UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

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

MEMORANDUM DECISION AND ORDER GRANTING PLAN ADMINISTRATOR'S SIXTH OMNIBUS MOTION TO ENFORCE THE PLAN INJUNCTION AND CONFIRMATION ORDER [ECF NO. 2656] AS IT RELATES TO GAUTAM AND PANTHOBI SHARMA

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

WEIL, GOTSHAL & MANGES, LLP
Attorneys for Debtors
767 Fifth Avenue
New York, New York 10153
By: David Hill, Esq.
Sunny Singh, Esq.
Richard W. Slack, Esq.
Cliff Sonkin, Esq.

TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT, LLP
Attorneys for Gautam and Panthobi Sharma
900 Third Avenue
New York, New York 10022
By: Michael Riela, Esq.

[1] 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 1100 Virginia Drive, Suite 100, Fort Washington, Pennsylvania 19034.

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

Introduction[2]

Section 10.5 of the Debtors' confirmed Plan[3] contains an injunction provision (the "Plan Injunction") which bars the holders of claims that arose prior to the Plan's Effective Date from "commencing, conducting or continuing in any manner, directly or indirectly, any suit, action, or other proceeding of any kind" against or affecting the Debtors. Gautam and Panthobi Sharma (the "Sharmas") are party to a Note and Mortgage relating to certain residential real property. Eight days after the Effective Date, Ditech Financial LLC ("Ditech") commenced an action against the Sharmas in Illinois state court to foreclose the Mortgage (the "Foreclosure Action"). In that action, the Sharmas are asserting counterclaims against Ditech for money damages occasioned by and arising out of Ditech's alleged breach of contract and foreclosure on the Mortgage (the "Counterclaims"). The Plan Administrator contends, and the Sharmas deny, that the Plan Injunction bars them from pursuing any claim for money damages against Ditech in the Foreclosure Action. The matter before the Court is the Plan Administrator's Sixth Omnibus Motion to Enforce the Plan Injunction and Confirmation Order (the "Motion").[4] The Plan Administrator filed a Reply to the Objection.[5] As relevant, through the Motion, the Plan Administrator seeks to enforce the Plan Injunction and enjoin the prosecution of the

---

[2] Capitalized terms that are not defined in this section either are defined below, or have the meanings ascribed to them in the confirmed Plan.

[3] Third Amended Joint Chapter 11 Plan of Ditech Holding Corporation and its Affiliated Debtors (ECF No. 1326) ("Plan"); Order Confirming Third Amended Joint Chapter 11 Plan of Ditech Holding Corporation and its Affiliated Debtors (the "Confirmation Order") [ECF No. 1404].

[4] Plan Administrator's Sixth Omnibus Motion to Enforce the Plan Injunction and Confirmation Order [ECF No. 2656].

[5] Plan Administrator's Reply to the Objection of Gautam and Panthobi Sharma To the Sixth Omnibus Motion to Enforce the Plan Injunction and Confirmation Order [ECF No. 2804]. The Declaration of Richard Slack (the "Slack Declaration") is annexed as Ex. 1 to the Reply.

Counterclaims. The Sharmas object to the Motion.[6] For the reasons stated herein, the Court overrules the Objection and grants the Motion.

Jurisdiction

A party invoking this Court's post-confirmation jurisdiction must demonstrate both (i) that the matter has a "close nexus to the bankruptcy plan or proceeding, as when a matter affects the interpretation, implementation, consummation, execution, or administration of the confirmed plan or incorporated litigation trust agreement," *Penthouse Media Group v. Guccione (In re Gen. Media, Inc.)*, 335 B.R. 66, 73 (Bankr.S.D.N.Y.2005) (quoting *Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l, Inc.)*, 372 F.3d 154, 168-69 (3d Cir. 2004)); and (ii) that the plan provides for the retention of jurisdiction over the dispute. *Id.* (citing *Hosp. and Univ. Prop. Damage Claimants v. Johns Manville Corp. (In re Johns–Manville Corp.*), 7 F.3d 32, 34 (2d Cir.1993)). *See also Cohen v. CDR Creances S.A.S.* (*In re Euro-Am. Lodging Corp.*), 549 F. App'x 52, 54 (2d Cir. 2014) ("A party may invoke the authority of the bankruptcy court to exercise post-confirmation jurisdiction only if the matter has a close nexus to the bankruptcy plan . . . and the plan provides for the retention of such jurisdiction . . . ") (internal citations omitted) (summary order); *Ace Am. Ins. Co. v. State of Mich. Workers' Comp. Ins. Agency* (*In re DPH Holdings Corp.*), 448 F. App'x 134, 137 (2d Cir. 2011) (summary order), *cert. denied*, 567 U.S. 935 (2012). *See also Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009) (a bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders).

[6] Objection of Gautam and Panthobi Sharma to Plan Administrator's Sixth Omnibus Motion to Enforce the Plan Injunction and Confirmation Order [ECF No. 2778] (the "Objection").

The Motion has a "close nexus" to the Plan, because the Plan Administrator seeks to enforce the Plan Injunction – a provision of the Plan – and the Confirmation Order, a prior order of the Court. *See, e.g.*, *In re Avaya Inc.*, No. 17-10089 (SMB), 2018 WL 4381524, at *3 (Bankr. S.D.N.Y. Sept. 12, 2018) (finding that motion to enforce Bar Date Order injunction and Discharge Injunction under confirmed plan had "close nexus" to plan.) The Plan provides for the retention of jurisdiction over the dispute because under the Plan the Court retained jurisdiction "to issue injunctions, enter and implement other orders, and take such other actions as may be necessary or appropriate to restrain interference by any Entity with the consummation, implementation, or enforcement of the Plan, the Confirmation Order, or any other order of the Bankruptcy Court[,]" (Plan, Art. XI § 11.1(g)), "to hear, adjudicate, decide, or resolve any and all matters related to Article X of the Plan, including, without limitation, the releases, discharge, exculpations, and injunctions issued thereunder." *Id.*, Art. XI § 11.1(n). Accordingly, the Court has subject matter jurisdiction over the Motion.

Background

On February 11, 2019, Ditech Holding Corporation (f/k/a Walter Investment Management Corp.) and certain of its affiliates (the "Debtors") filed petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in this Court. They remained in possession of their business and assets as debtors and debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On September 26, 2019, the Debtors confirmed their Plan, and on September 30, 2019 (the "Effective Date"), the Plan became

effective.[7] Article X of the Plan addresses the "Effect Of Confirmation Of Plan." Section 10.5 of the Plan contains the Plan's Injunction provisions. As relevant, it states that

> [A]ll Entities who have held, hold, or may hold Claims against or Interests in the Debtors . . . are permanently enjoined, on and after the Effective Date, solely with respect to any Claims, Interests . . . from (i) commencing, conducting or continuing in any manner, directly or indirectly, any suit, action, or other proceeding of any kind (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtors . . . ."

Plan, Art. X § 10.5(b). It also provides that "[t]he injunctions in this Section 10.5 shall extend to any successors of the Debtors (including the Wind Down Estates) . . . and their respective property and interests in property." *Id.* Art. X § 10.5(d). The Wind Down Estates and their counsel reviewed pending litigations against the Debtors to identify litigations where, among other things, (i) the parties to such litigations were, in fact, asserting pre-petition monetary claims against the Debtors (as opposed to, for example, a defense to a foreclosure action), (ii) the litigation against the relevant Debtors was active, and (iii) the counterparty was aware of the Plan Injunction. Motion ¶ 2. The Wind Down Estates sent letters to approximately 565 litigants who have filed claims for monetary damages against the Debtors to inform them of the Court's confirmation of the Plan and the Plan Injunction and to request that they dismiss the monetary claims subject to the Plan Injunction. *Id.* ¶ 3.[8] Once informed of the Plan Injunction or after follow-up communications, more than 400 parties voluntarily dismissed their monetary claims against the Debtors. *Id.* The correspondence notwithstanding, some parties (the "Litigation Parties") either continued to actively pursue their monetary damages claims, affirmatively

[7] 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].

[8] *See* Motion Ex. 2 (sample of letter).

refused to dismiss them or have ignored repeated requests and refused to even respond to the letters and emails notifying them of the Plan Injunction. *Id.* ¶ 4.

Gautam and Panthobi Sharma

The Sharmas are among the Litigation Parties. On November 16, 2007, Gautam and Panthobi Sharma executed a promissory note (the "Note") and a mortgage (the "Mortgage") with Bank of America, N.A., relating to residential real property located at 554 Bovidae Circle, Naperville, Illinois. Objection ¶ 7. The Mortgage and the Note were subsequently modified pursuant to a loan modification agreement that the parties executed in June 2018. *Id.*

On April 23, 2019, the Debtors defaulted under the Mortgage when a check for their April Mortgage payment was not honored by the Sharmas' bank. The Mortgage provides that upon default, "Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding." *See* Mortgage ¶ 22.[9] On May 1, 2019, Ditech sent a notice to Mr. Sharma regarding the delinquency of his mortgage account.[10] In that notice, Ditech advised him, among other things, that the "[f]ailure to make a payment as described above may result in Ditech exercising its contractual rights[,]" and that "[t]his notice does not preclude Ditech from pursuing additional legal or equitable remedies available pursuant to applicable state or federal laws." May 1 Notice. Ditech also informed the Sharmas that in sending the notice, it was acting as "a debt collector . . . in an attempt to collect a debt." *Id.* On May 7, 2019, Ditech sent another notice to Mr. Sharma regarding the delinquency of his mortgage account.[11] Without limitation,

[9] A copy of the Mortgage is annexed as Ex. A to the Complaint for Foreclosure (the "Complaint") which is annexed as Ex. A to the Objection.

[10] A copy of the notice (the "May 1 Notice") is annexed as Ex. C to the Slack Declaration.

[11] A copy of the notice (the "May 7 Notice") is annexed as Ex. D to the Slack Declaration.

in the "Frequently Asked Questions" section of the notice, Ditech advised Mr. Sharma, among other things, that

> If you do not respond to your lender's notices to you regarding past due payments, your lender may refer your loan to foreclosure in accordance with your mortgage loan documents and applicable law.

May 7 Notice. On May 23, 2019, Ditech sent a notice to Mr. Sharma regarding the delinquency of his mortgage account.[12] In that notice, Ditech advised Mr. Sharma, among other things, that "YOUR ACCOUNT IS OR WAS MORE THAN 30 DAYS PAST DUE . . . ." *Id.*

Bar Date

On February 22, 2019, the Court entered an order establishing a General Bar Date for claims of April 1, 2019, at 5:00 p.m. (prevailing Eastern Time).[13] In part, the order states that the term "claim" is "as defined in Section 101(5) of the Bankruptcy Code." As relevant, the Court-approved "Notice of Deadlines Requiring Filing of Proofs of Claim" states that

> Under section 101(5) of the Bankruptcy Code and as used in this notice, the word "claim" means a right to (a) payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (b) a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

On May 2, 2019 (just after the Sharmas' payment default under the Mortgage), this Court entered an order further extending the Bar Date for consumer borrower claims to June 3, 2019, at 5:00 p.m. (prevailing Eastern Time).[14] Between May 3, 2019 and May 8, 2019, Epiq Corporate

---

[12] A copy of the notice (the "May 23 Notice") is annexed as Ex. E to the Slack Declaration.

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

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

Restructuring, LLC ("Epiq"), as the Debtors' noticing agent, sent notice of the extended Bar Date to the Sharmas, by email and mail. *See* Conklin Affidavit ¶ 2.[15] In addition, between May 2019 and October 2019, Epiq provided the Sharmas with actual notice of the Ditech bankruptcy proceedings by multiple mailings and emails. *See* Conklin Affidavit. Epiq's records do not indicate that any mailing or email to the Sharmas was returned or bounced back as undelivered. *Id.* ¶7. The Sharmas did not file a proof of claim herein.

The Foreclosure Action

On October 8, 2019, eight days after the Effective Date, Ditech commenced the Foreclosure Action against the Sharmas in the Circuit Court for the Eighteenth Judicial Circuit in DuPage County – Wheaton, Illinois. In its Complaint, Ditech asserts, among other things, that the Sharmas are in default under the Mortgage because they failed to pay the required monthly Mortgage installments due April 1, 2019 and thereafter. Complaint ¶ 3(J). On March 10, 2020, the Sharmas filed their Answer and Affirmative Defenses in the Foreclosure Action (the "Sharma Answer").[16] For their affirmative defenses, the Sharmas assert that prior to commencing the Foreclosure Action, Ditech failed to provide them with written notices (i) called for under sections 20 and 22 of the Mortgage (First and Second Affirmative Defenses); and (ii) as required under both 12 C.F.R. § 1024.39(b), a Consumer Financial Protection Bureau ("CFPB") regulation, and the Federal Real Estate Settlement Procedures Act ("RESPA") (Third Affirmative Defense). *See* Sharma Answer at 3-9. *See also* Objection ¶¶ 2, 10, 11. On March 10, 2020, the Sharmas also filed the following Counterclaims against Ditech:

[15] *See* Affidavit of Service of Tim Conklin, from Epiq, the Debtors' noticing agent, annexed as Ex. 2 to the Reply [ECF No. 2804].

[16] A copy of the Sharmas Answer and Affirmative Defenses is annexed to the Objection as Ex. B.

Count I:	Breach of Contract Based on Section 20 of the Mortgage
Count II:	Breach of Contract Based on Section 22 of the Mortgage
Count III:	Violation of the Consumer Financial Protection Bureau Regulations: Noncompliance with 12 C.F.R. § 1024.39
Count IV:	Violation of the Illinois Consumer Fraud Act: Breach of Contract Based [sic] Section 20 of the Mortgage
Count V:	Violation of the Illinois Consumer Fraud Act: Breach of Contract Based [sic] Section 22 of the Mortgage
Count VI:	Violation of the Illinois Consumer Fraud Act: Noncompliance with 12 C.F.R. § 1024.39

See Counterclaims.[17] *See also* Objection ¶¶ 3, 13. In the Counterclaims, the Sharmas seek two forms of monetary damages from Ditech: (i) actual damages occasioned by the Ditech's alleged breaches of the Mortgage and alleged violations of state law (e.g., Counterclaim ¶ 40),[18] and (ii) attorneys' fees and other costs under 735 ILCS 5/15-1510 of the Illinois Mortgage Foreclosure Law (e.g., Counterclaim ¶ 41.)[19] That provision authorizes a state court to award reasonable attorneys' fees and costs to a defendant in a foreclosure action who prevails in a motion, an affirmative defense or counterclaim, or in the foreclosure action.[20]

---

[17] A copy of the Counterclaims is annexed to the Objection as Ex. C.

[18] Counterclaim ¶ 40 states, as follows:

> As a direct and proximate result of said breach, the Plaintiff caused GAUTAM SHARMA and PANTHOBI SHARMA to incur damages in an amount equal to the payments Plaintiff claims Defendants failed to pay under the Mortgage and/or Note, any and all fees, interests, costs, alleged by Plaintiff is due to it, including, but not necessarily limited to attorney's fees, property inspection costs/fees, court reporter fees, expenses and costs of litigation, as stated and alleged by Plaintiff in its Complaint; as well as Defendants' own fees, costs, expenses and attorney's fees relative to these proceedings.

[19] Counterclaim ¶ 41 states, as follows:

> Pursuant to 735 ILCS 5/15-1510, the Plaintiff is liable to GUATAM SHARMA and PANTHOBI SHARMA for all fees, costs, and expenses incurred relative to these proceedings.

[20] Section 5/15-1510 states, as follows:

The Motion

In the Motion**,** the Plan Administrator is seeking the entry of an order pursuant to sections 105(d), 524 and 1141 of the Bankruptcy Code and Rules 1015(c), 3020(d) and 9007 of the Federal Rules of Bankruptcy Procedure and the Confirmation Order, for authority to enforce the Plan Injunction. The Plan Administrator seeks to (i) enforce the Plan Injunction by prohibiting the Litigation Parties from continuing prosecution of their monetary claims against the Debtors; (ii) permit the Plan Administrator on behalf of the Wind Down Estates to seek sanctions in the event that a Litigation Party continues its refusal to dismiss its monetary claims against the Debtors; and (iii) permit the Wind Down Estates, upon entry of the Proposed Order to file a notice (the "Enforcement Notice")[21] in each court before which a Litigation Party is asserting monetary claims against the Debtors, including a description of the order and the ability to seek sanctions. Motion at ¶ 5. Prior to the initial hearing on the Motion, eight Litigation Parties filed formal or informal objections to the Motion or requested that the hearing with respect to their matters be adjourned. Seven of those Litigation Parties either have dismissed their claims or are

> (a) The court may award reasonable attorney's fees and costs to the defendant who prevails in a motion, an affirmative defense or counterclaim, or in the foreclosure action. A defendant who exercises the defendant's right of reinstatement or redemption shall not be considered a prevailing party for purposes of this Section. Nothing in this subsection shall abrogate contractual terms in the mortgage or other written agreement between the mortgagor and the mortgagee or rights as otherwise provided in this Article which allow the mortgagee to recover attorney's fees and costs under subsection (b).
>
> (b) Attorneys' fees and other costs incurred in connection with the preparation, filing or prosecution of the foreclosure suit shall be recoverable in a foreclosure only to the extent specifically set forth in the mortgage or other written agreement between the mortgagor and the mortgagee or as otherwise provided in this Article.

735 ILCS 5/15-1510 (2009).

[21] A proposed form of Enforcement Notice is annexed as Ex. 5 to the Motion.

in negotiations with Debtors to dismiss their claims through consensual stipulations. The Sharmas' Objection is the only remaining objection to the Motion.

The Sharmas do not dispute that the Plan Injunction bars the prosecution of the Counterclaims for monetary relief if the claims arose prior to the Plan's Effective Date. They contend that the Motion must be denied with respect to them because (i) the Counterclaims for attorney's fees and costs arise under a state statute that applies to foreclosure actions (i.e., the Illinois Mortgage Foreclosure Law), and not under the terms of the Note and Mortgage, and (ii) Ditech's acts and omissions that gave rise to the Counterclaims for attorneys' fees and costs occurred after the Effective Date, when Ditech commenced the Foreclosure Action without first providing the notices that are required by RESPA, CFPB regulation and the Mortgage. Objection ¶ 5.

The Plan Administrator disputes those contentions. It asserts that Counts I, II, IV and V of the Counterclaims are breach of contract claims relating from the Mortgage, and that Counts III and VI explicitly arise out of the Foreclosure Action. Reply ¶ 13. Moreover, it maintains that claims arising out of prepetition contracts, whether purely contractual or statutory in nature, are prepetition claims, even if those claims are not asserted until after Plan confirmation. *Id.* ¶ 3. Thus, it argues that the Counterclaims seeking monetary relief are subject to the Plan Injunction. *Id.* ¶ 4.

The Court considers those matters below.

Discussion

Section 10.5(b) of the Plan enjoins a holder of a "claim" from "commencing, conducting or continuing in any manner, directly or indirectly" any separate actions outside of the Bankruptcy Court seeking monetary relief against the Debtors. Under section 1.29 of the Plan,

the term "claim" has "the meaning set forth in section 101(5) of the Bankruptcy Code, as against any Debtor." *See* Plan, Art. I § 1.29. Section 101(5) of the Bankruptcy Code defines "claim" to include any

> right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

11 U.S.C. § 101(5)(A). The term "claim" is "sufficiently broad to encompass any possible right to payment." *Mazzeo v. United States (In re Mazzeo),* 131 F.3d 295, 302 (2d Cir. 1997). A "right to payment ... usually refer[s] to a right to payment recognized under state law." *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.,* 549 U.S. 443, 451 (2007) (internal quotation marks and citation omitted). "A claim will be deemed to have arisen pre-petition if the relationship between the debtor and the creditor contained all of the elements necessary to give rise to a legal obligation—a right to payment—under the relevant non-bankruptcy law." *Olin Corp. v. Riverwood Int'l Corp. (In re Manville Forest Prods. Corp.),* 209 F.3d 125, 129 (2d Cir.2000) (internal quotation marks omitted). Under the Bankruptcy Code a "contingent" claim "refers to obligations that will become due upon the happening of a future event that was within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created." *Ogle v. Fid. & Deposit Co. of Md.,* 586 F.3d 143, 146 (2d Cir.2009) (internal quotation marks omitted) (quoting *In re Manville Forest Prods. Corp.,* 209 F.3d 125, 128–29 (2d Cir.2000)); *see also In re St. Vincent's Catholic Med. Ctrs.,* 440 B.R. 587, 602 (Bankr.S.D.N.Y.2010).

Courts apply the "fair contemplation" test to determine whether a claim exists for breach of contract. Contract claims arise upon the execution of an agreement. *Pearl-Phil GMT (Far E.) Ltd. v. Caldor Corp.,* 266 B.R. 575, 582 (S.D.N.Y. 2001) (the "Bankruptcy Court's conclusion is

supported by the clear weight of case law in this Circuit which recognizes that contract-based bankruptcy claims arise at the time the contract is executed. For example, courts consistently hold that a post-petition breach of a pre-petition contract gives rise only to a prepetition claim"); *In re Texaco Inc*., No. 10-CV-8151 CS, 2011 WL 4526538, at *4 (S.D.N.Y. Sept. 28, 2011), *aff'd sub nom. In re Texaco, Inc.*, 505 F. App'x 77 (2d Cir. 2012) ("Contract claims arise upon execution of an agreement.") As a matter of law, the breach of the Mortgage was within the actual or presumed contemplation of the parties when the Sharmas executed the Note and Mortgage. *See In re Russell*, 193 B.R. 568, 571 (Bankr.S.D.Cal.1996) ("It is within the fair contemplation of the parties entering into a contract that the other party may breach it, or have made representations to induce the making of the contract. Thus, a contingent claim arises at that point in time, although it may never mature.") Moreover, here, the Sharmas' breach of the Mortgage was fully within the parties contemplation as of the Bar Date because, at that time, the Sharmas were in payment default under the Mortgage – and both the Sharmas and Ditech were aware of the breach. The Sharmas were on notice that if they did not cure the default, Ditech could seek to foreclose the Mortgage. As noted, the Mortgage provides that "[i]f the default is not [timely] cured . . . Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding." Mortgage ¶ 22. Moreover, prior to the Bar Date, in its correspondence with the Sharmas in May of 2019, Ditech advised that it was a "debt collector" seeking "to collect a debt," and notified the Sharmas that it was contemplating "refer[ing] your loan to foreclosure in accordance with your mortgage loan documents and applicable law." During the argument on the Motion, the Sharmas conceded that as of the Bar Date, it was within the fair contemplation of the parties that Ditech could commence the Foreclosure Action, and

that in doing so, the Debtor could violate the notice requirements contained in sections 20 and 22 of the Mortgage, thereby giving rise to monetary compensatory damage claims for breach of contract and violations of state law. Thus, they concede that as of the Bar Date, they held a contingent, unmatured claim for damages occasioned by Ditech's alleged breach of the Mortgage. *Cf. Rescap Liquidating Trust v. PHH Mortg. Corp. (In re Residential Capital, LLC*), 558 B.R. 77, 85-86 (S.D.N.Y. 2016) ("*Rescap II*") (stating "[t]he appellees do not dispute that they contemplated that litigation related to the Contracts might arise when they executed the Contracts with the protective Clauses, hence the inclusion of the provisions that enable the appellees to claim attorney's fees in the event of contractual breach, or that provide for covenants not to sue or forum selection clauses"), *rev'g and remanding* 541 B.R. 202 (Bankr. S.D.N.Y. 2015)("*Rescap I*"). The Sharmas had actual notice of the Bar Date but did not file a claim.

The Sharmas did not make the same concession with respect to the Counterclaims seeking attorney's fees and other costs under the Illinois Mortgage Foreclosure Law. It is settled that prepetition contract-based claims for attorney's fees are deemed to arise upon execution of the contract. *See Ogle v. Fid. & Deposit Co. of Md.,* 586 F.3d 143, 147 (2d Cir.2009) (holding that post-petition attorney's fees permitted under a pre-petition contract were properly a contingent claim brought through a proof of claim and were "deemed to have arisen pre-petition"); *see also Rescap II*, 558 B.R. at 85 (counterclaims for attorney's fees and costs under the provisions of a prepetition contract were unsecured contingent claims that were within the contemplation of the parties when they executed the contract). The Sharmas contend that the required elements necessary to give rise to a "right to payment" of attorney's fees and costs under the Illinois Mortgage Foreclosure Law arose after the Effective Date, when Ditech commenced the Foreclosure Action. They say that is so because the Counterclaims for

attorney's fees and costs arise independently under state law, not out of the Note and Mortgage. Objection ¶¶ 20-22. The Court finds no merit in that argument. As pled, the Counterclaims arise out of the Note and Mortgage, as the Sharmas seek damages stemming from and arising out of Ditech's alleged breach of contract and foreclosure on the Mortgage. Counterclaims I, II, IV and V are breach of contract claims relating to the Mortgage. *See* Counterclaim I ¶¶ 21-26 (alleging breach of obligation to provide Notice of Grievance as required by § 20 of the Mortgage); Counterclaim II ¶¶ 48-52 (alleging breach of obligation to provide written notice of acceleration as required by § 22 of the Mortgage); Counterclaim IV ¶¶ 124-28 (alleging breach of obligation to provide Notice of Grievance as required by § 20 of the Mortgage); Counterclaim V ¶¶ 150-54 (alleging breach of obligation to provide Notice of Grievance as required by § 20 of the Mortgage). Counterclaims III and VI stem from the Foreclosure Action. As it was in the fair contemplation of the parties that Ditech could breach the notice provisions in sections 20 and 22 of the Mortgage, it follows that it was in the fair contemplation of the parties that the Sharmas could assert claims for compensatory damages under the Mortgage, as well as claims for attorney's fees and costs under the Illinois Mortgage Foreclosure Law. That is especially so, because 735 ILCS 5/15-1510(a) applies solely to mortgage foreclosure actions. *See* 735 ILCS 5/15-1103 (2019) ("The authority of the court [to award attorney's fees and costs] continues during the entire pendency of the foreclosure and until disposition of all matters arising out of the foreclosure.") It is irrelevant that the Sharmas are seeking attorney's fees and costs under state law, rather than under the terms of the Note and Mortgage. The Plan Injunction bars the Sharmas from recovering monetary damages equally under the contract and under state law. *See In re Rubin Family Irrevocable Stock Trust*, 516 B.R. 221, 227 (Bankr. E.D.N.Y. 2014) ("Although the facts of both *Ogle* and *Travelers* involved pre-petition contracts upon which the

claim to attorney's fees was based, the holdings of those cases also extend to claims for attorney fees' and costs which are based upon statute."); *In re CD Realty Partners*, 205 B.R. 651, 656–60 (Bankr. D. Mass. 1997) (finding that claims could have been fairly contemplated even though "[t]he claim at issue is a hybrid, both contractual and statutory. It is rooted in the Debtor's and its predecessor's contractual promises of pension benefits to their employees. But ERISA and the MPPAA regulate and specify how an employer shall meet its contractual obligations to provide pension benefits").[22]

Alternatively, the Sharmas contend that the Plan Injunction does not bar them from asserting the state law counterclaims for attorney's fees and costs because in electing to sue the Sharmas post Effective Date, Ditech has subjected itself to the strictures of the attorney's fees provisions under state law, irrespective of its bankruptcy discharge. As support, the Sharmas

---

[22] In this light, the Sharmas misplace their reliance on cases discussing when regulatory and tort claims arise under the Bankruptcy Code. *See* Objection ¶¶ 23-30.

Rule 137 of the Illinois Supreme Court Rules is the Illinois equivalent of Federal Rule of Civil Procedure 11. Neither the Sharma Answer and Affirmative Defenses, nor the Counterclaims refers to Rule 137. Still, the Sharmas mention it throughout the Objection. *See* Objection ¶¶ 3, 4, 6, 14, 18, 21, 28, 40. Among other things, they argue that if the Court grants the Motion, it will effectively invalidate the powers afforded to the state court by Rule 137, and give mortgagees like Ditech freer rein to commence improper foreclosure actions. Objection ¶ 18. The Court disagrees. Rule 137 "is designed to prohibit the abuse of the judicial process by claimants who make vexatious and harassing claims based upon unsupported allegations of fact or law." *Peterson v. Randhava,* 313 Ill.App.3d 1, 7 (2000) (citing *Senese v. Climatemp, Inc.*, 289 Ill.App.3d 570, 581 (1997)); *see also Resurgence Capital, LLC v. Kuznar*, 2017 IL App (1st) 161853, ¶ 16 (The rule is intended "to discourage attorneys and parties from filing frivolous or false matters and asserting claims without any basis in law or fact, by penalizing those who engage in such wrongful conduct.") (citing *Baker v. Daniel S. Berger, Ltd.*, 323 Ill. App. 3d 956, 963 (2001)). The rule is penal in nature and must be strictly construed. It is not a fee shifting vehicle for the benefit of prevailing parties. *Toland v. Davis*, 295 Ill.App.3d 652, 657 (1998). *See also Peterson v. Randhava,* 313 Ill.App.3d at 6-7 ("The rule is not intended to penalize litigants and their attorneys merely because they were zealous, yet unsuccessful.") A claim under Rule 137 must be brought in the action where the allegedly improper pleading is filed (Rule 137(b)) and arises when that pleading is filed. *Peterson v. Randhava,* 313 Ill.App.3d at 7 ("In deciding whether the imposition of sanctions is appropriate, the court must determine what was reasonable for the attorney or the signing party to believe at the time of filing, rather than engaging in hindsight.") The Plan Injunction does not bar the application of Rule 137 in this matter.

rely on *Siegel v. Federal Home Loan Mortg. Corp.*, 143 F.3d 525 (9th Cir. 1998) and *Boeing North American, Inc. v. Ybarra (In re Ybarra)*, 424 F.3d 1018 (9th Cir.2005). In those cases, the Ninth Circuit determined that there was an exception to the discharge of attorney's fees when the debtor elects to "return to the fray" in order to bring an action against a creditor after the debtor receives its discharge in bankruptcy. In part, the *Siegel* court stated that

> [The debtor] had been freed from the untoward effects of contracts he had entered into Freddie Mac could not pursue him further, nor could anyone else. He, however, chose to return to the fray and to use the contract as a weapon. It is perfectly just, and within the purposes of bankruptcy, to allow the same weapon to be used against him.

Siegel, 143 F.3d at 533 (citations omitted). "In other words, while his bankruptcy did protect him from the results of his past acts, including attorney's fees associated with those acts, it did not give him carte blanche to go out and commence new litigation about the contract without consequences." *Id.* at 534. In *In re Ybarra*, after filing a voluntary petition under chapter 11of the Bankruptcy Code,[23] the debtor ("Ybarra") successfully vacated an order in the state court dismissing an action she had filed against her employer (together with its successor, "Rockwell") prior to filing for bankruptcy protection. 424 F.3d at 1020-21. While the action was pending, the bankruptcy court granted Ybarra a discharge in bankruptcy. Ultimately Rockwell prevailed in the litigation and the state court awarded it attorney's fees and costs (the "Fee Award"). *Id.* at 1021. Rockwell sought leave in the bankruptcy court to enforce the Fee Award. The bankruptcy court granted the motion, but only to the extent of fees and costs that accrued after Ybarra filed for bankruptcy. In so ruling, the bankruptcy court relied on *Siegel*. *Id.* The Bankruptcy Appellate Panel of the Ninth Circuit reversed, holding that the entire Fee Award was encompassed in the discharge. *Id.* In reversing that judgment, the Ninth Circuit held that the

[23] The case was later converted to one under Chapter 7 of the Bankruptcy Code.

fees and costs incurred post-petition were not discharged. In doing so, the circuit reaffirmed "that claims for attorney fees and costs incurred post-petition are not discharged where post-petition, the debtor voluntarily commences litigation or otherwise voluntarily 'return[s] to the fray.'" *Id.* at 1026 (citing *Siegel*, 143 F.3d at 533-34). It found that

> [w]hether attorney fees and costs incurred through the continued prosecution of litigation initiated pre-petition may be discharged depends on whether the debtor has taken affirmative post-petition action to litigate a prepetition claim and has thereby risked the liability of these litigation expenses.

Id. It concluded "that by affirmatively reviving the state suit, Ybarra 'returned to the fray.' Thus, under *Siegel*, Rockwell's claim for attorney fees and costs *incurred* post-petition was not discharged in the bankruptcy." *Id.*

In support of their argument, the Sharmas also rely on this Court's decision in *Rescap I*. As described by the district court, in that case, after the bar date, and the effective date of the debtors' plan, the Rescap Liquidating Trust (the "Trust"), as debtors' successor, sued a number of pre-petition lenders alleging breaches of various contracts among the parties. *Rescap II*, 558 B.R. at 84. The lenders asserted that the Trust's lawsuits breached certain provisions in the contracts which purported to entitle each lender to seek damages in the form of attorney's fees and costs. *Id.* at 79. The lenders filed counterclaims (the "Lender Counterclaims") to recover those damages. *Id.* at 79-80. The Trust sought to enjoin the lenders from asserting the Lender Counterclaims. It argued that the counterclaims were subject to the bankruptcy discharge and the injunction provisions of the bar date order. In denying the motion, the bankruptcy court found that the Lender Counterclaims were not prepetition claims subject to the bar date order and bankruptcy discharge because they resulted from the voluntary post confirmation actions of the Debtor and the Trust. *Id.* at 84-85. In part, the court adopted the "Ybarra rule." On appeal, the district court reversed and remanded the case for proceedings consistent with its opinion.

Without limitation, the district court found that the Trust's reliance on the Ybarra Rule was "unpersuasive." *Id.* at 88**.** In doing so, the court found that the Ybarra rule "had never been relied upon in this Circuit prior to the Bankruptcy Court's Order in this case" and that the exception "is at odds with well-established Second Circuit precedent that looks to contract execution as the time of claim accrual, not to the act that caused the breach, let alone the character of, or intent associated with, that act." *Id.* (citations omitted). It also found that the fact that the rule "is not rooted in statutory interpretation, but policy considerations . . . further weighs against its adoption." *Id.* at 89. The court found that to be particularly so, given that the Second Circuit "has cautioned, '[e]xceptions to dischargeability are narrowly construed against the creditor's objections, and *confined to those plainly expressed in the Bankruptcy Code*.'" *Id.* (quoting *In re Furio,* 77 F.3d 622, 624 (2d Cir.1996)) (citations omitted). It concluded that "there is therefore no basis for reading an exception for 'voluntarily ... returning to the fray' into the Bankruptcy Code where there is otherwise no statutory support for the exception and the Court of Appeals has instructed that 'the term "claim" is sufficiently broad to encompass any possible right to payment.'" *Id.* (quoting *In re Mazzeo*, 131 F.3d 295, 302 (2d Cir. 1997)).

Nonetheless, the Sharmas urge the Court to adopt the rationale of *Siegel, Ybarra* and this Court's decision in *Rescap I* and find that in electing to sue the Sharmas post Effective Date, Ditech "returned to the fray" and, as such, is at risk for attorneys' fees and costs under Illinois Mortgage Foreclosure Law. They contend that the district court's criticism of *Ybarra* in *Rescap II* focused largely on Second Circuit precedent that looks to contract execution as of the time of accrual, while the Sharmas are not relying on the terms of their Mortgage for their Counterclaims. However, as previously discussed, the Court finds that distinction irrelevant, since the state law Counterclaims arise out of a breach of the Mortgage and were within the

contemplation of the parties. *See In re Rubin Family Irrevocable Stock Trust*, 516 B.R. 221 (Bankr. E.D.N.Y. 2014). The Sharmas contend that there is a sound basis for excepting those Counterclaims from the discharge and Plan Injunction for the following reasons.

> *First*, enforcing the discharge in this type of situation would force creditors like the Sharmas to file contingent proofs of claim, which this Court in *Residential Capital* observed could clog the claims docket with (mostly) needless protective proofs of claim.
>
> *Second*, enforcing the discharge would give the estate leeway to file improper foreclosure actions after the Effective Date, which is against the public policy of Illinois law.

Objection ¶ 40. They say that by application of the Illinois Mortgage Foreclosure Law, plaintiffs like Ditech, that file improper foreclosure actions may be burdened with the defendants' attorney's fees and costs. They say that if the discharge were to apply here, the estate would have freer rein to file improper foreclosure actions in Illinois. They maintain that this would have the unintended consequence of rewarding Ditech's misconduct of (a) failing to abide by conditions precedent in contracts it drafted, which should be construed against it, (b) failing to abide by its obligation to provide notices under the CFPB regulation, and (c) prosecuting foreclosure actions without a good faith basis. They contend that this is of particular concern where the target of the foreclosure actions are consumers like the Sharmas, and not large, sophisticated businesses. *Id*.

The Court finds no merit to those contentions and declines the Sharmas request to apply the rationale of *Ybarra* and *Siegel* in this case. Turning first to the second point, the Sharmas overstate that risk that the discharge of the claims under Illinois Mortgage Foreclosure Law will reward litigation misconduct on Ditech's part. That is because, as Ditech concedes, the statutory right to attorney's fees and costs can be used as defenses to Ditech's claims. Reply ¶ 16 ("Pursuant to Sections 4.6 and 5.6 of the Plan, the Plan Administrator does not dispute that the

Sharmas retain the right to assert defenses in the Foreclosure Action . . .") *See Rescap II*, 558 B.R. at 89 ("Moreover, the appellees overstate the risk that discharge of their contingent claims for attorney's fees would allow the Trust to engage in riskless litigation. The Trust concedes that the appellees' contractual rights to attorney's fees can be used as defenses or setoffs against the Trust's claims.") As to the first point, it is not unfair for creditors like the Sharmas – who, prior to the Bar Date, are in default under their prepetition contracts and are on notice that the counterparty may commence litigation on account of the breach, to file a claim. *Id.* ("In this case, the Trust's litigation on the Contracts was entirely foreseeable, certainly within the appellees' contemplation at the time of Contract execution with the protective Clauses (a point the appellees do not dispute) and in fact presaged during the bankruptcy proceedings by the disclosure statement and the Plan Supplement.") The Plan Injunction bars them from recovering monetary damages from the Debtors arising out of its alleged breach of the Mortgage. *See, e.g.*, *Conway Hosp. Inc. v. Lehman Bros. Holdings Inc.*, 531 B.R. 339, 343 (S.D.N.Y. 2015).

Conclusion

Based on the foregoing, the Court overrules the Objection and grants the Motion.

IT IS SO ORDERED.

Dated: New York, New York
November 30, 2020

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