UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

In re:	:	Case No. 19-10412 (JLG)
Ditech Holding Corporation, *et al.*,	:	Chapter 11
Debtors.[1]	:	(Jointly Administered)

MEMORANDUM DECISION AND ORDER SUSTAINING THE FORTY-THIRD OMNIBUS OBJECTION WITH RESPECT TO THE CLAIMS OF DARRYL MACDONNELL (CLAIM NOS. 919 AND 920)

A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES LLP
Attorneys for the Plan Administrator
767 Fifth Avenue
New York, New York 10153
By: Ray C. Schrock, P.C.
Richard W. Slack, Esq.
Sunny Singh, Esq.

JENNER & BLOCK LLP
Attorneys for the Consumer Representative
919 Third Avenue
New York, NY 10022
By: Richard Levin, Esq.

Mr. Darryl MacDonnell
Appearing Pro Se
739 N. Kristen
Mesa, AZ 85213

[1] The confirmation of the Debtors' Third Amended Plan (as defined below) created the Wind Down Estates. The Wind Down Estates, along with the last four digits 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.

HON. JAMES L. GARRITY, JR.
U.S. BANKRUPTCY JUDGE

Introduction

In these Chapter 11 Cases, Darryl MacDonnell (the "Claimant") filed Proofs of Claim Nos. 919 (the "First MacDonnell Claim") and 920 (the "Second MacDonnell Claim") (together, the "Claims") as secured, priority claims against Ditech Financial LLC ("Ditech") and Reverse Mortgage Solutions, Inc. ("RMS"), respectively. In their Forty-Third Omnibus Claim Objection (the "Objection"),[2] the Plan Administrator and the Consumer Representative seek to disallow and expunge the Claims as "No Basis Consumer Creditor Claims." The Claimant is proceeding pro se herein. In response to the Objection, the Claimant filed a letter dated March 22, 2020 (the "March 2020 Letter")[3] and a "Motion to Acknowledge Default of Ditech".[4] The Plan Administrator and Consumer Representative submitted a joint reply in support of the Objection (the "Reply").[5] In response to the Reply, the Claimant submitted a "Motion to Show Validation of Claim 919 and 920"[6] and "Motion and Objection to Plan Claims 919 and 920."[7]

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[2] Forty-Third Omnibus Objection to Proofs of Claim (No Basis Consumer Creditor Claims) [ECF No. 1976]. References to "ECF No. __" herein are to documents filed in the electronic docket in these jointly administered cases under Case No. 19-10412 (the "Chapter 11 Cases").

[3] March 2020 Letter [ECF No. 2411].

[4] Motion to Acknowledge Default of Ditech [ECF No. 2723].

[5] Joint Reply of Plan Administrator and Consumer Representative in Support of the Forty-Third Omnibus Objection with Respect to Claims of Darryl MacDonnell (Claim Nos. 919 and 920) [ECF No. 3938]. The Reply annexes exhibits consisting of documents referenced in the Claimant's pleadings; the Claimant's allegations in support of the Claims are based on these documents. The Court takes judicial notice of those documents. *See Ng v. HSBC Mortg. Corp.,* No. 07-CV-5434 RRM/VVP, 2010 WL 889256, at *9 n. 13 (E.D.N.Y. Mar.10 2010) (in mortgage dispute, taking judicial notice of settlement statements)"); *Leon v. Shmukler*, 992 F. Supp. 2d 179, 184 (E.D.N.Y. 2014) ("It is well-settled that, in considering a motion to dismiss, courts may take judicial notice of documents attached to, integral to, or referred to in the complaint, as well as documents filed in other courts and other public records").

[6] Motion to Show Validation of Claim 919 and 920 [ECF No. 3957].

[7] Motion and Objection to Plan Claims 919 and 920 [ECF No. 3963].

The Plan Administrator and Consumer Representative contend that the Court should disallow and expunge the Claims because they fail to state claims for relief against either Ditech or RMS. Pursuant to the Claims Procedures Order,[8] the Court conducted a Sufficiency Hearing on the Claims. The legal standard of review at a Sufficiency Hearing is equivalent to the standard applied to a motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rule 12(b)(6)").[9] *See* Claims Procedures Order ¶ 3(iv)(a).

As explained below, accepting all factual allegations asserted by the pro se Claimant in support of the Claims as true, drawing all reasonable inferences in the Claimant's favor, and interpreting the Claims and the Claimant's responses to the Objection to raise the strongest arguments that they suggest, the Claims fail to state plausible claims for relief against either Ditech or RMS. Accordingly, the Court sustains the Objection and disallows and expunges the Claims.[10]

Jurisdiction

The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* dated January 31, 2012 (Preska, C.J.). This is a core proceeding pursuant to 28 U.S.C. § 157(b).

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[8] Order Approving (I) Claim Objection Procedures and (II) Claim Hearing Procedures [ECF No. 1632].

[9] Rule 12(b)(6) is incorporated herein by Rule 7012 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

[10] In support of the Objection, the Plan Administrator and Consumer Representative argue, in the alternative, that the Claims should be reclassified as a Consumer Creditor Claim because the Claims are not secured by an interest in property of the Debtors nor are they entitled to priority status. Reply ¶¶ 33-42. Given the Court's determination to expunge the Claims, the Court does not address the alternative arguments.

Background

The Chapter 11 Cases

On February 11, 2019 (the "Petition Date"), Ditech Holding Corporation (f/k/a Walter Investment Management Corp.) and certain of its affiliates ("Debtors") filed petitions for relief under chapter 11 of the Bankruptcy Code in this Court. The Debtors remained in possession and control of their business and assets as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On February 22, 2019, the Court entered an order fixing April 1, 2019 at 5:00 p.m. (prevailing Eastern Time) as the deadline for each person or entity, not including governmental units (as defined in section 101(27) of the Bankruptcy Code) to file a proof of claim in the Debtors' Chapter 11 Cases (the "General Bar Date").[11] Thereafter, the Court extended the General Bar Date for consumer borrowers, twice, and ultimately to June 3, 2019 at 5:00 p.m. (prevailing Eastern Time).[12]

On September 26, 2019, the Debtors confirmed their Third Amended Plan, and on September 30, 2019, that plan became effective.[13] The Plan Administrator is a fiduciary appointed under the Third Amended Plan who is charged with the duty of winding down, dissolving and liquidating the Wind Down Estates. *See* Third Amended Plan, Art. I, ¶¶ 1.130, 1.184, 1.186. The Consumer Representative is a fiduciary appointed under the Third Amended Plan who is responsible for the reconciliation and resolution of Consumer Creditor Claims and

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[11] Order Establishing Deadline for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof [ECF No. 90].

[12] Order Further Extending General Bar Date for Filing Proofs of Claim for Consumer Borrowers Nunc Pro Tunc [ECF No. 496].

[13] Third Amended Joint Chapter 11 Plan of Ditech Holding Corporation and its Affiliated Debtors [ECF No. 1326] (the "Third Amended Plan"); Order Confirming Third Amended Joint Chapter 11 Plan of Ditech Holding Corporation and its Affiliated Debtors [ECF No. 1404]. Notice of (I) Entry of Order Confirming Third Amended Joint Chapter 11 Plan of Ditech Holding Corporation and its Affiliated Debtors, (II) Occurrence of Effective Date, and (III) Final Deadline for Filing Administrative Expense Claims [ECF No. 1449].

distribution of funds to holders of Allowed Consumer Creditor Claims in accordance with the Third Amended Plan. *Id.,* Art. I, ¶ 1.41. Under the plan, the Plan Administrator, on behalf of each of the Wind Down Estates, is authorized to object to all Administrative Expense Claims, Priority Tax Claims, Priority Non-Tax Claims, and Intercompany Claims; and the Consumer Representative has the exclusive authority to object to all Consumer Creditor Claims. *See id.*, Art. VII, ¶ 7.1.

The Proofs of Claim

On April 11, 2019, Claimant timely filed the Claims, as follows:

The First MacDonnell Claim

Asserts a $262,800 secured claim, the entirety of which is also asserted as a priority claim under an unidentified subsection of 11 U.S.C. § 507(a). Claimant identifies the basis of the claim as "mortgage & collection thru assignment attached" and does not identify any Wind Down Estate owned property securing the claim. *See* First MacDonnell Claim at 2. The proof of claim does not specify on what basis the First MacDonnell Claim is entitled to priority status. *Id.* Claimant attached a number of documents to the proof of claim form, including the Deed of Trust, and Assignment of Deed of Trust, correspondence from Ditech regarding Claimant's loss mitigation applications, and billing statements (the "Claim Support Documents"). *See* First MacDonnell Claim at 3-49. None of those documents provides for the claim having a secured or priority basis.

The Second MacDonnell Claim

Asserts a $6,929.76 secured claim, the entirety of which is also asserted as a priority claim under an unidentified subsection of 11 U.S.C. § 507(a). *See* Second MacDonnell Claim at 2. The Claimant identifies the basis of the claim as "payments made to Ditech" but does not identify any Wind Down Estate owned property securing the claim. *Id.* at 1. Claimant attached the same Claim Support Documents to the claim.

The Objection and Claimant's Responses

In support of the Objection, the Plan Administrator and Consumer Representative contend that the Court should disallow and expunge the Claims because they fail to state cognizable claims against Ditech, RMS or any of the Debtors. Reply ¶¶ 26-32. Alternatively,

they assert that at a minimum, the Court should reclassify the secured Claims to unsecured Consumer Creditor Claims. *Id.* ¶¶ 33-42.

The Claimant filed the following four documents in support of the Claims:

March 2020 Letter

In the March 2020 Letter, the Claimant states that he is "a disabled retired veteran" who "relied on the servicing and modification of my loan with Ditech." March 2020 Letter at 1. He maintains that "Ditech did not act properly while servicing my home loan," and "Ditech failed to modify my loan" and "[a]s a result I am losing my home", and a "foreclosure is pending." *Id.* ¶¶ 2-5. He contends that "Ditech is fully responsible for this claim," and that Ditech is "hid[ing] behind a bankruptcy to diminish their responsibility and liability." *Id.* ¶¶ 6, 7.

Motion to Acknowledge Default of Ditech

In the two-page Motion to Acknowledge Default of Ditech, the Claimant states that "Ditech failed to transmit funds while Ditech was to service my home loan from Bank of America" and that the "[f]ailure of doing so made it seem to new servicer loan care [sic] that I never made payments on my mortgage therefore causing hardship and foreclosure that is pending." Motion to Acknowledge at 1.

Motion to Show Validation of Claim 919 and 920

In support of this "Motion" the Claimant purports to annex (i) "Servicer History Details" and (ii) "Recorded Assignment Deed of Trust dated 12-3-2018" as Exhibits 1 and 2, respectively.

Motion and Objection to Plan Claims 919 and 920

In support of the Motion and Objection to Plan Claims 919 and 920 the Claimant makes a number of allegations against Ditech. The Court will address those allegations below in its discussion of the Claims. The Claimant annexed copies of the following documents to this motion: (i) "Unofficial Document" September 5, 2019 Corporate Assignment Deed of Trust; Ditech, as Assignor, and LoanCare LLC, as Assignee; (ii) Payoff Quote, printed on December 23, 2020, addressed to Claimant, from and on behalf of LoanCare; (iii) "Unofficial Document" page 1 of 6 of "Loan Modification Agreement" between Claimant and LoanCare; and (iv) "Unofficial Document" two-page "Special Warranty Deed" pursuant to which Claimant purportedly conveyed the Property to "Masonary LLC, an Arizona limited liability company."

Applicable Legal Standards

Under section 502(a) of the Bankruptcy Code, "a claim ... proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest. . . objects." 11 U.S.C. § 502(a). The filing of a proof of claim constitutes "prima facie evidence of the validity and amount of a claim." Fed. R. Bank. P. 3001(f). If an objection refuting at least one of the claim's essential allegations is asserted, the claimant has the burden to demonstrate the validity of the claim. *See, e.g., Rozier v. Rescap Borrower Claims Tr. (In re Residential Capital, LLC)*, 15 Civ. 3248 (KPF), 2016 WL 796860, at *9 (S.D.N.Y. Feb. 22, 2016); *Hasson v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, No. 09-50026, 2012 WL 1886755, at *3 (S.D.N.Y. May 12, 2012); *In re Oneida Ltd.*, 400 B.R. 384, 389 (Bankr. S.D.N.Y. 2009), *aff'd sub nom. Peter J. Solomon Co., L.P. v. Oneida, Ltd.*, No. 09-cv-2229, 2010 WL 234827 (S.D.N.Y. Jan. 22, 2010). Additionally, section 502(b)(1) of the Bankruptcy Code provides, in relevant part, that a claim may not be allowed to the extent that "such claim is unenforceable against the debtor and the property of the debtor, under any agreement or applicable law . . ." 11 U.S.C. § 502(b)(1).

In filing the Objection, the Plan Administrator and Consumer Representative initiated a contested matter. *See* Fed. R. Bankr. P. 3007 advisory committee's note ("[t]he contested matter initiated by an objection to a claim is governed by Rule 9014. . ."). *See also In re Tender Loving Care Health Servs., Inc.*, 562 F.3d 158, 162 (2d Cir. 2009) (stating that "when a debtor files an objection to a claim, the objection has initiated a contested matter"). Bankruptcy Rule 9014 governs contested matters. The rule does not explicitly provide for the application of Bankruptcy Rule 7012. However, Bankruptcy Rule 9014 provides that a bankruptcy court "may at any stage in a particular matter direct that one or more of the other Rules in Part VII shall apply." Fed. R. Bankr. P. 9014. The Court did so here. Under the Claims Procedures Order, the legal standard of review the Court applies at a Sufficiency Hearing is equivalent to the standard applied by the

Court under Rule 12(b)(6) on a motion to dismiss for failure to state a claim upon which relief could be granted. *See* Claims Procedure Order ¶ 3(iv)(a). *See also In re 20/20 Sport, Inc.*, 200 B.R. 972, 978 (Bankr. S.D.N.Y. 1996) ("In bankruptcy cases, courts have traditionally analogized a creditor's claim to a civil complaint [and] a trustee's objection to an answer. . . ").

In applying Rule 12(b)(6) to the Claims, the Court assesses the sufficiency of the facts alleged in support of the Claims in light of the pleading requirements under Rule 8(a) of the Federal Rules of Civil Procedure.[14] Rule 8(a)(2) states that a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). To meet that standard, the Claims "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) ("*Iqbal*") (citations omitted); *accord Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007) ("*Twombly*"). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *accord Twombly*, 550 U.S. at 570. To satisfy Rule 12(b)(6), the "pleadings must create the possibility of a right to relief that is more than speculative." *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 183 (2d Cir. 2008) (citation omitted). In considering whether that standard is met for a particular claim, the court must assume the truth of all material facts alleged in support of the claim and draw all reasonable inferences in the claimant's favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). However, the court "need not accord 'legal conclusions, deductions or opinions that are couched as factual allegations . . . a presumption of truthfulness.'" *Hunt v. Enzo Biochem, Inc.*, 530 F.Supp.2d 580, 591 (S.D.N.Y. 2008) (quoting *In re NYSE Specialists Sec.*

[14] Rule 8 is incorporated herein pursuant to Bankruptcy Rule 7008.

Litig., 503 F.3d 89, 95 (2d Cir. 2007)). In short, "[i]n ruling on a motion pursuant to Fed. R. Civ. P. 12(b)(6), the duty of a court is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 113 (2d Cir. 2010) (citation and internal quotation marks omitted). Where, as here, the Claimant is proceeding pro se, the Court will liberally construe the Claims. Nonetheless, the Claims must be supported by specific and detailed factual allegations that provide a fair understanding for the basis of the Claims and the legal grounds for recovery against RMS and Ditech. *Kimber v. GMAC Mortgage, LLC (In re Residential Capital, LLC)*, 489 B.R. 489, 494 (Bankr. S.D.N.Y. 2013) (citing *Iwachiw v. New York City Bd. of Elections*, 126 Fed. Appx. 27, 29 (2d Cir. 2005)).

Analysis

Facts Relevant to The Claims

Claimant was the owner of real property located at 739 North Kristen, Mesa, Arizona 85213 (the "Property"). On or about September 12, 2007, Claimant executed a note (the "Note") with Claimant as the borrower and Security Mortgage Corporation as lender. *See* Note.[15] The

[15] A copy of the Note is annexed to the Reply as Exhibit A. The Claimant contends that counsel to the Plan Administrator cannot rely on the documents annexed to the Reply. *See* Motion and Objection to Plan Claims 919 and 920 at 3-6. The Court finds no merit to that contention. The Court takes judicial notice of the underlying mortgage documents that form the basis for the Claims and Claimant's proofs of claim, and of matters of public record, such as recording documents. *See* Memorandum Decision and Order Sustaining the Fifteenth Omnibus Objection (No Basis Consumer Creditor Claims) With Respect to Claim of Alton W. Obert at 1 (Oct. 3, 2021) [ECF No. 3718] (taking judicial notice of underlying mortgage documents). *See also Sutton ex rel. Rose v. Wachovia Sec., LLC*, 208 F. App'x 27, 30 (2d Cir. 2006) (holding that filings and orders in other courts "are undisputably matters of public record"); *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156, 165-66 (S.D.N.Y. 2015) (taking judicial notice of property records from a county website); *Chestnut v. Wells Fargo Bank, N.A.*, 2011 WL 838914, at *1 n.1 (E.D.N.Y. Mar. 2, 2011) (holding, in the context of a breach of contract action arising from a mortgage, that the "Complaint, however, contains limited factual material relating to Plaintiffs' contractual dispute with Wells Fargo . . . Consequently, the Court largely constructs this section from documents that it can take judicial notice of, such as the underlying mortgage documents, the state court records, and the related bankruptcy proceeding); *Int'l Audiotext Network, Inc. v. Am. Tel. and Tel. Co.*, 62 F.3d 69, 72 (2d Cir.1995) (in contract action, court can take judicial notice of underlying contract as a document "integral to the complaint"); *Annen v. Fed. Nat'l Mortg. Ass'n*, No. 116CV02177SCJAJB, 2016 WL 11567870, at *3 (N.D. Ga. Nov. 16, 2016), *report and recommendation adopted,* No. 1:16-CV-2177-SCJ, 2016 WL 11567820 (N.D. Ga. Dec. 9, 2016) (noting that "public

same day, Claimant executed a deed of trust (the "Deed of Trust") which secured the Note by the Property and identified Fidelity National Title as trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for the lender and its successors and assigns. *See* First MacDonnell Claim at 5-7. The documents annexed to the Claim show that Green Tree n/k/a Ditech was servicing the loan in 2018 (*id.* at 30, 32-37, 41, 45) and on December 3, 2018, MERS assigned the Deed of Trust to Ditech. *Id.* at 4.

On August 30, 2018, Ditech notified Claimant that he was in default under the terms of the documents creating and securing his loan, including the Note and Deed of Trust, for failing to pay the July and August of 2018 monthly payments. *Id.* at 32. Among other things, the notice advised the Claimant that to cure the default, he was required to pay the sum of $2,500.46 by October 4, 2018, and that he could dispute the delinquency by contacting Ditech. *Id.* at 33. The Claimant made the July 2018 payment but failed to pay the amount due for August, September, October, November and December 2018, as well as January 2019. *Id.* at 41, 43 and 47.

Apparently, at some point prior to October 31, 2018, the Claimant was evaluated for mortgage payment assistance based upon the eligibility requirements of Fannie Mae, the owner of his Note. *See* First MacDonnell Claim at 37. By letter dated October 31, 2018, Ditech advised Claimant that

> [b]ased on a careful review of the information you provided to us, Ditech (and in limited circumstances, Fannie Mae) has determined you are not eligible for Fannie Mae Capitalize and Extend (Term) Modification Trial Workout Plan due to the following reason(s):
>
> The hardship is not temporary or has not been resolved.
>
> You were also found to be ineligible for Fannie Mae Flex Modification Trial Workout Plan due to the following reason(s):

records, such as recorded security deeds, are among the permissible facts that a district court may consider on a motion to dismiss"). The Claimant also complains about the Plan Administrator's counsel's conduct generally in connection with the Objection. *See* Motion and Objection to Plan Claims 919 and 920 at 3-6. The Court finds no merit to those complaints and denies Claimant's request for relief against counsel.

> Ineligible for Fannie Mae Flex Modification Trial Workout Plan; the modified P&I payment amount is greater than the pre-modification P&I payment amount.

Id. The Claimant also was advised that he had the right to appeal the determination not to offer him loss mitigation assistance. *Id.*

The Claimant appealed the Decision and on December 4, 2018 Ditech denied that appeal. *See* First MacDonnell Claim at 18 (noting that "[a] review of the account has determined that a previous resolution was sent on December 04, 2018."). On December 26, 2018, Ditech again notified the Claimant that he was ineligible for the Modification Plans. *Id.* at 12. In that same letter, Ditech conditionally approved the Claimant for a short sale, which he did not accept. *Id. See also id.* at 27.

The Claimant filed another appeal, which Ditech denied in a letter dated January 17, 2019. *Id.* at 18. In the letter, Ditech explained that a previous resolution had been sent to him on December 4, 2018, and that such prior determination, was not subject to a second appeal. *Id.* Ditech advised that Claimant was not entitled to loan modification assistance. *Id*. As of January 16, 2019, the loan was six months delinquent with a past due balance of $7,484.76 and a negative escrow balance of $1,872.35. *Id.* at 43.

On February 1, 2019, Ditech notified Claimant that he was delinquent on his Note payments and under the terms of the Note and Deed of Trust, it had the right to foreclose on the Property. *Id.* at 19. Apparently, the Claimant contacted Ditech about his mortgage. In a letter dated February 11, 2019, Ditech thanked Claimant for contacting it about the mortgage and advised that he had been evaluated for mortgage payment assistance based upon the eligibility requirements of Fannie Mae, the owner of his mortgage account. *Id.* at 14. In part, in that letter, Ditech advised, as follows:

> Based on a careful review of the information you provided to us, Ditech (and in limited circumstances, Fannie Mae) has determined you are not eligible for Fannie Mae Capitalize and Extend (Term) Modification Trial Workout Plan due to the following reason(s):
>
> > The hardship is not temporary or has not been resolved.
>
> You were also found to be ineligible for Fannie Mae Flex Modification Trial Workout Plan due to the following reason(s):
>
> > Ineligible for Fannie Mae Flex Modification Trial Workout Plan; the modified P&I payment amount is greater than the pre-modification P&I payment amount.

Id. The letter also advised that Ditech was offering Claimant the opportunity to pursue a short sale of the Property. *Id.*

As of March 18, 2019, the firm of Tiffany & Bosco P.A. (the "Firm"), had been retained to conduct a non-judicial foreclosure of the Property pursuant to the Deed of Trust. By letter dated March 18, 2019, the Firm so notified Claimant. *See* First MacDonnell Claim at 38. On February 28, 2020, the Firm recorded a "Notice of Trustee's Sale" of the Property. *See* March 2020 Letter at 3, 6. Among other things, the notice advised that it would conduct the sale on June 2, 2020 at 10:00 a.m. *Id.* On January 12, 2021, the Firm filed a Cancellation of Trustee's Sale. *See* Reply, Ex. B. (Cancellation of Trustee's Sale from Leonard J. McDonald, Trustee). At some point before June 2021, LoanCare became the new servicer on the loan. On June 3, 2021, LoanCare, filed a Deed of Release and Full Reconveyance. *See* Reply Ex. C. In part, it advises that the Deed of Trust "HAS BEEN FULLY PAID." *Id.*

Discussion

The stated basis of the First MacDonnell Claim is "mortgage collection through assignment." *See* First MacDonnell Claim. As support for that claim, the Claimant asserts that "I am losing my home", and Ditech "is fully responsible for [the] claim" because "Ditech failed to

modify my loan" and "did not act properly while servicing my loan." *See* March 2020 Letter at 1. However, those conclusory allegations do not state a claim for relief.[16]

First, it is clear under federal regulations and case law that a loan servicer has no duty to provide a borrower with loss mitigation relief. *See* 12 C.F.R. § 1024.41 (specifically providing that for loss mitigation procedures, "[n]othing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option" and that it should not "be construed to create a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss mitigation option."); *Hermosillo v. Caliber Home Loans Inc.,* No. CV-15-02052-PHX-ESW, 2017 WL 2653039, at *6 (D. Ariz. June 20, 2017) (dismissing "[p]laintiff's claim that he was entitled to a loan modification pursuant to HAMP" because "agreements under the HAMP [Servicer Participation Agreement] do not provide an express or implied private right of action for borrowers as third party beneficiaries"); *Garcia v. JP Morgan Chase Bank NA*, No. CV-15-01493-PHX-DLR, 2017 WL 1311668 at *10 (D. Ariz. Apr. 5,

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[16] In the Motion and Objection to Plan Claims 919 and 920, the Claimant reverses his position and asserts, in part, as follows:

> First of all Claimant never applied for mortgage assistance with Ditech.
>
> Therefore since Claimant never applied there could be no type of appeal; there was no type of dispute either.
> Claimant never was approved or denied for a short sale of any type with Ditech and therefore no appeals were made either.

See Motion and Objection to Plan Claims 919 and 920 at 3. However, this position is directly contradicted by the documents Claimant annexed to the claims. *See e.g.,* First MacDonnell Claim at 12, 14, 16, 18, 22, 27, 37 (annexing multiple letters from Ditech to the Claimant denying his request for a loan modification). The Court is not constrained to accept as trust allegation directly contradicted by documents in the record. *In re Livent, Inc. Noteholders Sec. Litig.,* 151 F. Supp. 2d 371, 405–06 (S.D.N.Y. 2001) ("a court need not feel constrained to accept as truth conflicting pleadings that make no sense, or that would render a claim incoherent, or that are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely, or by facts of which the court may take judicial notice."); *Hirsch v. Arthur Andersen & Co.,* 72 F.3d 1085, 1095 (2d Cir.1995) (sustaining dismissal of the complaint where "attenuated allegations" supporting a claim "are contradicted both by more specific allegations in the complaint and by facts of which [the court] may take judicial notice").

2017) ("To the extent Garcia's and [Arizona Consumer Fraud Act] claim is premised on Defendants' failure to offer her a loan modification on her desired terms, her claim fails as matter of law because Defendants were under no obligation to modify her loan.") (collecting cases).

The Claimant does not allege that Ditech was contractually obligated to provide him with a loan modification; the documents annexed to his Claims, explicitly provide otherwise. *See* First MacDonnell Claim at 35 (stating that "[l]oss mitigation options that may be available to you include…" and that "[y]ou may not qualify for a loss mitigation option and not all accounts may be eligible for each of the listed loss mitigation options"). Ditech had no obligation to provide Claimant with loss mitigation options. *See In re Ravago*, BAP No. AZ-16-1005-LBJu, 2017 WL 2665032, at *9 (B.A.P. 9th Cir. June 20, 2017) (affirming dismissal of claim "because Debtor did not allege that Defendants had a contractual duty to offer or consider a loan modification or that she had a right to a loan modification pursuant to the deed of trust or other loan documents"). In any event, Claimant does not plead any facts to support his claim that he was entitled to a loan modification or that he was unjustly denied a modification. In resolving the Objection, the Court is not bound by the Claimant's conclusory contentions that RMS or Ditech unjustly or improperly denied him a loan modification. *See Achtman v. Kirby, McInerney Squire, LLP*, 464 F. 3d 328, 337 (2d Cir. 2006) ("Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to [defeat] a motion to dismiss."). The Claimant also asserts that as a result of Ditech denying his continued requests to modify his loan, "I am losing my home", a "foreclosure is pending," and "Ditech is fully responsible for this claim." March 2020 Letter at 1, 4. The Claimant provides no basis for his claim that a foreclosure is pending or that his home is subject to sale. To the contrary, it is undisputed that the Trustee under the Deed of Trust cancelled the judicial foreclosure sale. *See* Reply, Ex. B.

The Second MacDonnell Claim likewise fails to state a claim for relief against the Debtors. The claim is based on "payments made to Ditech." *See* Second MacDonnell Claim at 1. Claimant asserts that he is owed $6,929.76 which represents 6 monthly payments on his loan of $1,154.96 each. He says he made these payments to Ditech but received no credit for those payments. *See* Motion to Acknowledge at 1 (alleging that "Ditech failed to transmit funds while Ditech was to service my home loan from Bank of America."); March 2022 Letter at 5; Motion and Objection to Plan Claims 919 and 920 at 5 (stating the payments cannot be verified and finds were never sent to the new servicer). However, the Claimant pleads no facts in support of those allegations. As a matter of law, the Claimant fails to state a claim for relief in support of the Second MacDonnell Claim. *See e.g., Dow Jones Co. v. Intern. Securities Exchange,* 451 F.3d 295, 307 (2d Cir. 2006) ("[C]onclusory allegations unsupported by factual assertions" fail "even the liberal standard of Rule 12(b)(6)").

Conclusion

Based on the foregoing, the Court sustains the Objection and disallows and expunges the First and Second MacDonnell Claims.[17]

IT IS SO ORDERED.

Dated: New York, New York
May 4, 2022

/s/ James L. Garrity, Jr.
Honorable James L. Garrity, Jr.
U.S. Bankruptcy Judge

[17] In so ruling the Court does not consider the Plan Administrator and the Consumer Representative's alternative arguments in support of the Objection.