



**TABLE OF CONTENTS**

	<b><u>Page</u></b>
PRELIMINARY STATEMENT .....	1
BACKGROUND .....	3
A.    Agreements Presenting Rights of Setoff and Recoupment.....	4
B.    Debtors’ Impending Abandonment of Vulnerable Reverse Mortgage Borrowers.....	8
ARGUMENT .....	10
I.    BANA’s Rights of Recoupment and Setoff Under Its Various Agreements with Debtors Should Be Preserved, Notwithstanding Any Provision in the Plan. ....	10
II.   The Reorganized Debtors and Wind Down Estates Must Provide Adequate Assurance of Future Performance of BANA’s Reverse Mortgage Agreement To Be Assumed; and in the Alternative, BANA’s Reverse Mortgage Agreement Should Not Be Rejected on the Effective Date.....	14
CONCLUSION.....	15

**TABLE OF AUTHORITIES**

	<b><u>Page</u></b>
<b>FEDERAL CASES</b>	
<i>In re Bare</i> , 284 B.R. 870 (Bankr. N.D. Ill. 2002) .....	11
<i>In re Bennett Funding Grp., Inc.</i> , 146 F.3d 136 (2d Cir. 1998).....	12
<i>Bohack Corp. v. Borden, Inc.</i> , 599 F.2d 1160 (2d Cir. 1979).....	11, 12
<i>In re BOUSA Inc.</i> , 2006 WL 2864964 (Bankr. S.D.N.Y. Sept. 29, 2006).....	11
<i>In re Caribbean Petroleum Corp.</i> , 444 B.R. 263 (Bankr. D. Del. 2010).....	14
<i>Citizens Bank of Md. v. Strumpf</i> , 516 U.S. 16 (1995).....	12
<i>Daewoo Int’l (Am.) Corp. Creditor Tr. v. SSTS Am. Corp.</i> , 2003 WL 21355214 (S.D.N.Y. June 11, 2003) .....	1, 11, 13
<i>In re Ionosphere Clubs, Inc.</i> , 85 F.3d 992 (2d Cir. 1996).....	15
<i>In re McMahon</i> , 129 F.3d 93 (2d Cir. 1997).....	12
<i>In re Mirant Corp.</i> , 378 F.3d 511 (5th Cir. 2004) .....	14
<i>N.L.R.B. v. Bildisco &amp; Bildisco</i> , 465 U.S. 513 (1984).....	14
<i>In re Norando Aluminum, Inc.</i> , 549 B.R. 725 (Bankr. E.D. Mo. 2016).....	14
<i>In re Old Carco LLC</i> , 406 B.R. 180 (Bankr. S.D.N.Y. 2009).....	14
<i>In re Sweet N Sour 7th Ave. Corp.</i> , 431 B.R. 63 (Bankr. S.D.N.Y. 2010).....	12

**TABLE OF AUTHORITIES**  
**(Continued)**

	<b><u>Page</u></b>
<i>In re Waterscape Resort LLC</i> , 544 B.R. 507 (Bankr. S.D.N.Y. 2016).....	12
<i>In re Whimsy, Inc.</i> , 221 B.R. 69 (S.D.N.Y. 1998).....	12
<i>In re Wireless Data, Inc.</i> , 547 F.3d 484 (2d Cir. 2008).....	15
<b>FEDERAL STATUTES</b>	
11 U.S.C. § 365.....	14, 15
11 U.S.C. § 553.....	1, 12
11 U.S.C. § 1107.....	3
11 U.S.C. § 1108.....	3
11 U.S.C. § 1129.....	12
12 U.S.C. § 1715z-20.....	15
<b>FEDERAL REGULATIONS</b>	
24 C.F.R. § 206.1 .....	15
82 Fed. Reg. 7094, 7094 (Fed. Housing Admin. Jan. 19, 2017) (to be codified at 7 C.F.R. pts. 30 and 206) .....	14

Bank of America, N.A. (“BANA”), by and through its undersigned counsel, files this objection (the “Objection”) to the *Amended Joint Chapter 11 Plan of Ditech Holding Corporation and Its Affiliated Debtors* (the “Plan”) filed by Ditech Holding Corporation (“Ditech”) and its affiliated debtors and debtors-in-possession (collectively, with Ditech, the “Debtors”), including the proposed sales of the forward and reverse mortgage businesses and assurance of performance of certain contracts to be assumed by the Reorganized Debtors and the Wind Down Estates.<sup>1</sup>

### **PRELIMINARY STATEMENT**

1. BANA files this limited objection to the Plan to seek clarity on two important points.
2. *First*, BANA seeks to confirm—consistent with the bedrock law—that the Plan will not affect any rights BANA has to setoff or recoupment. The Plan expressly purports to bar “any right of setoff” against a wide range of obligations and also purports to transfer certain property “free and clear” of any claims. But the Bankruptcy Code expressly preserves the rights to setoff, *see* 11 U.S.C. § 553, and Debtors make no showing that could possibly satisfy the extremely high standard for a plan to extinguish BANA’s setoff rights. And while it is unclear if Debtors mean to disturb any rights of recoupment, they would have no basis to do so. The defense of recoupment is not a claim and is not generally even subject to discharge or a free and clear order for a sale of assets. *See Daewoo Int’l (Am.) Corp. Creditor Tr. v. SSTs Am. Corp.*, 2003 WL 21355214, at \*5 (S.D.N.Y. June 11, 2003).
3. *Second*, the Plan as currently formulated threatens to abandon the thousands of elderly borrowers whose reverse mortgages are currently being serviced by Reverse Mortgage

---

<sup>1</sup> Capitalized terms used but not defined herein shall have the meaning ascribed to those terms in the Plan.

Solutions, Inc. (“RMS”) pursuant to a subservicing agreement with BANA (the “Reverse Mortgage Agreement”), who no longer has the ability to service this portfolio. For years, RMS has been the servicer and single point of contact on these borrowers’ reverse mortgages—doing such things as fielding their questions about their reverse mortgages, funding borrower draw requests for what are often critical living expenses, and communicating with their heirs when a borrower passes away. Recognizing the crucial role RMS plays in meeting the needs of this protected class of borrowers, the parties bargained for a range of terms designed to prevent RMS from abandoning its role without BANA’s consent, and instead providing extensive lead time in transitioning to any new subservicing relationship. However, it is clear that Debtors now intend to sell the reverse mortgage servicing business, along with the servicing platform and a majority of the current employees, *without* transferring these borrowers or the associated subservicing agreement to the buyer. That outcome is untenable. Even if the Reorganized Debtors assume the existing Reverse Mortgage Agreement, it is unclear how they could successfully perform under the Reverse Mortgage Agreement when the reverse mortgage servicing business will have been sold to Mortgage Assets Management, LLC and SHAP 2018-1, LLC (together, the “Stalking Horse Bidder”). Debtors should not be allowed to walk away from this protected class of borrowers without making an acceptable arrangement for a replacement subservicer or providing BANA with sufficient time to make alternative arrangements. For the same reason, the Debtors should not alternatively be permitted to simply reject the Reverse Mortgage Agreement. In short, the Plan improperly abandons this protected class of reverse mortgage

borrowers, precluding the Debtors from satisfying either the standard for rejection or the standard of providing adequate assurances of future performance for assumption.

4. Although Debtors have not made their own arrangements to ensure the continued servicing of the borrowers' reverse mortgages, the Stalking Horse Bidder has advised BANA that it will be making its own proposal for a new contract with as yet unknown terms for the continued servicing of these borrowers. However, BANA has yet to receive a proposed contract from the Stalking Horse Bidder, and in the event that a new contract is ultimately not negotiated, these elderly borrowers may be placed in a position where their loans are not serviced appropriately or their draw requests are not timely funded. BANA would prefer that the Stalking Horse Bidder and the Debtors take the steps necessary to resolve this Objection consensually. If they do not, BANA seeks this Court's intervention to preserve BANA's rights of setoff and recoupment and to prevent Debtors from abruptly abandoning the Reverse Mortgage Agreement without making arrangements for the affected borrowers (whether the agreement is rejected or assumed).<sup>2</sup>

### **BACKGROUND**

5. The Debtors filed petitions for relief under chapter 11 of title 11, United States Code, 11 U.S.C. §§ 1101-1174 (as amended, the "Bankruptcy Code") on February 11, 2019 (the "Petition Date"). The Debtors are operating their business and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

6. On May 10, 2019, the Debtors filed their Amended Joint Chapter 11 Plan of Ditech Holding Corporation and Its Affiliated Debtors which, among other things, would enjoin BANA from asserting any right of setoff (*see* Section 10.5(b)(iv)) and seeks to transfer contracts

---

<sup>2</sup> BANA will continue to discuss appropriate arrangements with the Debtors in hopes of resolving its objections.

and causes of action “free and clear” of claims and liens—which include BANA’s claims and rights—to the Reorganized Debtors as part of the Wind Down Estates, to the buyers of the forward and reverse mortgage servicing business, and to the GUC Recovery Trust (*see* Sections 5.6 and 5.19).

**A. Agreements Presenting Rights of Setoff and Recoupment**

7. BANA is a party to a series of contractual relationships with Debtors under which the parties have ongoing obligations to each other, and pursuant to which BANA has rights of setoff and recoupment, including without limitation each of the agreements described below.

8. ***BANA’s Mortgage Servicing Rights Purchase and Sale Agreement with Debtors.*** On January 6, 2013, BANA entered into a Mortgage Servicing Rights Purchase and Sale Agreement (“MSR Sale Agreement”) with Green Tree Servicing LLC (“Green Tree”), which was later acquired by Ditech Financial LLC (“Ditech Financial”). Pursuant to that agreement, BANA sold the mortgage servicing rights of certain residential mortgage loan portfolios to Ditech Financial.

9. BANA and Ditech Financial have contractual obligations to each other under the MSR Sale Agreement. In Article IV, BANA made representations and warranties to Ditech Financial about itself. In Article V, BANA made representations and warranties to Ditech Financial about the purchased assets, which included mortgage servicing rights and related servicing advances for certain residential mortgage loan portfolios. In Article VI, Ditech Financial made representations and warranties to BANA about itself. In Sections 11.01 and

11.02, BANA and Ditech Financial agreed to mutually indemnify each other for breaches of their respective representations and warranties.

10. Since 2013, BANA and Ditech Financial have been negotiating to resolve certain claims they have against each other, including claims related to servicing advances that Ditech purchased from BANA. BANA and Ditech have reached a resolution on some, but not all, claims.

11. ***BANA's Forward Mortgage Subservicing Agreement with Debtors.*** On May 23, 2012, BANA entered into a Flow Subservicing Agreement (the "Forward Mortgage Agreement") with Green Tree, which was later acquired by Ditech Financial. Beginning in 2012, Green Tree serviced certain residential mortgage loan portfolios on behalf of BANA pursuant to the terms of the Forward Mortgage Agreement.

12. On July 5, 2017, BANA sent to Ditech Financial an Election to Terminate the Forward Mortgage Agreement, pursuant to Section 11.02 of the agreement. The Forward Mortgage Agreement was terminated as of October 1, 2017. The residential mortgage loan portfolios that Ditech Financial was servicing were either transferred to new subservicers, with BANA retaining the master servicing, or BANA sold the master servicing rights for certain portfolios.

13. Pursuant to the Forward Mortgage Agreement, BANA and Ditech Financial have ongoing obligations to each other after termination of the agreement. For example, BANA has an ongoing right to indemnity from Ditech Financial for losses arising out of Ditech Financial's failure to perform its duties. Section 8.01 states that Ditech Financial "shall indemnify [BANA] and hold it harmless against any and all claims, losses, Damages, penalties, fines, forfeitures, reasonable and necessary legal fees and related costs, judgments, and any other costs, fees and

expenses that [BANA] may sustain in any way related to, or arising out of, the failure of [Ditech Financial] to perform its duties and service the Mortgage Loans in strict compliance with the terms of this Agreement or a breach of the representations and warranties made by [Ditech Financial] under this Agreement.”

14. After the residential mortgage loan portfolios were transferred to other servicers, Ditech Financial had a limited right to seek reimbursement of Servicing Advances that were incurred prior to the transfer. Section 11.04(c) states that BANA “shall cause [Ditech Financial] to be reimbursed for any accrued and unpaid Servicing Fees and Incentives Fees earned prior to the Subsequent Transfer Date and for any trailing expenses representing Servicing Advances incurred by [Ditech Financial] and for which invoices are received by [BANA] within sixty (60) days the related Subsequent Transfer Date.”

15. BANA and Ditech have ongoing claims against each other arising under, but not necessarily limited to, Sections 8.01 and 11.04(c) of the Forward Mortgage Agreement. Since January 2018, BANA and the Debtors have been negotiating to resolve these claims.

16. ***BANA’s Reverse Mortgage Subservicing Agreement with Debtors.*** On November 27, 2012, BANA entered into the Reverse Mortgage Agreement, titled a Flow Servicing Agreement, with RMS. Pursuant to that agreement, RMS serviced certain first-lien fixed and adjustable rate Home Equity Conversion Mortgage (“HECM”) loans, which are reverse mortgage loans that allow borrowers over the age of 62 to tap into their home equity to help fund some of their financial needs. The current average age of BANA’s reverse mortgage borrowers is 81.

17. Under the Reverse Mortgage Agreement, BANA and RMS have many contractual obligations to each other. These obligations can give rise to potential claims against each other.

For example, RMS has an obligation to indemnify BANA for any losses caused by RMS's failure to perform its duties. Section 8.01(a)(i) states that "[RMS] shall indemnify, defend, and hold harmless [BANA] and its Representatives, successors and permitted assigns from and against any and all Damages, which arise out of, are alleged to arise out of, or relate to the following: (a) the failure of [RMS] to perform its duties and service the Mortgage Loans in compliance with the terms of this Agreement (including but not limited to, any failure of [RMS] to assign any Mortgage Loan to HUD pursuant to Section 5.03(c) or submit claims to HUD under FHA HECM Insurance in accordance with the HUD Handbook pursuant to Section 5.18 of this Agreement); (b) any breach in a representation, covenant or obligation of [RMS] contained in this Agreement; and (c) [RMS]'s reckless disregard for its duties under this Agreement and its bad faith, gross negligence, willful misconduct." In this regard, and as the Debtors are aware, BANA notes that there are loans BANA is reviewing for servicing errors by RMS that give rise to indemnity claims under the Reverse Mortgage Agreement. That review is ongoing and to date, no indemnity has been requested of RMS, and therefore no default has occurred and no cure is owed to date with respect to these indemnity claims. The review of loans will proceed in the ordinary course and be payable after assumption (or be part of a damages claim if the agreement is rejected).<sup>3</sup>

18. As a servicer, RMS is entitled to compensation for its services, as set forth in Section 5.23 of the Reverse Mortgage Agreement. Specifically, Section 5.23 states that RMS is entitled to "(i) the fees set forth in Exhibit F, (ii) all Ancillary Income paid with respect to each

---

<sup>3</sup> BANA objects to the notice of cure for the Reverse Mortgage Agreement to the extent it purports to bar indemnity claims following assumption of the Reverse Mortgage Agreement.

Mortgage Loan, and (iii) any other compensation to which [RMS] may be entitled under this Agreement or under any related Acknowledgment Agreement.”

19. BANA and RMS have claims against each other that arise under the Reverse Mortgage Agreement.

**B. Debtors’ Impending Abandonment of Vulnerable Reverse Mortgage Borrowers**

20. In connection with approval of the Plan, Debtors are seeking approval to sell RMS’s reverse mortgage business. ECF No. 724. The Debtors have accepted a stalking horse bid (the “Stalking Horse Bid”) submitted by the Stalking Horse Bidder; and Ditech Holding Corporation, Walter Reverse Acquisition LLC, and RMS (“Sellers”) and the Stalking Horse Bidder have executed a *Stock and Asset Purchase Agreement* (the “Stalking Horse Agreement”) for the purchase of certain of the Debtors’ assets, including RMS. On July 11, 2019, the Debtors filed a *Notice of Assumption and Assignment of Executory Contracts and Unexpired Leases of Debtors (Reverse Buyer)*. ECF No. 839. That notice attaches as Schedule 1 a schedule of the Transferred Contracts. The Reverse Mortgage Agreement is not listed on Schedule 1, which means that once RMS is purchased by the Stalking Horse Bidder, RMS will no longer perform obligations under that agreement.

21. Under the Reverse Mortgage Agreement, RMS currently services thousands of reverse mortgage loans that allow borrowers, the average age of whom is 81, to tap into their home equity to help fund some of their financial needs. For many of these elderly borrowers, their reverse mortgage is their primary source of income. They rely on this income to fund their

basic living expenses. Any interruption in the servicing of these reverse mortgage loans could have severe consequences for these borrowers.

22. Under the Reverse Mortgage Agreement, RMS has many contractual obligations as the servicer of BANA's reverse mortgage loans, including, but not limited to, calculating, distributing, and recording reverse mortgage draw requests, paying taxes and insurance when necessary, negotiating workouts and modifications of mortgages, and supervising the liquidation of mortgages when necessary. To fulfill these obligations, RMS has developed a servicing platform that is compatible with the types of reverse mortgage loan products that BANA owns and transferred to RMS for servicing. BANA and RMS have also developed substantial business processes so that BANA can maintain general supervision of RMS's servicing conduct—including the implementation of independent quality control and assurance testing at both BANA and RMS to ensure these protected-class borrowers are serviced according to all regulatory requirements. These platforms and processes took a significant amount of time to develop. If RMS ceased servicing BANA's reverse mortgage loan portfolio, BANA would not be able to immediately transition these responsibilities to a new servicer. BANA would need significant time to develop new platforms and processes with any transition servicer. Moreover, apart from RMS, there is only one other reverse mortgage subservicing entity operating in this market segment, so any transition would depend on that entity's capacity and willingness to enter into a reasonable agreement with BANA.

23. Recognizing the lead time necessary to effectuate the orderly transfer of subservicing responsibilities, the Reverse Mortgage Agreement requires RMS to provide 270 days' written notice before resigning as subservicer, and also to make arrangements for a

qualified successor servicer, subject to BANA's consent, to assume its responsibilities.

Reverse Mortgage Agreement § 11.03.

24. To BANA's knowledge, the Debtors have made no attempt to arrange such an orderly transfer of the servicing function. In recent weeks, BANA first learned that the Reverse Mortgage Agreement would not be acquired by the Stalking Horse Bidder. After contacting RMS and the Stalking Horse Bidder, BANA was told that the Stalking Horse Bidder would send a proposal for a new servicing agreement. Although BANA was informed that such a proposal would be received on or about July 15, 2019, BANA has not yet received such a proposal. As things currently stand, it appears from the *Notice of Assumption or Rejection of Executory Contracts and Unexpired Leases of Debtors (Wind Down Estates)* that the Reverse Mortgage Agreement is to be assumed by the Reorganized Debtors and become part of those estates. ECF No. 837 at 6. It is not clear how the Debtors—as distinct from the Stalking Horse Bidder—could hope to perform that agreement, once the Debtors divest themselves of the RMS reverse mortgage servicing business, platform, and people.

### ARGUMENT

#### **I. BANA's Rights of Recoupment and Setoff Under Its Various Agreements with Debtors Should Be Preserved, Notwithstanding Any Provision in the Plan.**

25. BANA objects to the Plan to the extent it fails to preserve BANA's setoff and recoupment rights.<sup>4</sup> According to the Section 10.5(b)(iv) of the Plan, once the Plan is confirmed, BANA will not be able to assert “any right of setoff, directly or indirectly, against any obligation due from the Debtors, the Reorganized Debtors, or the GUC Recovery Trust or against any

---

<sup>4</sup> In its separate capacity as a Term Lender with Term Loan Claims in Class 3 under the Plan, BANA submitted a ballot in favor of the Plan. BANA did not thereby waive the right to make the limited Objection set forth herein, which does not relate to the Term Loan Claims held by BANA.

property or interests in property of any of the Debtors, the Reorganized Debtors, or the GUC Recovery Trust, except as contemplated or Allowed by the Plan.”

26. BANA further objects to the Plan to the extent it seeks to transfer contracts and Causes of Action “free and clear” of BANA’s setoff and recoupment rights. *See* Section 5.6(a) (stating that on the Effective Date, the Debtors shall be authorized to consummate the Sale Transaction and the Debtors’ assets shall “be transferred to and vest in the applicable Successful Bidder free and clear of all Liens, Claims, charges, or other encumbrances”); Section 5.19(a) (stating that “the GUC Recover Trust Assets shall automatically vest in the GUC Recovery Trust free and clear of all Claim and Liens”); Section 10.1 (stating that “all remaining property of the Debtors’ Estates shall vest in the Reorganized Debtors or the Wind Down Estates free and clear of all Claims, Liens, encumbrances, charges, and other interests, . . .”).

27. By enjoining setoff and transferring assets “free and clear” of all encumbrances, BANA’s setoff and recoupment rights could be eliminated.<sup>5</sup> Confirmation of a plan should not extinguish setoff claims when a creditor timely asserts its setoff claims and objects to the plan. *See Daewoo*, 2003 WL 21355214, at \*5; *In re BOUSA Inc.*, 2006 WL 2864964, at \*6 (Bankr. S.D.N.Y. Sept. 29, 2006).<sup>6</sup> The Second Circuit “has repeatedly favored the allowance of setoffs.” *Bohack Corp. v. Borden, Inc.*, 599 F.2d 1160, 1165 (2d Cir. 1979). This reflects

---

<sup>5</sup> Notably, the Debtors have specifically preserved their own setoff and recoupment rights while seeking to eliminate BANA’s rights. *See* Section 6.16 (“The Debtors, the Reorganized Debtors, or Wind Down Estates, as applicable, or such entity’s designee (including, without limitation, the Disbursing Agent), may, but shall not be required to, set off or recoup against any Claim, and any distribution to be made on account of such Claim, any and all claims, rights, and Causes of Action of any nature whatsoever that the Debtors, the Reorganized Debtors, or the Wind Down Estates may have against the holder of such Claim pursuant to the Bankruptcy Code or applicable non-bankruptcy law ....”).

<sup>6</sup> The majority position is even more lenient. Most courts hold setoff rights survive even if they are not raised prior to a plan’s confirmation. *In re Bare*, 284 B.R. 870, 874 (Bankr. N.D. Ill. 2002); 4 Norton Bankr. L. & Prac. 3d § 73:14.

setoffs’ “favored position in [the] history of jurisprudence” and the Bankruptcy Act’s “policy ... to allow setoffs and counterclaims.” *Id.* at 1164-65. Consequently, setoffs should be allowed “unless compelling circumstances” require otherwise. *Id.* at 1165; accord *In re Bennett Funding Grp., Inc.*, 146 F.3d 136, 139 (2d Cir. 1998). Generally, compelling circumstances exist only if the setoff poses “a serious and immediate threat to the debtor” or if the creditor “has engaged in criminal conduct or fraud.” *In re Whimsy, Inc.*, 221 B.R. 69, 74 (S.D.N.Y. 1998) (citation omitted).

28. Additionally, section 553 of the Bankruptcy Code preserves the right of setoff in bankruptcy. See *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 18 (1995). There are no compelling circumstances that would justify the withholding of BANA’s setoff rights, so the Plan should provide for and preserve BANA’s setoff rights. Failure to do so would violate section 1129(a)(1). See 11 U.S.C. §1129(a)(1) (“The court shall confirm a plan only if ... [t]he plan complies with the applicable provisions of this title.”).

29. It is not clear that the Plan would eliminate BANA’s recoupment rights, but to the extent it seeks to do so, the Court should not permit it. Recoupment is an equitable doctrine that “is essentially a right to reduce the amount of a claim.” *In re Sweet N Sour 7th Ave. Corp.*, 431 B.R. 63, 70-71 (Bankr. S.D.N.Y. 2010). Specifically, “cross demands arising out of the same transaction are allowed to compensate one another and the balance only to be recovered.” *In re Waterscape Resort LLC*, 544 B.R. 507, 527 (Bankr. S.D.N.Y. 2016) (citation omitted). Recoupments are not subject to the Bankruptcy Code’s automatic stay. *In re McMahon*, 129 F.3d 93, 96 (2d Cir. 1997). Recoupment “is not a ‘claim’ within the meaning of the Bankruptcy

Code and this right is, as a general matter, unaffected by the debtor's discharge." *Daewoo*, 2003 WL 21355214, at \*5.

30. BANA submits that notwithstanding any proposed free and clear sale, discharge, or release granted under the Plan, the Plan cannot discharge any of BANA's setoff or recoupment claims and cannot effectuate any sale free and clear of such setoff rights or recoupment rights. In addition, BANA should be able to assert its setoff and recoupment rights against any of the entities that will receive claims or Causes of Action of the Debtors under the Plan to be pursued post-Effective Date, such as the buyers or the GUC Recovery Trust.

31. For these reasons, BANA respectfully requests that the following language be included in the Confirmation Order:

"Notwithstanding anything to the contrary contained in this Order, the Plan, the Plan Supplemental Documents, the Sale Transaction agreements or orders, all rights of setoff or recoupment of Bank of America, N.A. against the Debtors (including the rights of setoff provided in section 5.2(b) of the Plan, are preserved and retained and Bank of America, N.A. shall be entitled to assert any and all setoff and recoupment rights against the Debtors, the Reorganized Debtors, the Wind Down Estates, the GUC Recovery Trust, or the purchasers in the Sale Transactions under the Plan, and each of their successors and assigns."

**II. The Reorganized Debtors and Wind Down Estates Must Provide Adequate Assurance of Future Performance of BANA’s Reverse Mortgage Agreement To Be Assumed; and in the Alternative, BANA’s Reverse Mortgage Agreement Should Not Be Rejected on the Effective Date**

32. BANA objects to the Plan to the extent it either assumes the Reverse Mortgage Agreement without providing adequate assurance of future performance after selling the reverse mortgage servicing business, or rejects the Reverse Mortgage Agreement.

33. Section 365 of the Bankruptcy Code authorizes a debtor to reject contracts, subject to court approval. 11 U.S.C. § 365. A heightened standard applies to contract rejection when “the authority to reject ... conflict[s] with the policies designed to protect the national public interest underlying other federal regulatory schemes.” *In re Old Carco LLC*, 406 B.R. 180, 189 (Bankr. S.D.N.Y. 2009); *see In re Caribbean Petroleum Corp.*, 444 B.R. 263, 269 (Bankr. D. Del. 2010); *In re Norando Aluminum, Inc.*, 549 B.R. 725, 729 (Bankr. E.D. Mo. 2016). A debtor can reject a contract “only if the debtor can show that it ‘burdens the estate, [ ] that, after careful scrutiny, the equities balance in favor of rejecting’ that ... contract, and that rejection of the contract would further the Chapter 11 goal of permitting the successful rehabilitation of debtors.” *In re Mirant Corp.*, 378 F.3d 511, 525 (5th Cir. 2004) (quoting *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 526-27 (1984)). In considering these issues, “courts should carefully scrutinize the impact of rejection upon the public interest.” *Id.* at 525.

34. There can be no doubt that rejection conflicts with a federal regulatory scheme designed to protect the public interest. The Federal Housing Authority supports the issuance of reverse mortgages through its Home Equity Conversion Mortgage (HECM) program. *See, e.g.*, Strengthening the Home Equity Conversion Mortgage Program, 82 Fed. Reg. 7094, 7094 (Fed. Housing Admin. Jan. 19, 2017) (to be codified at 7 C.F.R. pts. 30 and 206). Congress’s intent in authorizing the program was to help “elderly homeowners” cope with the “economic hardship ...

through the insurance of ... [reverse] mortgages [that] permit the conversion of a portion of accumulated home equity into liquid assets.” 12 U.S.C. § 1715z-20(a)(1); *see* 24 C.F.R. § 206.1 (noting purpose of HECM program set forth in 12 U.S.C. § 1715z-20). Any reorganization plan that jeopardizes the servicing of the reverse mortgages is thus in direct conflict with Congress’s goal, because it would expose elderly homeowners to the very economic hardship that the HECM program was created to address.

35. To the extent the Plan is meant to have Debtors assume the Reverse Mortgage Agreement, it remains unclear how this would work after they have sold the entire reverse mortgage servicing platform to the Stalking Horse Bidder. The Bankruptcy Code prohibits a debtor from assuming a contract unless, *inter alia*, the debtor “provides adequate assurance of its future performance of its obligations under the contract.” *In re Ionosphere Clubs, Inc.*, 85 F.3d 992, 999 (2d Cir. 1996) (citing 11 U.S.C. § 365(b)); *accord In re Wireless Data, Inc.*, 547 F.3d 484, 489 (2d Cir. 2008). This reflects “Congress’s intent ... to insure that the contracting parties receive the full benefit of their bargain if they are forced to continue performance.” *Ionosphere*, 85 F.3d at 999 (internal quotation marks and citation omitted). That concern fully applies here. If Debtors assume the contract, BANA will continue to perform pursuant to its terms. But given Debtors’ avowed intent to sell the servicing platform on which Debtors’ performance depends, BANA lacks adequate assurance that Debtors will fulfill their contractual obligations.

### **CONCLUSION**

36. For the foregoing reasons, BANA respectfully requests that the Court (a) incorporate BANA’s proposed language in the Confirmation Order to preserve BANA’s setoff and recoupment rights; (b) protect the interests of reverse mortgage borrowers by either (i) requiring the Stalking Horse Bidder to take an assignment of the Reverse Mortgage Agreement or (ii) otherwise ensuring that the obligations of the Reverse Mortgage Agreement will be

adequately performed; and (c) grant such other relief as the Court deems just and proper under the circumstances.

DATED: July 18, 2019

MUNGER, TOLLES & OLSON LLP

By: /s/ Seth Goldman

Richard C. St. John

Seth Goldman

Jenny H. Hong

MUNGER, TOLLES & OLSON LLP

350 South Grand Avenue, Fiftieth Floor

Los Angeles, California 90071-3426

Telephone: (213) 683-9100

Facsimile: (213) 687-3702

Email: richard.st.john@mto.com

seth.goldman@mto.com

jenny.hong@mto.com

*Attorneys for Bank of America, N.A.*