

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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

**EMAD SARHAN’S REPLY IN SUPPORT OF HIS MOTION FOR RELIEF FROM THE
AUTOMATIC STAY**

NOW COMES EMAD SARHAN, by and through undersigned counsel, Robert J. Tomei Jr. of JOHNSTON TOMEI LENCZYCKI & GOLDBERG, LLC, and hereby files his Reply in Support of his *Motion for Relief from Stay*, dated May 17, 2019 (ECF No. 585) in response to *Debtor’s Objection to Motion of Emad Sarhan for Relief from the Automatic Stay* (ECF No. 1046) and in support thereof, states and allege as follows:

1. The Debtor has claimed that the movant’s motion should be denied for a number of reasons, including (i) the relief requested by Mr. Sarhan is unnecessary as a result of the stay modifications already provided by the Ditech OCB Order (Response at ¶ 4); (ii) to the extent Movant is seeking to recover monetary damages or payment for the Debtors, Movant’s request falls outside the purview of the OCB Order and should be denied; (iii) Movant has failed to show cause under the *Sonnox Factors* (*Sonnax v. Tri-Component Prods., Corp (In re Sonnox Indus., Inc.)*, 907 F.2d 1280, 1285 (2d Cir. 1990).

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

2. Mr. Sarhan's claims are recoupment claims, which are equitable claims in nature and are not expressly addressed in the Bankruptcy Code brought forth for purposes of abatement of the amount purportedly due and owing under the subject note and mortgage. Ditech's alleged rights to foreclosure arise from or relate to the contractual documents, mortgage servicing, lending transaction and whether repayment on the Note was owed, whether foreclosure is proper or not, and whether Mr. Sarhan should have judgment entered against him authorizing judicial sale, or whether Ditech should be enjoined from taking further action against him.

3. Mr. Sarhan's proposed counterclaims against Ditech arise from those same transactions, and as such, they are recoupment claims. *In re Malinowski*, 156 F.3d 131, 133 (2d Cir. 1998) ("In recoupment, on the other hand, the claim and counterclaim must arise out of the same transaction or set of transactions."), and the fact that he is requesting attorneys' fees does not make his claim not one in the nature of recoupment. *In re Wentz*, 393 B.R. 545, 560 (Bankr. S.D. Ohio 2008) ("[A]ttorney fees and costs are recoverable under the doctrine of recoupment to the extent that: a) the underlying causes of action permit the recovery of attorney fees and costs; b) any recovery is limited to the applicable law governing the appropriateness of attorney fees and costs; and c) any recovery is limited to reducing the [plaintiff's claim] This determination is consistent with the policy of encouraging borrowers to pursue remedies under these federal consumer protection statutes."); *Mater of Holford*, 896 F.2d 176, 178 (5th Cir. 1990) (holding that it was appropriate to recoup "losses caused by fraud in the inducement" from amounts owed under "that same lease" because "clearly . . . the two amounts arose out of the same transaction."); *In re 105 E. Second St., Assocs.*, 207 B.R. 64, 69-70 (Bankr. S.D.N.Y. 1997) (discussing *Holford* and writing: "*Holford* is similar to this case and highly persuasive. Both involve leases, a debtor's bad acts and a creditor's right to recoup losses suffered from

future rent payments . . . because bankruptcy courts apply recoupment as an equitable doctrine, to find the [creditor] was not entitled to recoup . . . against future rental payments would result in a windfall for the debtor and its other creditors who would share in the distribution of the funds.”); *Hispanic Indp. Television Sales, LLC v. Una Vez Mas, LP*, 110 A.D.3d 474, 475 (N.Y. App. Div. 2013) (recoupment defense based on seller’s breach of contract); *In re Hollis*, 2009n WL 3030125, at *3 (Bankr. D.N.J. Spt. 17, 2009) (“Generally, raising [TILA] as a recoupment defense occurs in response to a foreclosure action.”); *DHP Holdings II Corp.*, 435 B.R. 220 ,231-32 (Bankr. D. Del. 2010) (creditor’s breach of contract and fraud-in-the-inducement claims arose from the same transaction as the debtor’s breach of contract claim); *In re McClendon*, 488 B.R. 876, 886-87 (Bankr. E.D. N.C. 2013) (time-barred usury claim could be raised as a counterclaim to the lender’s proof of claim under theory of recoupment)’ *In re Maxwell*, 281 B.R. 101, 126 (Bankr. D. Mass. 2002) (permitting borrower to rescind mortgage loan by way of recoupment); *Howes v. Wells Fargo Bank, N.A.*, 2015 WL 5836924, at *44 (D. Md. Sept.. 30, 2015) (violations of the TILA “may serve as the basis for recoupment defense” to support a claim objection); *cf.*, *Taborski v. U.S. I.R.S.*, 141 B.R. 959, 964 (N.D. Ill. 1992) (“[B]oth claims arise out of the same transaction or occurrence, because plaintiff’s claim for costs and attorney’s fees is proximately linked to actions the IRS took to recover back taxes.”).

4. The *Sonnax Factors* are: (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor’s insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would

prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) impact of the stay on the parties and the balance of harms. *In re Sonnax Indus., Inc.*, 907 F. 2d 1280, 1286 (2d Cir. 1990). The court need not consider each factor, but may consider only the factors that are *relevant* to the particular case. *See In re RCM Global Long Term Capital Appreciation Fund, LTD.*, 200 B.R. 514, 526 (Bankr. S.D.N.Y. 1996) (emphasis added).

5. Ditech's response in opposition to Sarhan's motion states that he has failed to meet his burden to show cause to be granted relief from the stay and as such, the *Sonnax Factors* weigh in favor of denying Sarhan's motion because "among other things, the continued prosecution of an action would divert time, money and other resources from these chapter 11 cases to the detriment of other creditors and in circumvention of the claim allowance process." (Response at ¶ 35). Although Ditech goes to great lengths citing cases that demonstrate the importance of the automatic stay, which Mr. Sarhan does not dispute, Ditech fails to ferret out what the "other things" it references are. In essence, Ditech maintains the position that the *Sonnax Factors* are not satisfied because it does not want to expend resources defending Sarhan's recoupment claims in state court while it moves (unabated) to enforce its rights under the subject mortgage.

6. Contrary to Ditech's assertions, Sarhan can satisfy a number of the *Sonnax Factors* in his favor: (1) the competing issues could be completely resolved through the underlying mortgage foreclosure action; (2) this matter should not interfere in any way with the

disposition of the bankruptcy action as the parties should be permitted to resolve the dispute to final disposition at the state court level; (3) debtor is not a fiduciary; (4) the parties' competing claims arise under state law and federal law, non-bankruptcy statutes. The issues should therefore, be resolved in state court; (5) No insurance at issue; (6) None at this time, but Sarhan intends to interplead additional defendants and or prior servicers of record. Thus, the action *may* involve third parties not privy to the bankruptcy; (7) There should be little to no prejudice to other creditors, as the parties competing interests will be litigated to a final disposition at the state court level regardless of the ruling on the instant motion, the only difference being, whether Sarhan's claims become liquidated through the bankruptcy process. Thus, there are no additional resources that the Debtor will have to expend; (8) No equitable subordination; (9) Success in the other action would not result in a judicial lien and thus, would not otherwise impair the interests of other creditors ; (10) Judicial economy will be saved as the matter will be resolved in one court and proceeding; (11) The parties are not yet prepared for trial; (12) The balance of harms favors granting stay relief. Absent stay relief, the Debtors can pursue all of their claims and issues while Mr. Sarhan is denied the same right.

7. Thus, the *Sonnax Factors* favor granting Mr. Sarhan's motion.

WHEREFORE, Emad Sarhan, as a creditor, respectfully prays that this Court enter an Order finding, adjudging and ordering that:

- A. Enter an order granting the Motion for Relief from the automatic stay pursuant to §362(d) and (j);
- B. Enter an order allowing the parties to fully adjudicate any and all claims, including counterclaims asserted by Mr. Emad Sarhan, before the 19th Judicial Circuit Court of Lake County, Illinois.

C. For such other relief as this Court may deem just and appropriate.

Dated: August 6, 2019

Respectfully Submitted,
/s/ Robert J. Tomei Jr.
Attorney for Creditor Emad Sarhan

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CERTIFICATE OF SERVICE

I, Robert J. Tomei Jr., an attorney, hereby certify that on August 6, 2019, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to all attorneys of record.

Dated: August 6, 2019

Respectfully Submitted,
/s/ Robert J. Tomei Jr.
Attorney for Creditor Emad Sarhan

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