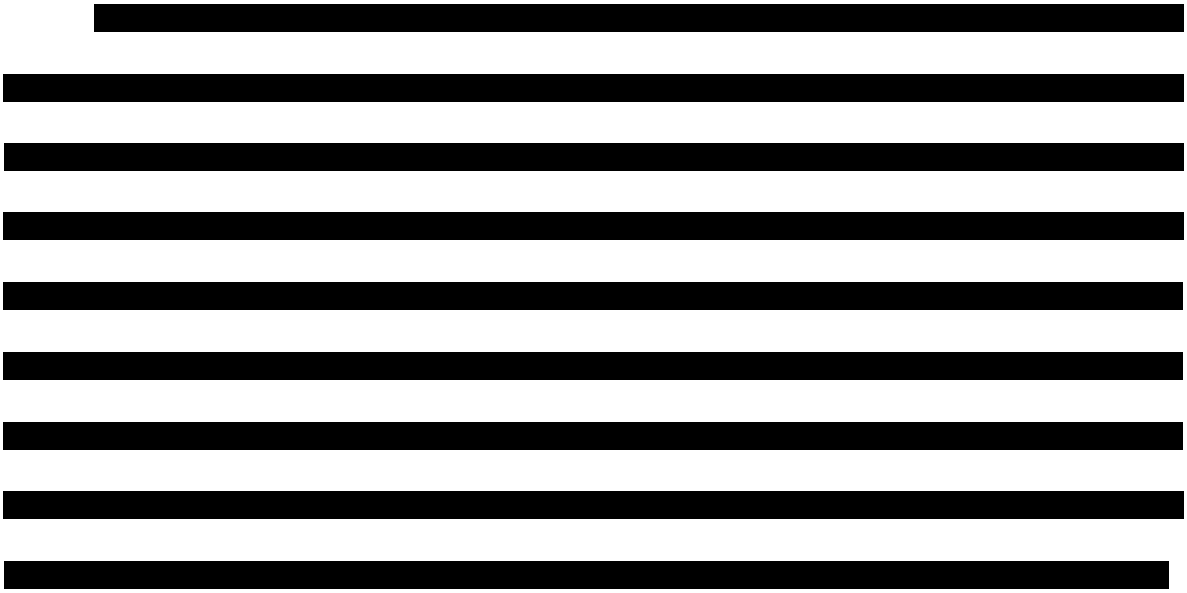
B. Think Finance attempts to avoid lending regulations by originating its loans through First Bank of Delaware.

Over the past decade, payday lending has become "one of the fastest growing segments of the consumer credit industry," and as of 2005 "there were more payday-loan stores in the United States than McDonald's, Burger King, Sears, J.C. Penney, and Target stores combined." Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 Wash. & Lee L. Rev. 751, 759 (2012) (quoting Karen E. Francis, Note, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Payday Loan Industry*, 88 Tex. L. Rev. 611, 611-12 (2010)). Despite its prevalence, it is no secret that "internet payday lenders have a weak history of complying with state laws." *Id*. at 764.

Prior to developing the rent-a-tribe business model, Think Finance and several other payday lenders entered into partnerships with national banks to avoid compliance with state laws.[2] Payday lenders used the banks as conduits for the loans because the National Bank Act allowed banks to charge "interest at the rate allowed by the laws of the State, Territory, or District where the bank" was located, 12 U.S.C. § 85, and some states do not have any interest rate caps. *Wolfe v. Ebert*, 37 B.R. 934, 936, n. 3 (D.S.C. 1983) (explaining that South Carolina repealed its usury laws in 1980). Beginning in 2005, federal regulators began cracking down on rent-a-bank

[2] *See, e.g.*, Jean Ann Fox & Edmund Mlerzwinkski, Consumer Fed'n of Am. & U.S. Pub. Interest Research Grp., *Rent-a-Bank Payday Lending: How Banks Help Payday Lenders Evade State Consumer Protection* at 17-22 (2001), available at http:// www.consumerfed.org/pdfs/paydayreport.pdf.

arrangements, and they were nearly eliminated by 2010—largely by the assessment of penalties and fines against participating banks.[3]



The Federal Deposit Insurance Corporation took steps to shut down Think Finance's arrangement with First Bank of Delaware through a cease and desist ordering it to terminate its relationship with "all third-party lending programs."[4] In response to the crackdown on rent-a-bank arrangements, several payday lenders reincarnated the lending model through associations with Native American tribes in an attempt to evade state laws. Johnson, *supra* note 3, at 399 n.16; Martin & Schwartz, *supra*, at 785. Like the rent-a-bank format, the loans would be originated in the name of a tribe, but the tribe would serve as nothing more than a nominal lender.

[3] *See, e.g.*, Creola Johnson, *America's First Consumer Financial Watchdog Is on A Leash: Can the CFPB Use Its Authority to Declare Payday-Loan Practices Unfair, Abusive, and Deceptive?*, 61 Cath. U. L. Rev. 381, 399 n. 16 (2012).

[4] *See, e.g.*, *In the Matter of First National Bank*, Case No. FDIC-07-256b, Order to Cease and Desist, Order for Restitution, and Order to Pay (Oct. 9, 2008), *available at* https://www.fdic.gov/bank/individual/enforcement/2008-10-03.pdf.

C. Think Finance adapts its business model to tribal lending after the FDIC shuts down its relationship with First Bank of Delaware.

Think Finance's chief executive officer, Kenneth Rees, frankly informed the media that Think Finance abandoned doing direct lending itself because "byzantine state laws" cut into the profits.[5] According to Rees, Native American tribes did not "have to look to each state's lending laws,"[6] and thus, Think Finance solicited the Chippewa Cree Tribe to participate in the venture. Shortly thereafter, the key companies involved in the enterprise—Think Finance, Haynes Investments, and Victory Park (through GPLS)—entered into a term sheet with the Chippewa Cree Tribe dated March 11, 2011. (Ex. 2).

Pursuant to the term sheet, Think Finance agreed to provide the infrastructure to run the lending operations, including the software, "risk management, application processing, underwriting assistance, payment processing, and ongoing service support" for consumer loans in the name of the Chippewa Cree Tribe. (Ex. 2 at pg. 1). On the other hand, the Chippewa Cree Tribe agreed to commit "its best efforts" to complete certain "critical path items" within 14 days, including establishing Plain Green, revising the Tribal Transaction Code to allow for the arrangement's lending products, setting up bank accounts and ACH processing for Plain Green, and obtaining separate originating and servicing addresses for Plain Green. (Ex. 2 at pg. 3). In return for the use of its name, Plain Green received "4.5% of cash revenue received" on the loans, as well as reimbursement for costs and expenses. (Ex. 2 at pg. 2).

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[5] Carter Dougherty, *Payday Lenders and Indians Evading Laws Draws Scrutiny* (June 4, 2012), http://stoppredatorygambling.org/wp-content/uploads/2012/12/2012-Payday-Lenders-and-Indian-Tribes-Evading-Laws-Draw-Scrutiny.pdf.

[6] This prediction was subsequently rejected by courts across the country. *See, e.g.*, *Otoe-Missouria Tribe v. N.Y. Dep't of Fin. Servs.*, 974 F.Supp.2d 353, 356 (S.D.N.Y. 2013) ("There is simply no basis… that the Tribes are treated differently from any other individuals or entities that enter New York to lend to a New York resident."), *aff'd*, 769 F.3d 105 (2d Cir. 2014).

Another company, Haynes Investments, LLC, agreed to "provide funding to the Tribe to enable it to make each of the Loans," and to fund Plain Green's bank account with "sufficient monies to fund one business day of Loans based upon the average Loan volumes for the preceding month." (Ex. 2 at pgs. 1-2). Consistent with the term sheet, Haynes Investments entered into a Credit Agreement *with Think Finance* (not the Chippewa Cree Tribe or Plain Green) where it agreed to "provide a revolving line of credit" to Think Finance "in a principal amount up to $2,000,000," which could only be used to fund loans in the name of Plain Green. (Ex. 3).

After the loans were originated in the name of Plain Green, at least 99% of the loans were "purchased" within two days by GPLS—an employee-less company that was "created to allow investors to purchase interests in the consumer loans originated by Native American Tribal lending businesses." *See Think Finance, LLC, v. Victory Park Capital Advisors, LLC*, Case No. 17-03106 (Banc. Tex.) (Dkt. 1, Compl. at ¶ 24) (explaining Victory Park's creation of GPLS). "Victory Park was the primary investor in a loan participation venture, GPLS," but "Victory Park required that Think Finance purchase a portion of the equity in GPLS, which it did through Think SPV." *Id.* at ¶ 26. After accounting for all expenses, GPLS paid a 20% fixed rate of return to its investors and the remaining profits were distributed to TC Administrative Service—[redacted]

D. Think Finance creates another tribal lending scheme entitled Great Plains.

[redacted]

[redacted] On this same day, Kenneth Rees instructed Think Finance's key employees to "start your engines!!" (Ex. 6, at TF-VA001630).

[redacted].

E. Think Finance's subsidiaries allow Think Finance to maximize profits while concealing Think Finance's role in the scheme.

TC Administrative, Tailwind, and TC Decision Sciences—all subsidiaries of Think Finance—served a dual purpose of returning as much money as possible to Think Finance, while at the same time concealing Think Finance's role in the scheme. [redacted]

[redacted] TC Decision Sciences also handled servicing responsibilities, including "customer support and collection services" under the guise of Great Plains. (Ex. 9, at TF-VA610-616). [redacted]

Pursuant to a marketing agreement, Tailwind handled the online and other advertisements for Great Plains. (Ex. 10 at TF-VA594) ("Tailwind shall perform services reasonably required to market Loans within the parameters established by [Great Plains], via one or more websites, search engine optimization, call centers or other marketing channels…."). Tailwind also handled the lead generation used to identify and solicit potential consumers. Tailwind received $100 for every borrower provided to Great Plains. (Ex. 10, at TF-VA608).

[redacted]

F. Think Finance ran the operations of Plain Green and Great Plains.

[redacted] In short, although Plain Green and Great Plains held themselves out as the actual lenders of these internet payday loans, Defendants were the *de facto* owners and controlled the day-to-day operations of the Plain Green and Great Plains.

II. NATURE OF PLAINTIFF'S CLAIMS AND THE PROPOSED CLASSES.

Plaintiff obtained loans from Plain Green and Great Plains. Each of those loans imposed interest rates far in excess of 10% APR in violation of California law. Because no exception to the California Constitution's interest rate cap applies, the loans are void and it was unlawful for Defendants to collect or receive any interest, fees, or charges on the loans. Cal. Civ. Code § 1916-2. Plaintiff paid no less than $10,250.20 on his loans with Plain Green and Great Plains, including $2,377.05 within a year of the filing of the Complaint—most of which was credited to interest and fees. (*See* Comp. ¶ 56). Thus, Plaintiff's claims are simple and straightforward—they accuse

Defendants of engaging in a scheme to lend money to California consumers at interest rates far exceeding those permitted by California law.

These loans violate California law on their face, and Defendants are prohibited from collecting any interest, fees, or charges from California consumers. The loans, and the system with which Defendants made them, also violate the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. §§ 1961–1968. Plaintiff therefore seeks certification of the following classes of California consumers, each of which Plaintiff is a member:

> **California RICO Class:** All California residents who executed a loan with Plain Green or Great Plains where the loan was originated and/or any payment was made.
>
> **California Usury Class:** All California residents who made a payment on any loan with Plain Green or Great Plains on or before December 21, 2015.
>
> **California Usury Treble Damages Subclass:** All California residents who made a payment on any loan with Plain Green or Great Plains on or after December 21, 2016.
>
> **California Unfair Competition Class:** All California residents who entered into a loan agreement in the name of Plain Green and/or Great Plains.
>
> **California Unfair Competition Restitution Subclass:** All California residents who made a payment on any loan with Plain Green or Great Plains.
>
> **California Unjust Enrichment Class:** All California residents who executed a loan with Plain Green or Great Plains where the consumer repaid more than the original principal of the loan.

III. LEGAL STANDARD

Federal Bankruptcy Rule 7023 allows Federal Rule of Civil Procedure 23—which governs class action proceedings—to apply in adversary proceedings. Fed. Bankr. R. 7023; Fed. R. Civ. P. 23. In the appropriate situation, then, class certification in an adversary proceeding is entirely proper and appropriate. *In re TWL Corp.*, 712 F.3d 886, 892 (5th Cir. 2013). In the claims process, however, Rule 23 does not automatically apply. *Id.* at 893. Rather, the Court has discretion whether to employ Rule 23 in circumstances like those here, where a class seeks certification so that the

group may submit a single, aggregated proof of claim against the debtor. *Id.* at 892. In making the decision of whether to permit a class claim, the Fifth Circuit advises a two-step analysis: (1) the Court must use its discretion under Rule 9014 as to whether to apply Rule 23; then (2) the Court must conclude that Rule 23's requirements are met. *Id.* at 892–93.

As to the first aspect, whether to apply Rule 23, the Fifth Circuit requires that the Court:

> [C]onsider a variety of factors relating to the bankruptcy case. These include: (1) whether the class was certified pre-petition, (2) whether the members of the putative class received notice of the bar date, and (3) whether class certification will adversely affect the administration of the case, especially if the proposed litigation would cause undue delay.

Id. at 893; *see also In re Craft*, 321 B.R. 189, 199 (Bankr. N.D. Tex. 2005) (stating that discretion under Rule 9014 should also consider "prejudice to the debtor or its other creditors, prejudice to putative class members, efficient estate administration, the conduct in the bankruptcy case of the putative class representatives, and the status of proceedings in other courts."). No one factor is dispositive, the importance of one factor or another depending on the facts of a particular case. *In re Chaparral Energy, Inc.*, 571 B.R. 642, 646 (Bankr. D. Del. 2017). The majority view is to permit class claims. *In re Craft*, 321 B.R. at 192.

IV. ARGUMENT AND AUTHORITIES

A. The Factors Weigh Heavily in Favor of the Court Using Its Discretion Under Rule 9014 to Apply Rule 7023.

The common factors considered weigh heavily in favor of the Court using its discretion under Rule 9014 to apply Rule 7023. First, the Consumer Claim Form used by Defendants fails to explain the nature of the bankrupt debtors' business or why the debtors identified each consumer as a potential creditor that could have claims against Defendants.[7] None of the information

[7] The Consumer Claim Form not only fails to explain the role of Defendants, but the Consumer Borrower Website continues to misrepresent Think Finance's role. Think Finance, LLC: Consumer Borrower Site, Answers to Frequently Asked Questions ("Think Finance is a financial technology company that provides

Defendants have provided to consumers explains the role of each of Defendants in the complex rent-a-tribe scheme, or the consumers' available remedies under applicable state law. Unlike many other states, California law provides unique remedies to borrowers injured by Defendants' scheme, including recover of treble the amount of interest paid within one year of the bringing of the action, the cancellation of all future interest, and a declaration that the contract is void. Cal. Civ. Code §§ 1916-2, 1916-3. However, the Consumer Claim Form fails to explain to California consumers their remedies. Worse yet, the Consumer Borrower Website confusingly informs consumers that receipt of the Claim Form "does not mean that you have a claim or that the Debtors or the bankruptcy court believes that you have any claim."[8] If the Court exercises its discretion to apply Rule 7023 and certifies the class Plaintiff seeks to represent, additional notice would be provided to California consumers that would appropriately explain their claims against Defendants. Fed. R. Civ. P. 23(c)(2)(B) ("For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.").

Second, class certification will not adversely affect the administration of the case or cause undue delay. It will do the opposite. The debtors have made it clear that they intend to vigorously object to any claims made by consumers, including the claims from Plaintiff and other California consumers. More importantly, the debtors have indicated that they "anticipate filing an ***omnibus claim objection*** to address the class proofs of claim issue[.]" (*See, e.g.*, Defs. Mot. Dismiss at Dkt. 19, pg. 15) (emphasis added). Because debtors anticipate filing an omnibus claim objection, there

administrative and other lender support services. Think Finance provided these types of services to sovereign Native American Tribal lenders.").

[8] Think Finance, LLC: Consumer Borrower Site, Answers to Frequently Asked Questions, https://www.americanlegal.com/TFConsumerBorrower/page/FAQ.

will be no adverse affect to the administration of the case or undue delay because the debtors' liability on Plaintiff's legal claims will be decided using the same legal standards, regardless of whether Plaintiff's claims are treated as an individual or class claim. If anything, allowing Plaintiff's claims to proceed on a class basis would promote efficiency because a certified class will allow the Court to address "the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Thus, if class certification is granted, the only material difference will be the number of consumers; not any undue delay. Moreover, if the Court denies the anticipated omnibus claim objection, then the Court would need to address the same complex issues for each claim, and the debtors could be subjected to costly and duplicative discovery as to each claim. There is simply no reason to have separate mini-trials regarding the same state-specific issues where, as here, there are no material individual defenses to Plaintiff's usury and RICO claims. *Henry v. Cash Today, Inc.*, 199 F.R.D. 566, 572 (S.D. Tex. 2000) ("the common questions are whether Defendants were engaged in racketeering activity or collecting an unlawful debt, whether an enterprise exists, and whether defendants conducted or participated in an enterprise. No reliance or causation need be shown….").

Third, determination of Plaintiff's claims on a class basis would not prejudice the debtors or the other creditors. To the contrary, requiring separate hearings for consumers' claims—assuming the consumers at issue here have the sophistication and wherewithal to do so—"would result in 'precisely the multiplicity of activity which Rule 23 was designed to avoid.'" *In re MF Glob. Inc.*, 512 B.R. 757, 764 (Bankr. S.D.N.Y. 2014) (quoting *Schuman v. The Connaught Grp., Ltd. (In re The Connaught Grp., Ltd.)*, 491 B.R. 88, 98 (Bankr. S.D.N.Y. 2013), which in turn quotes *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551 (1974)). Consolidating the cases will conserve the resources to the benefit of Defendants and the other creditors, especially where the

"principal question [is] whether Defendants conducted or participated in the conduct of the alleged enterprise(s) through patterns of racketeering" related to "collection of an unlawful debt in violation of 18 U.S.C. § 1964(c)." *Henry*, 199 F.R.D. at 571–72 ("Because such a [RICO] claim requires Plaintiffs to show a 'pattern of activity,' the proof in a class action and in an individual action are the same."); *Heastie v. Community Bank of Peoria*, 125 F.R.D. 669 (N.D. Ill. 1989).

Fourth, although the class was not certified pre-petition (which weighs against applying Rule 23), the potential prejudice to unsophisticated consumer creditors who lack the notice and resources to independently evaluate and pursue their claims clearly outweighs this concern in this case. "[T]he Court would not be alone in exercising its discretion to apply Bankruptcy Rule 7023 in these circumstances." *In re Chapparal*, 571 B.R. at 646 (citing cases so holding).

B. The Classes Meet The Requirements of Rule 23(a).

1. Numerosity is easily met.

Rule 23 first requires that the class be so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). A plaintiff need not demonstrate the number of persons in the class with precision to satisfy the requirement that joinder is impracticable where, as here, such a conclusion is clear from reasonable estimates. *Henry*, 199 F.R.D. at 569; *see also Zeidman v. J. Ray McDermott Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981). A showing that the class consists of more than forty members "should raise a presumption that joinder is impracticable." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (quoting 1 *Newberg on Class Actions* § 3.05, at 3–25 (3d ed. 1992)); *see In re Talbert,* 347 B.R. 804, 808-809 (E.D. La. 2005) (finding numerosity requirement met when class potentially consisted of 88 members).

Additionally, "the actual number of class members is [not necessarily] the determinative question, for '[t]he proper focus (under Rule 23(a)(1)) is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant

factors.'" *Zeidman*, 651 F.2d at 1038 (quoting *Phillips v. Joint Legislative Comm.,* 637 F.2d 1014, 1022 (5th Cir. 1981)). "Courts should consider additional factors, including, (i) the interest of judicial economy, (ii) whether the class involves small individual claims, (iii) the geographical dispersion of the class, and (iv) the ease with which class members may be identified." *In re Rodriguez*, 432 B.R. 671, 692 (Bankr. S.D. Tex. 2010) (citing *Zeidman,* 651 F.2d at 1038, and 1 *Newberg* § 3:3 (4th ed. 2002) (the numerosity test helps assure that the two class action objectives of "judicial economy and access to the legal system, particularly for persons with small individual claims" are served)). *Mullen* demonstrates that Rule 23(a)(1) does not require a movant to show that every factor favors numerosity before a court can find that numerosity exists. *Id.*; *see Mullen*, 186 F.3d at 624–25.

Here, the numerosity requirement is easily met. Defendants have admitted that the estimated number of payday borrowers who were victimized by their unlawful conduct "will exceed one million." (Doc. 69 at 14). Based on U.S. Census Bureau statistics, this figure translates to more than 120,000 affected California consumers, assuming the ratio of loans was consistent with the U.S. population as a whole.[9] As courts may make common-sense assumptions regarding numerosity, *Ramirez v. J.C. Penney Corp., Inc*., No. 6:14-CV-601, 2017 WL 6462355, at *2 (E.D. Tex. Nov. 30, 2017), the estimated number of borrowers demonstrates that numerosity is satisfied.

Judicial economy also favors a finding that numerosity exists. *Mullen*, 186 F.3d at 624–25. Judicial resources are wasted when each individual borrower is forced to prove the amount of their

[9] *Compare* U.S. Census Bureau QuickFacts: United States, available at https://www.census.gov/quickfacts/fact/table/US/PST045216 (reported population estimate of 325,719,178 in United States as a whole) *with* U.S. Census Bureau QuickFacts: California, available at https://www.census.gov/quickfacts/fact/table/CA,US/PST045217 (reported population estimate of 39,536,653 in California).

claim or the Defendants' illegal conduct. *Id*. at 693–94. Accordingly, Rule 23(a)(1)'s numerosity prerequisite is easily satisfied.

2. Common questions of law and fact bind Class Members together.

Rule 23(a)(2)'s commonality requirement demands that "there are questions of law or fact common to the class." *Dukes,* 564 U.S. at 368 (citing Fed. R. Civ. P. 23). "The principal requirement of [*Dukes*] is merely a single common contention that enables the class action 'to generate common *answers* apt to drive the resolution of the litigation.'" *In re Deepwater Horizon*, 739 F.3d 790, 811 (5th Cir. 2014) (citing *M.D. ex rel. Stukenberg v. Perry,* 675 F.3d 832, 840 (5th Cir. 2012)). "These 'common answers' may indeed relate to the injurious effects experienced by the class members, but they may also relate to the defendant's injurious conduct." *Id.* Regardless, "a *single* common question will do." *Id.* (emphasis added) (citing *Dukes*, 131 S. Ct. at 2556, alteration in original). Here, Plaintiff easily satisfies the commonality prerequisite.

The questions of fact and law at issue here are entirely common. The claims asserted by Plaintiff and the class members originate from the same conduct, practice, and procedure on the part of Defendants, namely the use of a rent-a-tribe scheme in an attempt to evade interest rate laws in California. Moreover, Defendants used a uniform pricing structure when issuing loans that universally resulted in each class member receiving a loan with an illegal interest rate under California law. (*See, e.g.*, Ex. 12 at TF-VA02229-2230 (showing the interest rates available on loans)). Thus, if brought and prosecuted individually, the claim of each class member would require proof of the same material and substantive facts.

Other courts have found common questions in cases based on similar factual allegations and legal claims. This includes certification of classes in cases alleging that the defendants used a subterfuge, such as a purported tribal lender, to conceal the fact that they were making unlawful loans. For example, in *Inetianbor v. CashCall, Inc.*, No. 13-cv-60066-JIC, Doc. 284 at 17–18 (S.D.

Fla. Sept. 19, 2016) (attached hereto as Exhibit 14), a case involving a similar rent-a-tribe scheme, the court found that:

> The proposed class' claims share multiple questions of law and fact. For example, it is a common question of fact whether CashCall improperly used Western Sky as a "front" for its lending business, invoking Tribal law in an attempt to shield the enterprise from State regulation and consumer laws. Additionally, all class members entered into loan agreements with materially similar terms; therefore, whether the loan contracts are void for charging usurious interest rates is a legal question common to all or nearly all members of the class. Further, whether the loans violated Florida lending and consumer protection law and whether Reddam can be held personally liable are legal questions common to the class.

The facts in this case are nearly identical to those in *Inetianbor* and similarly warrant a finding of commonality. Other courts, including the United States District Court for the Northern District of Texas, have also found class treatment appropriate when faced with claims arising from usurious payday loans. *Purdie v. Ace Cash Express*, No. Civ. A. 301CV1754L, 2003 WL 22976611, at *3 (N.D. Tex. Dec. 11, 2003) ("Here, the members of the putative class share a common factual circumstances of having obtained payday loans that were originated, serviced and collected in a uniform manner according to policies and procedures implemented by Defendants on a nationwide basis."); *see also Upshaw v. Georgia (GA) Catalog Sales, Inc.*, 206 F.R.D. 694, 699 (M.D. Ga. 2002) (identifying "numerous common issues," including, among others, "[w]hether the interest charged on the loans violates the Georgia usury laws," and "[w]hether the loans and interest are unlawful debts, the collection of which violates RICO."); *see also Madden v. Midland Funding, LLC*, 237 F. Supp. 3d 130, 155 (S.D.N.Y. 2017) (finding commonality in a case alleging violations of New York's usury laws based on the "common injury" of "the attempted collection of interest at a usurious rate").

In sum, where a wrongful practice by the defendant, common to all members, caused classwide harm, as did the usurious loans in this case, the commonality requirement is met. *See Rodriguez*, 432 B.R. at 695 ("Accordingly, the question of whether [Wells Fargo] systematically

ignored Rule 2016(a) by charging unauthorized fees is a common question affecting the class."); *Henry*, 199 F.R.D. at 572 ("the common questions are whether Defendants were engaged in racketeering activity or collecting an unlawful debt, whether an enterprise exists, and whether defendants conducted or participated in an enterprise. No reliance or causation need be shown…."). Accordingly, the Court should conclude that commonality is satisfied.

3. Plaintiff's claims are typical of the Classes' claims.

Typicality requires that the "claims or defenses of the representative class are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This requirement "focuses on the similarity between the named plaintiffs' legal and remedial theories and theories of those whom they purport to represent." *Id.* The analysis "seeks to assure that the interests of the [class] representative[s] are aligned with the common questions affecting the class." 1 *Newberg* § 3:13. However, it does not require a complete identity of claims, and the "test for typicality is not demanding." *James v. City of Dallas*, 254 F.3d 551, 571 (5th Cir. 2001). "Rather, the critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class." *Id.* The test is met where the representative plaintiff's claims arise out of the same event or course of conduct as the other members' claims and are based on the same legal theory. *In re First Republicbank Sec. Litig.*, 1989 WL 108795, *11 (N.D. Tex. Aug. 1, 1989). "[A] class representative and a class member must be similarly, not identically, situated." *Ligon v. Frito-Lay, Inc.*, 82 F.R.D. 42, 47 (N.D. Tex. 1979).

Here, Plaintiff asserts a uniform practice of charging usurious loans to consumers, using the now-rejected rent-a-tribe model to do so. Plaintiff and the class members are all in the same boat, having been the subject of the same usurious loans such that the only genuine difference from one member to another is the level of financial harm incurred. Again, *Inetianbor* is instructive. There, the court found that the plaintiffs' claims, based on usurious loans made pursuant to a rent-

a-tribe scheme, were "typical of those of the proposed class" because the plaintiffs all "entered into Western Sky loan agreements with materially similar terms, including interest rates that allegedly exceeded the allowable rate under Florida law," and "all members of the proposed class may allege similar damages as a result of Defendants' actions." *Inetianbor*, Ex. 14, at 19. Like the plaintiffs in that case, here, Plaintiff's claims for usury, RICO, violation of California's usury, unfair competition, and unjust enrichment laws are typical of those of the proposed classes.

Although no genuine factual differences exist, even were the Court to find differently, the Fifth Circuit has made clear that if "the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *Rodriguez*, 432 B.R. at 696 (citing *James*, 254 F.3d at 571 and *Mullen*, 186 F.3d at 626 (finding typicality when the "named Plaintiffs' and proposed class members' legal and remedial theories appear[ed] to be exactly the same," even though the specific injuries suffered by the class members may not have been the same)). Accordingly, Rule 23(a)(3)'s typicality prerequisite is satisfied here.

4. Plaintiff and his Counsel will adequately represent the Classes.

The Court should also easily conclude that "the representative parties will fairly and adequately protect the interests of the class," as required by Rule 23(a)(4). Fed. R. Civ. P. 23(a)(4). This requirement is satisfied when (i) there are no substantial conflicts of interests between the class representatives and the class; and (ii) the representatives and their attorneys will properly prosecute the case. *Sosna v. Iowa*, 419 U.S. 393, 403 (1975); *see Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 294 (5th Cir. 2017). The existence of minor conflicts of interest between the plaintiff and the class "alone will not defeat a party's claim to class certification: the conflict must be a 'fundamental' one going to the specific issues in controversy." *In re Deepwater Horizon*, 739 F.3d at 813 n.99 (quoting *Valley Drug Co. v. Geneva Pharms., Inc*., 350 F.3d 1181, 1189 (11th Cir. 2003)). Both prongs are satisfied here.

Plaintiff's interests and those of the members of the proposed classes are fully aligned. Plaintiff seeks a determination that Defendants violated § 1962(c) of RICO through the "collection of unlawful debt," that Defendants further violated § 1962(d) of RICO by entering into a series of agreements to violate § 1962(c), that the loans made and collected on by Defendants used an interest rate in excess of what is legal under California law, and that Defendants' loan agreements are void under California. Plaintiff and the proposed class share an identical interest in establishing Defendants' liability.

In addition, the members of Plaintiff's counsel are highly qualified to represent the classes. The law firms seeking to represent the classes here include qualified lawyers experienced in the successful prosecution of consumer class actions. They have collectively recovered millions-of-dollars for class members in other litigation, including cases involving rent-a-tribe enterprises. *Hayes v. Delbert Servs. Corp.*, Case No. 3:14-cv-258 (E.D. Va.). These firms and their co-counsel stand ready, willing, and able to devote the resources necessary to litigate this case vigorously, to see it through to the best possible resolution, and to protect all absent class members. (Ex. 15, Kelly Decl. ¶¶ 2-11; Ex. 16, Bennett Decl. ¶¶ 12-17). These litigators have partnered with an experienced bankruptcy firm from this District to ensure an absence of shortcomings from unfamiliarity with this Court's procedures or bankruptcy practice in general. Accordingly, Rule 23(a)(4)'s adequacy requirement is satisfied.

C. The Classes Likewise Meet the Demands of Rule 23(b)(3).

In addition to meeting the four prerequisites of Rule 23(a), parties seeking class certification must demonstrate that the action is maintainable under one of the three subsections of Rule 23(b). Rule 23(b)(3) requires that questions of law or fact common to the class predominate over questions affecting the individual members and that, on balance, a class action is superior to other methods available for adjudicating the controversy. Fed. R. Civ. P. 23 (b)(3).

1. Common questions predominate over individual ones.

Common questions predominate over any individual issues that may arise in these classes because all the class members' claims stem from the same usury scheme. "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 636 (5th Cir. 2016), *cert. denied*, 138 S. Ct. 76 (2017). Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof." *Amgen Inc.*, 568 U.S. at 469 (emphasis in original). Rather, the rule requires that the common issues "predominate over any questions affecting only the individual class members." *Id.* (quoting Fed. R. Civ. P. 23(b)(3)).

The objective of Rule 23(b)(3) is to promote economy and efficiency in actions that are primarily for money damages. Where common questions "predominate," a class action can achieve economies of time, effort, and expense as compared to separate lawsuits, permit adjudication of disputes that cannot be economically litigated individually, and avoid inconsistent outcomes, because the same issue can be adjudicated the same way for the entire class. Fed. R. Civ. P. 23(b)(3), advisory cmte. note (1966).

Here, common issues necessarily predominate because Plaintiff's claims are all based on Defendants' standardized conduct toward California consumers: namely, employing the rent-a-tribe scheme to issue and collect on usurious loans in California. As the court found in *Intetianbor*, common issues predominate in rent-a-tribe schemes for usurious loans because of "the standardized nature of the loan transactions and the uniform manner in which defendants made, processed and collected on the loans," such that "few variations exist in the claims and the legal claims and theories asserted." *Inetianbor*, Ex. 14, at 21; *see also Upshaw*, 203 F.R.D. at 700–01 (finding predominance in a payday lending case because "Defendants' conduct was substantially

the same with respect to all members of the class," and "[t]his conduct gives rise to Plaintiffs' class-wide liability claims for violation of the Georgia usury laws and RICO"). There are also no material individual defenses to Plaintiff's usury and RICO claims. *Henry*, 199 F.R.D. at 572 ("the common questions are whether Defendants were engaged in racketeering activity or collecting an unlawful debt, whether an enterprise exists, and whether defendants conducted or participated in an enterprise. ***No reliance or causation need be shown***…." (emphasis added)).

Similarly, the Fifth Circuit has considered whether the liability questions in a RICO claim alleging a pyramid marketing scheme predominated. *Torres*, 838 F.3d at 635. The district court certified a class based on this theory, concluding that there were no individual questions regarding liability because the financial injury to the lowest-level pyramid members (the class members) was a foreseeable and natural consequence of the scheme. *Id.* at 634–35. While the *Torres* plaintiffs sued under mail and wire fraud section of RICO, the same rationale applies here because, like *Torres*, there is no element of individual reliance on any of Plaintiff's claims. *See id.* Rather, here liability hinges solely on the illegal nature of Defendants' loans under California law, which can be determined without regard to the individual circumstances of any class member's loan transaction.

The Eleventh Circuit has also "explained that the common issues of fact in a RICO action, concerning the existence of an enterprise and a pattern of racketeering activity are quite substantial" and "would tend to predominate over all but the most complex individual issues." *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1357-58 (11th Cir. 2009). In a RICO action, "[t]he existence of a conspiracy, and whether the defendants aided and abetted each other" are "issues common to all of the plaintiffs" that "tend[] to predominate." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004). *Klay* concerned an alleged scheme under which health

management organizations (HMOs) conspired to underpay physicians for their services. Affirming class certification, the Eleventh Circuit observed:

> [P]laintiffs' RICO claims are not simply individual allegations . . . lumped together, and the allegation of an official corporate policy or conspiracy is not simply a piece of circumstantial evidence being used to support such individual . . . claims. Instead, *the very gravamen of the RICO claims is the "pattern of racketeering activities."*

Id. at 1257 (emphasis added). Similarly here, the proposed Classes' claims are not merely individual allegations lumped together, but rather are based on a uniform practice of employing a rent-a-tribe enterprise to initiate and collect on loans in California with unlawful rates of interest.

Finally, this case is also similar to other cases in which the defendant's lending practices or other financial misconduct predominates because the defendant's uniform treatment of the plaintiffs caused them harm. As the Northern District of Texas Court held in approving the settlement in *Purdie*:

> Given the standardized nature of the payday loan transactions and the uniform manner in which Defendants made, processed and collected on the loans, and that few variations exist in the claims or the factual bases underlying the claims and the legal claims and theories asserted, the court finds that the factual and legal issues in this case would be subject to generalized proof applicable to the entire class, and that such issues predominate over any issue that may be subject only to individualized proof.

Purdie, 2003 WL 22976611, at *4. Like the plaintiffs in *Purdie* and similar cases, Plaintiff and the classes have been subjected to the same usurious lending practices by Defendants here, and therefore, common issues predominate. *See also Henry*, 199 F.R.D. at 572; *Madden*, 237 F. Supp. 3d at 160–61 (finding predominance in a case based on violations of New York's usury laws).

2. Class treatment is the superior method for litigating the Classes' claims.

The superiority analysis of Rule 23(b)(3) requires the Court to examine whether the class action is superior to other methods of adjudication. The focus is "not on the convenience or burden of a class action suit *per se*, but on the relative advantages of a class action suit over whatever

other forms of litigation might be realistically available to the plaintiffs." *Klay*, 382 F.3d at 1251. As *Klay* recognized, there are four non-exhaustive factors a court should consider in assessing whether a class action is superior to individual litigation, including:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and]
> (D) the difficulties likely to be encountered in the management of a class action.

Id. (citing Fed. R. Civ. P. 23(b)(3)). All of these factors favor class treatment in this case.

First, the members of the classes have claims that are so small that it would cost them much more to litigate an individual case than they could ever hope to recover in damages. Thus, "[t]here is no reason to believe that the putative class members in this case have any particular interest in controlling their own litigation." *Id.* Indeed, in *Inetianbor*, the Southern District of Florida found that the first factor weighed heavily in favor of a finding of superiority for this very reason. Specifically, the Court found:

> Individual Western Sky borrowers likely do not have a substantial interest in controlling the prosecution of separate actions. The claims are relatively small due to the limited dollar amounts of the loans. And to the extent that potential class plaintiffs have a special interest in prosecuting their claims independently, they may opt out of the suit.

Inetianbor, Ex. 14, at 10-11; *see Purdie*, 2003 WL 22976611, at *4 ("The record reflects that many of the affected borrowers may be unaware of a violation of their rights and that any individual claim that they may have would be for relatively small amounts of money, making the likelihood of individual litigation unlikely. In 'small-stakes cases,' class actions suits are the best, and perhaps only, way to proceed."). Here, as in *Inetianbor*, the claims of all members of each class are identical, as the allegations involve standardized conduct and each class member is likely to have suffered small damages stemming from loans comparable in size to those issued to Plaintiff.

As to the second factor, there are no other lawsuits seeking the relief requested herein on behalf of California consumers. Third, the forum is not only logical and desirable, it is the only place for the litigation due to the automatic stay. Finally, the manageability analysis focuses on whether practical problems may render the class action format inappropriate. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156*,* 164 (1974). The question is whether multiple individual lawsuits would be more manageable than a class action, not whether a class will create significant management problems. *Klay*, 382 F.3d at 1273. Indeed, this factor "will rarely, if ever, be in itself sufficient to prevent certification." *Id*. at 1272. And significantly, in a case involving nearly identical facts, the Southern District of Florida found that "[a]s to the fourth factor, nothing suggests that this case will be unusually difficult to manage as a class action." *Inetianbor*, Ex. 14, at 11. Likewise, Plaintiff cannot foresee any manageability problems that would render individual actions a better method of resolving this controversy.

V. CONCLUSION

For the foregoing reasons, the Court should grant this Motion.

Respectfully submitted,

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Sample Brief- Virginia, Florida and California Consumer Borrowers' Brief in Support of Motions to Authorize Bankruptcy Rule 7023 to Proofs of Claim (Think Finance)

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	:	
	:	
THINK FINANCE, LLC, *et al.*,	:	Chapter 11
	:	
	:	Case No. 17-33964 (HDH)
Debtors.	:	
	:	(Jointly Administered)
_____	:	

VIRGINIA, FLORIDA, AND CALIFORNIA CONSUMER BORROWERS' BRIEF IN SUPPORT OF MOTIONS TO AUTHORIZE BANKRUPTCY RULE 7023 TO PROOF OF CLAIMS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treatises

I. INTRODUCTION

1. Pursuant to the Amended Scheduling Order Concerning Initial Hearing on Class Claim Pleadings entered by this Court on July 14, 2018 (Dkt. 651), Patrick Inscho, Darlene Gibbs, Stephanie Edwards, Lula Williams, Lawrence Mwethuku, India Banks, Joanne Griffths, Jeri Brennan, Alicia Patterson, Earl Browne, Kimetra Brice, and Jill Novorot (collectively, the "VA/FL/CA Consumers"), by counsel, hereby submit their Reply in support of their Rule 7023 Motions (Doc. Nos. 291, 336, and 340), presently scheduled to be held on August 7 and 8, 2018.

2. In Debtors' Omnibus Objection to the Rule 7023 Motions (Dkt. No. 693) ("Objection"), Debtors argue that application of Rule 7023 is unnecessary because the bar date noticing process was successful. (*Id.* at 4-18, 23-35.) The Debtors want to characterize the present dispute as one about notice. It is not. This dispute is about whether the class action mechanism is superior to the other available methods, namely the bar date noticing process, for the fair and efficient adjudication of the controversy. *See In re Computer Learning Centers, Inc.*, 344 B.R. 79, 91 (Bankr. E.D. Va. 2006) (cited with approval by *In re TWL Corp.*, 712 F.3d 886, 893 (5th Cir. 2013)). Given the evidence adduced to date, there can be no doubt that the class action mechanism is superior. This Court should thus use its discretion to apply Rule 7023.

3. Absent application of Rule 7023, consumers who were victims of an unlawful rent-a-tribe scheme will be prejudiced in a number of ways. First and foremost, refusal to apply Rule 7023 would mean that **over 99.5%** of consumers are guaranteed to receive no relief from Debtors' unlawful rent-a-tribe scheme even if this Court were ultimately to agree with the Consumer Borrowers on the merits of their claims. And even those few consumers who attempted to assert a claim will almost certainly fail in their attempt to recover as the Debtors have classified all of the consumer claims as un-established while refusing to allow anyone other than Debtors to know the identities of claimants. And because only the named Plaintiffs had the assistance of counsel, almost

every consumer who responded to the Bar Notice did so without any details (such as stating the basis for or amount of the claim) that are likely necessary for recovery. After all, the Frequently Asked Questions ("F.A.Q."), written by Debtors' counsel and provided at their instruction to every consumer who asked the Administrator for assistance instructed consumers that Think Finance was not a lender, did not participate in making loans and was merely a service provider – all facts disputed and central to the claims at issue here. None of the claims submitted other than those of the named Plaintiffs mention usury, RICO or any of the diverse claims asserted in these cases.

4. By contrast, if the Court applied Rule 7023 and found class certification appropriate, those consumers lacking any legal knowledge, unable to afford individual litigation, or otherwise unable to properly assert their claim could obtain necessary assistance through the representative litigation on the merits of the claims of similarly situated named Plaintiffs/Creditors. *See, e.g.*, *Bonner v. Team Toyota LLC*, No. 2:06cv157 PPS, 2006 WL 3392942, at *5 (N.D. Ind. Nov. 21, 2006) (because "many of the persons in these classes may be unaware" of their consumer claim, "a class action suit may help to safeguard their rights."); *White v. Imperial Adjustment Corp.*, No. Civ.A. 99–3804, 2002 WL 1809084, at *16 (E.D. La. Aug. 6, 2002) *aff'd in part, appeal dismissed in part and remanded*, 75 F. App'x 972 (5th Cir. 2003) ("Because . . . individual putative class members may not be aware of the violation of their rights, it appears improbable that the putative class members would possess the initiative to litigate their claims individually.").

5. Second, where, as here "the party opposing the class has acted on grounds generally applicable to the class," *injunctive relief or declaratory relief* is available in the class action mechanism. *Id.* Such relief is critical in this case because Think Finance continues to collect on these debts, and the loans may also be sold in the future, exposing consumers to illegal debt collection activities. In addition to providing these important benefits to the Consumer Borrowers, injunctive/declaratory relief would also serve "a deterrent function by ensuring that wrongdoers bear the costs of their

activities." *In re Am. Reserve Corp.*, 840 F2d 487, 489 (7th Cir. 1988). And through the class action mechanism consumers will receive a notice "specifically drafted to alert them to their potential claims". *In re Computer Learning Centers, Inc.*, 344 B.R. at 93.

6. Finally, application of Rule 7023 will unquestionably be less costly—so as to preserve resources of the estate—than to proceed with repeated determinations of the merits for the less than 0.5% of consumers who did file a Proof of Claim. Indeed, the Consumer Borrowers' claims appear to be the very reason Debtors filed for bankruptcy to begin with, as the total unsecured claims of non-Consumer Borrower creditors appears to be less than $8 million. (*See* Dkt Nos. 16, 165 (Schedules of Assets and Liabilities).) The fact that Debtors have expended such significant resources reviewing Proof of Claim forms and yet have only filed objections to two Proofs of Claim demonstrates that if Debtors' preferred approach is taken, we have only seen the tip of the iceberg from an expense perspective when it comes to evaluating Consumer Borrowers' Proofs of Claim. Yet Debtors have likewise filed an omnibus objection to five Virginia consumers' Proofs of Claim, relating to loans obtained from different lenders at different times. Essentially, Debtors are asking the Court to allow them to assert classwide defenses, without allowing Consumer Borrowers to assert a class claim. After the Virginia omnibus proceeding, if Rule 7023 is not applied, the claims of thousands of Consumer Borrowers who made claims would still need to be resolved. Debtors' proposed course of action would require its multiple expert witnesses to show up to contest each Proof of Claim. Considering the professional fees Debtors have accrued to date reviewing Proofs of Claim, the approach Debtors propose is not only unfair to consumers, but wasteful to the estate. Thus, the Court should exercise its discretion to apply Rule 7023.

II. BACKGROUND

7. Debtors spill significant ink attempting to assure the Court that the bar date notice was successful. Even if the bar date notice was successful, a fact the VA/FL/CA Consumers dispute

below, it failed to provide anywhere close to the same notice and relief that the class mechanism and notice will generate for putative class members. *See In re Computer Learning Centers*, 344 B.R. at 93 (considering whether the bar date notice was "specifically drafted to alert [putative class members] to their potential claims").

8. Perhaps most importantly, the approach Debtors are advocating is an expensive, inefficient one. From an analysis of counsel for Debtors' interim fee applications (Dkt. Nos. 328, 560), counsel for Debtors expended 1,068 hours of professional time during that four-month period, solely on work related to Consumer Borrower Proofs of Claims. *See* Ex. A (compilation of Debtors' counsel's Proof of Claim-related work prepared by VA/FA/CA Consumer counsel, pulled from Dkt. Nos. 328, 560). Using the hourly rates provided in the fee applications, that amounts to over $257,000 in estate resources devoted to that single issue during only a four-month window. *See* Ex. B (summary sheet tabulating hours and fees listed in Ex. A by timekeeper, and in total). Yet Debtors have not yet objected to almost all of these Proofs of Claims, and are instead devoting resources to their omnibus objection to the claims of five Virginia consumers. This process will delete the estate even further via attorney and expert expenses, and if Debtors' proposal to not resolve Consumer Borrowers' claims on a class basis is followed, these expenses will have to repeat themselves over and over. Thus, although as discussed herein, Consumer Borrowers stand to suffer great prejudice if Rule 7023 is not applied, the resources of the estate will suffer greatly, as well.

9. Additionally, the bar date notice was not successful. It is clear that the notice program—when put into practice—was prejudicial to Consumer Borrowers by not affording them a sufficient opportunity to file Proofs of Claim. As discussed in greater detail in the Expert Report of Shannon R. Wheatman, Ph.D. ("Wheatman Report"), attached hereto as Exhibit C, and confirmed by data and testimony from the claims agent, the notices and claims process, as ultimately implemented, were defective in several ways. And the testimony of Debtors' own witness, Jeff

Pirrung, confirmed that the claims agent American Legal Claims Services ("ALCS") never viewed its role as comparable to that of the administrator of a class action notice program.

10. The available data on claims and website interaction, along with testimony from the claims agent, indicate that some significant portion of Consumer Borrowers did not receive notice, and those who did were not adequately informed as to how to submit a claim. Debtors provide self-serving data to claim that 98.9% of Consumer Borrowers received notice by either postcard or email, in addition to the publication notice. (*Id.* at 24.) But Debtors presuppose that the intended recipients actually received the emails and postcards, which is contradicted by claims data and additional information obtained in discovery.

11. First, while Debtors claim over 1.3 million Consumer Borrowers received notice, the Consumer Borrower website only received 55,101 unique page views, and the toll-free telephone line only generated 25,759 calls, so, assuming each of those represented a unique Consumer Borrower (a generous assumption, given that (a) many likely both called and visited and (b) the website was likely not just viewed by Consumer Borrowers), that means ***92.9% of all consumer borrowers took no action whatsoever to learn more about the bankruptcy proceeding***. Ex. C, ¶ 19a. This indicates that either some portion of Consumer Borrowers did not receive notice, or of those who did, the notices did not put them on sufficient notice to alert them that they may have a claim. Indeed, the claims rate was orders of magnitude less than what would be expected, as only 4,931 of Consumer Borrowers submitted claims, for an abysmally low claims rate of ***0.43%*** (compared to an expected claims rate range of 5 to 15 percent in a case where, as here, a mailing list of potential claimants is easily compiled). *Id.* This data leads to only one inevitable conclusion: the notice program suffered from some defect that indicates either Consumer Borrowers did not receive notice or there were additional issues after they received the notice (or a combination of the two).

12. Indeed, based on the testimony of the claims agent, it appears likely that a significant portion of Consumer Borrowers did not even receive notice. Mr. Pirrung ALCS admitted that of 1.13 million Consumer Borrower addresses, ALCS utilized Accurint to update almost 60 percent of addresses; however, Accurint provides only a guess of multiple addresses in most cases, and ALCS only mailed notice to one address arbitrarily selecting one, with no way of knowing whether the address used was actually the correct address at which to reach consumer borrowers. Ex. D, Jeffrey Pirrung Deposition Transcript ("Pirrung Tr."), at 14:4-11, 119:14-123:8. And in doing so it overwrote the actual addresses provided by the consumers themselves – again, 60 percent of the time. Similarly, with respect to email notice, ALCS was provided with a list of email addresses by Debtor and played no role in choosing or validating the email addresses, ensuring the emails were delivered (versus going to junk mail or being returned as undeliverable), or tracking whether the emails were opened. *Id.* at 58:12-64:5. This is in spite of the fact that Pirrung testified that he was familiar with the Federal Judicial Center's Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide ("FJC Guide"). *Id.* at 42:19-23. The FJC Guide requires claims administrators in the typical noticing process to "[w]atch out for potentially ineffective 'last known address' mailings"—which the Accurint update does not ensure—and to take steps "to overcome SPAM filters and *ensure readership*" (emphasis added), a step the testimony indicates was clearly not taken here.[1]

13. Further, most of those consumers who did contact ALCS expressed actual confusion to the claims agent. *See, e.g.*, Ex. C ¶ 25. Upon receiving inquiries from Consumer Borrowers, ALCS would forward them to counsel for Debtor and ask how to respond, and then would receive and follow instructions from Debtors' counsel in so responding. *E.g.*, Ex. D, at 159:12-25. When this happened, Pirrung testified that, pursuant to the instruction of Debtors' counsel, the majority of

[1] Available at https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf (last visited Aug. 1, 2018).

inquiries by Consumer Borrowers received a "canned response" which ALCS "was provided by Debtors' Counsel." *Id.* at 126:17-127:7, 186:17-187:3.

14. For example, upon receiving an inquiry from a consumer who claimed to not have sufficient information to complete a claim form, ALCS asked Debtor's counsel how it should respond, and was instructed to provide the "standard response." *Id.* at 166:24-168:12. This response was similar to the "typical response" ALCS would provide individuals with telephone inquiries, by simply referring them to the website to read the F.A.Q. and find proof of claim forms, rather than actually answer questions or provide any useful information. *Id.* at 168:25-169:13, 171:2-14. Of course, the F.A.Q. was drafted by Debtors, *id.* at 126:17-127:7, and contained a self-serving statement that "Think Finance itself is not a lender or debt collector." *Id.* at 154:6-156:1. Although over time it became clear that the F.A.Q. did not provide sufficient answers to Consumer Borrowers' questions, ALCS never updated the F.A.Q. because Debtors' counsel never told them to do so. *Id.* at 176:15-177:13. In another problematic example, when ALCS received an inquiry in Spanish, Pirrung asked counsel for Debtors whether he should respond in Spanish, and Debtors' counsel explicitly instructed Pirrung to respond only in English. *Id.* at 157:2-17. This conflicts with the FJC Guide's typical mandate to claims administrators to "[c]onsider the demographics of the class to determine whether notice is necessary in Spanish or another language."

15. In addition to serving as a claims agent in bankruptcy cases, ALCS serves as a class action notice administrator. But Pirrung explicitly testified that it was not ALCS's role to consider whether the bar date notices would satisfy the "best notice practicable" standard of Fed. R. Civ. P. 23(c)(2)(B). *Id.* at 141:3-13, 145:23-146:7, 146:21-147:10. By contrast, when ALCS serves as a class action claims administrator, it provides that very input for the notice plan. *Id.* at 142:13-143:2. And while the claims data and associated evidence is sufficient to lead to the conclusion that Consumer Borrowers did not have an adequate opportunity to submit claims, Pirrung's testimony made it clear

that, unlike in a typical class action claims administrator role, ALCS had no responsibility for the content and means of implementing the bar date notices.[2] Indeed, Pirrung repeatedly testified that it was not ALCS's role to take steps to ensure that adequate notice was provided to Consumer Borrowers.[3] It would be another story if the claims data indicated that an appropriate percentage of Consumer Borrowers submitted claims here, but given the results of the noticing process, the conclusion is inevitable that Consumer Borrowers would be severely prejudiced if their claims cannot proceed on a class basis.

III. ARGUMENT

16. The parties agree that class proofs of claim are permitted in bankruptcy. *In re Craft*, 321 B.R. 189, 192, 195 (Bankr. N.D. Tex. 2005) ("[A]llowing class proofs of claim improves a debtor's fresh start and fosters equality of treatment of creditors, both major goals of Congress."). Indeed, "courts declining to permit class proofs of claim are recognized as being in the minority." *Id.* at 192. Despite that, Debtors ignore many of the factors relied on by other courts that favor application of Rule 7023 here. Among the relevant factors courts examine when evaluating whether to apply Rule 7023 are (i) the potential for prejudice to class members, (ii) the potential for prejudice

[2] *E.g.*, Pirring Tr. at 37:20-38:2, 125:25-126:4 (Debtors provided content of postcard notice, and ALCS did not review); 42:25-43:10, 45:22-46:24 (ALCS provided pricing for Self-Mailers but did not advise Debtors as to mailer format); 59:2-11, 60:4-11 (Debtors provided content of email notice to ALCS); 70:4-71:8 (ALCS did not select publications for published notice and did not draft content); 71:23-72:12 (ALCS was asked about online advertisements but did not play role in choosing against it); 74:7-79:13 (Debtors were responsible for information and content on consumer borrower website); 123:16-21, 126:5-8 (Debtors provided website Frequently Asked Questions ("F.A.Q.") language); 126:17-127:7 (Debtor provided content for written responses to consumers who mailed or emailed inquires); 127:8-14 (Debtor wrote claim form).

[3] *E.g.*, *id.* at 42:7-43:10, 52:6-14, 59:2-5 (not ALCS's role to review content of or provide most important information to Consumer Borrowers in Postcard Notice or email notice); 46:25-47:11 (not ALCS's role to consider Consumer Borrower demographics); 54:1-6, 58:24-59:1 (not ALCS's rule to assure quality of addresses on mailing list or email list); 63:12-17, 64:24-65:15 (not ALCS's role to monitor whether email notices were actually opened or went to junk email); 72:13-25 (not ALCS's role to analyze reach of publication notice); 90:21-91:15, 104:6-11 (not ALCS's role to analyze effectiveness of call script). Indeed, Pirrung explicitly testified that it was not ALCS's role to consider whether the bar date notices would satisfy the "best notice practicable" standard of Fed. R. Civ. P. 23(c)(2)(B). *Id.* at 141:3-13, 145:23-146:7, 146:21-147:10. By contrast, when ALCS serves as a class action claims administrator (as opposed to a bankruptcy claims agent), it provides that very input for the notice plan. *Id.* at 142:13-143:2.

to the debtor and other creditors, (iii) efficient administration of the estate, (iv) the benefits of class litigation including compensation to the class and deterrence; and (iv) the class representative's conduct in the bankruptcy case. *Id.* at 199; *see also In re American Reserve Corp.*, 840 F.2d 487, 492 (7th Cir. 1988) (suggesting several non-exclusive considerations).

17. Because (i) the VA/FL/CA Consumers promptly sought certification in the bankruptcy case, (ii) the results of the notice process indicate that Consumer Borrowers would be prejudiced without class treatment, and (iii) classwide determination will not prejudice Debtors or other creditors or cause undue delay, applying Rule 7023 is appropriate here. And the absence of prepetition class certification is not a barrier.

A. The Lack of Prepetition Certification Does Not Prevent Applying Rule 7023

18. Debtors argue that the absence of pre-petition class certification weighs against applying Rule 7023 here. (Objection at 22-23.) But they completely ignore *In re MF Global Inc.*, referenced in the motions, where the court in similar circumstances applied Rule 7023 and certified a class in the absence of prepetition certification, ruling that "the issue of prepetition certification loses its relevance, since there will seldom be time to file a class action complaint and certify a class before the petition date." 512 B.R. 757, 763 (Bankr. S.D.N.Y. 2014). That reasoning applies to the three class claims here: the California claimants did not file their action until after the bankruptcy petition; only one Florida claimant filed in the Southern District of Florida mere weeks before the bankruptcy petition, rendering class certification impossible; and the petition came only five months after the Virginia claimants filed their complaint in the Eastern District of Virginia, where motions to compel arbitration, transfer venue, dismiss, and stay proceedings were all briefed during that time. Thus, like in *MF Global*, prepetition certification was simply not possible for any of the VA/FL/CA Consumers. This factor thus does not weigh against application of Rule 7023. *See also, e.g.*, *In re Chaparral Energy, Inc.*, 517 B.R. 642 (Bankr. D. Del. 2017) (collecting cases applying Rule 7023 in

absence of prepetition certification); *In re Connaught Grp., Ltd.*, 491 B.R. 88, 98 (Bankr. S.D.N.Y. 2013) (rejecting argument about prepetition certification because it "is not surprising or significant" where claimants had little or no opportunity to seek certification prior to petition); *In re Kaiser Group Int'l, Inc.*, 278 B.R. 58 (Bankr. D. Del. 2002) ("We do not believe that the timing of the bankruptcy filing should be determinative of whether a class proof of claim should be permitted.").

19. *In re Musicland Holding Corp.*, 362 B.R. 644 (Bankr. S.D.N.Y. 2007), referenced by Debtors, also does not support their position. There, the class claimants filed a class proof of claim early in the bankruptcy proceeding (prior to the May 1, 2006 bar date), *id.* at 648, but they waited over six months until *after* a plan had been filed to file their certification motion. *Id.* at 649-50. There, the creditors had already voted on a plan, and a confirmation hearing had started. *Id.* at 656. The Court found that one relevant factor governing whether to apply Rule 23 was "whether a plan has been negotiated, voted on or confirmed." *Id.* at 654. In addition to the debtor, the creditor's committee objected on the ground that the class claim would "doom the plan." *Id.* Ultimately, the court refused to allow the class claim, based on counsel's delay. *Id.* at 656-57. The same consideration also grounded the court's finding in *In re Sacred Heart Hosp. of Norristown*, where it found that allowing the class proceedings would "effect very substantial and apparently unwarranted disruption to the administration of the Debtor's bankruptcy case, *in which there is presently a plan before us for imminent confirmation*." 177 B.R. 16, 24 (Bankr. E.D. Pa. 1996) (emphasis added). This case is also easily distinguished from *In re Woodward & Lothtop Holdings, Inc.*, referenced by Debtors (Objection, at 42), where two and a half years had elapsed since the claimant's case was filed, and he had still yet to seek class certification. 205 B.R. 365, 371 (Bankr. S.D.N.Y. 1997). No such problems are present here: the certification motions were filed on or before the bar date, no plan is pending before the Court, and there is no objection by the creditor's committee to the class proceedings.

B. The Bar Date Notice Process is an Inadequate Substitute for Class Action Notice

20. Although Debtors are correct that courts, when deciding whether to apply Rule 23, examine "whether the members of the putative classes received notice of the bar date," *In re TWL Corp.*, 712 F.3d at 893, this is just one aspect of a larger consideration of the potential for "prejudice to putative class members." *In re Craft*, 321 B.R. at 199.

21. Here, review of the content of the bar notice and the proof of claim process demonstrate that the bar date notice was an inadequate substitute for a class action notice. The low claims rate and other aspects of the notice process, as implemented, indicate that both a large number of Consumer Borrowers might not have received notice, and that most of those who did were dissuaded from filing a claim. As a result, over 99.5% of Consumer Borrowers did not file a claim, and each of those individuals will be prejudiced if this Court refuses to apply Rule 7023. Thus, without allowing for claims to proceed on a classwide basis, Consumer Borrowers who were unable to file a claim prior to the bar date will be denied the automatic relief that application of Rule 7023 would permit if this Court were to agree that Debtors operated an unlawful rent-a-tribe scheme.

i. The Available Data and Testimony Indicates That a Large Number of Consumer Borrowers Did Not Receive Notice

22. In support of their contention that the notice program was adequate, Debtors first argue that Consumer Borrowers effectively received notice. (Opposition, at 23-25.) In support of this contention, Debtors disingenuously claim that 98.9% of Consumer Borrowers received notice when even Debtors' own claim agent admitted that (1) with respect to email notice, nothing was done to validate the email addresses, ensure that emails were delivered (versus going to spam), or actually opened and (2) with respect to postcard notice, there is significant reason to believe that the postcards were delivered to addresses at which many consumer borrowers no longer received mail. *See* Section II, *supra*. Finally, based on the readership and demographic mismatches between the

selected publications and the Consumer Borrower population, there is little reason to believe many Consumer Borrowers viewed the publication notice. *Id.*

23. The claim figures confirm that application of Rule 7023 is necessary to avoid prejudice to the Consumer Borrowers. Only 4,931 out of over 1.13 million Consumer Borrowers submitted claim forms, for a claims rate of 0.43%, which falls far below the expected claims rate of 5 to 15% in cases where a mailing list of potential claimants can be compiled. Ex. C, ¶ 26. And perhaps more strikingly, the Consumer Borrower website only received 55,101 unique page views, and the telephone line only generated 25,759 calls. Assuming each of those figures represents a unique Consumer Borrower (a generous assumption, given that (a) many likely both called and visited and (b) the website was likely not just viewed by Consumer Borrowers), *92.9% of all consumer borrowers took no action whatsoever to learn more about the bankruptcy proceeding. Id.* ¶ 19a. This suggests that a significant number of those Consumer Borrowers likely did not receive or view the notices at all; or, as discussed below, the notices failed to fulfill the purpose of prompting consumers to take additional action.

24. This Court previously confronted a similar question in *Craft*. There, the court found that even "where the class is apparently clearly identifiable, actual notice may prove insufficient." 321 B.R. at 194. In that case, the debtor admitted that about half of the class members did not receive notice. *Id.* Thus, the Court recognized that "[i]f a class claim is not allowed, class members without notice will have non-dischargeable claims." *Id.* The only difference between *Craft* and this case is that here, Debtors claim that notice effectively reached the majority of the class. But the testimony of the claims agent, claims figures, and website and telephone statistics confirm the opposite.

25. In fact, in *Pearson v. NBTY, Inc.*, the first case Debtors trumpet, the Seventh Circuit *reversed* approval of a Settlement with a woefully low claim rate, finding that the claim form, like the

one here, imposed a requirement for "needlessly elaborate documentation" and made "threats of criminal prosecution." 772 F.3d 778, 783 (7th Cir. 2014). Indeed, that case, in which the Court rejected the settlement in which "only one-fourth of one present of [] fraud victims" made claims, *id.* at 787, similar to the rate here, supports the VA/ FL/CA Consumers, not Debtors. Similarly, although Debtors praise the low claim rate in *Moody v. Sears Roebuck & Co.*, the state court in that case found that the notice plan there "*does not pass muster under the Due Process clause of the Fourteenth Amendment*." No. 02 CVS 4892, 2007 WL 2582193, at *4 (N.C. Super. Ct. May 7, 2007). Indeed, the court found "obvious problems" with the miniscule claim rate in that case, *id.* at *5, which, again, supports the VA/ FL/CA Consumers here, not Debtors. The other cases Debtors reference fare little better. In *Yeagly v. Wells Fargo & Co.*, the Court observed that the settlement was "virtually worthless" to class members, as all they received was two free credit reports, so it is little surprise that participation in that case was low. No. C 05-03403 CRB, 2008 WL 171083, at *1-2 (N.D. Cal. Jan. 18, 2008). Similarly, as Debtors acknowledge, in *LaGarde v. Support.com, Inc.*, the low claim rate was attributable to the fact that class members stood to only receive $10. No. C 12-0609 JSC, 2013 WL 1283325, at *6 (N.D. Cal. Mar. 26, 2013). Here, by contrast, Consumer Borrowers have claims potentially worth thousands of dollars. Finally, Debtors claim the low claims rate in *Union Fid. Life Ins. Co. v. McCurdy* supports them, but in that case, only 4,080 out of over 100,000 class members received direct notice. 781 So. 2d at 186, 188 (Ala. 2000). Thus, the miniscule participation rate there, which resembles the rate here, provides little support to Debtors, as they claim nearly all Consumer Borrowers received direct notice. Indeed, the low claims rate here suggests that it is more likely that, like in *McCurdy*, a much smaller share of the Consumer Borrowers received actual notice. If the claims rate cases Debtors reference are the best ones to purportedly support their position, the Court should have little difficulty finding that notice was inadequate here, and that Consumer Borrowers would be prejudiced if Rule 7023 is not applied.

ii. The Notices and Claim Forms Themselves Failed to Advise Consumer Borrowers of Their Claims and Were Unnecessarily Onerous

26. Although the claims figures and related data and testimony by themselves indicate that the bar date notice program fell short, the claims process was also unfriendly to those consumers who did receive notice. The problems are not limited to the notices and claims forms. Debtors also exercised complete control over the content of the Consumer Borrower website, including the F.A.Q. on the website, which flatly denied that Debtors were a lender in a self-serving, one-sided statement about the key issue at stake in this litigation. When Consumer Borrowers contacted ALCS with questions, they were not provided answers and, ***at Debtor's direction***, were instead simply provided with copies of the claim form, and directed to the self-serving F.A.Q. Furthermore, when it became clear that consumers were confused, no action was taken to update the F.A.Q. Taken alone, these maladies render the program deficient, but as discussed in Section III.B.i, *infra*, the actual data and testimony available on reach, claims figures, and website and telephonic interaction indicate that not only was the notice process deficient, but many Consumer Borrowers likely received no notice whatsoever. Additionally, the claim form also required Consumer Borrowers to provide information—such as their loan number, the amount of their claim, or the basis for their claim—that Debtors possessed and the Consumer Borrowers might not have. Finally, the notices did not alert Consumer Borrowers to their potential claims, something that can be done in a class action setting. *See In re Computer Learning Centers*, 344 B.R. at 93. Thus, although it appears that a significant portion of the Consumer Borrower population may not have received notice, the claims data indicates that additional factors (and additional ones discussed in the Wheatman Declaration, Ex. C) likewise suppressed claims.

27. In support of their argument that notice was adequate, Debtors reference several cases that presuppose that most Consumer Borrowers actually received notice (Objection at 31-33),

which is suspect, at best. However, none of those cases are closely analogous to the situation in either this case or *In re AM Int'l, Inc.*, 142 B.R. 252 (Bankr. N.D. Ill. 1992). In that case, the "Addressograph–Multigraph Corporation" changed its name to "AM International, Inc." prior to filing for Chapter 11. *Id.* at 253. The bar date notice only listed the name of the new entity, but the creditor in that case had only previously done business with the company under its prior name, which did not appear in the bar date notice. *Id.* The creditor contended that the debtor should have included its prior name in the bar date notice. *Id.* at 254. The court denied summary judgment to the debtor, finding no evidence that the creditor "had actual knowledge of the name change." *Id.* at 256-57; *see also Alderwoods Grp., Inc. v. Garcia*, No. 10-20509-CIV-MOORE (S.D. Fla. Sept. 9, 2010) (finding that cemetery owner's notice should have identified cemeteries, as those were "the only entities directly connected to the cemetery where [debtors'] relatives' remains were buried"), *rev'd on other grounds* 682 F.3d 958 (11th Cir. 2012); *Grand Pier Ctr. LLC v. ATC Group Servs., Inc.*, No. 03 C 7767, 2007 WL 2973829, at *8 (N.D. Ill. Oct. 9, 2007) (referencing *AM Int'l* in similar scenario where creditor did not know debtor's name). The same finding is appropriate here, where the bar date notice only listed Debtors, with whom Consumer Borrowers had no business dealings, rather than the lending entities such as Plain Green and Great Plains (of which they were aware).[4] Such a finding is even more appropriate in light of the other maladies with the notice, and the high likelihood that direct notice did not reach a large number of Consumer Borrowers.

iii. The Proof of Claim Process Provides an Inferior Remedy for Consumer Borrowers

28. Absent application of 7023, only those Consumer Borrowers who filed a proof of claim can even attempt to litigate and prove their consumer claim. Each proof of claim must be

[4] Debtors' argument that the Proof of Claim Form identified the lenders at issue (Objection, at 33) misses the point: since the notice itself only identified an entity foreign to consumers, they had no reason to take any further action, so most Consumer Borrowers never saw the other entities listed on the Claim Form.

reviewed and be determined to be a legitimate proof of claim, both as to entitlement and amount. Everything here actually indicates that the Debtors will litigate those claims as aggressively as its scorched earth defense of the named Plaintiffs' claims. If this Court were to apply Rule 7023, certify a VA/CA/FL class, at least all consumers could have the benefit of the litigation that is already underway. And of the Court finds for the class on the merits, *all* VA/CA/FL consumers would be entitled to relief through *automatic* distributions. Indeed, a strong preference exists in the judiciary for automatic common fund distributions, rather than claims-made settlements or resolutions. *See, e.g.*, *Ebarle v. Lifelock, Inc.*, No. 15-cv-00258-HSG, 2016 WL 5076203, at *8 (N.D. Cal. Sept. 20, 2016) (highlighting component of fund distribution where class members "will automatically receive a settlement payment without the need to file a claim"); *In re Checking Account Overdraft Litig.*, 1:09-MD-02036-JLK, 2013 WL 11320088, at *9 (S.D. Fla. Aug. 2, 2013) (same).

iv. Consumer Borrowers Who Filed Claims Will Also Be Prejudiced Absent Class Treatment

29. Debtors' also contend that Consumer Borrowers who timely filed a proof of claim could be prejudiced by allowing class claims to proceed. (Objection, at 39.) They have it backwards. If those individuals' claims are challenged (which they inevitably will be), those individuals will be put in the unenviable position of having to defend their relatively small claims, without the protection of a class mechanism or attorneys litigating on their behalf. Most of these individuals have both limited finances and legal knowledge, and to force them to defend their individual claims in court (which could entail travel expenses that would obviate any recovery) would severely weaken their potential to recover anything. *See Am. Reserve Corp.*, 840 F.2d at 489 (recognizing that "[t]he combination of contingent claims (which many people may not identify as something they are entitled to pursue) and the effort needed to decide whether to pursue an identified claim means that for many small claims, it is class actions or nothing").

30. Outside the bankruptcy context, courts regularly recognize that the class vehicle is the exact mechanism for which individuals with modest claims—who would otherwise not being them on their own—can obtain redress. "The desirability of providing recourse for the injured consumer who would otherwise be financially incapable of bringing suit and the deterrent value of class litigation clearly render the class action a viable and important mechanism in challenging fraud on the public." 6 NEWBERG ON CLASS ACTIONS § 21:30 (4th ed. 2003) *E.g.*, *Deposit Guaranty Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device."); *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 253 (3d Cir. 2016), *as amended* (Sept. 29, 2016) (finding that class mechanism "ensur[es] that small-value claims have a mechanism by which they can be economically litigated"). Applying Rule 7023 will allow for such an outcome here because the class process is best suited to protect these individuals.

v. Debtors' Invocation of Collateral Estoppel Must Be Rejected

31. Debtors' attempt to hide behind the doctrines of collateral estoppel and law of the case is also easily rejected. These doctrines do not provide a basis for Debtors to avoid application of Rule 7023.

32. First of course, the question here is not whether the Bar Notice was adequate generally, but rather whether it was comparable to a Rule 23(c) class action notice. These are two different purposes, questions and standards. And the Court does not consider merely the content of the Bar Date Notice in the abstract to determine if additional notice through the class action mechanism is necessary, but also the actual effectiveness of that notice. *See In re Computer Learning Centers*, 344 B.R. at 92-93.

33. Further, issue and/or claim preclusion only applies when there has been a final judgment on the merits with respect to the issue or claim sought to be relitigated. *See, e.g.*, *Arizona v. California*, 460 U.S. 605, 618 (1983) (noting that under the "precise requirements of res judicata," the binding finality of collateral estoppel will only attach once litigation "produces a judgment" and explaining, "[i]t is clear that res judicata and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment"). Because Debtors can point to no final judgment here, their supporting case law is not applicable as there can be no issue or claim preclusion.

34. In apparent recognition of this, Debtors assert in the alternative that "the Court's prior factual findings and legal conclusions concerning the bar date process are nonetheless binding . . . under the doctrine of the law of the case." (Dkt. 693 at 26.) As an initial matter, however, the more amorphous law of the case doctrine "directs a court's discretion, it does not limit [the Court's] power." *Arizona v. California*, 460 U.S. at 618. Debtors appear to improperly conflate the two branches of the law of the case doctrine. The first is discretionary and provides that subject to exceptions, a court should "follow its own rulings made at a prior stage in the case; the other branch—sometimes known as the mandate rule—far more stringently precludes a lower court from contravening the rulings of a higher court made at an earlier stage of the same controversy." *Conley v. United States*, 323 F.3d 7, 12 (1st Cir. 2003).

35. In any event, even as a discretionary matter, the law of the case doctrine only applies when the same legal issue has already been decided on the merits. "Law of the case does not reach a matter that was not decided." § 4478 Law of the Case, 18B Fed. Prac. & Proc. Juris. § 4478 (2d ed.). This Court's Bar Date Order does not address, much less resolve, whether Rule 7023 should be applied in the present context; nor does it consider whether the failure to apply Rule 7023 would result in prejudice to putative class members. These are the questions before the Court here.

Consequently, because this is the Court's first opportunity to address these matters, the law of the case doctrine is not applicable and should not enter the Court's analysis. *See Clifford v. Gibbs*, 298 F.3d 328, 331 (5th Cir. 2002) (refusing to apply the law of the case doctrine to question of whether inmate had failed to exhaust his administrative remedies when prior decision only concluded that inmate's claim was frivolous); *Walsh v. McGee*, 918 F. Supp. 107, 112 (S.D.N.Y. 1996) (holding that because "Rules 12(b)(1) and 12(b)(6) address different aspects of a party's claim, are evaluated under different standards by the courts, and are subject to different rules concerning timing and waiver," a decision under one does not become the law of the case with respect to the other).

36. Moreover, even if the law of the case doctrine were applicable, it "should not be applied woodenly in a way inconsistent with substantial justice." *United States v. Miller*, 822 F.2d 828, 832 (9th Cir. 1987). And "when there is new evidence on the question at issue," a deviation from the law of the case is appropriate. *Conley v. United States*, 323 F.3d 7, 13 (1st Cir. 2003). At the time the Court issued the Bar Date Order, approving of the form and manner of providing notice to Think's creditors under the applicable provisions of the Bankruptcy Code and Rules (which, again, are separate and different from the notice requirements of Rule 23), the Court did not have the benefit of the bulk of later-obtained evidence the Consumer Borrowers intend to present at the August 7 hearing. This evidence, discussed in summary form herein, will demonstrate the prejudice that would result to putative class members if this Court were to deny application of Rule 7023, including the abysmally low claims rate that could be cured by application of Rule 7023 and automatic distribution of claims, as well as the considerable confusion of consumers that resulted from the notice and likely contributed to the suppressed claims rate. *Hagood v. Sonoma Cty. Water Agency*, 81 F.3d 1465, 1473 (9th Cir. 1996) (holding that consideration of a court's jurisdiction on one claim does not become the law of the case with respect to jurisdiction to hear a different claim and that even if it did,

significant new evidence bearing on the jurisdiction issue at the summary judgment stage that was not before the court at the 12(b)(6) stage warranted reconsideration).

37. Because this Court is addressing whether to apply Rule 7023 in the first instance, and given the significant new evidence bearing on the sufficiency of notice, the law of the case doctrine does not bar application of Rule 7023.

C. Applying Rule 7023 will Reduce the Profitability of Wrongdoing and Deter Debtors and Similarly Situated Entities

38. Reducing the profitability of wrongdoing and deterring illegal conduct favors application of Rule 7023. *In re American Reserve Corp.*, 840 F.2d at 489. "The class action provides compensation that cannot be achieved in any other way . . . the device still severs a deterrent function by ensuring that wrongdoers bear the costs of their activities." *Id.* Although deterrence is generally less important in bankruptcy because no entity survives the bankruptcy, in this case deterrence is relevant because Consumer Borrowers continue to pay on their illegal debts and other involved entities will benefit.

D. Applying Rule 7023 Would Not Cause Delay or Prejudice or Otherwise Adversely Affect Administration of the Case

39. Class certification here will cause no delay, prejudice, or other harm to administration of the case. Indeed, Debtors have chosen to group claims together, having filed an omnibus objection to the VA/FL/CA Consumers' claims. Permitting Debtors to only group claims together on their own terms would be manifestly unjust. And Debtors' arguments to the contrary do not hold water.

40. First, as discussed above, Debtors' litigation conduct indicates that it is their proposed course of action—claim-by-claim determinations related to the Consumer Borrowers—that will cause great delay and expense, as opposed to classwide resolution. Indeed, in just a four month period, Debtors' counsel expended 1,068 hours solely related to Proofs of Claim, as a cost to

the estate of over $257,000. *See* Exs. A, B. Allowing this to continue will further deplete the estate.

41. Further, Debtors' claims of prejudice to Debtors' and other creditors is a red herring. Indeed, because the Consumer Borrowers stand to be prejudiced if application of Rule 7023 is denied, *see* Section III.B, *supra*, to deny the class vehicle to Consumer Borrowers would essentially render them powerless to have their claims fairly adjudicated, while simultaneously affording Debtors the benefit of having their *objections* heard on an omnibus basis. "Persons holding small claims, who absent class procedures might not prosecute them, are no less creditors under the Code than someone with a large easily filed claim. Applying Rule 23 to filing procedures will bring all claims forward, as contemplated by the Bankruptcy Code." *In re Charter Co.*, 876 F.2d 866, 871 (11th Cir. 1989). Indeed, Debtors' seemingly acknowledged this reality at the Bar Date Hearing, when they stated that "it's important that we put a process in place for all of the consumers who may in fact want to assert a claim to come and assert a claim and to do it by the bar date." *See* Dkt. 348-3, at 10: 12-15. For them to now attempt an end-run around the most logical process available to consumers represents an about-face. Moreover, Debtors would have the Court believe that the Consumer Borrowers would be the only impediment to this case proceeding on an efficient basis. To the contrary, Debtors have petitioned for multiple extensions of exclusivity. Given Debtors' lack of urgency to file a plan, applying Rule 7023 does not threaten to further slow matters.

42. Debtors reference *Craft* and argue that permitting a class claim would unfairly prejudice other creditors. (Objection, at 36.) But in that case, this Court wanted to ensure that the potential class creditors (not other creditors) were treated equally: "[C]lass claims foster broader creditor participation in distributions and equal treatment of class members." 321 B.R. at 195. That sentiment was echoed in *American Reserve Corporation*, in which the court explained that other creditors should not receive a windfall to the detriment of class members. 840 F.2d at 492 ("That most policyholders would not learn of the bankruptcy and the need to file proof-of-claim forms is

not a good reason why the other creditors should receive $10 million in the bankruptcy."). To refuse to apply Rule 7023 here would result in class members being treated unequally, and rendering the vast majority of them (those who did not submit proofs of claim) ineligible to receive a distribution. Additionally, Debtors' purported fear of the potential for confusion resulting from conflicting class notices (Objection, at 37) ignores the reality that the Court would have to approve of any classwide notice process. There would simply be no "dueling" notice process. Similarly, Debtors are incorrect that proceeding with class claims would, by itself, delay the trial on the First Omnibus Objection. (*Id.* at 37-38.)

IV. CONCLUSION

43. For the reasons discussed herein, the VA/FL/CA Consumers' Rule 7023 Motions should be granted.

Dated: August 2, 2018

Respectfully submitted,

/s/ Theodore O. Bartholow

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all parties requesting notice via the Court's CM/ECF system on August 2, 2018.

/s/ Theodore O. Bartholow, III
Theodore O. Bartholow, III

Sample Deck- Closing Arguments re: Motions to Authorize Bankruptcy Rule 7023 to Proofs of Claim (Think Finance)

CLOSING ARGUMENT

OF THE VIRGINIA, FLORIDA & CALIFORNIA CONSUMER BORROWERS

Application of **Rule 7023** is needed to ensure **fair** and **efficient** adjudication of the controversy.

The Court's factors weigh in favor of class proceedings.

- Did consumers "receive" effective "notice"?
- No evidence of adverse effect on administration of the estate
- No evidence of prejudice to the debtor and other creditors
- Putative class members would suffer prejudice
- Deterrence of wrongdoing

In re Craft, 321 B.R. 189, 199 (Bankr. N.D. Tex. 2005)

In re Craft, 321 B.R. 189 (Bankr. N.D. Tex. 2005).

- "[C]lass claims foster broader creditor participation in distributions and equal treatment of class members.
- "[A]llowing class proofs of claim improves a debtor's fresh start and fosters equality of treatment of creditors, both major goals of Congress.

In re Craft, 321 B.R. 189 (Bankr. N.D. Tex. 2005).

- "A bankruptcy court should be absolutely convinced of a Congressional command to do so before it prohibits use of a device, here class claims, that is helpful in advancing two recognized goals served by the Code."

DID CONSUMERS *RECEIVE* EFFECTIVE *NOTICE*?

Whether the members of the putative class **received notice** of the bar date.

In re TWL Corp., 712 F.3d 886, 893 (5th Cir. 2013)

"Even in cases such as Craft's where the class is apparently clearly identifiable, actual notice may prove insufficient."

In re Craft, 321 B.R. 189 (Bankr. N.D. Tex. 2005)

have consumers **received** notice?

- Pirrung and Smith: Only demonstrate consumers were sent the bar date notice
- Emails were not opened

MR. PIRRUNG: "And a statistic that I heard was that, as to the first email batch that was sent, there was a **3.4 percent open rate**. Does that sound about right to you?

A Seems right, yes.

Q And a **.9 percent click-through**, meaning they clicked on the link that was provided in the email, right?

A I think that's right.

- Mr. Pirrung testified sender listed as Think Finance

have consumers **received** notice?

- Publication Notice
- "Reliance on published notice to reach a class of claimants may not be adequate. It will not always reach every class member such that the rules of due process are satisfied."

In re Craft, 321 B.R. 189 (Bankr. N.D. Tex. 2005)

- Wall Street Journal/USA Today
  - *Dr. Wheatman testified just over 1% readership rate*
  - *"[D]id not effectively reach the borrowers."*
  - *Notice even smaller and harder to understand*

Was the notice **effective**?

- Dr. Wheatman
  - *Master's and a PhD in social psychology and a master's in legal studies with in focus on law and psychology: "The study of how laypersons interpret and process and respond to legal information."*
- "[A]sked to review the bankruptcy bar date notice and the claims process **to see if it was an effective comparable alternative** to notice under Rule 23."
- DR. WHEATMAN: "I concluded that the bar date notice did not meet the best notice practicable under the circumstances, that it didn't provide enough information for potential claimants to make an informed decision, and that it was not an effective comparable alternative to a class action notice."

Was the notice **effective**?

DR. WHEATMAN: Consumers "were confused about what this notice really was about. So you had people who thought they were being sued, thought that we were telling them they had a bankruptcy and they never had a bankruptcy. So I think generally we were getting some questions from people who just, on the face of it, didn't understand anything about the notice."

were consumers ***informed***?

- Notice did not identify the claims
- Failed to meet standards of Federal Judiciary Guidelines
- Avg. adult reads at 8th grade level
- *Barred*
- *Participation Interest*
- *Debtors*
- *Who are the Tribal Lending Entities?*

3. Pursuant to the Bar Date Order, if you do not file a proof of claim by the General Bar Date you will be barred, estopped, and enjoined from asserting a Prepetition Claim, or filing a related proof of claim, against the Debtors or their property.

4. You are receiving this notice because you may have obtained a consumer loan from a sovereign Native American Tribal lender between April 5, 2011 and May 8, 2017, or, if you are a Pennsylvania resident, a ThinkCash consumer loan between February 1, 2009, and December 31, 2010, from First Bank of Delaware. Certain of the Debtors may have provided services to the lender and/or invested in an entity that may have purchased a participation interest in your loan. Certain parties have filed litigation asserting claims against one or more of the Debtors related to similar loans. The Debtors deny any liability and the fact that you are receiving this notice does not mean that you have a claim.

consumer responses
to the bar date order

"I would like to request a copy"

To whom it may concern

I am unable to obtain the original loan agreement contract through online. I would like to request a copy of loan contract before I process the payment to pay it off within 60 days.

Please send me a copy of Loan Agreement contract to [redacted]

Thanks in advance

[redacted]

"What is filing a claim?"

From: Jeffrey Pirrung
Sent: Tuesday, December 12, 2017 12:22 PM
To: [redacted]
Subject: RE: Think finance

American Legal Claims Services is unable to provide you legal advice.

Sent from my T-Mobile 4G LTE Device

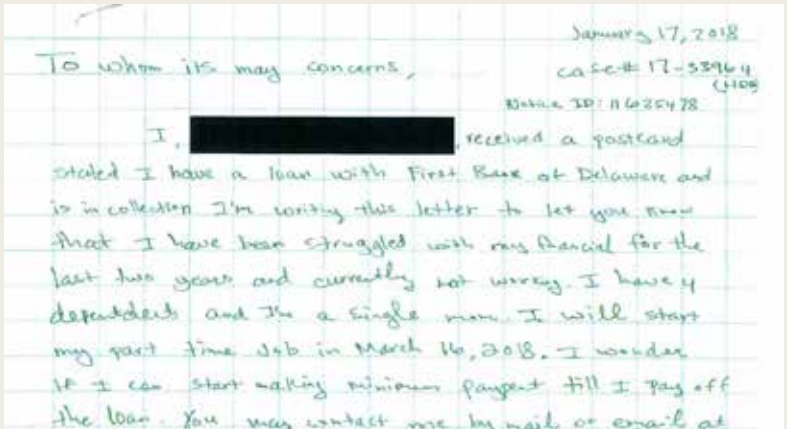
-------- Original message --------
From: [redacted]
Date: 12/12/17 11:37 AM (GMT-05:00)
To: Jeffrey Pirrung <jeff.pirrung@americanlegalclaims.com>
Subject: Re: Think finance

Hi,
Can you explain to me what a claim is?

Thanks!
[redacted]

consumer responses
to the bar date order

"I can start making minimum payment"



January 17, 2018

To whom its may concerns,

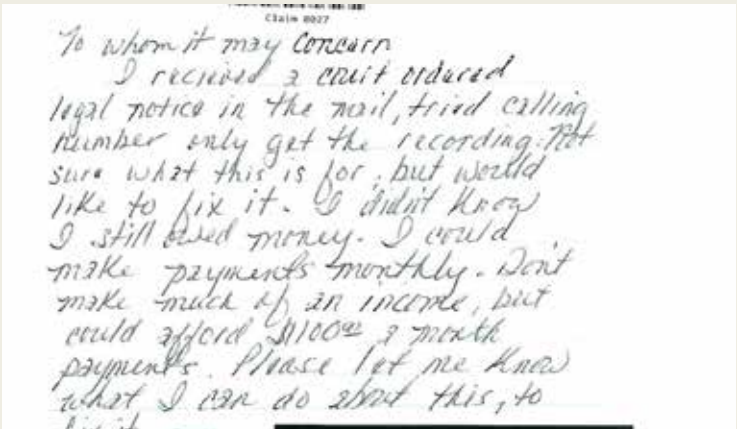
case# 17-33964 (HDH)

Notice ID: 1162547B

I, [redacted] received a postcard stated I have a loan with First Bank of Delaware and is in collection I'm writing this letter to let you know that I have been struggled with my financial for the last two years and currently not working. I have 4 dependents and I'm a single mom. I will start my part time job in March 16, 2018. I wonder if I can start making minimum payment till I pay off the loan. You may contact me by mail or email at

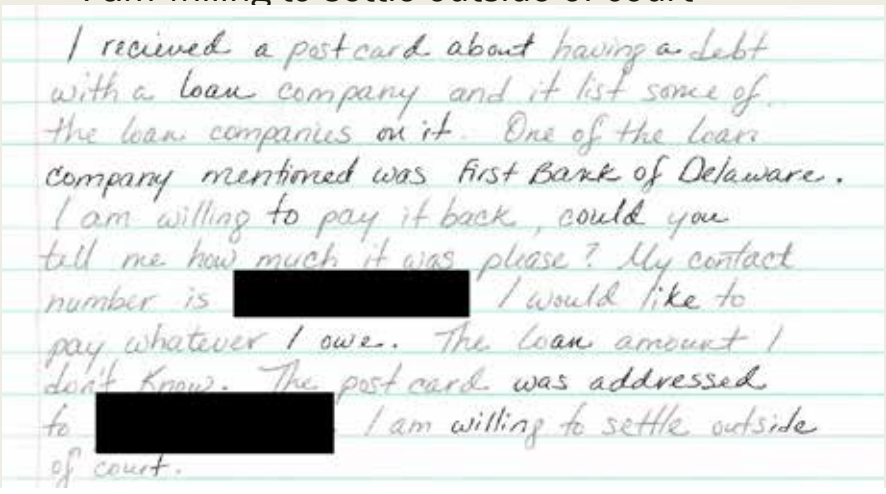
consumer responses
to the bar date order

"I didn't know I still owed money"


To whom it may Concern
I received a court ordered legal notice in the mail, tried calling number only get the recording. Not sure what this is for, but would like to fix it. I didn't know I still owed money. I could make payments monthly. Don't make much of an income, but could afford $100.00 a month payments. Please let me know what I can do about this, to

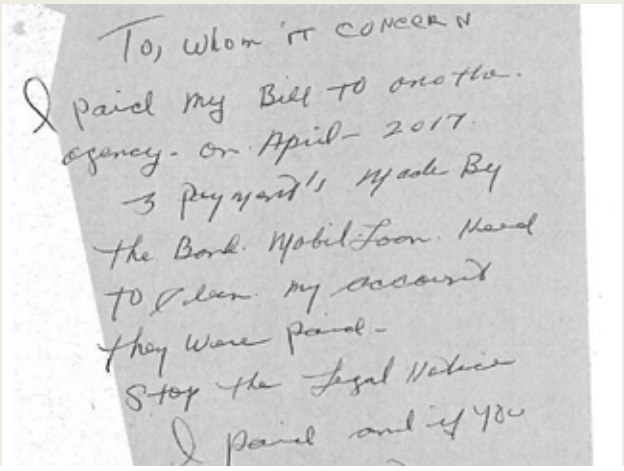
consumer responses
to the bar date order

"I am willing to settle outside of court"


I received a postcard about having a debt with a loan company and it list some of the loan companies on it. One of the loan company mentioned was First Bank of Delaware. I am willing to pay it back, could you tell me how much it was please? My contact number is [redacted] I would like to pay whatever I owe. The loan amount I don't know. The postcard was addressed to [redacted] I am willing to settle outside of court.

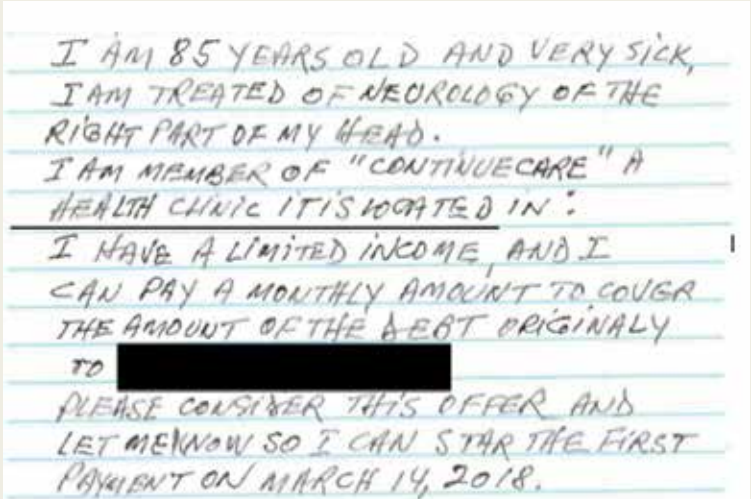
consumer responses
to the bar date order

"I paid my bill"


To, whom it concern
I paid my Bill to another agency. on April- 2017.
3 payments, Made By the Bank. Mobil Loan. Need to clean my account they were paid-
Stop the legal Notice
I paired and if you

consumer responses
to the bar date order

"Let me know so I can start the first payment"


I AM 85 YEARS OLD AND VERY SICK, I AM TREATED OF NEUROLOGY OF THE RIGHT PART OF MY HEAD.
I AM MEMBER OF "CONTINUECARE" A HEALTH CLINIC IT IS LOCATED IN:
I HAVE A LIMITED INCOME, AND I CAN PAY A MONTHLY AMOUNT TO COVER THE AMOUNT OF THE DEBT ORIGINALY TO [redacted]
PLEASE CONSIDER THIS OFFER AND LET ME KNOW SO I CAN STAR THE FIRST PAYMENT ON MARCH 14, 2018.

consumer responses

to the bar date order

"Are they trying to sue me"

Jeffrey Pirrung

From: Jeffrey Pirrung
Sent: Tuesday, December 12, 2017 8:24 AM
To: [redacted]
Subject: RE: Think finance

They are not trying to sue you. The FAQs are written to provide you with the reasons you received the card.

NOTICE: The information transmitted in this e-mail, including any attachments, may contain information that is proprietary or confidential and is intended solely for the individual or entity to which it is addressed. If you are not the intended recipient of this message, any unauthorized use, retention, dissemination, forwarding, printing or copying of this message is prohibited. If you have received this communication in error, Please delete it from your system and notify the sender by return e-mail or by telephone.

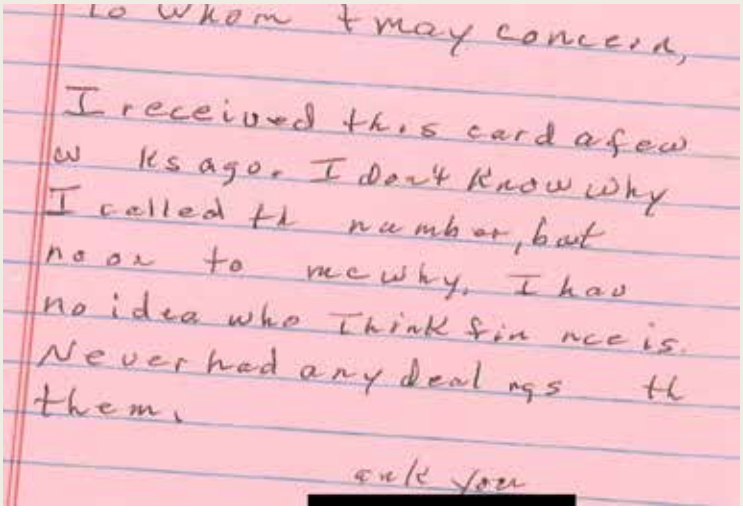
-----Original Message-----
From: [redacted]
Sent: Tuesday, December 12, 2017 8:22 AM
To: Jeffrey Pirrung <jeff.pirrung@americanlegalclaims.com>
Subject: Re: Think finance

Thank you for writing me back. I'm just confused on what this means? Are they trying to sue me? The FAQ didn't answer my questions.

consumer responses

to the bar date order

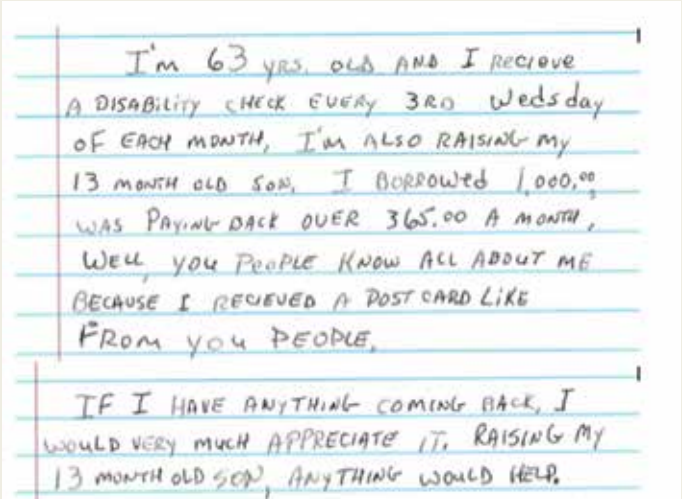
"No idea who Think Finance is"



consumer responses

to the bar date order

"If I have anything coming back, I would very much appreciate it"



I'm 63 yrs. old and I recieve a disability check every 3rd Wedsday of each month, I'm also raising my 13 month old son. I borrowed 1,000.00, was paying back over 365.00 a month, Well, you people know all about me because I recieved a post card like from you people.

If I have anything coming back, I would very much appreciate it. Raising my 13 month old son, anything would help.

consumer responses

to the bar date order

"respond in English"

From: Paget, Justin F. [/O=HUNTON/OU=US/CN=RECIPIENTS/CN=12745]
Sent: 2/23/2018 4:23:16 PM
To: Jeffrey Pirrung [jeff.pirrung@americanlegalclaims.com]
Subject: RE: Question

I think you should respond in English.

From: Jeffrey Pirrung [mailto:jeff.pirrung@americanlegalclaims.com]
Sent: Friday, February 23, 2018 11:19 AM
To: Paget, Justin F.
Subject: RE: Question

Yes.

From: Paget, Justin F. [mailto:jpaget@hunton.com]
Sent: Friday, February 23, 2018 11:18 AM
To: Jeffrey Pirrung <jeff.pirrung@americanlegalclaims.com>
Subject: RE: Question

You mean should you respond in Spanish?

debtors' narrative fostered
to consumer confusion

Failed to identify lending entities

- *Only identified the tribal lending entities*
- *Indicated had sovereign immunity*
- *PIRRUNG: Plain Green, Great Plains and Mobiloans not added to website until after deadline passed*

"We are not a lender or debt collector."

- *Information in FAQs*
- *Information on Website*

debtors response
to consumer confusion

No Telephonic Options

- Had to listen to entire 2:30 minute Voicemail Before Can Respond
- Can Only Leave Name and Address – no Freeform Messages
- No Live Operator
- No Choice Phone Tree
- Outsourced from ALCS
- No Recordings Maintained

debtors response
to consumer confusion

failed to answer specific questions

- *referred telephone inquiries to the FAQs of the website*
- *provided a "canned response"*

provided no language accommodations

- *responded in English to Spanish speakers*
- *Insert exhibit*

OUTCOME

did the bar date order provide adequate notice?

- Many things could have been done better
  - *Online form*
  - *Too many steps to for consumers to accomplish claim*
- Claims Rate of Under 1%
  - *Eric Schacter- exceedingly low*
  - *Dr. Wheatman- not surprised with the notice*
- Testified it was an "exceedingly low claims rate'
  - *Typical claims rate: 5-20%*

OUTCOME

did the bar date order provide adequate notice?

- "If, as the district court said, filing a proof of claim is so simple that a child can do it then the proof-of-claim and opt-out methods should produce roughly the same outcome"

In re Am. Reserve Corp., 840 F.2d 487, 489 (7th Cir. 1988)

- SCHACHTER: "Based on my experience in claims administration, a claim rate of less than .5 percent through a direct mail and email notice program would never be deemed by a court to evidence effective notice to a class."

"Costs of Information" Explain Low Claim Rate and Support Class Device

- [But], "if, as we think, the costs of information lead many legitimate claimants not to file on their own, then the class device is superior[.]"

Matter of Am. Reserve Corp., 840 F.2d 487, 489 (7th Cir. 1988)

PREJUDICE

TO THE CONSUMER BORROWERS

"The combination of contingent claims (which many people may not identify as something they are entitled to pursue) and the effort needed to decide whether to pursue an identified claim means that for many small claims,

it is class actions or nothing."

In re American Reserve Corp., 840 F.2d 487 (7th Cir. 1988).

There is Prejudice to Putative Class

- More than 99.5% would get nothing
- Never understood rights that each consumer gave up
- Do not understand potential claims
- Complicated legal claims where debtors business model obscures its role as lender
  - *Intended to conceal*
  - *Uncovered in 2014 with CFPB investigation/PA AG lawsuit*

Class proceedings needed to avoid prejudice to consumers

- All participants in the bankruptcy should be treated fairly
- Consumers Need an Advocate
  - *Understand Claims and Rights Given Up*
- "this notice did not achieve the principal benefit of a class action device"
- Even though there is no fee to file claims in bankruptcy, the opportunity costs of the time needed to investigate and decide whether to file may be substantial, especially because Bankruptcy Rule 9011(a) (a parallel to Fed.R.Civ.P. 11) requires every claimant to investigate the facts and do necessary legal research before filing. *Matter of Am. Reserve Corp.*, 840 F.2d 487, 489 (7th Cir. 1988)
- Understanding the Claim
  - *Giving Consumers the opportunity or ability to participate*

ADMINISTRATION OF THE ESTATE

"Persons holding small claims . . . are no less creditors under the Code than someone with a large easily filed claim. Applying Rule 23 to filing procedures will bring all claims forward, as contemplated by the Bankruptcy Code."

In re Charter Co., 876 F.2d 866, 871 (11th Cir. 1989).

Class Device will facilitate effective/streamlined administration

- Otherwise confront objections to over 4,000 pro se claims
- Lack of notice threatens discharge of individual claims
- Prior to transfer already moved to certify class against Rees/GPLS
- Adversary Proceedings
  - *Adversaries in VA/FL/CA*
  - *Necessary for Injunctive Relief*
  - *Other "enterprise" participants- GPLS, VPC entities, Rees have adversaries transferred here*
  - *Same claims*
  - *Issues will be litigated regardless*
  - *Can all be litigated together*
- Class Claims are more streamlined than individual objections

Impact on Administration of the Estate

- Government Actors Still Have Claims
  - *PA*
  - *CFPB- 17 Subject States*
  - *Not representing CA/FL/VA Consumers*
- 1/3 of lending volume from those states

Ensures fair treatment of all creditors

NO PREJUDICE TO OTHER CREDITORS OR DEBTORS

"[C]lass claims foster broader creditor participation in distributions and equal treatment of class members. Thus allowing class proofs of claim improves a debtor's fresh start and fosters equality of treatment of creditors, both major goals of Congress.

In re Craft, 321 B.R. 189, 195 (Bankr. N.D. Tex. 2005)

prejudice to others

There is no evidence that class proceedings will prejudice other creditors.

- Government Agencies
  - *Different States/Streamline Process*
- Other RICO Participants
  - *Taken no position opposed*
  - *Would be unfair to treat differently*
  - *Adversaries pending*
- Trade Debt Creditors
  - *Under 10 million in debt*
  - *Not opposed to this relief*

prejudice to others

There is no evidence that class proceedings will prejudice other creditors.

- Consumers who filed proof of claims
  - *Florida Consumer- asserting FDCPA/FCRA Claims*
  - *"Debtors are not debt collectors"*
  - *Debtors do not report to CRAs- reported in name or Great Plains or Plain Green or MobiLoans*
  - *California Consumer- asserting false advertising*
  - *No such statutory claim*
- Problems with Entry of Claim Register
  - *Consumers estimated amount*
  - *Debtors entered no value*
- Summarily rejected because could not articulate claims

DETERRENCE OF WRONGDOING

"The class action provides compensation that cannot be achieved in any other way . . . the device still serves a deterrent function by ensuring that wrongdoers bear the costs of their activities."

In re American Reserve Corp., 840 F.2d 487 (7th Cir. 1988).

Deterrence is Necessary

- *"American Reserve,* the seminal case on this issue[.]" *In re Computer Learning Centers, Inc.*, 344 B.R. 79, 85 (Bankr. E.D. Va. 2006)
- Cited in *In re TWL Corp.*, 712 F.3d 886, 899 (5th Cir. 2013)
- Cited in *In Re Craft* 321 B.R. 189, 193 (B.C.N.D.Tex. 2005)]

Think Finance is Still Undeterred

TESTIMONY OF STEPHEN SMITH

Q. Since the initiation of the lawsuits against Think Finance, have you yourself issued any directives to the company to change the way in which it conducts its business with relation to servicing of consumer loans for tribal entities?

A. No.

- Stephen Smith testified continued to operate after the NY AG lawsuit challenging whether state law applies

Debtors Continue to Harm Consumers

- Debtors continue to engage in similar wrongdoing
- Continued to operate after CFPB started investigation in 2014 and PA AG filed lawsuit in 2014
- Debtors only business is consumer lending
- Participated in Circle of Nations lending enterprise during the bankruptcy
  - *TF Investments*
- Debtors continue to engage in the alleged illegal enterprise
  - *Collecting Debts*
  - *Briggs Declaration, October 23, 2017 [Dkt. No. 12]*

Sample Letter- Letter to AUST requesting formation of Consumer Committee

KELLETT & BARTHOLOW PLLC
KAREN L. KELLETT
THEODORE O. BARTHOLOW, III ("THAD")
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April 8, 2019

Via Electronic Mail

William K. Harrington
United States Trustee for Region 2
201 Varick Street, Room 1006
New York, NY 10014
Attn: Greg M. Zipes, Benjamin J. Higgins

Re: *In re Ditech Holding Corp.* Case No. 19-4012 (and associated cases) - Request for Appointment of Official Committee of Consumer Creditors, or, in the alternative, for modification of the composition of the Official Committee of Unsecured Creditors to add and/or substitute consumer borrower creditors for current committee members.

Dear Messrs. Harrington, Zipes, and Higgins:

As our objection (on behalf of our clients, Richard and Gail Legans) to the Debtors' notice of presentment regarding a proposed extension of the claims filing bar date in this case indicates, my firm represents several consumer creditors of the Debtors in the above-referenced consolidated Chapter 11 bankruptcy cases, including but not limited to Mr. and Mrs. Legans, Grace Carleton, Joe Martinez, Matthew and Jazmin Bennett, and Dawn Davis.

Each of our clients has a mortgage loan that Ditech Financial LLC ("Ditech") serviced pre-petition, and each of our clients has claims against Ditech based on its illegal pre-petition loan servicing and accounting practices. However, only Mr. Martinez, Ms. Carleton, and Ms. Davis have loans currently serviced by Ditech. The servicing rights for the Legans' mortgage loan were transferred[1] to another servicer prepetition, and the servicing rights for the Bennetts' loan were transferred post-petition (February 2019). Out of this group, only Mr. and Mrs. Legans had active litigation pending against Ditech debtor entities prior to the Debtors' filing of their Chapter 11 petitions. We have also been in contact with counsel for several other consumer creditors of the

[1] The Legans received a letter from Ditech in November of 2017 indicating that servicing for their mortgage loan was being transferred from Ditech to BSI Financial Services ("BSI") effective December 1, 2017. It is unclear what caused the servicing rights for the Legans' loan to be transferred from Ditech to BSI at that time. Even more questionable, according to the allegations in the Legans' Adversary Proceeding pending (though currently stayed) in the Bankruptcy Court for the Northern District of Texas (Chief Bankruptcy Judge Barbara J. Houser presiding), are the otherwise undisclosed amounts assessed to the Legans' loan during their Chapter 13 case by Ditech and Ditech's predecessor servicers, which BSI has continued to attempt to collect from the Legans.

Ditech debtor entities who also support our request[2] that the United States Trustee either establish an Official Committee of Consumer Creditors in this case, or, in the alternative, materially modify the composition of the existing Official Committee of Unsecured Creditors so that the Debtors' consumer creditors' interests may be adequately heard and represented in this case.

We are submitting this request to you because our consumer creditor constituents, none of whom chose to do business with the Debtors, are the most vulnerable and have the least financial means available to them of all of the Debtors' creditors. Moreover, the Debtors' plan's provisions threaten substantial harm to our constituents, insofar as Debtors seek to use their plan discourage and/or eliminate consumer creditors' challenges to illegally-assessed charges Debtors added to consumers' accounts and other improper loan servicing and accounting practices, which have caused consumer creditors' accounts to be overstated and inaccurate.

It is our understanding that Debtors' illegal accounting practices have already caused some consumer creditors to lose their homes. If Ditech succeeds in confirming a plan that leaves consumer creditors without any meaningful and enforceable remedies, this bankruptcy will cause yet more consumer borrowers to unfairly and unlawfully be deprived of their homes. Debtors' improper loan servicing and accounting practices also cause significant harm to consumer borrowers' credit, which harm will be all-but-impossible to prevent if consumers' statutory enforcement rights under the Fair Credit Reporting Act are eliminated by plan confirmation and/or discharge in this case.

Perhaps most perversely, Debtors' efforts to collect these illegal amounts violates the borrowers' discharge injunctions entered by bankruptcy courts around the nation in borrowers' Chapter 13 cases. As this court is well-aware, Chapter 13 debtors work hard, making bankruptcy payments for up to five years before they earn their Chapter 13 discharges. By contrast, in this Chapter 11 case, Debtors are attempting to obtain a discharge injunction in a matter of months, that would immunize them and their successors-in-interest for past and future violations of their consumer borrowers' prior discharge injunctions. Further violations of the borrowers' discharge injunctions will inevitably result, as the Amended Plan and its pre-petition Disclosure Statement are conspicuously devoid of any proposal that would address Debtors' improper pre-petition loan servicing and accounting practices.

Establishing an Official Consumer Creditors' Committee for this case and/or making substantial changes to the composition of the membership of the Official Unsecured Creditors' Committee in this case is therefore critical, not just to protect the consumer creditors' interests, but also to educate the Court and all legitimate creditors regarding Debtors' servicing and accounting

[2] These consumer creditors attorneys include Tara Twomey, Dale W. Pittman and Thomas D. Domonoske (on behalf of Robert and Sally Hall), Thomas A. Cox (on behalf of Peter and Marguerite Dittmann), Kristi C. Kelly (on behalf of Victor Ramalheira, Oriana Romero-Sosa, and Alejandro Abencia), Tavian M. Mayer (on behalf of Chris Alan and Samantha Jane Prior), Gabriel J. Waddell (on behalf of Richard and Jackie Orozco), Jack S. Tenenbaum (on behalf of Dorothy Harris), Daniel Lindsey (on behalf of Earlean Danzy), Adam J. Feur (on behalf of Raknikant Jani), Brandi L. Snyder (on behalf of creditors Barnwell and Frye), and Jacob D. DeGraaff (on behalf of Michael Thomas), all of whom are copied on the email transmitting this letter to you.

practices. In order to properly assess the value of the Debtors' assets, the stakeholders need to determine the effect of Debtors' improper servicing and accounting practices on the Debtors' financials and the extent that Defendants' servicing portfolios are infested with improper charges and fees that are not factored into the financial disclosures by the Debtors in this case.

Without meaningful input from consumer creditors, Debtors' efforts to hide the vast scope of their servicing and related accounting misconduct will be significantly more likely succeed, and the consumer creditors, as well as Debtors' unwitting investors and other good faith participants in this case will be needlessly harmed. We therefore submit that all of the good faith stakeholders in this case will benefit from the consumer creditors' participation, and the consumer creditors need to be given an opportunity to protect their own interests through participation in this case.

Appointment of an Official Committee of Consumer Creditors

Section 1102(a)(2) of the Bankruptcy Code provides that "[o]n request of a party in interest, the court may order the appointment of additional committees of creditors or equity security holders if necessary, to assure adequate representation of creditors or of equity security holders. The United States Trustee shall appoint any such committee."[3] Here, appointment of a separate official committee is necessary to assure adequate representation of the unique interests of Consumer Creditors.

If courts determine that "the appointment of an additional committee is necessary to assure the movants are adequately represented" the court will then inquire as to "whether it should exercise its discretion and order the appointment." Among the factors considered by courts in determining whether to exercise their discretion and direct the appointment of an additional committee are (i) whether the moving party has an economic interest on account of which it will receive a distribution under the case; (ii) the time of the application; (iii) the potential for added complexity and cost; (iv) the presence of other avenues for creditor participation.[4]

The Consumer Creditors Currently Are Not Adequately Represented in this Chapter 11 Case

The Official Unsecured Creditors' Committee ("OUCC") cannot adequately represent the interests of the Consumer Creditors in this case, which are significantly and substantively different from the interests of the other unsecured creditor constituents of the existing Committee. While the Consumer Creditors understand that "dissident factions of the same class of creditors are not automatically entitled to separate committees," these Chapter 11 Cases present unique circumstances in which the interests of the members of the OUCC and Consumer Creditors are not aligned.

[3] 11 U.S.C. § 1102(a)(2); *In re First RepublicBank Corp.*, 95 B.R. 58, 59 (Bankr. N.D. Tex. 1988); *see also, In re Semcrude LP*, Case No. 08-11525 (BLS), Order dated Oct. 15, 2008 [Doc. No. 1774].

[4] *See*, e.g., *Enron*, 279 B.R. at 685; *In re Spansion Inc.*, 421 B.R. 151, 156 (Bankr. D. Del. 2009).

If the claims of Consumer Creditors are ignored or successfully objected to without an appropriate voice speaking on their behalf, the trade creditors who comprise a majority of the OUCC stand to be paid significantly more than the Consumer Creditors for their unsecured claims. Most Consumer Creditors have likely never needed to file a Chapter 11 claim. They also may not be aware that they even have legal claims against the Debtors. Individually, Consumer Creditors' claims may be too small to provide an economic incentive for Consumer Creditors to retain (or obtain) their own competent counsel to protect their interests. In any event, an influx of individual appearances by thousands of Consumer Creditors would be detrimental to the efficient administration of these Chapter 11 Cases. Appointment of a separate Consumers' Committee would allow the Debtors' victims a dedicated and consolidated voice to adequately represent and protect their interests.

Courts have established official committees of consumer borrowers in similar circumstances.[5] For example, in *In re American Home Mortgage Holdings, Inc.* Case No. 07-11047 (CSS)(Bankr. D. Del. 2007), the court found that inherent conflicts of interest existed that could not be resolved between the consumer borrowers and the members of the unsecured creditor committee. At the October 8, 2008 hearing on the motion requesting appointment of a consumer borrowers' committee, the American Home court found that the creditors committee was "inherently conflicted" and was not "adequately representing the borrowers."[6] In authorizing the appointment of a consumer borrowers' committee, the court considered, *inter alia,* (i) "the unique nature of a number of the borrower claims" that were "different from the general nature of the claims of most of the unsecured creditors;" (ii) the numerosity of the claimants (450 borrowers); (iii) that the vast majority of the borrowers would be financially unable to hire counsel; (iv) the "potential for unique remedies on behalf of the borrowers;" and (v) the complexity of the company, which made it inherently "difficult for unsophisticated people familiar with the Bankruptcy Code to figure out what's going on."[7] Each of the factors considered by the American Home court are present in these Chapter 11 Cases.

Similarly, the First Alliance[8] court appointed an official committee of consumer borrowers. In addition to protecting the interests of consumer borrowers throughout the First Alliance bankruptcy case, the consumer borrowers' committee commenced an action against one of the debtor's mortgage securitizers, accusing it of aiding and abetting the debtor's fraud through its knowledge and funding of the debtor's fraudulent practices in connection with its loan structures. A jury agreed, and the Ninth Circuit affirmed. The First Alliance decision demonstrates the importance of having an independent assessment of potential claims against

[5] *See. e.g., In re American Home Mortg. Holdings. Inc.*. Case No. 07- 11047 (CSS)(Bankr. D. Del. 2007); *Henry v. Lehman Commer Paper. Inc. (In re First Alliance Mortg,)*, 471 F.3d 977 (9th Cir. 2006).

[6] Motion to Appoint Consumer Borrower Committee Hr'g Tr. at 76, *In re American Home Mortg. Holdings, Inc.* Case No. 07- 11047 (CSS)(Bankr. D. Del. 2007).

[7] Motion to Appoint Consumer Borrower Committee Hr'g Tr. at 76-78, *In re American Home Mortg. Holdings. Inc.*, Case No. 07-11047 (CSS)(Bankr. D. Del. 2007).

[8] *Henry v. Lehman Commer. Paper, Inc. (In re First Alliance Mortg.)* 471 F.3d 977 (9th Cir. 2006).

creditors. In these Chapter 11 Cases, just as in First Alliance, lenders, third party servicers, and other creditors of the Debtors will undoubtedly seek to maximize the value of the loans on which Consumer Creditors are allegedly liable and to minimize the liabilities attached, which would primarily benefit Debtors' secured creditors and its "go forward" trade creditors. A dedicated consumers' committee pursuing Consumer Creditors' claims against the Debtors and related non-debtor entities would provide a better opportunity for maximizing the Debtors' estate and the resulting return for general unsecured creditors.

Significantly, the requesting Consumer Creditors are not impugning the motives or intent of the OUCC or its counsel. As was the case in American Home, the Consumer Creditors trust that the OUCC has been "diligently representing the interests of general unsecured creditors as a general matter."[9] However, as was also the case in American Home, the inherent conflicts in the positions of these creditor constituents is unavoidable and needs to be addressed through the formation of a separate official Consumer Creditors' Committee.

Accordingly, notwithstanding the appointment of the OUCC, the Consumer Creditors submit that the divergent interests at play in these Chapter 11 Cases prevent the OUCC from serving as an adequate or appropriate steward for Consumer Creditors.

The Consumer Creditors Will Have an Actual Economic Interest in a Distribution if Their Claims Against Debtors and Other Non-Debtor entities are Successful.

An additional committee may be appointed where the moving party has an economic interest likely to receive a distribution in accordance with the absolute priority rule.[10] The Debtors' servicing and sub-servicing agreements require that Debtors maintain errors and omissions insurance, which have not been tapped (or disclosed) in this case. Moreover, insofar as Debtors' misconduct has been assisted, compounded, enabled, or perpetrated by non-debtor entities, those parties would have resources that could be contributed to the Debtors' estate and/or applied toward the Consumer Creditors' claims.

Appointment Will Reduce the Cost and Complexity of Resolving Consumer Creditor-Related Issues.

While the Consumer Creditors realize the appointment of a committee requires the estates' payment of other professionals, any such cost will be evaluated by your office and the Court. Moreover, allowing the Consumer Creditors to form an official committee will coalesce the Consumer Creditors' strategy and position in these Chapter 11 Cases and thus is likely to prevent the Debtors and the OUCC from having to review and respond to multiple pleadings by different groups of Consumer Creditors. Absent the appointment of an official committee,

[9] Motion to Appoint Consumer Borrower Committee Hr'g Tr. at 61, *In re American Home Mortg. Holdings, Inc.*, Case No. 07-11047 (CSS)(Bankr. D. Del. 2007).

[10] *See*, e.g., *In re Spansion Inc.*, 421 B.R. 151, 156 (Bankr . D. Del. 2009).

individual Consumer Creditors or smaller groups thereof will be required to file motions and objections throughout this case in order to protect their interests, wasting estate and judicial resources.

As stated by the Semcrude Court, "... there is no question ... or guarantee that the appointment of a producers' committee will limit the amount of litigation in these cases or will otherwise curtail the actions of individual producers. But experience suggests that that may occur here and thus holds out the prospect that the debtors and other parties will benefit from having a single voice within whom to negotiate on at least some important issues."[11]

Time is of the Essence for Appointment.

While the requesting Consumer Creditors understand and appreciate that the United States Trustee's decision whether to appoint a committee is the product of deliberation, please note that the decision whether to appoint an official committee of consumer creditors in these cases is highly time-sensitive.

Conclusion

The requesting Consumer Creditors are aware that parties seeking the appointment of a committee bear the burden of persuasion. Based upon the facts of these Chapter 11 Cases and the inherent conflict between the interests of various members of the OUCC, the significant economic interests of Consumer Creditors, the number of Consumer Creditors, and the lack of any other party to jointly represent their interests, we respectfully submit that the appointment of a committee is warranted and appropriate.

If you have any questions, or would like to discuss further, please do not hesitate to contact me.

Sincerely,

KELLETT & BARTHOLOW PLLC

Theodore O. Bartholow II ("Thad")
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11300 N. Central Expressway., Suite 301
Dallas, Texas 75243
Phone: (214) 696-9000

[11] Semcrude, Oct. 3, 2008 Hearing Tr., p. 143.

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Thomas A. Cox (on behalf of Peter and Marguerite Dittmann), tac@gwi.net
Kristi C. Kelly (on behalf of Victor Ramalheira, Oriana Romero-Sosa, and Alejandro Abencia), kkelly@kellyguzzo.com
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Brandi L. Snyder (on behalf of creditors Barnwell and Frye), brandi.snyder.law@gmail.com
Jacob D. DeGraaff (on behalf of Michael Thomas), jacobd@hdm-legal.com
Sunny Singh, sunny.singh@weil.com (on behalf of Debtors)
Gaby Smith, gaby.smith@weil.com (on behalf of Debtors)
Bradford J. Sandler (on behalf of Official Unsecured Creditors Committee), bsandler@pszjlaw.com

Hearing Date and Time: May 14, 2019 at 11:00 a.m. (Eastern Time)
Objection Date and Time: May 13, 2019 at 4:00 p.m. (Eastern Time)

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Sunny Singh

Attorneys for Debtors
and Debtors in Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11**
DITECH HOLDING CORPORATION, *et al.*,	:	**Case No. 19-10412 (JLG)**
Debtors.[1]	:	**(Jointly Administered)**

NOTICE OF HEARING ON MOTION OF DEBTORS FOR ENTRY OF AN ORDER (I) DISBANDING THE OFFICIAL COMMITTEE OF CONSUMER CREDITORS APPOINTED BY THE U.S. TRUSTEE OR, ALTERNATIVELY, (II) LIMITING THE SCOPE OF SUCH COMMITTEE AND CAPPING THE FEES AND EXPENSES WHICH MAY BE INCURRED BY SUCH COMMITTEE

PLEASE TAKE NOTICE that a hearing on the annexed motion (the "**Motion**"), of Ditech Holding Corporation (f/k/a Walter Investment Management Corp.) and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "**Debtors**"), for entry of an order pursuant to sections 105(a) and 1102(a) of

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are Ditech Holding Corporation (0486); DF Insurance Agency LLC (6918); Ditech Financial LLC (5868); Green Tree Credit LLC (5864); Green Tree Credit Solutions LLC (1565); Green Tree Insurance Agency of Nevada, Inc. (7331); Green Tree Investment Holdings III LLC (1008); Green Tree Servicing Corp. (3552); Marix Servicing LLC (6101); Mortgage Asset Systems, LLC (8148); REO Management Solutions, LLC (7787); Reverse Mortgage Solutions, Inc. (2274); Walter Management Holding Company LLC (9818); and Walter Reverse Acquisition LLC (8837). The Debtors' principal offices are located at 1100 Virginia Drive, Suite 100, Fort Washington, Pennsylvania 19034.

chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**") (i) disbanding the official committee of consumer creditors appointed by the U.S. Trustee (the "**Consumer Creditors' Committee**") or, alternatively, (ii) if the Court determines not to disband the Consumer Creditors' Committee, limiting such committee's scope and capping the fees and expenses which may be incurred by such committee and its professionals, all as more fully set forth in the Motion, will be held before the Honorable James L. Garrity, Jr., United States Bankruptcy Judge, at the United States Bankruptcy Court for the Southern District of New York, Courtroom 601, One Bowling Green, New York, New York 10004 (the "**Bankruptcy Court**") on **May 14, 2019 at 11:00 a.m. (Eastern Time)** (the "**Hearing**"), or as soon thereafter as counsel may be heard.

PLEASE TAKE FURTHER NOTICE that any responses or objections (the "**Objections**") to the Motion shall be in writing, shall conform to the Bankruptcy Rules and the Local Rules, shall be filed with the Bankruptcy Court (i) by attorneys practicing in the Bankruptcy Court, including attorneys admitted *pro hac vice*, electronically in accordance with General Order M-399 (which can be found at www.nysb.uscourts.gov), and (ii) by all other parties in interest, on a CD-ROM, in text-searchable portable document format (PDF) (with a hard copy delivered directly to Chambers), in accordance with the customary practices of the Bankruptcy Court and General Order M-399, to the extent applicable, and shall be served in accordance with the *Order Implementing Certain Notice and Case Management Procedures* (ECF No. 211) (the "**Case Management Order**"), so as to be filed and received no later than **May 13, 2019 at 4:00 p.m. (Eastern Time)** (the "**Objection Deadline**").

PLEASE TAKE FURTHER NOTICE that if no Objections are timely filed and served with respect to the Motion, the Debtors may, on or after the Objection Deadline, submit to

the Bankruptcy Court an order substantially in the form of the proposed order annexed to the Motion, which order may be entered without further notice or opportunity to be heard.

PLEASE TAKE FURTHER NOTICE that any objecting parties are required to attend the Hearing, and failure to appear may result in relief being granted upon default.

Dated: May 8, 2019
New York, New York

/s/ Sunny Singh
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
Ray C. Schrock, P.C.
Sunny Singh

Attorneys for Debtors
and Debtors in Possession

Example- Motion to Disband Consumer Creditors Committee (Ditech)

Hearing Date and Time: May 14, 2019 at 11:00 a.m. (Eastern Time)
Objection Date and Time: May 13, 2019 at 4:00 p.m. (Eastern Time)

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Ray C. Schrock, P.C.
Sunny Singh

Attorneys for Debtors
and Debtors in Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11**
DITECH HOLDING CORPORATION, *et al.*,	:	**Case No. 19-10412 (JLG)**
Debtors.[1]	:	**(Jointly Administered)**

MOTION OF DEBTORS FOR ENTRY OF AN ORDER (I) DISBANDING THE OFFICIAL COMMITTEE OF CONSUMER CREDITORS APPOINTED BY THE U.S. TRUSTEE OR, ALTERNATIVELY, (II) LIMITING THE SCOPE OF SUCH COMMITTEE AND CAPPING THE FEES AND EXPENSES WHICH MAY BE INCURRED BY SUCH COMMITTEE

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Ditech Holding Corporation (f/k/a Walter Investment Management Corp.) and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "**Debtors**") file this motion (the "**Motion**") for entry of an order pursuant to

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are Ditech Holding Corporation (0486); DF Insurance Agency LLC (6918); Ditech Financial LLC (5868); Green Tree Credit LLC (5864); Green Tree Credit Solutions LLC (1565); Green Tree Insurance Agency of Nevada, Inc. (7331); Green Tree Investment Holdings III LLC (1008); Green Tree Servicing Corp. (3552); Marix Servicing LLC (6101); Mortgage Asset Systems, LLC (8148); REO Management Solutions, LLC (7787); Reverse Mortgage Solutions, Inc. (2274); Walter Management Holding Company LLC (9818); and Walter Reverse Acquisition LLC (8837). The Debtors' principal offices are located at 1100 Virginia Drive, Suite 100, Fort Washington, Pennsylvania 19034.

sections 105(a) and 1102(a) of chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**") (i) disbanding the official committee of consumer creditors appointed by the U.S. Trustee (the "**Consumer Creditors' Committee**") or, alternatively, (ii) if the Court determines not to disband the Consumer Creditors' Committee, limiting such committee's scope solely to the treatment of consumer borrower claims under the Plan[2] (as defined below) or a Sale Transaction, and capping the fees and expenses which may be incurred by such committee and its professionals to $250,000 in the aggregate. In support of the Motion, the Debtors respectfully represent as follows:

Preliminary Statement

1. The Debtors are at a critical stage of their chapter 11 cases. They are actively marketing and seeking bids for substantially all of their assets, all with the goal of maximizing value for their creditors and stakeholders. At the same time, the Debtors continue to run a large, complex, and heavily regulated business in chapter 11 to, among other things, preserve the option for a Reorganization Transaction—an unprecedented endeavor. While the Debtors have the support of the Ad Hoc Term Lender Group, successful completion of these chapter 11 cases in a reasonable timeframe is incredibly challenging, especially given the circumstances of these chapter 11 cases and the Debtors' industry.

2. On May 10, 2019, the Debtors will seek an order from this Court for approval of their disclosure statement. Ahead of the disclosure statement hearing, following weeks of extensive negotiations, the Debtors have reached a settlement in principle with the official committee of unsecured creditors (the "**Creditors' Committee**") previously appointed in

[2] Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to such terms in the First Day Declaration (as defined below) or the *Joint Chapter 11 Plan of Ditech Holding Corporation and its Affiliated Debtors* [ECF No. 145] (as may be further amended, modified, or supplemented, the "**Plan**"), as applicable.

these chapter 11 cases. The settlement in principle with the Creditors' Committee is the result of a long process of good faith discussions and arms' length negotiations between the Debtors, the Ad Hoc Group of Term Lenders, and the Creditors' Committee, all represented by experienced and competent attorneys and financial advisors.

3. On May 2, 2019—less than two weeks after the U.S. Trustee's decision to expand the Creditors' Committee and include two additional consumer creditors on the Creditors' Committee (instead of appointing an additional consumer creditors' committee), and one week before the Debtors' disclosure statement hearing—the United States Trustee for Region 2 (the "**U.S. Trustee**"), following two letters requesting the appointment of an official consumer creditors' committee and a letter from the Debtors requesting that the U.S. Trustee not appoint a new committee,[3] decided to appoint an additional creditors' committee—the Consumer Creditors' Committee.

4. The U.S. Trustee's decision to appoint a separate official committee of consumer creditors at this stage of the chapter 11 cases—when the Debtors are in the middle of a bidding and sale process and have just reached a settlement in principle with the Creditors' Committee, and merely a week before the Debtors' disclosure statement hearing—is patently unreasonable and unwarranted. The consumer creditors' interests are already more than adequately represented by the Creditors' Committee in these chapter 11 cases. The Creditors' Committee has a fiduciary obligation to all general unsecured creditors. The Creditors' Committee is represented by competent and experienced legal and financial professionals, and

[3] *See* letter filed by J. Samuel Tenenbaum of the Investor Protection Center at Northwestern University School of Law, dated April 19, 2019 [ECF No. 429] and the letter filed by Mr. Wayne M. Greenwald, dated April 23, 2019 [ECF No. 449]. A copy of the Debtors' letter to the U.S. Trustee is attached hereto as **Exhibit B**.

the Creditors' Committee has engaged actively on a broad range of issues in these chapter 11 cases since its appointment. The appointment of the Consumer Creditors' Committee at this stage could introduce unnecessary complexity and delay these chapter 11 cases and impose unnecessary incremental costs on the estates. It will also cast a shadow on the bidding and sale process, and may jeopardize the entire reorganization of the Debtors' businesses to the detriment of all stakeholders. Respectfully, such a decision—so close on the heels of appointing two members to the Creditors' Committee and the settlement reached thereafter—serves only to harm the Debtors' ability to reorganize. Further, taxing these chapter 11 cases with the costs, expense and delay associated with the appointment of the Consumer Creditors' Committee, in addition to the Creditors' Committee, is unnecessary given the clear facts and circumstances in these chapter 11 cases.

5. Accordingly, the Court should disband the Consumer Creditors' Committee should be disbanded or, alternatively, at a minimum, such committee's scope should be explicitly limited to the treatment of consumer borrower claims under the Plan or a Sale Transaction, and the fees and expenses which may be incurred by such committee and its professionals should be limited to $250,000 in the aggregate.[4]

Relief Requested

6. The Debtors respectfully request, pursuant to sections 105(a) and 1102(a) of the Bankruptcy Code, that this court enter an order (i) disbanding the Consumer Creditors' Committee appointed by the U.S. Trustee or (ii) alternatively, if the Court determines not to disband the Consumer Creditors' Committee, limiting such committee's scope solely to the

[4] Despite the Debtors filing the Motion, the Court should be aware that Debtors' counsel have already met with proposed counsel to the Consumer Creditors' Committee, Quinn Emanuel Urquhart & Sullivan, LLP. Further, the Debtors have sent the amended disclosure statement and borrower notice to the Consumer Creditors' Committee's proposed counsel for review and comment in advance of the disclosure statement hearing.

treatment of consumer borrower claims under the Plan and imposing a cap on the fees and expenses which may be incurred by such committee and its professionals at $250,000 in the aggregate.

7. A proposed form of order granting the relief requested herein is attached hereto as **Exhibit A** (the "**Proposed Order**").

Background

8. On February 11, 2019 (the "**Commencement Date**"), the Debtors each commenced with this Court a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

9. On February 27, 2019, the U.S. Trustee appointed the Creditors' Committee. On April 22, 2019, the U.S. Trustee appointed two additional members to the Creditors' Committee. On May 2, 2019, the U.S. Trustee appointed the Consumer Creditors' Committee. No trustee or examiner has been appointed in these chapter 11 cases.[5]

10. The Debtors' chapter 11 cases are being jointly administered for procedural purposes only pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**").

11. The Debtors commenced these chapter 11 cases on a prearranged basis and have the support of more than eighty percent (80%) of their term loan lenders. Consistent with their obligations under that certain Restructuring Support Agreement, dated as of February 8, 2019 (the "**RSA**"), the Debtors filed a proposed plan of reorganization on March 5, 2019 [ECF

[5] *See Notice of Appointment of Official Committee of Unsecured Creditors* [ECF No. 127]; *Amended Notice of Appointment of Official Committee of Unsecured Creditors* [ECF No. 444]; Second *Amended Notice of Appointment of Official Committee of Unsecured Creditors* [ECF No. 497]; *Notice of Appointment of Official Committee of Consumer Creditors* [ECF No. 498].

No. 145] and will seek to emerge from chapter 11 on an expedited timeframe. The Debtors filed amended proposed plans of reorganization on March 28, 2019 [ECF No. 315] and April 26, 2019 [ECF No. 469].

12. Information regarding the Debtors' business, capital structure, and the circumstances leading to the commencement of these chapter 11 cases is set forth in the *Declaration of Gerald A. Lombardo Pursuant to Rule 1007-2 of the Local Bankruptcy Rules for the Southern District of New York* (the "**First Day Declaration**"), sworn and filed on the Commencement Date [ECF No. 2].

Jurisdiction

13. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the Amended Standing Order of Reference M-431, dated January 31, 2012 (Preska, C.J.). This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Basis for Relief Requested

14. Section 1102(a)(2) of the Bankruptcy Code provides that "[o]n the request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or equity security holders. The United States trustee shall appoint any such committee." 11 U.S.C. § 1102(a)(2). Unlike the appointment of an official committee of unsecured creditors, which is the norm in almost every case, appointment of additional committees is a disfavored and "extraordinary remedy that courts are reluctant to grant." *See In re Residential Capital, LLC*, 480 B.R. 550, 557 (Bankr. S.D.N.Y. 2012); *In re Dana Corp.*, 344 B.R. 35, 38 (Bankr. S.D.N.Y. 2006) (citing *In re Enron Corp.*, 279 B.R. 671, 685 (Bankr. S.D.N.Y. 2002)).

15. A court may disband a committee under sections 1102 and 105 of the Bankruptcy Code where the committee is not necessary to protect the interests of its constituency, the administrative expense of the committee is not justified, and the presence of the committee is counter-productive to the process of the case. *See In re Pacific Avenue*, LLC, 467 B.R. 868 (Bankr. W.D.N.C. 2012); *see also In re City of Detroit, Michigan*, Case No. 13-53846, (ECF No. 2784) (Bankr. E.D. Mich. Feb. 28, 2014) (finding the court had authority to disband a creditors' committee pursuant to section 105 of the Bankruptcy Code); *In re Delphi Corp*., Case No. 05-44481 (ECF No. 15576) (Bankr. S.D.N.Y. Apr. 23, 2009) (granting disbandment motion brought under sections 105 and 1102 of the Bankruptcy Code).

16. When considering whether to overturn the U.S. Trustee's decision to appoint an additional unsecured creditors' committee and disband such committee, bankruptcy courts typically employ a *de novo* standard of review. *In re Sharon Steel Corp*., 100 B.R. 767, 776 (Bankr. W.D.Pa. 1989) ("[T]he decision of the U.S. Trustee with respect to the appointment of additional official committees. . . is subject to *de novo* review by the Bankruptcy Court in order to determine the adequacy of the representation."); *In re Williams Comm'ns Grp., Inc*., 281 B.R. 216, 219-20 (Bankr. S.D.N.Y. 2002); *In re McLean Industries, Inc*., 70 B.R. 852, 857 (Bankr. S.D.N.Y. 1987) ("legislative history confirms that bankruptcy judges are to determine *de novo*, as they had previously, whether an additional committee is necessary to achieve adequate representation"); *In re Texaco*, 79 B.R. 560, 566 (Bankr. S.D.N.Y. 1987) ("[An] abuse of discretion standard does not apply with respect to the United States Trustee's initial exercise of discretion [to appoint an additional committee] because the concept of adequate representation is a legal issue which must be resolved judicially.").[6]

[6] Some bankruptcy courts have held that the court has the inherent power, as well as the statutory authority under Section 105(a), to review acts of the UST, under an "arbitrary and capricious" or "abuse of discretion" standard of

17. In considering this extraordinary remedy, bankruptcy courts generally employ a two-step process. First, the court determines whether the appointment of an additional committee is indeed necessary to assure the moving creditors are adequately represented. Second, if the answer to the first question is yes, then the court must decide whether it should exercise its discretion and order such appointment. *See Enron Corp.*, 279 B.R. at 685. The burden is on the moving party to prove that the existing committee does not provide adequate representation. *See Dana Corp.*, 344 B.R. at 38; *Enron Corp.*, 279 B.R. at 685; *In re Winn–Dixie Stores, Inc.*, 326 B.R. 853, 857 (Bankr. M.D.Fla. 2005); *In re Dow Corning Corp.*, 194 B.R. 121, 144 (Bankr. E.D.Mich. 1996), *rev'd on other grounds*, 212 B.R. 258 (E.D.Mich. 1997).

18. Despite having discretion to direct the appointment of additional official committees, courts have been reluctant to grant such relief, and have described the "necessary to assure adequate representation" standard as ranging from a "high standard" to requiring a showing that an additional committee is "'absolutely required,' 'essential,' or 'indispensable.'" *See In re Eastman Kodak*, No. 12–10202, 2012 WL 2501071, at *2 (Bankr. S.D.N.Y. June 28, 2012) (*quoting In re ShoreBank Corp.*, 467 B.R. 156, 164–65 (Bankr.N.D.Ill.2012)); *In re Oneida Ltd.*, 351 B.R. 79, 83 (Bankr. S.D.N.Y. 2006).

19. When considering application of the "adequate representation" standard, bankruptcy courts in this district generally consider seven factors in deciding whether to appoint an additional official committee:

(1) the ability of the existing committee to function;

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review. *See, e.g., In re Barney's Inc.*, 197 B.R. 431, 438 (Bankr.S.D.N.Y.1996) (holding that the court reviews the U.S. Trustee's appointment of a committee under an "arbitrary and capricious" standard); *In re JNL Funding Corp.*, 438 B.R. 356, 362 (Bankr. E.D.N.Y. 2010) (finding the "arbitrary and capricious" standard of review applies to the U.S. Trustee's decision to appoint particular creditors to the general unsecured creditors' committee under section 1102(a)(1) of the Bankruptcy Code). As discussed in this Motion, the Debtors submit that, even if the Court reviews the U.S. Trustee's decision to appoint the Consumer Creditors' Committee under an "arbitrary and capricious" standard of review, such decision does not pass muster in these circumstances.

(2) the nature of the case;
(3) the standing and desires of the various constituencies;
(4) the ability of creditors to participate in a case without an additional committee;
(5) the delay and additional cost that would result if the court appoints an additional committee;
(6) the tasks which a separate committee is to perform; and
(7) other factors relevant to the adequate representation issue.

No one factor is dispositive, and the consideration given to each depends on the circumstances of a particular chapter 11 case. *See, e.g., Dana Corp*., 344 B.R. at 38; *Residential Capital*, 480 B.R. at 558.

20. As demonstrated below, application of the governing legal standard to the facts at hand makes it clear that the Consumer Creditors' Committee's appointment in these chapter 11 cases is unwarranted and that the U.S. Trustee's decision to do so was unreasonable, arbitrary and capricious. Accordingly, the Consumer Creditors' Committee should be disbanded.

A. Consumer Creditors' Interests Are Already Adequately Represented By The Creditors' Committee

21. Courts have held that an official creditors' committee "has a fiduciary duty to protect the interests of all unsecured creditors" and that the ability of an official committee to function is a significant factor in the determination of whether a court should order the appointment of another committee. *See Enron*, 279 B.R. at 686; *Mirant Americas Energy Mktg., L.P. v. Official Comm. of Unsecured Creditors of Enron Corp*., No. 02–cv–6274, 2003 WL 22327118, *4 (S.D.N.Y. Oct. 10, 2003); *In re Barney's, Inc*., 197 B.R. 431, 442 (Bankr. S.D.N.Y. 1996). Courts have noted that "[c]reditor committees often contain creditors having a variety of viewpoints (heterogeneous); however, these differing views do not require a separate homogeneous committee unless they impair the ability to reach a consensus. The issue is not whether the Official Committee is an exact replica of the creditor body, but whether representation of various creditor types is adequate." *Dana Corp*., 344 B.R. at 38-39.

"Adequate representation does not require proportionate representation of distinct groups of creditors on a committee of unsecured creditors. The determinative factor is whether the official committee is serving their interests as unsecured creditors. *Residential Capital*, 480 B.R. at 559. Further, while the interests of the official creditors' committee members may not always be aligned, the presence of potential conflict does not always require separate committees for representation to be adequate. *In re McLean Industries, Inc*., 70 B.R. 852, 860 (Bankr. S.D.N.Y. 1987).

22. Indeed, forming a separate committee solely to advance certain individual creditors' claims is not appropriate, because acting as *de facto* counsel for certain creditors would be an impermissible role for an official committee. *See Residential Capital*, 480 B.R. at 558-59 ("[F]orming a Borrowers Committee solely to advance individual borrowers' claims is not appropriate, because acting as *de facto* counsel for borrowers would be an impermissible role for an official committee"); *Mirant*, 2003 WL 22327118, *3 ("The principal purpose of creditors' committees is not to advocate any particular creditor class's agenda, but rather to 'strike a proper balance between the parties such that an effective and viable reorganization of the debtor may be accomplished.'") (quoting *Hills Stores*, 137 B.R. at 7); *see also In re Garden Ridge Corp*., No. 04–10324, 2005 WL 523129, at *4, (Bankr. D. Del. Mar. 2, 2005) (declining to appoint an official committee for landlords because an official committee "is simply not intended to represent individual creditor interests").

23. Accordingly, "in the vast majority of chapter 11 cases, a single committee of creditors has been deemed sufficient." *Residential Capital*, 480 B.R. at 558. *See also, e.g., In re Sharon Steel Corp*., 100 B.R. 767, 777–78 (Bankr. W.D.Pa. 1989) (explaining that a single creditors committee is the norm and appointment of additional committees is an extraordinary

remedy); *In re Residential Capital, LLC*, 480 B.R. 550 (Bankr. S.D.N.Y. 2012) (holding that borrowers of residential mortgage servicer were "adequately protected" by the official committee of unsecured creditors and were not entitled to appointment of separate borrowers' committee); *see also In re Hills Stores Co.*, 137 B.R. 4 (Bankr. S.D.N.Y. 1992) (denying request for appointment of separate committee of subordinated bondholders); *In re Interco, Inc.*, 141 B.R. 422 (Bankr. E.D.Mo. 1992) (denying request to appoint separate committee of debenture holders); *In re Public Serv. Co. of N.H.*, 89 B.R. 1014, 1019 (Bankr. D.N.H. 1988) (declining request by individual debenture holders for appointment of separate committee); *In re Williams Comm'ns Grp., Inc.*, 281 B.R. 216, 223 (Bankr. S.D.N.Y. 2002) (denying motion for appointment of equity committee since shareholders' interests were adequately represented).

24. The consumer creditors' interests are more than adequately represented by the Creditors' Committee in these chapter 11 cases. The Creditors' Committee has a fiduciary obligation to all general unsecured creditors. The Creditors' Committee is represented by competent and experienced legal and financial professionals, and the Creditors' Committee has engaged actively on a broad range of issues in these chapter 11 cases since its appointment. Indeed, to date in these chapter 11 cases, there have been no assertions by any party that the Creditors' Committee is doing anything but discharging its fiduciary duties to the estates and the estates' creditors. The consumer creditors have not pointed to a single instance in these chapter 11 cases where the ability of the Creditors' Committee to function has been impaired or where the Creditors' Committee has inadequately represented the consumer creditors, and no such complaints have been made to date.

25. Further, the request to appoint an official committee of consumer creditors has already been addressed (appropriately, in the Debtors' view) by the U.S. Trustee's decision

to appoint two additional members—consumer borrower creditors—to the Creditors' Committee [ECF No. 444], particularly as, upon the appointment of the two new members, the total number of members representing consumer interests was three—1/3 of the total membership. Notably, this Court expressed the exact same sentiment at the hearing on April 11, 2019:

> [I]t just seems to me the case [and] where we are and the timing that is before us, it would probably make more sense, even from the perspective of the consumer creditors, to be part of a group that's been operating and then be able to benefit from all of the institutional knowledge there. You could very quickly get up to speed with things, but I'll leave that to you and others to figure out.

Apr. 11, 2019 Hr'g Tr., at 75, ¶15-22.

26. Less than two weeks passed between the U.S. Trustee's decision to expand the Creditors' Committee and the subsequent decision to appoint the Consumer Creditors' Committee, and there has been no change in circumstances that warranted appointing another committee. At this stage of the chapter 11 cases—when the Debtors are in the middle of a bidding and sale process and have just reached a settlement in principle with the Creditors' Committee—a separate Consumer Creditors' Committee could delay these chapter 11 cases and may jeopardize the reorganization of the Debtors' businesses to the detriment of all stakeholders.

27. Moreover, even without the appointment of an official committee of consumer creditors, the consumers and borrowers may continue to monitor and participate in these cases pursuant to section 1109(b) of the Bankruptcy Code, which allows any party in interest to be heard on any issue in a bankruptcy case, as they have done so far. For example, Wayne Greenwald P.C., purportedly on behalf of approximately 800 consumer creditors, filed a motion to extend the time to file proofs of claim [ECF No. 465]. Another group of consumer borrowers, represented by Kellett & Bartholow PLLC, has filed several objections to date, including an objection to the Debtors' bar date [ECF No. 22], an objection to the Debtors'

amended disclosure statement [ECF No. 355] and four joinders to other objections to the Debtors' amended disclosure statement [ECF Nos. 350-354]. Yet another group of unsecured creditors in these chapter 11 cases—the "Geary Class Action" group, represented by Nobile & Thompson Co., L.P.A.—filed a motion to authorize it to have derivative standing to bring certain claims in these chapter 11 cases [ECF No. 326] and an objection to the Debtors' disclosure statement [ECF No. 336]. Following these objections, the Debtors made certain changes and modifications to their disclosure statement. *See Notice of Filing of Amended Disclosure Statement for Amended Joint Chapter 11 Plan of Ditech Holding Corporation and Its Affiliated Debtors* [ECF No. 470].

28. Clearly, there is no issue of inadequate representation here. The consumer creditors are adequately represented by competent and experienced counsel and undoubtedly "[t]heir voices have been and likely will continue to be heard in this case." *Dana Corp.*, 344 B.R. at 39-40.

B. These Chapter 11 Cases Bear Strong Resemblance To Residential Capital And Warrant The Same Result

29. In *Residential Capital*—a chapter 11 case of a residential mortgage servicer—a group of homeowners filed a motion to appoint a separate borrowers' committee, apart from the official committee of unsecured creditors. The court in *Residential Capital* denied the motion and held that:

> (a) the borrowers have a representative on the Creditors Committee, (b) the Debtors are continuing to operate their mortgage servicing business subject to monitoring and sanctions for noncompliance with the borrower protections provided in the Government Agreements, (c) the Debtors will provide notice of the Bar Date to all borrowers whose mortgage loans are being serviced by the Debtors (not just borrowers who are in active litigation with the Debtors), (d) the Court has provided some relief from the automatic stay for borrowers pursuant to the

> Supplemental Servicing Order, and (e) the Debtors have provided telephonic access to the Court upon request.

Residential Capital 480 B.R. at 559-60.

30. The homeowners in *Residential Capital* relied on *In re American Home Mortgage Holdings*, No. 07–11047 (Bankr. D. Del. 2007). In *American Home*, the bankruptcy court ordered appointment of an official committee of borrowers where (i) there was no borrower representative member on the official creditors committee, (ii) borrowers apparently did not have relief from the automatic stay to assert claims and counterclaims as defenses against foreclosures, evictions and borrower bankruptcy proceedings, (iii) notice of the bar date was provided to only those borrowers who were in active litigation with the debtors, and (iv) the debtors had sold their mortgage loan servicing business and were in the process of liquidating, and therefore were unable to provide relief to borrowers in distress. *See Residential Capital* 480 B.R. at 559-60.

31. All of the factors relied on by the court in *Residential Capital* are present here and dictate the same result. Specifically, (a) consumer creditors have *three* representatives on the Creditors' Committee, (b) the Debtors are continuing to operate their business in the ordinary course, subject to court supervision and close monitoring and sanctions for noncompliance from Fannie Mae, Freddie Mac and Ginnie Mae, (c) the Debtors provided notice of the general bar date to borrowers whose mortgage loans are being serviced by the Debtors (not just borrowers who are in active litigation with the Debtors), (d) the Debtors have twice extended the general bar date specifically for consumer borrowers giving them approximately 100 days to file claims,[7] (e) the Court has provided tailored relief from the automatic stay for borrowers

[7] *See Order Extending General Bar Date Order* [ECF No. 272] and *Order Further Extending General Bar Date for Filing Proofs of Claim for Consumer Borrowers Nunc Pro Tunc* [ECF No. 496].

pursuant the OCB Orders,[8] and (f) the Debtors have prepared a notice tailored to consumer borrowers which will provide such parties with relevant information about these chapter 11 cases. Further, following active discussions with the U.S. Trustee and the Creditors' Committee, the Debtors have filed an amended plan of reorganization, which includes a new class of Borrower Non-Discharged Claims (Class 7), and an amended disclosure statement that provides additional disclosure regarding certain aspects of the consumer borrower claims.[9] This clearly shows that the consumer creditors are more than adequately informed and represented in these chapter 11 cases.

C. The Costs of Another Committee And the Delays Attendant Thereto Cannot Be Justified

32. Undoubtedly, the appointment of an additional official committee of consumer creditors will immediately be followed by a request from the committee of consumer creditors to retain its own professionals. This will carry with it the obvious related significant costs, expenses, delays, and duplicative efforts, which will lead to potential adverse impacts on value for all stakeholders. *See Dana Corp*., 344 B.R. at 40 ("This Court is very aware of the high cost of legal and professional fees in large chapter 11 cases. Appointing a separate committee for the Asbestos Claimants may inevitably lead to duplicative efforts in these cases."); *In re Winn-Dixie Stores, Inc*., 326 B.R. 853, 858, n.4 (Bankr. M.D. Fla. 2005) ("In light of the numerous experts retained by the Debtors and the Creditors' Committee, the Court has little

[8] The "**OCB Orders**" mean the *Final Order (I) Authorizing Debtors to Continue Origination and Servicing of Forward Mortgage Loans in Ordinary Course and Granting Related Relief, (II) Modifying Automatic Stay on a Limited Basis to Facilitate Debtors Ongoing Operations* [ECF No. 224] and the *Final Order (I) Authorizing Debtors to Continue Honoring Reverse Issuer and Servicing Obligations in the Ordinary Course and Granting Related Relief, (II) Modifying Automatic Stay on a Limited Basis to Facilitate Debtors Ongoing Operations* [ECF No. 229].

[9] *See Notice of Filing of Amended Joint Chapter 11 Plan of Ditech Holding Corporation and Its Affiliated Debtors* [ECF No. 469] and *Notice of Filing of Amended Disclosure Statement for Amended Joint Chapter 11 Plan of Ditech Holding Corporation and Its Affiliated Debtors* [ECF No. 470].

doubt that an additional committee would seek to retain its own experts."); *In re Wang Labs, Inc.*, 149 B.R. 1, 4 (Bankr. D. Mass. 1992) ("appointment of additional committees is closely followed by applications to retain attorneys and accountants"). Such additional costs—where secured creditors, who have been paying administrative claims and are anticipated to lose hundreds of millions of dollars—are unfair and unjustified in these circumstances. Absent a strong argument regarding inadequate representation, a debtor should not bear the burden of incurring additional professionals' fees on account of an additional creditors' committee. Otherwise, the appointment of an additional creditors' committee merely burdens the Debtors with additional and likely substantial expenses without any corresponding benefit to the estate.

33. Moreover, at this stage of the chapter 11 cases—when the Debtors are in the middle of a bidding and sale process and have just reached a settlement in principle with the Creditors' Committee ahead of the disclosure statement hearing scheduled for May 10, 2019—a separate official committee of consumer creditors would likely introduce unnecessary complexity and delay these chapter 11 cases, in addition to the unnecessary incremental costs. Appointing an additional official creditors' committee on the eve of the disclosure statement hearing will undoubtedly delay these chapter 11 cases—to fulfill its statutory and fiduciary duties, the Consumer Creditors' Committee, along with its retained professionals, will need to spend considerable time and effort familiarizing itself with the complex issues involved in these chapter 11 cases, issues that the Creditors' Committee has already thoroughly reviewed and analyzed—with no real benefit either to the estate or to the consumer creditors. The settlement in principle with the Creditors' Committee is the result of a long process of good faith discussions and arms' length negotiations between the Debtors, the Ad Hoc Group of Term Lenders, and the Creditors' Committee, all represented by experienced and competent attorneys

and financial advisors. Additionally, appointing an additional creditors' committee at this stage of the chapter 11 cases will cast a shadow on the Debtors' sale and auction process and may potentially chill bidding. Multiple official committees, each focused on the parochial interests of one specific class of creditors, "will only weaken the impetus to compromise" on which a successful reorganization depends. *In re Enron Corp*., 279 B.R. at 688-89 (quoting *In re Sharon Steel Corp*., 100 B.R. 767, 779 (Bankr. W.D. Penn. 1989)). *See also Mirant Ams. Energy*, 2003 WL 22327118 at *8 ("because creditors would be balkanized into several independent committees, each furthering the interests of only certain groups, the consultation and balancing of interests necessary for a successful negotiation of a reorganization plan would be severely hampered, leading to increased costs and delay").

34. Ultimately, as noted earlier, even without the appointment of an official committee of consumer creditors, the consumers and borrowers may continue to monitor and participate in these cases as they have actively done so far. Nothing prohibits the consumers and borrowers from filing motions and objections in these chapter 11 cases, and the Debtors will continue to respond to such objections and motions. Where the Debtors deem appropriate, they will amend their pleadings and plan of reorganization to address certain specific borrower issues (as demonstrated by the recent changes to the plan of reorganization and disclosure statement).

D. Alternatively, The Court Should Limit The Scope of Consumer Creditors' Committee and Impose A Cap on Such Committee's Fees And Expenses

35. If, notwithstanding the above, the Court determines not to disband the Consumer Creditors' Committee, the Debtors respectfully request that the Court explicitly limit such committee's scope solely to the treatment of consumer borrower claims under the Plan or a Sale Transaction, and impose a cap on the fees and expenses which may be incurred by such committee and its professionals. The Debtors request their liability for all fees and expenses

incurred by the Consumer Creditors' Committee and its professionals not exceed $250,000 in the aggregate (the "**Fee Cap**").

36. Limiting the Committee's scope to the treatment of consumer borrower claims under the Plan and Sale Transaction and imposing the Fee Cap will ensure that the Consumer Creditors' Committee pursues only those legitimate goals for which the interests of the consumer creditors truly diverge from those of the other unsecured creditors. Further, the Fee Cap will prevent duplicative and unnecessary costs of administering these chapter 11 cases. The proposed Fee Cap is reasonable and adequately tailored to ensure that the Consumer Creditors' Committee has sufficient resources to participate in these chapter 11 cases. Bankruptcy courts have previously imposed fee caps on official committees when such cap was justified under the circumstances. *See, e.g. In re Horsehead Holding Corp.*, Case No. 16-10287 (CSS) (Bankr. D. Del. June 24, 2016) (imposing a cap on the fees and expenses of an equity committee); *In re Finova Cap. Corp.*, Case No. 01-0698 (PJW) (Bankr. D. Del. June 16, 2005) (imposing a cap on fees and expenses of an equity committee); *see also In re Tronox Inc.*, Case No. 09-10156 (ALG) (Bankr. S.D.N.Y. May 7, 2009) (prohibiting equity committee's retention of financial advisors absent findings, after motion and hearing, that equity committee was "unreasonably" denied access to debtors' and creditors' financial advisors and existing non-privileged work product). For all the reasons previously stated, the imposition of the Fee Cap is necessary and appropriate in the context of these chapter 11 cases.[10]

[10] As an alternative construct, the Court could condition the payment of fees and expenses of the professionals hired by the Consumer Creditors' Committee upon a showing—at the end of the case—that their efforts resulted in an actual substantial contribution to their constituency, and were actual and necessary expenses.

Conclusion

37. For the reasons stated herein, the Debtors do not believe taxing these chapter 11 cases with the costs, expense, and delay associated with the appointment of an additional creditors' committee is appropriate or necessary given the clear facts and circumstances in these chapter 11 cases. Accordingly, the Consumer Creditors' Committee should be disbanded or, alternatively, its scope should be limited to the treatment of consumer borrower claims under the Plan and its fees and expenses should be capped at $250,000 in the aggregate.

Notice

38. Notice of this Motion will be provided in accordance with the procedures set forth in the Order Implementing Certain Notice and Case Management Procedures [ECF No. 211] (the "**Case Management Order**"). The Debtors respectfully submit that no further notice is required.

39. No previous request for the relief sought herein has been made by the Debtors to this or any other Court.

WHEREFORE the Debtors respectfully request entry of an order granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: May 8, 2019
New York, New York

/s/ Sunny Singh

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Ray C. Schrock, P.C.
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Attorneys for Debtors
and Debtors in Possession

Exhibit A

Proposed Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11**
DITECH HOLDING CORPORATION, *et al.*,	:	**Case No. 19-10412 (JLG)**
Debtors.[1]	:	**(Jointly Administered)**
	:	**Related Docket No.** [_]

ORDER GRANTING DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) DISBANDING THE OFFICIAL COMMITTEE OF CONSUMER CREDITORS APPOINTED BY THE U.S. TRUSTEE OR, ALTERNATIVELY, (II) LIMITING THE SCOPE OF SUCH COMMITTEE AND CAPPING THE FEES AND EXPENSES WHICH MAY BE INCURRED BY SUCH COMMITTEE

Upon the motion dated May 8, 2019 (the "**Motion**")[2] of Ditech Holding Corporation and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "**Debtors**"), for entry of an order pursuant to sections 105(a) and 1102(a) of chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**") (i) disbanding the official committee of consumer creditors appointed by the U.S. Trustee (the "**Consumer Creditors' Committee**") or (ii) alternatively, if the Court determines not to disband the Consumer Creditors' Committee, limiting the fees and expenses which may be incurred by such committee and its professionals to $250,000 in the aggregate, all as more fully set forth in

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are Ditech Holding Corporation (0486); DF Insurance Agency LLC (6918); Ditech Financial LLC (5868); Green Tree Credit LLC (5864); Green Tree Credit Solutions LLC (1565); Green Tree Insurance Agency of Nevada, Inc. (7331); Green Tree Investment Holdings III LLC (1008); Green Tree Servicing Corp. (3552); Marix Servicing LLC (6101); Mortgage Asset Systems, LLC (8148); REO Management Solutions, LLC (7787); Reverse Mortgage Solutions, Inc. (2274); Walter Management Holding Company LLC (9818); and Walter Reverse Acquisition LLC (8837). The Debtors' principal offices are located at 1100 Virginia Drive, Suite 100, Fort Washington, Pennsylvania 19034.

[2] Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to such terms in the Motion.

the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334, and the Amended Standing Order of Reference M-431, dated January 31, 2012 (Preska, C.J.); and consideration of the Motion and the requested relief being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided to the Notice Parties in accordance with the Case Management Order; and such notice having been adequate and appropriate under the circumstances, and it appearing that no other or further notice need be provided; and the Court having reviewed the Motion; and the Court having held a hearing on the Motion to consider the relief requested in the Motion (the "**Hearing**"); and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and it appearing that the relief requested in the Motion is in the best interests of the Debtors, their estates, creditors, and all parties in interest; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT

1. The Motion is granted to the extent set forth herein.

2. The Consumer Creditors' Committee appointed in the above captioned chapter 11 cases is hereby disbanded.

3. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, and/or enforcement of this Order.

Dated: _____, 2019
New York, New York

_____
HONORABLE JAMES L. GARRITY, JR.
UNITED STATES BANKRUPTCY JUDGE

Exhibit B

Debtors' Letter to the U.S. Trustee

Weil, Gotshal & Manges LLP

CONFIDENTIAL
BY E-MAIL

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May 1, 2019

Office of the United States Trustee for Region 2
201 Varick Street, Suite 1006
New York, New York 10014
Attn: Greg Zipes, Esq. and Benjamin J. Higgins, Esq.

Re: *In re Ditech Holding Corporation, et al.*, Case No. 19-10412 (JLG):
Debtors' Opposition to Requests to Appoint Official Committee of Consumer Creditors

Dear Mr. Zipes and Mr. Higgins:

Reference is made to the letter filed by J. Samuel Tenenbaum of the Investor Protection Center at Northwestern University School of Law, dated April 19, 2019 [ECF No. 429] and the letter filed by Mr. Wayne M. Greenwald, dated April 23, 2019 [ECF No. 449] (together, the "**Movants**"), requesting the appointment of an official committee of consumer creditors in the chapter 11 cases of Ditech Holding Corporation and its debtor affiliates (collectively, the "**Debtors**").[1] Based on the facts of these chapter 11 cases and the applicable authority, the Debtors urge the U.S. Trustee to deny the request. For the reasons set forth below, the Movants have failed to satisfy their burden to show that an appointment of an official committee of consumer creditors, in addition to the Official Committee of Unsecured Creditors (the "**Creditors' Committee**") already appointed—and at this stage of the chapter 11 cases, where the Debtors are in the middle of a sale and auction process and have just settled in principle with the Creditors' Committee ahead of the disclosure statement hearing scheduled for May 10, 2019—is necessary or appropriate in these chapter 11 cases. On the contrary, appointing a separate official committee of consumer creditors months into these cases and merely a week before the Debtors' disclosure statement hearing could delay these chapter 11 cases and may jeopardize the entire reorganization of the Debtors' businesses to the detriment of all stakeholders. Respectfully, such a decision is nothing short of arbitrary and capricious and serves only to harm the Debtors' ability to reorganize.

Section 1102(a)(2) of the Bankruptcy Code permits the appointment of an additional committee of creditors only if necessary to assure adequate representation of creditors. Appointment of an additional committee is an "extraordinary remedy that courts are reluctant to grant." *See In re Residential Capital, LLC*, 480 B.R. 550, 557 (Bankr. S.D.N.Y. 2012); *In re Dana Corp.*, 344 B.R. 35, 38 (Bankr. S.D.N.Y. 2006) (citing *In re Enron Corp.*, 279 B.R. 671, 685 (Bankr. S.D.N.Y. 2002)). In considering this

[1] The Debtors reserve the right to supplement this letter and/or submit additional responses to any additional requests that the United States Trustee appoint an official committee of consumer creditors in these chapter 11 cases.

extraordinary remedy, courts employ a two-step process. First, a court determines whether the appointment of an additional committee is necessary to assure the movants are adequately represented. Second, if the answer to the first question is yes, then the court must decide whether it should exercise its discretion and order such appointment. *See Enron Corp*., 279 B.R. at 685. The burden is on the moving party to prove that the existing committee does not provide adequate representation. *See Dana Corp*., 344 B.R. at 38; *Enron Corp*., 279 B.R. at 685; *In re Winn–Dixie Stores, Inc*., 326 B.R. 853, 857 (Bankr. M.D.Fla. 2005); *In re Dow Corning Corp*., 194 B.R. 121, 144 (Bankr. E.D.Mich. 1996), *rev'd on other grounds*, 212 B.R. 258 (E.D.Mich. 1997).

Despite having discretion to direct the appointment of additional official committees, courts have been hesitant to grant such relief, and have described the "necessary to assure adequate representation" standard as ranging from a "high standard" to requiring a showing that an additional committee is "'absolutely required,' 'essential,' or 'indispensable.'" *See In re Eastman Kodak*, No. 12–10202, 2012 WL 2501071, at *2 (Bankr. S.D.N.Y. June 28, 2012) (*quoting In re ShoreBank Corp*., 467 B.R. 156, 164–65 (Bankr.N.D.Ill.2012)); *In re Oneida Ltd*., 351 B.R. 79, 83 (Bankr. S.D.N.Y. 2006).

When considering application of the "adequate representation" standard, bankruptcy courts in this district generally consider seven factors in deciding whether to appoint an additional official committee:

(1) the ability of the existing committee to function;
(2) the nature of the case;
(3) the standing and desires of the various constituencies;
(4) the ability of creditors to participate in a case without an additional committee;
(5) the delay and additional cost that would result if the court appoints an additional committee;
(6) the tasks which a separate committee is to perform; and
(7) other factors relevant to the adequate representation issue.

No one factor is dispositive, and the consideration given to each depends on the circumstances of a particular chapter 11 case. *See, e.g., Dana Corp.*, 344 B.R. at 38; *Residential Capital*, 480 B.R. at 558.

As demonstrated below, none of these factors supports the appointment of an additional committee of consumer creditors in these chapter 11 cases.

We have been advised that the Ad Hoc Group of Term Lenders supports the Debtors' position.

A. Consumer Creditors' Interests Are Already Adequately Represented By The Creditors' Committee

Courts have held that an official committee "has a fiduciary duty to protect the interests of all unsecured creditors" and that the ability of an official committee to function is a significant factor in the determination of whether a court should order the appointment of another committee. *See Enron*, 279 B.R. at 686; *Mirant Americas Energy Mktg., L.P. v. Official Comm. of Unsecured Creditors of Enron Corp*., No. 02–cv–6274, 2003 WL 22327118, *4 (S.D.N.Y. Oct. 10, 2003); *In re Barney's, Inc*., 197 B.R.

431, 442 (Bankr. S.D.N.Y. 1996). Courts have noted that "[c]reditor committees often contain creditors having a variety of viewpoints (heterogeneous); however, these differing views do not require a separate homogeneous committee unless they impair the ability to reach a consensus. The issue is not whether the Official Committee is an exact replica of the creditor body, but whether representation of various creditor types is adequate." *Dana Corp.*, 344 B.R. at 38-39. "Adequate representation does not require proportionate representation of distinct groups of creditors on a committee of unsecured creditors. The determinative factor is whether the official committee is serving their interests as unsecured creditors. *Residential Capital*, 480 B.R. at 559. Further, while the interests of the official creditors' committee members may not always be aligned, the presence of potential conflict does not always require separate committees for representation to be adequate. *In re McLean Industries, Inc.*, 70 B.R. 852, 860 (Bankr. S.D.N.Y. 1987).

Indeed, forming a separate committee solely to advance certain individual creditors' claims is not appropriate, because acting as *de facto* counsel for certain creditors would be an impermissible role for an official committee. *See Residential Capital*, 480 B.R. at 558-59 ("[F]orming a Borrowers Committee solely to advance individual borrowers' claims is not appropriate, because acting as *de facto* counsel for borrowers would be an impermissible role for an official committee"); *Mirant*, 2003 WL 22327118, *3 ("The principal purpose of creditors' committees is not to advocate any particular creditor class's agenda, but rather to 'strike a proper balance between the parties such that an effective and viable reorganization of the debtor may be accomplished.'") (quoting *Hills Stores*, 137 B.R. at 7); *see also In re Garden Ridge Corp.*, No. 04–10324, 2005 WL 523129, at *4, (Bankr. D. Del. Mar. 2, 2005) (declining to appoint an official committee for landlords because an official committee "is simply not intended to represent individual creditor interests").

Accordingly, "in the vast majority of chapter 11 cases, a single committee of creditors has been deemed sufficient." *Residential Capital*, 480 B.R. at 558. *See also, e.g., In re Sharon Steel Corp.*, 100 B.R. 767, 777–78 (Bankr. W.D.Pa. 1989) (explaining that a single creditors committee is the norm and appointment of additional committees is an extraordinary remedy); *In re Residential Capital, LLC*, 480 B.R. 550 (Bankr. S.D.N.Y. 2012) (holding that borrowers of residential mortgage servicer were "adequately protected" by the official committee of unsecured creditors and were not entitled to appointment of separate borrowers' committee); *see also In re Hills Stores Co.*, 137 B.R. 4 (Bankr. S.D.N.Y. 1992) (denying request for appointment of separate committee of subordinated bondholders); *In re Interco, Inc.*, 141 B.R. 422 (Bankr. E.D.Mo. 1992) (denying request to appoint separate committee of debenture holders); *In re Public Serv. Co. of N.H.*, 89 B.R. 1014, 1019 (Bankr. D.N.H. 1988) (declining request by individual debenture holders for appointment of separate committee); *In re Williams Comm'ns Grp., Inc.*, 281 B.R. 216, 223 (Bankr. S.D.N.Y. 2002) (denying motion for appointment of equity committee since shareholders' interests were adequately represented).

Consumer creditors' interests are more than adequately represented by the Creditors' Committee in these chapter 11 cases. The Creditors' Committee has a fiduciary obligation to all general unsecured creditors. The Creditors' Committee is represented by competent and experienced legal and financial

professionals, and the Creditors' Committee has engaged actively on a broad range of issues in these chapter 11 cases since its appointment. The Movants have not pointed to a single instance where the ability of the Creditors' Committee to function has been impaired or where the Creditors' Committee has inadequately represented the consumer creditors, and no such complaints have been made to date.

Further, the request to appoint an official committee of consumer creditors has already been addressed (appropriately, in the Debtors' view) by the U.S. Trustee's decision to appoint two additional members—consumer borrower creditors—to the Creditors' Committee [ECF No. 444], particularly as, upon the appointment of the two new members, the total number of members representing consumer interests is three—1/3 of the total membership. Notably, the Bankruptcy Court expressed the exact same sentiment at the hearing on April 11, 2019:

> [I]t just seems to me the case [and] where we are and the timing that is before us, it would probably make more sense, even from the perspective of the consumer creditors, to be part of a group that's been operating and then be able to benefit from all of the institutional knowledge there. You could very quickly get up to speed with things, but I'll leave that to you and others to figure out.

Apr. 11, 2019 Hr'g Tr., at 75, ¶15-22.

It has not even been two weeks since the U.S. Trustee's decision to expand the Creditors' Committee and there has been no change in circumstances that warrants appointing another creditors' committee. At this stage of the chapter 11 cases—when the Debtors are in the middle of a bidding and sale process and have just reached a settlement in principle with the Creditors' Committee—a separate official committee of consumer creditors would likely delay these chapter 11 cases and may jeopardize the reorganization of the Debtors' businesses to the detriment of all stakeholders.

Moreover, even without the appointment of an official committee of consumer creditors, the consumers and borrowers may continue to monitor and participate in these cases as they have done so far.[2] The Movants are adequately represented by competent and experienced counsel and undoubtedly

[2] For example, Mr. Greenwald, purportedly on behalf of approximately 800 consumer creditors, filed a motion to extend the time to file proofs of claim [ECF No. 465]. Another group of consumer borrowers, represented by Mr. Theodore O. Bartholow III, has filed several objections to date, including an objection to the Debtors' bar date [ECF No. 22], an objection to the Debtors' amended disclosure statement [ECF No. 355] and four joinders to other objections to the Debtors' amended disclosure statement [ECF Nos. 350-354]. Yet another group of unsecured creditors in these chapter 11 cases—the "Geary Class Action" group—filed a motion to authorize it to have derivative standing to bring certain claims in these chapter 11 cases [ECF No. 326] and an objection to the Debtors' disclosure statement [ECF No. 336]. Following these objections, the Debtors made certain changes and modifications to their disclosure statement. *See Notice of Filing of Amended Disclosure Statement for Amended Joint Chapter 11 Plan of Ditech Holding Corporation and Its Affiliated Debtors* [ECF No. 470]. Clearly, there is no issue of inadequate representation here.

"[t]heir voices have been and likely will continue to be heard in this case." *Dana Corp.*, 344 B.R. at 39-40.

B. These Chapter 11 Cases Bear Strong Resemblance To *Residential Capital* And Warrant The Same Result

In *Residential Capital*—a chapter 11 case of a residential mortgage servicer—a group of homeowners filed a motion to appoint a separate borrowers' committee, apart from the official committee of unsecured creditors. The court in *Residential Capital* denied the motion and held that:

> (a) the borrowers have a representative on the Creditors Committee, (b) the Debtors are continuing to operate their mortgage servicing business subject to monitoring and sanctions for noncompliance with the borrower protections provided in the Government Agreements, (c) the Debtors will provide notice of the Bar Date to all borrowers whose mortgage loans are being serviced by the Debtors (not just borrowers who are in active litigation with the Debtors), (d) the Court has provided some relief from the automatic stay for borrowers pursuant to the Supplemental Servicing Order, and (e) the Debtors have provided telephonic access to the Court upon request.

Residential Capital 480 B.R. at 559-60.

The homeowners in *Residential Capital* relied on *In re American Home Mortgage Holdings*, No. 07–11047 (Bankr. D. Del. 2007). In *American Home*, the bankruptcy court ordered appointment of an official committee of borrowers where (i) there was no borrower representative member on the official creditors committee, (ii) borrowers apparently did not have relief from the automatic stay to assert claims and counterclaims as defenses against foreclosures, evictions and borrower bankruptcy proceedings, (iii) notice of the bar date was provided to only those borrowers who were in active litigation with the debtors, and (iv) the debtors had sold their mortgage loan servicing business and were in the process of liquidating, and therefore were unable to provide relief to borrowers in distress. *See Residential Capital* 480 B.R. at 559-60.

All of the factors relied on by the court in *Residential Capital* are present here. These chapter 11 cases bear close resemblance to *Residential Capital* and warrant the same result. Here, (a) the consumer creditors have *three* representatives on the Creditors' Committee, (b) the Debtors are continuing to operate their business in the ordinary course, subject to court supervision and close monitoring and sanctions for noncompliance from Fannie Mae, Freddie Mac and Ginnie Mae, (c) the Debtors provided notice of the general bar date to borrowers whose mortgage loans are being serviced by the Debtors (not just borrowers who are in active litigation with the Debtors), (d) the Debtors have twice extended the general bar date specifically for consumer borrowers giving them approximately 100 days to file claims, (e) the Court has

provided tailored relief from the automatic stay for borrowers pursuant the OCB Orders,[3] and (f) the Debtors have prepared a notice tailored to consumer borrowers which will provide such parties with relevant information about these chapter 11 cases. Further, following active discussions with the U.S. Trustee and the Creditors' Committee, the Debtors have filed an amended plan of reorganization, which includes a new class of Borrower Non-Discharged Claims (Class 7), and an amended disclosure statement that provides additional disclosure regarding certain aspects of the consumer borrower claims.[4] This clearly shows that the consumer creditors are more than adequately informed and represented in these chapter 11 cases.

C. The Costs of An Official Consumer Creditors' Committee And the Delays Attendant Thereto Cannot Be Justified

Undoubtedly, the appointment of an additional official committee of consumer creditors will immediately be followed by a request from the committee of consumer creditors to retain its own attorneys, financial advisors and possibly other experts. This will carry with it the obvious related significant costs, expenses, delays, and duplicative efforts, which will lead to potential adverse impacts on value for all stakeholders. *See Dana Corp.*, 344 B.R. at 40 ("This Court is very aware of the high cost of legal and professional fees in large chapter 11 cases. Appointing a separate committee for the Asbestos Claimants may inevitably lead to duplicative efforts in these cases."); *In re Winn-Dixie Stores, Inc.*, 326 B.R. 853, 858, n.4 (Bankr. M.D. Fla. 2005) ("In light of the numerous experts retained by the Debtors and the Creditors' Committee, the Court has little doubt that an additional committee would seek to retain its own experts."); *In re Wang Labs, Inc.*, 149 B.R. 1, 4 (Bankr. D. Mass. 1992) ("appointment of additional committees is closely followed by applications to retain attorneys and accountants"). Such additional costs—where secured creditors, who have been paying administrative claims and are anticipated to lose hundreds of millions of dollars—are unfair and unjustified in these circumstances.

Moreover, at this stage of the chapter 11 cases—when the Debtors are in the middle of a bidding and sale process and have just reached a settlement in principle with the Creditors' Committee ahead of the disclosure statement hearing scheduled for May 10, 2019—a separate official committee of consumer creditors would likely introduce unnecessary complexity and delay these chapter 11 cases, in addition to the unnecessary incremental costs. The settlement in principle with the Creditors' Committee is the result

[3] The "**OCB Orders**" mean the *Final Order (I) Authorizing Debtors to Continue Origination and Servicing of Forward Mortgage Loans in Ordinary Course and Granting Related Relief, (II) Modifying Automatic Stay on a Limited Basis to Facilitate Debtors Ongoing Operations* [ECF No. 224] and the *Final Order (I) Authorizing Debtors to Continue Honoring Reverse Issuer and Servicing Obligations in the Ordinary Course and Granting Related Relief, (II) Modifying Automatic Stay on a Limited Basis to Facilitate Debtors Ongoing Operations* [ECF No. 229].

[4] *See Notice of Filing of Amended Joint Chapter 11 Plan of Ditech Holding Corporation and Its Affiliated Debtors* [ECF No. 469] and *Notice of Filing of Amended Disclosure Statement for Amended Joint Chapter 11 Plan of Ditech Holding Corporation and Its Affiliated Debtors* [ECF No. 470].

of a long process of good faith discussions and arms' length negotiations between the Debtors, the Ad Hoc Group of Term Lenders, and the Creditors' Committee, all represented by experienced and competent attorneys and financial advisors. Appointing an additional official creditors' committee on the eve of the disclosure statement hearing will delay these chapter 11 cases with no real benefit either to the estate or to the consumer creditors. Additionally, appointing an additional creditors' committee at this stage of the chapter 11 cases will cast a shadow on the Debtors' sale and auction process and may potentially chill bidding. Multiple official committees, each focused on the parochial interests of one specific class of creditors, "will only weaken the impetus to compromise" on which a successful reorganization depends. *In re Enron Corp.*, 279 B.R. at 688-89 (quoting *In re Sharon Steel Corp.*, 100 B.R. 767, 779 (Bankr. W.D. Penn. 1989)). *See also Mirant Ams. Energy*, 2003 WL 22327118 at *8 ("because creditors would be balkanized into several independent committees, each furthering the interests of only certain groups, the consultation and balancing of interests necessary for a successful negotiation of a reorganization plan would be severely hampered, leading to increased costs and delay").

Ultimately, as noted earlier, even without the appointment of an official committee of consumer creditors, the consumers and borrowers may continue to monitor and participate in these cases as they have actively done so far. Nothing prohibits the consumers and borrowers from filing motions and objections in these chapter 11 cases, and the Debtors will continue to respond to such objections and motions and, where the Debtors deem appropriate, amend their pleadings and plan of reorganization to address certain specific borrower issues (as demonstrated by the recent changes to the plan of reorganization and disclosure statement).

Absent a strong argument regarding inadequate representation, a debtor should not bear the burden of incurring additional professionals' fees on account of an additional creditors' committee. Otherwise, the appointment of an additional creditors' committee merely burdens the Debtors with additional and likely substantial expenses without any corresponding benefit to the estate.

In sum, the Debtors do not believe taxing these chapter 11 cases with the costs, expense, and delay associated with the appointment of an additional creditors' committee is appropriate or necessary given the clear facts and circumstances in these chapter 11 cases. Further, at this stage of the chapter 11 cases—when the Debtors are in the middle of a bidding and sale process and have just reached a settlement in principle with the Creditors' Committee a week before the Debtors' disclosure statement hearing—a decision to appoint a separate committee of consumer creditors would simply be arbitrary and capricious. Accordingly, the request should be denied.

If, notwithstanding the above, the U.S. Trustee is minded to pursue the appointment of a second creditors' committee, the Debtors respectfully request, on behalf of the estates and all stakeholders, that the U.S. Trustee delay its decision until a status or chambers conference can be scheduled with the court as soon as possible, where the Debtors and any other stakeholders may be heard on this issue. The Debtors submit that in these circumstances such a conference is justified and necessary. Alternatively, the Debtors

request to be heard by the U.S. Trustee in connection with the identity of the prospective members of such committee.[5]

Respectfully,

Ray C. Schrock, P.C.

cc: Mr. J. Samuel Tenenbaum
Mr. Wayne M. Greenwald
Counsel to the Creditors' Committee
Counsel to the Term Loan Ad Hoc Group
Counsel to Barclays Bank PLC, as DIP Agent
Counsel to Nomura Corporate Funding Americas, LLC

[5] Specifically, we are instructed by the Debtors that certain claims made to your office regarding representation on behalf of borrowers may be misleading and may relate to consumer borrowers whose claims have been resolved prepetition or who have no connection to the Debtors at all. Accordingly, before making any appointment of members to a second creditors' committee, the U.S. Trustee should first satisfy themselves of the bona fides of such claim and the circumstances thereof. If you would like to discuss further with the Debtors regarding such claims, we would be happy to discuss further.

Example- Transcript from Hearing Denying Motion to Disband Consumer Creditors Committee (Ditech)

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 19-10412-jlg

- x

In the Matter of:

DITECH HOLDING CORPORATION,

Debtor.

- x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

May 17, 2019

3:37 PM

B E F O R E :

HON JAMES L. GARRITY

U.S. BANKRUPTCY JUDGE

ECRO: KAREN

HEARING re 1) Motion to Disband Committee (Doc #522)

HEARING re Statement of the Motion of Debtors for Entry of an Order (I) Disbanding the Official Committee of Consumer Creditors Appointed by the U.S. Trustee or, Alternatively, (II) Limiting the Scope of Such Committee and Capping the Fees and Expenses Which May be Incurred by Such Committee (Doc #529)

HEARING re Objection of the Official Committee of Consumer Creditors (Doc #548)

HEARING re Declaration of Victor Noskov in Support of the Official Committee of Consumer Creditors' Objection to the Debtors' Motion (Doc #549)

HEARING re Objection of the United States Trustee to the Motion of the Debtors for Entry of an Order Disbanding the Official Committee of Consumer Creditors (Doc #556)

HEARING re Opposition to Debtors' Motion to Disband the Consumer Creditors' Committee filed by Wayne M. Greenwald on behalf of Monique Scranton & 800 Consumer Creditors (Doc #560)

HEARING re The Diamond Victims' Joinder in Objection to Debtors' Motion to Disband Consumer Creditors Committee (Doc #561) continued from 5/14/2019

Transcribed by: Sonya Ledanski Hyde

A P P E A R A N C E S :

QUINN EMANUEL URQUHART & SULLIVAN LLP
Attorneys for the Consumer Creditors Committee
51 Madison Avenue, 22nd Floor
New York, NY 10010

BY: BENJAMIN I. FINESTONE
VICTOR NOSKOV

P R O C E E D I N G S

THE COURT: All right. I apologize for the delay in our start. This is the Ditech Holding Corp., Case No. 19-10412. This is the adjourned hearing on the Debtors' motion for an order seeking to disband the Official Committee of Consumer Creditors. We heard argument and other matters on May 14th and adjourned the matter to today. And I will issue my decision now.

The matter before the Court is the Debtors' motion to an order pursuant to Sections 105(a) and 1102(a) of the Bankruptcy Code, one, disbanding the Official Committee of Consumer Creditors, which I'll refer to as the "Consumer Creditors Committee," appointed by the United States Trustee or alternatively, two, if the Court determines not to disband the Consumer Creditors' Committee, limiting such committee's scope solely to the treatment of consumer borrower claims under the plan or a sale transaction and capping the fees and expenses which may be incurred by such committee and its, excuse me, professionals to $250,000 in the aggregate.

The motion is supported by the Ad Hoc Term Loan Group which is a term defined below. See ECF Number 529. The following parties oppose the motion: the U.S. Trustee; the Consumer Creditors Committee; approximately 800 consumer creditors represented by the firm of Wayne Greenwald, P.C.

-- I'll refer to them as "the Scranton Consumers;" Milan Harris, individually and not in his capacity as a member of the Consumer Creditors Committee; together with five other consumers who assert that they are victims of a reverse mortgage fraud scheme. See ECF Numbers 548, 556, 560, and 561.

The Official Committee of Unsecured Creditors did not file a response to the motion.

Just one moment, please. If you have dialed in, if you'd please mute your phone. We're hearing some background noise. Thanks very much.

(Pause)

THE COURT: We'll try it one more time. If you're on the phone, mute it please. If you have a live line, especially mute it. Thank you.

The Court held a hearing on the motion on May 14, 2019. For the reasons discussed below, the motion is denied. The Court has jurisdiction of the motion pursuant to 28 U.S.C. Sections 1334(a) and 157(a) and the Amended Standing Order of Referral of Cases of Bankruptcy Judges of the United States District Court For the Southern District of New York dated January 31, 2012, Preska as chief judge. This matter is a core proceeding under 28 U.S.C. Section 157(b)(2).

The facts are as follows. On February 11, 2019,

each of the Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in this court. Since that date, the Debtors have remained in possession and control of their business and assets as Debtors In Possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. The Debtors along with their non-debtor subsidiaries, which I'll collectively refer to as "the Company" operate as an independent servicer originator of mortgage loans and servicer of reverse mortgage loans. See the declaration of Gerald A. Lombardo pursuant to Rule 1007-2 of Local Bankruptcy Rule for the Southern District of New York, ECF Number 2. That's the Lombardo Rule 1007 declaration at Paragraph 6.

The company originates and purchases residential loans through consumer correspondent and wholesale lending channels that are predominantly sold to the Federal National Mortgage Association or Fannie Mae and the Federal Home Loan Mortgage Corporation, also known as Freddie Mac, and government entities. Fannie Mae and Freddie Mac are government-sponsored enterprises, each a GSC and collectively the GSEs. It's ordered by Congress that by and securitized mortgage loans originated by mortgage lenders. See the Lombardo Rule 1007 declaration at Paragraph 6, 20, and 25, Note 3.

The Company's business is comprised of three

primary segments, one, forward mortgage originations; two, forward mortgage servicing; and three, reverse mortgage servicing. That's the declaration at 24, Paragraph 24.

The Company's forward mortgage originations are done exclusively through Debtor Ditech Financial, LLC., which I'll refer to as "Ditech." Virtually all of the loans that Ditech originates are conventional conforming loans eligible for securitization by GSEs. In 2018, Ditech originated or purchased over $12.6 billion in mortgage loans. See the declaration at Paragraphs 25 and 27.

Ditech also performs mortgage service -- excuse me, also performs forward mortgage loan servicing for mortgage loans for which Ditech owns the mortgage servicing rights and subservicing for third party owners of mortgage servicing rights. See the declaration at Paragraph 38. As of the year-end of 2018, Ditech serviced approximately 1.4 million residential loans with an unpaid principal balance of $176.1 billion. And of those, Ditech was the subservicer for $700,000 accounts with an unpaid principal balance of $104.3 billion. See the declaration at Paragraph 39.

Debtor Reverse Mortgage Solutions, Inc., or RMS, primarily focuses on servicing and subservicing reverse mortgage loans, the majority of which are home equity conversion mortgages or HECMs that are insured by the Federal Housing Administration. An HECM is a loan that

allows home owners to borrow money against the equity value of their homes. See the declaration at Paragraph 40.

A reverse mortgage borrower typically is not required to remit monthly mortgage payments but instead receives cash in monthly installments, a lump sum, or a line of credit up to a principal limit, which limit is calculated on among other things the age of the borrower, the appraised value of the borrower's home, and the loan interest rate. See the declaration at Paragraph 41.

An HECM borrower must be age 62 or over and typically relies on the proceeds of the loan -- of such loan to fund their living expenses. The average age of the borrowers under the HECMs in RMS's portfolio was approximately 75 years of age. See the declaration at Paragraph 41.

Reverse mortgage loan servicing accounts for approximately 13 percent of the Debtors' revenue. See the declaration at 40, Paragraph 42. RMS performs servicing for mortgage loans that fall into two categories: one, mortgage loans that RMS owns or owns the mortgage servicing rights and, two, mortgage loans for which RMS performs servicing and subservicing for third-party owners of the loans. That's the declaration at 42. As of December 31, 2018, RMS serviced or subserviced approximately 88,000 loans with an unpaid principal balance of $17.1 billion. See the

declaration at Paragraph 44.

As of the petition date and without limitation, the Debtors had outstanding debt obligations in the principal amount of approximately $961.4 million relating to certain terms loans. Those are the 1 L term loans. And the lenders thereunder are the 1 L term lenders. The 1 L terms loans are secured by a first lien basis -- on a first-lien basis by substantially all of the Debtors' assets. Refer to that as the 1 L collateral.

The Debtors also have outstanding note obligations in the principal amount of $253.9 million as of the petition date relating to certain notes, refer to those as the 2 L notes, which are secured on a second-lien basis on the 1 L collateral. See the declaration at Paragraphs 48 to 49.

As of the petition date, the Debtors were servicing approximately 1.5 million loans made to individuals -- I'll refer to them as "the Consumer Borrowers" -- and that were secured by forward and reverse mortgages on their residences. The Debtors acknowledge that at this time RMS is party to approximately 6,000 judicial and non-judicial foreclosure proceedings and more than 600 eviction proceedings and that Ditech is party to 16,400 judicial and non-judicial foreclosure proceedings and approximately 350 eviction proceedings. See documents filed at ECF Numbers 9 at Paragraph 75 and Number 10 at Paragraph

61.

It's undisputed that in many of the judicial and non-judicial foreclosure proceedings, the Consumer Borrowers are asserting claims and defenses to foreclosure including claims against RMS and Ditech. In addition, apart from the foreclosure-related litigation, Consumer Borrowers have sued RMS and Ditech on account of their alleged illegal and fraudulent loan origination, servicing, and accounting practices.

In very general terms, those consumer creditor claims fall into two categories. One consists of claims, crossclaims, third-party claims, and counterclaims that do not result in any ordered judgment, verdict, decree, or arbitration award of monetary damages including without limitation attorney's fees or costs, penalties, or fines including statutory penalties and fines against the Debtors but that are necessary to resolve, one, a claim or defense involving the amount, validity, priority of liens with respect to the property subject to the mortgages; two, a claim or defense that is subject to Section 363(o) of the Bankruptcy Code; three, alleged servicing errors involving the misapplication or payment or miscalculation of amounts due and owing; or four, a claim or defense brought by a consumer borrower on account of the Debtors' alleged pre-petition failure to, among other things, comply with the

loan modification obligations and the improper assignment of deeds of trust.

I'll refer to those types of claims as non-monetary claims. The other type of claims asserted by Consumer Borrowers against the Debtors in the foreclosure actions and otherwise consist of claims, crossclaims, third-party claims, and counter claims that result in orders, judgments, verdicts, decrees, or arbitration awards of money damages including attorney's fees, costs, and statutory and non-statutory penalties and fines. I'll refer to those claims as monetary damage claims.

As of the petition date, the Debtors were party to thousands of actions involving Consumer Borrowers, asserting consumer creditor claims which include non-monetary claims and/or money damages claims against the Debtors. The Debtors explain that in recent years, their business has been impacted by significant operational challenges and industry trends that have severely constrained their liquidity and ability to implement needed operational initiatives.

To address the burden of its over-leveraged capital structure, Walter Investment Management Company, which is now known as Ditech Holding Corp. which is the Debtor herein, consummated a fully-consensual pre-packaged Chapter 11 plan on February 8, 2018. See the Lombardo

declaration at Paragraph 7. However, even as of the effective date of Walter's Chapter 11 plan, the company was facing significant liquidity and operational headwinds, and the company's new senior management team determined that additional relief was needed.

In June 2018, the company began a formal review of strategic alternatives including a potential merger or sale of all or substantially all of the assets of the company. I'll refer to that as the pre-petition marketing process. The company, however, has not been able to consummate an out-of-court transaction with a third-party purchaser. See the Lombardo declaration at Paragraph 69.

By May 2019, the company turned its focus toward planning for an in-court recapitalization transaction that would maximize value for its creditors and preserve the enterprise as a going concern. See the declaration at Paragraph 8. To that end, in December of 2018, the company began in earnest negotiating with groups of holders of its corporate debt on an acceptable recapitalization structure culminating in a restructuring support agreement with the Ad Hoc Group of Term Lenders, which I'll refer to as "the Ad Hoc Term Loan Group" holding in the aggregate approximately $736.6 million of the 1 L term loans. I'll refer to that agreement as "the Restructuring Support Agreement" or the RSA.

Among other things in the RSA, the Debtors agreed to commence these Chapter 11 cases and to propose a joint reorganization plan that provides for a transaction -- refer to that as "the Reorganization Transaction" -- pursuant to which the Debtors would equitize a portion of the 1 L term loans and extinguish certain other debt. In pertinent part, the Reorganization Transaction calls for a debt-to-equity swap of 1 L term loans which would lead the 1 L term lenders with 100 percent of the equity of the reorganization company and $400 million of first lien debt; an unspecified distribution in cash to holders of so-called go-forward trade claims, that is trade creditors that the company identified with the consent of 1 L term lenders as being integral to the reorganized company; and the extinguishment of the 2 L notes and all remaining general unsecured claims including all consumer borrower claims for no consideration. See the declaration at Paragraph 9.

The RSA also provides that as a toggle to the Reorganization Transaction, the Debtors would continue the pre-petition marketing process to pursue a sale of all or substantially all of their assets with the sale proceeds being distributed to creditors, which we'll refer to as the sale transaction, and alternatively, a smaller asset transaction that could complement a Reorganization Transaction.

In the event of a sale after payment of administrative claims, priority claims, and satisfaction of certain unimpaired -- excuse me, certain unimpaired secured claims, the proceeds would be distributed pursuant to a waterfall as follows: first to the holders of 1 L term loans, second to the holders of 2 L notes, and third to the holders of general unsecured claims including the claims of the consumer borrowers and go-forward trade claims.

The toggle decision of whether to effectuate a Reorganization Transaction or sale transaction would be at the election of a super majority that is 66 and two-third percent of the 1 L term lenders. On March 5, 2019, the Debtors filed a joint plan of reorganization and a disclosure statement in support of it. The plan was faithful to the RSA with certain exceptions not relevant here and proposed a toggle Chapter 11 plan. In the disclosure statement, the Debtors projected that in a sale transaction, unsecured creditors including Consumer Borrowers would receive no distribution on account of their claims and that those claims would be discharged in bankruptcy.

On February 27, 2019, the U.S. Trustee appointed the Creditors Committee. At that time, it consisted of seven members comprised of two trade creditors, two general unsecured creditors, the indentured trustee for the 2 L

notes and the indenture trustee for certain RMBS trusts, and one Consumer Borrower holding a liquidated litigation claim. Promptly thereafter, the Creditors Committee retained bankruptcy and specialty industry counsel and financial advisors.

The Committee's bankruptcy counsel explained that its mandate from the Committee from the outset of its retention has been to work with the Debtors and 1 L lenders towards maximizing the recovery for general unsecured creditors under the plan noting that, as filed, the plan provided for no distribution on account of those claims.

In line with that mandate, on April 4, 2019, the Creditors Committee filed an objection to the disclosure statement. The Committee objected to the adequacy of the information contained in the disclosure statement and the solicitation and voting procedures. It also contended that the disclosure statement should not be approved because the plan was patently unconfirmable. Among other things, the Creditors Committee argued that the plan violated the best interest of creditors test, the absolute priority rule, and unfairly discriminated between go-forward trade creditors and general unsecured creditors.

The Committee also argued that any sale contemplated by the plan must incorporate Section 363(o) of the Bankruptcy Code. That section provides that

notwithstanding (f) if a person purchases any interest in a consumer credit transaction that is subject to the Truth In Lending Act or any interest in a consumer creditor contract as defined in Section 433.1 of Title 16 of the Code of Federal Regulations January 1, 2004 as amended from time to time, and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer creditor transaction or such consumer creditor contract to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section. See 11 U.S.C. Section 363(o).

Without limitation, the Debtors contend that any sale that will be effectuated through the plan that the -- excuse me. Without limitation, the Debtors contend that any sale of the assets in this case will be effectuated through a plan and, therefore, will not implicate Section 363(o). The U.S. Trustee objected to the disclosure statement. Without limitation, it asserted that the provisions in Section 363(o) are -- or excuse me, are applicable both in a sale and reorganization transaction. Various consumer borrowers also objected to the disclosure statement.

On or about April 26, 2019, the Debtors filed a revised plan and disclosure statement. As relevant here,

the second amended plan added a creditor class of borrower nondischarged claims. In essence, that class consists of consumer borrowers holding non-monetary claims. Under that plan in a reorganization transaction, the holders of borrower non-discharged claims receive no distribution on account of their claims but those claims are accepted from discharge. Thus, in such a transaction, the borrower non-discharged claims would patch through the plan and be enforceable against the reorganized debtor.

The balance of the consumer creditor claims including the money damage claims would be classified with general unsecured claims and be discharged in bankruptcy. In the event of a sale transaction, the plan calls for the borrower nondischarged claims to be treated as general unsecured claims and paid through a claims waterfall and discharged in bankruptcy. As with the initial plan, the Debtors projected that under a sale transaction, unsecured creditors will receive no distribution on account of their claims.

On April 26th, the Debtors filed an application to further extend the bar date solely for consumer creditors. That application was filed partly in response to "numerous inquiries from consumer borrowers unfamiliar with the Chapter 11 process regarding filing proofs of claim." The Debtors recognize that "such consumer borrowers are

typically not sophisticated and are not represented by counsel." The Court granted the application.

After they appointed a Creditors Committee, the U.S. Trustee received several letters from various representatives of Consumer Borrowers requesting the appointment of a Consumer Creditors Committee. The first such letter is dated April 8, 2019, and was sent by Thad Bartholow on behalf of certain individual Consumer Borrowers. As the April letter indicates, Mr. Bartholow's request for the appointment of an additional committee was supported by eleven counsel representing a number of Consumer Borrowers. And a number of those counsel were acting on behalf of various pro bono organizations as, for example, the National Consumer Law Center and the Legal Assistance Foundation.

That letter was followed by two letters from the Connecticut Fair Housing Center dated April 12th, 2019. Victor Noskov of the Quinn Emanuel Law Firm which is the proposed counsel to the Consumer Creditors Committee authored one of those letters as pro bono counsel for the Connecticut Fair Housing Center and certain individual reverse mortgage borrowers.

Atlanta Legal Aid sent a letter to the U.S. Trustee dated April 5, 2010, and J. Samuel Tenenbaum at the Northwestern University School of Law Investor Protection

Center sent a letter to the U.S. Trustee dated April 19, 2019. All of those letters requested the appointment of a Consumer Creditors Committee for the benefit of their clients.

The issues raised in Mr. Bartholow's letter are representative of those raised by the other creditors in support of their requests for the appointment of a Consumer Creditors Committee. In part, that letter states as follows:

"We are submitting this request to you because our consumer creditor constituents, none of whom chose to do business with the Debtors, are the most vulnerable and have the lease financial liens available to them of all the Debtors' creditors. Moreover, the Debtors' plan provisions threaten substantial harm to our constituents insofar as the Debtors seek to use their plan discharge and/or eliminate consumer creditors' challenges to illegally assessed charges Debtors added to consumer accounts and other improper loan servicing and accounting practices which have caused consumer creditors' accounts to be overstated and inaccurate.

"It's our understanding that the Debtors' illegal accounting practices have already caused some

consumer creditors to lose their homes. If Ditech succeeds in confirming a plan that leaves consumer creditors without any meaningful and enforceable remedies, this bankruptcy will cause yet more consumer borrowers to unfairly and unlawfully be deprived of their homes. Debtors' improper loan servicing and accounting practices also cause significant harm to the consumer borrowers' credit which harm will be all but impossible to prevent if consumers' statutory enforcement rights under the Fair Credit Reporting Act are eliminated by plan confirmation and/or discharge in this case.

"Perhaps, most perversely, Debtors' efforts to collect these illegal amounts violates the borrowers' discharge injunctions entered by bankruptcy courts around the nation in borrowers' Chapter 13 cases. As this Court is well aware, Chapter 13 debtors work hard making bankruptcy payments up to five years before they earn their Chapter 13 discharges.

"By contrast, in this Chapter 11 case, Debtors are attempting to obtain a discharge injunction in a matter of months that would immunize them and their successors in interest, pardon me, for past and future violations of their consumer borrowers'

prior discharge injunctions.

"Further, violations of the borrowers' discharge injunctions will inevitably result as a result of the amended plan and its pre-petition disclosure statement are conspicuously devoid of any proposal that would address Debtors' improper pre-petition loan servicing and accounting practices.

"Establishing an official Consumer Creditors Committee for this case and/or making substantial changes to the composition of the membership of the Official Unsecured Creditors Committee in this case is, therefore, critical not just to protect the Consumer Creditors' interest but also to educate the Court and all legitimate creditors regarding Debtors' servicing and accounting practices. In order to properly assess the value of the Debtors' assets, the stakeholders need to determine the effect of the Debtors' improper servicing and accounting practices on the Debtors' financials in the extent that Debtors'/Defendants' servicing portfolios are infested with improper charges and fees that are not factored into the official -- into the financial disclosures by the Debtor in this case."

That's the Bartholow letter at Pages 2 to 3.

In response to those letters, on April 22nd, 2009, the U.S. Trustee appointed two additional unsecured creditors who are consumer borrowers with liquidated consumer creditor claims against the Debtors to serve as members of the Creditors Committee. Beginning promptly after the retention, the Committee -- Creditor Committee's professionals engaged the Debtors and the Ad Hoc Term Loan Group in negotiations regarding modifications to the plan that would yield a return for the benefit of unsecured creditors and in doing so, resolve the Creditors' Committee's objections to the Debtors' plan and disclosure statement.

Under the careful watch of the members of the Creditors Committee, the professionals reached a settlement which we refer to as the "Committee Settlement" with the Debtors and 1 L term lenders. In broad strokes, the settlement provides that the Creditors Committee will support a plan incorporating the following terms, one, there would be a de facto substantive consolidation of the Debtors' estate solely for the purposes of creating a creditor trust for the benefit of unsecured creditors -- I'll refer to that as the "GUC," G-U-C, "Recovery Trust" -- that will make distributions to general unsecured creditors and pursue non-release causes of action contributed to the trust by the Debtors. The proceeds of such causes of action

will be split 50/50 between general unsecured creditors and 1 L term lenders.

The GUC Recovery Trust assets will be -- will also include $4 million less certain fees to be paid to the Creditors Committee advisors and certain other fees and expenses to be paid to the 2 L notes, the Trustee, and the RMBS Trustee as those terms are defined in the plan. And 1.5 percent of any net cash proceeds, as that term is defined in the plan, distributed to 1 L term lenders after a 70 percent recovery for the term lenders in the event of a sale transaction -- we'll refer to that as the "Contributed Sale Proceeds" -- 1.5 million and the pro rata share of the contributed proceeds for the 2 L notes and the elimination of the go-forward trade class from the plan. This description, of course, is qualified entirely by what is set forth in the agreement and in the amended disclosure statement.

Thus, the Creditors Committee succeeded in obtaining the promise of a distribution on account of the claims of general unsecured creditors, including the consumer creditor claims in the face as I noted earlier of a plan that is originally filed provided for no distribution on account of those claims.

Under the Committee settlement, the nondischarged borrower claims are unimpaired and not discharged in a

reorganization transaction but will be treated as general unsecured claims in a sale transaction. The Committee settlement does not mandate that the plan include language incorporating the effects of Section 363(o) of the Bankruptcy Code or otherwise provide any additional relief to consumer borrowers.

The Committee had vetted the proposed settlement and was scheduled to vote on whether to support it when the U.S. Trustee appointed the two new consumer borrower members to the Creditors Committee. The Committee delayed the vote on the Committee settlement for approximately one week to accommodate the new borrower members. During that time, the Committee attempted to renegotiate the settlement to reflect the interests of the Creditors Committee new membership, but those efforts were unsuccessful.

In an email letter to the, excuse me, email letter to the United States Trustee dated April 29, 2019, counsel to the Creditors Committee explained that after the appointment of the two consumer members, the Committee added Section 363(o) as a new condition to the near final settlement but that the proposal was rejected by the 1 L -- by the first lien lenders and the Debtors despite pushback from the Committee.

Counsel further explained that the Creditors Committee ultimately decided to give up on the Section

363(o) issue because it was focused on attempting to maximize the cash recovery for all unsecured creditors rather than focusing on one sector of the unsecured creditor body. It observed that the Section 363(o) issue was murky and that rather than pressing the point with the Debtors and the 1 L term lenders, the Creditor's Committee could leave the issue with counsel to the consumer creditors to take up at confirmation.

Counsel noted that although the Creditors Committee ultimately decided to drop the request for relief related to Section 363(o) from the Committee settlement, it agreed at the behest of its two new consumer borrower members to vote on whether to either support, not oppose, or oppose the creation of a separate consumer creditor committee. Committee counsel reported that the vote was unanimous to not oppose the creation of a consumer creditor committee.

After the U.S. Trustee appointed the new members to the Creditors Committee, the Scranton Consumers filed a letter dated April 23, 2019 requesting the formation of a separate committee of consumer creditors. In their letter, the Scranton Consumers maintain that the existing Official Committee of Unsecured Creditors even with the new additional consumer borrower members could not adequately represent Consumer Borrowers' interests. Following the

second request, the Debtors sent via email a letter date May 1, 2019 to the U.S. Trustee arguing that the appointment of a separate committee -- against the appointment of a separate Committee of Unsecured Creditors.

The Debtors argued among other things that the Consumer Creditors' interests are already adequately represented by the Creditors Committee, particularly in light of the additional Consumer Creditors added to that Committee. The Consumer Creditors have been actively participating in the Debtors' Chapter 11 cases since the petition date and in many cases through represented counsel -- have been doing so through represented counsel.

They also argued that the factors set forth in this Court's decision in Residential Capital weigh against the formation of a separate consumer creditors committee and that the cost of the Official Consumer Creditors Committee particularly at this late stage in the Chapter 11 cases could not be justified.

On May 2nd, 2019, the U.S. Trustee appointed the Official Committee of Consumer Creditors which consists of five individuals holding consumer creditor claims. The Consumer Creditors -- Consumer Committee's mandate is narrow. Proposed counsel to the Consumer Creditors Committee explained that the Committee will focus on, A, analyzing the Debtors' sale process to understand what

assets are being sold, how consumer mortgages are being packaged as part of the plan, what analysis has been done on account of consumer claims as part of the sale process, and ultimately what the sale will mean for consumer rights; and B, ensuring that the legal rights of consumers are being respected under the plan including the consumers' rights under Section 363(o) and the rights of setoff, recoupment, and defenses.

Counsel also advised that the Committee might -- will review and may ask the Court to reconsider the order that the Court entered in connection with the ordinary course of business procedures in the case as it relates to the effect on impact of the automatic stay.

On May 8, 2019, the Debtors filed a third amended plan which incorporated the Committee settlement and a disclosure statement. Prior to the hearing on the third amended disclosure statement, proposed counsel to the Consumer Creditors Committee and the Debtors were able to discuss the Consumer Creditors Committee's concerns with the plan and disclosure statement. Ultimately, the Debtors and Consumer Creditors Committee agreed that the hearing could go forward without objection on the part of the Consumer Creditors Committee because the Debtors agreed to add a new section in the disclosure statement which discusses the Consumer Creditors Committee's position regarding the

proposed treatment of consumer claims under the Debtors' plan.

The Consumer Creditors Committee has raised various issues with the headline of their position is that the proposed plan cannot be confirmed unless claims held by consumer borrowers in connection with their mortgages both against any of the Debtors and non-debtor third parties are fully preserved that may be brought against any purchaser of the Debtors' assets. With their comments incorporated, the Consumer Creditors Committee did not object to the approval of the disclosure statement. And on May 4th after a hearing on that, the Court approved the disclosure statement and the procedures -- the solicitation procedures with regard to the plan.

We'll now turn our attention to the discussion of the legal principles applicable to this motion. Section 1102 of the Bankruptcy Code governs the appointment of statutory committees in Chapter 11 cases. In part, it authorizes the United States Trustee to appoint a committee of creditors holding unsecured claims and additional committees of creditors or of equity security holders as the United States Trustee deems appropriate. See 11 U.S.C. Section 1102(a)(1).

It also provides that on the request of a party in interest, the Court may order the appointment of additional

committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. See 1102(a)(2).

However, it does not address whether the Court is empowered to disband a committee appointed by the U.S. Trustee pursuant to Section 1102(a)(1). The Debtors argue that pursuant to Sections 1102 and 105 of the Bankruptcy Code, a court may disband a committee where, one, the committee is not necessary to protect the interests of its constituency; two, the administrative expense of the committee is not justified; and three, the presence of the committee is counter productive to the process of the case. See the motion in Paragraph 15.

The U.S. Trustee and the Consumer Creditors Committee contend that the Court has no authority to dissolve a committee that has been constituted by the U.S. Trustee. In support, the U.S. Trustee asserts that Section 1102 of the Bankruptcy Code delineates specific but different powers for the Court and the U.S. Trustee and Committee members -- in Committee matters and that such language reflects Congress's desire to separate the judicial and administrative functions between the two. See the Trustee's opposition at Pages 8 to 9.

Further, the U.S. Trustee contends that Section 105(a) is not a separate source of the Court's authority

where Section 1102 provides none. And in any event, the Debtors' construction of Sections 1102 and 105 runs afoul of the Supreme Court's decision in Law vs. Siegel, 571 U.S. 415 (2014). Courts have considered whether a bankruptcy court is empowered to disband a committee appointed by the U.S. Trustee pursuant to Section 1102(a)(1) of the Bankruptcy Code have reached different conclusions.

In In re Caesars Entertaining Operating Corp., Inc., 526 B.R. 265-268 (Bankr. N.D.Ill. 2015), the bankruptcy court held that under the explicit statutory language, "Nothing in Section 1102(a) confers on the court the power to disband a committee that the U.S. Trustee has appointed under Section 1102(a)(1)." There, the U.S. Trustee appointed an official committee of second priority noteholders in addition to the official committee of general unsecured creditors.

The debtor, Caesars, moved to disband the noteholder's committee arguing that, one, an inter-creditor agreement to which each noteholder committee members is a party prevented the noteholder committees from performing many of the statutory functions; two, the noteholders are sophisticated business entities who do not need a committee to represent their interests; and three, a second committee would increase administrative costs with no corresponding benefit to the estate. The U.S. Trustee and the noteholders

committee and the Official Committee of -- and the creditors committee opposed the motion. See 526 B.R. at 267 of 268.

The court denied the motion finding that it had no authority under Section 1102(a) to disband the noteholders committee. The court -- in doing so, the court applied the statutory construction rule of "expressio unius est exclusio alterius" or the expression of one thing is the exclusion of another and reasoned that Section 1102 was explicit in enumerating the different powers of the bankruptcy court and the U.S. Trustee as to the constitution of statutory committees and the ability to dissolve a constituted statutory committee was not one of the court's enumerated powers. See 536 B.R. at 268 to 269.

The court also rejected Caesars argument that the authority to disband a statutory committee constituted by the U.S. Trustee lies within Section 105(a). That section states in part that "the court may issue any order, process, or judgement that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. Section 105(a).

The court -- the bankruptcy court explained that Section 105(a) gives the bankruptcy courts "the power only to implement existing code provisions" and, thus, -- and is, thus, "not a vehicle for reading into Section 1102(a)(1) a power to do away with statutory committees. And Section 1102(a)(1) itself grants no such power and especially when

Section 1102(a) grants other powers but not this one." That's 526 B.R. at 269.

In doing so, the Caesars court noted the Supreme Court's view of the limits of Section 105 as set forth in Law vs. Siegel. There, the Supreme Court rejected the contention that by application of Section 105(a), a bankruptcy court can equitably surcharge an individual debtor's assets that are exempt from property of the estate under Section 522 of the Bankruptcy Code for administrative expenses in this case. In doing so, the Supreme Court noted that "its hornbook law that Section 105 does not allow bankruptcy courts to override explicit mandates of other sections of the Bankruptcy Code." 571 U.S. at 421.

The Supreme Court explained that the bankruptcy court's surcharge contravenes Section 522 of the Bankruptcy Code which entitled the Debtor to exempt $75,000 of equity in his home and that exempted amount is not liable for the payment of any administrative expenses of the estate. The Supreme Court went on to note that Section 522 is explicit in enumerating the criteria and limits for exemptions and "even assuming the bankruptcy court could have revisited the debtor's entitlement to exemptions, Section 522 does not give the court discretion to grant or withhold exemptions based on whatever considerations the deem appropriate." 571 U.S. at 424.

Other cases have questioned the bankruptcy court's power to disband an official committee appointed by the U.S. Trustee under Section 1102(a). See, for example, In Re New Life Fellowship, 202 B.R. 994 at 995 (Bankr. W.D.Okla.) where the court stated that "both the specific language in the legislative history of Section 1102(a)(1) compel the conclusion that the court is without power to abolish there it was a bondholders committee" and denying the motion because it lacked authority to grant relief. See also In Re Dewey and LeBoeuf, LLP, Number 12-12321, 2012 WL 5985325*3 (Bankr. S.D.N.Y. November 29, 2012) where the court noted that Section 1102 is silent whether the court has power to disband an additional committee after that committee has been appointed and noting that the answer as to whether or not it can be done is not so clear.

However, in In Re Pacific Avenue, 467 B.R. 868 (Bankr. W.D.N.C. 2012), the court reached the opposite conclusion in granting the motion filed by a Chapter 11 trustee to abolish the official committee of general unsecured creditors. The court found that although there was no specific provision in Section 1102 for disbanding a creditors committee, Section 105(d) gave it authority to do so in light of the particular facts and circumstances of that case. That's 467 B.R. at 870.

Section 105(d) authorizes a bankruptcy court to

hold status conferences in bankruptcy cases "to further the expeditious and economic resolution of a case." And pursuant to Section 105(d)(2), the bankruptcy court "may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically." See 11 U.S.C. Sections 105(d).

The court found that the following factors supported its determination to disband the creditors committee. One, the committee itself did not have a stake in the case but only acted as a representative for other stakeholders and, thus, where a Chapter 11 trustee was appointed, he took over the fiduciary duties of representing the unsecured creditors in lieu of a committee; two, the committee's efforts at protecting the creditor's interests are duplicative and necessary; three, while the appointment of a Chapter -- with the appointment of a Chapter 11 trustee, the debtor's plan effectively a liquidating plan, the bankruptcy is akin to a Chapter 7 where there are no creditors committee; four, the only economically disinterested party which was a bankruptcy administrator supported disbanding the committee; five, the committee's counsel is an administrative burden at the expense of the cash collateral of the secured creditor and could not be justified; and six, the efforts of the committee had not

been effective in that the progress of the case had deteriorated in large part due to the actions of the committee including, for example, the committee's redundant discovery requests.

The Debtors rely on Pacific Avenue in support of the motion. The Debtors also cite to In Re City of Detroit, Michigan, 519 B.R. 673 (Bankr. E.D.Mich. 2014) and In Re Delphi Corporation, Case Number 0544481 (Bankr. S.D.N.Y. April 23, 2019) as support for the authority to disband the consumer creditors committee. The Debtors rely on these cases is misplaced.

In In Re City of Detroit, Michigan, as the case commenced under Chapter 9 and, thus, the court's authority concerning the appointment of a statutory committee by the U.S. Trustee in Chapter 11 cases pursuant to Section 1102 was not implicated. See 519 B.R. at 677 where the court concluded that Section 1102(a)(1) was not applicable in the Chapter 9 case.

In In Re Delphi Corporation, the equity committee that the debtor sought to dissolve was appointed by the U.S. -- was not appointed by the U.S. Trustee but was appointed by the bankruptcy court under a motion by an equity holder pursuant to Section 1102(a)(2). Thus, there was never a question concerning the authority of the bankruptcy court to disband the committee formed by the U.S. Trustee. Moreover,

the bankruptcy court's order directing the appointment of an equity committee specifically reserved that court's authority to disband the equity committee upon a change of circumstances.

The Court also finds that the Debtors' reliance on Pacific Avenue is misplaced as well. One, the facts in this case and in Pacific Avenue are significantly different as there has not been an appointment of a Chapter 11 Trustee here. There's no question that the -- and what that case was seeking to do was to disband -- and there was no -- excuse me, there was no question that the Committee that they were seeking to disband in that case had been ineffectual and that is not the case. There's no evidence to that effect here.

Moreover, the Pacific Avenue court's reliance on Section 105(d) of the Bankruptcy Code as a statutory authority to disband the committee may be questioned given the recent holding in Law vs. Siegel, 571 U.S. 415. In any event, the Court finds that that case is distinguishable and is not -- and is certainly of questionable authority.

In the end of the day, though, the Court does not have to determine whether it has the authority to direct the disbandment of the consumer creditors committee because even assuming arguendo that it has such authority, the court denies the motion and concludes that the consumer creditors

committee should not be disbanded for the reasons discussed below. As an initial matter, the Debtors argue that when considering whether to overturn the U.S. Trustee's decision to appoint the Consumer Creditors Committee and order its disbandment, the Court should apply a de novo standard of review. The U.S. Trustee and Consumer Creditors Committee disagree. They contend that if at all, the Court should review the U.S. Trustee's appointment of the Consumer Creditors Committee under the arbitrary and capricious standard.

Hereto, the Court need not resolve the parties' different contentions as to the standard of review applicable to the U.S. Trustee's appointment of the Consumer Creditors Committee. As the movants, the Debtors have the burden of demonstrating grounds for disbanding the Consumer Creditors Committee. See In Re Dewey and LeBoeuf, LLP, 2002 WL 5985325*5 where the court noted that the burden should be no less rigorous to disband an additional committee appointed by the U.S.T. and the moving party -- has the moving party demonstrated that existing committee is not necessary to assure the adequate representation.

As explained below, the Debtors have failed to carry their burden under either standard of review. A decision is arbitrary and capricious if it is "based on an erroneous conclusion of law, a record devoid of evidence on

which the decisionmaker could rationally have based its decision or as otherwise patent and unreasonable, arbitrary, or fanciful." In Re Barneys, 8197 B.R. 431-439 (Bankr. S.D.N.Y. 1996) citing Heat and Controlling vs. Hester Industries, Inc., 785 F.2nd 1017 at 1022 (Fed.Cir. 1986).

In meeting this high standard, the Debtors must present substantial evidence that the U.S. Trustee acted arbitrarily and capriciously. That's Barneys 197 B.R. at 439. The evidence in the record of these cases shows that the U.S. Trustee engaged in a thoughtful and deliberative process in deciding to constitute the Consumer Creditors Committee. Prior to the appointment of that committee, the U.S. Trustee received and reviewed at least eight letters requesting the appointment of a committee, two of which requests were filed on the electronic docket in this case.

Before deciding to form the Consumer Committee, the U.S. Trustee not only considered the views expressed by the Consumer Borrowers in these letters but also considered the Debtors' response letter in opposition to such formation. Second, the U.S. Trustee did not reflexively appoint the Consumers Committee based solely on his review of the correspondence. He took other steps to address the Consumer Borrower concerns and issues before appointing a separate committee, namely he requested that the Debtors seek to extend the bar date for Consumer Borrowers to file

proofs of claims to address issues of notice and confusion by Consumer Borrowers.

Two, he added two more Consumer Borrowers to the Creditors Committee. And, three, he raised issues as to the application of Section 3630 to the sale -- to the transactions proposed under the plan. It was also only after further deliberations and input from members of the Creditors Committee and the Creditors Committee counsel as to the formation of a separation committee that he decided to empanel the Consumer Creditors Committee.

The Debtors bear the burden of demonstrating that the U.S. Trustee acted arbitrarily and capriciously in appointing the Consumers Committee. Now, the Debtors have not presented any evidence, let alone substantial evidence to that effect. At the May 14 hearing on the motion, the Debtors conceded that they're not really contending that the U.S. Trustee had acted inappropriately or was without authority or discretion in appointing the Consumer Creditors Committee. Rather, they were questioning the timing of the U.S. Trustee's decision given the posture of these cases, to wit, that the debtors, lenders, creditors committee had been on the brink of and in fact did reach the committee settlement that would move the bankruptcy proceedings towards confirmation expeditiously when the Consumer Creditors Committee was appointed.

Without more, the timing of the appointment of that committee is not grounds to upset the appointment. It's not disputed that at the outset of these cases, the U.S. Trustee had in fact considered the need for the appointment of a consumers committee, but at least initially lacked the information in the possession of the Debtors as to the identities and contacts of the Consumer Borrowers to solicit their interest in participating a statutory committee member.

Moreover, the Debtors had been aware of the requests by Consumer Borrowers for committee representation and have always been aware of the possibility of an additional committee.

Further, to the extent that the timeline in these cases has been truncated, that's been at the request of the Debtors and their lenders. All the parties in interest in this case, the creditors committee, the consumer creditors, the consumer borrowers, the U.S. Trustee, and now the Consumer Creditors Committee have acted in good faith in keeping pace with the progress of these Chapter 11 cases.

The Court finds that in light of the actions taken by the U.S. Trustee and the deliberative process that he employed in reaching his decision to appoint the Consumers Committee, U.S. Trustee did not act arbitrarily or capriciously in doing so. See, for example, In Re J&L

Funding Corp., 438 B.R. 356 at 363 (Bankr. E.D.N.Y. 2010).

The Court will now consider the de novo review standard. Under that standard, no deference is given to the determination by the U.S. Trustee to constitute the Consumer Creditors Committee. In making an independent determination of whether a separate committee should be constituted, the Court will consider the following factors and circumstances in these cases: one, the nature of the Chapter 11 cases; two, the desires of the various constituencies; three, the ability of the Consumer Borrowers to participate in these cases if a separate committee is not appointed; four, the adequate representation of Consumer Borrowers' interests by the existing creditors committee in the tasks that the Consumer Creditors Committee is being asked to perform.

These factors have been considered by courts in other contexts in determining whether a separate committee should be constituted or disbanded. See, for example, In Re Dana, 344 B.R. 35 at 38 (Bankr. S.D.N.Y.) and In Re Pacific Avenue, LLC, 467 B.R. at 870. The Court finds these factors to be helpful guidance in its analysis.

First, the Consumer Borrowers comprise of the majority in number and in value of the Debtors' unsecured creditors. Moreover, the Debtors have acknowledged that the record -- acknowledged on the record at various hearings before the Court that the Company in both its forward

mortgage business and reverse mortgage business services more than 1.5 million consumer mortgage accounts and that the Consumer Borrowers are the life blood of the Company's business.

Second, the formation of the Consumer Creditors Committee is not opposed by the Creditors Committee. The appointment of the Consumer Creditors Committee as a separate statutory committee is also strongly supported and indeed -- and has been obviously supported by the request of Consumer Borrowers.

Third, it's undisputed that as a constituent group the Consumer Borrowers are generally unsophisticated senior citizens from lower socioeconomic communities that have limited access and financial means to obtaining meaningful legal representation. See, for example, the Debtors' application to extend the bar date for Consumer Borrowers where they stated that Consumers Borrowers may be unfamiliar with the Chapter 11 process and typically are not sophisticated and not represented by counsel.

See the Lombardo 1001 declaration at Paragraphs 40 to 41 where he's describing the reverse mortgages as -- individuals obtaining reverse mortgages as being eligible only to persons of 62 years or older and also noting that the average age of the borrowers here is 75 years old. See also the Atlanta Legal Aid letter dated April 15 where the

stated that Consumers Borrowers are particularly vulnerable and at the risk of harm in these Chapter 11 cases.

Many of the Consumer Borrowers who have been arguably active in these cases are represented by non-profit organizations and/or governmental consumer agencies such as state legal aid who may themselves be unfamiliar with federal bankruptcy proceedings and lack the financial expertise and professionals to meaningful review of the economics of the Debtors' plan or I should say the terms of the Debtors' plan.

Fourth, the lack of adequate representation of the Consumer Borrowers by the existing committee clearly favors the formation of the Consumer Creditors Committee.

Finally, the scope of the mandate of the Consumer Creditors Committee and the scope of its retention -- and the scope of the retention of the proposed professionals are narrowly tailored. As discussed herein, propose counsel to the Consumer Creditors Committee has repeatedly emphasized that the Committee does not intend to replicate the work being undertaken by the Creditors Committee or to derail the progress of these Chapter 11 cases.

He advises that the Committee will focus its attention on the Consumer Borrower issues that have been previously raised in the context of the plan and disclosure statement objections including analyzing the Debtors' sale

process to understand what assets are being sold, how consumer mortgages are being packaged as part of the sale, assessing the impact of the sale on consumers rights, and ensuring that the legal rights of the consumers are being respected under the plan, including consumer rights under Section 363(o) and the rights of setoff, recoupment, and other defenses.

The Debtors argue that these Chapter 11 cases are analogous to the bankruptcy proceedings in Rosecap in which Judge Glenn denied a motion to appoint a consumer borrowers committee in a pre-packaged case of a mortgage servicer. See the motion at Paragraph 29 to 31. In that regard, the Debtors maintain that the Creditors Committee can pursue the Consumer Borrower issues including issues relating to Section 363(o) in the event of a sale transaction and/or the scope of the borrower non-discharged claims at confirmation.

Neither argument is convincing. First, there are crucial differences between Rosecap and this case. Here, the U.S. Trustee appointed the Consumer Creditors Committee unlike the court in Rosecap, which was instead considering a motion by certain consumer borrowers to appoint one pursuant to Section 1102(a)(2) and opposition thereto made by key constituencies including the creditors committee.

In addition, the consumer borrowers in Rosecap face different issues and concerns than the consumer

borrowers in this case. Among other things, the consumer borrowers in Rosecap had the benefit of a settlement entered into between the debtors and the federal government, 49 state attorney generals, and 48 banking departments which obligated the debtors to provide $200 million towards borrower relief for certain loans owned by the debtors and, two, a consent order entered into between among others the debtors and the Federal Reserve Board and the Federal Deposit Insurance Company which required the debtors to make improvements to their servicing business. See Rosecap 480 B.R at 561*2.

No such settlements or consent orders exist here for the benefit of the Consumer Borrowers. Moreover, a review of the docket in the Rosecap case reveals that the sale orders entered in that case incorporated the protections of Section 363(o). See, for example, Case Number 12-12020, the sale order, ECF Number 2246 at Paragraph 9.

Here, by contract, the Debtors' proposed plan does not contemplate that Section 363 -- the protections afforded by Section 363(o) will be available in either a sale transaction or a reorganization transaction.

Finally, the Court in Rosecap determined that based on the facts of that case, the creditors committee could adequately represent the consumer borrowers.

Here, the Court finds that that's not the case and that the Committee cannot effectively pursue the Consumer Borrowers' concerns as to Section 363(o) protections or the scope of the Debtors' discharge and release. That's because pursuant to the Committee settlement the Creditors Committee has committed to supporting the plan as currently drafted.

For all of those reasons discussed above, the Creditors Committee here cannot adequately represent the Consumers Borrowers' interests. Based upon the Court's de novo review of this matter, the Court finds that the U.S. Trustee did not err in appointing the Consumer Creditors Committee. Accordingly, the Debtors' request that the Court disband the Consumer Creditors Committee is denied.

The Court will now consider the alternative request for relief. The Debtors -- as we noted, the Debtors also seek in the alternative to limit the scope of the Consumer Creditors Committee's mandate and to cap its fees and expenses to $250,000 in the aggregate. This aspect of the motion is likewise respectfully denied. Insofar as the Debtors and the 1 L lenders and other parties have a genuine and legitimate concerns as to the Debtors' accrual of administrative and litigation expenses as a result of the Consumer Creditors Committee, those matters will be resolved through the fee application process. See, for example, In Re Dewey & LeBoeuf.

I'm satisfied that the U.S. Trustee and all interested parties will have a meaningful opportunity in the event that they believe that the fees incurred by the professionals retained by the Consumer Creditors Committee are excessive, we will hear from them. I note that just -- that the Committee's financial professionals are seeking to be retained and that the requested retention is at what they represent to be and in my experience, it seems to be a below-market compensation package.

Based upon all of the foregoing, I most respectfully deny the Debtors' motion to disband the creditors -- excuse me, the Consumer Creditors Committee and deny their request for alternative relief. The record is so ordered. Thank you all very much.

(Whereupon these proceedings were concluded at 4:46 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Veritext Legal Solutions
330 Old Country Road
Suite 300
Mineola, NY 11501

Date: May 21, 2019

Example- Motion to Employ (Ditech)

Presentment Date and Time: August 5, 2019 at 10:00 a.m. (Eastern Time)
Objection Date and Time: August 2, 2019 at 4:00 p.m. (Eastern Time)
Hearing Date and Time (Only if Objections Filed): To be Determined

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Counsel for the Official Committee of Consumer Creditors

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	
	)	Chapter 11
DITECH HOLDING CORPORATION., *et al*.[1]	)	
	)	Case No. 19-10412 (JLG)
Debtors.	)	
	)	(Jointly Administered)

NOTICE OF PRESENTMENT OF THE APPLICATION TO RETAIN AND EMPLOY TARA TWOMEY AS SPECIAL CONSUMER COUNSEL TO THE OFFICIAL COMMITTEE OF CONSUMER CREDITORS *NUNC PRO TUNC* TO JUNE 13, 2019

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are Ditech Holding Corporation (0486); DF Insurance Agency LLC (6918); Ditech Financial LLC (5868); Green Tree Credit LLC (5864); Green Tree Credit Solutions LLC (1565); Green Tree Insurance Agency of Nevada, Inc. (7331); Green Tree Investment Holdings III LLC (1008); Green Tree Servicing Corp. (3552); Marix Servicing LLC (6101); Mortgage Asset Systems, LLC (8148); REO Management Solutions, LLC (7787); Reverse Mortgage Solutions, Inc. (2274); Walter Management Holding Company LLC (9818); and Walter Reverse Acquisition LLC (8837). The Debtors' principal offices are located at 1100 Virginia Drive, Suite 100, Fort Washington, Pennsylvania 19034.

PLEASE TAKE NOTICE that the Official Committee of Consumer Creditors (the "Consumer Creditors' Committee"), hereby files the Application to Retain and Employ Tara Twomey as Special Consumer Counsel to the Official Committee of Consumer Creditors in the above-captioned chapter 11 cases (the "Application").

PLEASE TAKE FURTHER NOTICE that the undersigned will present the proposed *Order Authorizing The Official Committee Of Consumer Creditors To Retain And Employ Tara Twomey As Special Consumer Counsel Effective* Nunc Pro Tunc *To June 13, 2019* (the "Proposed Order") to the Honorable James L. Garrity, Jr., United States Bankruptcy Judge, for signature and entry on **August 5, 2019 at 10:00 a.m.** (prevailing Eastern Time), at the United States Bankruptcy Court, Southern District of New York, One Bowling Green, New York, New York 10004-1408 (the "Presentment Date").

PLEASE TAKE FURTHER NOTICE that any responses or objections (the "Objections") to the Proposed Order shall be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Rules, shall be filed with the Bankruptcy Court (a) by attorneys practicing in the Bankruptcy Court, including attorneys admitted *pro hac vice*, electronically in accordance with General Order M-399 (which can be found at www.nysb.uscourts.gov), and (b) by all other parties in interest, in text-searchable portable document format (PDF) (with two hard copies delivered directly to Chambers), in accordance with the customary practices of the Bankruptcy Court and General Order M-399, to the extent applicable, and shall be served to the Notice Parties (as defined in the Application), so as to be filed and received no later than **August 2, 2019 at 4:00 p.m. (Eastern Time)** (the "Objection Deadline").

PLEASE TAKE FURTHER NOTICE that if no responses or objections are timely filed and served the Proposed Order may be signed. If an objection is timely filed and served, the Court

may schedule a hearing at any time on or after the Presentment Date. Objecting parties are required to attend any such hearing, and failure to appear at any such hearing may result in the relief requested in the Application being granted upon default.

Dated: July 26, 2019
New York, New York

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

/s/ *Victor Noskov*
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Counsel for the Official Committee of Consumer Creditors

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	
	)	Chapter 11
DITECH HOLDING CORPORATION., *et al*.[1]	)	
	)	Case No. 19-10412 (JLG)
Debtors.	)	
	)	(Jointly Administered)

APPLICATION TO RETAIN AND EMPLOY TARA TWOMEY AS SPECIAL CONSUMER COUNSEL TO THE OFFICIAL COMMITTEE OF CONSUMER CREDITORS *NUNC PRO TUNC* TO JUNE 13, 2019

The Official Committee of Consumer Creditors (the "Consumer Creditors' Committee") for Ditech Holding Corporation and its affiliated debtors (collectively, the "Debtors"), hereby submits this application (the "Application") pursuant to sections 1103(a), 328(a) and 330 of title

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are Ditech Holding Corporation (0486); DF Insurance Agency LLC (6918); Ditech Financial LLC (5868); Green Tree Credit LLC (5864); Green Tree Credit Solutions LLC (1565); Green Tree Insurance Agency of Nevada, Inc. (7331); Green Tree Investment Holdings III LLC (1008); Green Tree Servicing Corp. (3552); Marix Servicing LLC (6101); Mortgage Asset Systems, LLC (8148); REO Management Solutions, LLC (7787); Reverse Mortgage Solutions, Inc. (2274); Walter Management Holding Company LLC (9818); and Walter Reverse Acquisition LLC (8837). The Debtors' principal offices are located at 1100 Virginia Drive, Suite 100, Fort Washington, Pennsylvania 19034.

11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the "Bankruptcy Code"), Rules 2014(a) and 2016 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rules 2014-1 and 2016-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the Southern District of New York (the "Local Rules"), for the entry of an order, in substantially the form attached hereto as **Exhibit A**, authorizing the retention and employment of Tara Twomey ("Ms. Twomey") as Special Consumer Counsel to the Consumer Creditors' Committee in connection with the above-captioned chapter 11 cases (the "Chapter 11 Cases"), *nunc pro tunc* to June 13, 2019. In support of the Application, the Consumer Creditors' Committee submits the declaration of Ms. Twomey (the "Twomey Declaration"), attached hereto as **Exhibit B**, and the declaration of Theodore O. Bartholow, III (the "Bartholow Declaration"), Legal Representative of the Chair of the Consumer Creditors' Committee, attached hereto as **Exhibit C**. In further support of the Application, the Consumer Creditors' Committee respectfully states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this Application pursuant to 28 U.S.C. §§ 157 and 1334. This a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested are Bankruptcy Code sections 1103(a), 328(a), and 330, Bankruptcy Rules 2014(a) and 2016, and Local Rules 2014-1 and 2016-1.

BACKGROUND

3. The Debtors each filed petitions for relief under chapter 11 of the Bankruptcy Code on February 11, 2019 (the "Petition Date"). The Debtors continue to operate their business and manage estate property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these chapter 11 cases.

4. On February 27, 2019, the United States Trustee (the "U.S. Trustee") appointed the official committee of unsecured creditors (the "Unsecured Creditors' Committee"). Nearly two months later, in the wake of consumer requests, on April 22, 2019, the U.S. Trustee appointed two additional consumer creditor members to the Unsecured Creditors' Committee.

5. On May 2, 2019, the U.S. Trustee appointed the Consumer Creditors' Committee, consisting of five consumer creditors.[2] The members of the Consumer Creditors' Committee are Stephen Kulzyck, Jose Martinez, LeRon Harris, Melinda Hopkins, and D.C. Randall, individual consumer borrowers residing in different parts across the country. Four of the five members are represented by counsel for non-profit legal services organizations or legal aid entities, including Sarah White at the Connecticut Fair Housing Center, Sam Tenenbaum at the Northwestern University School of Law Investor Protection Center, Bren J. Pomponio at Mountain State Justice in Charleston, West Virginia, and Alysson Snow at The Legal Aid Society of San Diego. The Consumer Creditors' Committee voted unanimously for Jose Martinez, a consumer borrower residing in Texas, to be the Chair of the Committee. Theodore O. Bartholow, III, a partner at Kellett & Bartholow PLLC, represents Jose Martinez.

6. On May 6, 2019, the Consumer Creditors' Committee selected Quinn Emanuel Urquhart & Sullivan LLP as its counsel, which has been approved by the Court in the Order dated July 17, 2019 [Dkt. 881] (the "QE Retention Order"). On May 9, 2019, the Consumer Creditors' Committee selected TRS Advisors as its financial advisor, which has been approved by the Court in the Order dated July 17, 2019 [Dkt. 877] (the "TRS Retention Order"). On June 13, 2019, the

[2] *See Notice of Appointment of Official Committee of Unsecured Creditors* [Dkt. No. 127]; *Amended Notice of Appointment of Official Committee of Unsecured Creditors* [Dkt. No. 444]; *Second Amended Notice of Appointment of Official Committee of Unsecured Creditors* [Dkt. No. 497]; *Notice of Appointment of Official Committee of Consumer Creditors* [Dkt. No. 498].

Consumer Creditors' Committee selected Ms. Twomey as its Special Consumer Counsel, subject to Court approval.

7. On May 16, 2019, this Court entered into the *Order Authorizing And Approving The Employment of Rich Michaelson Magaliff, LLP As Special Industry Counsel To The Official Committee Of Unsecured Creditors Of The Debtor* Nunc Pro Tunc *to February 26, 2019* [Dkt. 572]. The Unsecured Creditors Committee employed the Special Industry Counsel to render services as they relate to the industry-specific issues concerning the Debtors' mortgage origination and servicing business. [Dkt. 376 at ¶ 10].

8. On July 11, 2019, this Court entered into the *Order Authorizing Debtors to (I) Retain and Employ Bradley Arant Boult Cummings LLP As Special Counsel To The Debtors* Nunc Pro Tunc *To The Commencement Date and (II) Approve Proposed Compensation Procedures* [Dkt. 836]. The Debtors' Special Counsel, among other things, advises the Debtors regarding mortgage servicing issues arising under applicable federal, state, and local laws in bankruptcy, foreclosure, loss mitigation and title matters, and render services for discrete compliance projects relating to the Debtors' servicing obligations. [Dkt. 608 at ¶¶ 13-19]

RELIEF REQUESTED

9. By this Application, the Consumer Creditors' Committee seeks to employ and retain Ms. Twomey as Special Consumer Counsel in connection with the Chapter 11 Cases and the matters described below pursuant to Bankruptcy Code sections 1103(a), 328(a) and 330, Bankruptcy Rules 2014(a) and 2016, and Local Rules 2014-1 and 2016-1, and, to the extent required by the foregoing, the U.S. Trustee's Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases effective as of November 1, 2013 (the "Appendix B Guidelines").

BASIS FOR RELIEF REQUESTED

10. Under section 1103(a) of the Bankruptcy Code, an official committee appointed under section 1102 "may elect and authorize the employment by such committee of one or more attorneys . . . to represent or perform services for such committee." 11 U.S.C. § 1103(a).

11. Under section 328(a) of the Bankruptcy Code, with the Court's approval, a committee appointed under section 1102 of the Bankruptcy Code may employ professional persons under section 1103 of the Bankruptcy Code "on any reasonable terms and conditions of employment, including on retainer, on an hourly basis, on a fixed or percentage basis, or on a contingent fee basis." 11 U.S.C. § 328(a).

12. As required by Bankruptcy Rule 2014(a), this Application, along with the Twomey Declaration, sets forth: (a) the specific facts establishing the need for Ms. Twomey's retention and employment in the Chapter 11 Cases; (b) the reasons for the Consumer Creditors' Committee's selection of Ms. Twomey as counsel; (c) the professional services to be rendered by Ms. Twomey; (d) Ms. Twomey's compensation and the reasonableness thereof; and (e) to the best of the Consumer Creditors' Committee's knowledge, Ms. Twomey's connections, if any, to certain parties in interest in these matters.

QUALIFICATIONS

13. The Consumer Creditors' Committee seeks to employ and retain Ms. Twomey as Special Consumer Counsel because Ms. Twomey has a wealth of experience in the field of consumer protection laws and the mortgage servicing and origination industry. As further described in the Twomey Declaration, Ms. Twomey has taken senior leadership positions in the nation's leading consumer rights organizations. Tara Twomey has an excellent reputation for her experience with consumer borrower issues and is well-respected among consumer rights and bankruptcy attorneys.

14. The Consumer Creditors' Committee's selection of Tara Twomey as a Special Consumer Counsel was based on, among other things: (a) the Consumer Creditors' Committee's need to retain a Special Consumer Counsel to advise and assist it with unique issues facing consumer borrowers in connection with the mortgage servicing and origination industry, which are at the core of the Consumer Creditors' Committee's mandate; (b) Ms. Twomey's extensive experience and excellent reputation in her teaching, writing, and advocacy for consumer borrower issues; and (c) Ms. Twomey's deep knowledge of the mortgage servicing and origination industry.

SCOPE OF SERVICES

15. As reflected in the Engagement Letter, Ms. Twomey will provide such legal services and advice to the Consumer Creditors' Committee as the Consumer Creditors' Committee deems appropriate and feasible in order to advise the Consumer Creditors' Committee in the course of these Chapter 11 Cases, including but not limited to the following:

(a) advise the Consumer Creditors' Committee and assist the Consumer Creditors' Committee's other advisors in connection with industry-specific consumer borrower issues; and

(b) assisting the Committee with consumer borrower and consumer advocate inquiries.

DISINTERESTEDNESS

16. To the best of the Consumer Creditors' Committee's knowledge and based on the Twomey Declaration, the Consumer Creditors' Committee submits that Ms. Twomey is a "disinterested person" as that term is defined in Bankruptcy Code section 101(14). The Consumer Creditors' Committee submits that Ms. Twomey currently neither holds nor represents any interest adverse to the Debtors' estates, to the Unsecured Creditors' Committee, or the Consumer Creditors' Committee except as set forth in the Twomey Declaration. Further, except as set forth in the Twomey Declaration, Ms. Twomey has no connection with any Debtor, creditor, other party-in-

interest, their respective attorneys and accountants, the U.S. Trustee, or any person employed in the office of the U.S. Trustee.

17. Ms. Twomey will not, while employed by the Consumer Creditors' Committee, represent any other entity having an adverse interest in connection with the Debtors' chapter 11 cases.

18. The Consumer Creditors' Committee has been informed that Ms. Twomey is conducting an ongoing review of her files to ensure that no disqualifying circumstances arise. To the extent that Ms. Twomey discovers any connection with any interested party or enters into any new relationship with any interested party, she will promptly supplement her disclosure to the Court.

COMPENSATION

19. Ms. Twomey did not receive any payments from the Consumer Creditors' Committee or the Debtors during the one-year period before the Petition Date.

20. Subject to the Court's approval, and in accordance with section 328(a) of the Bankruptcy Code, Tara Twomey proposes to render services to the Consumer Creditors' Committee based on the following fee structure:

(a) Hourly Fee. The fee for the services rendered herein by Ms. Twomey is **$350.00** per hour. Time and services include, but are not limited to telephone contacts, interviews, research, analysis, reviewing documents, preparing affidavits, or reports. Time is billed in tenth of an hour increments.

(b) Reimbursement of Expenses. The Committee shall seek approval of reasonable out-of-pocket expenses as incurred in connection with Ms. Twomey's performance of her engagement hereunder according to the applicable bankruptcy rules and procedures. Such reasonable expenses shall include, but not be limited to, expenses incurred in connection with travel and lodging, data processing and communication charges, and regulatory, research, and courier services.

(c) To the extent that the Committee requests that Ms. Twomey perform additional services not contemplated by this Agreement, such additional fees as shall be mutually agreed upon by Ms. Twomey and the Committee, in writing, in advance.

(d) Fee Cap. Ms. Twomey's fees will be subject to a cap of a total amount of $20,000 per month.

21. Subject to the Court's approval, and pursuant to the terms of the Engagement Letter, the Consumer Creditors' Committee will work with Ms. Twomey to file all necessary applications for allowance of compensation and reimbursement of expenses in compliance with applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, the U.S. Trustee Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330 (the "Fee Guidelines"), and any other applicable procedures and orders of the Court.

22. The U.S. Trustee shall retain rights to respond or object to fee applications filed by Ms. Twomey for compensation based on the reasonableness standard provided for in section 330 of the Bankruptcy Code. Moreover, Ms. Twomey advised that she will, to the best of her ability, comply with the U.S. Trustee's requests for information and additional disclosures as set forth in the Fee Guidelines.

23. The Consumer Creditors' Committee believes that the aforementioned fee structure is not only consistent with compensation arrangements entered into by other special counsels that render similar services under similar circumstances, and, given that it is capped at $20,000 per month, it is reasonable, well below-market, and designed to compensate Tara Twomey fairly for her work and to cover fixed and routine expenses.

24. Ms. Twomey will work with Quinn Emanuel Urquhart & Sullivan, LLP, counsel to the Consumer Creditors' Committee and submit interim and final applications for compensation in accordance with any interim compensation order entered in the Chapter 11 Cases, sections

328(a), 330, and 331 of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, any further order of the Court, and, to the extent required by the foregoing, the Appendix B Guidelines.

NUNC PRO TUNC RELIEF

25. The Consumer Creditors' Committee respectfully requests that Ms. Twomey's retention be made effective *nunc pro tunc* to June 13, 2019 so that she may be compensated for the services she has provided before this Application is approved by the Court. Tara Twomey has provided services to the Consumer Creditors' Committee in advance of approval of this Application in anticipation that her retention would be approved *nunc pro tunc* to June 13, 2019.

NO OBJECTION BY U.S. TRUSTEE

26. Before filing this Application, the Consumer Creditors' Committee sent a draft Application for the U.S. Trustee' review, and the U.S. Trustee has informed the Consumer Creditors' Committee that it does not object to this Application. However, the U.S. Trustee reserves its right of review under section 330 of the Bankruptcy Code.

NOTICE

27. In accordance with the *Order Implementing Certain Notice And Case Management Procedures* [Dkt. No. 211] (the "Case Management Order"), notice of this Application will be given to all parties on the Master Service List (as defined in the Case Management Order) (the "Notice Parties"). In light of the nature of the relief requested, the Consumer Creditors' Committee submits that no other or further notice need be provided.

NO PRIOR REQUEST

28. No prior request for the relief sought in this Application has been made to this or any other court.

WHEREFORE, the Consumer Creditors' Committee respectfully requests that the Court enter the Order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested herein and granting such other relief as is just and proper.

Dated: July 26, 2019
New York, New York

THE OFFICIAL COMMITTEE OF CONSUMER CREDITORS OF DITECH HOLDING CORPORATION, *et al.*

/s/ ___*Theodore O. Bartholow*, III_____

Jose Martinez
By: Theodore O. Bartholow, III

Solely in his capacity as Chair of the Official Committee of Consumer Creditors

Filed By:

QUINN EMANUEL URQUHART & SULLIVAN, LLP

/s/ ____*Victor Noskov*_____

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Exhibit A

Proposed Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	
	)	Chapter 11
DITECH HOLDING CORPORATION., *et al*.[1]	)	
	)	Case No. 19-10412 (JLG)
Debtors.	)	
	)	(Jointly Administered)

ORDER AUTHORIZING THE OFFICIAL COMMITTEE OF CONSUMER CREDITORS TO RETAIN AND EMPLOY TARA TWOMEY AS SPECIAL CONSUMER COUNSEL *NUNC PRO TUNC* TO JUNE 13, 2019

Upon the application (the "Application")[2] of the Consumer Creditors' Committee, for entry of an order pursuant to sections 1103(a), 328(a), and section 330 of the Bankruptcy Code, Rules 2014(a) and 2016 of the Bankruptcy Rules, and Rules 2014-1 and 2016-1 of the Local Rules, for authority to retain and employ Tara Twomey as Special Consumer Counsel to the Consumer Creditors' Committee in the Chapter 11 Cases, in accordance with the terms and conditions set forth in the Engagement Letter *nunc pro tunc* to June 13, 2019, as more fully set forth in the Application; and upon consideration of the Twomey Declaration and the Bartholow Declaration; and this Court having jurisdiction to consider the Application and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and consideration of the Application and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157; and venue being proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Application

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are Ditech Holding Corporation (0486); DF Insurance Agency LLC (6918); Ditech Financial LLC (5868); Green Tree Credit LLC (5864); Green Tree Credit Solutions LLC (1565); Green Tree Insurance Agency of Nevada, Inc. (7331); Green Tree Investment Holdings III LLC (1008); Green Tree Servicing Corp. (3552); Marix Servicing LLC (6101); Mortgage Asset Systems, LLC (8148); REO Management Solutions, LLC (7787); Reverse Mortgage Solutions, Inc. (2274); Walter Management Holding Company LLC (9818); and Walter Reverse Acquisition LLC (8837). The Debtors' principal offices are located at 1100 Virginia Drive, Suite 100, Fort Washington, Pennsylvania 19034.

[2] Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Application.

being adequate and appropriate under the particular circumstances; and the U.S. Trustee having not objected to the relief requested in the Application; and the Court having determined that (i) the relief requested in the Application is in the best interest of the Consumer Creditors' Committee, the Debtors, creditors, and all parties in interest, (ii) the legal and factual bases set forth in the Application, the Twomey Declaration, and the Bartholow Declaration establish just cause for the relief granted herein, (iii) Tara Twomey does not represent or hold any interest adverse to the Consumer Creditors' Committee or any Debtor or to the estates; and upon all of the proceedings had before this Court; after due deliberation and sufficient cause appearing therefor, it is hereby ORDERED THAT:

1. The Application is GRANTED *nunc pro tunc* to June 13, 2019.

2. Pursuant to sections 1103(a), 328(a), and 330 of the Bankruptcy Code, Bankruptcy Rules 2014(a) and 2016, and Local Rules 2014-1 and 2016-1, the Consumer Creditors Committee is hereby authorized to employ and retain Tara Twomey as its Special Consumer Counsel in these Chapter 11 Cases *nunc pro tunc* to June 13, 2019, in accordance with the terms and conditions set forth in the Application and Engagement Letter, except as otherwise provided in this Order.

3. Tara Twomey shall be compensated for her services and reimbursed for any related expenses in accordance with applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and any other applicable orders or procedures of this Court.

4. Tara Twomey shall make reasonable efforts to comply with requests of the U.S. Trustee for information and additional disclosures as set forth in the Appendix B Guidelines, in connection with both any interim fee application or final fee application filed in these Chapter 11 Cases.

5. The Consumer Creditors' Committee is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.

6. Notice of the Application as provided therein shall be deemed good and sufficient notice of such Application.

7. To the extent there is any inconsistency between this Order and the Engagement Letter or the Application, the provisions of this Order shall govern.

8. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

9. The relief granted herein shall be binding upon any chapter 11 trustee appointed in these chapter 11 cases, or upon any chapter 7 trustee appointed in the event of a subsequent conversion of these chapter 11 cases to a cases under chapter 7.

10. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this Order.

Dated: August ____, 2019

HONORABLE JAMES L. GARRITY,
UNITED STATES BANKRUPTCY JUDGE

Exhibit B

Declaration of Tara Twomey

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	
	)	Chapter 11
DITECH HOLDING CORPORATION., *et al*.[1]	)	
	)	Case No. 19-10412 (JLG)
Debtors.	)	
	)	(Jointly Administered)

DECLARATION OF TARA TWOMEY IN SUPPORT OF APPLICATION TO RETAIN AND EMPLOY TARA TWOMEY AS SPECIAL CONSUMER COUNSEL TO THE OFFICIAL COMMITTEE OF CONSUMER CREDITORS *NUNC PRO TUNC* TO JUNE 13, 2019

I, TARA TWOMEY, declare under penalty of perjury as follows:

1. I am the Executive Director for the National Consumer Bankruptcy Rights Center and Of Counsel to the National Consumer Law Center. I submit this declaration, in support of the *Application to Retain and Employ Tara Twomey As Special Consumer Counsel to the Official Committee of Consumer Creditors* Nunc Pro Tunc *to June 13, 2019* (the "Application").

2. I have personal knowledge of the facts stated herein. To the extent any information disclosed herein requires amendment or modification upon completion of further review, a supplemental declaration will be submitted to the Court reflecting such amended or modified information.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are Ditech Holding Corporation (0486); DF Insurance Agency LLC (6918); Ditech Financial LLC (5868); Green Tree Credit LLC (5864); Green Tree Credit Solutions LLC (1565); Green Tree Insurance Agency of Nevada, Inc. (7331); Green Tree Investment Holdings III LLC (1008); Green Tree Servicing Corp. (3552); Marix Servicing LLC (6101); Mortgage Asset Systems, LLC (8148); REO Management Solutions, LLC (7787); Reverse Mortgage Solutions, Inc. (2274); Walter Management Holding Company LLC (9818); and Walter Reverse Acquisition LLC (8837). The Debtors' principal offices are located at 1100 Virginia Drive, Suite 100, Fort Washington, Pennsylvania 19034.

Qualifications

3. I have decades of experience practicing consumer protection law and advocating for consumer rights. I am Executive Director for the National Consumer Bankruptcy Rights Center and Of Counsel to the National Consumer Law Center. I have been a Lecturer in Law at Stanford Law School, Harvard Law School, and Boston College Law School. I am a former Clinical Instructor at the Hale and Dorr Legal Services Center of Harvard Law School, where my practice focused, in part, on sustainable homeownership for low- and moderate-income homeowners. Currently, I focus on consumer credit and bankruptcy issues. I am a contributing author of several books published by the National Consumer Law Center, including *Mortgage Servicing and Loan Modifications* (2019) and *Home Foreclosures* (2019), and am also a contributing author to the *Collier Bankruptcy Practice Guide*. I am a conferee of the National Bankruptcy Conference and recently served as the Commissioner for the American Bankruptcy Institute's Commission on Consumer Bankruptcy.

4. I earned my J.D. from Boston College Law School, *summa cum laude* and received my undergraduate degree from the University of California, San Diego. After law school, I served as a law clerk for Chief Justice Herbert P. Wilkins of the Massachusetts Supreme Court. Thereafter, I received a two-year Skadden Fellowship to work at the Legal Services Center of Harvard Law School.

5. Based on my experience representing consumer borrowers, research, teaching, and writing about consumer protection issues, I am familiar with the industry practices of mortgage origination and servicing companies and the types of claims that consumer borrowers have or may have against mortgage companies.

Compensation

6. As set forth in the engagement letter annexed hereto as **Schedule 1**, and subject to the Court's approval, I propose to render services to the Consumer Creditors' Committee in accordance with the following provisions as set forth in the engagement letter:

(a) Hourly Fee. The fee for the services rendered is **$350.00** per hour. Time and services include, but are not limited to telephone contacts, interviews, research, analysis, reviewing documents, preparing affidavits, or reports. Time is billed in tenth of an hour increments.

(b) Reimbursement of Expenses. The Consumer Creditors' Committee shall seek approval of reasonable out-of-pocket expenses as incurred in connection with my performance of the engagement hereunder according to the applicable bankruptcy rules and procedures. Such reasonable expenses shall include, but not be limited to, expenses incurred in connection with travel and lodging, data processing and communication charges, and regulatory, research, and courier services.

(c) Fee Cap. My fees will be subject to a cap of a total amount of $20,000 per month.

(d) To the extent that the Consumer Creditors' Committee requests that I perform additional services not contemplated by the engagement letter, such additional fees as shall be mutually agreed upon by the Committee and myself, in writing, in advance.

7. I believe that this fee structure is reasonable, below-market, and, based on the unique circumstances of this case, appropriate compensation for me for my work in these chapter 11 cases.

8. I will maintain detailed records of fees and expenses incurred in connection with the rendering of the professional services described above, in accordance with applicable rules and guidelines.

Disinterestedness

9. I do not represent any interest adverse to that of the Debtors' estates in the matters upon which the Consumer Creditors' Committee seeks to engage me, and I believe that I am a "disinterested person" within the meaning of Bankruptcy Code section 101(14).

10. From time to time, I serve as an expert in cases in which Ditech is a party. I occasionally provide, and will likely continue to provide advice to consumer counsel on mortgage servicing and origination cases. In some of those cases, consumer counsel represents consumer creditors who have actual or potential claims against the Debtors. However, I do not represent or provide direct services to consumer creditors.

11. In addition, I serve as the Executive Director of the National Consumer Bankruptcy Rights Center, where K. John Shaffer, a partner at Quinn Emanuel Urquhart & Sullivan, LLP, the counsel to the Official Committee of Consumer Creditors also serves on the board of directors. As described below, I have undertaken a detailed search to determine, and to disclose, whether I am providing or have provided, services to any party in interest in such unrelated matters.

12. In connection with the preparation of this Declaration, I conducted a review of my contacts with the Debtors, their non-debtor affiliates, and certain entities holding large claims against or interests in the Debtors that were made reasonably known to me in the Retention Checklist filed by counsel to the Debtors [Annex 1 (Dkt. No. 97)].

13. I reviewed parties included on the Retention Checklist, including: Debtors and Affiliates, Director/Officer, Governmental/Regulatory Agencies, Insurance, Insurance - Workers Comp, Investments - Ditech Services for these trusts, Landlords, Lenders - 1L Tranche B Loan, Litigation, Litigation Vendors, Litigation Firms, Litigation Consumer Firms, Ordinary Course Professionals, Significant Competitors, Taxes, Top 40 Creditors, Top 5 Secured, U.S. Trustee Office, Utilities, and each vendor with claims of $100,000 or more and compared those categories to my current and prior representations. Based on the results of my review, I have a relationship with the parties disclosed on **Schedule 2** attached hereto, none of which matters related to these proceedings. To the best of my knowledge, no services have been provided to the parties included

on the Retention Checklist that involve their rights in the Debtors' cases, nor does my involvement in this case compromise my ability to continue such services in this case or to such parties in their unrelated matters. I will continue to review the remaining categories of the Retention Checklist and will submit a supplemental declaration upon completion of that review if any additional disclosures are identified.

14. On a going forward basis, I will disclose any and all facts that may have a bearing on whether I hold or represent any interest adverse to the Debtors, their creditors, or other parties-in-interest.

15. I do not believe that I am a "creditor" of any of the Debtors within the meaning of section 101(1) of the Bankruptcy Code. Further, I, to the best of my knowledge, am not a holder of any of the Debtors' outstanding debt, equity or preferred stock investments.

16. I am not so connected with the Judges of the United States Bankruptcy Court for the Southern District of New York or the Assistant Trustee or Trial Attorneys for the Office of the United States Trustee, as to render my employment as Special Consumer Counsel for the Consumer Creditors' Committee inappropriate under Bankruptcy Rule 5002(b).

17. I am not and was not an insider of the Debtors.

18. I am not and was not a director, officer or employee of the Debtors as defined in Bankruptcy Code Sections 101(14)(B) or (C).

19. On the basis of the above, I believe that I am a "disinterested person" within the meaning of Bankruptcy Code Section 101(14).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 26, 2019

/s/ Tara Twomey
Tara Twomey

Schedule 1

Engagement Letter

June 17, 2019

The Official Committee of Consumer Creditors (the "Committee")
of Ditech Holding Corporation and its affiliated debtors and debtors-in-possession (the "Debtors")
c/o: Chair of the Committee

Jose Martinez
c/o Theodore O. Bartholow, III
Kellett & Bartholow PLLC
11300 North Central Expressway, Suite 301
Dallas, Texas 75243
Telephone: (214) 696-9000

This letter (the "Agreement") confirms the terms and conditions of the agreement between (i) the Committee and (ii) Tara Twomey ("Ms. Twomey") regarding the retention of Ms. Twomey, subject to approval by the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), as Special Consumer Counsel to the Committee to provide legal services to the Committee in connection with the Debtors' Chapter 11 cases (the "Cases") pending in the Bankruptcy Court as described below.

Section 1 Services to be Rendered

Pursuant to the engagement by the Committee, Ms. Twomey's services will consist of, if appropriate and if requested by the Committee of:

a) advising the Committee and assisting the Committee's other advisors in connection with industry-specific consumer borrower issues; and

b) assisting the Committee with consumer borrower and consumer advocate inquiries.

Ms. Twomey is providing her services as the Special Consumer Counsel to the Committee, and is not providing any services on behalf of the individual members of the Committee.

At the direction of counsel to the Committee ("Committee Counsel"), certain communications and correspondence from Ms. Twomey, and work product and analyses prepared by Ms. Twomey for the Committee in connection with this matter, will be considered in preparation for litigation over the restructuring of the Debtors, and, accordingly, will be subject to the attorney-client privilege and work-product doctrine.

Section 2 Confidentiality

(a) The Committee and Ms. Twomey acknowledge and agree that, in rendering services hereunder, Ms. Twomey will be using and relying on information (the "Information") made available to it by the Committee, its other advisors, or the Debtors and its advisors

(and information available from public sources). Ms. Twomey agrees that, to the extent she receives information that is nonpublic and has been delivered to the Committee or its advisors pursuant to a confidentiality/nondisclosure agreement, Ms. Twomey will be bound by the confidentiality and use restrictions contained in any such confidentiality/nondisclosure agreement.

(b) Ms. Twomey acknowledges that she will be bound by the provision in the Bylaws of the Committee regarding confidentiality ("Confidentiality Provision").

Section 3 Fees and Expenses

As compensation for the services rendered hereunder, beginning on June 13, 2019, Ms. Twomey will charge the following fees and seek reimbursement of expenses:

(a) Hourly Fee. The fee for the services rendered herein by Tara Twomey is **$350.00** per hour. Time and services include, but are not limited to telephone contacts, interviews, research, analysis, reviewing documents, preparing affidavits, or reports. Time is billed in tenth of an hour increments.

(b) Reimbursement of Expenses. The Committee shall seek approval of reasonable out-of-pocket expenses as incurred in connection with Ms. Twomey's performance of her engagement hereunder according to the applicable bankruptcy rules and procedures. Such reasonable expenses shall include, but not be limited to, expenses incurred in connection with travel and lodging, data processing and communication charges, and regulatory, research, and courier services.

(c) To the extent that the Committee requests that Ms. Twomey perform additional services not contemplated by this Agreement, such additional fees as shall be mutually agreed upon by Ms. Twomey and the Committee, in writing, in advance.

(d) Fee Cap. Ms. Twomey's fees will be subject to a cap of a total amount of $20,000 per month.

The Committee shall seek approval of the fees from the Bankruptcy Court according to the applicable bankruptcy rules and procedures. The Committee and Ms. Twomey each acknowledge and agree that (a) the hours worked, (b) the results achieved, and (c) the ultimate benefit to the Committee of the work performed, in each case, in connection with this engagement, may be variable, and that the Committee and Ms. Twomey have taken such factors into account in setting the fees hereunder.

The fees, expenses and costs set forth in this Agreement will be paid directly by the Debtors in accordance with the Bankruptcy Code, Bankruptcy Rules, the local rules of the Bankruptcy Court, and any procedures established in the Bankruptcy Case.

Section 4 Term

The term of Ms. Twomey's engagement commenced on the date when Ms. Twomey began performing services within the scope of this Agreement and may be terminated by either the Committee or Ms. Twomey upon thirty (30) days advance written notice. If terminated, Ms. Twomey shall be entitled to, and the Committee shall seek Bankruptcy Court approval of, (a) reimbursement of any and all reasonable out-of-pocket expenses described in Section 3 and (b) payment of any fees which are due and owing to Ms. Twomey upon the effective date of termination. For the avoidance of doubt, Ms. Twomey shall not be entitled to any payment of fees or expenses for services performed before June 13, 2019.

Section 5 Miscellaneous

(a) *Modification*. Any modification of the terms of this statement must be in writing and signed by both Tara Twomey and the Committee. Should either party choose to waive any requirement under the terms of this agreement, that waiver shall not be deemed a subsequent waiver of that requirement or any other requirement under the terms of this agreement.

(b) *Bankruptcy Court Approval.* The Committee shall, as soon as practicable following the execution of this Agreement by the Committee, seek an order authorizing the employment of Ms. Twomey pursuant to the terms of this Agreement, as a professional person pursuant to, and subject to the standard of review of, the applicable sections of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and applicable local rules and orders. The Committee shall use its best efforts to cause Ms. Twomey's employment application to be considered on the most expedited basis. The employment application and the proposed order authorizing employment of Ms. Twomey shall be provided to Ms. Twomey as much in advance of their filing as practicable, and must be acceptable to Ms. Twomey in its sole discretion. If the order authorizing the employment of Ms. Twomey is obtained, the Committee shall seek to enforce the and seek payment of all fees and expenses due pursuant to the Agreement from the Debtors as promptly as possible in accordance with the terms of this Agreement and the order of such Bankruptcy Court, the Bankruptcy Code, the Bankruptcy Rules and applicable local rules and orders, and the Committee will work with Ms. Twomey to promptly file any and all necessary applications regarding such fees and expenses with the Bankruptcy Court. The terms of this Section are solely for the benefit of Ms. Twomey, and may be waived, in whole or in part, only by Ms. Twomey.

Very truly yours,
Tara Twomey

Tara Twomey
PO Box 5146
Carmel, CA 93921

Accepted and agreed to as of
the date first written above:

THE OFFICIAL COMMITTEE OF CONSUMER CREDITORS
OF DITECH HOLDINGS CORPORATION

By:
Name: Theodore O. Bartholow, III
Title: Counsel to Chair of the Consumer Creditors' Committee

Schedule 2

Disclosure Schedule

Matched Entity	Relationship to Debtors	Relationship to Tara Twomey
Troutman Sanders LLP	Consumer Litigation Firms	Former Client
Famers Insurance	Vendor	Employer of sister-in-law, where she serves as the Chief Risk Officer

Exhibit C

Declaration of Theodore O. Bartholow, III

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	
	)	Chapter 11
DITECH HOLDING CORPORATION., *et al.*[1]	)	
	)	Case No. 19-10412 (JLG)
Debtors.	)	
	)	(Jointly Administered)

DECLARATION OF THEODORE O. BARTHOLOW, III, LEGAL REPRESENTATIVE OF THE CHAIR OF THE OFFICIAL COMMITTEE OF CONSUMER CREDITORS, IN SUPPORT OF THE APPLICATION TO RETAIN AND EMPLOY TARA TWOMEY AS SPECIAL CONSUMER COUNSEL TO THE OFFICIAL COMMITTEE OF CONSUMER CREDITORS *NUNC PRO TUNC* TO JUNE 13, 2019

I, Theodore O. Bartholow, III, legal representative of Jose Martinez, the chair of the Official Committee of Consumer Creditors (the "Consumer Creditors' Committee") for Ditech Holding Corporation and its affiliated debtors (collectively, the "Debtors"), being duly sworn, state the following under penalty of perjury:

1. I am a partner at Kellett & Bartholow PLLC, located at 11300 N. Central Expy, Ste. 301, Dallas, TX 75243. I represent Jose Martinez in his capacity serving as the Chair of the Consumer Creditors' Committee.

2. I submit this declaration (the "Declaration") in support of the *Application To Retain And Employ Tara Twomey As Special Consumer Counsel to the Official Committee of Consumer*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are Ditech Holding Corporation (0486); DF Insurance Agency LLC (6918); Ditech Financial LLC (5868); Green Tree Credit LLC (5864); Green Tree Credit Solutions LLC (1565); Green Tree Insurance Agency of Nevada, Inc. (7331); Green Tree Investment Holdings III LLC (1008); Green Tree Servicing Corp. (3552); Marix Servicing LLC (6101); Mortgage Asset Systems, LLC (8148); REO Management Solutions, LLC (7787); Reverse Mortgage Solutions, Inc. (2274); Walter Management Holding Company LLC (9818); and Walter Reverse Acquisition LLC (8837). The Debtors' principal offices are located at 1100 Virginia Drive, Suite 100, Fort Washington, Pennsylvania 19034.

Creditors Nunc Pro Tunc *to June 13, 2019* (the "Application").[2] Except as otherwise noted, all facts in this Declaration are based on my personal knowledge of the matters set forth herein, information gathered from my review of relevant documents, and information supplied to me by individuals employed by the Debtors.

CONSUMER CREDITORS' COMMITTEE'S SELECTION OF TARA TWOMEY

3. By the Application, the Consumer Creditors' Committee seeks authorization to retain Tara Twomey to provide legal services and advice with regards to:

(a) advise the Consumer Creditors' Committee and assist its other advisors in connection with industry-specific consumer borrower issues; and

(b) assist the Consumer Creditors' Committee with consumer borrower and consumer advocate inquiries.

4. The Consumer Creditors' seeks to retain Tara Twomey based on her substantial expertise in the areas of consumer protection, mortgage servicing, and foreclosures. I believe that Tara Twomey is both well qualified and uniquely able to provide the specialized legal advice sought by the Consumer Creditors' Committee going forward in an efficient and effective manner.

RATE STRUCTURE

5. Tara Twomey will provide services in accordance with the fee structure agreed to in the Engagement Letter, including an hourly fee of $350.00 per hour (subject to a cap of $20,000 per month) and reimbursement of reasonable, actual, out-of-pocket expenses in relation to the scope of her engagement.

[2] Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Application.

COST SUPERVISION

6. As the legal representative of the Chair of the Consumer Creditors' Committee, I am responsible for, among other things, monitoring fees and costs for the Consumer Creditors' Committee. I understand that it is my responsibility as the legal representative of the Chair of the Consumer Creditors' Committee to closely review and monitor fees and expenses sought by Tara Twomey to ensure that the fees and expenses charged to the estates remain consistent with my expectations, the interests of reasonableness, and the exigencies of the Chapter 11 Cases. I will review the invoices that Tara Twomey regularly submits, and, together with Tara Twomey, periodically amend any budget, as the case develops.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: July 26, 2019

By: ___/s/ *Theodore O. Bartholow, III*_____
Name: Theodore O. Bartholow, III
Title: Legal Representative of the Chair of the Consumer Creditors' Committee

Example Postcard Notice to Consumers (ThinkFinance)

Court-Ordered Legal Notice

This Notice may affect your legal rights. Please read it carefully.

Important Legal Notice authorized by the United States Bankruptcy Court for the Northern District of Texas

Case Name:
In re Think Finance, et al.
Case Number:
17-33964 (HDH)

(Continued on Reverse Side)

Think Finance, et al.
c/o ALCS
PO Box 23650
Jacksonville, FL 32241-3650

FIRST-CLASS MAIL U.S. POSTAGE PAID @

<<Barcode>>
Postal Service: Please Do Not Mark or Cover Barcode
In re Think Finance, LLC et al.—<<MailRec>>

[NAME1]
[ADDR2]
[CITY] [ST] [ZIP]
[COUNTRY]

PLEASE TAKE NOTICE OF THE FOLLOWING:

1. On October 23, 2017, Think Finance, LLC and six (6) affiliated entities ("Debtors") filed petitions in the United States Bankruptcy Court for the Northern District of Texas seeking relief under chapter 11 of the United States Bankruptcy Code. These cases are jointly administered, meaning that all pleadings filed in these cases will be reflected on the case docket for Think Finance, LLC, Case No. 17- 33964.

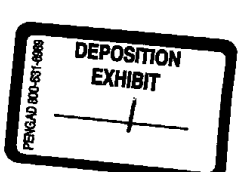
2. On November __, 2017, the Court entered an order ("Bar Date Order") establishing (a) 4:00 p.m. (Central Time) on March 1, 2018, as the last day for filing proofs of claim against the Debtors by non-governmental units ("General Bar Date"). Pursuant to the Bar Date Order, each person or entity that wishes to assert a claim against any of the Debtors arising or deemed to have arisen prior to the Petition Date (a "Prepetition Claim") must file on or before the General Bar Date an original, separate, completed and executed proof of claim at the following address:

By U.S. Postal Service:	By Private Delivery Service/Hand Delivery:
Think Finance, LLC, et al. c/o ALCS P.O. Box 23650 Jacksonville, FL 32241	Think Finance, LLC, et al. c/o ALCS 5985 Richard St., Suite 3 Jacksonville, FL 32216

3. Pursuant to the Bar Date Order, if you do not file a proof of claim by the General Bar Date you will be barred, estopped, and enjoined from asserting a Prepetition Claim, or filing a related proof of claim, against the Debtors or their property.

4. You are receiving this notice because you may have obtained a consumer loan from a sovereign Native American Tribal lender between April 5, 2011 and May 6, 2017, or, if you are a Pennsylvania resident, a ThinkCash consumer loan between February 1, 2009, and December 31, 2010, from First Bank of Delaware. Certain of the Debtors may have provided services to the lender and/or invested in an entity that may have purchased a participation interest in your loan. Certain parties have filed litigation asserting claims against one or more of the Debtors related to similar loans. The Debtors deny any liability and the fact that you are receiving this notice does not mean that you have a claim.

5. You may find out more information and obtain a proof of claim form by visiting [WEBSITE ADDRESS TO BE PROVIDED] or by calling [XXX] XXX-XXXX. or by writing to Think Finance, LLC et al., c/o ALCS, P.O. Box 23650, Jacksonville, FL 32241



Example FAQ for Postcard Notice to Consumers (ThinkFinance)

Consumer Borrower Postcard Mailing Frequently Asked Questions (FAQ)

1. I have never heard of Think Finance or any of the other Debtors. Why would I be sent a notice about filing a claim?

You received this notice because you may have obtained (i) a ThinkCash consumer loan from First Bank of Delaware between February 1, 2009 and December 31, 2010 while maintaining residence in Pennsylvania or (ii) a consumer loan between April 5, 2011 and May 6, 2017 from one of the sovereign Native American Tribal lenders listed on the consumer borrower proof of claim form. Receipt of this notice does not mean that Think Finance believes that you have claims against it or against any of the other Debtors. The decision to file or not to file a claim must be made by each individual that receives the notice. If you need help in deciding whether or not you have a claim, or how to complete the form, you should contact an attorney.

2. Does the bankruptcy of Think Finance mean that I do not have to repay my loan?

No. Think Finance's bankruptcy has no impact on your obligation to repay your loan.

3. What is the relationship between Think Finance and my lender?

Think Finance is a financial technology company that provides administrative and other lender support services. Think Finance provided these types of services to sovereign Native American Tribal lenders. Think Finance also provided these types of services to First Bank of Delaware in connection with ThinkCash consumer loans between February 1, 2009 and December 31, 2010.

4. I do not recall obtaining a consumer loan from a sovereign Native American Tribal lender or a ThinkCash consumer loan from First Bank of Delaware. Can you tell me more about my loan?

You may have obtained a loan between April 5, 2011 and May 6, 2017 from one of the sovereign Native American Tribal lenders listed on the consumer borrower proof of claim form. If you are a Pennsylvania resident, you may have obtained a ThinkCash consumer loan from First Bank of Delaware between February 1, 2009 and December 31, 2010. You may have applied for the loan over the internet. Most of these loans were typically for no greater than 18 months duration and were either installment loans or lines of credit for amounts between $250 and $2500. Think Finance has relied on records available to it to determine to whom to send notice of the bar dates, but it is ultimately your responsibility to determine whether you obtained such a loan and whether to file a proof of claim.

5. How do I know if I have a claim?

In general, a claim is a right to payment or remedy for something that arose or occurred prior to the bankruptcy filing. The Consumer Borrower Postcard is being sent to many persons and entities that have had some relationship with or have done business with the

Debtors but may not have any claim against the Debtors. The fact that you have received the Consumer Borrower Postcard does not mean that you have a claim or that the Debtors or the bankruptcy court believes that you have any claim. In fact, Think Finance has disputed that it has any liability to individuals that obtained a consumer loan from a sovereign Native American Tribal lender or a ThinkCash consumer loan from First Bank of Delaware. The decision to file or not file a claim, and the type of claim you may have, must be made by each individual. If you need help in deciding whether or not you have a claim, or how to complete the form, you should contact an attorney.

6. What is the claims bar date and what happens if I do not file a proof of claim on or before the claims bar date?

The Bankruptcy Court entered an order (the "Bar Date Order") that provides that the General Bar Date by which all proofs of claim of non-governmental units must be filed is 4:00 p.m. (prevailing Central Time) on March 1, 2018. The Bar Date Order also provides that any person that fails to file a proof of claim by the General Bar Date shall be forever barred from asserting a claim that arose prior to the Debtors' bankruptcy filing and shall not not be entitled to participate in any share of distributions in the bankruptcy cases or to vote to accept or reject any plan proposed by the Debtors.

7. Is anyone authorized to file a proof of claim on my behalf?

No. The court has not authorized any representative to file a proof of claim on behalf of any group or class of Consumer Borrowers.

8. Why I am required to provide the last four digits of my social security number?

The Debtors have access to a database that contains information concerning individuals who may have obtained one or more consumer loans described above. At the time the individuals obtained the loans, they provided social security numbers. You must provide the last four digits of your social security number, in addition to the other information contained in the Consumer Borrower Proof of Claim form, in order for the Debtors to verify that you received one or more of such loans based on the records available to the Debtors. To protect personally identifiable information, among other things, the Bar Date Order provides that the Consumer Borrower Proofs of Claim shall not be made available to the public.

9. How can I obtain a proof of claim form?

You may download a proof of claim form by clicking on the "Download Proof of Claim Form" link in the upper left corner of the Consumer Borrower website www.americanlegal.com/TFConsumerBorrower, by calling (800) 501-9541 or by writing to Think Finance, LLC et al., c/o ALCS, P.O. Box 23650, Jacksonville, FL 32241.

10. Who do I contact if I have questions about filling out the claim form?

You can find instructions for filling out the claim form by clicking on the "Download Proof of Claim Form" link.

The Debtors do not handle the claims process and the Debtors' personnel, their lawyers and ALCS cannot help you or advise you as to how to complete or submit your proof of claim form.

The Bankruptcy Court cannot provide you with legal advice. Do not contact the Bankruptcy Court for assistance or advice as to how to complete the proof of claim form, your rights as a creditor, or the amount of your claim.

If you have questions as to your rights as a creditor or your claim, you should contact a lawyer.

11. What if I do not wish to receive further correspondence?

The Consumer Borrower Postcard is the only notice being sent to the broad list of entities and individuals. Unless you file a claim form you should receive no further notice about this case.

Example Expert Report for “Plain Language” Expert (ThinkFinance)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	:	
	:	
THINK FINANCE, LLC, *et al*.,	:	Chapter 11
	:	
	:	Case No. 17-33964 (HDH)
Debtors.	:	
	:	(Jointly Administered)
_____	:	

EXPERT REPORT OF SHANNON R. WHEATMAN, PH.D.

July 3, 2018

INTRODUCTION

1. I am president of Kinsella Media, LLC ("KM"), a nationally recognized advertising and legal notification firm in Washington, D.C. specializing in the design and implementation of notification programs to reach unidentified putative class members, primarily in consumer and antitrust class actions, and claimants in bankruptcy and mass tort litigation. My business address is 2101 L Street, NW Suite 800, Washington, DC 20037. My telephone number is (202) 686-4111.

2. This Expert Report and the opinions contained herein are based on my personal knowledge, professional experience, industry-specific knowledge, and expertise in the area of class action and bankruptcy notice programs.

3. KM is being compensated at a rate of $500 per hour for my work on this matter, and my compensation is not contingent on any findings or the outcome of this matter.

RELEVANT EXPERIENCE

4. I have served as a qualified class action and plain language notice expert in many major class actions and large bankruptcy cases. State and federal courts have accepted my analyses and expert testimony on whether information is effectively communicated to people, including whether or not a notice program to reach potential class members/claimants is the best notice practicable under the circumstances. My curriculum vitae is attached as **Exhibit 1**.

5. I worked on the following bankruptcy cases where I assisted with designing notice plans and drafting notices: *In re W.R. Grace & Co*., No. 01-01139 (Bankr. D. Del.); *In re: Energy Future Holdings Corp., et al.*, No. 14-10979 (Bankr. D. Del.); *In re Garlock Sealing Technologies LLC*, No. 10-31607 (Bankr. W.D.N.C.); and *In re: SCBA Liquidation, Inc., f/k/a Second Chance Body Armor, Inc.,* No. 04-12515 (Bankr. W.D. Mich.) which was a class action settled within a bankruptcy.

6. I have testified in court as an expert in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litig.*, MDL No. 2672 (N.D. Cal.); *State v. Farmers Group Inc.*, No. D-1-GV-02-002501 (D. Ct. Tex., Travis County); *Scharfstein v. BP West Coast Products,*

LLC, No. 1112-17046 (Cir. Ct. Ore.); *Spillman v. RPM Pizza, Inc.*, No. 10-349 (M.D. La.); *PRC Holdings, LLC v. East Resources, Inc.*, No. 06-C-81 (Cir. Ct. W. Va.); *Guidry v. American Public Life Ins. Co*., No. 2008-3465 (14th Jud. Dist. Ct., Calcasieu Parish); *Webb v. Liberty Mutual Ins. Co.*, No. CV-2007-418-3 (Cir. Ct. Ark); and *Beasley v. The Reliable Life Insurance Co*., No. CV-2005-58-1 (Cir. Ct. Ark). I have been deposed as an expert in *Hale v. CNX Gas Company, LLC*, No. 10-CV-59 (W.D. Va.) and *Thomas v. A. Wilbert Sons, LLC*, No. 55,127 (18th Jud. Dist. Ct., Iberville Parish).

7. I have been involved in some of the largest and most complex national notification programs in the country, including: *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litig.*, MDL No. 2672 (N.D. Cal.); *Precision Associates, Inc. v. Panalpina World Transport*, No. 08-CV-00042 (E.D.N.Y.); *In re Transpacific Passenger Air Transportation Antitrust Litig.,* MDL No. 1913 (N.D. Cal.) (involving millions of international airline passengers); *In re Dynamic Random Memory Antitrust Litig.,* MDL No. 1486 (N.D. Cal.) (involving tens of millions of consumers); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827 (N.D. Cal.) (involving millions of indirect purchasers); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010,* MDL No. 2179 (E.D. La.); *In re Target Corp. Customer Data Security Breach Litig*., MDL No. 14-2522 (D. Minn.) (data breach); *In re Sony Gaming Networks & Customer Data Security Breach Litig.*, No. 11-MD-2258 (S.D. Cal.) (data breach); *Fogel v. Farmers Group, Inc.*, No. BC300142 (Cal. Super. Ct., LA County) ($455 million settlement involving tens of millions of insureds); *In re Katrina Canal Breaches Consolidated Litig.*, No. 05-4182 (E.D. La.) (settlement obtained for Hurricane Katrina and Rita survivors); and many others.

8. Courts have admitted my expert testimony on quantitative and qualitative evaluations of the effectiveness of notice programs, and several courts have commented favorably, on the record, regarding the effectiveness of notice plans I have done. Selected judicial comments are included in the attached curriculum vitae.

9. My qualifications include expertise in the form and content of notice. For example,

while serving with the Federal Judicial Center ("FJC"), I played an integral part in the development of the illustrative, "model" forms of notice designed to satisfy the plain language requirements of Federal Rule of Civil Procedure 23(c)(2). This research formed the basis for my doctoral dissertation, *The Effects of Plain Language Drafting on Layperson's Comprehension of Class Action Notices* (2001) (Ph.D. dissertation, University of Georgia). To assist judges and attorneys, both in state and federal courts, the FJC posted the notices at www.fjc.gov.

10. I have authored and co-authored articles on class action notice and due process. I believe notice and due process depend upon clear communication with the people affected, and have stated this position in my publications *See, e.g.,* Shannon R. Wheatman & Katherine M. Kinsella, *International Class Action Notice,* in WORLD CLASS ACTION: A GUIDE TO GROUP AND REPRESENTATIVE CLASS ACTIONS AROUND THE GLOBE 673-686 (Paul Karlsgodt ed., 2012); Katherine Kinsella & Shannon Wheatman, *Class Notice and Claims Administration,* in PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE UNITED STATES: A HANDBOOK 338-348 (Albert A. Foer & Randy M. Stutz eds., 2012); Shannon R. Wheatman & Terri R. LeClercq, *Majority of Class Action Publication Notices Fail to Satisfy Rule 23 Requirements*, 30 REV. LITIG. 53 (2011); Katherine Kinsella & Shannon R. Wheatman, *Class Notice and Claims Administration*, in THE INTERNATIONAL PRIVATE ENFORCEMENT OF COMPETITION LAW 264–274 (Albert A. Foer & Jonathan W. Cuneo eds., 2010); Todd B. Hilsee, Shannon R. Wheatman & Gina M. Intrepido, *Do you really want me to know my rights? The ethics behind due process in class action notice is more than just plain language: A desire to actually inform*, 18 GEO. J. LEGAL ETHICS 1359 (2005); and Todd B. Hilsee, Gina M. Intrepido & Shannon R. Wheatman, *Hurricanes, Mobility and Due Process: The "Desire-to-Inform" Requirement for Effective Class Action Notice Is Highlighted by Katrina*, 80 TULANE LAW REV. 1771 (2006).

OVERVIEW

11. I have been asked by attorneys for Darlene Gibbs, Stephanie Edwards, Lula Williams, Patrick Inscho, Lawrence Mwethuku, Kimetra Brice, Jill Novorot, Earl Browne, India

Banks, Joanne Griffths, Jeri Brennan, and Alicia Patterson to study the communication effectiveness of the Bar Date Notices ("Postcard Notice", "Email Notice" and "Publication Notice") and Proof of Claim form and the manner of publication.

12. I have also studied the questions the Claims, Noticing, and Balloting Agent, American Legal Claims Services, LLC ("ALCS"), received from potential claimants.

13. I was presented with the question of whether this bankruptcy notice and notice process could serve as an effective or comparable alternative to a notice process for a claims process under Fed. R. Civ. P. 23.

14. In my opinion, the Debtors' notice program did not provide the best notice practicable under the circumstances and did not afford potential claimants enough details to make an informed decision. Whether or not the Debtors' notice program would comply with Bankruptcy procedure, it would not serve as a reasonable, effective, or comparable alternative to a class action claims program notice process.

15. To the extent that additional information is disclosed in discovery concerning Debtors' notice program, I reserve the right to amend my opinions and this Expert Report.

THE NOTICES[1]

16. **The Notices do not follow accepted standards for effectively written communication, including:**

a. A prominent headline that makes the notice "stand out as important, relevant, and reader-friendly"[2];

b. Being designed to come to the attention of recipients;

c. Being written in clear, concise, and easily understood language;

d. Containing sufficient information for recipients to make an informed

[1] The actual Email Notice was not available for review but ALCS reported it was the same as the Postcard Notice. Therefore, all of my opinions on the Postcard Notice would apply to the Email Notice.

[2] Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, available at www.fjc.gov/content/judges-class-action-notice-and-claims-process-checklist-and-plainlanguage-guide-0 (last visited July 3, 2018).

decision; and

e. A clear call-to-action.

17. **The Postcard Notice was not designed to capture the attention of potential claimants.** Advertising research has found that the eyes and consciousness of most readers never make it past the headline.[3] The Postcard Notice has an uninformative headline, "Important Legal Notice authorized by the United States Bankruptcy Court for the Northern District of Texas" that will fail to attract the reader's attention. A carefully crafted headline should be subject matter-specific and quickly persuade readers that they have a stake in the matter and that they will be able to understand it. A headline that merely talks about a legal notice and the court name will not garner readership and may cause recipients to fear they are being sued. An appropriate headline for this case would have mentioned the names of the online lenders from which Consumer Borrowers obtained their loans.

18. **The Postcard Notice is not written in plain language and will be misunderstood by many recipients.** Plain language, particularly in legal notice documents is necessary because the average U.S. adult reads at an eighth-grade reading level.[4]

a. The Postcard Notice does not explain concepts that are foreign to the average person. It uses complicated, legalistic words and phrases that laypersons are not likely to understand, instead of clear, simple terms and references. Numerous terms will hold little meaning for the layperson, such as, "Debtors", "chapter 11", "United States Bankruptcy Code", "barred", "estopped", "enjoined", etc.

b. From a communications perspective, in my opinion, the language used to inform potential claimants about the bankruptcy falls short of providing the information that people need to properly exercise their due process rights.

19. **The content is deficient because important information is missing.**

[3] Chris Cilizza, *Americans Read Headlines and Not Much Else*, THE WASHINGTON POST (Mar. 19, 2014).
[4] *See* William H. DuBay, *The Principles of Readability 1* (Aug. 25, 2004), *at* http://www.impact-information.com/impactinfo/readability02.pdf (last visited July 3, 2018).

a. *The Postcard Notice does not convey enough information for potential claimants to make an informed decision about whether to file a claim.* It is my understanding that many Consumer Borrowers received a payday loan through Great Plains Lending, Plain Green, and Mobi-Loans. The Postcard Notice does not list any entity the consumer would recognize other than First Bank of Delaware. Consumer Borrowers who had loans from the unnamed entities were likely unaware that these entities were affiliated with Native American Tribal lenders. As a result, many Consumer Borrowers may not have realized that this bankruptcy proceeding involved their loan at all. Consumer Borrowers would have needed to call or access the case website to learn about the other entities. However, there were only 55,101 unique page views of the home page of the Consumer Borrowers website and 25,759 calls to the pre-recorded message at the toll-free number through March 1, 2018. Assuming these numbers are unique,[5] this means that 92.9% of Consumer Borrowers did not take any action to learn more about the bankruptcy proceeding and many of these individuals would have no idea that other banks were involved.

b. *The Postcard Notice does not explain how a Consumer Borrower could even have a claim.* Bankruptcy proceedings are foreign and confusing to laypersons. The Postcard Notice did not take into consideration how these Consumer Borrowers differ from the average creditor who is likely to be a business entity that is acquainted with bankruptcy proceedings. Without any background, the Consumer Borrowers would have no basis to understand why the Debtors would owe them money and therefore the reason for and amount of their claim would be unknown to them. The FAQs and other information available at the website do not provide any assistance in understanding the bankruptcy proceeding or the potential claims that Consumer Borrowers may have in the case.

c. *The Postcard Notice fails to meet all of the standards of due process*

[5] There is no identifying information available to determine if these are unique individuals or if there is any duplication.

because the consequences of participation are not adequately disclosed. The Notice is unclear about what potential claimants will give up if they do not file a claim. Recipients of the postcard are told they will be "barred, estopped, and enjoined from asserting a Prepetition Claim." However, these legalistic terms are never defined.

20. **The publication portion of the notice program would not have effectively reached Consumer Borrowers**. The Notice was published in *The Wall Street Journal* and *USA Today*. These publications are not an effective way to reach Consumer Borrowers because only 1.09% of Adults 18+ read *The Wall Street Journal* and 1.26% of Adults 18+ read *USA Today*.[6] The percent of Consumer Borrowers reading these publications is likely much lower. The table below compares the demographics of payday loan borrowers and the demographics of readers[7] of *The Wall Street Journal* and *USA Today*:

	Payday Loan Borrowers[8]	***Wall Street Journal***	***USA Today***
Age	25-49	45+	45+
Income	< $40k	$100k+	$75k+
Education	High School	College Educated	College Educated

21. **The Publication Notice is neither clear or concise nor written in plain language.** The language in the Publication Notice (see **Exhibit 2** for actual copies of how the Notice looked when published) would not be accessible to a person with a high school education since it is full of legalistic terms (*e.g.*, "notwithstanding that such claims may not have matured or become fixed or liquidated prior to such date. Under section 101(5) of the Bankruptcy Code as used herein, the word "claim" means (a) a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal,

[6] GfK MRI, 2017 Doublebase. This is a third-party media survey data provider that measures audiences for print publications.
[7] Finder, *A Look at the Telling Statistics of Payday Loans*, *at* https://www.finder.com/payday-loans-statistics (last visited July 3, 2018). Group noted in table represents the highest payday lending use.
[8] *supra* note 4.

equitable, secured, or unsecured, or (b) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured."). The Publication Notice uses the case caption in lieu of an attention-getting headline, is written in small print that appears to be six-point font, and is not concise at over 1,175 words. The small print is very obvious when comparing the size of the font used in the Notice versus that used in the articles in the newspaper.

22. **There was no other available source from which Consumers could obtain necessary information**. I have reviewed correspondence between consumers requesting information by mail or e-mail that was not otherwise in the Notice or on the website. I have also reviewed the standard responses that were sent to these communications. Correspondence sent by mail or email requesting the identity of a consumer's lender or details about their loan were answered with only a standard and substance-less response containing pre-written FAQs. There was not any effective supplement or alternative to the defective notice process.

CONSUMER BORROWER PROOF OF CLAIM

23. **The Consumer Borrower Proof of Claim is confusing, burdensome, and the process is overly complicated.**

a. The Proof of Claim asks for information that many Consumer Borrowers may not currently have (*e.g.,* loan number) or cannot determine on their own (*e.g.,* amount of claim, basis for claim).

b. The Proof of Claim is burdensome since it asks for information that should be in the possession of the Debtors.

c. The Proof of Claim uses language that will only serve to scare potential claimants from filing a genuine claim ("fraudulent claim could be fined up to $500,000, imprisoned up to 5 years, or both").

24. **The Instructions for the Consumer Borrower Proof of Claim does little to clear**

up any confusion. Here, they advise people to consider getting the advice of an attorney. Given the demographics of payday loan borrowers, it is unlikely that people that make less than $40,000 a year would have the means to consult with an attorney. The class action mechanism would go a long way to provide Consumer Borrowers the representation they need to truly understand the claims they may have against the Debtors and the amount of those claims.

CONSUMER BORROWER RESPONSE

25. **Consumer Borrower responses showed much confusion.** Numerous Consumer Borrowers reached out to the administrator by email or phone. I reviewed the consumer correspondences and listened to the consumer voice messages that appeared at TF-BK-VT_NC 000711-001440. Some of the questions posed by potential claimants showed a high level of confusion:

a. "I'm just confused on what this means? Are they trying to sue me? The FAQ didn't answer my questions.", "Not sure if I had a loan and I never filed Bankruptcy?"

b. "Can you explain to me what a claim is?", "Hi can you please tell me what the claim is for? What is a claim?", "What is filing a claim? Can you please explain this to me?", "Does Think Finance have to reimburse people to whom loans were distributed?", "What should be placed in the basis for claim?"

c. "I do not remember amounts or anything they should have that on record who would get what."

d. One Consumer Borrower emailed a question in Spanish and ALCS was directed to respond in English.

26. **Claims rate for Consumer Borrowers is low.** In my experience, claims rates are typically much higher (between 5% and 15%) in cases where a mailing list of potential claimants can be compiled. In this case, the claims rate for Consumer Borrowers is only .43% (4,931 proof of claims filed for 1,134,125 Consumer Borrowers). This lower than expected claims rate is likely

the result of the deficient Notices and burdensome claims process.

27. **Simple ways to increase the claims rate.** In my experience, including the Proof of Claim in the mailing to Consumer Borrowers or as a tear off to the Postcard Notice would have increased the claims rate. Also, allowing claims to be filed online also would have been helpful.[9]

CONCLUSION

28. In the course of planning notification efforts, the U.S. Supreme Court's guidance in *Mullane*, which deals with communications' principles underlying due process, needs to be followed: "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . ."[10] The Debtors' notice program in this case falls short of this admonition.

29. From a communications perspective, it is my opinion that the Postcard Notice, Email Notice, Publication Notice, and the Borrower Proof of Claim does not satisfy all of the standards of due process.

LIMITING FACTORS AND OTHER ASSUMPTIONS

30. This Expert Report is being provided solely addressing issues raised for the Rule 7023 hearing pending in the above-captioned matter and may not and is not intended to be used for other purposes. The analysis and opinions contained in this Expert Report are based on information available to me as of the date of this Report. (See **Exhibit 3** for list of documents.) I reserve the right to amend this report in the event additional information becomes available.

Dated: July 3, 2018

Shannon R. Wheatman

[9] *supra* note 1, FJC guidelines state that using "an online submission option" will increase claims because of "the convenience of one-click submission of claims."

[10] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

EXHIBIT 1

KINSELLA MEDIA
An Exela Brand

Shannon R. Wheatman, Ph.D.

President
Kinsella Media, LLC
2101 L Street NW, Suite 800
Washington, DC 20037
2010 – Present

Dr. Wheatman specializes in designing, developing, analyzing, and implementing large-scale legal notification plans. She is a court-recognized expert who provides testimony on the best notice practicable. Dr. Wheatman began her class action career in 2000 at the Federal Judicial Center where she was instrumental in the development of model notices to satisfy the plain language amendment to Rule 23. Her plain language expertise was advanced by her education, including her doctoral dissertation on plain language drafting of class action notice and her master's thesis on comprehension of jury instructions. Dr. Wheatman has been involved in over 500 class actions. Her selected case experience includes:

Antitrust

Allen v. Dairy Farmers of America, Inc., No. 5:09-CV-00230-CR (D. Vt.).

Blessing v. Sirius XM Radio, Inc., No. 09-CV-10035 HB (S.D.N.Y.).

Brookshire Bros. v. Chiquita, No. 05-CIV-21962 (S.D. Fla.).

Cipro Cases I and II, No. 4154 and No. 4220 (Super. Ct. Cal.).

In re Automotive Parts Antitrust Litigation, MDL No. 2311 (E.D. Mich.).

In re Dynamic Random Memory (DRAM) Antitrust Litig., MDL No. 1486 (N.D. Cal.).

In re Flonase Antitrust Litig., No. 08-CV-3301 (E.D. Pa.).

In re LIBOR-Based Financial Instruments Antitrust Litig. (Barclays Bank plc Settlement), No. 11-cv-5450 (S.D.N.Y.).

In re Metoprolol Succinate End-Payor Antitrust Litig., No. 06-CV-71 (D. De.).

In re NYC Bus Tour Antitrust Litig., No. 13-CV-0711 (S.D. N.Y.).

In re Online DVD Rental Antitrust Litig., MDL No. 2029 (N.D. Cal.).

In re TFT-LCD (Flat Panel) Antitrust Litig., MDL No. 1827 (N.D. Cal.).

In re Transpacific Passenger Air Trans. Antitrust Litig., MDL No. 1913 (N.D. Cal.).

Precision Associates, Inc. v. Panalpina World Transport, No. 08-cv-00042 (E.D. N.Y.).

Roos v. Honeywell Int'l, Inc., No. CGC 04-0436205 (Super. Ct. Cal.).

Sweetwater Valley Farm, Inc. v. Dean Foods, No. 2:07-CV-208 (E.D. Tenn.).

The Shane Grp., Inc., v. Blue Cross Blue Shield of Michigan, No. 2:10-CV-14360 (D. Minn.).

Consumer and Personal Injury/Product Liability

Abbott v. Lennox Industries, Inc., No.16-2011-CA-010656 (4th Jud. Cir. Ct., Dade Cty. Fla).

Beringer v. Certegy Check Servs., Inc., No. 8:07-CV-1434-T-23TGW (M.D. Fla.) (data breach).

Chaudhri v. Osram Sylvania, Inc., No. 2:11-CV-05504 (D.N.J.) (false advertising).

CSS, Inc. v. FiberNet, L.L.C., No. 07-C-401 (Cir. Ct. W. Va.) (telecommunications).

Donovan v. Philip Morris USA, Inc., No. 06-12234 NG (D. Mass.) (medical monitoring).

FIA Card Servs., N.A. v. Camastro, No. 09-C-233 (Cir. Ct. W.Va.) (credit card arbitration).

George v. Uponor Corp., No. 12-249 (D. Minn.) (defective product).

Glazer v. Whirlpool Corp., No. 1:08-WP-65001 (N.D. Ohio)(defective product).

Grays Harbor v. Carrier Corp., No. 05-CIV-21962 (W.D. Wash.) (defective product).

In re Building Materials Corp. of America Asphalt Roofing Shingle Prods. Liab. Litig., No. 8:11- 02000 (D.S.C.) (roofing shingles).

In re Checking Account Overdraft Litig., MDL No. 2036 (S.D. Fla.) (JP Morgan, U.S. Bank, BOA settlements; overdraft fees).

In re Enfamil LIPIL Mktg. & Sales Practs. Litig., No. 11-MD-02222 (S.D. Fla.) (false advertising).

In re M3Power Razor System Mktg. & Sales Practs. Litig., MDL No. 1704 (D. Mass.) (false advertising).

In re: National Football League Players' Concussion Injury Litigation, No. 2:12-md-02323 (E.D. Pa.)

In re Netflix Privacy Litig., No. 5:11-CV-00379 (N.D. Cal.) (privacy).

In re Pharm. Industry Average Wholesale Price Litig., MDL No. 1456 (D. Mass.) (pharmaceutical).

In re SCBA Liquidation, Inc., f/k/a Second Chance Body Armor, Inc., No. 04-12515 (Bankr. W.D. Mich.) (defective product).

In re Sony Gaming Networks & Customer Data Security Breach Litig., No. 11-MD-2258 (S.D. Cal.) (data breach).

In re Target Corp. Customer Data Security Breach Litig., MDL No. 14-2522 (D. Minn.) (data breach).

In re Toyota Motor Corp. Unintended Acceleration Mktg, Sales Practs, & Prods. Litig., No. 8:10ML2151 (C.D. Cal.) (unintended acceleration).

In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, No. 3:15-md-2672 (N.D. Cal.)

In re Vioxx Products Liab. Litig., No. 05-MD-01657 (E.D. La) (pharmaceutical).

In re Wachovia Corp. "Pick-a-Payment" Mortgage Mktg & Sales Practs. Litig., No. M:09-CV-2015 (N.D. Cal.) (negative amortization).

In re Wirsbo Non-F1807 Yellow Brass Fittings, No. 2:08-CV-1223 (D. Nev.) (defective product).

Jabbari v. Wells Fargo, No. 3:15-cv-02159 (N.D. Cal.) (unauthorized accounts).

Keilholtz v. Lennox Hearth Prods., No. 08-CV-00836 (N.D. Cal.) (defective product).

Kramer v. B2Mobile, LLC, No. 10-CV-02722 (N.D. Cal.) (TCPA).

Lee v. Carter Reed Co., L.L.C., No. UNN-L-39690-04 (N.J. Super. Ct.) (false advertising).

Mirakay v. Dakota Growers Pasta Co., Inc., No. 13-CV-4229 (D.N.J.) (false advertising).

Palace v. DaimlerChrysler, No. 01-CH-13168 (Cir. Ct. Ill.) (defective product).

Pauley v. Hertz Global Holdings, Inc., No. 13-C-236 (Cir. Ct. W.Va.) (administrative/handling fees).

Rowe v. UniCare Life & Health Ins. Co., No. 09-CV-02286 (N.D. Ill.) (data breach).

Spillman v. Domino's Pizza, No. 10-349 (M.D. La.) (robo-call).

Trammell v. Barbara's Bakery, Inc., No. 3:12-CV-02664 (N.D. Cal.) (false advertising).

United Desert Charities v. Sloan Valve Company, No. CV12-06878 (C.D. Cal.)(defective product).

Wolph v. Acer America Corp., No. 09-CV-01314 (N.D. Cal.) (false advertising).

Environmental/Property

Allen v. Monsanto Co., No. 041465 and *Carter v. Monsanto Co*., No. 00-C-300 (Cir. Ct. W. Va.) (dioxin release).

Andrews et al. v. Plains All American Pipeline, L.P., No. 2:15-cv-04113 (C.D. Cal.) (Santa Barbara Oil Spill).

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Ed Broome, Inc. v. XTO Energy, Inc., No. 1:09-CV-147 (N.D. W.Va.) (oil & gas rights).

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In re Katrina Canal Breaches Litig., No. 05-4182 (E.D. La.) (Hurricanes Katrina and Rita).

In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010, MDL No. 2179 (E.D. La.) (BP, Halliburton and Transocean settlements).

Jones v. Dominion Transmission Inc., No. 2.06-CV-00671 (S.D. W.Va.) (oil & gas rights).

Thomas v. A. Wilbert & Sons, LLC, No. 55,127 (18th Jud. Dist. Ct., Iberville Parish) (vinyl chloride water contamination).

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Walgreens Settlement, Federal Trade Commission.

Insurance

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Fogel v. Farmers Grp., Inc., No. BC300142 (Super. Ct. Cal.)(management exchange fees).

Guidry v. Am. Public Life Ins. Co., No. 2008-3465 (14th Jud. Dist. Ct.) (cancer insurance).

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McFadden v. Progressive Preferred, No. 09-CV-002886 (Ct. C.P. Ohio) (UM/UIM).

Orrill v. Louisiana Citizens Fair Plan, No. 05-11720 (Civ. Dist. Ct., Orleans Parish) (Hurricane Katrina property insurance).

Press v. Louisiana Citizens Fair Plan Prop. Ins. Co., No. 06-5530 (Civ. Dist. Ct., Orleans Parish) (Hurricane Katrina property insurance).

Purdy v. MGA Ins. Co., No. D412-CV-2012-298 (4th Jud. Ct. N. Mex.) (UM/UIM).

Shaffer v. Continental Casualty Co., No. 06-2235 (C.D. Cal.) (long term care insurance).

Sherrill v. Progressive Northwestern Ins. Co., No. DV-03-220 (18th D. Ct. Mont.) (automotive premiums).

Soto v. Progressive Mountain Ins. Co., No. 2002-CV-47 (Dist. Ct. Mont.) (personal injury insurance).

Webb v. Liberty Mutual Ins. Co., No. CV-2007-418-3 (Cir. Ct. Ark) (bodily injury claims).

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Shannon Wheatman & Katherine Kinsella, *The Plain Language Toolkit for Class Action Notice*, in A PRACTITIONER'S GUIDE TO CLASS ACTIONS, 2ND ED. 701 - 710 (Marcy Greer ed., 2017).

Katherine Kinsella & Shannnon Wheatman, *Quantifying Notice Results in Class Actions,* in A PRACTITIONER'S GUIDE TO CLASS ACTIONS, 2ND ED. 693 - 700 (Marcy Greer ed., 2017).

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Shannon Wheatman & Alicia Gehring, *Mixed Media: A Smarter Approach To Class Action Notice*, Law360.com (June 11, 2015).

Shannon Wheatman, Speaker, *Balancing Due Process and Claims: A Conversation on Strategies to Safeguard Your Settlement*, Plaintiffs' Forum, Rancho Palos Verdes, CA (Apr. 2015).

Joshua Davis, Shannon Wheatman & Cristen Stephansky, *Writing Better Jury Instructions: Antitrust as an Example*, Paper presented at 15th Annual Loyola Antitrust Colloquium, Chicago, IL (Apr. 2015).

Shannon R. Wheatman, Speaker, *Can Competition Concepts be Made Comprehensible to Juries (and Judges)*, American Antitrust Institute's Business Behavior & Competition Policy in the Courtroom: Current Challenges for Judges, Stanford, CA (Aug. 2014).

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Shannon R. Wheatman, *Cutting Through the Clutter: Eight Tips for Creatively Engaging Class Members and Increasing Response*, CLASS ACTION LITIGATION REPORT, 15 CLASS 88 (Jan. 24, 2014).

Shannon Wheatman & Michelle Ghiselli, *Privacy Policies: How To Communicate Effectively with Consumers*, International Association of Privacy Professionals (2014).

Shannon R. Wheatman, Speaker, *Report on Model Jury Instructions in Civil Antitrust Cases, Presentation*, American Antitrust Institute's 7th Annual Private Antitrust Enforcement Conference, Washington, DC (Dec. 2013).

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Shannon R. Wheatman, Speaker, *Class Action Developments and Settlements*, 18th Annual Consumer Financial Services Institute, New York, New York (Apr. 2013).

Shannon R. Wheatman, Speaker, *Recent Trends in Class Actions in the United States*, National Conference on Class Actions: Recent Developments in Québec, in Canada and in the United States, Montreal, Canada (Mar. 2013).

Shannon R. Wheatman, Speaker, *Report on Model Jury Instructions in Civil Antitrust Cases, Presentation*, American Antitrust Institute's 6th Annual Private Antitrust Enforcement Conference, Washington, DC (Dec. 2012).

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In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, No. 3:15-md-2672 (N.D. Cal.)

State v. Farmer Group Inc., No. D-1-GV-02-002501(D. Ct. Tex., Travis County)

Scharfstein v. BP West Coast Products, LLC, No. 1112-17046 (Cir. Ct. Ore.)

Spillman v. Domino's Pizza, No. 10-349 (M.D. La.)

PRC Holdings LLC v. East Resources, Inc., No. 06-C-81 (Cir. Ct. W. Va.)

Guidry v. Am. Public Life Ins. Co., No. 2008-3465 (14th Jud. Dist. Ct., Calcasieu Parish)

Webb v. Liberty Mutual Ins. Co., No. CV-2007-418-3 (Cir. Ct. Ark)

Beasley v. The Reliable Life Ins. Co., No. CV-2005-58-1 (Cir. Ct. Ark)

Depositions

Hale v. CNX Gas Co., LLC, No. 10-CV-59 (W.D. Va.).

Thomas v. A. Wilbert Sons, LLC, No. 55,127 (18th Jud. Dist. Ct., Iberville Parish).

Judicial Comments

Jabbari v. Wells Fargo, No. 3:15-cv-02159 (N.D. Cal.)
"In addition to that robust direct mail and email notice program, the Settlement provided an extensive media and advertising component. *See* Wheatman Decl. (ECF 183). That included printing a color publication notice in national news outlets and Spanish-language outlets. Id. ¶¶ 17-19. "Banner ads" were also placed on websites, using targeted ad campaigns. Id. ¶ 23. Supplementing all of these efforts was a media outreach program designed to drive awareness of the Settlement and point Settlement Class Members to the Settlement Website, www.WFSettlement.com, which provided notice, frequently asked questions, and key court documents. Id. ¶¶ 28-33 . . . In short, the parties and their Court-appointed experts used every reasonable tool to create and implement and [sic] wide-ranging program to provide the best notice practicable to potential Settlement Class Members . . . Because the Court finds that the Notice complied with due process and the requirements of Rule 23, it overrules objections to the Notice." - Hon. Vince Chhabria (2018)

Good v. West Virginia American Water Co., No. 2:14-cv-1374 (S.D.W. Va.)
"The Notice transmitted to the Settlement Class met the requirements of Fed. R. Civ. P. 23(c), constituted the best notice practicable under the circumstances, and satisfied the Constitutional due process requirements of notice with respect to all Settlement Class Members, . . . The Notice Program was executed by qualified and experienced Notice Administrators . . ." - Hon. John T. Copenhaver, Jr. (2018)

In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010, MDL No. 2179 (E.D. La.) (Haliburton and Transocean settlements)
"The Class Notices were 'noticeable, clear, concise, substantive, and informative.' Wheatman Decl. ¶ 4(b).14 The notice distribution method satisfied Rule 23(c)(2), as it was the 'best notice that is practicable under the circumstances.' Fed. R. Civ. P. 23(c)(2); *see* Wheatman Decl. ¶ 5. The notice contents satisfied Rule 23(c)(2)(B)(i)–(vii) . . . " - Hon. Carl J. Barbier (2017)

In re Automotive Parts Antitrust Litigation, MDL No. 2311 (E.D. Mich.).
"EPPs, through EPPs' class action notice expert consultant, Kinsella Media, LLC ("Kinsella"),

implemented a class-notice program utilizing paid and earned media. See, e.g., Declaration of Shannon R. Wheatman, Ph.D. . . . Notice was published in *Field & Stream*, *ESPN The Magazine*, *People*, *Reader's Digest*, *Southern Living*, *Woman's Day*, *The Wall Street Journal*, *Auto Rental News*, *Automotive Fleet*, *Reuters*, *NBC Money*, *Consumer Reports*, and *Automotive Weekly*, and online media efforts through banner advertisements on outlets like Facebook and Yahoo!. The banner advertisements . . . have been seen a total estimated 354,593,140 times. The earned media component of this notice program included a multimedia news release distributed on PR Newswire's US1 National Circuit on November 29, 2016. Id. [T]he release was republished across 171 news websites and received over 11,415 views. Id. A total of 248 journalists engaged with the multimedia news release, and major national outlets that covered the Settlements, include: *Reuters*, *Associated Press*, *Boston Globe*, *Chicago Tribune*, *The Today Show*, *NBC Money*, *Consumer Reports*, and *Automotive Weekly*. Other earned media efforts . . . included statewide press releases in the EPP States as well as outreach to 275 national and local reporters for print and television." - Hon. Marianne O. Battani (2017)

In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, No. 3:15-md-2672 (N.D. Cal.)
"The Notice Program included 811,944 mailings, 453,797 emails, 125 newspaper insertions and targeted online advertising. The Court is satisfied that the extensive Notice Program was reasonably calculated to notify Class Members of the proposed Settlement. The Notice 'apprise[d] interested parties of the pendency of the action and afford them an opportunity to present their objections.' *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Indeed, the Notice Administrator reports the Notice Program reached more than 90% of potential Class Members." - Hon. Charles R. Breyer (2016)

In re Transpacific Passenger Air Trans. Antitrust Litig., MDL No. 1913 (N.D. Cal.)
In overruling an objection that direct notice should have been done, the Court found "[T]he notice program, which the Court already approved, reached 80.3% of the potential class members in the United States an average of 2.6 times and "at least 70%" of members of the Settlement Classes living in Japan. See Mot. for Final Approval at 4; Wheatman Decl. ¶¶ 8, 18. The notice also included paid media in 13 other countries. Id.; ¶ 25. There were 700,961 unique visits to the website, toll-free numbers in 15 countries received over 2,693 calls, and 1,015 packages were mailed to potential class members. Id. ¶¶ 6, 9, 10. It was therefore adequate." - Hon. Charles R. Breyer (2015)

In re Target Corp. Customer Data Security Breach Litig., MDL No. 14-2522 (D. Minn)
"The parties accomplished notice here through direct notice, paid and earned media, and an informational website . . . [T]he notice program reached 83% of potential class members. The notice here comports with Rule 23(e) . . . Class notice reached more than 80 million people, with direct notice sent to 61 million consumers . . . [The] infinitesimally small amount of opposition weighs in favor of

approving the settlement." - Hon. Paul A. Magnuson (2015)

The Shane Grp., Inc., v. Blue Cross Blue Shield of Michigan, No. 2:10-CV-14360 (D. Minn.)
"The notice to Settlement Class Members consisted of postcard notices to millions of potential class members, as well as advertisements in newspapers and newspaper supplements, in *People* magazine, and on the Internet . . . The Court finds that this notice . . . was reasonable and constituted due, adequate, and sufficient notice to all persons entitled to be provided with notice; and . . . fully complied with due process principles and Federal Rule of Civil Procedure 23." - Hon. Denise Page Hood (2015)

Mirakay v. Dakota Growers Pasta Co., Inc., No. 13-CV-4229 (D. N.J.)
"Having heard the objections made, the Court is unimpressed with the Objectors argument that there was somehow insufficient notice . . . This notice program has fully informed members of their rights and benefits under the settlement, and all required information has been fully and clearly presented to class members. Accordingly, this widespread and comprehensive campaign provides sufficient notice under the circumstances, satisfying both due process and Rule 23 and the settlement is therefore approved by this Court." - Hon. Joel A. Pisano (2014)

Spillman v. Dominos Pizza, LLC., No. 10-349 (M.D. La.)
"At the fairness hearing notice expert Wheatman gave extensive testimony about the design and drafting of the notice plan and its implementation, the primary goal of which was to satisfy due process under the applicable legal standards . . . Wheatman, who has extensive experience developing plain-language jury instructions, class action notices and rules of procedure, testified that the notice was composed at a ninth grade reading level because many adults read below a high school level." - Hon. Stephen C. Riedlinger (2013)

Kramer v. B2Mobile, LLC, No. 10-CV-02722 (N.D. Cal.)
"The Court approved Notice Plan to the Settlement Classes . . . was the best notice practicable under the circumstances, including comprehensive nationwide newspaper and magazine publication, website publication, and extensive online advertising. The Notice Plan has been successfully implemented and satisfies the requirements of Federal Rule of Civil Procedure 23 and Due Process." - Hon. Claudia A. Wilken (2012)

Cather v. Seneca-Upshur Petroleum, Inc., No. 1:09-CV-00139 (N.D. W. Va.)
"The Court finds that Class Members have been accorded the best notice as is practical under the circumstances, and have had the opportunity to receive and/or access information relating to this Settlement by reading the comprehensive written notice mailed to them . . . or by reading the published Notice in the local newspapers . . . The Court further finds that the Notice provided to the members of the Settlement Class had been effective and has afforded such class members a reasonable opportunity to

be heard at the Final Fairness Hearing and to opt-out of the subject settlement should anyone so desire." - Hon. Irene M. Keeley (2012)

In re Checking Account Overdraft Fee Litig., No. 1:09-MD-2036 (S.D. Fla.) (JP Morgan Settlement)
"The Court finds that the Settlement Class Members were provided with the best practicable notice; the notice was "reasonably calculated, under [the] circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Shutts*, 472 U.S. at 812 (quoting *Mullane*, 339 U.S. at 314-15). This Settlement with Chase was widely publicized, and any Settlement Class Member who wished to express comments or objections had ample opportunity and means to do so." - Hon. James Lawrence King (2012)

Purdy v. MGA Ins. Co., No. D412-CV-2012-298 (N.M. 4th Jud. Dist. Ct.)
"Notice of the Settlement Class was constitutionally adequate, both in terms of it substance and the manner in which it was disseminated. The Notice contained the essential elements necessary to satisfy due process . . . [T]he Notice also contained a clear and concise Claim Form, and a described a clear deadline and procedure for filing of Claims. Notice was directly mailed to all Class Members whose current whereabouts could be identified by reasonable effort. Notice reached a large majority of the Class Members. The Court finds that such notice constitutes the best notice practicable." - Hon. Eugenio Mathis (2012)

Soto v. Progressive Mountain Ins. Co., No. 2002-CV-47 (Dist. Ct. Colo.)
"Notice of the Settlement Class was constitutionally adequate, both in terms of its substance and the manner in which it was disseminated. The Notice contained the essential elements necessary to satisfy due process . . . Finally, the Notice also contained a clear and concise Claim Form, and described a clear deadline and procedure for filing of claims . . . Notice reached a large majority of the Class Members. The Court finds that such notice constitutes the best notice practicable." - Hon. J. Steven Patrick (2010)

In re Katrina Canal Breaches, No. 05-4182 (E.D. La.)
"The notice here was crafted by Shannon Wheatman, Ph.D., whose affidavit was received as evidence . . . The entire notice was drafted in plain, comprehensible language . . . The Court finds this notice adequately reached the potential class." - Hon. Stanwood R. DuVal, Jr. (2009)

Jones v. Dominion Transmission Inc., No. 2.06-CV-00671 (S.D. W. Va.)
"The Parties' notice expert Shannon R. Wheatman, Ph.D. . . . testified that in this case . . . that the mailed notices reached approximately 95.4 percent of the potential class . . . I HOLD that personal jurisdiction exists over the Class Members because notice was reasonable and afforded the Settlement Class an opportunity to be heard and to opt out." - Hon. Joseph R. Goodwin (2009)

Guidry v. Am. Public Life Ins. Co., No. 2008-3465 (14th Jud. Dist. Ct.)
"The facts show that the notice plan . . . as adequate to design and implementation . . . Dr. Shannon R. Wheatman, a notice expert, also testified at the fairness hearing as to the sufficiency of the notice plan. Dr. Wheatman testified that the notice form, content, and dissemination was adequate and reasonable, and was the best notice practicable." - Hon. G. Michael Canaday (2008)

Webb v. Liberty Mutual Ins. Co., (March 3, 2008) No. CV-2007-418-3 (Cir. Ct. Ark)
"Ms. Wheatman's presentation today was very concise and straight to the point . . . that's the way the notices were . . . So, I appreciate that . . . Having admitted and reviewed the Affidavit of Shannon Wheatman and her testimony concerning the success of the notice campaign, including the fact that written notice reached 92.5% of the potential Class members, the Court finds that it is unnecessary to afford a new opportunity to request exclusion to individual Class members who had an earlier opportunity to request exclusion but failed to do so . . . The Court finds that there was minimal opposition to the settlement. After undertaking an extensive notice campaign to Class members of approximately 10,707 persons, mailed notice reached 92.5% of potential Class members." - Hon. Kirk D. Johnson (2008)

Sherrill v. Progressive Northwestern Ins. Co., No. DV-03-220 (18th D. Ct. Mont.)
"Dr. Wheatman's affidavit was very informative, and very educational, and very complete and thorough about the process that was undertaken here . . . So I have reviewed all of these documents and the affidavit of Dr. Wheatman and based upon the information that is provided . . . and the significant number of persons who are contacted here, 90 percent, the Court will issue the order." - Hon. Mike Salvagni (2008)

Beasley v. The Reliable Life Ins. Co., No. CV-2005-58-1 (Cir. Ct. Ark)
"[T]he Court has, pursuant to the testimony regarding the notification requirements, that were specified and adopted by this Court, has been satisfied and that they meet the requirements of due process. They are fair, reasonable, and adequate. I think the method of notification certainly meets the requirements of due process . . . So the Court finds that the notification that was used for making the potential class members aware of this litigation and the method of filing their claims, if they chose to do so, all those are clear and concise and meet the plain language requirements and those are completely satisfied as far as this Court is concerned in this matter." - Hon. Joe Griffin (2007)

Education and Experience

Education

Ph.D., Social Psychology, 2001; The University of Georgia, Athens, GA
Dissertation Title: *The effects of plain language drafting on layperson's comprehension of class action notices*.

M.S., Social Psychology, 1999; The University of Georgia, Athens, GA
Thesis Title: *Effects of verdict choice, dispositional instructions, opportunity to deliberate, and locus of control on juror decisions in an insanity case*.

M.L.S., Legal Studies, 1996; The University of Nebraska-Lincoln, Lincoln, NE

B.A., Psychology, 1993; Millersville University of Pennsylvania, Millersville, PA
Honor's Thesis Title: *The effects of inadmissible evidence and judicial admonishment in individual versus group decisions in a mock jury simulation*.

Related Experience

Hilsoft Notifications
Souderton, PA
2004-2009

Dr. Wheatman was the Vice President (2006-2009) and Notice Director (2004-2009) at Hilsoft Notifications, a legal notification firm.

Federal Judicial Center
Washington, DC
2000-2004

Dr. Wheatman was a Research Associate at the Federal Judicial Center. The Federal Judicial Center is the education and research agency for the Federal Courts. The Research Division performs empirical and explanatory research on federal judicial processes and court management. Dr. Wheatman worked with the Civil Rules Advisory Committee on a number of class action studies and with the Bankruptcy Administration Committee on judicial evaluations.

Supplementary Background

Dr. Wheatman has a strong statistical background, having completed nine graduate level courses as well as teaching undergraduate statistics at the University of Georgia.

EXHIBIT 2

Bitcoin Trading Overwhelms Exchanges

Disruptions follow a jump in the value of the currency and the launch of futures trading

By Gregory Stuart Hunter

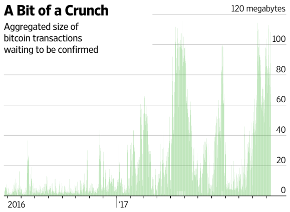
Some of the world's biggest cryptocurrency exchanges have experienced disruptions in recent days as interest in bitcoin surged in the weeks leading up to Sunday's launch of bitcoin futures.

Bitcoin exchanges and brokerages including **bitFlyer**, **Bitfinex** and **Coinbase** have all reported service outages in the past week. The digital currency has increased in value by more than 16 times since the start of the year and lured more customers into the market.

The latest problems at bitcoin exchanges followed similar outages when the digital currency crossed above $10,000 late last month. The impetus for disruptions in recent days has been the rally around the start of futures trading on **Cboe Global Markets** over the weekend. The availability of futures lets investors take leveraged or short bets on the currency, and marks its entry into the mainstream financial system. The Chicago-based exchange reported outages to its website Sunday due to heavy traffic.

A Bit of a Crunch

Aggregated size of bitcoin transactions waiting to be confirmed



Source: Blockchain.info THE WALL STREET JOURNAL.

BitFlyer, Japan's biggest cryptocurrency exchange, said Sunday that some of its users were unable to log on as a result of "erroneous deposits made to a portion of users accounts," an issue which it has now resolved. The company didn't respond to requests for comment.

Coinbase, the cryptocurrency brokerage which shot to the second-most-downloaded app in Apple's App Store for the U.S. on Thursday, said it was experiencing "significant backlog" in processing some bitcoin withdrawals.

"Despite the sizable and ongoing increases in our technical infrastructure and engineering staff, we wanted to remind customers that access to Coinbase services may become degraded or unavailable during times of significant volatility or volume," its cofounder and chief executive Brian Armstrong wrote in a blog post on Friday.

Bitfinex said twice this month it came under so-called distributed denial-of-service attacks, in which attackers try to overwhelm a website with traffic. The issue has since been resolved. The company didn't respond to requests for comment.

SEC Chairman Warns on Rush to Cryptocurrencies

WASHINGTON—Wall Street's top regulator on Monday raised alarms about the money flooding into bitcoin trading and other cryptocurrency markets, warning the red-hot corner of less-regulated finance is burning with risk for retail investors.

Securities and Exchange Commission Chairman Jay Clayton issued a statement spelling out his concerns about bitcoin, which the agency doesn't regulate, and other deals that piggyback off excitement about the cryptocurrency. The SEC has come down particularly hard on initial coin offerings, in which startups raise money—sometimes by soliciting bitcoin—from investors in exchange for giving them a new digital coin that may be traded or grow in value.

"The world's social media platforms and financial markets are abuzz about cryptocurrencies and initial coin offerings," Mr. Clayton said. "There are tales of fortunes made and dreamed to be made. We are hearing the familiar refrain, 'this time is different.'"

Mr. Clayton's alert came on the same day the SEC intervened to halt a $15 million initial coin offering that it said should have been conducted under the regulator's longstanding rules for securities sales.

A person familiar with Mr. Clayton's thinking said he voiced his views now because the run-up in bitcoin's price has captivated retail investors and because the commission's prior statements on bitcoin and ICOs have generated substantial interest.

—Dave Michaels

BITCOIN

Continued from page B1

on the first day of trading to draw firm conclusions about how the new futures market will play out, traders said.

On their first day of trading, 3,969 of Cboe's contracts had changed hands, worth about $68 million, according to calculations by the WSJ Market Data Group—still a tiny market compared with the billions of dollars worth of daily trading volume in bitcoin itself.

"People are cautiously trading in a very small and limited capacity, not really taking huge bets," said Garrett See, chief executive of DV Chain, a proprietary trading firm focused on cryptocurrencies.

The digital currency has posted an extraordinary price surge, running up more than 1,500% since the start of the year. Part of that rally has been fueled by how difficult it has been to short bitcoin, traders have said.

Shorting bitcoin futures can be potentially ruinous for a trader because it can lead to unlimited losses if bitcoin keeps rocketing higher.

That was the reasoning of a major online brokerage, Interactive Brokers Group Inc., when it announced last week that it would provide its customers with access to Cboe's bitcoin futures—but only if they were going long.

That decision might have contributed to the early price run-up in bitcoin futures, some market participants said.

Interactive Brokers disputed that its decision led to the price surge. Big trading firms have the opportunity to go short if bitcoin futures surge too high, said Steven Sanders, an executive vice president at the firm. "If it was really out of whack, they'd take advantage and dive in until it fell in line," Mr. Sanders said.

Many large futures-clearing firms, including JPMorgan Chase & Co. and Bank of America Merrill Lynch, told their customers they would sit out Sunday's launch of bitcoin futures, The Wall Street Journal reported last week.

The absence of large clearing firms likely damped volumes on the first day of trading, traders said. Such firms can suffer losses if their customers' bets go bad. That made them hesitant about clearing bitcoin futures, given the volatility of bitcoin.

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BANKRUPTCIES

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

In re: THINK FINANCE, LLC, *et al.*, Debtors.	**Chapter 11, Case No. 17-33964 (HDH) Jointly Administered**

NOTICE OF DEADLINE REQUIRING FILING OF PROOFS OF CLAIM BY THE GENERAL BAR DATE, GOVERNMENTAL UNIT BAR DATE, AND REJECTION BAR DATE

PLEASE TAKE NOTICE OF THE FOLLOWING:

On October 23, 2017, (the "Petition Date"), Think Finance, LLC, Think Finance SPV, LLC, Financial U, LLC, TC Loan Service, LLC, Tailwind Marketing, LLC, TC Administrative Services, LLC, and TC Decisions Sciences, LLC (collectively, the "Debtors") filed voluntary petitions for relief under Chapter 11 of title 11 of the United States Bankruptcy Court (as amended, the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court").

By Order of this Court entered on November 21, 2017 (the "Bar Date Order"), the Court entered an order establishing certain deadlines to file proofs of claim against the Debtors.

General Bar Date. Pursuant to the Bar Date Order, the last date and time for filing proofs of claim for any claim against one or more of the Debtors that arose prior to the Petition Date (any such claim, a "Prepetition Claim") is **March 1, 2018 at 4:00 p.m. (prevailing Central Time)** (the "General Bar Date").

For the avoidance of doubt, you MUST file a proof of claim by the General Bar Date if you have a claim that arose on or before the Petition Date. Acts or omissions of the Debtors that arose on or before the Petition Date may give rise to claims against the Debtors notwithstanding that such claims may not have matured or become fixed or liquidated prior to such date. Under section 101(5) of the Bankruptcy Code as used herein, the word "claim" means (a) a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured, or (b) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

In addition to entities holding claims subject to the Governmental Unit Bar Date or the Rejection Bar Date (both defined below), the following entities do not need to file proofs of Prepetition Claims by the General Bar Date: (a) any entity that has already properly filed with the Claims Docketing Center (as defined below) a proof of Prepetition Claim against one or more of the Debtors for which no other or additional amounts or claims are sought; (b) any entity (i) whose Prepetition Claim is not listed as "disputed," "contingent," or "unliquidated" in the Debtors' schedules of assets and liabilities (the "Schedules"); (ii) that agrees with the nature, classification, and amount of such Prepetition Claim set forth in the Schedules, and (iii) such entity does not dispute that its Prepetition Claim is an obligation of only the specific Debtor against which the Prepetition Claim is listed in the Schedules; (c) any entity whose Prepetition Claim (including any Prepetition Claim listed in the Debtors' Schedules) has been allowed previously by, or paid pursuant to, an order of the Court; and (d) any of the Debtors that hold Prepetition Claims against one or more of the other Debtors. The foregoing claims are collectively referred to herein as the "Excluded Prepetition Claims."

Governmental Unit Bar Date. Any governmental unit holding Prepetition Claims against the Debtors is required to file proofs of such Prepetition Claims on or before **April 23, 2018 at 4:00 p.m. (prevailing Central Time)** (the "Governmental Unit Bar Date"). The Governmental Unit Bar Date would apply to all governmental units holding Prepetition Claims against the Debtors (whether secured, unsecured, priority or unsecured non-priority) that arose prior to the Petition Date, including Governmental Units with claims against the Debtors for unpaid taxes, whether such claims arise from prepetition tax years or prepetition transactions to which the Debtors were a party.

Rejection Bar Date. If you wish to submit a rejection damages claim arising from the Debtors' rejection of an executory contract or unexpired lease during these Bankruptcy Cases, such proof of claim must be filed by the later of (a) the General Bar Date or (b) thirty (30) days after the effective date of rejection of such executory contract or unexpired lease as provided by an order of this Court or pursuant to a notice under procedures approved by this Court (the "Rejection Bar Date"). Any other claims arising before the Petition Date with respect to any leases or contracts of the Debtors must be filed by the General Bar Date.

FAILURE TO FILE PROOFS OF CLAIMS. EXCEPT WITH RESPECT TO EXCLUDED PREPETITION CLAIMS, ANY ENTITY THAT IS REQUIRED TO FILE A PROOF OF CLAIM FOR ANY PREPETITION CLAIM, BUT FAILS TO DO SO BY THE APPLICABLE BAR DATE DESCRIBED IN THIS NOTICE OR THAT DOES NOT SUBSTANTIALLY COMPLY WITH THE PROOF OF CLAIM INSTRUCTIONS WILL BE FOREVER BARRED, ESTOPPED AND ENJOINED FROM ASSERTING SUCH PREPETITION CLAIM (OR FILING A PROOF OF CLAIM WITH RESPECT TO SUCH PREPETITION CLAIM) AGAINST THE DEBTORS, AND THE DEBTORS AND THEIR PROPERTY WILL BE FOREVER DISCHARGED FROM ANY AND ALL INDEBTEDNESS OR LIABILITY WITH RESPECT TO SUCH PREPETITION CLAIM, AND SUCH ENTITIES SHALL NOT BE PERMITTED TO PARTICIPATE IN ANY DISTRIBUTION IN THESE BANKRUPTCY CASES ON ACCOUNT OF SUCH PREPETITION CLAIM OR TO RECEIVE FURTHER NOTICES REGARDING SUCH PREPETITION CLAIM. SUCH ENTITIES FAILING TO ASSERT A PREPETITION CLAIM ALSO SHALL NOT BE PERMITTED TO VOTE ON ANY PLAN ON ACCOUNT OF SUCH PREPETITION CLAIM. YOU SHOULD NOT FILE A PROOF OF CLAIM IF YOU DO NOT HAVE A PREPETITION CLAIM AGAINST A DEBTOR. THE FACT THAT YOU HAVE RECEIVED THIS NOTICE DOES NOT MEAN THAT YOU HAVE A PREPETITION CLAIM OR THAT THE DEBTORS OR THE COURT BELIEVE THAT YOU HAVE A PREPETITION CLAIM.

Procedures Generally Applicable to the Filing of Proofs of Claim. Except as provided herein, proofs of claim must be filed so as to be received on or before the applicable Bar Date. A proof of claim will be deemed timely filed only if the original proof of claim is mailed or delivered by hand, courier or overnight service so as to be actually received at the following addresses (the "Claims Docketing Center") on or before the applicable Bar Date: **If via U.S. mail:** Think Finance LLC Claims Center, c/o American Legal Claim Services, LLC, P.O. Box 23650, Jacksonville, FL 32241-3650; **If via delivery by hand, courier, or overnight service:** Think Finance LLC Claims Center, c/o American Legal Claim Services, LLC, 5985 Richard St., STE 3, Jacksonville, FL 32216.

Proofs of claim may not be sent by facsimile, telecopy or other electronic means.

All entities asserting claims against more than one Debtor are required to file a separate proof of claim with respect to each such Debtor.

You may obtain a "Proof of Prepetition Claim", upon written request to American Legal Claim Services, LLC ("ALCS") sent to the appropriate address set forth above or at the website maintained for these cases by ALCS at the address www.americanlegal.com/TF.

If you file a proof of claim, your filed proof of claim must (a) be written in the English language, (b) be denominated in lawful currency of the United States, (c) comply substantially with the "Proof of Prepetition Claim", (d) attach copies of any writings upon which your asserted Prepetition Claim is based, (e) indicate the specific Debtor against which the claim is being filed and (f) be signed by the claimant or by an authorized agent of the claimant.

Copies of the Schedules and the Bar Date Order are available and may be examined by interested parties (i) at the website maintained for these cases by ALCS at the address www.americanlegal.com/TF, (ii) at the office of the Clerk of the Court, Earle Cabell Federal Building, 1100 Commerce St., Rm. 1254, Dallas, TX 75424-1496, between the hours of 8:00 a.m. and 4:30 p.m. (prevailing Central Time), or (iii) on the Court's electronic docket of these cases at the address www.txnb.uscourts.gov.

If you have any questions regarding the filing or processing of a proof of claim, please send an inquiry to Notice_tf@americanlegal.com or call 904-517-1442. YOU SHOULD CONSULT YOUR ATTORNEY REGARDING ANY OTHER INQUIRIES, SUCH AS WHETHER AND IN WHAT AMOUNT YOU SHOULD FILE A PROOF OF CLAIM. **DO NOT ATTEMPT TO CONTACT THE COURT FOR ADVICE.**

Dated: December 12, 2017 **BY ORDER OF THE UNITED STATES BANKRUPTCY COURT**

ATTENTION DIRECT AND INDIRECT HOLDERS OF, AND PROSPECTIVE HOLDERS OF, STOCK ISSUED BY CUMULUS MEDIA INC.:

On December 1, 2017, the United States Bankruptcy Court for the Southern District of New York (the "**Court**"), having jurisdiction over the chapter 11 cases of Cumulus Media Inc. ("**Cumulus**"), and its subsidiaries (the "**Debtors**"), captioned as In re Cumulus Media Inc., et al., Case No. 17-13381 (SCC) (the "**Chapter 11 Cases**"), entered an interim order establishing procedures (the "**Procedures**") with respect to direct and indirect transfers of interests in the Debtors, and scheduled a hearing on a final order with respect to such Procedures.

In certain circumstances, the Procedures restrict transactions involving, and require notices of the holdings of and proposed transactions by, any person or group of persons that is or, as a result of such a transaction, would become a Substantial Stockholder of the common stock issued by Cumulus. For purposes of the Procedures, a "**Substantial Stockholder**" is any person or entity (within the meaning of applicable U.S. Treasury regulations, including certain persons making a coordinated acquisition) that beneficially owns, directly or indirectly, at least 1,320,225 shares of Common Stock (representing approximately 4.5% of all issued and outstanding common shares). **Any prohibited acquisition or other transfer of Cumulus Stock (as defined in the Procedures) will be null and void ab initio and may lead to contempt, compensatory damages, punitive damages, or sanctions being imposed by the Court.**

The Procedures, as approved on an interim basis and as requested on a final basis, are available on the website of the Debtors' Court-approved claims agent, located at http://dm.epiq11.com/cumulus, and also on docket of the Chapter 11 Cases, Docket No. 41, which can be accessed via PACER at https://www.pacer.gov.

PLEASE TAKE FURTHER NOTICE that the final hearing on the Motion shall be held on **December 21, 2017, at 10:00 a.m. (Eastern Time)** and any objections or responses to the Motion shall be in writing, filed with the Court, with a copy to chambers, and served on (i) the Debtors, 3280 Peachtree Road, N.W., Suite 2200, Atlanta, Georgia 30305, Attn: Richard Denning; (ii) proposed counsel to the Debtors, Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of the Americas, New York, New York 10019, Attn: Jacob A. Adlerstein; (iii) the Office of the United States Trustee for Region 2, Attn: Paul Schwartzberg, Esq.; (iv) counsel to any committee appointed under section 1102 of the Bankruptcy Code in these Chapter 11 Cases; (v) counsel to the Ad Hoc Term Lender Group, Arnold & Porter Kaye Scholer LLP, 70 West Madison Street, Chicago, Illinois 60602, Attn: Seth Kleinman, Esq.; and (vi) counsel to the Consenting Equity Holders, Davis Polk & Wardwell LLP, 450 Lexington Ave., New York, New York 10017 Attn: Michelle M. McGreal, Esq., in each case so as to be received no later than **12:00 p.m. (Prevailing Eastern Time) on December 18, 2017**.

PLEASE TAKE FURTHER NOTICE that the requirements set forth in the Procedures are in addition to the requirements of Bankruptcy Rule 3001(e) and applicable securities, corporate, and other laws, and do not excuse non-compliance therewith.

A direct or indirect holder of, or prospective holder of, stock issued by Cumulus that becomes a Substantial Stockholder should consult the Procedures. Any 50% Shareholder, as defined in the Motion, who wants to declare a worthless stock deduction is also subject to the Procedures, and should refer to the relief requested in the Motion and the interim order.

Dated: December 4, 2017 New York, New York **BY ORDER OF THE COURT**

BUSINESS WATCH

APPLE

iPhone Maker Acquires Shazam

Apple Inc. said it has acquired **Shazam Entertainment** Ltd., giving it ownership of one of the popular song-recognition apps at a time the iPhone maker is looking to boost its music-subscription service. Financial terms of the deal weren't disclosed.

Apple said Monday it has "exciting plans" for Shazam but declined to disclose more. Shazam said Apple would enable it to "continue innovating."

The acquisition gives Apple ownership of an app that helps users identify unfamiliar songs. Users are often directed to listen to those songs at Apple Music or Spotify, helping those services possibly reach new subscribers. Such referrals could help Apple boost the number of subscribers to its streaming-music service from its current 30 million. **Spotify** AB says its service has 60 million paid subscribers.

Shazam, which made its debut as an app in 2008, also gives Apple access to extensive data and insight on people's musical interests.

"If you have the direct integration of Shazam as part of Apple, and people find out what a song is [by] using Apple, then they go buy it using Apple. It creates a full ecosystem," said Brian Zisk, the executive producer of the SF MusicTech Summit, an annual conference.

—Tripp Mickle

SIMON DAWSON/BLOOMBERG NEWS

Apple's purchase of Shazam gives it access to wide data and insight on users' musical interests.

BOEING

Dividend Rises 20% To $1.71 a Share

Boeing Co. boosted its quarterly dividend to $1.71 a share, a 20% increase and above the Wall Street consensus for a raise.

Boeing, which in October gave a bullish outlook citing demand for its single-aisle jets, also replaced its share-repurchase program with an $18 billion authorization, targeting buybacks over the next 24 to 30 months.

Boeing had $8.57 billion in cash as of Sept. 30, the most recent figures released.

Shares rose 1.4% to $286.98 in extended trading Monday.

—Maria Armental

ATOS

French IT Company Bids for Gemalto

French information-technology services firm **Atos** SA is making an unsolicited bid to buy smart-card maker **Gemalto** NV for €4.3 billion ($5.1 billion), part of a broader wave of deals in the payment space as rivals join forces to cut costs.

Atos, which offers services such as infrastructure and cloud applications for businesses, said Monday that it had made a friendly all-cash offer for Gemalto two weeks ago. The offer was for €46 a share, representing a premium of 36% over Gemalto shares at Monday's close and 42% over the company's one-month weighted average price, Atos said.

Thierry Breton, Atos's chief executive, said in a conference call Monday that he hadn't received a response from Gemalto on the bid. He said he went public with the offer because of recent gyrations in Gemalto's shares. An Atos spokesman declined to say whether there have been any negotiations since the offer was made. A Gemalto spokeswoman didn't respond to requests for comment.

Atos's bid comes comes as firms in the payments space join forces to cut costs, develop new products and add customers as greater regulatory scrutiny and rising competition from technology start-ups squeeze fees.

—Sam Schechner

Corning to Buy 3M Optical Fiber, Copper Cable Unit

XINHUA/ZUMA PRESS

Corning Inc. said Monday it agreed to buy almost all of **3M** Co.'s optical fiber and copper cable business for $900 million.

3M's communications markets division, based in Austin, Texas, generates about $400 million a year in sales, the company said. About 500 3M employees will join Corning as part of the deal, which is expected to be completed in 2018.

"After completing a thorough strategic review, we believe that this business will be well positioned with Corning," said Ashish Khandpur, 3M's executive vice president for its electronics and energy business group.

The deal will add to Corning's 2019 per-share earnings by between 7 cents and 9 cents, it said. 3M said it expects to realize a gain of 40 cents a share from the divestiture.

Corning said it plans to spend between $1 billion and $3 billion on acquisitions as part of its multiyear capital-allocation plan.

Shares in Corning rose 0.7% Monday, while shares of 3M rose 0.5%.

—Allison Prang

FARM EQUIPMENT

Sales Increase At Cooler Pace

Retail sales of large farm tractors and harvesting combines rose at a more moderate pace in November after months of big gains against depressed year-earlier sales volumes.

Sales of high-horsepower, two-wheel-drive tractors in the US and Canada increased 5% from last November, said the Association of Equipment Manufacturers. U.S. sales alone were up 3%.

November is typically the slowest month of the year for sales of big tractors, says JPMorgan, which expects retail sales to be up about 10% in 2018. Year-to-date, sales of high-horsepower, two-wheel-drive tractors are down 6%. Combine sales increased 14% in November against a weak comparison last year.

—Bob Tita

BRIEFS

Trump signs $700 billion budget for military spending into law

President Trump signed a defense policy bill that authorizes a $700 billion budget for the military, including additional money for missile defense programs to respond to the growing nuclear threat from North Korea.

There's a catch. The budget won't become reality until lawmakers agree to roll back a 2011 law that set strict limits on federal spending. The law caps 2018 defense spending at $549 billion.

Arkansas panel clears way for new Ten Commandments marker

An Arkansas commission cleared the way to install another Ten Commandments monument outside the state Capitol, months after the previous marker was destroyed by an activist who crashed his car into it.

The Arkansas Capitol Arts and Grounds Commission signed off on the final design Tuesday. The monument will include four concrete posts for protection.

Governor to name Sen. Franken's replacement Wednesday

Minnesota Gov. Mark Dayton was set to appoint a replacement Wednesday for Sen. Al Franken amid pressure to choose someone who could keep the seat in Democratic hands in a special election next November.

Dayton has deflected questions about the appointment since Franken announced last week he would step down after allegations of sexual misconduct.

Watchdog to probe EPA chief's purchase of privacy booth

A government watchdog will examine whether the head of the Environmental Protection Agency misused taxpayer money by purchasing a soundproof booth for making private phone calls from his office.

The EPA's Office of the Inspector General confirmed the latest investigation Tuesday after a request by congressional Democrats. It will be at least the third inquiry launched into EPA Administrator Scott Pruitt's actions since his appointment.

Pruitt spent nearly $25,000 on the custom-made privacy booth.

Drone strike removes 'imminent threat' to Somalians, U.S. says

A U.S. military drone strike on a vehicle carrying explosives in Somalia removed "an imminent threat to the people of Mogadishu" by the al-Shabab extremist group, the U.S. Africa Command said Tuesday. The airstrike was carried out Tuesday about 40 miles southwest of Somalia's capital, the U.S. statement said.

From staff and wire reports

British want police to do more to stop stalkers

Crime is misunderstood, government report says

Jane Onyanga-Omara
USA TODAY

Singer Lily Allen says she was stalked for years and let down by the police response. MONICA SCHIPPER/GETTY IMAGES

LONDON – The Rev. Graham Sawyer has been a victim of stalking, so he can speak from personal experience when he complains that authorities in England and Wales aren't doing enough to stop the growing problem.

"It's horrendous because people do not understand the crime of stalking," Sawyer says. "It's covered in mystery, and it's also a bit embarrassing. ... The victim doesn't realize they are being stalked until it's advanced."

Stalking has been a crime in England and Wales since 2012. Many victims complain they are not being taken seriously by authorities.

Victims reported nearly 250,000 cases of stalking or harassment in the 12 months through June, a 36% increase from the same period in 2016, according to the most recent data from the Office for National Statistics.

Sawyer, who preaches at a church in Burnley in northern England, says he was stalked by a churchgoer, starting in early 2014 after he provided the woman pastoral support following the death of her husband. He says he reported hundreds of emails and calls to the police, but they failed to act for more than a year.

His ordeal ended after the woman was given a warning from the Lancashire police in December 2015, and she stopped stalking him.

Others are speaking out for police to take greater steps to stop the crime. Last year, anti-stalking charities attributed a sharp increase in the number of victims coming forward to singer Lily Allen, who spoke about her own seven-year stalking ordeal.

A government report on the problem this past summer says stalking is often misunderstood by police and prosecutors, who charge suspects with other offenses, especially harassment.

"Stalking is a terrible form of abuse that can have a devastating effect on its victims, which is why this government is working to protect victims and stop perpetrators at the earliest opportunity," Britain's Home Office said in a statement on Thursday.

It said the maximum sentences for stalking and harassment were raised from five to 10 years this year.

In the USA, California introduced the world's first anti-stalking law in 1990 after five women, including actress Rebecca Schaeffer, were killed by stalkers. Anti-stalking laws are in place in all U.S. states.

Victoria Charleston of Suzy Lamplugh Trust, a British charity that helps victims, says the group's national stalking help line aided 4,500 people in 2017. "We hear from them (the callers) that often stalking isn't taken seriously by the police and their concerns around the impact of emails and social media aren't taken into account," she says.

'Monster' penguin marched long ago

Fossils of human-sized bird in New Zealand reveal unknown species

Doyle Rice
USA TODAY

An artistic reconstruction compares an ancient penguin (Kumimanu biceae) with a human diver. RECONSTRUCTION BY G. MAYR/SENCKENBERG RESEARCH INSTITUTE

Talk about your big bird.

Scientists on Tuesday announced the discovery of a new species of an ancient giant penguin, one that was nearly 6 feet tall and weighed about 220 pounds, roughly the same height and size as an average man.

Fossilized remains of the extinct penguin were discovered in the Otago region on New Zealand's South Island. The new species is named *Kumimanu biceae*: In the Maori language of New Zealand, *Kumi* means "monster," and *manu* is the word for "bird."

The penguin lived about 55 million years ago, scientists say, so the fossils help provide clues to the early evolution of penguins.

"We examined the wing and leg bones of this penguin and quickly realized that we were looking at a previously unknown species," said Gerald Mayr, a paleontologist at the Senckenberg Research Institute in Frankfurt and lead author of the study.

It is also one of the oldest known penguin species; only two other species are known from as far back as 62 million to 58 million years ago.

"The fossil species is not directly ancestral to any of the modern species," he said, adding that the giant penguins became extinct without leaving any direct descendants.

When the species lived, there were very few potential predators in the seas around New Zealand. Large marine mammals — such as toothed whales and seals — had not evolved, so the only predators probably were sharks, Mayr said.

Other large marine predators soon appeared, so the penguins faced new competition and predation — which may have led to their extinction. Therefore, penguins did not get smaller as they evolved. The smaller species lived together with the large penguins, but only the descendants of the smaller penguins survive today.

The scientists assume the penguins' gigantism was a result of the seabirds' flightlessness. Like penguins today, they were not able to fly: "It was certainly perfectly able to swim and walk on land but probably spent most time in the water," Mayr said.

As for its diet, this new penguin species was probably a fish eater and sported long, spear-like beaks.

The study was published in *Nature Communications*, a peer-reviewed British journal.

Arctic is warming at its fastest pace in 1,500 years

Doyle Rice
USA TODAY

The Arctic is running a fever.

The magnitude and pace of the Arctic's sea-ice decline and ocean warming is "unprecedented" in at least the past 1,500 years and probably much longer, according to a federal report released Tuesday by the National Oceanic and Atmospheric Administration.

The polar region shows no sign of returning to its reliably frozen state of recent decades, and its permafrost is thawing faster than ever before, the report warned.

"The Arctic is going through its most unprecedented transition in human history, and we need better observations to understand and predict how these changes will affect everyone, not just the people of the north," said Jeremy Mathis, head of NOAA's Arctic Research Program. "The Arctic has traditionally been the refrigerator to the planet, but the door of the refrigerator has been left open."

Research shows that changes in Arctic sea ice and temperature can alter the jet stream, a major factor in U.S. weather and climate patterns.

"There are some connections between the warming in the Arctic and the extreme weather events down here," Mathis said.

The shift probably is partly responsible for the unusual weather in the U.S. in recent years, including the destructive wildfires in California and the sharp cold snap in the South and East, said NOAA scientist James Overland.

Retired Navy rear admiral Timothy Gallaudet, acting NOAA administrator, said Tuesday that "the rapid and dramatic changes we continue to see in the Arctic present major challenges and opportunities."

Contributing: The Associated Press

EXHIBIT 3

APPENDIX

Documents provided to Expert, Dr. Shannon Wheatman

1. Declaration of Jeffrey Pirrung Regarding Notice of Change of Physical Address of American Legal Claim Services (Dkt. 474)
2. Correspondence Regarding Proof of Claim Matter filed by Credit Bruce Kevin Green (Dkt. 388)
3. Pew Trusts Report 4 in the Payday Lending in America series: *Fraud and Abuse Online: Harmful Practices in Internet Payday Lending*
4. Think Finance Bankruptcy Case Heading
5. NonPrime101.com Report: *Profiling Internet Small-Dollar Lending, Basic Demographics and Loan Characteristics*
6. Clarity Services Report: *Changing Patterns and Behaviors of Unsecured Short Term Loan Consumers*
7. Clarity Services Report: *Preliminary 2012 Study Findings*
8. Think Finance Consumer Borrower Notice
9. American Legal Claim Website: Think Finance, LLC-Consumer Borrower Site, Consumer Borrower Postcard Mailing Frequent Asked Questions
10. Plaintiffs' Brief in Support of Motion for Class Certification (Dkt. 47)
11. An Opinion from the United States District Court, Eastern District of Pennsylvania regarding Attorney General Josh Shapiro v Think Finance, Inc.
12. TF-BK-VT_NC 000711-001440
13. Motion of the Debtors and Debtors-in-Possession for Entry of an Order Approving Procedures for Claims Objections (Dkt. 372)
14. USA Today's Affidavit of Publication (Dkt. 200)
15. The Wall Street Journal's Affidavit of Publication (Dkt. 199)
16. Declaration of Jeffrey Pirrung, Managing Director of American Legal Claim Services, LLC, in Support of the Debtors' Bar Date Motion (Dkt. 102)
17. Order Authorizing the Appointment of American Legal Claims Services, LLC, as Claims, Noticing and Balloting Agent (Dkt. 147)
18. Think Finance, et al. c/o ALCS Bankruptcy Notice
19. Order Granting Application to Employ American Legal Claims Services, LLC (Dkt, 140)
20. Order (I) Approving the Form and Manner of Notice of Commencement of These Chapter 11 Cases and (II) Authorizing the Debtors to File a Consolidated List of Debtor's Thirty (30) Largest Unsecured Creditors (Dkt. 040)
21. Stipulated Protective Order regarding related document(s) and Motion for Leave filed by Creditor Patrick Inscho (Dkt. 455)
22. Vermont and North Carolina Plaintiffs' Designations of (1) Expert Witness and (2) Potential Witnesses for the May 1, 2018 Hearing on Rule 7023 Motions
23. Expert Report of Eric Schachter, dated March 30, 2018

Faculty

Theodore O. Bartholow, III is a partner with Kellett & Bartholow PLLC in Dallas, where he focuses on representing consumers from around the country in individual and class-action litigation against financial services providers and related entities, including mortgage-servicers, debt-collectors and other consumer creditors, with a focus on matters arising in and related to consumer bankruptcy. He also has substantial experience representing consumer creditors in connection with chapter 11 bankruptcies filed by consumer lenders and mortgage-servicers, including active roles in the recent Think Finance (N.D. Tex.) and Ditech (S.D.N.Y.) bankruptcies, in which he was particularly active on behalf of his consumer clients. Mr. Bartholow is a member of the John C. Ford American Inn of Court, received the National Association of Consumer Bankruptcy Attorneys' Distinguished Service Award in 2016, and represented the National Association of Consumer Bankruptcy Attorneys at a "Mortgage Mini-Conference" focusing on development of Bankruptcy Rule 3002.1 held by the Rules Committee of the National Conference of Bankruptcy Judges in 2012. His written work has been published in the *ABI Journal*, among other publications, and he has spoken at ABI conferences and at numerous other national conferences, including the National Conference of Bankruptcy Judges Annual Conference (2017), the National Consumer Law Center's Consumer Rights Litigation Conference (2016, 2020), the National Association of Consumer Advocates and the National Association of Consumer Bankruptcy Attorneys, in addition to frequent presentations at local and regional continuing legal education events and webinars. In connection with representation of his consumer clients, Mr. Bartholow has been quoted by "NBC News," *The New York Times*, *The Wall Street Journal*, *The Los Angeles Times*, *The Chicago Tribune*, *The Dallas Morning News*, *ProPublica* and "CNN Money," among others. He received his undergraduate degree in philosophy from the University of Texas in 1998 and his J.D. in 2002 from the Benjamin N. Cardozo School of Law in New York, where he was executive editor of the *Cardozo Journal of International and Comparative Law*.

Alexandra Dugan is a partner with Bradley Arant Boult Cummings LLP in Nashville, Tenn., and regularly represents financial services and mortgage company clients with compliance matters, including risk-management and remediation, state investigations, regulatory compliance and operational implementation of legal guidelines. Her practice focuses on bankruptcy compliance and regulatory concerns. She also is a member of the firm's Auto Finance and Payment Systems industry teams. Ms. Dugan provides daily guidance to clients on bankruptcy-related regulatory and compliance matters, supervises large-scale remediation projects, designs and presents bankruptcy training programs, implements changes to business practices that are required as a result of new statutes and regulations, and works through operational matters that arise daily in a client's bankruptcy department. She works directly with her clients' internal legal department and business leaders to identify the most efficient and effective measures to ensure compliance with federal, state and local requirements and mitigate risk. She also routinely responds to inquiries from government entities, including the Department of Justice (DOJ), on behalf of her clients. In addition to her compliance work, Ms. Dugan represents mortgage companies in litigation matters across the country — including advising clients and local counsel concerning best practices. Her practice also includes representation of debtors and secured creditors in chapter 11 cases, out-of-court workouts, reorganizations, restructurings and liquidations. Her practice spans a wide range of industries, including bank and nonbank lenders, investors in distressed assets, legal, automotive and commercial real estate. Mr. Dugan is a member of the Confer-

ence on Consumer Finance Law (CCFL) and the American Bar Association, for which she serves as Pro Bono Subcommittee chair for its Consumer Financial Services Committee and as webmaster of its Bankruptcy Court Structure and Insolvency Committee. She also is a member of the National Association of Chapter 13 Trustees and the Nashville Bar Association's Mortgage Committee, and she is a Certified Regulatory Compliance Manager (CRCM) by the American Bankers Association. Ms. Dugan received her B.A. *cum laude* in 2008 from Vanderbilt University and her J.D. in 2011 with honors from Emory University School of Law, where she was admitted to the Order of the Coif.

Hon. Christopher M. Lopez is a U.S. Bankruptcy Judge for the Southern District of Texas in Houston, appointed on Aug. 14, 2019. He previously was a member of the Business, Finance & Restructuring Group of Weil, Gotshal & Manges LLP and focused on representations ranging from top global corporations in mega-restructurings to middle-market debtor and creditor representations. Judge Lopez lectures across the country on bankruptcy issues. He also serves as an adjunct professor at Thurgood Marshall School of Law. Judge Lopez currently serves as a council member of the State Bar of Texas's Bankruptcy Law Section, an advisor to the State Bar of Texas Young Lawyers Committee, a member of the Nominations Committee for the National Conference of Bankruptcy Judges, and a member of the National Bankruptcy Conference. He received his B.A. in psychlogy in 1996 from the University of Houston, his M.A. in religion in 1999 from Yale Divinity School and his J.D. from the University of Texas School of Law in 2003.

Lydia R. Webb is a corporate restructuring and bankruptcy partner in Gray Reed's Dallas office and focuses her practice on representing and advising debtors, creditors, committees and trustees in bankruptcy cases and other insolvency or restructuring scenarios. She has guided clients to successful results in complex cases before courts throughout Texas and many other states, including Oklahoma, Delaware and New York. Ms. Webb's cases span the oil and gas, health care, retail, manufacturing and restaurant businesses. She has been listed in *The Best Lawyers in America* in the fields of Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law since 2021 and in Bankruptcy Litigation for 2022-23, was selected to participate in the National Conference of Bankruptcy Judges Next Generation program in 2019, and has been named a "Rising Star" by *Texas Super Lawyers* since 2018. Ms. Webb is an ABI member and is social chair of the DFW Association of Young Bankruptcy Lawyers. She is also a member of the Dallas Bar Association's Bankruptcy Section, The Hon. John C. Ford American Inn of Court and the International Women's Insolvency & Restructuring Confederation. Ms. Webb was honored in 2021 as one of ABI's "40 Under 40." She received her B.B.A. *cum laude* in finance and economics from Baylor University in 2009 and her J.D. *cum laude* from Baylor University School of Law in 2012.