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

Attorneys for Richard and Gail Legans, Joe Martinez, 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)

OPPOSITION TO DEBTORS' MOTION TO STAY ADVERSARY PROCEEDINGS IN FAVOR OF THE BANKRUPTCY CLAIMS PROCESS

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-

[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.

Sosa, and Bettye O'Neal (together, "Consumer Creditors") hereby file this opposition to Debtors' Motion to Stay Adversary Proceedings in Favor of the Bankruptcy Claims Process. (Dkt. 772).

I. INTRODUCTION

1. In April 2015, the Federal Trade Commission and Consumer Financial Protection Bureau agreed to a $63 million-dollar settlement with Green Tree Servicing, LLC, a subsidiary of Walter Investment Management Corporation.[2]

2. In that case, the FTC and CFPB alleged that Green Tree harmed consumers "with illegal loan servicing and debt collection practices," including claims that Green Tree: (1) "misrepresented the amount consumers owed or the terms of their loans," (2) "failed to investigate disputes before continuing collections" when "consumers disputed the amounts owed or terms of their loans," (3) "furnished consumers' credit information to consumer reporting agencies when it knew, or had reasonable cause to believe, that the information was inaccurate," and (4) failed to honor loan modifications that were in the process of being finalized when consumers' loans were transferred." *Id.*

3. After agreeing to the $63 million-dollar settlement, Walter Investment Management Corporation merged "Green Tree with another of Walter Investment's well-known subsidiaries, Ditech Mortgage Corp.," in an effort to rebrand their mortgage servicing business. But, other than changing its name on paper, Ditech continues to engage in the same type of widespread, illegal loan servicing and debt collection practices as its predecessor. And if they have

[2] Press Release, Federal Trade Commission, National Mortgage Servicing Company Will Pay $63 Million to Settle FTC, CFPB Charges (Apr. 21, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/04/national-mortgage-servicing-company-will-pay-63-million-settle.

it their way, this bankruptcy will allow Debtors to conceal their systematic misconduct and deprive consumers of the opportunity to correct errors in their accounts and obtain remedies.

4. This motion is part of Debtors' overarching goal to manipulate the bankruptcy process to avoid even having to address their misconduct. In their motion, Debtors urge the Court to stay these adversary proceedings for a single reason. According to Debtors, these "claims should be handled exclusively through the Court's claims process, not an adversary proceeding." Dkt. 772 at ¶ 2. In their view, the claims administration process offers the same protections to Plaintiffs, and thus, they claim the adversary proceedings "are redundant and can only result [in] a waste of time and resources and prejudice to the Debtors and other creditors." *Id.* at ¶ 3.

5. But other than conclusory statements, Debtors fail to specify any additional costs they would incur if the claims proceed through an adversary proceeding as opposed to the claims process. How would it possibly cost more? In theory, it should make no difference—Debtors will presumably take the same steps to oppose the class claims regardless of whether they proceed as adversary proceedings or through the claims process. In reality, however, it makes a significant difference because of how Debtors intend to proceed, *i.e.*, to delay resolution of the class claims while they continue to attempt to confirm a plan without ever addressing these claims. The claims process allows them to do this; the adversary proceedings do not. That is the genuine reason for this motion.

6. The Court should not permit this end-run attempt to deny Plaintiffs the opportunity to present their motions for class certification, which have been pending since June 3, 2019. *See, e.g.*, *Martinez, Jr. v. Ditech Financial, LLC*, Case No. 1:2019-ap-01235 (S.D. Bankr.

2019) at Dkt. 635.[3] The issue before the Court is not simply a choice—as framed by the Debtors—of picking between two procedural avenues that move the cases down parallel, but separate tracks that arrive at the same destination. Debtors want to stay the adversary proceeding because it would allow them to continue to try to confirm a plan without ever addressing the class claims or answering discovery, which would show its knowledge that its systems, processes, and account records are seriously flawed and have damaged thousands of consumers.

7. Even taking them at face value, neither of the purported reasons cited by Debtors justify preventing Plaintiffs from moving forward with the adversary proceedings. First, as a threshold matter, Debtors contend "that the claims in the Actions—all of which seek money damages for Ditech for alleged pre-petition harm—cannot be asserted in an adversary proceeding" under Rule 7001 of the Federal Rules of Bankruptcy Procedure, which sets out the nine enumerated categories of cases that may be filed as adversary proceedings. Dkt. 772 at ¶ 20.

8. One of those categories allows adversary proceedings to obtain "an injunction or other equitable relief." Fed. R. Bankr. P. 7001(7). And, while Debtors posit that these adversary proceedings are simply pre-petition damages claims, "it is clear that class action relief is equitable in nature" and, thus, "satisfies Fed. R. Bankr. P. 7001(7)." *In re Protected Vehicles, Inc.*, 392 B.R. 633, 642 (S.C. Bankr. 2008); *see also In re Dewey & LeBoeuf LLP*, 487 B.R. 169, 177 (Bankr. S.D.N.Y. 2013) (citing with approval *In re Protected Vehicles, Inc.*, 392 B.R. at 642). Because class actions are available under Fed. R. Bankr. P. 7001(7), it naturally follows that Rule 7023 expressly

[3] Even though Debtors are the sole cause of the delay, they will likely argue that the delay warrants denial of class certification. *See, e.g., In re Ephedra Products Liability Litigation*, 329 B.R. 1 (2005) (denying a motion for class certification, in part, because resolving class claims would delay the distribution of the estate).

provides that Rule 23 of the Federal Rules of Civil Procedure "applies in adversary proceedings." Fed. R. Bankr. P. 7023.

9. Although the adversary proceedings are proper, the Court nonetheless retains discretion to stay them. According to Debtors, the adversary proceedings should not proceed because they "are redundant and can only result [in] a waste of time and resources and prejudice to the Debtors and other creditors." Dkt. 772 at ¶ 3; *id.* at ¶ 26 ("Requiring Ditech to expend significant time and resources to defend against improper adversary proceedings… when any such claims can and should be addressed as part of the claims process is needlessly wasteful of the estate's assets and should be avoided."). This overarching argument favoring the claims process assumes the existence of a parallel path where the Court addresses the claims. This cannot and will not occur until Ditech objects to the class proof of claims filed by Plaintiffs.

10. Courts have rejected similar arguments and attempts to delay the resolution of class claims through requests to stay or dismiss adversary proceedings in favor of the claims process. For example, in one such case, several plaintiffs brought a class action adversary proceeding asserting that a debtor violated the Worker Adjustment and Retraining Notification Act. *In re Quantegy, Inc.*, 343 B.R. 689 (M.D. Ala. Bankr. 2006). Like the Debtors in this case, the creditors' committee moved to dismiss the adversary proceeding on the ground that it was "duplicative of the claims process and therefore a wasteful and inefficient means to determine the claims of affected employees." *Id.* at 693. The court noted "[a]t first blush, the committees' contention," was not "without merit." *Id.* However, the court reasoned that the adversary proceeding was "distinctive in that it was filed as a class action." *Id.* Because "Rule 23 is not [automatically] applicable to a contested matter," the court concluded that an "adversary proceeding may be the

most expeditious vehicle for processing this claim" because it allowed the plaintiffs to "invoke the provisions of Rule 23 without waiting for the debtor to object to its claim." *Id.*

11. Other courts have reached similar conclusions when confronted with this issue. *In re Taylor Bean & Whitaker Mortgage Corp.*, 2010 WL 4025873 (M.D. Fla. Bankr. 2010) (rejecting an argument that an adversary proceeding was "unnecessary and duplicative of the claims process" and finding that resolving the "claims collectively through a class action adversary proceeding will be more efficient than handling them in a piece-meal fashion through the claims process."); *In re Bill Heard Enterprises, Inc.*, 400 B.R. 795, 801 (Bankr. N.D. Ala. 2009) (same).

12. In rejecting the argument before the Court in this Motion, one court explained:

> Recognizing that Plaintiffs are entitled to file a class proof of claim, the Court finds that if the class can be certified, handling of the WARN Act claims in an adversary proceeding is appropriate and preferable to the claims procedure. The Defendants have argued that an adversary proceeding is duplicative of the normal bankruptcy claims process and that the claims process is capable of resolving disputed claims. As a general proposition, the Court does not disagree. However, in this matter the Court finds that resolution of the WARN Act claims will be expedited and handled more efficiently in a class adversary proceeding because the claims will be handled collectively rather than in a piece meal fashion. An adversary proceeding will also require the Trustee to state any objections to claims that she may have more promptly than would be required in the normal claims objection process. In addition, the class certification issues can be brought before the Court now, without the necessity of waiting for an objection to be filed. Thus, if the class is certified, the Court finds that as between an adversary proceeding and the claims process, an adversary proceeding has the potential to provide a less protracted and more efficient litigation framework.

In re First NLC Fin. Servs., LLC, 410 B.R. 726, 730 (Bankr. S.D. Fla. 2008).

13. These cases are not only well reasoned and directly on point, but they are even more persuasive when considering that each of the opinions come from bankruptcy courts within the Eleventh Circuit, which had already decided that "class proofs of claim are allowable in

bankruptcy" pursuant to Rule 9014. *In re Charter Co.*, 876 F.2d 866, 873 (11th Cir. 1989). Unlike the Eleventh Circuit, it is still undecided in the Second Circuit whether a class proof of claim is even permissible. *In re Ephedra Products Liability Litigation*, 329 B.R. 1 (explaining that "nothing in the Bankruptcy Code or Rules expressly permits a creditor to file a proof of claim not only for himself but also on behalf of all other creditors similarly situated" and "neither the Second Circuit nor the Supreme Court has taken up the issue.").

14. The adversary proceeding, in other words, not only provides "a less protracted and more efficient litigation framework," but it also may be the *only* framework in the Second Circuit. It would certainly be "unnecessarily costly and inefficient" to force Plaintiffs to pursue their claim through the claims process only to have the Second Circuit determine that a class proof of claim is impermissible. And, even if the Second Circuit determines that a class proof of claim is permissible, it would be unnecessarily costly and inefficient to allow a party, creditor or the trustee to delay the case to appeal this issue.

15. Given the uncertainties, the benefit of using the adversary proceeding far outweighs any *purported* costs. And, using the adversary proceeding in this situation is also consistent with its purpose. As one court has explained: "The delineation between an adversary proceedings and contested matters has, as its underpinnings, concerns over due process. In more detail, and while not true in every situation, the delineation between these two procedural methods for resolving disputes is predicated upon the general assumption that certain controversies in bankruptcy will involve more complex issues and affect greater substantial rights, thereby requiring the greater procedural protections afforded by the Federal Rules of Procedure." *In re Irby*, 321 B.R. 486, 469 (N.D. Ohio Bankr. 2005). By contrast, "other matters in bankruptcy will involve relatively

uncomplicated disputes" thereby making the claims process "a better tool for judicial economy." *Id.* Here, given the rights and issues at stake, as well as Ditech's attempts to unload the servicing rights free and clear of its widespread misconduct, the controversy is sufficiently complex and warrants greater substantial rights, including the opportunity for Plaintiffs to present and the Court to consider briefing/argument regarding why this case satisfies each of the elements of Rule 23 of the Federal Rules of Civil Procedure (made applicable through Rule 7023).

16. In the alternative, if the Court grants this motion, Plaintiffs respectfully request the Court to order Debtors to: (1) object to Plaintiffs' class proof of claims within 14 days of the entry of this order; (2) file their opposition to Plaintiffs' motions to apply Rule 7023 no later than September 13, 2019, and (3) prohibit Debtors from proposing a confirmation plan before the Court issues a ruling on class certification.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request that the Court deny Debtors' Motion to Stay Adversary Proceeding in Favor of Bankruptcy Claims Process (Docket No. 772). In the alternative, Plaintiffs respectfully request that the Court order Debtors to: (1) object to Plaintiffs' class proof of claims within 14 days of the entry of this order; (2) file their opposition to Plaintiffs' motions to apply Rule 7023 no later than September 13, 2019, and (3) prohibit Debtors from proposing a confirmation plan before the Court issues a ruling on class certification.

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

Dale Pittman
THE LAW OFFICE OF DALE W. PITTMAN, PC
The Eliza Spotswood House
112-A West Tabb Street
Petersburg, Virginia 23803
(804) 861-6000
(804) 861-3368 - fax
dale@pittmanlawoffice.com

Counsel for Robert and Sally Hall

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

Counsel for Joe Martinez, Robert Hall, and Sally Hall

Kristi C. Kelly, Esq., VSB #72791 (*pro hac vice forthcoming*)
Andrew J. Guzzo, Esq., VSB #82170 (*pro hac vice forthcoming)*
KELLY GUZZO, PLC
3925 Chain Bridge Road, Suite 202
Fairfax, VA 22030
(703) 424-7572
(703) 591-0167 Facsimile
Email: kkelly@kellyguzzo.com
Email: aguzzo@kellyguzzo.com

Counsel for Bettye O'Neal, Victor Ramalheira, and Oriana Romero-Sosa