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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11**
DITECH HOLDING CORPORATION, *et al.*,	:	**Case No. 19-10412 (JLG)**
Wind Down Estates.[1]	:	**(Jointly Administered)**
	:	**Related Dockets: 2324, 3531**

REPLY OF THE CONSUMER CLAIMS TRUSTEE AND THE PLAN ADMINISTRATOR TO THE RESPONSE OF M. SCRANTON, S. JOHNSON, AND B. MARTINEZ AND "800 CONSUMER CREDITORS" TO OBJECTIONS TO THEIR PROOFS OF CLAIM (CLAIM NOS. 21367, 1745, 1797, 2502, 2552, 2559, 2574, 2630, 21622, 60195, 60239)

The Consumer Claims Trustee ("**Trustee**"), on behalf of the Consumer Creditor Recovery Trust established under the confirmed Plan and the Plan Administrator ("**Administrator**") on behalf of the Wind Down Estates filed an **Objection** [ECF 2324] to Claim No. 21367 of Stella Johnson, Bernadette Martinez, Monique J. Scranton (the

[1] The Debtors' *Third Amended Joint Chapter 11 Plan of Ditech Holding Corporation and Its Affiliated Debtors* (ECF No. 1326) was confirmed, which created the Wind Down Estates. The Wind Down Estates, along with the last four digits of each of their 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); Walter Management Holding Company LLC (9818); and Walter Reverse Acquisition LLC (8837). The Wind Down Estates' principal offices are located at 2600 South Shore Blvd., Suite 300, League City, TX 77573.

"**Walters Claim**") and to six claims listed in the Objection that are related to the Walters Claim (the "**Related Claims**" and together with the Walters Claim, the "**Claims**"). The Objection addressed only statute of limitations defenses to the Walters Claim and the Related Claims, reserving the right to assert objections on any other ground, including the merits of the Claims.

"Approximately 800 of the Debtor's consumer creditors" filed the "*800 Consumer Creditors' Response To The Consumer Claims Administrator's Objection To Their Claim*" ("**Response**") [ECF 3531]. This Reply addresses the Response.

BACKGROUND AND FACTS

Who Are The Claimants?

1. The Walters Claim, Claim No. 21367, was filed as a purported class proof of claim by three claimants, Stella Johnson, Bernadette Martinez, and Monique J. Scranton, on behalf of approximately 800 consumer creditors. As noted in the Objection, despite being the named claimants in a purported class proof of claim, Mss. Johnson and Scranton are not included on the list of approximately 800 creditors attached to the proof of claim form for the Walters Claim.

2. In addition, the holders of six Related Claims, all of whom are listed on the 800-creditor exhibit attached to the Walters Claim, filed individual proofs of claim. The Trustee and the Administrator included those six Related Claims in Omnibus Claims Objections. *See* Objection at 5 (list of claims and omnibus objections). The six creditors filed nearly identical responses, which provided no substantive response to the Objection, but rather simply identified the claimants as part of the group of 800 and referenced the Response.

3. The Response itself largely disregards all six individuals claimants who filed the Related Claims. It provides no substantive response to the Objection to the six Related

Claims apart from its generic response for the 800 Creditors. It proposes that five of the Related Claims be disregarded on the ground that the claims were "misfiled" and that the claimants were not "aware that current counsel would represent them along with the remaining 800 Creditors." Response ¶ 63, at 17; *but see* Letters of Representation for Arrington, Harrision, McDonald, Miller and Waters, Walters Claim at 508, 1058, 1423, 1461, 1893. With respect to the sixth Related Claim, that filed by Ms. Darty, the Response states that she expects to "be a part of the 800 Creditors' claims rather than pursuing her claims independently." Response ¶ 65, at 17.

4. The Response similarly glosses over the three individuals named in the Walters Claim. It attaches an arbitration demand by Ms. Martinez, Response, Ex. C., but does not otherwise address Ms. Martinez's claim or the Objection to her claim. It does not mention Ms. Scranton at all. And for Ms. Johnson, it says only that she is representative of the 800 Creditors, and "[o]nly one lead Plaintiff is necessary." Response ¶ 66, at 17.

5. The Objection addresses only the claims of the nine claimants (the three named claimants in the Walters claim and the claimants in the six Related Claims), not the claims of the 800 Creditors. In addition to filing the Walters Claims, Ms. Johnson filed a Motion for Class Certification. [ECF No. 2438] However, that class certification motion is not currently before this Court, a class has not been certified, and a class certification motion cannot be relied on in response to the Objection to the individual claims. Moreover, until a class is certified, the legal sufficiency of allegations in the class claim depends on only the named claimant:

> In order to maintain a class action, Plaintiffs must first establish that they have a valid claim with respect to the shares that they purchased. If the named plaintiffs have no cause of action in their own right, their complaint must be dismissed, even though the facts set forth in the complaint may show that others might have a valid claim.

Goldberger v. Bear, Stearns & Co., 2000 WL 1886605, at *1 (S.D.N.Y. Dec. 28, 2000)); *accord In re Initial Pub. Offering Sec. Litig,* 214 F.R.D. 117, 122 (S.D.N.Y. 2002).

6. No substantive Response to the Objection has been provided with respect to the six Related Claims or to the claim of Ms. Scranton in the Walters Claim. For that reason, the Objection as to these seven claims should be granted, and the claims should be disallowed, even if the Walters Claim is not disallowed in its entirety, subject only to possible participation in any recovery of the class—if the class is certified and a class claim allowed.

7. Therefore, the only claimants before this Court on the Objection are Stella Johnson and Bernadette Martinez (the "**Claimants**"). This Reply addresses their claims in the Walters Claim.

What Are The Claims?

8. The Walters Claim (and by implication, the Related Claims) assert claims against Ditech Financial, LLC, as the successor in interest to Walter Mortgage Company, LLC, and the purported successor in interest to Jim Walters Homes, Inc., which originated their loans, for violation of various statutes relating to the origination, not the servicing, of mortgage loans:

- deceptive, predatory, and harmful housing scheme, targeting victims on the basis of race, color, and national origin, constituting "reverse redlining" and violating the federal Fair Housing Act ("**FHA**"), 42 U.S.C. § 3601 et seq.,
- the federal Equal Credit Opportunity Act ("**ECOA"**), 15 U.S.C. § 1691 et seq.,
- the federal Truth in Lending Act ("**TILA**"), 15 U.S.C. § 1601 et seq.,
- violations of the Real Estate Procedures Settlement Act;
- willful and systemic violations of the Fair Debt Collection Practices Act ("**FDCPA**");
- violation of MCA §81-19-1, the Consumer Loan Broker Act;
- violation of MCA §81-18-55, the Mississippi S.A.F.E. Mortgage Act, and particularly MCA §81-18-55(1)(f);

- infliction of emotional distress; and
- other violations of federal and state law.

Walters Claim at 6–7. The Claims do not explain in what way any of the alleged conduct violated any of these statutes.

9. The Response repeats this litany of claims and adds common law fraud, though without specifying any of the details of the alleged fraud or what "other violations of federal and state law" might be.

10. The Objection asserts statute of limitations defenses to each of the claimed violations in the Walters Claim and the Related Claims and that a valid statute of limitations defense defeats the Claims and requires disallowance. Objection ¶ 32, at 11. The statutes of limitations for the asserted claims range from one to five years. The Response asserts three reasons why the Claimants believe the statute of limitations does not apply: (i) continuing violation, (ii) the discovery rule and the layman's test, and (iii) fraudulent concealment. But it does not dispute that a valid statute of limitations defense would require disallowance of the Claims, nor does it dispute the applicable statutes of limitations set forth in the Objection. None of the asserted reasons save these late claims.

A. The Asserted Violations Are Not Continuing Violations.

1. Federal Claims

11. Claimants do not dispute the statutes of limitations set forth in the Objection that apply to the federal claims, the longest of which is five years. Objection ¶¶ 24–28, at 9–10. To get arouund the statutes, the Claimants assert the violations were continuing violations, citing *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 380 (1982). Response ¶ 51, at 13. *Havens* involved a continuing violation in the sense that the plaintiffs alleged that a "continuing pattern, practice, and policy of unlawful racial steering has deprived them of the benefits of interracial association arising from living in an integrated neighborhood." *Id*.

at 381. Here, by contrast, the Claimants do not allege any activity at all with respect to these loans (other than servicing) by Ditech or its predecessor in interest, Walter Mortgage Company, LLC, after 2009, a full ten years before the February 11, 2019 petition date (the "**Petition Date**"). Even if the continuing violation doctrine applied to the asserted federal claims, it would not save these claims. Nothing in the *Havens* decision suggests that lingering effects of past activities constitutes a continuing violation, and nothing in the Walters Claim or in the Response alleges any such continuing activity or effect.

2. State Claims

12. The same applies to the Mississippi law state claims. The Claimants rely on *Hendrix v. City of Yazoo City, Miss.,* 744 F. Supp. 1412, 1414 (S.D. Miss. 1989). The plaintiff in that case alleged a violation of the Fair Labor Standards Act based on a reduction in plaintiff's wages. The court found a continuing violation because the defendant continued to pay the plaintiff the allegedly illegal wage. Here, the state claims assert violations of the Mississippi Consumer Loan Broker Act, MCA §81-19-1, and the Mississippi S.A.F.E. Mortgage Act, MCA §81-18-55, all of which relate to origination of the loans and for which the statutes of limitations are three years. But they nowhere allege that any mortgage origination activity continued at any time after February 11, 2016 (three years before the Petition Date). To the contrary, they do not allege any activity at all by Ditech or its predecessor with respect to the loans (other than servicing) after 2009. Therefore, there is no continuing violation that would prevent the statute of limitations from running.

B. The Discovery Rule (Or Layman 's Test) Does Not Save the Claims

1. Federal Claims

13. The discovery rule applies generally to federal statutes of limitations, unless the statute provides otherwise. *See TRW Inc. v. Andrews*, 534 U.S. 19, 122 S. Ct. 441 (2001). Under the federal discovery rule, the statute of limitations begins to run when the plaintiff

discovered or should have discovered the injury. *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 263 (D. Mass. 2008). The courts are divided on whether the discovery rule applies to claims under the FHA (two-year statute of limitations, 42 U.S.C. § 3613(a)) or the ECOA (five-year statute of limitations, 15 U.S.C. § 1691e(f)). *Id.*

14. Here, however, the court need not address the issue, because the Walters Claim and the Response show the Claimants should have discovered the injury no later than 2015, more than three years before the Petition Date. At least three members of the purported class asserted essentially the same causes of action as set forth in the Walters Claims in actions commenced in 2013, 2014, and 2015, more than three years before the Petition Date. Response Ex. G, at 1, Ex. H, at 1. Therefore, it is apparent that the facts underlying the claims asserted here were available to all class members more than three years before the Petition Date.

15. The applicable statute of limitations for the TILA claim is either one year or three years, depending on the nature of the violation and the remedy sought. 15 U.S.C. § 1640(e). TILA generally requires disclosure of loan terms. If disclosures are never made or are improperly made, the triggering date is the consummation date of the loan. *See*, *e.g. Morilus v. Countrywide Home Loans, Inc.*, 651 F. Supp. 2d 292 (E.D. Pa. 2008) (no concealment, because claimed disclosure discrepancies were found on face of documents that borrower signed); *King v. California*, 784 F.2d 910, 913 (9th Cir. 1986); *Douce v. Banco Popular, N. Am.*, 2006 WL 2627966 *8 (S.D.N.Y. Sept. 12, 2006).

16. Further, any tolling of the statute of limitations on "discovery" grounds requires that the claimant plead and prove due diligence. *Fritz v. Resurgent Capital Servs.*, LP, 955 F. Supp. 2d 163 (E.D.N.Y. 2013) (absent showing of due diligence, neither discovery rule nor equitable tolling applied); *Coveal v. Consumer Home Mortgage, Inc.* 2005 WL

704835, at *6 (E.D.N.Y. Mar 29, 2005). Here, there is no allegation of any investigation or due diligence. Since all the actions the Walters Claim asserts give rise to a cause of action alleged to have occurred more than three years before the Petition Date, the TILA claims are time barred.

17. The FDCPA, if it applies at all to a mortgage originator and holder, *see* 15 U.S.C. § 1692a(6) (definition of "debt collector," which excludes entity collecting a debt in its own name), imposes a one-year statute of limitations. Although the discovery rule might apply, *see Derisme v. Hunt Leibert Jacobson P.C.*, 880 F. Supp. 2d 339, 355–56 (D. Conn. 2012), application of the rule requires the same showing of due diligence and reasonable investigation. *Fritz v. Resurgent Capital Servs.*, LP, 955 F. Supp. 2d 163 (E.D.N.Y. 2013). None is alleged. The Walters Claim provides no allegations at all of any unfair or deceptive debt collection practices. The Response contains broad general allegations without any information on when the actions took place and does not allege there were any such actions against the Claimants. Therefore, the Walters Claim fails to allege sufficient facts to support a plausible claim for an FDCPA violation that arose within the one-year statute of limitation.

2. State Claims

18. Claimants assert that the state statute of limitations could not have run against them because of their lack of sophistication and the inherently complex nature of the financings. They claim:

> As lay, rural Mississippians, the 800 Creditors could not possibly have been expected to detect Ditech's sophisticated consumer credit scheme to obtain, package, service and sell consumer credit securities.

Response ¶ 53 at 14. The argument misconstrues Mississippi's discovery rule, and it does not relate to the particular claims asserted.

19. Claimants do not dispute that the general three-year Mississippi statute of limitations, MCA § 15-1-49, applies to their state law claims. That statute provides in relevant part:

> (1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.
>
> (2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

20. Paragraph (2) states Mississippi's "discovery rule." The discovery rule applies to injury to property. *Donald v. Amoco Production Co.*, 735 So. 2d 161, 168 (Miss. 1999). If an injury is latent, the statute of limitations starts to run when a layman could realistically perceive a previously secret injury. *Id.* But the statute begins to run upon discovery of the injury itself, not later when the plaintiff discovers the cause of the injury. *City of Tupelo v. Patterson,* 208 So. 3d 556, 569 (Miss. 2017).[2]

21. Under the pleading rules that apply in this federal action, the necessary facts must be alleged in the claim itself showing that the claimant has a plausible claim to come within the discovery rule. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. v. Twombly*, 550 U.S. 544 (2007). New allegations in an opposition to a motion to dismiss cannot cure a claim's shortcomings. *See Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) (a plaintiff cannot amend a complaint through a brief); *U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1361-62 (11th Cir. 2006) (same). "[I]t is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984). "To hold otherwise would mean that a party could unilaterally amend a complaint at will, even without filing an amendment, and

[2] Claimants' reliance on two cases are inapposite, because they involve medical malpractice claims that are governed by a different statutory provision, MCA 15-1-36, and different discovery rules. *Stringer v. Trapp,* 30 So.3d 339, 342 (Miss.2010), and *Holaday v. Moore,* 169 So.3d 847, 850 (2015).

simply by raising a point in a brief." *Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989) (citation omitted).

22. This Court expressly made these pleading rules applicable to objections to claims in this case. *Order Approving (I) Claims Objection Procedures and (II) Claim Hearing Procedures* (ECF No. 1632) (sufficiency hearing on claim objection governed by Bankruptcy Rule 7012, incorporating Fed. R. Civ. Proc. 12). Therefore, this Court may determine, based on the allegations in the Walters Claim, whether the Claimants have plausibly alleged facts that would support application of the discovery rule.

23. The Claimants assert two claims under Mississippi law: the Consumer Loan Broker Act, MCA §81-19-1, and the Mississippi S.A.F.E. Mortgage Act, MCA §81-18-55. As its name suggests, the Consumer Loan Broker Act applies only to loan brokers. The only cause of action it provides to a borrower is for a loan broker's violation of a list of requirements, mainly relating to fees and service charges, use of false or misleading advertising, or false promises to induce the borrower to use the loan broker's services. Here, the Claimants allege that the mortgages were placed directly with Jim Walter Mortgage Company, not involving any loan broker. Walters Claim ¶ 3, at 5. Even crediting the Response, the Claimants do not allege the use of a loan broker. Response, ¶¶ 19, at 5 ("Ditech was the source of the debt and paper."), ¶ 24, at 7 ("Oftentimes these consumer credit transactions occurred with only one Ditech agent and without a notary present."). The Claims allege nothing to suggest that loan brokers were involved, that the Claimants did not discover until later that loan brokers arranged the loans, or even that the involvement of loan brokers was hidden by misrepresentations that would have prevented discovery of claims under the Loan Broker Act.

24. To the extent the Response addresses loan brokers at all, it does so in a conclusory manner that makes clear that the Claimants would or should have known at the

time of the loans themselves that loan brokers were not involved. Response, ¶43, at 11–12 ("Here, Ditech made false promises to the 800 Creditors in order to influence or induce them to use its consumer loan broker's services ….").

25. Therefore, there is no basis to apply the discovery rule for claims under the Consumer Loan Broker Act. As set forth in the Objection, none of the claims of the two Claimants or even of the 800 Consumer Creditors arose from mortgages placed after 2009. Therefore, claims under the Consumer Loan Broker Act, if any, would be barred by Mississippi's three-year statute of limitations under MCA § 15-1-49.

26. The Mississippi S.A.F.E. Mortgage Act provision on which the Claimants also rely, MCA § 81-18-55(1)(f), requires a mortgage lender to mail detailed information to a borrower at least 45 days before a power of sale foreclosure auction is conducted. The Walters Claim does not allege that Ditech failed to mail the required information to Claimants within the specified time period. The Response only generally alleges that Ditech foreclosed on the properties. It does not provide any facts that establish a violation of Mississippi's S.A.F.E. Mortgage Act within or outside of the limitations period. Response ¶ 25, at 7 ("Ditech also serviced the loans, collected, and foreclosed on the same people which it had fraudulently qualified."). Nor does the Walters Claim allege that any foreclosure sale occurred within three years before the February 2019 Petition Date or that either of the Claimants was unaware of a foreclosure auction such that the discovery rule would apply. Therefore, the Mississippi statute of limitations bars claims under the S.A.F.E. Mortgage Act.

C. The Fraudulent Concealment Doctrine Does Not Save the Claims.

1. Federal Claims

27. Although the "doctrine of fraudulent concealment is read into every federal statute of limitations," it applies only when the plaintiff "shows the exercise of reasonable

care and diligence in seeking to learn the facts which would disclose the fraud." *Humphrey v. J. B. Land Co.*, 478 F. Supp. 770, 772 (S.D. Tex. 1979). "Unawareness of facts or law, alone, does not justify suspending the operation of the statute. The party seeking protection under this doctrine must have exercised reasonable care and diligence in seeking to learn the facts which would disclose fraud." *Morgan v. Koch*, 419 F.2d 993, 997 (7th Cir. 1969) (citations omitted); *see Derisme v. Hunt Leibert Jacobson P.C.*, 880 F. Supp. 2d 339, 355–56 (D. Conn. 2012) ("In the context of a claim of fraudulent concealment, plaintiffs must show: (1) concealment of the alleged wrongdoing; and (2) plaintiffs' failure to discover the facts giving rise to their claims despite their exercise of due diligence.").

28. In addition, under Fed. R. Civ. Proc. 9(b), a claim of fraud "must state with particularity the circumstances constituting fraud." Rule 9 applies to an objection to claim. *See* Fed. R. Bankr. Proc. 9014(c) (applying Rule 7009, which incorporates Rule 9, to contested matters); Rule 3007 (objection to claim is a contested matter). *See also Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 264 (D. Mass. 2008) (Rule 9(b) applies to allegations of fraudulent concealment).

29. Here, the Claimants do not allege anything to support a claim that the underlying asserted statutory violations were fraudulently concealed or, if they were, that they exercised reasonable care and diligence in learning what transpired.

30. In fact, the Walters Claim and the Response imply otherwise. They suggest that the conduct, other than the securitization of the mortgages, was open and notorious. At least three members of the purported class asserted essentially the same causes of action as set forth in the Walters Claims in actions commenced in 2013, 2014, and 2015, more than three years before the Petition Date. Response Ex. G, at 1, Ex. H, at 1. Therefore, the facts underlying the claims asserted here were available to all class members more than three years before the Petition Date.

31. Although the Walters Claim and the Response assert that the securitization of the mortgages was difficult to understand, neither the Walters Claim nor the Response allege that the securitization was part of the harm the Claimants suffered, only that the alleged conduct was in furtherance of a securitization. Nothing in the Walters Claim or the Response suggests that the claims would not lie but for the securitization or that the securitizations were any essential element of the liability. Whether or not the Claimants understood the securitization is not relevant to the fraudulent concealment issue.

2. State Law Claims

32. Like federal law, Mississippi law imposes a fraudulent concealment rule.

> In order to establish fraudulent concealment, "there must be shown some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim." Robinson and Johnson must first prove that Cobb "engaged in affirmative acts of concealment." Robinson and Johnson must also prove that even though they acted with due diligence in attempting to discover Cobb's role in the accident, they were unable to do so.

Robinson v. Cobb, 763 So.2d 883, 887 (Miss. 2000) (citations omitted).

33. Here, the Walters Claim and the Response contain no allegations of any "act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim," nor of due diligence, only that the securitizations were too complex to understand. Moreover, because the Mississippi claims relate to loan brokers and certain foreclosure pre-requisites, neither of which are alleged in the Walters Claim or the Response, any claims about the securitizations cannot support a claim of fraudulent concealment of the Mississippi claims.

RESERVATION OF RIGHTS

34. Like the Objection and the Response, this Reply addresses only the statute of limitations issues raised in the Objection. The Trustee and the Administrator reiterate the reservation of rights stated in the Objection. Objection ¶ 35, at 11.

WHEREFORE the Trustee and the Administrator respectfully request entry of an order granting the Objection and granting such other and further relief as is just.

Date: November 23, 2021

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