UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re, Auto Money North LLC, Debtor(s).	C/A No. 22-03309-HB Adv. No. 22-80046-HB Chapter 11
Auto Money North LLC, Plaintiff(s), v. Parties Listed on Appendix A to Complaint, and John and Jane Does 1-1000, Defendant(s).	**ORDER**

THIS MATTER came before the Court for consideration of the motion (the "Motion") filed by Auto Money North, LLC (the "Debtor[1]") seeking entry of an order declaring that 11 U.S.C. § 362(a) prohibits the commencement or continuation of certain litigation (the "North Carolina Litigation") by the parties listed on Appendix A to the Complaint in this Action (the "Named Defendants") and John and Jane Does 1-1000, against an affiliate of Debtor, AutoMoney, Inc. ("AMI"), while Debtor's Chapter 11 case remains pending, and/or entering a preliminary injunction under §105(a) of the Bankruptcy Code to enjoin the commencement or continuation of any such actions by both against AMI.

Appearing at the hearing were Thomas Waldrep, Jr., Jennifer Lyday, and Stanley H. McGuffin for the Debtor; James R. Faucher, Jeffrey K. Peraldo, and Joshua J. Hudson on behalf of substantially all the Named Defendants; Morris Dawes Cooke, Jr., and Charles P. Summerall, IV, on behalf of AIM.; Christine Brimm, Subchapter V Trustee; and Linda Barr, for the United States Trustee.

[1] Although referred to as "Debtor" throughout, several the factual events herein occurred prior to the filing of the above captioned bankruptcy.

Based on the evidence and testimony presented at the hearing, the record in this case, and the arguments submitted the Court finds as follows.

FINDINGS OF FACT

AMI makes or made loans commonly known as "title loans." A "title loan" is a short-term loan product that is secured by the title to the borrower's motor vehicle. John Derbyshire and Linda Derbyshire own all stock of AMI. Although located in South Carolina, AMI made loans to North Carolina residents.

To perfect the lender's interest in the title for a vehicle registered in North Carolina a lien must be recorded on the title through the North Carolina Department of Motor Vehicles. The Named Defendants are North Carolina residents and the John and Jane Does are presumed to be North Carolina residents. North Carolina law allows a maximum APR of 30.0%. N.C.G.S. §53-176(a). AMI allegedly charged residents of North Carolina rates of interest on their car title loans that exceed this limit.

Debtor was organized in May of 2019 as a South Carolina limited liability company. John Derbyshire and Linda Derbyshire each hold 50% membership interests. Other companies affiliated with Debtor and AMI include Auto Money Title Pawn, LLC, Jolin Enterprises, Inc., and MoneyLine Properties, LLC.

Beginning in August 2019, some of the Named Defendants filed lawsuits in North Carolina against AMI for violations of the North Carolina Consumer Finance Act. N.C. Gen. Stat. § 53-190, applies to "loans made elsewhere" and provides:

> No loan contract made outside this State in the amount or of the value of fifteen thousand dollars ($15,000) or less, for which greater consideration or charges than are authorized by G.S. 53-173 and G.S. 53-176 of this Article have been charged, contracted for, or received, shall be enforced in this State. Provided, the foregoing shall not apply to loan contracts in which all contractual activities, including solicitation, discussion, negotiation, offer, acceptance, signing of documents, and delivery and receipt of funds, occur entirely outside North Carolina.

> If any lender or agent of a lender who makes loan contracts outside this State in the amount or of the value of fifteen thousand dollars ($15,000) or less, comes into this State to solicit or otherwise conduct activities in regard to such loan contracts, then such lender shall be subject to the requirements of this Article.

The remedy for a violation of the Act is set forth in N.C.G.S. § 53-166(d), which states loans that violate the Act "shall be void and the licensee or any other party in violation shall have no right to collect, receive or retain any principal or charges whatsoever with respect to such loan."[2] The North Carolina legislature has declared at N.C.G.S. § 24-2.1(a) "[i]t is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws."

Debtor entered into an Asset Purchase Agreement ("APA") dated November 18, 2019, with AMI. The APA is signed by Linda Derbyshire on behalf of Debtor, and John Derbyshire on behalf of AMI. The documentation for the transaction includes the following relevant terms:

- Debtor would acquire all AMI's rights under store leases and related agreements for 18 stores in northern South Carolina, all associated loans and notes outstanding at those locations, all security agreements and instruments relating to such notes and loans, and other assets.
- Debtor would acquire such property for a purchase price of $6,744,000.00, with such price being seller-financed by AMI and subject to a security agreement in AMI's favor on substantially all the Debtor's personal property assets.
- Section 1(c) of the APA provides "that any liability associated with the assets being transferred to [Debtor] by [AMI] herein, shall be expressly assumed by [Debtor] in this transaction, which includes - but is not limited to - the contingent liabilities associated with making title loans to North Carolina

[2] The Court makes no finding at this time that North Carolina law applies.

customers".

- Section 8(b) of the APA provides Debtor "shall indemnify, defend at [Debtor's] expense (unless defense is being provided by an insurance carrier), and hold harmless [AMI] against, and in respect of, any and all claims, demands, losses, costs, expenses, obligations, liabilities, damages, recoveries, and deficiencies (including interest penalties and reasonable attorney's fees) that [AMI] shall incur or suffer, which arise, result from, or relate to any claim, demand, or liability (including any tax deficiency or assessment) and the reasonable cost of defense, asserted against [AMI] after the Closing which arises or accrues from acts, omissions, or transactions occurring after the Closing."
- All notices and demands regarding the APA are to be directed to the attention of John Derbyshire on behalf of AMI and Linda Derbyshire on behalf of Debtor.

Debtor is licensed and subject to regulatory oversight by the South Carolina Division of Consumer Finance, the South Carolina Board of Financial Institutions, and the South Carolina Department of Consumer Affairs. Debtor continued the practice of making loans to North Carolina residents at rates of interest that exceeded the cap in that state and recording liens on car titles in North Carolina as well. Over 100 individuals filed their North Carolina Litigation before the APA was executed. After the APA, Debtor became entangled in the AMI litigation and was named or added as a defendant in many instances. Complaints include allegations of additional contacts of Debtor and AMI within North Carolina.

Litigation history among various related parties includes an action filed by AMI in the United States District Court for the District of South Carolina in 2019, *AutoMoney, Inc. v. Deirdre Booker Pippins*, No. 2:19-2217-RMG. In an Order abstaining from hearing the matter and granting a motion to dismiss Judge Richard Mark Gergel found:

> This matter arises out of a dispute over the applicability of the North Carolina Consumer Finance Act to loans made outside North Carolina in which lenders allegedly "solicit or otherwise conduct activities" within the State of North Carolina. N.C. GEN. STAT. § 53-190(b). This is a subject of considerable litigation within the North Carolina courts, including an action pending in the Superior Court of Guilford County in which the Defendant here, Deirdre Booker Pippins, is the Plaintiff and the Plaintiff here, Automoney, Inc [AMI], is the Defendant.
>
> ….First, it is apparent that North Carolina has a strong interest in the enforcement of its consumer protection laws and in protecting the citizens from what under North Carolina law are usurious loan rates. Second, the pending [North Carolina] Superior Court litigation between the parties affords an ample forum in which the parties can efficiently and effectively litigate all of their claims. Third, the creation of a parallel action in the United States District Court in South Carolina would be a potential recipe for confusion and unnecessary entanglement with the North Carolina state courts. Fourth, the initiation of a new action in federal court in South Carolina raises the appearance of procedural fencing and forum shopping, since the North Carolina forum appears perfectly adequate for all parties to litigate their claims.

AutoMoney, Inc. v. Deirdre Booker Pippins, No. 2:19-2217-RMG D.S.C. December 30, 2019.

Debtor filed a similar action in the same court, *Auto Money North, LLC v. Fentress Brown*, No. 0:21-cv-00393-JMC. In her February 18, 2022, Order Judge J. Michelle Childs stated:

> This action arises from a car title loan and associated contracts entered into by AutoMoney North's [now the Debtor] predecessor in interest, AutoMoney, Inc.[AMI], and Brown…. Brown contends that on February 3, 2021, her counsel mailed for filing a complaint against AutoMoney North and AutoMoney, Inc. in the North Carolina Superior Court for Richmond County….

Debtor countered by filing a corresponding action before Judge Childs, who described it as follows:

> In the present action, AutoMoney North asks the court to determine whether its consumer loans to Brown are valid and enforceable under the relevant South Carolina consumer lending laws and whether they are subject to, invalidated by, or in violation of certain North Carolina lending laws or, in the alternative, whether the relevant North Carolina lending statutes violate the Commerce Clause….

Judge Childs considered issues of "federalism, efficiency, and comity" when deciding whether to exercise jurisdiction over the matter under the Declaratory Judgment Act and stated:

> In determining whether to exercise declaratory judgment jurisdiction, courts look to (1) the state's interest in having its own courts decide the issue; (2) the state courts' ability to resolve the issues more efficiently than the federal courts; (3) the

> potential for unnecessary entanglement between the state and federal courts based on overlapping issue of fact or law; and (4) whether the federal action is mere forum shopping. *Id.* [citing *Trustgard Ins. Co. v. Collins*, 942 F.3d 195, 201 (4th Cir. 2019)].

Judge Childs determined that the North Carolina state courts have "a strong interest in interpreting the scope and application of its own consumer protection laws" and decided to abstain, in part finding that "the initiation of this action raises, at the very least, the appearance of forum shopping." *Auto Money North, LLC v. Fentress Brown,* No. 0:21-cv-00393-JMC D.S.C. February 18, 2022.[3] Debtor's appeal of that decision is pending before the Fourth Circuit Court of Appeals.[4]

The North Carolina Litigation pending in state court exists in two forms. First, twenty-one (21) North Carolina civil actions pending against Debtor and AMI as co-defendants seeking damages for alleged violations of North Carolina consumer lending laws. Second, fifteen (15) North Carolina civil actions pending against AMI only seeking damages for alleged violations of North Carolina consumer lending laws.[5]

Within the second set of civil actions are the claims of "the Remand Defendants"[6] whose North Carolina cases AMI moved to dismiss in North Carolina state court for lack of personal jurisdiction, failure to state a claim based on a South Carolina choice-of-law provision, and improper venue based upon a South Carolina forum selection clause. The North Carolina trial courts denied AMI's motions to dismiss, and AMI appealed those rulings to the North Carolina Court of Appeals. On July 19, 2022, in unanimous opinions, the North Carolina Court of Appeals affirmed the trial court orders denying AIM's motions to dismiss. The Remand Defendants' cases are currently

[3] *See also*, *McDonald v. AutoMoney, Inc*., No. 1:21-cv-00114, ECF No. 25 (M.D.N.C. Nov. 30, 2021)(federal court remanded removed action back to state court).
[4] *Auto Money North, LLC v. Fentress Brown,* C/A No. 22-1296 (4th Cir. March 18, 2022).
5 The record in this adversary proceeding does not include copies of all state court complaints. However, examples provided contain causes of action by the Named Defendants under N.C.G.S. 75-1.1 and request treble damages and attorney fees. *See* Fletcher Complaint, hearing Exhibit 6.
[6] The Debtor did not name these parties as defendants in the Debtor's second adversary proceeding discussed below, Adv. No. 22-80047.

pending in the trial courts of North Carolina. After remand, AMI filed its answers and, among other defenses, asserted that, as applied to its transactions with the Remand Defendants, the North Carolina Consumer Finance Act, at N.C.G.S. § 53-190, violates the dormant Commerce Clause of the United States Constitution. AMI also filed a Petition for Discretionary Review with the Supreme Court of North Carolina, which remains pending.

On December 2, 2022, Debtor filed the underlying Chapter 11 bankruptcy, electing to proceed under Subchapter V of Chapter 11. Debtor contends the primary reason for the bankruptcy filing is to resolve the North Carolina Litigation expeditiously and efficiently by asking this Court to determine whether the application of North Carolina's consumer protection laws to Debtor violates the United States Constitution. On December 5, 2022, Debtor filed related Adv. No. 22-80047, asking this Court to determine that question and naming approximately 400 Named Defendants. On the same day, Debtor filed this above captioned adversary proceeding naming mostly the same defendants. Due to extensions, responsive pleadings are due in both proceeding on February 3, 2023. The same day this adversary proceeding was filed, Debtor filed the instant Motion, requesting an order declaring that § 362(a) prohibits the commencement or continuation of the North Carolina Litigation by the Named Defendants and the John and Jane Does against AMI while Debtor's Chapter 11 case remains pending, and/or entering a temporary restraining order and preliminary injunction under § 105(a) of the Bankruptcy Code to enjoin the commencement or continuation of any such actions by both against AMI.[7]

The Court entered an order on December 6, 2022, denying the TRO request, providing that Debtor must give notice to affected parties, establishing a response date, and scheduling a hearing for December 28, 2022.

[7] Debtor's Motion in the above captioned adversary proceeding is co-dependent on the record in the underlying bankruptcy case and the related adversary proceeding and therefore, the Court examined all information available, included herein as relevant.

Meanwhile, Debtor filed schedules and statements in the underlying bankruptcy case, signed by Jeremy Blackburn, Debtor's manager and officer since its inception. Blackburn oversees Debtor's day to day operations and reports to John Derbyshire and Linda Derbyshire.

Debtor's December 8, 2022, schedules and statements indicated assets of $8,893,800.07, including bank accounts with Wells Fargo Bank, N.A. Secured claims of $896,693.13 are scheduled along with nonpriority unsecured claims in a dollar amount of $575,985.53. Of the total scheduled liabilities of $1,472,678.53: $893,010.33 was listed as owed to AMI as a secured debt (not contingent, unliquidated, disputed nor otherwise indicated as challenged in any way); and $3,682.80 owed to Wells Fargo Vendor Fin. Services, LLC. No priority debts were scheduled. The Named Defendants listed therein were scheduled as contingent, unliquidated, and disputed with an "unknown" balance. The unsecured debts listed also included: a handful of smaller debts of hundreds of dollars each; one debt to Henry Allen Cauthen, III, (no explanation) for $8,250.00; $2,480.00 to NAI Earle Furman, LLC; $2,343.32 to SCF RC Funding I, LLC; $3,112.00 to Springland, Inc.; $3,012.00 to Tammy S. Reason dba Associates Asset Recovery; along with debts to related companies ($24,000.00 to Jolin Enterprises, Inc., $65,677.50 to Moneyline Properties, LLC). The bulk of the unsecured debt amount ($450,200.00) is listed as disputed and unsecured, to the U.S. Small Business Administration for an April 9, 2020, Payroll Protection Loan.[8] Schedule H listed numerous affiliated co-debtors: AMI, Jolin Enterprises, Inc., and Moneyline Properties, LLC.

The schedules indicate Debtor was able to accelerate payments on the 2019 twenty-year APA note owed to AMI and reduce it from $6,744,000.00 to $893,010.33 in three years. Debtor's first day motions stated the debt to AMI is secured by a Security Agreement dated November 18, 2019. The Security Agreement provides that it grants a blanket lien in and to substantially all the

[8] Debtor is challenging this debt in the U.S. District Court, *Auto Money North, LLC v. Small Business Association,* 22-CV-01455.

Debtor's assets, including, without limitation, its accounts receivable, chattel paper, instruments, deposit accounts, and other payment rights. A UCC Financing Statement was recorded almost three years later, on October 6, 2022, in the office of the South Carolina Secretary of State. No other liens or secured creditors affecting cash collateral were disclosed or scheduled.

On December 9, 2023, the United States Trustee filed an Objection to Debtor's first day motions. The response disclosed details about prior litigation initiated by AMI and Debtor related to the issues raised in the adversary proceedings, filed in the federal courts, and reference above.[9]

On December 12, 2022, following an expedited hearing, the Court granted Debtor's request to use cash collateral based on the information and the testimony of Blackburn. Due to the extreme equity cushion in the alleged collateral, the Court allowed the use of cash collateral but declined to grant a replacement lien to AMI for amounts used post-petition in Debtor's operations. The approved budget included generous amounts for legal and accounting fees through March 2023 and indicated Debtor likely has sufficient cash to cover substantial future legal fees and its expenses without contributions from other entities.

On December 13, 2022, after an expedited hearing, the Court granted Debtor's request to operate using existing bank accounts with Wells Fargo Bank, N.A., existing cash management systems and forms, and to continue customer referral programs.

On December 21, 2022, an acceptance of service was filed in this proceeding wherein the group of attorneys that appeared at the hearing on behalf of the Named Defendants accepted service for most Named Defendants. On December 22, 2022, the Named Defendants responded to this Motion. The Response detailed prior litigation in the federal courts, referenced above, along with

[9] Debtor's Statement of Financial Affairs filed December 8, 2022, listed the caption of the pending 4th Circuit appeal "*Auto Money North, LLC v. Fentress Brown*, 22-1296."

discussion of litigation history and decisions of the North Carolina Court of Appeals regarding issues related to the adversary proceedings initiated here.

On December 23, 2022, Blackburn filed a declaration that provided additional information regarding discovery and upcoming trial dates in state court in January, February, and March 2023 in cases against AMI. The filing included copies of pleadings wherein AMI asserted a defense that it is not the real party in interest.

On December 28, 2022, Debtor filed a brief status report that acknowledged the debt structure set forth in the December 8, 2022, bankruptcy schedules. On the same day, the Court held a hearing and entered a final cash collateral order with the consent of AMI. Also on December 28, 2022, the Court held an evidentiary hearing on the current Motion where Blackburn testified. At the conclusion of the hearing the Court took the Motion under advisement and requested competing proposed orders from the parties.

At the hearing Debtor argued that AMI is a separate and distinct legal entity, it is not an alter-ego of AMI, and the entities observe all necessary corporate formalities. The evidence did not indicate that Blackburn would be unable to fulfill his role as Debtor's manager if the Motion is denied, or that he would not have sufficient time and resources to proceed with the reorganization. The evidence did not indicate any contribution from or direct participation in the reorganization by AMI (other than as a creditor), John Derbyshire, or Linda Derbyshire.

There is no evidence that AMI lacks sufficient resources and motivation to litigate cases against it; and the Debtor has offered no evidence showing that AMI's litigation efforts in other courts, whether offensive or defensive, will either cease or lessen moving forward.

Although other creditors are listed in Debtor's schedules, the evidence received at the December 28, 2022, hearing painted a picture of essentially a two-sided dispute between Debtor and the Named Defendants, with other claims disputed, of minimal amounts, or owed to affiliated

companies. Debtor informed the Court that its entire plan of reorganization hinges upon a judicial determination of the constitutional issue presented in related Adv. No. 22-80047.

Debtor has not provided evidence to indicate if any Named Defendants had loans that originated with AMI and were closed by payoff or repossession prior to the assignment to Debtor, such that there was no balance to assign. Over three years have passed since the "loan balances" were assigned under the APA. Likely loans assigned have been altered by payments, repossessions, or have been written off. Therefore, the value of each Named Defendant's loan balance to the Debtor's reorganization is unclear.

Although similarly situated, the Named Defendants and the John and Jane Does, are not fungible. The constitutional challenge will require separate factual inquiries into each borrower's transactions and dealings with the lender on a case-by-case basis before a court can determine the issues raised.

This proceeding includes John and Jane Does, who according to Debtor, are "prospective, putative plaintiffs who may, at any time while Debtor's Chapter 11 bankruptcy case is pending, seek to commence an action against AMI similar to the North Carolina Litigation…" These are, presumably, current and/or former borrowers whose names and addresses are, or will be, known to Debtor and AMI. Debtor did not give those borrowers notice of the bankruptcy, the adversaries, Motion, or hearing.

According to Blackburn's testimony, approximately sixty-five percent of Debtor's car title loan volume is with North Carolina resident borrowers. There is no evidence that Debtor intends to cease or slow its practice of lending to North Carolina residents or collecting from the Named Defendants, or others, while the issues raised in the North Carolina Litigation and the adversaries are determined.

As of the Petition Date, the Named Defendants were comprised of 406 individual plaintiffs who have filed 36 actions in North Carolina state courts against Debtor and/or AMI. All Named Defendants that have appeared in this action are represented by the same counsel.[10] Twenty-one (21) state court actions named both Debtor and AMI as defendants, and fifteen (15) named only AMI. Sixteen (16) of the Named Defendants cannot be identified due to the commonality of their names. Fourteen (14) of the Named Defendants are prosecuting claims arising under title loans owned by AMI in actions alongside the 375 litigants mentioned above. One of the Named Defendants is prosecuting an individual action concerning a title loan owned by AMI. A state court complaint filed post-petition by counsel for the Named Defendants asserts that Debtor and AMI are treated by the Derbyshires as alter egos of one another. At the hearing, counsel for the Named Defendants reported that this complaint essentially crossed in the mail with notice of the bankruptcy filing, that counsel for Debtor did not mention the bankruptcy filing during other discussions about the ongoing litigation happening around that time, and any post-petition filing would be remedied.

Counsel for the Named Defendants argued that the Motion should be denied because a judgment rendered by a court in North Carolina against AMI is not necessarily a judgment against the Debtor.[11] Moreover, counsel for the Named Defendants reasoned in their post-hearing submission that this Court should deny the Motion in part because the doctrines of *res judicata* and collateral estoppel will not apply.[12] As of the hearing, there was no evidence that AMI had made demands of Debtor under any indemnity provision found in the APA. AMI is not currently a party in either of the adversary proceedings pending in this Court.

On December 30, 2022, Frank B.B. Knowlton filed a Notice of Appearance in the base case

[10] Debtor represented to the Court that it intends to voluntarily dismiss these two Named Defendants because one has passed away and the other voluntarily dismissed its claims against the Debtor and/or AMI prior to the Petition Date. The record includes discussion about some Named Defendants still being identified due to commonality of names. *See* ECF No. 15, C/A No. 22-03309 ECF No. 71.
[11] Transcript of December 28, 2022, hearing, p. 91-92, 112.
[12] Proposed Order. ECF No. 30, page 17.

on behalf of Wells Fargo Bank, N.A., a party thus far not involved in this proceeding as a creditor. On January 4, 2023, while the Court was considering the Motion under advisement, Debtor filed amended schedules that significantly change the debt amount and structure in this case. The amendments changed Debtor's total scheduled debt amount from $1,472,678.53 to $6,122,673.69.[13] The primary change involves the addition of debts to Wells Fargo Bank, N.A., of approximately $4.6 million because of Debtor's guarantee of the debts of affiliates. The filing stated that the filer "recently discovered that Debtor had signed a Commercial Guaranty…" Related parties John Derbyshire, Linda Derbyshire, and MoneyLine Properties, LLC were added as co-debtors. Property of this estate of approximately $405,000.00 in cash in Debtor's bank account at Wells Fargo is disclosed as security. The amendments also added AMI and Auto Money Title Pawn, LLC as co-debtors on a contract with Decision Dynamics, LLC, and changed the list of 20 largest unsecured creditors by adding four new creditors (including Wells Fargo). A status hearing was held in the bankruptcy case on January 10, 2023. Counsel reported that the Wells Fargo loans, signed by one or both Derbyshires, were made to an affiliate and guaranteed by Debtor in 2021- two years after the APA.

On January 13, 2023, the proposed orders addressing the Motion under advisement were filed. As neither order fully captured the Court's reasoning, those submissions are considered by the Court as post-trial briefs.

APPLICABLE LAW

Section 362(a)(1) of the Bankruptcy Code provides, among other things, a stay of the "commencement or continuation . . . of a judicial . . . proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title."

[13] These numbers do not include any "unknown" amounts Named Defendants may assert as creditors.

Debtor's case is pending under Subchapter V of Chapter 11. When recently enacted, no language therein provided a co-debtor stay.[14] However, Fourth Circuit precedent recognizes that the automatic stay imposed by § 362(a)(1) may offer protection from actions against parties who share such an identity of interests with a debtor with respect to those actions where a debtor is, in effect, the real-party defendant. *See A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986); *see also McCartney v. Integra Nat'l Bank N.*, 106 F.3d 506, 510–11 (3d Cir. 1997) (concluding that the automatic stay enjoined an action against non-debtor third party where the debtor "was, in essence, the real party in interest" in the pursuit of a deficiency judgment against the third party); *In re Brier Creek Corporate Ctr. Assocs. Ltd*., 486 B.R. 681, 689–92 (Bankr. E.D.N.C. 2013). An "identity of interest" can be established in different ways, including: (1) when a debtor owes a duty to indemnify the non-debtor party, or (2) when litigation would produce results that would bind a debtor's estate. *Robins*, 788 F.2d at 999 (quoting *In re Metal Ctr.*, 31 B.R. 458, 462 (D. Conn. 1983) ("Clearly the debtor's protection must be extended to enjoin litigation against others if the result would be binding upon the debtor's estate."); *Aldrich Pump*, 2021 WL 3729335, at *31 (finding an "identity of interests" where adjudication of claims against non-debtors "raises collateral estoppel and *res judicata* issues for the debtor").

Indemnification alone is not always sufficient. In *In re Newberry,* the Court held:

> …although the Debtor alleged that [the non-debtor] has a right of indemnification from the Debtor for costs incurred in connection with the state court proceeding, it appears from the evidence submitted that [the non-Debtor] has sufficient funds to pay his own defense and would not necessarily need to invoke the alleged indemnification right against the Debtor. Further, importantly, the Debtor's budgets do not indicate a dire need for funding from [the non-debtor] prior to confirmation.

In Re Newberry, No. 13—01377-JW, at *7.

The stay also protects property of a debtor's estate as defined by § 541(a). Section § 362(a)(3)

[14] *Contrast, e.g.*, 11 U.S.C. §§ 1201, 1301.

focuses on property of the estate, prohibiting "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." Courts have determined that actions against third parties that would adversely affect or otherwise diminish property of a debtor's estate may be included in the protections of § 362(a)(3). *Acands, Inc. v. Travelers Cas. & Sure. Co.*, 435 F.3d 252, 260 (3d Cir. 2006) (Alito, J.) (staying lawsuit against third-party that would have affected a debtor's rights under an insurance contract); *Amedisys, Inc. v. Nat'l Century Fin. Enters. (In re Nat'l Century Fin. Enters.)*, 423 F.3d 567, 575–76, 78 (6th Cir. 2005) (stating that § 362(a)(3) bars actions against non-debtors based on adverse impacts on estate property); *48th St. Street Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th St. Steakhouse, Inc.)*, 835 F.2d 427, 431 (2d Cir. 1987) (barring action to terminate lease of non-debtor prime tenant that would have resulted in termination of debtor's sublease); *Robins*, 788 F.2d at 1001–02 (holding that actions against insurers, officers, or employees of a debtor that could affect the debtor's interest in a products liability insurance policy were stayed under § 362(a)(3)).

Claims a debtor could assert against a third party that belong to the estate may be impacted by the automatic stay. "[I]n the Fourth Circuit the rule is settled that Code § 362(a)(3) stays automatically—without a restraining order—a creditor's claim against a third-party that the debtor can assert for the benefit of the estate." *Litchfield Co. of S.C. Ltd. P'ship v. Anchor Bank (In re Litchfield Co. of S.C. Ltd. P'ship)*, 135 B.R. 797, 803 n.4 (W.D.N.C. 1992); *see Steyr-Daimler-Puch of Am. Corp. v. Pappas*, 852 F.2d 132, 135 (4th Cir. 1988) (creditor's alter ego claim against debtor's principal and affiliate was cause of action that debtor could assert under state law and thus was "'property of the estate' within the meaning of § 541(a)(1)").

Section 105(a) of the Bankruptcy Code provides that this Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." This includes "ample power to enjoin actions excepted from the automatic stay which might interfere

in the rehabilitative process" of a bankruptcy case. *In re Johns-Manville Corp.*, 26 B.R. 420, 425, 436 (Bankr. S.D.N.Y. 1983) (citing 2 COLLIER ON BANKRUPTCY § 362.05 (15th Ed.)), aff'd 40 B.R. 219 (S.D.N.Y. 1984), and appeal allowed, decision vacated in part on other grounds, 41 B.R. 926 (S.D.N.Y. 1984). BANKRUPTCY § 362.05 (15th Ed.), aff'd 40 B.R. 219 (S.D.N.Y. 1984), and appeal allowed, decision vacated in part on other grounds, 41 B.R. 926 (S.D.N.Y. 1984). Section 105(a) provides the broad authority "to enjoin parties other than the bankrupt from commencing or continuing litigation." *Robins*, 788 F.2d at 1002 (quoting *In re Otero Mills, Inc.*, 25 B.R. 1018, 1020 (D.N.M. 1982)). An injunction as to third-party litigation may be appropriate where the

> failure to enjoin would [a]ffect the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through the third party. Id.at 1003 (internal citations omitted). In such cases, an injunction allows the debtor to receive the benefits of the automatic stay imposed by Section 362 of the Bankruptcy Code, which aims to: protect the debtor from an uncontrollable scramble for its assets in a number of uncoordinated proceedings in different courts, to preclude one creditor from pursuing a remedy to the disadvantage of other creditors, and to provide the debtor and its executives with a reasonable respite from protracted litigation, during which they may have an opportunity to formulate a plan of reorganization for the debtor.

Robins, 788 F.2d at 998.

Debtor calls the Court's attention to several examples where a court, acting under the authority of § 105(a), stayed claims against non-debtor entities, including non-debtor affiliates, to maintain the integrity of a debtor's estate and fully effectuate the protections of the automatic stay. *See, e.g.*, *In re Am. Film Techs, Inc.*, 175 B.R. 847, 855 (Bankr. D. Del. 1994) (staying claims against a debtor's directors); *In re Family Health Servs., Inc.*, 105 B.R. 937, 942–43 (Bankr. C.D. Cal. 1989) (staying claims by certain health care providers against members and enrollees of a debtor HMO); *In re Purdue Pharma L.P.*, No. 19-23649, Adv. No. 19-08289 [Adv. Dkt.No.82] (Bankr. S.D.N.Y. Oct. 11, 2019) aff'd 619 B.R. 38 (S.D.N.Y. 2020) (staying claims by all governmental and private plaintiffs); *USA Gymnastics v. Gedderts' Twistars USA Gymnastics Club, Inc., et al. (In re USA Gymnastics)*, No. 18-09108, Adv. No. 19-50075 [Adv. Dkt. No. 71] (Bankr. S.D. Ind. Apr. 22, 2019) (staying

litigation against eight co-defendants, including several training facilities, gymnastics teams, and two individuals, asserting claims related to USA Gymnastics and the conduct of Larry Nassar).

To decide if a preliminary injunction should issue, a court should consider: 1) the debtor's reasonable likelihood of reorganization; 2) the imminent risk of irreparable harm to the debtor's estate without the injunction; 3) the balance of harms between the debtor and its creditors; and 4) whether the public interest weighs in favor of an injunction. *In re Chicora Life Ctr., LC*, 553 B.R. 61, 64 (Bankr. D.S.C. 2016).

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008).

While courts typically consider all four elements, "the Fourth Circuit has made very clear that the critical, if not decisive, issue [in whether a Section 105(a) injunction is warranted] is whether and to what extent the non-debtor litigation interferes with the debtors' reorganization efforts." *Brier Creek*, 486 B.R. at 694 (citing *Robins*, 788 F.2d at 1003–09; *Kreisler v. Goldberg (In re Kreisler)*, 478 F.2d 209, 215 (4th Cir. 2007)).

DISCUSSION

John and Jane Does

As an initial matter, the Court notes that Debtor requests affirmative relief against John and Jane Does 1- 1000. No relief is warranted at this time. The John and Jane Does, according to Debtor, are "prospective, putative plaintiffs who may, at any time, while Debtor's Chapter 11 bankruptcy case is pending, seek to commence an action against AMI similar to the North Carolina Litigation…" There is no evidence they were given notice of the December 28, 2022, hearing and the relief Debtor now seeks, nor that Debtor lacked the ability to provide notice. Without notice, Debtor's requests for relief

against those parties is denied.

The Named Defendants

It appears that the Court has adequate jurisdiction and authority to determine this Motion, and thus far no party given notice has challenged the same. The remainder of Debtor's Motion affects the Named Defendants comprised of 375 individuals who assert claims against Debtor or AMI, 15 individuals who assert claims against AMI, and 16 individuals who cannot be classified into either group until they are properly named/identified.

Clearly all pre-petition claims for actions prosecuted against Debtor as a named defendant are stayed by the plain language of § 362(a)(1) and cannot be prosecuted against Debtor without further relief from this Court.

Debtor asks the Court to further determine that actions against non-debtor party AMI are stayed as well. No co-debtor stay is imposed by the Code, and the plain language of § 362(a)(1) does not protect parties other than a debtor. Although case law allows the Court to interpret the automatic stay as protecting third parties in certain circumstances, the Court finds those circumstances lacking here. Debtor maintains it is separate and distinct from AMI. AMI may have additional defenses in the North Carolina Litigation not available to Debtor-- including its defense in some pending actions that it is not the real party in interest-- or may have different contacts with the individual Named Defendants affecting application of North Carolina law. Debtor argues fears of preclusion because of litigation prosecuted against AMI. Although it is a challenge to apply the elements of collateral estoppel or *res judicata* at this stage of North Carolina Litigation, the Named Defendants, who would be the parties affected by Debtor's Motion who would assert these doctrines, reasoned that the Court should not grant the requested relief because these concepts of preclusion would not apply to Debtor as a result of a decision or judgment against AMI. Further, some of the state court actions are asserted against AMI only and the automatic stay has halted all action against Debtor. While the North

Carolina litigation could establish an evidentiary record against AMI, including testimony of the common owners, it is a stretch and oversimplification to base application of the automatic stay to a non-debtor on a concern that when witnesses testify it will necessarily result in harm to Debtor. At most, at this point in time, it appears that any findings and judgments of the North Carolina courts adverse to AMI could constitute *interpretations of law* that may, or may not, be persuasive to future courts considering the same questions. Debtor has failed to show that the requisite identity of interests exists, that Debtor is the real party in interest, or any other grounds to interpret the stay of § 362(a)(1) as broadly as it asserts.

Debtor argues that North Carolina Litigation against AMI represents impermissible attempts to exercise control over property of the Debtor's estate, and asserts that any actions that seek to decrease the value of the assets of the Debtor are automatically stayed pursuant to § 362(a)(3). This interpretation of the facts before the Court is untenable. As stated above, the Named Defendants agree that a judgment against AMI will not bind the Debtor. Again, *interpretations of law* may result in litigation against AMI or other litigation pending in North Carolina against other similar business models. But that possibility is insufficient to warrant the relief requested under applicable law.

While the APA includes a provision requiring Debtor to indemnify that provision alone is not determinative, and this Motion cannot be decided in a vacuum created only by that provision. In context-- at the time of the execution of the APA, the parties on both sides were aware of the issues raised in pending lawsuits. AMI and Debtor share common ownership: John Derbyshire and Linda Derbyshire. John Derbyshire executed the APA on behalf of AMI that transferred assets to Debtor. Debtor accepted through Linda Derbyshire and agreed to the indemnity provision. As a result, in 2019 Debtor agreed to pay $6,744,000.00 to AMI in exchange for the assets and associated litigation. Although AMI's UCC filing and secured claim have been asserted in this case, it was not made until two months before the bankruptcy. Debtor has greatly accelerated payments under the twenty-year

payment schedule to AMI to satisfy most of that amount pre-petition.

Meanwhile, the amended schedules filed after the hearing and entry of various orders indicate that AMI, through one or more of the Derbyshires, guaranteed $4.6 million in debt for the benefit of another company related to the Derbyshires in 2021, with no explanation, and that the debt is secured by $450,000.00 in Debtor's funds. Although the bankruptcy case is in early stages, taken as a whole, the facts in the record thus far paint a picture of deliberate decisions and actions that have created an entanglement of related companies that appear to benefit two individuals, not the Debtor or its estate; and raise questions about whether AMI will ultimately prevail in collecting from the bankruptcy estate under the APA or otherwise, or whether on the contrary the estate should explore avoidance or collection from AMI. At this early stage in the reorganization and this adversary proceeding, the facts undermine Debtor's argument that AMI's indemnity claims will impact the estate and reorganization in the manner Debtor asserts.

Debtor asserts that it has sufficient assets to reorganize, and it does not appear to be financially dependent on AMI in its reorganization effort. The evidence does not indicate that Debtor needs financing to reorganize that is dependent on the Motion, nor that Debtor is dependent upon AMI or its assets. Debtor's continued operations do not appear to be dependent upon AMI's management and there has been no evidence that the assets of AMI will be voluntarily contributed to Debtor's plan or operations. Further, the record does not indicate that AMI lacks sufficient resources and motivation to fight the North Carolina Litigation pending against it, and Debtor has offered no evidence showing that defense efforts will either cease or lessen moving forward.

Debtor expresses concern over the assertion in other courts, or intent to assert, that Debtor and AMI are alter egos of one another and points out that the estate may have similar claims against AMI to assert for the benefit of creditors. This is a stretch of the facts at this stage of this litigation and bankruptcy case. First, this does not appear to be a real threat thus far in the North Carolina Litigation

based on the facts before the Court. Second, Debtor has, to the contrary, asserted that it and AMI are two distinct entities and has not given any indication that it intends to pursue any claims on behalf of the estate that the two are alter egos of one another, or anything similar. There is no indication that use of any assets of, or recovery from, AMI is contemplated by Debtor at this stage.

In summary, the facts do not support entry of an order finding that the automatic stay extends to the Named Defendants' actions against AMI or that the North Carolina Litigation against AMI only is an "act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."

Section 105 and the Request for a Preliminary Injunction

Considering this record and assessing Debtor's reasonable likelihood of reorganization, the imminent risk of irreparable harm to the Debtor's estate without the injunction, the balance of harms between the Debtor and its creditors, and whether the public interest weighs in favor of an injunction, for many of the same reasons discussed above, the Court finds that Debtor has failed to show a preliminary injunction is appropriate.

Debtor has significant resources to operate its business, absent an adverse result from a court of competent jurisdiction regarding the constitutional issues pending in Adv. No. 22-80047. However, Debtor states that its reorganization, and in fact its business model, depend upon success therein. There has been no briefing or argument on the constitutional issues raised and the challenge Debtor is making will require separate factual inquiries into each borrower's transactions and dealings with Debtor on a case-by-case basis before this Court can determine the ultimate issue. Depending on the facts of any particular transaction, Debtor may prevail, or it may not. The Court would be, at best, speculating on whether Debtor will prevail on the issue raised in the second adversary proceeding and, consequently, have a reasonable likelihood of a successful reorganization. In summary, the Court is not swayed in either party's direction because of this consideration.

The Named Defendants will be harmed if the injunction is issued. Many began their state court lawsuits against AMI prior to the APA. Many of the Named Defendants' cases, and in particular, the cases of the Remand Defendants, have been pending for some time and have progressed through the North Carolina courts against AMI. Some of the cases were filed in mid-2019 and have already been through lengthy ligation. The Remand Defendants have survived motions to dismiss. Their cases have been to the North Carolina Court of Appeals and have been fully briefed and argued. Their cases have been remanded, stay motions denied, and some cases are now ripe for summary dispositions or bench trials. AMI and Debtor have previously sought the intervention of the federal courts prior to this bankruptcy filing without success.

Debtor argues allowing litigation to continue in the North Carolina state courts against the non-debtor AMI risks inconsistent decisions, while Debtor's bankruptcy case provides a single forum for resolving similar claims in a uniform and equitable manner. This argument fails to consider that AMI is not a party in the adversary proceedings, nor a debtor in this Court. Therefore, the proceedings pending here are not a fair substitute to the North Carolina Litigation for the Named Defendants pursuing AMI. Further, there is no promise that the Named Defendants could continue their pursuit of AMI here, or anywhere else, if the North Carolina Litigation against AMI is halted or delayed. If the Named Defendants are ultimately able to pursue AMI in this Court, they will need to start over with litigation that is well underway elsewhere against AMI. Despite Debtor's requests to delay the Named Defendants' pursuit of AMI while Debtor litigates here there is currently no corresponding delay to the ability of Debtor, or AMI, to collect from any of the Named Defendants or repossess their motor vehicles while related issues are pending. These facts together evidence considerable harm to the Named Defendants if relief is granted.

Debtor, on the other hand, cannot show comparable harm if the relief is not granted, and certainly not imminent risk of irreparable harm. The litigation against Debtor has been automatically

stayed by the bankruptcy filing. Debtor argues that it faces irreparable harm in the form of the potentially preclusive effects of the Named Defendants' pending cases against AMI, but for the reasons discussed above, the Court does not consider the doctrines of *res judicata* or collateral estoppel to be a threat to Debtor. Further, Debtor has not shown that AMI lacks the motivation, resources, and opportunity to defend itself and appeal in the North Carolina Litigation. Debtor has not shown any imminent risk rising to the level of irreparable harm if the North Carolina Litigation against AMI is not enjoined.

While it is true that the public has an interest in successful reorganizations, relying on that alone is an overgeneralization of the facts before the Court. Other public interests are relevant, including the interest of the state of North Carolina in protecting its residents. The North Carolina legislature has declared it is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of these North Carolina laws. The relief Debtor seeks – an injunction preventing the Named Defendants' continued prosecution of their claims against AMI in the courts of North Carolina – is counter to this policy. On this point, the Court finds guidance in the decision of Judge Childs in *Auto Money North, LLC v. Fentress Brown*, No. 0:21-cv-00393-JMC (D.S.C. Feb. 8, 2022), abstaining and dismissing Debtor's federal court action in part because she found that the North Carolina state courts have "a strong interest in interpreting the scope and application of its own consumer protection laws" and commenting that "the initiation of …[that lawsuit] raises, at the very least, the appearance of forum shopping." The public interests do not weigh in favor of the requested injunction.

The Court is not convinced that this bankruptcy case and the North Carolina Litigation against AMI cannot coexist. Debtor has not named the Remand Defendants in the second adversary proceeding, and AMI is not a named party in either adversary. Resolving the many controversies discussed herein is not as simple as staying the North Carolina Litigation and carrying forward with

the adversary proceedings and, in conclusion, there is no assurance such efforts would result in greater efficiencies. After consideration of applicable law as applied to the facts of this case, Debtor has failed to show that the Court should issue a preliminary injunction.

CONCLUSION

Having fully considered the evidence and Debtor's Motion, and after careful consideration of applicable law, IT IS HEREBY ORDERED, that all pre-petition claims that are for actions prosecuted against Debtor, as a named defendant, are stayed by the plain language of § 362(a)(1) without the need for an order from this Court; Debtor's request for of an order declaring that § 362(a) prohibits the commencement or continuation of the North Carolina Litigation by the parties listed on Appendix A to the Complaint in this Action, and John and Jane Does 1-1000 against non-debtor affiliate, AMI while Debtor's Chapter 11 case remains pending; and/or entering a preliminary injunction under §105(a) of the Bankruptcy Code to enjoin the commencement or continuation of such actions against AMI is denied.

FILED BY THE COURT
01/30/2023

Entered: 01/30/2023

Chief US Bankruptcy Judge
District of South Carolina