UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

THE GEARY CLASS ACTION'S OBJECTIONS TO THE §363 SALE TRANSACTION BETWEEN DEBTOR, DITECH FINANCIAL, LLC AND NEW RESIDENTIAL INVESTMENT CORP.

Now comes the GEARY CLASS ACTION ("**GCA**") and sets forth below its OBJECTIONS to the 11 U.S.C. §363 sale transaction ('**Sale Transaction**") offered for approval by the Debtors, Ditech Financial, LLC ("**DF**") and New Residential Investment Corp. ("**NRIC**"). For the reasons set forth below, approval of the Sale Transaction should be withheld.

Respectfully submitted,

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[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); Matrix 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.

I. Background

A. GCA'S Relationship to DF and Chapter 11 Cases

Brian and Connie Geary filed a class action against DF, then known as Green Tree Servicing, LLC ("**Green Tree**"), on June 3, 2014 in the case of *Brian and Connie Geary v. Green Tree Servicing, LLC,* Case No. 2:14-CV00522-ALM EPD (S.D. Ohio). After preliminary motions practice, the District Court granted Mr. and Mrs. Geary's Motion for Class Certification on June 16, 2017. The District Court certified six (6) separate classes of individuals similarly situated to Mr. and Mrs. Geary who have claims for DF's failure to abide by 15 U.S.C. §1692g of the Fair Debt Collection Practices Act ("**FDCPA**"). The District Court certified the issues of FDCPA liability and statutory damages. The District Court further ruled that DF may face statutory liability of up to $500,000.00 per class. Based upon stipulations and admissions of DF, the six (6) classes involved individual consumer account debtors of over 31,000 accounts involving debts serviced by DF.

On November 6, 2017, the U.S. Court of Appeals for Sixth Circuit denied DF's petition under Fed. R. Civ. P. 23(f) for interlocutory appeal. Since November 6, 2017, the GCA had been progressing through discovery on the merits of the individual and class FDCPA claims. On December 7, 2018, DF filed a Motion for Summary Judgment and to Decertify the Classes. DF's Motion for Summary Judgment was fully briefed and was waiting for hearing / ruling when DF filed its Notice of Bankruptcy Filing and Suggestion of Automatic Stay with the District Court on February 15, 2019.

B. The Chapter 11 Filing, Amended Plan And Proposed Sale Transaction

DF, together will other entities affiliated with Ditech Holding Corporation ("**DHC**"), filed Chapter 11 cases before this Court on February 11, 2019. On February 28, 2019, the GCA filed a

proof of claim in this jointly-administered case in the amount of $25,500,000.00. See, Claim 20041. On May 10, 2019, the Debtors filed a joint, Amended Chapter 11 Plan. ECF 542. Reduced to its simplest terms, the Debtors' Plan proposed two (2) potential outcomes, a Reorganization Transaction, or a Sale Transaction.

On June 18, 2019, the Debtors filed a Notice of Designation of Stalking Horse Bid and Request for Approval of Stalking Horse Bid Protections (Forward Business) ("**Stalking Horse Bid Notice**"). ECF 722. Therein, the Debtors, and in particular DF, disclosed the Debtors' intention to sell the assets of DF to NRIC and outlined the terms of the sale pursuant to 11 U.S.C. §363. Attached to the Stalking Horse Bid Notice is an Asset Purchase Agreement that provides the details of the proposed Sale Transaction. ECF 722; EX C.

The Sale Transaction described in the Asset Purchase Agreement, unsurprisingly, contained conditions precedent and a set of termination provisions. Relevant here is the termination provision set forth as Article VIII; Section 8.1(c)(vi). ECF 722; EX C, at 86 (emphasis added). This provision states that the Sale Transaction may be terminated if DF notifies NRIC that:

> (vi) the Bankruptcy Court shall have (A) entered an order confirming the Plan or any other Plan of Reorganization that is not in form and substance reasonably acceptable to Buyer or the Confirmation Order or any other order relating to the sale does not contain the Sale Provisions in form and substance acceptable to Buyer in its sole discretion or (B) directed the Parties to submit a Confirmation Order that does not provide (or otherwise expressly indicated (e.g., from the bench or in chambers) that it will not enter a Confirmation Order that provides) for the sale to Buyer of the Acquired Assets **"free and clear" of all Liens (other than Permitted Liens), including Claims that are the subject of section 363(o) of the Bankruptcy Code**, to the maximum extent permitted by the Bankruptcy Code; provided, that the right to terminate this Agreement pursuant to this Section 8.1(c)(vi) shall expire two (2) Business Days following the earliest occurrence of any event giving rise to such termination right and the conclusion of the hearing to consider the Confirmation Order;

The Stalking Horse Bid Notice further contains the following warning:

> The Stalking Horse Agreement contains certain representations and warranties, is subject to certain closing conditions, and may be terminated by Sellers or Buyer under certain circumstances. Buyer may terminate the Stalking Horse Agreement if, among other things, the Confirmation Order or any other order relating to the sale does not contain the Sale Provisions in form and substance acceptable to Buyer in its sole discretion or **if** the Confirmation Order does not provide for the sale to Buyer of the Acquired Assets "free and clear" of all Liens (other than Permitted Liens), including Claims that are the subject of section 363(o) of the Bankruptcy Code.

ECF 722 at pg. 2 (emphasis added).

II. GCA Objections To Sale Transaction

The GCA has two objections to the Sale Transaction. First, this sale cannot be approved if the intention of the Debtors and NRIC is to obtain, over the objection of a creditor, an order attempting to release NRIC from pass through liability pursuant to §363(o). The GCA objects under §363(o) if that is indeed the intention of the Debtors and NRIC. Second, the GCA does not understand the calculations that went into determination of the "net benefit" of the Sale Transaction to the DF bankruptcy estate. Additional information may easily resole the GCA's second objection. Each of the objections are further discussed below.

A. The §363(o) Objection

i. Pertinent Facts Underlying the GCA

On or around May 18, 2008, Brian and Connie Geary executed a Note and Security Agreement ("**Loan**") with Citifinancial Servicing, LLC ("**Citi**") in the original amount of $13,504.84. The proceeds of the Loan were used to purchase a used 1995 Ford Windstar. The vehicle was used for personal, family and household purposes. On August 18, 2011, the Gearys filed a Chapter 7 bankruptcy petition in the Southern District of Ohio. Prior to the issuance of their discharge, the Gearys entered into a reaffirmation agreement with Citi in the amount of $2,350.00 to be paid at 6% interest over 24 months. The monthly payments as stated on the

reaffirmation agreement were in the original amount of $140.15. The total dollar amount to be paid under the reaffirmation agreement was disclosed at $3,363.60. However, the monthly payment amount was actually mathematically incorrect. At 6% interest per annum over 24 months, the payment should have been $104.15, and the total dollars to be paid should have been $2,499.60. Citi appeared to have transposed the numbers. This error notwithstanding, the Gearys paid off the error-ridden reaffirmation agreement early after making larger than normal periodic payments. After July 2013, the Gearys had paid Citi a total of $3,480.00.

In spite of being overpaid, Citi continued to send monthly payment statements to the Gearys seeking additional payment of over $900.00. Effective November 1, 2013, Citi then transferred the debt to Green Tree. Green Tree sent the Gearys an initial collection letter dated October 16, 2013, demanding that the Gearys not only continue making the incorrect monthly payments of $140.15, but also demanding that they pay off an alleged remaining principal balance of $904.13. Among other things, and relevant here[2], Green Tree's initial letter failed to provide the Gearys with a consumer's rights under 15 U.S.C. §1692g of the FDCPA to (i) dispute the debt; (ii) obtain written debt validation; and (iii) be free of continued debt collection during the debt validation process. Even though the proper notifications were not provided by Green Tree, the Gearys actually timely requested debt validation. Green Tree ignored the Gearys' request and continued to dun them.

[2] In addition to failing to comply with the FDCPA as described, Green Tree failed to honor the Gearys' additional subsequent demands for debt validation and continued to unfairly dun them over their objections and protests for at least the next year, including time periods following the filing of the Gearys' FDCPA lawsuit. Thus, the Gearys maintain many individual FDCPA claims against Green Tree in addition to the issues certified by the U.S. District Court related to the Class claim.

Eventually, the Gearys filed their FDCPA Class Action against Green Tree on June 3, 2014. It is important to note here, that the FDCPA only applies to collection of "debts" within the meaning of 15 U.S.C. §1692a(5). This section states:

> The term "debt" means any obligation or alleged obligation of a consumer to pay money **arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes**, whether or not such obligation has been reduced to judgment.

As set forth above, Green Tree (now DF) disclosed that approximately 31,000 similar accounts involving "debts" within the meaning of the FDCPA and which were serviced by Green Tree (now DF) fit within the Gearys' Class definitions. The U.S. District Court appointed the Gearys as Class representatives of the six (6) certified classes.

ii. Application of 11 U.S.C. §363(o) to the GCA

The FDCPA, like the Truth in Lending Act ("TILA"), is part and parcel of the "Consumer Credit Protection Act" found at 15 U.S.C. §1601 et seq. Both statutes, and the Code of Federal Regulations applicable to each, generally limit their reach to personal, consumer, non-business debts.

In 2005, Congress amended the U.S. Bankruptcy Code to include new subsection (o) to the property sale provisions set forth in 11 U.S.C. §363. After its enactment, all claims and defenses of consumers with respect to "consumer credit transactions" and "consumer credit contracts" were preserved. Where a debtor's bankruptcy estate attempts to sell the rights to such agreements, such consumer claims and defenses pass through to the purchaser. 11 U.S.C. §363(o). The phrases "consumer credit transactions" and "consumer credit contracts" are defined respectively in Regulation Z applicable to the TILA (12 C.F.R. §221.2(a)(12)), and the Federal Trade Commission

regulations (16 C.F.R. §433.1(i))[3]. Simply stated, the definitions are keyed to transactions involving loans / debts entered into for consumer, rather than business purposes.

The contracts and transactions underpinning the rights of the members of the six (6) certified class in the GCA involve exactly the types of debts defined under the TILA and the Code of Federal Regulations.

iii. GCA's §363(o) Objection and DF and NRIC's *Espinosa*[4] Procedure

The GCA OBJECTS to the Sale Transaction to the extent it seeks to obtain approval over the GCA's objection pursuant to 11 U.S.C. §363(o). Section 363(o) is self-effectuating and activates notwithstanding §363(f). Based upon the GCA's research, no case could be found that suggests that the Court has discretion to deviate from application of the subject provision. The GCA's objection is filed to preserve the rights of all of the membership of all of the members of the GCA's six (6) certified classes. If DF and NRIC intend to close the Sale Transaction, the GCA's FDCPA claims and its pending U.S. District Court case in the S.D. of Ohio case must survive.

It seems clear enough that DF and NRIC fully recognize that §363(o) could serve as a significant disincentive to closing the type of asset sale envisioned by the Plan and Sale Transaction. They openly disclose in their papers that the Sale Transaction is permissive in nature and upon DF's notification that §363(o) becomes involved, NRIC can, *but is not necessarily compelled to,* contractually terminate the deal. What is not disclosed is how monetarily intensive the potentially preserved consumer claims are in relation to the value of the assets being purchased by NRIC.

[3] Also referred to as the "FTC Holder in Due Course Rule".

[4] This refers the U.S. Supreme Court case of *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367 (2010)

An examination of the claims register is not helpful. Aside from the sheer number of potential claims, most of the consumer-based claims are disputed and unliquidated. The numbers given in the filed claims are, in many cases, extremely overstated. In one example, the registered claim errantly states an amount of $1.5 billion when in fact it is seeking recovery of $1.5 million– this amount sought, based upon one account debtor's allegation of loan account-mishandling of an original $104,000.00 loan. See, Claim 20407. The claims register is replete with similar examples. This is not to say that the Debtors, and in particular DF, were not exposed to numerous legitimate and potentially costly claims and defenses prior to commencement of these Chapter 11 cases. Indeed, there are definitely at least 31,000 accounts involved in the GCA, where the U.S. District Court in Ohio has already certified six (6) classes to remedy DF's (formerly Green Tree's) willful FDCPA violations for such consumers.

Yet, DF and NRIC want to engage in an asset purchase transaction for their mutual benefit. In light of §363(o), DF and NRIC have developed a procedure to seemingly ferret out whether the Sale Transaction will be financially worthy of closure. Basically, DF and NRIC have set in motion the following:

1. They have announced a §363(f) sale in tandem with the Plan as is permitted by 11 U.S.C. §1123(b)(4).

2. The Plan has classified claims, and relevant here, the claims of consumers are not entitled to vote.

3. They have negotiated an Asset Purchase Agreement (with Stalking Horse Bid Protections) for the purchase of DF's (forward business) assets for $1,055 million ($442 million net after payment of certain DIP debts).

4. They have announced that they intend that the sale be "free and clear" of all claims, including any claims that are the subject of §363(o).

5. They are careful not to state that they assert that there is a legal basis upon which to conduct a §363(f) sale without application of §363(o). Instead they couch their proposal in terms of contract termination. What is being communicated appears to be that if enough objections are filed pursuant to §363(o) then the Debtors, DF and NRIC will regroup and determine if termination of the Sale Transaction is warranted.

6. They set up a notice and opportunity to object procedure. Presumably, DF has served all of its account debtors with the Sale Transaction notification package and the Plan. A deadline of July 18, 2019 has been provided for objections.

7. Presumably, if insufficient §363(o) objections are timely lodged, the Debtors, DF and NRIC may indeed close the Sale Transaction and the Plan may be confirmed. It seems that if this is the case, NRIC will take the position that later claims / defenses raised against NRIC by former DF account debtors who did not timely object were waived, released or discharged.

While the GCA would not stand in the way of a *beneficial* sale of assets, the Sale Transaction does nothing to benefit the members of the GCA. At this stage, no consideration is even being offered to allow the GCA to liquidate and resolve its claims that would clearly pass through to NRIC pursuant to §363(o). The GCA would consider supporting the Sale Transaction if it were supported by appropriate consideration. It is not, and therefore, both the Gearys, as Class Representatives, and the undersigned, as Class Counsel, must object.

Furthermore, in its current state, the GCA would also present this objection as a cautionary tale. DF and NRIC's procedure is reminiscent of a prevalent Chapter 13 practice that, at one point in many jurisdictions, attempted to discharge certain portions of otherwise non-dischargeable

student loan debts. The Bankruptcy Code's provisions governing discharge of student loan debts, like §363(o), are self-executing. The student loan discharge provisions, unlike §363(o), require a a separate Court determination finding "undue hardship". Typically, such a showing must come in the procedural form of an adversary proceeding backed by appropriate due process. 11 U.S.C. §523(a)(8) and Fed. R. Bankr. P. 7001. However, many Chapter 13 bankruptcy practitioners used the Chapter 13 plan confirmation process as a means of providing due process and obtaining final orders to discharge otherwise non-dischargeable debt. Eventually, this practice reached the U.S. Supreme Court for consideration in the case of *United Student Aid Funds, Inc. v. Espinosa*. Citation see FN 4.

In *Espinosa*, the debtor prepared and served a Chapter 13 Plan that proposed to discharge the interest that had accumulated on a federally guaranteed student loan debt. Absent a specific finding of "undue hardship" such interest on the debt was absolutely non-dischargeable under 11 U.S.C. §523(a)(8). The debtor's Chapter 13 plan was served upon the servicer of the debt, United Student Aid Funds, Inc. ("**USAF**"). USAF filed a timely claim, but did not object to confirmation. Even though there was no finding of undue hardship as required by §523(a)(8) and even though no adversary proceeding was filed which gave USAF a summons and complaint, the U.S. Supreme Court held such failure was legal error, but not of the jurisdictional or constitutional due-process type to "void" the Bankruptcy Court's binding confirmation order. *Espinosa*, 130 S. Ct. at 1378. USAF, according to the U.S. Supreme Court, had effectively slept on its rights after receiving actual notice and could not otherwise be saved by Fed. R. Civ. 60(b)(4). *Id.*, at 1380. Accordingly, the U.S. Supreme Court seemingly countenanced the practice of proposing a reorganization plan that dispensed with, or altered otherwise self-effectuating U.S. Bankruptcy Code provisions.

Indeed, the U.S. Supreme Court recognized that in some cases, the parties can stipulate to certain justifications to avoid the negative effects of such otherwise self-effectuating provisions (e.g. bargaining on a debt balance that is less than the non-dischargeable amount to allow for plan completion and stipulating to "undue hardship"). *Id*., at 1381. However, the Supreme Court further cautioned that when a Court observes that ambush language is being inserted in a plan in spite of plain self-effectuating, and controlling statutory language, the practice can be sanctioned under appropriate circumstances even if there are no objections. *Id*., at 1382.

The GCA does not believe that the attempt by DF and NRIC to obtain Court confirmation of the §363(f) Sale Transaction is by any means by "ambush" or "bad faith". The Debtors, DF and NRIC fully disclosed the termination condition in their papers. The process employed by them appears instead to be an investigatory mechanism, albeit an immensely costly one, by which NRIC can evaluate whether the Asset Purchase Agreement is too cost-prohibitive.

Unfortunately for DF and NRIC, the GCA must object. The Gearys and their Class Counsel are simply not in an ethical position to waive rights under §363(o) for no consideration on behalf of the account debtors for 31,000 accounts. DF and/or NRIC can however negotiate / stipulate with the GCA to overcome this problem if they so choose.

B. Understanding the "Net Benefit" of the Sale Transaction to the Estate

The Stalking Horse Bid Notice stated that NRIC would be paying $1,055 million in cash prior to repayment of approximately $613 million in principal amounts outstanding under the DIP. ECF 722 at 2. The Debtors also filed a separate summary to provide an estimation of the "net proceeds" for the forward business Sale Transaction. ECF 725. The summary stated the following: "For illustrative purposes, Net Acquired Assets includes the projected amount outstanding under the DIP Facility as of July 31, 2019 which are not being assumed as part of the

transaction. The actual purchase price for both the Stalking Horse transactions will be gross of the DIP Financing and transaction proceeds will be utilized to repay the DIP Financing." ECF 725 at 6; FN1.

At the outset of these Chapter 11 cases, the Debtors sought and obtained approval to incur post-petition debt (the DIP facilities) for its forward and reverse mortgage businesses. ECF 26, 53, 389, and 422. With respect to DF and the forward business, there was pre-petition balance of $231,394,016.81, and a similar amount for certain servicer "advance" facilities owed by subsidiary / related entities. The GCA's understanding is that the Debtors used certain existing cash assets and part of the DIP post-petition facilities to pay off the existing pre-petition debt. The existing value associated with the originated mortgage products was used as partial security for the DIP post-petition facilities. It appears that the Debtors have regularly serviced the DIP post-petition debt during the past five (5) months, but there remains a balance of $613 million.

The GRC would expect there to be a substantially equivalent/commensurate value associated with the loans originated by DF both pre and post-petition. As such, the value of such originated loans should factor much higher in the valuation analysis. It appears that for DF's assets (not including $272 million in excluded assets), NRIC is coming to closing with $418 million in cash?

The GRC is not necessarily objecting to the Sale Transaction based upon valuation, but it would request a better, more detailed, but possibly more simplified explanation to describe the assets being sold, their value, and a better breakdown of the DIP debt to be paid off (e.g. how much was borrowed by DF following refinance of the pre-petition debt?).

III. Conclusion

Based upon the forgoing, the GCA OBJECTS to the Sale Transaction to the extent it seeks confirmation of the same over the GCA's rights under §363(o), and protectively to gain a better understanding of the valuation and DIP debt repayment information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing THE GEARY CLASS ACTION'S OBJECTION TO THE §363 SALE TRANSACTION BETWEEN DEBTOR, DITECH FINANCIAL, LLC AND NEW RESIDENTIAL INVESTMENT CORP. was electronically filed with the Clerk of the Court using CM/ECF on July 18, 2019. I also certify that the foregoing document is being served this day on the following counsel of record via email transmission:

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