UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Re DITECH HOLDING CORPORATION, *et al.,* Wind Down Estates	Chapter 11 Case No. 19-10412 (JLG) Jointly Administered

RESPONSE TO DEBTOR'S FORTY-NINTH OMNIBUS OBJECTION TO PROOFS OF CLAIM FOR CLAIM NO. 20991

Rajnikant Jani ("Creditor") is a creditor in the above-entitled Bankruptcy proceeding filed by Ditech Holding Corporation ("Debtor"). Creditor hereby opposes Debtor's Objection to Claim 20991 (the "Objection") as follows:

The basis for Creditor's claim is his Second Amended Verified Counterclaims, filed in the Circuit Court of the 18th Judicial Circuit, DuPage County Illinois, on August 14, 2018, which pleading is attached to his Proof of Claim No. 20991, incorporated by reference herein (the "Claim"). The Claim was timely filed on April 24, 2019. Debtor answered that state court pleading by filing an Answer and Affirmative Defenses on September 5, 2018, also attached as an exhibit to the Claim. Creditor initially filed the Claim as a secured claim; the Claim was subsequently reclassified as an unsecured consumer creditor claim without objection.

Creditor's state court lawsuit and Claim focus on the January 23, 2012 letter from Debtor offering the Creditor a trial payment plan (the "TPP Offer Letter"). It is a four-count complaint for relief under the Illinois Consumer Fraud Act ("ICFA"), and for common law fraud, negligent misrepresentation and breach of contract. The pleading alleges that as a result of receiving the TPP Offer Letter, Creditor did not make his February 1, 2012 mortgage payment, believing that his next payment was due on March 1, 2012. This belief was a reasonable one, given that March 1st was

the precise due date for his next payment that was stated to him in the TPP Offer Letter. Creditor further alleges that, despite his several telephone requests during the trial period for clarification of the other letters Debtor sent him subsequent to January 23rd alleging delinquency and containing different payment amounts from those set forth in the TPP Offer Letter, Debtor during this time never told Creditor he had been obligated to pay the February 1, 2012 payment. Further, Creditor made all three required TPP payments, after which Debtor never sent Creditor his permanent modification agreement. Creditor made three additional TPP payments thereafter, for a total of six, and still never received the permanent modification agreement. Debtor then sued Creditor for foreclosure, alleging that Creditor's failure to make his February 1st payment was a default on the terms of his loan. **Creditor had never missed a single mortgage payment in his life prior to February 1, 2012**. The only reason he did not pay the February 1st payment is because Debtor sent him a letter on January 23rd telling him not to pay until March 1st. Debtor then failed to perform its obligations under the TPP, which was a binding and enforceable contract that entitled Creditor's loan to be permanently modified after he performed his obligation to make the three trial payments.

As alleged in the Counterclaim, this began a nightmarish series of events that has caused Creditor and his wife, since 2012, to live in perpetual fear of losing their home, along with all the attendant shame, anxiety, humiliation and worry that comes with being a borrower in foreclosure. This is the specter under which they still live today. They have also suffered the total destruction of their credit ratings, lost credit capacity and opportunity, and expended thousands of dollars on attorney's fees defending the foreclosure lawsuit so wrongfully brought. They were finally beginning to see the light at the end of the tunnel – they were at issue on their Second Amended Counterclaims, which Debtor had answered. In fact, their claims had also survived summary judgment, as the state court first granted Debtor's motion for it, but then reconsidered its decision,

allowing the claims to go forward as amended (and, again, as answered by the Debtor). But before Creditor could have his "day in court" and set his case for trial, Debtor sought insolvency protection under Chapter 11 of the Bankruptcy Code. Debtor now objects to Creditor's Claim as having an insufficient legal basis; however, Debtor's objection should be overruled. Creditor is entitled to damages and compensation for Debtor's harms, and Creditor's Claim should be allowed to proceed.

LEGAL STANDARD

A Proof of Claim executed and filed constitutes *prima facie* evidence of the validity and amount of the claim. Federal Rule of Bankruptcy Procedure 3001 (f); *In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991) *quoting* 3 Lawrence P. King, Collier on Bankruptcy Case Section 502.02, at 502-22 (15th ed. 1991). After an objection is raised, the objector bears the burden of going forward to produce evidence sufficient to negate the prima facie validity of the filed claim. *In re Allegheny Intern, Inc*., 954 F.2d 167, 173 (3rd Cir. 1992). If the objector produces evidence sufficient to negate the validity of the claim, the ultimate burden of persuasion remains on the claimant to demonstrate by a preponderance of evidence that the claim deserves to share in the distribution of the debtor's assets. *Allegheny Intern, Inc*., 954 F.2d at 174; *Holm*, 931 F2d at 623; 3 Lawrence P. King, Collier on Bankruptcy, Section 502.02 at 502-22 (15th ed. 1993).

CREDITOR'S CLAIMS ARE SUFFICIENTLY GROUNDED IN LAW AND FACT AND SHOULD BE ALLOWED

I. The Breach of Contract Claim

The required elements of a breach of contract claim in Illinois are the standard ones of common law: "(1) offer and acceptance, (2) consideration, (3) definite and certain terms, (4) performance by the plaintiff of all required conditions, (5) breach, and (6) damages." *Ass'n Ben. Servs. v. Caremark Rx, Inc.*, 493 F.3d 841, 849 (7th Cir. 2007). A Trial Period Plan Agreement

("TPP agreement") is "a unilateral offer to modify [a borrower's] loan conditioned on the borrower's compliance with the stated terms of the bargain. 'The test for an offer is whether it induces a reasonable belief in the [offeree] that he can, by accepting, bind the [offeror].'" *Wigod v. Wells Fargo Bank,* 673 F.3rd 547, 562 (7th Cir. 2012).

To hold that a loan servicer can nullify its obligations to permanently modify a borrower's loan by simply failing to send the borrower a permanent loan modification agreement for the borrower's execution after the TPP Agreement conditions have been performed by the borrower, would be to "turn[] an otherwise straightforward offer into an illusion." *Id.*

As to consideration, the requirements of a TPP are valid and sufficient consideration for contract formation under Illinois law. *See Wigod,* 673 F.3rd at 564 (Finding the TPP at issue there contained sufficient consideration "because, under its terms, Wigod the promisee incurred cognizable legal detriments."); *see also , In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation,* No. 10-md-02193-RWZ, 2011 WL 2637222, at *4 (D. Mass. July 6, 2011) (multi-district litigation) ("The requirements of the TPP all constitute new legal detriments."); *Ansanelli v. JPMorgan Chase Bank, N.A.,* No. C 10-03892 WHA, 2011 WL 1134451, at *4 (N.D. Cal. Mar. 28, 2011) (accord).

As to definite and certain terms, "[a] contract may be enforced even though some contract terms may be missing or left to be agreed upon, but if the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract." *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 25 (1991).

Here, the January 23rd TPP was a unilateral offer to a contract, with sufficiently definite terms, and consideration that constituted a new legal detriment. To hold that a loan servicer can nullify its obligations to permanently modify a borrower's loan by simply failing to send the

borrower a permanent loan modification agreement for the borrower's execution after the TPP Agreement conditions have been performed by the borrower, would be to "turn[] an otherwise straightforward offer into an illusion." *Wigod*, 673 F.3rd at 564

Creditor has sufficiently pleaded facts to establish that Debtor failed to send him the final loan modification agreement, which it was contractually bound to do by virtue of the Creditor's performance of his own TPP obligations. In Debtor's Answer to Creditor's state court Complaint on the contract count, Debtor did not specifically deny the **factual allegation** that "[Debtor] did not send [Creditor] the final modification Agreement." *See* Debtor's Answer to Counterclaims ¶ 63 ("The allegations contained in Paragraph 63 contain conclusions of law to which no response is required. To the extent a response is required, and the allegations are contrary to the law, they are denied.") This Court should allow the contract count to proceed and allow evidence to be taken on it so the Creditor can either prove it, or Debtor can prove its Third Affirmative Defense (that Debtor did send Creditor the Agreement, but Creditor failed to return it).

II. Negligent Misrepresentation

Under Illinois law, the tort of negligent misrepresentation permits recovery for purely economic loss "where one who is in the business of supplying information for the guidance of others in their business transactions makes negligent representations." *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 88-89 (1982). A negligent misrepresentation consists of: (1) a false statement of material fact, (2) carelessness or negligence in ascertaining the truth of the statement by the party making it, (3) an intention to induce the other party to act, (4) action by the other party in reliance on the truth of the statement, and (5) damage to the other party resulting from such reliance, (6) when the party making the statement is under a duty to communicate accurate information. *See* M. Polelle & B. Ottley, Illinois Tort Law § 14.02[5][b]; *Neptuno*

Treuhand-Und Verwaltungsgesellschaft Mbh v. Arbor, 295 Ill. App.3d 567, 572-74 (1st Dist. 1998). This exception does not apply when the information "supplied is merely ancillary to the sale [of a product or service] or in connection with the sale." *Fireman's Fund Insurance Co. v. SEC Donohue, Inc.*, 176 Ill.2d 160, 168 (1997).

The negligent misrepresentation exception has been applied to pure information providers such as accountants (*Congregation of the Passion, Holy Cross Province v. Touche Ross & Co*., 159 Ill.2d 137 (1994)); a bank providing credit information to a potential lender (*DuQuoin State Bank v. Norris City State Bank*, 230 Ill.App.3d 177, 172 (1st Dist. 1992); a title insurer (*Notaro Homes, Inc. v. Chicago Title Insurance Co.,* 309 Ill.App.3d 246, 257 (1st Dist. 1999)); real estate brokers (*Duhl v. Nash Realty, Inc*., 102 Ill.App.3d 483 (1st Dist. 1981); *Menard, Inc. v. U.S. Equities Development, Inc., No.* 01 C 7142, 2002 WL 314571 (N.D. Ill. February 28, 2002))(mem. op.); and stockbrokers (*Penrod v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 68 Ill.App.3d 75 (1st Dist. 1979)).

In such cases, "the product was purely information—the consumer received analytical work rather than a tangible product." *Fox Associates, Inc. v. ROBERT HALF INTERN*., 334 Ill. App.3d 90 (1st Dist. 2002). "In other words, the end product [was] the ideas, not the documents or other objects into which the ideas [were] incorporated." *Tolan & Son*, Inc. v. *KLLM Architects Inc.,* 308 Ill.App.3d 18, 29 (1st Dist. 1999), *citing Congregation of the Passion*, 159 Ill.2d at 163. "[S]upplying information need not encompass the enterprise's entire undertaking [for the defendant to fall within the information provider exception,] but [information] must be central to the business transaction between the parties." *Tolan & Son*, 308 Ill.App.3d at 29.

Here, Creditor has pleaded "[Debtor] is in the business of supplying information for the guidance of others in their business transactions, to wit: Information it gives to consumers about

loan products and the actions consumers are required to take to comply with the terms of the loan [Debtor] is servicing." Counterclaims ¶ 49. He has pleaded that the January 23, 2012 TPP Offer Letter falsely stated his next payment was due on March 1, 2012, when in fact Debtor expected a payment on February 1st. *Id.* ¶ 50-51. And that Debtor intended Creditor to rely on its statements, had ample opportunity to but did not correct Creditor's false impressions about his payment status, was under a duty to communication accurate information to Creditor, and that Debtor's failure to do so actually and legally damaged Creditor. *Id.* ¶52-58. Creditor's negligent misrepresentation claim has sufficient legal and factual predicates; it should be allowed to proceed.

III. The Illinois Consumer Fraud Act and Common Law Fraud Counts

A claim under the Illinois Consumer Fraud Act, 815 ILCS 505/1 et seq., requires (1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in a course of conduct involving trade or commerce, and (4) actual damage to the plaintiff that is (5) a result of the deception. *De Bouse v. Bayer*, 235 Ill.2d 544 (2009), *citing Zekman v. Direct American Marketers, Inc*., 182 Ill.2d 359 (1998).

Plaintiff's reliance is not an element of statutory consumer fraud. *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill.2d 482 (1996), *citing Harkala v. Wildwood Realty, Inc*., 200 Ill.App.3d 447, 453 (1st Dist. 1990). But a valid claim must show that the consumer fraud proximately caused plaintiff's injury *Id., citing Wheeler v. Sunbelt Tool Co*., 181 Ill.App.3d 1088, 1109(1st Dist. 1989). Furthermore, a complaint alleging a violation of consumer fraud must be pled with the same particularity and specificity as that required under common law fraud. *People ex rel. Hartigan v. E & E Hauling, Inc.*, 153 Ill.2d 473, 492 (1992). Plaintiffs can recover damages under the Consumer Fraud Act only for injuries that were proximately caused by the alleged consumer fraud. *Connick,* 174 Ill.2d at 502, *citing Stehl v. Brown's Sporting Goods, Inc*., 236 Ill.App.3d 976, 981

(1st Dist.1992).” For common law fraud, but not statutory fraud, a plaintiff’s reliance on the truth of the statement, and damages resulting from reliance on the statement must also be alleged. *Board of Education v. A, C, & S, Inc.*, 131 Ill.2d 428 (1989).

Here, Creditor has alleged that Debtor sending him the TPP Offer Letter was a deceptive act because it explicitly stated his first payment was due March 1, 2012, and, taken as a whole, implied that he did not have a payment due on February 1, 2012, which was false. Counterclaim ¶ 27. He alleged that the TPP Offer induced him into not making a payment on February 1, 2012 because it suppressed or omitted the fact that the Creditor would be in default if he failed to make his February 1, 2012 mortgage payment, when in fact his failure to make that payment would and did cause his loan to go into default. *Id.* ¶ 28. He alleged that Debtor intend the TPP Offer Letter to reach and influence him, because it was addressed to him at home, and offered him "immediate payment relief” by making his "first monthly trial period payment under the trial plan" on March 1, 2012, at a time when Creditor had previously expressed to Debtor that he was going to experience trouble paying his mortgage and needed payment relief. *Id.* ¶ 30. Creditor alleged that his reliance on Debtor’s false statements actually damaged him, because when his loan was not permanently modified, his loan was determined to be in default for the payment due February 1, 2012 and he was sued for foreclosure. *Id.* ¶ 33. Finally, punitive damages are available under the Consumer Fraud Act for a company’s conscious, knowing or reckless disregard for the rights of a consumer, or a pattern and practice of engaging in such behavior towards consumers, both of which Creditor has alleged. *Id.* ¶ 35-36. Creditor’s statutory and common law fraud claims are sufficiently grounded in law and fact and should be allowed to proceed.

Therefore, it is respectfully requested that Debtor’s Objection to Creditor’s Claim be overruled.

WHEREFORE, Creditor prays as follows:

(1) That Debtor's Objection to Claim 20991 be denied.

(2) For such other relief as this Court deems proper.

Respectfully submitted,

Rajnikant Jani

By: /s/ Adam J. Feuer

His Attorney

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CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2021, I electronically filed the foregoing Opposition to Debtor's Forty-Ninth Omnibus Objection to Proofs of Claim for Claim No. 20991 with the Clerk of the Court using the ECF system which will send notification of such filing to the Chapter 11 Trustee and parties.

And I certify that, on November 11, 2021, consistent with the Claims Hearing Procedure, I electronically mailed the Opposition to Debtor's Forty-Ninth Omnibus Objection to Proofs of Claim for Claim No. 20991 to:

Consumer Claims Trustee, Tara Twomey, Ditech Consumer Recovery Trust, via email to info@ditech-settlement.com; and

The chambers of the Honorable James L. Garrity, Jr., United States Bankruptcy Court for the Southern District of New York, via email to CaseFiling@nysb.uscourts.gov

/s/ Adam J. Feuer