Kellett & Bartholow, PLLC
Theodore O. Bartholow III ("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

Thomas D. Domonoske
(VSB #35434)
Consumer Litigation Associates, P.C.
763 J. Clyde Morris Blvd., Suite 1A
Newport News, VA 23601
Telephone (540) 442-7706
tom@clalegal.com

Attorneys for Joe Martinez, Richard and Gail Legans, Grace Carleton, Dawn Davis, Robert and Sally Hall, Matthew and Jazmin Bennett, Victor Ramalheira, Oriana Romero-Sosa and Bettye O'Neal.

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)

RESPONSE OF COUNSEL FOR CERTAIN CONSUMER CREDITORS TO PLAN ADMINISTRATOR'S OBJECTION TO MOTION PURSUANT TO SECTIONS 503(B)(3)(D) AND (B)(4) OF THE BANKRUPTCY CODE FOR ALLOWANCE OF PAYMENT OF FEES AND EXPENSES INCURRED

[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.

Counsel for Creditors Joe Martinez, Richard Legans, Gail Legans, Matthew Bennett, Jazmin Bennett, Dawn Davis, Grace Carleton, Robert T. Hall, Sally W. Hall, Victor Ramalheira, Oriana Romero-Sosa, and Bettye O'Neal ("Applicants") hereby submit this Response to the Plan Administrator's Objection (ECF 3668) (the "Objection") to the Motion of Counsel for Certain Consumer Creditors Pursuant to Section 503(b)(3)(D) and (b)(4) of the Bankruptcy Code for Allowance of Payment of Fees and Expenses Incurred (ECF 1579) (the "Application").

In support of this Motion, Applicants respectfully state as follows:

PRELIMINARY STATEMENT

a. Initial Matter: Adjustments to Amounts Requested.

2. Although the Application originally sought approval of a total of $643,929.92 for Applicant's attorneys' fees and expenses incurred in connection with Applicant's efforts in furtherance of the successful resolution of the Ditech Chapter 11 Bankruptcy, culminating in confirmation of the Debtors' Third Amended Plan on September 26, 2019, Applicants have identified certain amounts that they believe can be appropriately deducted from this total. The proper amount should be $574,938.20, which reflects a voluntary reduction of $68,991.72. In reviewing their fee request and the invoice detail included therewith, and in consultation with the U.S. Trustee's Office, Applicants have identified $68,991.72 in fees which could *arguably* be attributable solely to Applicants' own clients, and not to the case as a whole. Applicants therefore believe that such a reduction is appropriate.

3. In its Objection, the Plan Administrator seeks to remove Applicants' entire total expense request in the amount of $29,032.37, but this is not appropriate. ECF 3668 at ¶ 1. As stated in footnote 5 of the Application (ECF 1579), Applicants acknowledged that $29,032.37 amount includes certain expenses (in the amount of $12,903.16) incurred by Mr. Bartholow in his

capacity as counsel to Applicants' client, Jose Martinez, chair of the Official Consumer Creditors' Committee, and that the $12,903.16 amount was included in the expense reimbursement submitted by the Committee at Docket No. 1576. *See* Ex. 1 thereto at 1576-1 and 2. Applicants stated in footnote 5 of the instant Application that it would be appropriate to reduce the expense reimbursement under this Application by any award granted to Mr. Bartholow under the Committee Application, but because the Court declined to award Mr. Bartholow the $12,903.16 in expenses sought in the Committee's application at ECF 1576—based on the fact that Applicants had also sought reimbursement under its own separate Application (ECF 1579)—there is no reason to reduce Applicants' request for payment of the full $29,032.37 now.[2]

4. Applicants are unable to track the Plan Administrator's claim in the chart at ¶ 1 of its Objection that the total should be further reduced by $16,146.70 based on a "discrepancy between Application Data and Supporting Data Provided," but Applicants will confer with the Plan Administrator to see if any additional reductions are appropriate.[3]

[2] Applicants would note that the Committee Application includes only one time entry, in the amount of $37.00 (Hearing 09.04.19 – Court Call), which was *not* included in the list of expense included in the Application currently before the Court. All other expenses included in the Committee Application are also included in this Application. Because this $37.00 amount was not included in the current Application (and was not awarded in the Committee Application), Applicant sees no reason to adjust the total sought by $37.00, and Applicants do not seek reimbursement for that amount here.

[3] With regard to this Application, Applicants engaged in significant efforts to negotiate a good faith resolution of the Application with the Plan Administrator. The Plan Administrator made one settlement offer and demanded that Applicants provide a detailed breakdown of the amount of fees Applicants were seeking. Applicants prepared and provided a detailed analysis and made a confidential counteroffer in a good faith effort to reach a consensual resolution with the Plan Administrator. The Plan Administrator did not counter. Thus, the Plan Administrator's statement that it "attempted to resolve the Application between January 2020 and early July 2021" is true in the sense that the Plan Administrator did not inform Applicants that it would not compromise from its initial settlement proposal, made in January 2020, until early July 2021. In terms of substantive negotiations, the Plan Administrator has not otherwise meaningfully engaged. By offering a compromise in response to the Plan Administrator's settlement proposal, which was for settlement purposes only, Applicants did not and do not now concede that their recovery should be reduced below the amounts set forth herein.

b. Preliminary Response to the Plan Administrator's Objection.

5. Applicants have standing as counsel for their clients, on whose behalf Applicants were working when they performed the services that are the subject of the Application. Applicants' clients retained Applicants to represent them in connection with their disputes with Ditech and other third-parties regarding a variety of alleged improper mortgage servicing practices. Applicants' client, Mr. Jose Martinez, by agreeing to serve as Chair of the Consumer Creditor's Committee (the "CCC") and as putative class representative in a proposed class action, understood and took seriously his responsibility to represent other consumer creditors impacted by Ditech's alleged misconduct. *See* Martinez Declaration, ¶¶ 3, 9-16. Applicants were acting on his behalf and on behalf of Applicants' other consumer creditor clients when taking the actions described herein. The Plan Administrator's argument implies that Applicants were not acting at the behest of any creditor client and only looking out for themselves, which is untrue and belied by the facts of this case and the considerable efforts and significant personal expense and time away from home by Applicants over the whirlwind six months between when Applicants first became involved in the Ditech bankruptcy and the eventual confirmation of Ditech's Third Amended Plan.

6. The Plan Administrator's standing argument is contrary to sound public policy. If accepted, the Plan Administrator's argument that Applicants lack standing because Applicants expected to be paid from its consumer clients' recovery (instead of from its consumer clients directly) would effectively preclude consumers from having any voice in Chapter 11 bankruptcy proceedings like this one - an unconscionable result and would lead to precisely the kinds of abuses (and worse) that Applicants were able to help prevent in this case, which would not have been prevented in this case but for Applicants' zealous advocacy on behalf of Applicants' consumer clients.

7. More broadly, the Plan Administrator's standing argument is incompatible with the reality of how consumer litigation works, which is - by necessity - entirely different from traditional hourly fee retainer-based or contingency fee compensation models. As a group, the overwhelming majority of consumers lack the means to independently fund payment of the attorneys' fees and litigation expenses necessary to protect themselves from the kinds of abuses that consumer laws are designed to protect. That is why most consumer protection statues, including the laws that are the subject of Applicants' clients' claims against Ditech, provide for statutory exceptions to the 'American Rule', which provides that parties ordinarily must bear their own attorneys' fees and litigation expenses.

8. Thus, in the context of consumer creditor representations in bankruptcy, evaluating "standing" according to whether the client is actually paying the attorney or whether the attorney actually expects compensation to be paid "from the client" is at odds with the statutory framework and policy purposes underlying the fee shifting provisions in the applicable consumer laws.

9. In other words, adopting the Plan Administrator's strained interpretation of standing would mean that only wealthy consumers with the means to fund their consumer litigation would have the ability to protect themselves against harmful, complex, and fast-moving corporate bankruptcies filed by consumer facing financial service provider businesses like Ditech.

10. Moreover, the fact that Ditech elected to file its second Chapter 11 bankruptcy and thereby forced Applicants' clients to protect themselves in the Bankruptcy Court in New York does not render Applicants' services, which provided a substantial contribution to the ultimate positive outcome in this case, any less necessary to the prosecution of Applicants' clients' claims.

11. Indeed, the exact opposite is true: but for Applicants' efforts, its clients' claims, as well as those of thousands of other consumer creditors, would have been effectively extinguished,

among other specific harms Applicants' efforts on behalf of Applicants' clients in this case mitigated for a variety of non-client consumer creditors.

12. Thus, contrary to the Plan Administrator's argument, Applicants were not acting outside the scope of their duties to their clients in this case, and Applicants were not acting on their own behalf, untethered from Applicants' responsibilities to their clients.

13. For two reasons, Applicants also were not working "without any expectation that they would be paid by the Creditor Clients" ECF 3668 at p.4 ¶5. First, Applicants have fee agreements with their clients that entitle Applicants to recover compensation for representing their Creditor Clients in connection with each client's mortgage dispute(s), including the clients' disputes with Ditech. These agreements contemplate that Applicants' recovery would likely to come from proceeds obtained from their mortgage creditors, including Ditech, but it is well established that the right to recover is the client's, not Applicants'. *In re Synergy Pharms. Inc.*, 621 B.R. 588, 608 (Bankr. S.D.N.Y. 2020).

14. Moreover, Applicants' ability to actually be paid with respect to representing their Creditor Clients is directly impacted by the extent of the relief Applicants are able to obtain on behalf of such clients. Thus, while Applicants' actions and achievements that are the subject of the Application have provided substantial benefits to numerous parties, in addition to the benefits Applicants' actions have achieved for Applicants' Creditor Clients, those actions also have the effect of increasing the potential that Applicants' clients will be able to recover on their claims and thus have the ability to compensate Applicants.

15. Further, contrary to the Plan Administrator's objections, Applicants' contributions to the case led to demonstrable benefits for a variety of stakeholders, including consumer creditors,

general unsecured creditors, and the debtor's estate, among others, as detailed in the Application and supporting declarations and as further set forth herein.

SUPPLEMENTAL BACKGROUND FACTS

16. The facts of Applicants' meaningful participation in and substantial contributions to the Ditech Bankruptcy case are well-documented in the Application at ECF 1579 and supported by the declarations of Applicants Theodore O. Bartholow, III, O. Max Gardner, III and Tom Domonoske filed concurrently therewith at ECF 1582, 1581, and 1580. Attached hereto are supplemental declarations from Mr. Bartholow and Mr. Gardner, as well as declarations from Applicants' Creditor Clients Jose Martinez, Jr. and Richard Legans, filed in support of their Application,[4] which refute the Plan Administrator's specious standing arguments.

17. Applicants also attach the Declaration of the Consumer Representative appointed under the consensual Third Amended Plan, Tara Twomey, which includes a discussion of her knowledge regarding Applicants' efforts and achievements at issue in connection with the Application, as well as discussion of her efforts in resolving consumer disputes as a result of her appointment as Consumer Representative in this case.[5]

18. From the beginning of Applicants' involvement in this case, Applicants were aware of the disastrous impact that Ditech's proposed sale of its servicing rights, free and clear of consumer claims and disputes, could have on the borrowers whose mortgage loans were serviced by Ditech. Those borrowers would have no right to contest or obtain legal remedies for harms resulting from the illegal charges assessed on their accounts, or unlawful foreclosures predicated

[4] *See* Supplemental Declaration of Mr. Bartholow at Exhibit No. 1 hereto (the "TO3 Supp. Dec."), Supplemental Declaration of Mr. Gardner at Exhibit No. 2 hereto (the "OMG Supp. Dec."), Declaration of Mr. Martinez at Exhibit No. 3 hereto (the "Martinez Dec."), the Declaration of Mr. Legans at Exhibit No. 4 hereto (the "Legans Dec."), and the Declaration of Mr. Hall at Exhibit No. 8 hereto (the "Hall Dec."). The original Declaration of Mr. Bartholow filed at ECF 1582 is referred to herein as the "TO3 Dec."

[5] See Declaration of Tara Twomey at Exhibit No. 5 hereto (the "Twomey Dec.").

on non-payment of illegal charges, if the proposed sale of those faulty loans through a Chapter 11 plan was effectuated.

19. Understanding that it would take time to educate counsel for Ditech's consumer borrowers about the impact that the proposed Plan could have on their accounts and the need to file a timely Proofs of Claims, Applicants successfully negotiated multiple extensions of the bar date for all consumer creditors, not just their own clients, specifically rejecting Debtors' offer to extend the bar date exclusively as to Applicants' clients. TO3 Dec. at ¶ 30.

20. Applicants later negotiated improved notice language for correspondence Ditech was sending consumers, which was included in the notice of the extended Proof of Claim deadline. TO3 Supp. Dec. at ¶ 2.

21. At the outset of Applicants' involvement in this case, Applicants reached out to Debtors' counsel in March of 2019 to request that Ditech modify its proposed plan to confirm that consumer borrowers' accounts would retain the protections contemplated by § 363(o) of the Bankruptcy Code and would not have their accounting ratified by any conveyance resulting from confirmation of Ditech's plan. TO3 Dec. at ¶ 18; Supp. TO3 Supp. Dec. at ¶ 3 and email to Ditech Counsel attached at Ex. A thereto.

22. Ditech's counsel did not respond to Applicants' request regarding § 363(o) protection in writing and did not negotiate on this point at any time prior to the contested confirmation hearing that resulted in the denial of confirmation of Ditech's Second Amended Plan.

23. Mr. Bartholow and Tom Domonoske also attended the meeting of creditors in this case and examined Ditech's Chief Financial Officer. During this examination, Applicants asked specifically as to whether Ditech intended to preserve consumer claims and did not receive a meaningful answer. TO3 Dec. at ¶ 21.

24. Between March and May of 2019, Applicant, including Mr. Gardner and Mr. Bartholow, as well as Tara Twomey, gave several well-attended webinars to consumer and bankruptcy-oriented organizations, including the National Association of Consumer Advocates, the National Association of Consumer Bankruptcy Attorneys, the National Association of Chapter 13 Trustees, the California Consumer Bankruptcy Bar Association and to members of Max Gardner's Consumer Bankruptcy Litigation Academy's Listserv, to educate the membership of these consumers' rights advocacy groups about the Ditech bankruptcy, the potential impact of Ditech's proposed Second Amended Plan on the accounts of consumer borrowers, and the importance of filing timely Proofs of Claim for borrowers with claims against Ditech. OMG Supp. Dec. at ¶¶ 29-32. Hundreds of lawyers from across the country attended these webinars. *Id*. at ¶ 33.

25. We now know, thanks to information provided by Ms. Twomey, who at Mr. Bartholow's urging was unanimously approved by members of the CCC to serve as special counsel to the CCC, and who, also at Mr. Bartholow's recommendation and with the unanimous support of the other members of the CCC, has subsequently been appointed the Consumer Representative under the confirmed Third Amended Plan, that the consumer participation increased as a result of Applicants' efforts, as she is able to report that an additional 5,600 timely consumer claims were filed after the initial bar date. *See* Twomey Dec. at ¶ 9.

26. Also during this time, Mr. Gardner was engaged in extensive communications with the U.S. Trustee's Office regarding the serious consumer issues raised by the Ditech bankruptcy and the potential for serious harmful impacts of the proposed plan's terms on consumer borrowers. OMG Supp. Dec. at ¶¶ 25-26, 36.

27. As outlined in the Application and Mr. Bartholow's Declaration, Applicants' letter to the U.S. Trustee's counsel, combined with Applicants' communications with the U.S. Trustee's office, led initially to appointment of Mr. Martinez and Connecticut Fair Housing's client to the General Unsecured Creditor Committee ("GUC") in order to provide additional consumer representation on the GUC. It immediately became apparent that the interests of the existing GUC members and those of the newly added consumer members were not aligned. So promptly thereafter the GUC agreed to support formation of the Consumer Creditor Committee (the "CCC"). TO3 Dec. at ¶ 23. Once established, the CCC unanimously voted to elect Applicants' client, Jose Martinez, as Chair of the CCC.

28. The important role Applicants' letter played in catalyzing formation of the CCC is substantiated by the fact that the Court read several pages of Applicants' letter into the record in its opinion denying Ditech's motion to disband the CCC based on Applicant's recent experience incorporating consumer remedies into a successful Chapter 11 plan in the Think Finance case in the U.S. Bankruptcy Court for the Northern District of Texas. ECF 1582; TO3 Dec. at ¶ 36.

29. Mr. Bartholow, in his capacity as counsel for Mr. Martinez, Chairman of the Official Committee of Consumer Creditors of Ditech Holding Corporation, *et al.*, signed the application for the employment of Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn") as proposed counsel for the CCC on June 5, 2019 (date), which was subsequently approved by this Court. ECF 659 and 881.

30. As stated in the application, the CCC sought to retain Quinn on the basis of its experience representing various parties in complex Chapter 11 bankruptcy cases, including committees, debtors and trustees. ECF 659 at ¶ 12. While counsel for the CCC did have experience representing parties in mortgage-related Chapter 11 cases (such as representing the liquidating

trust in the Residential Capital LLC case and the Federal Housing Finance Agency in a case involving investigation and litigation of mortgage-backed securities, as outlined in the application), Quinn did not represent that it had extensive experience in consumer mortgage litigation related to mortgage origination and servicing issues.

31. It was Applicants and Applicants' accomplished fellow legal aid attorneys on the CCC who brought significant experience and expertise regarding the consumer mortgage servicing issues at the heart of the consumer claims in the Ditech bankruptcy. Applicants and counsel for the other members of the CCC devoted significant time and resources to lend their expertise in aid of the CCC's constituents, not merely for the benefit of their own clients. TO3 Dec. at ¶¶ 41-42 and Supp. OMG Dec. at ¶¶ 38-44.

32. After the appointment of the CCC, Applicants continued to participate meaningfully in the case on behalf of their clients, working independently, yet generally in coordination with CCC counsel, but focusing solely on consumer issues from the perspective of a consumer litigator, as contrasted with the CCC counsel's more technical Chapter 11 focus.

33. As outlined in the TO3 Declaration at ¶ 25, Applicants participated meaningfully on the committee level in advocating, for example, for the CCC to challenge the confidentiality of the Bank of America ("BOA") settlement and assisting CCC counsel and its advisors with "identification of important sources of information regarding the kinds of consumer claims to be investigated by the committee and its advisors, helped transform negotiations with the Debtors and their lenders from a simple discussion of how many dollars it would take to resolve the case to what I consider the defining achievement of this bankruptcy for consumer creditors: establishing a process and means to correct borrower accounts through the consumer claims administrator." TO3 Dec. at ¶ 25.

34. Indeed, in connection with the Bank of America objection, counsel for the CCC and Applicants elicited testimony from Ditech's witness that approximately 23% of the corporate advances assessed to accounts Ditech obtained from Bank of America could not be substantiated and were therefore uncollectable, an important revelation that offered a glimpse into the shocking extent of unresolved servicing errors on the portfolio of Ditech-serviced loans. *Id*. at ¶ 38.

35. In addition, a recent September 20, 2021 decision out of the Middle District of Florida involving Ditech has exposed even more issues with unlawful charges on Ditech-serviced accounts that went undisclosed during the confirmation process in Ditech's Chapter 11 bankruptcy.[6] *Ditech Financial, LLC v. AIG Specialty Insurance Company*, Case No. 8:20-cv-409-WFJ-AEP, 2021 WL 4263330 (M.D. Florida, September 20, 2021). In the post-confirmation AIG case, Ditech unsuccessfully sought to recover insurance proceeds to offset a $23.98 million settlement with the Executive Office of the United States Trustee (the "EOUST") relating to Ditech's failure to run annual escrow analyses for borrowers in Chapter 13 bankruptcy proceedings, and for Ditech's unlawful attempts to collect these undisclosed escrow shortages after the borrowers received their Chapter 13 discharges. The record in the AIG case reveals that the EOUST raised this escrow issue with Ditech "sometime in 2014 or 2015." *Id*. at * 2.

36. Between 2015 and 2019, Ditech undertook, at the urging of the EOUST, an estimation of write-off calculations to remediate the escrow analysis issue, ultimately reaching a "final settlement with the EOUST in September 2019"—post-confirmation of the Third Amended Plan in the Ditech bankruptcy—in which "Ditech admitted the escrow analysis issue affected 13,774 loans" and the "final escrow remediation totaled $23.98 million." *Id*. at * 6. Ditech

[6] Not coincidentally, Counsel's client Jose Martinez, has asserted identical facts relating to the post-discharge attempts by Ditech to collect undisclosed and unlawful escrow amounts in its class action adversary proceeding pending before this Court. *See*, Docket No. 1, *Martinez v. Ditech Financial LLC f/k/a Green Tree Servicing, LLC et al*, Adv. No. 19-01235, pending in the United States Bankruptcy Court for the Southern District of New York.

thereafter sought to collect insurance proceeds to offset those losses, ultimately bringing its unsuccessful suit against AIG in that effort. In its various filings, including its appendix in support of its summary judgment motion against AIG (which it lost), Ditech attaches documents admitting the extent of the escrow account issues. *See* Ditech Summary Judgment Appendix, Docket No. 65, Civil Action 8:20-cv-00409-WFJ-AEP, *Ditech Financial, LLC v. AIG Specialty Insurance Company*, filed in the United States District Court for the Middle District of Florida.

37. What does the AIG case mean for this instant Application? It means that Ditech knew, prior to filing its 2019 bankruptcy and certainly prior to the filing of its Second Amended Plan, that Ditech's servicing portfolio was rife with servicing errors, to the tune of at least $23. 98 million *as to the escrow issue for current and former chapter 13 bankruptcy debtors alone,* not to mention any of the other innumerable types of mortgage servicing errors routinely committed by Ditech. It means that Applicants were right in characterizing Ditech's proposed plan as a scheme to strip consumer borrowers of their consumer protections and to ratify unlawful charges on their accounts, and, but for Applicants' insistence on account correction and preservation of claims for recoupment and setoff, Ditech would have succeeded in this effort, had its Second Amended Plan been confirmed as proposed.

38. Instead of disclosing the known extent of the servicing errors, instead of negotiating in good faith a plan that met the best interests of creditors and did not endeavor to strip consumers of the right to correct their accounts, instead of providing an accurate and honest liquidation analysis, Ditech chose the more aggressive path of an enormously expensive contested confirmation hearing that it lost.

39. Yet, without a hint of irony, the Plan Administrator's objection to the Application complains vaguely about unnecessary expenses the estate allegedly incurred as a result of

Applicants' participation in Ditech's bankruptcy, where much of the expense of the entire Chapter 11 case could have been avoided, had Ditech willingly engaged with Applicants and the CCC to work out the resolution of the consumer claims issues consistent with the Third Amended Plan's provisions, instead of pursuing confirmation of its failed Second Amended Plan.

40. Applicants were not the only party sounding the alarm regarding Ditech's lack of transparency regarding the extent of account misapplications, but Applicants were the only party insisting at confirmation that resolution of consumer issues, absent expensive and robust claims estimation process, would have to entail either or both of an account correction process or a sale that fully preserved borrowers' claims and defenses.

41. During this same time period, Applicants objected to the Debtors' proposed settlement with Black Knight, which provided the "servicing platform" software for the Debtors' servicing systems of record for Ditech's forward servicing business. Importantly, Ditech admits in the AIG case that its escrow failures were caused by deficiencies in its system of record. Applicants reached a consensual resolution with the Debtors as to Applicants' objection to the notice of presentment regarding settlement between Debtors and Black Knight, which preserved Applicants' Creditor Clients' class claims against Black Knight, which benefitted not only Applicants' individual Creditor Client Mr. Martinez, but also the putative class he seeks to represent. ECF 1347.

42. When it was clear that Ditech did not intend to negotiate a consensual plan or otherwise include consumer dispute resolution procedures as part of confirmation of the Second Amended Plan, the CCC counsel filed a reply in addition to the complimentary, nonduplicative objections to the Amended Plan. Applicants specifically elected not to duplicate the efforts of the CCC's objection to the Amended Plan in arguing the best interests test and other deficiencies in

the proposed plan, but rather focused on what they knew to be true: Ditech's servicing portfolio was rife with servicing errors, and Ditech was attempting to confirm a plan in order to transform those errors into recoverable charges and/or preclude borrowers from obtaining relief from the harms and losses they suffered as a consequence of Ditech's errors, to the detriment of potentially hundreds of thousands of consumer borrowers.

43. Applicants, with the CCC, also objected to confirmation on the basis that the Second Amended Plan failed to include account adjustment procedures, as an alternative to the § 363(o) remedies. ECF at 1077. Although the Court did not preserve the 363(o) claims through the sale or find bad faith, and although the Court ruled that it could not force the Debtor to include account adjustment procedures in its relief, the Court ultimately denied confirmation on related grounds, holding that Ditech failed to show that it could satisfy the best interests of creditors test without offering a valuation of the consumer creditors' claims. ECF at 1240. As such, Applicants submit that the efforts of Applicants and CCC defeated the Debtor's Second Amended Plan.

44. These results were impressive and newsworthy, having implications for consumers everywhere, as well as the mortgage industry as a whole. Indeed, an ABI Journal note dated August 29, 2019 entitled "Consumer Concerns Sink Ditech's Chapter 11 Exit Plan" outlined the fact that the Court denied confirmation of the Second Amended Plan because "the plan could prevent homeowners whose mortgages were serviced by Ditech from fighting back against fees, defaults and foreclosures once the company's assets are sold."[7]

45. Shortly after the Court denied confirmation of the Second Amended Plan, the Court held a status conference on September 4, 2019. At the Court's direction, Mr. Bartholow attended

[7] A true and correct copy of the ABI Journal note is attached hereto as Exhibit 6.

this conference in person with his client, Mr. Martinez. TO3 Supp. Dec. at ¶ 5; Martinez Dec. at ¶ 16.

46. After the conference, but on that same day, Applicants sent an email to Debtors' counsel and counsel for all the major stakeholders in the Ditech bankruptcy, urging that the parties engage in mediation to resolve the remaining issues: "In light of last week's ruling on confirmation and the Court's comments at today's status conference, my co-counsel and I propose that the essential parties to resolution of the remaining issues in Ditech's Chapter 11 bankruptcy convene for mediation as soon as possible." TO3 Supp. Dec. at ¶ 6, and Exhibit B thereto (copy of the September 4, 2019 email). Applicants further provided a list of the essential parties to the proposed litigation and provided a list of possible mediators.

47. Counsel for the Debtors responded as follows: "Unfortunately, your construct and demands are really just completely unworkable." *Id*. at September 4, 2019 reply email. Debtors' counsel further stated "[t]here is [sic] a couple of days to get a deal consensually" but chided that "getting all of these people together is just never going to happen in 48 hour and we will waste any time trying." *Id*.

48. The following day, on September 5, 2019, Applicants sent a two-part email to counsel for the CCC in which Applicants again repeated his earlier call for including a consumer dispute resolution (account correction) procedure in the plan—an idea that CCC's counsel then considered so lofty and ambitious that CCC counsel had humorously dubbed it "Thad-land"— and outlining certain terms to accomplish that purpose. Although the September 5, 2019 emails are privileged, the proposed terms included a consumer claims reserve, an account adjustment procedure which could draw on said reserve to the extent adjustments were merited, appointment of a "litigation trustee" to determine the correct amount of consumer claims, special

accommodations for adjustment of accounts of borrowers in discharged Chapter 13 cases such that those cases could be modified consistent with "deem current" orders, and treatment of releases to accommodate ongoing account adjustment efforts, among other relevant terms. TO3 Supp. Dec. at ¶ 7.

49. Although the Court did not deny confirmation based on the Second Amended Plan's lack of an account correction provision, that provision, which Applicants asserted was necessary as an alternative to § 363(o) language as a condition of settlement prior to the confirmation hearing on the Second Amended Plan, ultimately became the vehicle that allowed Ditech to confirm its Third Amended Plan without objection from the CCC and without having to reveal its valuation of the consumer claims.[8]

50. When the Court denied confirmation of Ditech's Second Amended Plan, the parties were forced to return to the settlement table, and armed with new leverage, Applicants and the other members of the CCC, through counsel, were able to push through account correction in a consensual Third Amended Plan. But for Applicants' efforts in sounding the alarm, objecting to Ditech's schemes, and insisting on inclusion of account correction provisions in the Third Amended Plan, these consumer protections likely never could have materialized, and could have been left with nothing but a *pro rata* share in a meager $4 million general unsecured claims pool, if anything.

51. But for Applicants' efforts, on their own dime, on behalf of their own clients, who were serving the interests of all of Ditech's consumer creditors, it is almost certain that consumer creditors would have fared much worse than they did, resulting in a net loss for numerous accounts;

[8] It turns out, the settlement with the EOUST that Ditech entered into immediately following confirmation revealed that Ditech valued the bankruptcy escrow remediation claims alone at approximately $23 million (as described in the AIG litigation discussed above), not to mention various additional claims related to Ditech's failure to modify loans as promised to borrowers in BK, which was also a component of the EOUST settlement.

indeed, any *pro rata* recovery by consumer creditors would have been nominal, if anything, and NewRez would thereafter be free to demand and collect the unlawful (but now ratified) amounts Ditech and its predecessors has assessed to borrowers' mortgage accounts, had Ditech successfully confirmed its Second Amended Plan.

ARGUMENT

A. Applicants have standing to assert their administrative claim for attorneys' fees and expenses based on Applicants' substantial contributions to this case.

1. Applicants represent creditors (for purposes of §503(b)(3)(D) standing) who made substantial contributions in this case, and as a result of these substantial contributions, Applicants incurred professional fees that are compensable under §503(b)(4).

52. Applicants had fee agreements with their Creditor Clients that require Applicants' Creditor Clients to pay Applicants. TO3 Supp. Dec. ¶ 8 and Exhibit C, Martinez Dec. ¶¶ 6-8, Hall Dec. ¶ 7, Legans Dec. ¶ 3. The Plan Administrator's objection implies, without any factual support, that Applicants' Creditor Clients had no obligation to pay Applicants by virtue of the fact that Applicants' application recognized that their clients *could not afford to pay* the fees requested in the Applicants' substantial contribution fee application. However, as any debtor in bankruptcy knows, being liable on a debt and actually being able to pay are not the same thing.

53. Moreover, the Plan Administrator's argument is pure conjecture unsupported by any evidence. In fact, as reflected in the attached declarations of Jose Martinez, Robert Hall, and Dale Legans, Applicants' clients were obligated to pay Applicants, and they have expressly acknowledged that obligation in their declarations. The unremarkable fact that these consumer creditors, including two who were recent former Chapter 13 bankruptcy debtors (Martinez/Legans), lack the means to pay the six-figure attorneys' fees that Applicants

accumulated in vigorously and successfully representing their interests in this case, has no impact on whether Applicants' clients actually incurred a legal obligation to pay these fees.

54. Because Applicants' clients acknowledge and confirm their legal obligation to pay Applicants' fees and support Applicants' efforts to recover their fees from the estate as a substantial contribution claim, this Court's standing analysis in *Synergy Pharmaceuticals* is inapposite, to the extent this Court held in *Synergy* that the applicants lacked standing based on their lack of an enforceable agreement with the Ad Hoc committee members on whose behalf they purported to be acting in connection with the services for which the *Synergy* applicants were seeking compensation.

55. Similarly, the Plan Administrator's claim that Applicants' substantial contribution fee application was not *authorized* by Applicants' Creditor Clients (as the *Olsen* court held in a factually unusual case in which the Applicants' client was actively opposing the attorney Applicants' substantial contribution administrative claim against the Applicants' client's wife's bankruptcy estate. *See,* 334 B.R. 104 (S.D.N.Y. 2005)) is also pure conjecture that is inconsistent with reality. Again, the attached Martinez and Hall declarations refute the Plan Administrator's baseless assertion and confirm that Applicants' Creditor Clients authorized and endorsed Applicants' efforts in Ditech's bankruptcy case and that Applicants' clients authorize and support Applicants' application to recover attorneys' fees as an administrative claim based on Applicants' substantial contributions to the Ditech Bankruptcy case. *See* Martinez Dec. ¶¶ 17-18, Hall Dec. ¶¶ 21-23.

2. The cases the Plan Administrator cites are distinguishable and generally support a finding of that Applicants have standing to assert their substantial contribution claim in this case.

56. The *Lehman* and *Trade Creditor Group* cases the Plan Administrator cites for the proposition that counsel cannot request a substantial contribution claim on its own behalf do not actually address that issue. *In re Lehman Bros. Holdings Inc.*, 508 B.R. 283, 296 (S.D.N.Y. 2014); *Trade Creditor Grp. V. L.J. Hooker Corp., Inc. (In re Hooker Invs., Inc.)*, 188 B.R. 117, 120 (S.D.N.Y. 1995). Moreover, for the reasons discussed above and established through the Martinez, Legans, and Hall declarations, Applicants are not asserting a substantial contribution on their own behalf in this case, and this argument is therefore irrelevant and wholly meritless.

57. Similarly, the *Olsen* case was a case where the Applicants' creditor client, husband of the debtor, did not support his attorney's application for compensation from his wife's bankruptcy estate and therefore affirmatively objected to the creditor's counsel's substantial contribution fee application. As such, the *Olsen* court held that the application was not filed on behalf of the creditor client, because it was not authorized by the client, which the *Olsen* court held that §503 requires. The *Olsen* court recognized that the case presented unusual circumstances but nevertheless declined to extend §503 standing to an attorney whose client did not support the application. There is no such conflict here, as only the Plan Administrator has objected to the application, and Applicants' clients support Applicants' substantial contribution fee application.

B. The Requested Fees and Expenses in the Application are entitled to payment under Sections 503(b)(3)(D) and 503(b)(4) of the Bankruptcy Code.

1. Applicants provided Benefit to all Stakeholders in Ditech Bankruptcy Cases.

58. The Plan Administrator asserts that Applicants' actions were geared to its own client's interest and did not confer a direct, significant and demonstratively positive benefit upon the estates. ECF 3668 at ¶ 39. As argued extensively herein, this is just not accurate, and the Plan

Administrator's Objection does little to refute this, but instead merely repeats the high burden applicable to substantial contribution applications in this jurisdiction. The Plan Administrator then states, in conclusory fashion, that Applicants have not satisfied that burden.

59. As the docket, Applicants' fee records, the supporting declarations filed in connection with the Application and this Response show, Applicants engaged in meaningful participation in the Ditech bankruptcy case, not just on behalf of their own clients, but on behalf of all consumer creditors, and actions taken by Applicants had a direct and demonstrably positive benefit upon the estates. This benefit extended not just to Applicants' own clients, but to virtually all stakeholders in this bankruptcy case.

60. **Benefit to Consumer Creditors:** As shown by the record presented in connection with the Application, Applicants first proposed, and thereafter promoted and negotiated, the consumer account correction procedures that provided a mechanism to resolve consumer disputes relating to the mismanagement of their mortgage loan accounts by Ditech, before servicing rights were transferred to a different servicer. *See* TO3 Dec. at ¶¶ 21-25. This avoided the disastrous result of the new servicer taking the servicing rights, and the associated loan accounts, free and clear of all consumer claims, and therefore permitting the new servicer to collect unlawful amounts from innocent consumers without consequences.

61. Indeed, a Yahoo Finance article entitled "Ditech deal with homeowners paves way for $1.8B Sale," published shortly after an agreement was reached on the Third Amended Plan in September of 2019,[9] trumpets the successful resolution of the dispute over whether Ditech could sell its servicing rights free and clear of consumer creditor claims: "The sale doesn't ratify mistakes

[9] A true and correct copy of the Yahoo article is attached as Exhibit 7 hereto.

in mortgage accounts and both Ditech and the new buyers have committed to investigate account misstatements and correct them." This is a far cry from just a month earlier, the article continues:

> More than 4,000 homeowners have filed complaints to federal agencies regarding Ditech over the past year, including allegations that it failed to properly credit payments and wrongly foreclosed on their homes. Ditech lawyers argued in court last month that the buyers would only complete the transactions if they were unencumbered by consumer claims.

62. So why the sudden shift? The difference in attitude is directly attributable to Applicants' action in exposing the Debtor's intent to "clean" its problem loans, opposing the Second Amended Plan and pressing for a consumer dispute resolution and account correction procedure.

63. As an additional, but important point, payment of Applicants' fees would not come out of the Consumer Creditor Recovery Cash Pool or the GUC Trust; rather Applicants understand they would be compensated from cash reserves maintained by the Debtor for purposes of paying administrative expenses.

64. **Benefit to Non-Consumer General Unsecured Creditors:** But for Applicants' successful establishment of the CCC and active engagement with counsel for the CCC with respect to the subsequent negotiation of the $10 million Consumer Creditor Recovery Cash Pool and $1 million Consumer Creditor Fee Reserve, consumer creditors would have shared the $4 million GUC Recovery Trust, greatly reducing the pro rata recovery by non-consumer general unsecured creditors. The costs of administration of consumer creditors' claims would have further (and substantially) diluted the recovery of non-consumer general unsecured creditors. By pushing for and negotiating the dispute resolution procedure for consumer claims under which Allowed Consumer Creditor Claims would be satisfied from a separate claims fund, Applicants helped carve out consumer claims, thereby limiting the further dilution of amounts available to unsecured

creditors in general. *See* Third Amended Plan at ¶ 1.38. Because the potential amount of Allowed Consumer Creditor Claims is significant—based on the account information already resolved by the Consumer Representative Tara Twomey,[10] based on information obtained by Applicants and counsel for the CCC that 23% of the Bank of America accounts in Ditech's servicing portfolio contained unrecoverable corporate advances, and based the recent admissions of Ditech in the AIG litigation resulting in $23.89 million in claims just as to escrow accounts for Chapter 13 debtors alone, discussed *supra*—consumer claims would have significantly diluted any recovery by general unsecured creditors. The dispute resolution procedure also had the effect of limiting potential administrative expenses by providing the Consumer Representative with set procedures on how to resolve claims and establishing amounts for payment of fees and expenses relating to same. *See* Consumer Representative Fee Reserve, Third Amended Plan at ¶ 1.43. In addition to the foregoing, it is noteworthy that the GUC negotiated its claim reserve of $4 million before the CCC was even established, long before Applicant, working with and through counsel for the CCC, helped negotiate for and establish the separate consumer claims fund.

65. **Benefit to the Estate:** After the Court denied confirmation of the Second Amended Plan, Debtors were at risk of termination of their servicing agreements, which would result in a cascade of disastrous consequences, which would have precluded Debtors' contemplated sale of Ditech's servicing rights to the forward and reverse loan portfolios and effectively evaporated the Term Lender's collateral securing repayment of Ditech's obligations. The negotiated settlement, incorporating Applicants' account correction and consumer claims administration procedures, which Applicants proposed prior to the hearing on the Second Amended Plan and which were ultimately incorporated into the Third Amended Plan, allowed the estate to avoid termination of

[10] *See* Twomey Declaration.

its servicing rights by the GSEs and others, and to sell Ditech's servicing rights to NewRez without having to undergo costly claims estimation processes necessary to satisfy the best interests of creditors test. To be clear, Applicants did not directly negotiate the Consumer Creditor Recovery Pool and the Consumer Representative's claims administration and account correction authority—that specific language was hammered out by Debtors' counsel and counsel for the CCC—but Applicants were extremely active behind the scenes working with the other members of the CCC and with CCC's counsel to develop the nuances of the strategies and positions that resulted in the final product crafted by CCC counsel and Debtors' counsel. Applicants' participation also aided directly in the selection of Tara Twomey as Consumer Representative, rather than leaving administration of the consumer creditor claims to the GUC Recovery Trustee or Plan Administrator.

66. Further, the estates are themselves now directly benefitting from the consumer protection mechanisms Applicants proposed, which were made part of the Third Amended Plan at Applicants' insistence: the Plan Administrator filed a motion at ECF 2874 seeking to retain and administer approximately $96 million in pre-petition unclaimed funds (as well as an additional $14 million in post-petition and $4 million in post-sale funds) resulting from excess payments by borrowers on their loans or escrow accounts. ECF 2874 at ¶ 2. The Plan Administrator justified this approach under the Third Amended Plan and Confirmation Order by relying on the account correction provisions that Applicants had been seeking to include in the plan from the outset. ECF 2874 at ¶¶ 47-48. The Court entered an order permitting the Plan Administrator to administer the unclaimed funds as proposed, in the face of multiple objections by attorneys general from various states, seeking to administer the unclaimed funds themselves through the states' unclaimed funds procedures.

67. **Benefit to Purchaser of Ditech's Mortgage Servicing Rights ("MSR"):** Applicants' actions had a direct and demonstrable benefit to other stakeholders in the Ditech bankruptcy case, including New Residential Investment Corp ("NewRez"), as the purchaser of Ditech's servicing rights to Ditech's portfolio of servicing rights for consumer mortgage loans. The account correction procedures that Applicants successfully insisted be included in the Third Amended Plan allowed NewRez to acquire those rights while minimizing the risk of litigation over unlawful amounts assessed to consumers' mortgage loans by Ditech and its predecessors. As stated in Applicants' Application: "[e]ven New Residential benefitted and continues to benefit from this solution, which allows it to have incorrect accounts fixed prior to undertaking servicing responsibilities, thus evading future litigation risk." ECF 1579 at ¶ 14. Accordingly, Applicants' efforts established a pathway forward, which allowed the sale to proceed in a way that protected the Debtor, consumer creditors, and NewRez as the buyer.

2. Applicants' Work that is the Subject of this Application is Not Duplicative of the Consumer Creditor Committee's Counsel.

68. The Application has been on file for nearly two years, and only the Plan Administrator has objected. Applicants have communicated with the U.S. Trustee's Office regarding concerns related to work performed exclusively for the benefit of Applicants' clients. Prior to the filing of the Application, Applicants attempted to exclude time and expenses incurred solely on behalf of Applicants' clients. However, based on Applicants' communications with the U.S. Trustee, Applicants have further voluntarily reduced their request by $68,991.72, which reflects amounts billed for work arguably benefitting only or primarily Applicants' clients. This includes elimination of fees for the Badstubner Deposition, one of the few specific items of Applicants' work that the Plan Administrator disputes in its objection.

69. As described above, Applicants and counsel to the CCC performed different roles in service of their common goal of delivering a confirmed plan that maximized consumers' recovery and protected consumer borrowers from ratification of unlawful charges assessed to their mortgage loan accounts. CCC counsel expertly navigated the CCC through the complex Chapter 11 process and procedural nuances of the Southern District of New York. However, Applicants, along with counsel for the other members of the CCC, provided consumer law expertise and deep knowledge of mortgage servicing practices and issues to the CCC's counsel that guided the CCC's counsel's strategic approach for protecting the CCC's constituents' interests.

70. In asserting that the work performed by Applicants after the formation of the CCC was duplicative, the Plan Administrator is attempting to induce Applicants to say that the CCC's counsel "was not performing its job." That is not an accurate characterization of the unique circumstances this case presented. A more appropriate description is that the Applicants' assistance provided the CCC's counsel critical mortgage servicing industry-specific knowledge necessary to understand the needs and goals of the consumer creditors that were its constituents, specialized knowledge that has accumulated among the members of the CCC over many years of practice in this technical and complex area of the law. The CCC's counsel's work in opposing confirmation of Ditech's second proposed plan, based on extremely technical and nuanced arguments related to the Chapter 11 process, was nothing short of masterful. That was the job the CCC's experienced bankruptcy counsel was retained to perform, and they were excellent at it.

71. Applicants could not duplicate and did not attempt to duplicate the work that the CCC performed. Rather, Applicants' work was complimentary and substantially informed the negotiation process that culminated in confirmation of the Third Amended Plan in this case, which included account correction provisions and the appointment of a consumer claims administrator,

which Applicants conceived of and pressed for. The CCC's counsel ultimately negotiated for and obtained these important and unconventional plan provisions at Applicants' and other CCC members' urging.

72. As an example of how Applicants worked alongside CCC counsel, Applicants, with the unanimous support of the members of the CCC, instructed counsel for the CCC to object to the Debtor's proposed settlement with Bank of America and to Ditech's attempts to keep the settlement terms confidential. Counsel for the CCC filed objections at ECF 739 and 773, and this Court thereafter issued an important opinion and order requiring that the material terms of the Bank of America settlement be disclosed. ECF at 972. As a result of that ruling, Counsel for the CCC and Applicants examined the Debtors' witness at the 9019 hearing as to the BOA settlement. Together, Applicants and counsel for the CCC elicited testimony establishing that at least 23% of fees assessed to Ditech's borrower accounts acquired from BOA could not be substantiated, further revealing an unsettling detail regarding the extent of consumer grievances with regards to the loan servicing errors in the servicing portfolio Ditech was trying to sell through the plan. This confirmed the importance of either providing a mechanism for account correction or conducing a robust claims estimation process, which the Court has acknowledged would have been extraordinarily costly and potentially unworkable.

73. The Plan Administrator's reliance on *In re Worldwide Direct, Inc.*, 259 B.R. 56 (Bankr. D. Del. 2001) to suggest that Applicants' work is not compensable as a substantial contribution because it is duplicative of the CCC counsel's work is misguided, because Applicants' role in the case went well beyond merely advising Applicants' Creditor Clients and extended to active participation in litigation of the Chapter 11 case.[11] Also, the facts of *Worldwide Direct* are

[11] *Worldwide Direct* was reviewed in the first instance under Section 503(b)(3)(F) and (b)(4), as compensation of a member of a committee, and not substantial contribution under Section 503(b)(3)(D). The Court denied the application

easily distinguished, in that the committee member in that case sought reimbursement for fees incurred in sending its counsel to committee meetings in its stead, and reviewing *all* pleadings (not just the "incomprehensible ones") and explaining same to the committee member. *Id*. at 62-63. Here, Applicants are seeking compensation for actively working to resolve the case, not merely for keeping their clients informed. Additionally and importantly, the *Worldwide Direct* Court, in *dicta*, expressly limited the scope of its opinion to the "context of this case," and specifically contemplated a scenario in which a committee member's counsel brought special expertise to the committee, in which instance it would be appropriate to compensate counsel:

> Similarly, where counsel for a member has a special expertise or has been involved in a matter pre-petition and, therefore, has specialized knowledge that would assist the committee in handling a particular discreet matter, it would be appropriate for the committee in the performance of its duties to ask the member's counsel to perform work on that particular matter. Such a practice would avoid the administrative expense and delay of bringing a new attorney into a matter mid-stream. *See, e.g., In re Jefsaba*, 172 B.R. 786, 801 (Bankr.E.D.Pa.1994) (finding that the estate should not bear the cost of the learning curve of each new addition to a firm). The committee, in the first instance, should be diligent in assuring that there is no duplication of effort.

Id. at 61. The instant case manifests that exact hypothetical: Applicants here provided critical expertise in consumer litigation in the field of mortgage servicing. *See* Bartholow Declaration at ECF 1582, ¶¶ 25; OMG Supp. Dec., ¶¶ 20-26, 29-33, 39-42. As argued above, Applicants were very intentional in not duplicating the efforts of CCC counsel, who played an important role in this case, nevertheless, it was neither unreasonable nor duplicative for Applicants to review and independently stay up-to-date on this extraordinarily fast-paced and document intensive bankruptcy proceeding.

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as to pre-committee fees, because fees and expenses are simply not reimbursable under section 503(b)(4) before a committee is even formed. Although the applicant did not seek reimbursement for substantial contribution, the Court stated that there was no evidence presented that pre-committee work provided a substantial contribution to the estate. *Id*. at 62.

3. Applicants Engaged in a Leadership Role throughout the Case.

74. The Plan Administrator asserts that there is "no evidence that the Creditor Clients played a leadership role in any of the negotiations, let alone was even involved in the discussions." ECF 3668 at ¶ 53. This assertion is disingenuous insofar as Debtors' counsel refused to engage Applicants in any negotiations regarding plan provisions, rebuffing Applicants' overtures from the beginning to the end of the case. It is also inaccurate, as detailed above and in the Application, because Applicants negotiated extensions of the bar date on multiple occasions, negotiated improved language for consumers with respect to the claims procedures and disclosure statement notices, took the initiative of getting the CCC established, and worked to educate consumer advocates about the claims process.

75. The Plan Administrator's objection fails to address Applicants' work prior to confirmation of the Third Amended Plan, which identified and pressed for the solutions (account correction, appointment of consumer claims administrator) that ultimately were incorporated into the agreement(s) that produced the settlement embodied in the Third Amended Plan.

76. The Plan Administrator's description of the negotiations among committee counsel and the Debtors did not include discussion of the Applicant. That does not mean that Applicants were not active in the negotiation process on the committee-end and otherwise. Applicants negotiated with the secured creditors' counsel at Kirkland & Ellis just prior to the deal that was ultimately reached, and those negotiations contributed to the ultimate settlement amount of $10 million for the consumer creditors and another $1 million to cover the expenses of the consumer claims administrator. In the Second Amended Plan, the Debtors had been proposing to pay just $5 million to establish a consumer claims fund, without account correction, and that fund would have been administered by the general unsecured claims administrator, along with all of the other trade

claims. If that had happened, that $5 million fund would have been quickly exhausted by the GUC administrator's professionals, who are not experienced in the complex mechanics of mortgage loan accounting and the nuanced processes involved in consumer mortgage loan servicing. Instead, because of Applicants' efforts, Tara Twomey, one of the pre-eminent consumer attorneys in the nation, and one of the pre-eminent experts in the field of consumer mortgage servicing, has been appointed as Consumer Representative (consumer claims administrator), billing at a blended hourly rate of just over $200/hr., and Ms. Twomey has been expertly navigating the morass of consumer claims that Ditech's improper servicing practices have generated, an unsavory task that the GUC administrator would be totally unequipped to perform.

77. Moreover, the Court's expressed concern that the Debtors had failed to engage with the CCC and its constituents in negotiating the Second Amended Plan was not the result of a failure of the Applicants to seek to engage Debtors in negotiations. Rather, Debtors had refused Applicants' overtures to engage in mediated settlement discussions, and in the 'settlement' discussions that did occur prior to the confirmation hearing on the second amended plan, the Debtors refused to engage with Applicants on the specific issue of account correction - which proved to be the eventual key to confirmation in this case.

78. Furthermore, Mr. Bartholow was present at the offices of Weil in late July of 2019 for and participated in settlement negotiations with the Debtors' senior management, CCC counsel, and Debtors' counsel. Additionally, it was Mr. Bartholow who first sent an email, dated September 4, 2019, to Ditech's counsel and counsel for all other stakeholders, pressing for mediation, listing the necessary parties to a successful mediation, and providing a list of possible mediators. *See* Ex. B to Supplemental Bartholow Declaration.

79. The Plan Administrator's allegation that there is "no mention of Counsel for the Creditor Clients at all, much less any contribution by them in furtherance of confirmation of the Third Amended Plan, in either the Confirmation Hearing transcript, the Consumer Creditors' Committee Statement, or the Confirmation Order," is inapposite. *See* ECF 3668 at ¶ 53. This statement is misleading by suggesting that the fact that Applicants were not 'mentioned' at the confirmation hearing for the Third Amended Plan is somehow indicative of Applicants' lack of participation in the process that led to confirmation of the Third Amended Plan.

80. Furthermore, the contributions of Applicants had already occurred in exposing the consumer issues and in the resolution proposed and negotiated through counsel for the CCC resulting in a consensual plan. The Plan Administrator is attempting to write Applicants out of the record and diminish Applicants' actual and demonstrable contributions to the estate just because Applicants did not travel from Texas and Virginia to New York one last time in order to claim glory at the final confirmation hearing, after confirmation of the Third Amended Plan was essentially *a fait accompli*, when there would be no benefit to any party to have Applicants attend that hearing.

4. Applicants' Actions Were Not Primarily Intended to Benefit its Clients Only.

81. Despite the Plan Administrator's unfounded accusations, Applicants' actions in this case were not primarily intended to benefit its clients only. *See* ECF 3668 at ¶ 49. The Plan Administrator's only example of Applicants' supposedly self-serving behavior is its allegation that Applicants' "primary conduct was the inappropriate filing of four separate Adversary Proceedings designed to benefit their particular clients." *Id*. at ¶ 50. The Plan Administrator laments that the "Debtors were then forced to expend time and estate resources to defend against them in the midst of the confirmation process." *Id*. This argument is not only specious, but it is also a red herring.

It is specious because (a) an adversary was appropriate given Applicants' clients' claims against third party defendants and because (b) the adversary is necessary, together with the proofs of claim filed, to preserve Applicants' clients' class claims. While the Plan Administrator asserts that prosecution of adversary proceedings seeking monetary damages against the Debtors was "obviously conducted for the specific benefit of the Creditor Clients bringing the Adversary Proceedings and did not benefit the estates or other creditors generally" (*see* ECF 3668 at ¶ 14), this statement ignores that these were class actions, which, by definition, are designed to benefit 'other creditors' – namely the absent class members. Indeed, in a case like this one, involving thousands of consumer creditors, many of whom did not file claims of their own, prosecution of a class action is precisely designed to help other creditors who would otherwise have their rights compromised as a consequence of confirmation of Ditech's plan.[12]

82. Also, the Plan Administrator's conjecture that Applicants' decision to file proofs of claims based on Applicants' clients' adversary proceedings constitutes Applicants' 'tacit recognition that monetary relief for claims that arise prepetition must be brought in the proof of claims process" is incorrect. ECF 3668 at ¶ 16. Rather, it is Applicants' understanding that the filing of a proof of claim is necessary to have a claim for class relief that can be prosecuted through an adversary proceeding, and that a claim pursuant to section 7023 for class relief, falling within the "7000 series" of the Bankruptcy Rules applicable to adversary proceedings, must therefore be prosecuted, at least to the extent of class certification, through an adversary proceeding, in order to afford appropriate due process to the debtor and the absent class members, including satisfaction of Rule 7023's requirements for class certification. Likewise, Mr. Martinez's adversary proceeding

[12] The adversary proceedings sought declaratory and injunctive relief, which - as to Ditech - has largely been achieved as a consequence of the account correction provisions contained in the ultimately confirmed third amended plan. Thus, the filing of these APs was neither inappropriate, nor did it represent an undue drain on the debtor's resources.

seeks a declaratory judgment against Ditech, which is not relief that is available through the claims process above. Applicants agree that the amount of monetary relief can be established through the claims allowance process, following the Court's determination regarding whether to certify the proposed class. However, because the claims allowance process set forth in the Bankruptcy Code and Rules does not contemplate class certification proceedings, until a determination has been made regarding class certification in the adversary proceeding, dismissal of the putative class creditors' adversary proceedings seeking class certification would be premature. (Note that some of these matters have been settled with the claims administrator on an individual basis, and thus those cases may therefore now be dismissed.)

83. The Plan Administrator's argument is also a red herring because Applicants have not requested payment of any fees relating to the representation of their clients in the referenced Adversary Proceedings. Moreover, as noted above, following discussions with the U.S. Trustee, Applicants have made additional reductions to account for amounts that may be construed as benefitting their clients only. *See* Preliminary Statement Section a above, discussing voluntary reductions in the total amount sought by Applicant. Further, by the Plan Administrator's own admission, the parties almost immediately agreed to a stay of those proceedings, and therefore Applicants should not be blamed if the Debtors have needlessly chosen to spend "significant resources" to defend against inactive Adversary Proceedings. *Id*. at fn. 7.

84. Aside from these unfounded accusations, Applicants have taken action in this case that has benefited a much wider group than Applicants' clients alone. As stated above, Applicants would assert that their client, Jose Martinez, is a class plaintiff in his adversary proceeding. As such, Applicants *by definition* represent a putative class of similarly situated consumer creditors. Class representatives owe a duty to represent the interest of the class above their own individual

claims, and Applicants, as putative class counsel, have embraced that responsibility in connection with their representative of Mr. Martinez. Jose Martinez was also chairman of the Consumer Creditor Committee, and as such, Mr. Martinez's responsibilities were further expanded to include consideration of and advocacy for all of Ditech's consumer creditors, which means that Applicants' duties were similarly expanded based on Mr. Martinez's leadership role with the CCC.

85. Applicants' efforts in benefitting all parties to this bankruptcy case, and not just their own clients, are well-chronicled above and need not be repeated here. More relevant is the Plan Administrator's failure to identify specific, allegedly self-serving conduct for which Applicants seek compensation, outside of Applicants' already written-off pursuit of the Badstubner depositions and Applicants' filing of the adversary proceedings, for which Applicants have sought no compensation in connection with this Application.

86. The Plan Administrator cites the *Sears* opinion for the proposition that creditors are presumed to act in their own self-interest, and therefore face a high burden. ECF 3668 at ¶ 6, *citing In re Sears Holding Corporation*, Case No. 18-23538 (RDD), Hr'g Tr. 64:23-25 (Bankr. S.D.N.Y. Jan. 21, 2021). Applicants accept and embrace that high burden, and as set forth at length above and in Applicants' Application and supporting declarations, Applicants submit that they have met their burden. Applicants' contributions to this case are precisely the kind of truly "above and beyond" contributions that this high standard requires.

87. Moreover, the *Sears* case is distinguishable, as the applicant in that case merely accelerated the timing of certain payments that benefitted only a subset of administrative creditors and did not materially affect confirmation. *Sears* Transcript, ECF 3668, at pp. 72-75.

88. The Plan Administrator also states that Jose Martinez, by virtue of his status as a committee member, is not entitled to be reimbursed for the fees for his own separate counsel. ECF

3668 at ¶ 48. The Plan Administrator cites *In re Lehman Bros. Holdings Inc*., 508 B.R. 283, 296 (S.D.N.Y. 2014) for this proposition. *Id*. However, as the *Lehman Bros.* opinion expressly explains, participation on committees is not automatically disqualifying for purposes of substantial contribution claims:

> True, as explained above, § 503(b) does not authorize payment of professional fee expenses solely on the basis of official committee membership. Similarly, it is true that BAPCPA amended § 503(b)(4) to prevent reimbursement for professional fee expenses on the basis of committee membership alone. But the current structure and the amendment imply nothing more than a rejection of a per se rule that official committee members should have their professional fee expenses paid. That is an understandable choice, as paying committee members' professional fee expenses regardless of contribution can lead to abuses or could create an incentive to litigate for the members' benefit at the estate's expense. *See In re Chemtura Corp.*, 439 B.R. 561, 612 (S.D.N.Y.2010) ("[T]hose whose fees are paid by someone else have no incentive to keep costs under control, or to bring the litigiousness to an end."). Nevertheless, there is no reason to think that the Bankruptcy Code would punish an entity that *has* made a substantial contribution solely because it was also willing and able to serve on the official committee. According to the UST's logic, a creditor who has used a lawyer to help file a petition or to recover property for the estate's benefit—expenses that are normally reimbursed under § 503(b)(3)(A)–(B) and 503(b)(4)—would be prevented from getting reimbursed simply because the creditor also served as a member of an official committee. Nothing in the language of the statute requires or suggests such a perverse outcome.

In re Lehman Bros. Holdings Inc., 508 B.R. 283, 295 (S.D.N.Y. 2014).

89. Accordingly, just because one of Applicants' clients was on the committee does not automatically disqualify Applicants from seeking reimbursement for substantial contribution.

5. This is an Extraordinary Situation which Warrants Substantial Contribution Award.

90. The Plan Administrator further asserts that Applicants' actions were not "extraordinary," pointing to certain time entries where Applicants performed "routine tasks performed in every chapter 11 case" such as reviewing docket and pleadings, preparing for court hearings and reviewing SEC filings. Id. at ¶ 51. The Plan Administrator's argument fails on both a macro and a micro level.

91. First, from the macro perspective, it is undeniable that this was an extraordinary case. This was a case of first impression for this Court. This is believed to be the first attempt by a mortgage servicer debtor to transfer its servicing rights through a Chapter 11 "plan sale" and thus sidestep/strip the consumer protections otherwise preserved under 363(o). If successful, this case undoubtedly would have served as a blueprint for future servicers seeking to avoid consumer remedies for improper servicing and accounting practices. While the Second Amended Plan failed under the best interests test, the § 363(o) litigation was a key factor in forcing the Debtor to the table to negotiate a confirmable plan that provided for consumer account correction.

92. On the micro level, Applicants' time entries are hardly routine, and to the extent they can be characterized as routine, that is not a basis for disallowance, so long as they were reasonably necessary for Applicants to perform the services that resulted in the substantial contributions and to the successful resolution of the Ditech Bankruptcy. "Extraordinary situations," does not necessarily require that every action taken by the applicant be a superhero, life-saving moment. *In re Granite Partners*, 213 B.R. 440, 445-6 (Bankr. S.D.N.Y. 1997).

93. It was critical in this case that Applicants were acting on behalf of the consumer creditors' interests, understood the consumers' claims and concerns, and were able to review pleadings, prepare for hearings, and review SEC filings, so to ferret out and fight the strategies employed by the Debtor to sell its servicing rights free and clear of consumer claims. Applicants' understanding of the issues and ability to apply that understanding to interpret and analyze the firehose of filings by the Debtors in order to prevent Debtors from stripping consumers' rights was anything but routine. It was necessary work done for the benefit of not just consumer creditors, but for the benefit of all stakeholders, as shown above.

6. Relevant Case Law Supports a Substantial Contribution Award in this Case.

94. Beyond the issue of standing addressed *supra*, this case is easily distinguished from this Court's recent opinion in *In re Synergy Pharms. Inc.*, 621 B.R. 588 (Bankr. S.D.N.Y. 2020). In *Synergy*, the Applicants were counsel for a group of equity holders that formed a short-lived *ad hoc* committee, which produced no additional value for its constituents or any other party-in-interest. Unlike the applicant in *Synergy*, whose only notable success was the establishment of an official committee that ultimately contributed nothing to the outcome of the bankruptcy case, Applicants' participation and leadership role in this case provided a pathway to confirmation and materially benefited numerous stakeholders, in addition to potential and as-of-yet unrealized benefits for Applicants' own clients.

95. Applicants' contributions in this case compare favorably with cases in which the Applicants were found to have made a substantial contribution to the estate. *Marcus Montgomery Wolfson & Burten P.C. v. AM Int'l (In re AM Int'l),* 203 B.R. 898 (D. Del. 1996) and *In re Energy Partners, Ltd*. 422, B.R. 68 (Bankr. S.D. Tex. 2009) were discussed by the Court in the *Synergy* opinion. In *AM Int'l*, an *ad hoc* equity group petitioned the court for the appointment of an official committee on the substantiated basis that the proposed, pre-packaged plan "grossly undervalued the going concern and liquidation value" of the debtor, leading ultimately to the addition of a significant amount of necessary information to the debtor's disclosure statement, and creating additional value for equity shareholders and the estate as a whole through the development of a warrant structure under the plan. *Synergy* at 617-618, citing *AM Int'l,* 203 B.R. at 901-902. The Applicants' efforts, therefore, "substantially contributed" to the case by providing value to the estate "that was clearly not available in a prepackaged plan." *Id*. quoting *AM Int'l,* 203 B.R. at 905.

96. Here, Ditech intended from the start to sell its overstated loan accounts to NewRez. Only a month into the case, Ditech filed its initial plan, which contemplated a free and clear sale in the first instance. ECF 145 at §§ 5.5 – 5.6. Applicants sounded the alarm as to Ditech's intended scheme to ratify the overcharges to borrowers' mortgage accounts and cut off borrowers' remedies for mortgage servicing errors and abuses through a plan sale (as opposed to a section 363 sale), fought for multiple extensions of the claims bar date so that more consumer creditors could (and did) participate by filing proofs of claim, urged the U.S. Trustee to form a consumer committee, exposed the existence of millions of dollars of unsubstantiated fees and charges assessed to borrowers' mortgage accounts as a result of Applicants' insistence, on behalf of the CCC Chair, and with the full support of the CCC, that CCC counsel oppose the confidentiality of the Bank of America settlement, which counsel for the CCC did successfully. As in *AM Int'l*, it was Applicants who sounded the alarm and provided the solution that allowed for confirmation of a plan that preserved value without trampling on consumer borrowers' rights.

97. Similarly, in *In re Energy Partners*, another *ad hoc* equity committee case, an equity holder made a substantial contribution and was awarded an administrative claim for fees and expenses by contesting the debtor's valuation and by providing its own valuation. Although the equity holder's valuation was never formally adopted by the official committee appointed later, the court found that the equity holder created "momentum" to form the official equity committee. This in turn led to retention of counsel by the official committee, which culminated in the negotiation of a consensual plan of reorganization in which equity realized 5% of the stock in the reorganized debtor. *Synergy* at 619- 620, citing *In re Energy Partners*, 422, B.R. at 92-93. The pattern and progression of the applicants' involvement in the *Energy Partners* case, and the resulting benefit to the class of creditors it represented, is analogous here, except that in the case

at bar, Applicants' contributions continued to provide value in this case, even after the formation of the CCC.

7. But For the Actions of Applicant, Consumer Creditors Would Have Suffered and the General Unsecured Creditors' Share of the GUC Pool Would Have Been Significantly Diluted.

98. As stated in the Application, it is clear that Applicants have made a substantial contribution to these chapter 11 cases—but for the actions of Applicants, it is likely that this case would have had one or two outcomes: either the rights of thousands of consumer creditors would have been stripped, or this case would have converted to a Chapter 7. Even under a Chapter 7 scenario, consumer claims would remain unresolved.

99. As reflected above, there is a direct causal connection between Applicants' actions and the results obtained. The extension of the bar date and negotiated language of the bar date notices can be shown through the many communications between Applicants and Debtor's counsel. Applicants' efforts in educating consumer bankruptcy attorneys and Chapter 13 Trustees nationwide can be shown through the records of the seminars conducted by Mr. Bartholow, Mr. Gardner and Ms. Twomey in early 2019, and the increased participation by consumer creditors can be shown through Ms. Twomey's claims analysis. Applicants' communications with the U.S. Trustee's office about the extent of the servicing errors in the Ditech portfolio, and the need for a consumer creditor committee, traces a direct line to the formation of such a committee. TO3 Dec. ¶¶ 35-36. Applicants' contribution to the CCC after its formation can be seen in its billing records and various other communications within the Committee and to Debtors' counsel, where it is clear that Applicants provided leadership to the Committee and expertise on all consumer-based matters. The transcript of the Badstubner Deposition, conducted by Applicants in connection with the objection to the Bank of America settlement, exposed the extent of Ditech's servicing errors, which

provided a foundation for Applicants' objection to the plan. Applicants' objection to the Plan differs in scope from the objection by the CCC, shows that Applicants coordinated with the CCC in filing this objection so as to not duplicate work or argument. The record also shows that it was Applicants who initiated and pressed for a global settlement following denial of confirmation. It was Applicants who first outlined the framework for a consumer claims resolution procedure, as shown by internal communications with the CCC counsel, and by Applicants' own testimony. Applicants' testimony, and also email correspondence, confirms that it was Applicants who campaigned for the appointment of Tara Twomey as Consumer Representative.

100. Based on the foregoing, it is clear that Applicants' efforts in this case are directly attributable to the results, such that a substantial contribution award is merited here.

WHEREFORE, the Consumer Creditors respectfully request that this Court enter an Order granting this Application and (i) allowing as administrative expenses the fees and expenses incurred by the Consumer Creditors for the services of Counsel rendered in the captioned, jointly administered bankruptcy cases in the aggregate adjusted amount of $574,938.20 (ii) directing the Debtors to make payment directly to Counsel in accordance with the schedule attached to the proposed order, and (iii) granting such other relief as may be just and proper.

DATED: October 1, 2021.

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

Counsel for Joe Martinez, Richard and Gail Legans, Grace Carleton, Dawn Davis, Matthew and Jazmin Bennett, Robert and Sally Hall, Bettye O'Neal, Victor Ramalheira, and Oriana Romero-Sosa

Thomas D. Domonoske (VSB #35434)
Consumer Litigation Associates, P.C.
763 J. Clyde Morris Blvd., Suite 1A
Newport News, VA 23601
Telephone (540) 442-7706

Counsel for Joe Martinez, Robert Hall, and Sally Hall

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October 2021, the foregoing document was served on all parties receiving electronic notice in this case, including Debtors' counsel, via CM/ECF.

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