The following constitutes the ruling of the court and has the force and effect therein described.

Signed August 30, 2018

Harlin DeWayne Hale
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	**Chapter 11**
	§	
Think Finance, LLC, *et al.*,	§	**Case No. 17-33964 (HDH)**
	§	
Debtors.	§	**(Jointly Administered)**

ORDER GRANTING MOTIONS FOR APPLICATION OF BANKRUPTCY RULE 7023 TO PROOFS OF CLAIM

These bankruptcy cases were largely caused by lawsuits that were being filed against the Debtors in multiple jurisdictions across the country. The plaintiffs in those lawsuits claim the Debtors ran an illegal payday lending scheme and charged an unlawful amount of interest to over one million consumer borrowers. Among other things, the plaintiffs have alleged the Debtors violated the Racketeer Influenced and Corrupt Organizations Act, state usury laws, and a slew of consumer protection laws. Given the nature of these claims and the large number of generally unsophisticated borrowers, the plaintiffs have sought leave from this Court to apply the rules regarding class actions to their proofs of claim. For the reasons stated in this ruling, the Court will exercise its discretion to do so.

I. Procedural and Factual Background

The above-captioned debtors (the "Debtors") filed voluntary petitions for bankruptcy relief under Chapter 11 of the Bankruptcy Code on October 23, 2017 initiating the above-captioned cases (the "Bankruptcy Cases"). Recognizing the challenges of providing adequate notice to over one million consumer borrowers who would—at least under the plaintiffs' legal theories—hold claims against the Debtors, the Debtors quickly sought approval from the Court of both the bar date for filing proofs of claim and the procedures for providing notice to all individuals who may wish to assert claims. The Official Committee of Unsecured Creditors supported the Debtors' efforts.

On November 21, 2017, the Court entered the *Order (I) Establishing Bar Dates for Filing Proofs of Claim, (II) Approving Proof of Claim Forms, (III) Approving the Form and Manner of Notice Thereof, and (IV) Providing Certain Supplemental Relief* [Docket No. 137] (the "Bar Date Order") in which the Court set March 1, 2018 as the deadline for consumer borrowers to file proofs of claim (the "Bar Date"). In the Bar Date Order, the Court found that it appeared the procedures set forth by the Debtors were fair and reasonable and would provide good, sufficient, and proper notice to all potential creditors of their rights and obligations in connection with claims they may have against the Debtors or their property in these Bankruptcy Cases. After entry of the Bar Date Order, the Debtors, with the assistance of American Legal Claim Services, LLC (the "Noticing Agent"), implemented the notice procedures authorized in the Bar Date Order (the "Notice Procedures").

The Notice Procedures were fairly extensive. The Noticing Agent obtained physical addresses for the consumer borrowers from the Debtors and then updated them by utilizing a skip tracing service, running the mailing address data files against the U.S. Postal Service Change of Address service, and running the data against the U.S. Postal Service's Coding Accuracy Support

System. While the entire Bar Date Order was not sent to all potential claimants, postcards with some of the key information from the Bar Date Order were mailed to approximately 1.13 million consumer borrowers. In addition, e-mail notifications were sent to more than one million consumer borrowers, and notice of the deadline to file proofs of claim was published in the Wall Street Journal and USA Today. With the assistance of the Noticing Agent, the Debtors ensured that a call center and website were available for consumer borrowers who needed additional information. The Debtors also directed the Noticing Agent to make a second attempt at delivery for the 68,007 Bar Date postcards that were returned undeliverable and the roughly 300,000 electronic notices for which the vendor utilized by the Noticing Agent did not indicate that the notices were delivered. This process involved attempting to find a new physical address using a skip tracing service and simply resending the electronic notice to the e-mail addresses for which the Noticing Agent had not received an indication of permanent undeliverability. This second attempt resulted in an additional 4,066 successfully delivered postcards and what the Noticing Agent characterized as 8,460 successful deliveries of electronic notification.

Despite these efforts, there were some notable weaknesses in the Notice Procedures as implemented. For one, most consumer borrowers are unlikely to recognize the name "Think Finance, LLC" because they would not have had any direct interactions with the Debtors. Nevertheless, the notice prominently displayed the Debtor's name, but the name of the entity with which the consumer borrowers directly interacted (*i.e.*, the name of the entity they would most likely be able to recognize) was not on the front of the postcard they received and, for most borrowers, was not included in the fine print either. The back of the postcard also stated: "The Debtors deny any liability and the fact that you are receiving this notice does not mean that you have a claim." This message was reiterated if the consumer borrowers contacted the call center or

visited the website. In addition, as is common in bankruptcy proceedings where the potential claimants would have a wide variety of claims, the notice did not give any information about what kind of claim the individuals may have.

A review of the evidence shows that many consumer borrowers did not understand why they were receiving the notice, and the responses received from the individuals who did receive the notice and took the time to read it, showed a great deal of confusion. There were approximately 26,274 calls to the consumer borrower information call center prior to the Bar Date, but those individuals only received a recorded message with the opportunity to leave a voicemail. Most inquiries, whether they came through the call center or through some other channel, were only answered with a form response. Credible testimony from an expert witness showed that the notice provided to the consumer borrowers did not afford them enough information in a comprehensible way to enable them to make an informed decision about whether to file a proof of claim.

Ultimately, after the implementation of Notice Procedures designed to reach approximately 1.13 million individuals, consumer borrowers filed less than 5,000 proofs of claim by the Bar Date and in these proofs of claim, identified a wide variety of bases for the claims.

In the first few months of the Bankruptcy Cases, counsel for several groups of consumer borrower plaintiffs (the "Movants") either filed complaints initiating adversary proceedings or transferred litigation pending in another forum to this Court. The Movants also filed proofs of claim on behalf of their clients. The Debtors have generally sought to dismiss the adversary proceedings, contending that the claims asserted by the Movants should be determined through the claims administration process. Between January 31, 2018 and March 8, 2018 (generally while the Notice Procedures were being implemented and before the Bar Date passed), the Movants filed motions asking the Court to apply Federal Rule of Bankruptcy Procedure 7023 to their consumer

borrowers' class proofs of claim and to certify various classes of consumer borrowers (the "7023 Motions").[1] The Debtors filed an omnibus objection to the 7023 Motions.[2]

Allowing a class action proof of claim starts as a procedural issue. Pursuant to Bankruptcy Rule 7023, Rule 23 of the Federal Rules of Civil Procedure, governing class action procedures, applies in "adversary proceedings." However, there is a distinction between Rule 23's operation in an "adversary proceeding" and its operation in the claims process. *Teta v. Chow (In re TWL Corp.)*, 712 F.3d 886, 892-93 (5th Cir. 2013). A claim objection is not an "adversary proceeding," but instead, a "contested matter." Bankruptcy Rule 9014 governs "contested matters" and provides that only certain procedural rules automatically apply when an objection is raised to a proof of claim. Bankruptcy Rule 7023 is not designated as automatically applicable in contested matters. *Id.* Courts therefore look to Bankruptcy Rule 9014(c)'s permissive language that says a court *may* direct other rules in Part VII of the Bankruptcy Rules, which includes Bankruptcy Rule 7023, to apply.

Understanding this discretion, the Fifth Circuit has stated that Rule 23's operation in contested matters involves a two-step process. *TWL*, 712 F.3d at 892. First, the court must exercise its discretion under Bankruptcy Rule 9014 to determine whether to apply Bankruptcy Rule 7023 to the contested matter. *Id.* If the court does exercise its discretion to apply Bankruptcy Rule

[1] The 7023 Motions include the *Motion of Consumer Borrower Plaintiffs for Entry of an Order (1) Applying Bankruptcy Rule 7023 to the Class Claim, and (II) Certifying the Class for Purposes of the Class Claim* [Docket No. 285], the *Motion to Authorize Bankruptcy Rule 7023 to Virginia Plaintiffs' Proof of Claims and to Certify Class of Virginia Consumers* [Docket No. 291], the *Motion to Authorize Bankruptcy Rule 7023 to Florida Plaintiff's Proof of Claims and to Certify Class of Florida Consumers* [Docket No. 336], the *Amended Motion to Authorize Bankruptcy Rule 7023 to California Plaintiffs' Proof of Claims and to Certify Class of California Consumers* [Docket No. 340], and the *Motion of Consumer Borrower Plaintiffs for Entry of an Order (I) Applying Bankruptcy Rule 7023 to the Great Plains Borrower Class Claim, and (II) Certifying the Great Plains Borrower Class for Purposes of the Great Plains Borrower Class Claim* [Docket No. 348].

[2] *Omnibus Objection of the Debtors and Debtors-in-Possession Applicable to the Threshold Issues on the 7023 Motions* [Docket No. 693].

7023, it then must determine whether Rule 23's requirements for class certification have been satisfied. *Id.* at 892-93.

Given the two-step process, this Court recognized a threshold legal issue—whether to apply Bankruptcy Rule 7023 to the putative class claims. For this reason, on April 24, 2018, the Court determined that the hearing on the 7023 Motions should be bifurcated and the threshold legal issue of whether the Court should exercise its discretion to apply Bankruptcy Rule 7023 should proceed first. The Court held an evidentiary hearing on this threshold issue in the 7023 Motions on August 7 and 8, 2018.[3] The parties returned to give closing arguments on August 20, 2018, after which the Court took the matter under advisement.

II. Jurisdiction and Venue

This Court has jurisdiction over the 7023 Motions and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), and (O), and venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

III. Applicable Legal Standard

The threshold legal determination of whether to apply Bankruptcy Rule 7023 to contested matters is made using a discretionary standard, and the exercise of discretion relies largely on facts and case-specific analysis. *TWL*, 712 F.3d at 892-93; *In re Chaparral Energy, Inc.*, 571 B.R. 642, 646 (Bankr. D. Del. 2017). No one factor is dispositive. *Chaparral Energy*, 571 B.R. at 646.

In *TWL*, the Fifth Circuit observed that in considering whether to apply Bankruptcy Rule 7023, courts will consider a variety of factors relating to the bankruptcy case. These include:

[3] The hearing would have taken place sooner, but it was delayed because the parties sought to mediate their disputes with Judge David Jones of the Southern District of Texas. That mediation did not result in settlement, but the parties have indicated to this Court several times since then that they are still discussing settlement.

(1) whether the class was certified prepetition, (2) whether the members of the putative class received notice of the bar date, and (3) whether class certification will adversely affect the administration of the case. *TWL*, 712 F.3d at 893; *see also In re Musicland Holding Corp.*, 362 B.R. 644, 654 (Bankr. S.D.N.Y. 2007) (listing the same considerations). Courts in this District have held that where, as here, a Rule 23 determination has not yet been made in another court, the appropriate bases for the exercise of discretion under Bankruptcy Rule 9014 may also properly include (i) prejudice to the debtor or its other creditors, (ii) prejudice to putative class members, (iii) efficient estate administration, (iv) the putative class representatives' conduct in the bankruptcy case, and (v) the status of proceedings in other courts. *In re Craft*, 321 B.R. 189, 198-99 (Bankr. N.D. Tex. 2005).[4]

IV. Analysis

In determining whether to apply Bankruptcy Rule 7023 to proofs of claim, not all of the factors considered by other courts are relevant in every case. In this case, the Court believes the relevant considerations are what notice the putative class members received, the potential prejudice to the putative class members, the potential prejudice to the Debtors and their other creditors, the efficient administration of the Debtors' estates, and the putative class representatives' conduct in these Bankruptcy Cases.

At the outset, the Court would like to note that very little consideration was given to the fact that no classes were certified prepetition. The Debtors argue that the lack of class certification weighs against granting the 7023 Motions because it deflates the argument that putative class

[4] Other courts have also considered: (1) the timing of the certification motion; (2) whether a plan has been negotiated; (3) the benefits and costs of class litigation to the estate; (4) whether the bankruptcy court's control over the debtor and its property renders class certification unnecessary; (5) whether proceeding as a class is superior to the ordinary bankruptcy proceeding; (6) whether the class proof of claim will serve as a deterrent for wrongdoing; and (7) and the overall theme of preventing undue delay in the administration of the case. *See* 10 Collier on Bankruptcy ¶ 7023.01; *see also In re American Reserve Corp.*, 840 F.2d 487, 491-92 (7th Cir. 1988); *In re Computer Learning Ctrs., Inc.*, 344 B.R. 79, 86-92 (Bankr. E.D. Va. 2006); *Musicland*, 362 B.R. at 654-55; *Chaparral Energy*, 571 B.R. at 649-50. While not separately discussed in this order, the Court addresses these additional considerations, to the extent they are relevant to these Bankruptcy Cases, in the context of the other considerations identified in *Craft* and *TWL*.

members did not file a proof of claim by the Bar Date because of their reliance on the class representatives filing a claim on their behalf. While the Court agrees that this removes an argument that could have weighed in favor of granting the 7023 Motions, it does not particularly weigh in favor of denial. The Movants had little or no opportunity to seek classification prepetition. In cases such as this one where there was not time to certify a class before the petition date, the Court agrees that "the issue of prepetition certification loses its relevance." *In re MF Global, Inc.*, 512 B.R. 757, 763 (Bankr. S.D.N.Y. 2014). To hold otherwise would allow defendants in class action lawsuits to gain too much leverage by filing for bankruptcy after a complaint has been filed but before class certification can occur.

A. What Notice the Putative Class Members Received

As noted in *TWL*, the traditional consideration regarding notice is whether the putative class members received actual notice of the bar date, but the Court believes the inquiry should be slightly broader in this case. The Notice Procedures implemented by the Debtors and the Noticing Agent were extensive, but as the Movants have pointed out, the Notice Procedures had some significant weaknesses and ultimately did not produce good results.[5] The Debtors characterize the Movants' attack on the Notice Procedures as a collateral attack on the Bar Date Order, but this is not about compliance with the Bar Date Order or satisfaction of due process. This is not about holding the Debtors to the "best notice practicable under the circumstances" standard for class action noticing under Federal Rule of Civil Procedure 23 either. *See, e.g., Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 173 (1974). Rather, this is about whether the class procedures provide a superior method of administering these claims such that the Court should exercise its discretion to apply Bankruptcy Rule 7023 to the class proofs of claim.

[5] The weaknesses in the Notice Procedures appear to have been caused primarily by cost considerations.

Through the Notice Procedures, the Debtors attempted to give notice to potential claimants of the Bankruptcy Cases and the Bar Date. While the Debtors may have largely accomplished this, that information appears to have had very little meaning to the recipients of the notice. As noted above, most consumer borrowers probably would not have recognized any of the entities identified on the postcard notice. They may have been dissuaded from believing they had a claim based on some of the language in the postcard, or they may have not understood some of the legal terms used in the notice. Expert testimony supports a finding that the postcard notice did a poor job of communicating vital information to the consumer borrowers, and in a practical sense, receipt of the notice is not terribly helpful if the recipient has no idea why they received it. Inquiries received from the consumer borrowers that did receive notice and took the time to read it showed a great deal of confusion, and the evidence presented regarding the responses to those inquiries leads the Court to believe that most of the confusion was not addressed effectively.

The Notice Procedures resulted in a very low claim submission rate,[6] but looking at the claim submission rate probably still overstates the success of the Notice Procedures. The proofs of claim that were submitted assert a variety of different legal bases, most of which are probably not quite correct because they were completed by non-attorney consumer borrowers. Based on the evidence presented regarding the implementation of the Notice Procedures and the exemplar proofs of claim presented to the Court, the number of consumer borrowers who received notice of the Bar Date, understood the notice, filed a claim, and properly identified the basis for their claim appears to be vanishingly small.

[6] Expert testimony indicated that the claims submission rate for this case was under 1% while a more typical claims submission rate would have been 5-20%.

In the Bar Date Order, the Court found that it appeared the Notice Procedures would provide sufficient notice to creditors. The results indicate that while the Notice Procedures may have been constitutionally sufficient, they were not successful in facilitating creditor participation in these Bankruptcy Cases. A fundamental goal of bankruptcy is to promote creditor participation. Having seen the results obtained by the Notice Procedures, the Court is confident that application of the class procedures presents a superior option for administration of these claims, and therefore the notice provided to putative class members weighs heavily in favor of granting the 7023 Motions.

B. Prejudice to the Putative Class Members

There is a significant risk of prejudice to the putative class members if the Court does not grant the 7023 Motions. It is true that the bankruptcy process provides established mechanisms for notice, procedures for managing large numbers of claimants, proceedings in a single court, and protection against a race to judgment. It is also generally easier and cheaper to complete and submit a proof of claim than it is to file a lawsuit. These features of the bankruptcy process overcome many of the challenges that face parties with small claims in other circumstances, but they are less ameliorative in situations such as this one where it is not obvious to the potential claimants that they would have a claim against the entity in bankruptcy, or what legal theory would support their claim.

As noted above, the reality is that based on the results of the Notice Procedures, even if the Movants are correct about their legal theories and the consumer borrowers have valid causes of action, over 99% of the putative class members will not receive a distribution on their claims. The evidence does not support that this was a deliberate and informed choice by the putative class members who did not file proofs of claim. In addition, even the consumer borrowers who filed

proofs of claim are not guaranteed recoveries because they may not have properly articulated the basis for their claims or may not be equipped or incentivized to defend their proofs of claim. Filing a claim may have been relatively easy for consumer borrowers who were familiar with their causes of action, but defending against an objection could be significantly more difficult and costly.

In this case, allowing application of Bankruptcy Rule 7023 to the class proofs of claim will allow consumer borrowers who did not receive or understand the notice sent by the Noticing Agent to participate in a class, if one is certified, and it will provide properly incentivized counsel to defend the class proofs of claim. For these reasons, the potential for prejudice to the putative class members weighs in favor of granting the 7023 Motions.

C. Efficient Estate Administration

While concerns regarding the efficiency of administration of the Debtors' estates are relevant in these Bankruptcy Cases, they do not weigh heavily for or against the 7023 Motions. Consideration of the impact of granting the 7023 Motions on the efficiency of administering the Debtors' estates is complicated by the fact that—despite the filing of the 7023 Motions before the Bar Date—the Bar Date has now passed and, along with it, the opportunity to avoid the cost of (1) implementing the Noticing Procedures and (2) addressing the thousands of proofs of claim filed by individual consumer borrowers. The Debtors correctly point out that there are now issues with reconciling the different bases for relief asserted by individual consumer borrowers with those asserted by the class representatives. There is also the potential for confusion because of the possibility of conflict between two sets of class counsel seeking certification of potentially overlapping classes.

Nevertheless, there is still the opportunity to realize some efficiencies from granting the 7023 Motions because of the current posture of the Bankruptcy Cases. The Debtors have not yet

filed a plan of reorganization. Instead, the Debtors' focus is on the claims resolution process, and the class proofs of claim will provide an opportunity to streamline that process somewhat. This has already been evident by the Debtors' choice to first litigate a bellwether claim objection. Because of the potential for the certification of classes, counsel for the Movants are vigorously defending those claims, and the rulings will provide useful guidance for addressing the large quantity of remaining claims. While granting the 7023 Motions will certainly present additional issues that need to be addressed by this Court, such as class certification, those additional expenses are counterbalanced by the more streamlined claims resolution process provided by the class claims. If conflicts arise between class counsel or there is the potential for confusion because of multiple rounds of notice going to consumer borrowers, the Court stands ready to assist the parties in crafting procedural and substantive solutions to make the process as efficient as possible.

D. Prejudice to the Debtors or Their Creditors

While concerns regarding potential prejudice to the Debtors or their other creditors are relevant in these Bankruptcy Cases, they do not weigh heavily for or against the 7023 Motions. On this factor, the Debtors make a few claims. They claim that allowing class proofs of claim would essentially allow the putative class members to circumvent the Bar Date because they did not file timely proofs of claim. In this case, however, if a class is certified, there will be timely proofs of claim filed on their behalf by a class representative. The Debtors also claim that allowing the consumer borrower class claims to proceed could potentially dilute distributions to other unsecured claimants who also filed timely proofs of claim. The Court does not believe this is a valid justification for denying the 7023 Motions. With regard to the consumer borrowers, if the class claims are not allowed to proceed, those who filed proofs of claim without counsel will be significantly more vulnerable to claim objections, as they would be forced to defend their

individual claims by themselves. With regard to creditors other than the consumer borrowers, it is true that granting the 7023 Motions may dilute their distributions, but they are hardly entitled to the windfall that would result from denying class representation to over 99% of the consumer borrowers. In addition, it is notable that neither the Official Committee of Unsecured Creditors nor any individual creditors opposed the relief sought in the 7023 Motions.

E. The Putative Class Representatives' Conduct in the Bankruptcy Cases

The conduct of the putative class representatives in these Bankruptcy Cases weighs in favor of granting the 7023 Motions. The class representatives have been active participants in these Bankruptcy Cases and have taken appropriate actions to diligently pursue their rights in a timely manner. They did not wait long into the bankruptcy proceedings to file their proofs of claim and seek the application of Bankruptcy Rule 7023.

V. Conclusion

These Bankruptcy Cases involve a large number of consumer borrowers who likely do not realize that they may have a cause of action against the Debtors and likely do not even know who the Debtors are. To the extent the consumer borrowers have valid claims, those claims are relatively small and almost certainly do not individually justify the expense of obtaining legal assistance. While these circumstances are not unique to these Bankruptcy Cases, in this instance, there is the prospect of class claim procedures providing a superior method of fairly and efficiently adjudicating these claims. Applying Bankruptcy Rule 7023 to the class claims will remedy the defects in the Notice Procedures and avoid potential prejudice to the putative class members. While a number of claims have already been filed by consumer borrowers, applying Bankruptcy Rule 7023 to the class claims will still provide an efficient method for administering the Debtors' estates and should not prejudice the Debtors or other creditors in the Bankruptcy Cases. Under

these circumstances, the Court believes it is appropriate to apply Bankruptcy Rule 7023 to the class proofs of claim.

One final observation must be made. In their briefing and at the hearing on the 7023 Motions, the Movants and the Official Committee of Unsecured Creditors seemed to suggest that the Debtors and their counsel intentionally schemed to deprive the consumer borrowers of notice of the Bankruptcy Cases and to suppress the filing of claims. The record is to the contrary. The notice procedures originally proposed by the Debtors comported with constitutional due process and the Bankruptcy Code, but the Debtors and their counsel worked to improve those procedures—and did improve those procedures—in response to comments from parties in the Bankruptcy Cases. That is what the Debtors and their counsel were supposed to do and in fact did. In this ruling, the undersigned simply finds that the notice provided was not as successful as the Court would have hoped and that under the circumstances, the application of Bankruptcy Rule 7023 provides a better avenue for providing creditors with a process for recovering on their alleged claims.

IT IS THEREFORE ORDERED that the 7023 Motions are **GRANTED** in part, as stated herein; and it is further

ORDERED that Bankruptcy Rule 7023 applies to the class proofs of claim filed by the Movants.

###End of Order###