UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

THE GEARY CLASS ACTION'S MOTION TO APPLY FED. R. BANKR. P. 7023 TO ANY OBJECTION, VALUATION OR OTHER CONTESTED MATTER REGARDING ITS CLAIM PURSUANT TO FED. R. BANKR. 9014

Now comes the GEARY CLASS ACTION ("GCA") and moves this Court pursuant to Fed. R. Bankr. P. 9014(c), to apply Fed. R. Bankr. P. 7023 to any objection, valuation or other contested matter regarding its filed proof of claim. Support for this request is set forth in the following MEMORANDUM.

Respectfully submitted,

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[1] 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); 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 Wind Down Estates' principal offices are located at 1100 Virginia Drive, Suite 100, Fort Washington, Pennsylvania 19034.

I. BACKGROUND

The Debtors commenced this Chapter 11 case on February 11, 2019. On February 28, 2019, the GCA filed a proof claim ("GCA Claim") relative to the Ditech Financial, LLC ("DF") bankruptcy estate. Claim No. 20041. The GCA Claim contained several attachments, inclusive of the underlying complaint, class certification order, and Fed. R. Civ. P. 23(f) denial order.

As described in the attachments to the GCA Claim, Brian and Connie Geary filed a class action against DF, then known as Green Tree Servicing, LLC, 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 2014). 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 had 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 issue of individual actual damages of the members of the six (6) classes was not certified by the District Court, but the procedure for resolving such actual damages was reserved for later determinations and proceedings. The District Court further ruled that DF may face statutory liability of up to $500,000.00 per class[2]. On November 6, 2017, the Court of Appeals for Sixth Circuit denied DF's petition under Fed. R. Civ. P. 23(f) for interlocutory appeal.

In spite of the long existing and readily available nature of this information, on March 28, 2019, the Debtors disclosed the existence of the GCA by errantly scheduling: [GEARY, BRIAN

[2] Each class was determined by reference to six (6) form letters sent to thousands of consumers from a pool of consumer-debt loan portfolios DF purchased from three (3) different loan servicers. Three (3) of the offending form letters were based upon consumer debts acquired by DF after default from *Citifinanical, Inc*. Two (2) of the offending form letters were based upon consumer debts acquired by DF after default from *Lendmark Financial Services, a subsidiary of BB&T*. One (1) of the offending form letters was based upon consumer debts acquired by DF after default from *Everhome Mortgage*. Exemplar copies of one of each of the six (6) offending form letters were attached as exhibits to the GCA's class certification motion.

AND CONNIE NOBILE & THOMPSON CO, LPA MICHAEL B. ZIEG, ESQ 4876 CEMETERY RD HILLIARD, OH 43026] on Schedule E/F for the joint Chapter 11 debtor known as Green Tree Servicing Corp. ECF 300 at pg. 63.

Also on March 28, 2019, the Debtors further errantly disclosed the underlying litigation in the Statement of Financial Affairs of Green Tree Servicing Corp. as: "Geary, Brian and Connie v. Green Tree Servicing, LLC, 14-00522", and ambiguously referred to the nature of the proceedings as "Loan Administration-Servicing Transfer". ECF 301 at pg. 35. The GCA noted the apparent scheduling errors in the GCA's objections to the Debtors' Amended Disclosure Statement. ECF 336 at pg. 3.

On May 7, 2019, the Debtors filed Amended Schedule E/F for DF and Green Tree Servicing Corp. to, among other things, seemingly correct these and other errors. ECF 511 at pg. 185, and ECF at pg. 512. With respect to the DF's Amended Schedule E/F, DF listed the debt as GEARY, BRIAN AND CONNIE, NOBILE & THOMPSON CO, LPA MICHAEL B. ZIEG, ESQ 4876 CEMETERY RD. HILLIARD, OH 43026. It is unclear to the GCA whether any corresponding corrections were made to the Statement of Financial Affairs of either DF or Green Tree Servicing Corp.[3]

On September 11, 2019, the Debtors filed a notice of filing their Third Amended Joint Chapter 11 Plan ("Plan"). ECF 1287. The GCA filed several objections to confirmation of the Plan. ECF 1296. A subsequent notice of filing the Plan was filed on September 22, 2019, as was a Memorandum of Law in Support of Confirmation of Third Amended Joint Chapter 11 Plan of

[3] It is worth noting however, that during the course of the GCA's litigation in the S.D. Ohio, DF ultimately refined its search during post-class certification discovery and motions practice, and disclosed 21,924, individual and/or joint DF accounts, that fit within the six (6) certified class definitions. On November 15, 2017, DF provided the GCA with an Excel Spreadsheet containing the names, addresses and DF account numbers associated with the certified classes.

Ditech Holding Corporation and Its Affiliated Debtors and (II) Omnibus Reply to Objections Thereto ("Plan Memo"). ECF 1325 and 1326. Therein, the Debtors treated the GCA's claim as a class claim within Class 6 of the Plan for the purposes of plan confirmation. ECF 1325 at 43-46; 49-59.

In their analysis, the Debtors revealed for the first time that of the 21,924 accounts DF identified during class discovery, only 2,299 accounts were "owned" by DF as of the date of confirmation. ECF 1325 at 51; ECF 1330 O'Connor Dec. ¶81. The Debtors explained to counsel for the GCA that the other accounts were already transferred by DF in the ordinary course of its operations prior to or during the Debtors' current Chapter 11 case.

The Debtors analyzed and described the GCA's claim in the context of having both "Section 363(o)" and "non-Section 363(o)" claim components. ECF 1325 at 52. The Debtors' expert, Denis O'Connor estimated that based upon the 2,299 remaining accounts that could potentially qualify for 363(o) treatment, the value of the GCA's "Section 363(o)" claim component would be between $574,750 and $1,149,500[4]. ECF 1330; O'Connor Dec. ¶s 82-83. The Debtors did not attempt to estimate the value of "non-Section 363(o)" component of the GCA's claim.

September 26, 2019 the Court confirmed the Plan over the GCA's remaining objections. ECF 1404.

[4] The Debtors' experts, Denis O'Connor and Jeffrey Naimon, both also concluded that the value of the "Section 363(o)" component of the GCA's claim could be zero because, they say, there is "no true assignee liability for the new servicer solely based on the prior servicer's actions". ECF 1328; Naimon Dec. ¶20c; ECF 1330; O'Connor Dec. ¶91. Both opinions make certain faulty assumptions. First and foremost is the assumption that each of 2,299 remaining accounts were residential mortgage accounts subject to the Truth in Lending Act's ("TILA") cited provisions. Mr. and Mrs. Geary's account was based upon a secured car loan, subject to 16 C.F.R. Part 433, claims and defenses preservation rules – the FTC holder in due course rule. While the GCA does not doubt that the overwhelming majority of the all of the 21,924 class action accounts were residential mortgage accounts, the Debtors have never disclosed such loan-type details, specifically as to the 2,299 accounts. Some of them could very well be like the Gearys'. Second, the GCA does not involve the TILA, or the actions of DF as a "servicer" under the consumer credit cost disclosure aspects of that statute. The GCA involves the actions of DF as a "debt collector" under the Fair Debt Collections Practices Act ("FDCPA"). The experts' citations to the TILA servicer liability provisions (15 U.S.C. §1641(f)) are limited to consumer claims brought under the relevant TILA "subchapter" regarding credit cost disclosure.

II. CURRENT CLAIM STATUS

The Plan proposes to treat the GCA Claim as a Class 6 Consumer Creditor Claim. ECF 1404-1 at 24-25. Neither the Debtors nor the Consumer Representative have objected to the GCA Claim. However, upon information and belief, the GCA anticipates that objections will be forthcoming and may include some request by the Consumer Representative to expunge the class-nature of the GCA Claim.

Even though there is no "contested matter" within the meaning of Fed. R. Bankr. P. 9014 currently before the Court as to the GCA Claim, the GCA believes it will be prudent to preliminarily and protectively request that the Court apply Fed. R. Bankr. P. 7023 at this stage to any future contested matter, formal value estimation, and/or claim objection concerning its filed proof of claim. *In re Chateaguy Corp.*, 104 B.R. 626, 634 (S.D.N.Y. 1989) citing *In the Matter of American Reserve Corp.*, 840 F. 2d 487, 488 (7th Cir. 1988).

III. LAW AND ARGUMENT

A. Pre-Filing Certified Class Claims in Bankruptcy

Although not prohibited, there is no absolute right to file a class proof of claim under the Bankruptcy Code in this jurisdiction. *In re Musicland Holding Corp.*, 362 B.R. 644, 650 (Bankr. S.D.N.Y. 2007). The permissibility of class action claims, the treatment thereof, and the application of Rule 7023 thereto are matters of discretion for the Bankruptcy Court under Fed. R. Civ. P. 9014(c). *In MF Global, Inc.*, 512 B.R. 757, 762 (Bankr. S.D.N.Y. 2014) citing *In re Kaiser Grp. Int'l, Inc*. 278 B.R. 58, 62 (Bankr. D. Del. 2002). However, it has been recognized that the filing and consideration of a class proof of claim is consistent with the Bankruptcy Code, particularly where (i) a class or classes have been certified pre-petition by a non-bankruptcy court; and (ii) where there has been no actual or constructive notice to the class members of the

bankruptcy date and claims bar date. *In re Bally Total Fitness of Greater New York, Inc.*, 402 B.R. 616, 620 (Bankr. S.D.N.Y. 2009) (*aff'd*) 411 B.R. 142 (S.D.N.Y. 2009). Claims based upon pre-filing certified classes are considered the "best candidates" for application of Rule 7023. *In re Sacred Heart Hosp. of Norristown*, 177 B.R. 16, 22 (Bankr. E.D.Pa. 1995). The GCA meets both of these conditions.

The GCA Claim was both filed and treated as a class proof of claim in this case. The GCA Claim was supported by a pre-filing, thoroughly written decision analyzing the merits of class certification by the U.S. District Court for the S.D. Ohio. Further, the U.S. Court of Appeals for the Sixth Circuit denied DF's petition under Fed. R. Civ. P. 23(f) to examine the District Court's decision on an interlocutory basis. Following the class certification decision and denial of its Rule 23(f) petition, DF prepared a list ("List") for the purposes of notification under Fed. R. Civ. 23(c)(2)(B). DF identified 21,924 accounts[5] that fit the definitions of one or more of the six (6) classes certified by the District Court. Many of these accounts on the List identified more than one account borrower, who each received a communication from DF that gave rise to a claim under the FDCPA. Contrary to the assertions and analyzes of the Debtors' experts during Plan confirmation, DF did not identify only 21,924 "class members". ECF 1330; O'Connor Dec. ¶s 81. A closer inspection of confidential List prepared by DF shows that more than half of the identified accounts had more than one borrower – making DF's pre-certification representation of 31,000 more closely aligned with the data.

It is important to note that the identified members of the six (6) classes were likely "borrowers" on accounts serviced by DF. However, for the purposes of both the GCA and these

[5] Pre-certification however, DF's counsel represented that DF identified that more than 31,000 persons were involved. *Geary v. Green Tree Servicing, LLC*, 2:14-CV-000522 ALM-EPD (S.D. Ohio 2014); ECF 42; EXHIBIT 2.

Chapter 11 cases, these members maintained separate but collective FDCPA claims. It goes without saying that the Debtors were in possession of the List prior to filing this Chapter 11 case. An inspection of DF's bankruptcy schedules indicates that DF did not disclose the names and addresses of all of the persons identified on the List. Indeed, DF's amended schedules identified only 2,866 individual and/or joint claimants. ECF 511. The GCA's undersigned class counsel also reviewed and did a preliminary audit of the Debtors' consolidated list of creditors filed with the Court on February 11, 2019. ECF 15. The GCA's counsel further reviewed the approved procedures for the initial case notification to, *inter alia*, the borrower accounts serviced by DF. ECF 14, 71. Based upon the approved procedures, it appears that the "borrowers" whose names[6] appeared on the consolidated list of creditors were provided notice of commencement of the case by publication in either or both the *New York Times* and *USA Today*. ECF 14 at 7-8.

Based upon the GCA's counsel inspection, it appears that many and most of the GCA class members do not appear on the Debtors' approved consolidated list. Moreover, it does not appear that the Debtors made provision for notice of commencement of the case for the GCA class members separately even though they had distinct FDCPA claims apart from their respective statuses as "borrowers". It stands to reason therefore that a vast number of the GCA's class members did not receive individual actual or constructive notice of the Debtors' bankruptcy case, and/or the claims bar date.

Accordingly, based upon the foregoing reasoning and precedent, the Court should apply Fed. R. Bankr. P. 7023 to any contested matter, valuation of, or objection to the GCA Claim.

[6] Addresses and account information were left off or redacted with Court approval. ECF 71.

B. Other Considerations

While typically reserved for consideration of class claims in situations without a pre-filing class certification, it has been observed that Chapter 11 bankruptcy cases. like the Debtors' here, undoubtedly change "the balance of factors" that determine whether a class action claim should or should not be allowed in bankruptcy court. *Musicland Holding*, 362 B.R. at 650-51, citing also, *In re Ephedra Prods. Liab. Litig.*, 329 B.R. 1, 5 (S.D.N.Y. 2005). In situations where a class claimant timely files a class proof of claim, and timely moves for application of Rule 7023 and class certification during the bankruptcy case, such claimaint must also show that the requirements Rule 23 are met, and that there are benefits that will be derived from the use of the class action device that are / will be consistent with the goals of bankruptcy. *In re Woodward & Lothrop Holdings, Inc.*, 205 B.R. 365, 369 (Bankr. S.D.N.Y. 1997).

The GCA Claim, as argued, already satisfies the standards for allowance, and application of Fed. R. Bankr. P. 7023 because class certification was fully considered pre-petition, and actual and constructive notice can only be guaranteed on a representative basis – through the GCA's class counsel. Nevertheless, there are many benefits that can and will be derived from the use of the class action device in this case. They include the following:

- Consistency in Plan interpretation. The Debtors already relied upon the nature of the GCA Claim as a class claim in the preparation and confirmation of the Plan. The rights and entitlements of each individual class member were not analyzed except upon a collective basis;
- Lesser administrative burden on the Consumer Creditor Trust. Upon the assumption that the GCA Claim is administered as a class claim, such will permit the Consumer Representative to liquidate and resolve the rights and claims over 30,000 potential

claimants through one final and binding representative device. Moreover, in the event the GCA and the Consumer Representative could resolve the claim by settlement, the process to obtain a final order approving the settlement will be greatly simplified. As discussed below, upon settlement and payment, the matter could be remanded back to the District Court for the S.D. Ohio for final resolution and administration – likely through the appointment of a third-party administrator who will handle noticing and claim administration.

- Lesser administrative burden on the Court. Upon the assumption that the GCA Claim is administered as a class claim, use of the class device will permit the Court to avoid the potential complexities of fashioning a procedure to both notify and deal with over 30,000 individual claims. Instead, upon liquidation of the GCA Claim as a class claim (preferably by settlement) would give the Court the option to abstain and remand the approval of the settlement and final administration of the payout of the claim to the District Court for the S.D. Ohio.
- Finality and Issue Reduction. In class actions certified under Fed. R. Civ. P. 23(b)(3) like the GCA, each class member would typically be notified after class certification of the right to opt out under Fed. R. Civ. P. 23(c)(2)(B). The purpose of the notice is to provide finality as to all issues certified. But, due to the operation of the automatic stay in this case, the District Court for the S.D. Ohio was stayed from fulfilling that duty. As stated, it appears that the vast majority of the members of the GCA were not provided actual or constructive notice of the bankruptcy case and right to file an individual claim. However, an efficient representative procedure could be established, either in combination with settlement or otherwise, to provide each individual with

appropriate notice to opt out. For those very few who do opt out, the issues necessary to resolve their individual claims will be greatly reduced. For the vast majority all issues will be binding and final.

IV. CONCLUSION

Based upon the foregoing, the GCA respectfully requests that the Court apply Fed. R. Bankr. P. 7023 to any contest matter, claim objection, or claim valuation filed regarding the GCA Claim, plus any other relief appropriate under the circumstances.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing THE GEARY CLASS ACTION'S MOTION TO APPLY FED. R. BANKR. P. 7023 TO ANY OBJECTION, VALUATION OR OTHER CONTESTED MATTER REGARDING ITS CLAIM PURSUANT TO FED. R. BANKR. 9014 was electronically filed with the Clerk of the Court using CM/ECF on NOVMEBER 6, 2020. 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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