IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

AUTO MONEY NORTH, LLC, Plaintiff, v. DARIN WALTERS, CARLA WALTERS, TIMOTHY MCQUEEN, and CECILIA MCQUEEN, Defendants, and STATE OF NORTH CAROLINA, Intervenor.	)	CA No.: 7:23-cv-2952-JDA

STATE OF NORTH CAROLINA'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS THE COUNTERCLAIMS ON CONSTITUTIONAL GROUNDS

Intervenor, the State of North Carolina, hereby submits its Memorandum of Law in Opposition to Plaintiff Auto Money North, LLC's ("Auto Money" or "Plaintiff") Motion to Dismiss the Defendants' counterclaims. More specifically, Intervenor submits this memorandum for the limited purpose of defending the constitutionality of North Carolina's Consumer Finance Act, N.C. Gen. Stat. § 53-190, and North Carolina's usury statute, N.C. Gen. Stat. § 24-2.1 (collectively, "the North Carolina Statutes"). As set forth below, Plaintiff's First Amendment challenge to the North Carolina Statutes is premature because the counterclaims allege Auto Money's conduct in North Carolina involves far more than mere speech. Moreover, even ignoring

this procedural posture, the North Carolina Statutes do not violate the First Amendment. Accordingly, Auto Money's motion to dismiss on the constitutional grounds should be denied.[1]

INTRODUCTION

The State of North Carolina has a strong public policy to protect North Carolina resident borrowers from usurious, high-cost loans – a fundamental policy that has existed for over two centuries. In this case, Plaintiff has made car title loans at triple-digit interest rates to the individual Defendants, who are North Carolina residents. There is no dispute that the terms of the loans Plaintiff made to Defendants grossly exceed the interest rates allowed by North Carolina law, which caps the maximum interest rate at 18% on small loans by unlicensed lenders, and at 33% for licensed lenders. After multiple decisions by North Carolina courts and by arbitrators involving other North Carolina consumer borrowers that have held Plaintiff's loans were made in North Carolina and governed by North Carolina law, Plaintiff filed this action against these individual Defendants. Plaintiff seeks a declaratory judgment by this Court that application of the North Carolina Statutes to the loans it made to Defendants violate the U.S. Constitution. Presently, Plaintiff seeks to dismiss Defendants' counterclaims based on North Carolina's usury laws, contending that the North Carolina Statutes as applied violate the First Amendment. Plaintiff's argument is meritless and should be denied.

STATEMENT OF FACTS

I. The Instant Case

On at least four occasions in 2021 and 2022 – specifically, May 4, 2021 (Doc. 1-3); February 15, 2022 (Doc. 1-4); March 16, 2022 (Doc. 1-5); and May 17, 2022 (Doc. 1-2) – Plaintiff

[1] Intervenor takes no position on Plaintiff's non-constitutional grounds for dismissing the counterclaims because it has intervened for the limited purpose of defending the constitutionality of the North Carolina Statutes.

Auto Money made loans to Defendants Darin Walters and Carla Walters, who are North Carolina residents. Between those four loans, Plaintiff loaned $18,186 to the Walters.

The respective annual percentage rates ("APR") on the Walters' loans ranged from 158.99% (May 4, 2021 loan) to a high of 199.65% (May 17, 2022 loan), with the other two loans' APRs being 179%. The total interest and charges that Auto Money projected charging to the Walters was $98,339.75; thus, the total listed repayment amount for the Walters' original loans of $18,186 equaled a staggering $116,525.75. According to Plaintiff, as of the time it filed the Complaint, the Walters had made repayments totaling $39,385.73 to Plaintiff; thus, the Walters have already repaid more than double the loans' principal. (Complaint ¶8)

With regard to the remaining two individual Defendants, Timothy McQueen and Cecilia McQueen, who are also North Carolina residents, Plaintiff extended a loan to them in the amount of $6,000.00 on December 13, 2019, which was a refinance of an existing loan with Auto Money. (Complaint ¶10; Doc. 1-6) The APR on the McQueens' loan was 138.95%. The listed finance charge on the loan was $19,509.02, for a projected total repayment amount of $25,509.02 on an original loan amount of $6,000.00. According to Plaintiff, the McQueens have made payments to Plaintiff totaling $28,090.39, which is even more than the total of payments set out in their loan agreement. (Complaint ¶11; Doc. 1-6)

Each of the loans made to Defendants was secured by a vehicle title of vehicles owned by Defendants. For each of the Walters' loans, the security taken by Plaintiff was the title to their 2011 Buick LaCrosse. (Docs. 1-2, 1-3, 1-4, 1-5) For the McQueens' loan, the security taken by Plaintiff was the title to their 2012 Chevy Silverado. (Doc. 1-6) Plaintiff recorded its liens on all of the loans with the North Carolina Department of Motor Vehicles ("NCDMV"). (Complaint ¶¶64, 68)

Plaintiff argues that, because the Walters and McQueens traveled to South Carolina and signed the loan documents at Plaintiff's stores in the border towns of Fort Mill and Landrum, and because the loan agreements contained clauses stating the agreements were made in South Carolina and governed by South Carolina law, South Carolina law should apply to the loans. (Complaint ¶¶45-46, 83) Plaintiff acknowledges that, in addition to its recording of liens with the NCDMV, "Defendants may have sent payments from North Carolina to Plaintiff in South Carolina;" and "the Defendants might have made telephone calls to Plaintiff's locations in South Carolina after the Loans were made while the Defendants were located in North Carolina." (Complaint ¶64)

Plaintiff filed its Complaint for Declaratory Judgment on June 23, 2023. In its causes of action, Plaintiff seeks: (1) a declaratory judgment that North Carolina law provides for South Carolina law to govern the loans; (2) multiple claims for declaratory and injunctive relief predicated on the notion that application of the North Carolina Statutes to the loans would violate Plaintiff's rights under various provisions of the U.S. Constitution; and (3) a claim for breach of contract. (Complaint ¶¶81-119)

On November 1, 2023, the Defendants filed an Answer, Further Defenses, and Counterclaims. (Doc. 16) Among other defenses raised, Defendants raised the defenses of collateral estoppel, failure to state claims for which relief may be granted, the Court's lack of subject matter jurisdiction, and the illegalities of Plaintiff's conduct, among others. (*Id.*)

Defendants asserted counterclaims for: (1) Plaintiff's violations of North Carolina's Consumer Finance Act, N.C. Gen. Stat. § 53-165, *et seq.*, because Plaintiff charged Defendants annual rates of interest that "far exceed the maximum annual rate of interest allowed by" the Act; (2) Plaintiff's violations of N.C. Gen. Stat. § 75-1.1, maintaining that Plaintiff's violations of the Consumer Finance Act constitute violations of North Carolina's Unfair and Deceptive Practices

Act; and (3) in the alternative, Plaintiff's violations of North Carolina's usury laws, N.C. Gen. Stat. § 24-1.1, *et. seq.* (Counterclaim ¶¶18-35) The counterclaims allege the North Carolina Statutes apply to the loans Plaintiff made to Defendants. (Counterclaim ¶¶19, 30)

On November 7, 2023, Plaintiff filed a Notice of Constitutional Question Pursuant to Fed. R. Civ. P. 5.1(a), stating that "Plaintiff challenges the constitutionality of N.C. Gen. Stat. § 53-190 and N.C. Gen. Stat. § 24-2.1." (Doc. 18)

On November 27, 2023, Plaintiff filed the instant Motion to Dismiss Defendants' Counterclaims, contending: (a) "the South Carolina mandatory choice of law provision contained in the loan agreements bars the claims based on North Carolina law"; (b) N.C. Gen. Stat. § 53-190 "is inapplicable to this proceeding pending in South Carolina"; and (c) the North Carolina Statutes "violate the First and Fourteenth Amendments to the U.S. Constitution by impermissibly restricting commercially protected free speech." (Doc. 23)

On January 4, 2024, pursuant to 28 U.S.C. § 2403(b) and Fed. R. Civ. P. 5.1(c) and 24(a)(1), the State of North Carolina filed a Notice of Intervention to Defend the Constitutionality of North Carolina Statutes, intervening as of right for the limited purpose of defending the constitutionality of the North Carolina Statutes. (Doc. 38)

II. The North Carolina Statutes

A. Background of North Carolina's Usury Laws

North Carolina's General Assembly and its courts have imposed restrictions on usury – the charging and collection of illegal interest – for over two centuries. *Carter v. Brand*, 1 N.C. 255, 257 (1800) (holding verdict "discloses a clear case of usury," for which "no pretext . . . will secure it from the censure of the law."); *Turner v. Peacock*, 13 N.C. 303, 304 (1830) ("The statutes against

. . . usury have always been liberally construed, since they are made for the protection of the unwary and the distressed.").

In the late 1800s, a form of payday lending began, with early "salary lenders" advancing small amounts of cash against a wage earner's next paycheck. For example, in the early twentieth century, the "5 for 6 boys" lent five dollars at the beginning of the week, to be repaid with six dollars on the worker's payday, an effective APR of over 1040%. Christopher L. Peterson, "Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act," 55 Fla. L. Rev. 807, 855, 859 (2003). The term "loan shark" was originally coined to describe these lenders. Because most borrowers were unable to pay off the debt within the loan term – which was usually two weeks – oftentimes borrowers became ensnared in a cycle of "chain debt" in which they repeatedly paid large fees to "roll over" the debt without ever paying it off. *Id*. at 850-55; *see also* Lynn Drysdale & Kathleen E. Keest, "The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Role of Usury Laws in Today's Society," 51 S.C. L. Rev. 589, 618 (2000).

These multiplying stories of borrowers' downward spiral as they fell deeper into debt trying to pay oppressive interest rates led to a push for reform by numerous states. In 1876, the North Carolina General Assembly passed a law to "regulate the rate of interest." The law set the legal rate of interest at six percent (now eight percent), and provided that the "taking, receiving, reserving, or charging a rate of interest greater than is allowed . . . when knowingly done, shall be deemed a forfeiture of the entire interest which the note . . . carries with it . . . and in case a greater rate of interest has been paid, the person by whom it has been paid, . . . may recover back . . . twice the amount of interest paid." 1867-77 N.C. Sess. Law c. 91, sec. 2, 3; N.C. Gen. Stat. §§ 24-1, 24-2.

In 1907, the North Carolina General Assembly passed a law governing small loans, specifically prohibiting the lending of money on the security of household or kitchen furniture at a rate greater than six percent. 1907 N.C. Sess. Law c. 110; N.C. Gen. Stat. § 14-391. Shortly after its passage, the North Carolina Supreme Court upheld the law against a constitutional challenge, finding that it was intended to protect unsophisticated debtors and to protect the debtor's family from the loss of their necessary household goods: "The General Assembly knew that the man who mortgages his household goods does so because he has nothing else to mortgage. He is the poor man . . . [which] make[s] him the easy prey of the usurer. . . . [T]he statute tends to preserve the domestic peace, to promote the family health and prosperity, and is a valid exercise of the police power of the State." *State v. Davis*, 73 S.E. 130, 132 (N.C. 1911).

In the following decades, the North Carolina General Assembly enacted numerous changes to the state's usury laws in an effort to protect North Carolina borrowers from high-cost lending, and myriad attempts by lenders to evade the laws through various subterfuges. Throughout, North Carolina courts upheld the usury laws to protect North Carolina borrowers from usurious loans, holding that loans made in violation of the state's usury laws were void and against the state's public policy. *See, e.g.*, *Morris v. Holshouser*, 17 S.E.2d 115, 119 (N.C. 1941) (upholding amendment to usury law prohibiting the assignment of future wages); *Ripple v. Mortgage & Acceptance Corp.*, 137 S.E. 156, 157 (N.C. 1927) ("An agreement by the parties for the payment of interest in excess of the legal rate, made in this state . . . is unlawful. Such an agreement is in violation of the statute and is contrary to the public policy of this State, as declared by its General Assembly. The agreement is void. . . . The law in this respect is well settled, and generally understood by all persons, firms, or corporations doing business in North Carolina.").

In 1961, the North Carolina General Assembly enacted a comprehensive small loan law, the North Carolina Consumer Finance Act. 1961 N.C. Sess. Law c. 1053; N.C. Gen. Stat. §§ 53-164 to -191 (2023). It was patterned after the Model Uniform Small Loan Act. The drafters sought to provide North Carolina borrowers with access to small loans at reasonable terms that would allow regulated lenders to profit. The Consumer Finance Act exempted loans under $600 (now $25,000) from the state's usury limits – thereby allowing lenders to charge higher than the state's legal rate and other limits set out in Chapter 24, the state's broader interest statute – provided that the lenders were licensed and complied with the Act and regulations promulgated by the North Carolina Commissioner of Banks. N.C. Gen. Stat. §§ 53-166, -176. Under the Consumer Finance Act, the current maximum interest rate allowed on consumer loans of $25,000 or less is 33%.[2] *Id.* § 53-176(a).

B. Enactment of the Challenged Language in N.C. Gen. Stat. § 53-190 and § 24-2.1

1. Enactment Context: The *Aldens* Cases

In the 1970s, a few national mail order companies raised constitutional challenges to the usury laws of numerous states, where the states sought to enforce their usury laws to protect borrowers in their states. In each case, the states' usury laws and their applications to the credit transactions were upheld against constitutional challenge as being a permissible use of states' police powers to protect their citizens from sharp practices by lenders.

[2] North Carolina is not an outlier. Currently, 33 states and the District of Columbia have interest rate caps of 36% or less for small consumer loans. *See* Carolyn Carter, Lauren Saunders, and Margot Saunders, "Predatory Installment Lending in the States: How Well Do the States Protect Consumers Against High-Cost Installment Loans?" National Consumer Law Center Report (Nov. 21, 2023), https://www.nclc.org/resources/predatory-installment-lending-in-the-states-how-well-do-the-states-protect-consumers-against-high-cost-installment-loans-2023/.

More specifically, in a group of cases, Aldens, Inc., which was a national mail order business located in Illinois, challenged the interest rate laws of Pennsylvania, Wisconsin, Oklahoma, and Iowa. *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975) (challenge to Pennsylvania law); *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977) (challenge to Wisconsin law); *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir. 1978) (challenge to Oklahoma law); *Aldens, Inc. v. Miller*, 610 F.2d 538 (8th Cir. 1979) (challenge to Iowa law). In each case, the record showed that Aldens mailed catalogs and advertising flyers to consumers in all 50 states, including the challenged states; and it did multiple millions of dollars' worth of business with each states' consumers, but it only had a physical presence in Illinois. *Id.* Many of Aldens' sales to consumers were financed by Aldens; and Aldens retained a purchase money security interest in merchandise it financed. *Id.* Aldens charged consumers an interest rate of 21% on the financed transactions, which was permitted by Illinois law; this interest rate was higher than the rates allowed by numerous states, including Pennsylvania, Wisconsin, Oklahoma, and Iowa. *Id.* In Aldens' effort to charge the higher interest rate, all of its consumer credit contracts stated that the contracts were made in Illinois and governed by Illinois law. *Id.*

Aldens brought separate declaratory judgment actions against each of the states, contending that each state's usury law unduly burdened interstate commerce under the Commerce Clause and deprived Aldens of due process under the Fourteenth Amendment. The federal appellate courts upheld all the states' laws and their applications to the transactions. For example, in a representative opinion, the Eighth Circuit held:

> In contrast to the insubstantial burdens [the relevant Iowa law] imposes on interstate commerce, the interest of the State of Iowa in protecting its citizens from usurious interest rates in consumer credit transactions is considerable. And, it extends to credit sales solicited of and by Iowa residents in Iowa, notwithstanding that the contract terms declare the contract to be governed by the laws of the state in which the seller is located. It suffices to note that it is necessary for the states to enact

> reasonable consumer credit legislation to protect this public interest, for in the power of the lender to relieve the wants of the borrower lies the germ of oppression.
>
> Aldens' imposition of a usurious interest charge violates the express public policy of the state that no Iowan shall pay more than that prescribed by [Iowa law] on his consumer credit transaction solicited in Iowa. This concern of the state to prohibit usurious loans to its residents is sufficient to surmount the burdens placed on interstate sellers to conform to the provisions of [Iowa law].

Miller, 610 F.2d at 540 (cleaned up).

> In a similar opinion, the Tenth Circuit held:
>
> It is clear from the times prior to *International Shoe* that the state can regulate the consequences of commercial transactions on its citizens which arise or are directed from outside its borders . . . . It is apparent here . . . that the state's interest in the cost of credit extended for goods sold to its residents is sufficient to overcome due process objections. The degree of interest by the State of Oklahoma in this subject is clearly sufficient to support the Oklahoma Code against the due process attack. Physical presence of Aldens in Oklahoma is not required to subject its credit rates to state regulation in transactions with Oklahoma residents.

Ryan, 571 F.2d at 1161; *see also Packel*, 524 F.2d at 47-49; *LaFollette*, 552 F.2d at 750-53; *State ex rel. Meierhenry v. Spiegel, Inc.*, 277 N.W.2d 298, 301-02 (S.D. 1979) (holding, under similar facts, "the strong public policy in South Dakota regarding maximum interest rates . . . invalidates the governing law agreement of the parties" and the South Dakota law did not place an excessive burden on interstate commerce "when weighed against the local benefits and protections of the law").

2. 1979 Amendment to North Carolina Law Alters § 53-190 and Adds § 24-2.1

Plaintiff's constitutional arguments in its motion to dismiss are wholly premised on the language added by a 1979 amendment to North Carolina usury laws. That year, the North Carolina General Assembly passed a bill, included in the Appendix, to clarify the applicability of North Carolina's usury laws to out-of-state lenders. 1979 N.C. Sess. Law c. 706. The bill was passed against the backdrop of out-of-state companies advertising, soliciting, and extending credit to

consumers in North Carolina, together with the declaratory judgment actions described above having been brought against numerous states seeking to avoid application of their usury laws.

The 1979 bill both amended the Consumer Finance Act to add new language to section 53-190, and it added a new section, section 24-2.1, to the general usury law in Chapter 24. The Act stated it was "An Act to Amend Various Credit Laws To Specifically Include Mail Order Transactions." The preamble to the bill declared, in part:

> Whereas, the provisions of [sic] Consumer Finance Act which define the scope of the act to out-of-State companies are somewhat ambiguous; and
>
> Whereas, the interest and usury laws of North Carolina do not expressly set forth provisions concerning the application of those laws to transactions involving borrowers located in this State and lenders located in another state; and
>
> Whereas, it is the purpose of this bill to set forth specifically the application of North Carolina laws to certain transactions in which some, but not all of the parties reside in North Carolina;

1979 N.C. Sess. Law c. 706, preamble.

Since its original enactment in 1961, section 53-190 of the Consumer Finance Act has prohibited the enforcement in North Carolina of loans made outside the state that exceed the rates and charges permitted by the act. 1961 N.C. Sess. Law c. 1053, sec. 1 (adding N.C. Gen. Stat. § 53-190); *see also* 1967 N.C. Sess. Law c. 769, sec. 2 (adding text now appearing in N.C. Gen. Stat. § 53-190(c)). The 1979 amendment added the following clause that appears in section 53-190(a): "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." 1979 N.C. Sess. Law c. 706, sec. 2. The 1979 amendment also added subsection (b) to section 53-190: "If any lender or agent of a lender who makes loan contracts outside this State in the amount or of the value of three thousand dollars ($3,000) 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."[3] *Id*.

Finally, the 1979 amendment added a new section, section 24-2.1, to Chapter 24, which is the general interest rate statute of North Carolina. Chapter 24 of the North Carolina General Statutes sets out laws applying to a broader range of loans made in North Carolina, such as mortgage loans, revolving credit, and other loans, that are outside the scope of small consumer loans that are expressly governed by the Consumer Finance Act. The 1979 amendment added the following language to Chapter 24:

> § 24-2.1. Transactions governed by Chapter. – For purposes of this Chapter, any extension of credit shall be deemed to have been made in this State, and therefore subject to the provisions of this Chapter if the lender offers or agrees in this State to lend to a borrower who is a resident of this State, or if such borrower accepts or makes the offer in this State to borrow, regardless of the situs of the contract as specified therein. Any solicitation or communication to lend, oral or written, originating outside of this State, but forwarded to and received in this State by a borrower who is a resident of this State, shall be deemed to be an offer or agreement to lend in this State. Any solicitation or communication to borrow, oral or written, originating within this State, from a borrower who is a resident of this State, but forwarded to, and received by a lender outside of this State, shall be deemed to be an acceptance or offer to borrow in this State.

1979 N.C. Sess. Law c. 706, sec. 3.

Thus, by enacting the above clarifications following the *Aldens* cases, the North Carolina General Assembly sought to make clear that North Carolina usury law would apply to protect North Carolina borrowers when out-of-state lenders actively solicited or communicated with North Carolina resident borrowers in North Carolina, or otherwise engaged in substantial activity in North Carolina, and when lenders actually made loans to North Carolina borrowers – but that

[3] The loan amount has been increased several times since 1979, and it is now $25,000. 2023 N.C. Sess. Law c. 61, sec. 1.

North Carolina law would not apply where there was no connection whatsoever to the State of North Carolina.[4]

C. Current Law

Under North Carolina usury laws' remedy provisions, when a usurious small loan is made to a consumer, the loan is void; the lender forfeits the principal and interest on the loan; the loan cannot be enforced in North Carolina; and a borrower may recover twice the interest paid on the usurious loan.[5] N.C. Gen. Stat. §§ 53-166(d), 53-190(a), 24-2, 24-2.1. The counterclaims in this case are seeking relief under those provisions. (Counterclaim ¶¶20, 34)

ARGUMENT

Plaintiff has moved to dismiss Defendants' counterclaims on three grounds, including that they "violate the First and Fourteenth Amendments to the U.S. Constitution by impermissibly restricting commercially protected free speech." (Doc. 23 at 2) Plaintiff's motion should be denied because Plaintiff is litigating the motion to dismiss on the faulty premise that it can challenge the

[4] The above provisions in North Carolina's law are not unique. For example, the Pennsylvania law challenged by Aldens, which was upheld by the Third Circuit prior to the North Carolina General Assembly's passage of the 1979 bill, contained an almost identical provision: "Any solicitation or communication to sell, verbal or written, originating outside the Commonwealth of Pennsylvania but forwarded to and received in Pennsylvania by a resident buyer of Pennsylvania shall be construed as an offer or agreement to sell in Pennsylvania." *Packel*, 524 F.2d at 42 (quoting 12 Pa. Cons. Stat. Ann. § 6304(b)). In addition to Pennsylvania, the laws of Kentucky and California, among others, contain similar provisions. *See* Ky. Rev. Stat. Ann. § 360.100(5) ("Any oral or written solicitation or communication to lend originating outside of Kentucky, but forwarded to and received in Kentucky by a borrower who is a resident of Kentucky, shall be deemed to be an offer or agreement to lend in Kentucky and, therefore, subject to this section."); Cal. Civ. Code § 1802.19 (providing that "any solicitation or communication" to sell under a retail installment credit contract originating outside the state, but forwarded to a resident buyer in the state "shall be deemed to be an offer or agreement to sell in this state.").

[5] The violation of the usury laws also constitutes a violation of North Carolina's Unfair and Deceptive Practices Act, N.C. Gen. Stat. § 75-1.1, as "violations of statutes designed to protect the consuming public and violations of established public policy may constitute unfair and deceptive practices." *State ex rel. Cooper v. NCCS Loans, Inc.*, 624 S.E.2d 371, 374 (N.C. App. 2005).

North Carolina Statutes' application to a lender whose sole contact with North Carolina is through speech, and because the North Carolina Statutes do not violate the First Amendment even if analyzed based on the hypothetical application raised by Plaintiff.

I. PLAINTIFF CANNOT PURSUE A MOTION TO DISMISS BASED ON THE NORTH CAROLINA STATUTES' APPLICATION TO A LENDER WHOSE SOLE CONTACT WITH NORTH CAROLINA IS THROUGH SPEECH

Plaintiff's First Amendment argument for dismissing the counterclaims is premised on the assertion that the North Carolina Statutes "purport to regulate loans . . . merely as a result of a discussion or a solicitation with a North Carolinian while that person is located in North Carolina." (Pl's Mem. (Doc. 23-1) at 15-16) But even if Plaintiff were right that North Carolina's usury laws could theoretically be enforced on the basis of speech alone, that is not the situation at issue in this case. Instead, the counterclaims allege significant conduct in North Carolina, including:

- "Auto Money regularly enters into North Carolina for collection purposes, to scout and photograph collateral motor vehicles and to take possession of North Carolina titled motor vehicles." (Counterclaim ¶9; *see also id.* ¶16)
- "Auto Money has registered with the North Carolina DMV in order to place liens upon North Carolina motor vehicle titles and does, in fact, regularly place liens on North Carolina motor vehicle titles." (Counterclaim ¶10; *see also id.* ¶11(*i*))
- "Auto Money offered its unlawful loan products at a time when Counterclaimants were physically in the state of North Carolina." (Counterclaim ¶11(e))
- "Auto Money received acceptances for its offers of its unlawful loan products at a time when Counterclaimants were physically in the state of North Carolina." (Counterclaim ¶ 11(f); *see also id.* ¶16)

- "Auto Money intentionally and regularly accept[s] loan payments from North Carolina consumers while those consumers are physically in the state of North Carolina by mail, telephone debit card payments, online payments, MoneyGram and by Western Union." (Counterclaim ¶15; *see also id.* ¶11(h)).

The North Carolina Court of Appeals has held such allegations are sufficient to bring a loan within the scope of the North Carolina Statutes. *See Wall v. Automoney, Inc.*, 877 S.E.2d 37, 49 (N.C. Ct. App. 2022) (citing a plaintiff's allegations that the South Carolina lender "used the DMV to perfect their security interest, and repossessed cars in North Carolina" as examples of why section 53-190(a) applied); *Troublefield v. Automoney, Inc.*, 876 S.E.2d 790, 804 (N.C. Ct. App.2022) (holding a plaintiff's allegations that the South Carolina lender "offer[ed] or agree[d] in [North Carolina] to lend" brought the lender within the scope of section 24-2.1(a)).

These allegations go well beyond potentially subjecting Plaintiff to liability for "mere[] . . . discussion or . . . solicitation." (Pl's Mem. at 15-16) Since the counterclaims' allegations must be accepted as true for purposes of ruling on the motion to dismiss, Plaintiff's constitutional defense fails on its own terms in the current procedural posture. *See Williams v. Unum Grp. Corp.*, No. 3:17-cv-01814-CMC, 2017 U.S. Dist. LEXIS 231491 (D.S.C. Oct. 18, 2017) ("A counterclaim is subject to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure only if, after accepting all well-pleaded allegations as true, it appears certain the party advancing the counterclaim cannot prove any set of facts that entitles him (or it) to relief.").

Moreover, because Plaintiff's First Amendment challenge is based on only its *commercial* speech (Doc. 23 at 2), Plaintiff cannot rely on the same kinds of theoretical defects that often underpin First Amendment challenges. While the overbreadth doctrine typically allows a party to pursue some First Amendment challenges to statutes raising hypothetical applications not actually

applicable to itself, *see, e.g.*, *Legends Night Club v. Miller*, 637 F.3d 291, 297 (4th Cir. 2011), that doctrine is inapplicable to commercial speech. As the United States Supreme Court has held in no uncertain terms: "[I]t is irrelevant whether [a law] has an overbroad scope encompassing protected commercial speech of other persons, because the overbreadth doctrine does not apply to commercial speech." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 496-97 (1982); *see also United Seniors Ass'n v. SSA*, 423 F.3d 397, 407 (4th Cir. 2005). The Supreme Court has further explained that "a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground – our reasoning being that commercial speech is more hardy, less likely to be 'chilled,' and not in need of surrogate litigators." *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 481 (1989). Therefore, Plaintiff cannot litigate about the validity of the North Carolina Statutes as applied to a hypothetical lender whose only connection to North Carolina is directing speech into the state. Instead, Plaintiff must prove that the company itself has suffered unconstitutional regulation.

Accordingly, Plaintiff's purported First Amendment defense is fatally premature at the motion to dismiss stage. Only if Plaintiff can demonstrate at a later stage of this litigation that it is actually being subjected to the North Carolina Statutes solely based on directing commercial speech into the state – notwithstanding the counterclaims' allegations to the contrary and the facts it has affirmatively alleged in its own Complaint about its contacts with North Carolina[6] – can it litigate on that premise. It seems highly unlikely such a scenario will be shown given the Third Circuit's determination that car title lending has a clear connection to the borrower's state. *See*

[6] Plaintiff's own Complaint alleges "Plaintiff's . . . contacts with the State of North Carolina related to the Loan are (a) the recording of a lien with the NCDMV . . .; (b) Defendants may have sent payments from North Carolina to Plaintiff in South Carolina . . .; and (c) the Defendants might have made telephone calls to Plaintiff's locations in South Carolina after the Loans were made while the Defendants were located in North Carolina." (Complaint ¶64)

TitleMax of Del., Inc. v. Weissmann, 24 F.4th 230, 239 (3d Cir. 2022) ("[A car title lender's] transactions with Pennsylvanians involve both loans and collection, and these activities do not occur 'wholly outside' of Pennsylvania. [The lender's] transactions involve more than a simple conveyance of money at a brick-and-mortar store in a location beyond Pennsylvania's border."). However, the Court can leave that question for another day.

II. THE NORTH CAROLINA STATUTES REGULATE CONDUCT, NOT SPEECH, AND THEREFORE DO NOT IMPLICATE THE FIRST AMENDMENT

Even if Plaintiff's challenge was not premature for the reasons explained above, it falters out of the gate because the North Carolina Statutes constitute regulation of conduct and not speech. Accordingly, Plaintiff cannot use the First Amendment to defend itself from its conduct of making usurious loans.

A. The North Carolina Statutes Prevent Making Usurious Loans, Not Speaking About Them

The plain language of North Carolina's usury law, as well as holdings by North Carolina courts, make manifest that the illegal conduct targeted by the statutes is not speech, but rather the *actual making* of, or entering into, a loan contract containing usurious interest or unauthorized charges, and attempting to collect, or collecting, on that loan. Indeed, as held by North Carolina courts: "Interest is the premium allowed by law for the use of money, while usury is the taking of more for its use than the law allows. It is an illegal profit." *Yarborough v. Hughes*, 51 S.E. 904, 907 (N.C.1905). "The elements of usury are [1] *a loan* or forbearance of the collection of money, [2] an understanding that the *money owed* will be paid, [3] *payment or an agreement to pay interest at a rate greater than allowed by law*, and [4] the lender's corrupt intent to receive more in interest than the legal rate permits for use of the money loaned." *Swindell v. Fed. Nat'l. Mortg. Ass'n*, 409 S.E.2d 892, 895-96 (N.C. 1991) (citations omitted) (emphasis added). Each of these elements must

be satisfied to maintain a cause of action for usury and to demonstrate a violation of North Carolina's usury law, and to thereby recover under the law. *Id.*

The fact that the usury law targets conduct, not speech, is manifest in the law's definition of usury, as well as the law's remedies for a violation of the statute. The Consumer Finance Act prohibits "engag[ing] in the business of lending . . . *and contract[ing] for, exact[ing], or receiv[ing]*, directly or indirectly, *on or in connection with any such loan,* any charges whether for interest, compensation, consideration, or expense, or any other purpose whatsoever, which in the aggregate are greater than permitted by" either Chapter 24 of the North Carolina General Statutes or the Consumer Finance Act. N.C. Gen. Stat. § 53-166(a) (emphasis added). Similarly, the broader usury statute in Chapter 24 defines usury as "[t]he *taking, receiving, reserving or charging* a greater rate of interest than permitted by this chapter or other applicable law." *Id*. § 24-2 (emphasis added).

The concomitant statutory remedy for usury in the Consumer Finance Act is that the loan "is void, and the licensee or any other party in violation shall not collect, receive, or retain any principal or charges whatsoever *with respect to the loan*." *Id*. § 53-166(d) (emphasis added). Similarly, under Chapter 24, the express "[p]enalty for usury" is "a forfeiture of the entire interest *which the note or other evidence of debt carries with it*, or which has been agreed to be paid thereon. And in case a greater rate of interest *has been paid,* the person or his legal representatives or corporation by whom it has been paid, may recover back twice the amount of interest paid." *Id*. § 24-2 (emphasis added). Thus, the law penalizes the actual making of a usurious loan; if no usurious loan is actually contracted for, there is no violation and there is no resulting remedy under the plain language of the statute.

In evaluating whether the North Carolina Statutes regulate speech or conduct, they must be read in the overall context of the intent and purpose of the law of usury – namely, the prohibition

against lenders' making illegal high-cost loans to North Carolina residents, and to safeguard against lenders' attempts to evade the law through contractual or other means. Section 53-190(a) reinforces North Carolina's public policy against usury by providing that usurious contracts for small consumer loans deemed to have been "made outside this State" will not be enforced in the state. However, this prohibition does not apply – the loan will be enforced – where "all contractual activities, including solicitation, discussion, negotiation, offer, acceptance, signing of documents, and delivery and receipt of funds, occur entirely outside North Carolina," thereby judiciously withholding the applicability of North Carolina law where there is clearly no contact with the state. *Id*. § 53-190(a). When a lender makes a loan outside the state (or contractually deems the loan to have been made outside the state), but "comes into this State to solicit or otherwise conduct activities in regard to such loan contracts," then the lender is subject to the requirements of the Consumer Finance Act. *Id*. § 53-190(b).

Similarly, section 24-2.1(a) provides that North Carolina law will generally govern loan contracts made with North Carolina resident borrowers, notwithstanding lenders' insertion of contractual choice-of-law provisions naming other states' law (typically more favorable to lenders but more detrimental to North Carolina borrowers) as the governing law or contractual provisions deeming the loans to have been made in another state (with laws more favorable to the lender). The section clarifies that, "regardless of the situs of the contract," "any extension of credit shall be deemed to have been made in this State . . . if the lender offers or agrees in this State to lend" to a North Carolina resident borrower, or if a North Carolina borrower "accepts or makes the offer in this State to borrow." *Id*. § 24-2.1(a).

To further clarify, section 24-2.1(b) and (c) expounds on "offer," "acceptance," and "agreement to lend" when an "extension of credit" has been made under subsection (a) – for

purposes of determining where the loan is made, and consequently, whether North Carolina law applies. Thus, subsection (b) explains: "Any solicitation or communication to lend, oral or written, originating outside of this State, but forwarded to and received in this State by a borrower who is a resident of this State, shall be deemed to be an offer or agreement to lend in this State." *Id*. § 24-2.1(b). The corollary is set forth in subsection (c), which states: "Any solicitation or communication to borrow, oral or written, originating within this State, from a borrower who is a resident of this State, but forwarded to, and received by a lender outside of this State, shall be deemed to be an acceptance or offer to borrower in this State." *Id*. § 24-2.1(c).

Plainly, the above provisions are not restrictions on speech, nor are they intended to restrict speech. They do not contain any prohibitions on solicitations or advertising, nor do they place any content restrictions on any speech. Instead, the provisions serve to explicate some of the circumstances when lenders' lending activities – because of their activities directed to North Carolina borrowers located in the state, or other activities directed towards the state or in the state – subject lenders to North Carolina's usury law for the purpose of protecting North Carolina residents. Such provisions are a regulation of lending conduct that does not implicate the First Amendment.

The fact that the North Carolina Statutes regulate conduct, and not speech, is further demonstrated when they are contrasted with another provision of the Consumer Finance Act. Section 53-183, which is titled "Advertising, broadcasting, etc., false or misleading statements," provides that:

> No licensee subject to th[e Consumer Finance Act] shall advertise, display, distribute, telecast, or broadcast or cause or permit to be advertised, displayed, distributed, telecasted or broadcasted, in any manner whatsoever, any false, misleading, or deceptive statement or representation with regard to the rates, terms or conditions of loans. The Commissioner [of Banks] may require that charges or rates of charge, if stated by a licensee, be stated fully and clearly in such manner as

> he may deem necessary to prevent misunderstanding thereof by prospective borrowers. The Commissioner may permit or require licensees to refer in their advertising to the fact that their business is under State supervision, subject to conditions imposed by him to prevent an erroneous impression as to the scope or degree of protection provided by th[e Consumer Finance Act].

Id. § 53-183. This is the type of speech-regulating statute to which the First Amendment analysis is relevant, rather than the North Carolina Statutes that determine the situs of lending activities.

B. Plaintiff's Argument to the Contrary Relies on Inapposite Cases Involving Express Restrictions on Speech

Plaintiff points to no case – in North Carolina or elsewhere – when mere advertising about loan terms, or truthful speech about legal loans – without more – resulted in liability under a state's usury laws. And, it cannot. Instead, it is always *conduct* – the making of the loans at usurious interest rates, and attempting to collect on those loans – that subjects Plaintiff and other lenders to North Carolina's usury laws. The counterclaims in this case are premised on just such a theory. (*See, e.g.*, Counterclaim ¶20 ("The acts of Auto Money in charging Counterclaimants excessive and unlawful annual interest rates are clear violations of the North Carolina Consumer Finance Act . . . .")

A considered reading of the First Amendment cases Plaintiff cites in support of its arguments reveals that they are wholly inapposite. In each of the thirteen First Amendment cases Plaintiff cites – with the exception of *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484 (4th Cir. 2007), which can be distinguished on its facts – a statute, ordinance, regulation, or directive by a regulator expressly prohibited or restricted protected speech, and imposed direct penalties for that specific speech. Indeed, in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980), Central Hudson, an electric utility, challenged a regulation of the New York Public Service Commission that *completely banned all promotional advertising* by all electrical utilities. *Id*. at 558-60. The provisions of the North Carolina Statutes

regulating lenders' making of usurious loans in North Carolina are not remotely analogous to the New York Public Service Commission's complete ban on electrical utilities' advertising to encourage energy conservation.

The other First Amendment cases cited by Plaintiff similarly involved express bans on protected speech, not conduct, making them inapplicable here. For example, in *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Supreme Court addressed a Virginia statute that expressly prohibited, and made it a crime, for any person "by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, [to] encourage or prompt the procuring of abortion or miscarriage." *Id*. at 812-13. In *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983), the challenged law specifically prohibited the mailing of unsolicited advertisements for contraceptives. *Id*. at 61-62. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the state statute at issue completely banned all price advertising for alcoholic beverages, except at the place of sale. *Id*. at 489-90; s*ee also Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011) (Vermont law prohibited the sale, disclosure, and use of prescriber-identifying information for marketing purposes); *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994) (Florida Board of Accountancy reprimand for truthfully using designations of CPA and CFP in advertising); *Edenfield v. Fane*, 507 U.S. 761 (1993) (Florida Board of Accountancy rule prohibiting CPAs from engaging in in-person solicitations to obtain new clients); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013) (Arizona statute prohibiting day laborers' solicitation for employment from a stopped car); *Katt v. Dykhouse*, 983 F.2d 690 (6th Cir. 1992) (ruling by Michigan Insurance Commissioner declaring that Michigan anti-rebating statute barred insurance agent from providing his clients with information concerning availability of life insurance rebates in Florida); *Wash. Mercantile Ass'n v. Williams*, 733 F.2d 687 (9th Cir. 1984) (state statute banning advertisements

for sale of drug paraphernalia); *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916 (6th Cir. 1980) (municipal drug paraphernalia ordinances banned advertisements for drug paraphernalia, including paraphernalia legally available outside of city limits), *vacated and remanded on other grounds*, 456 U.S. 968 (1982); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Worcester*, 851 F. Supp. 2d 311 (D. Mass. 2012) (city ordinance prohibiting outdoor advertising of tobacco products).

Although *Carolina Trucks* did not involve a patent ban on protected speech, its facts are inapplicable to the instant case. In *Carolina Trucks*, a South Carolina statute, the Dealers Act, prohibited out-of-state vehicle manufacturers from selling, directly or indirectly, motor vehicles "to a consumer in this State" except through new motor vehicle dealers holding authorized franchises within South Carolina. 492 F.3d at 488-89. Carolina Trucks, a South Carolina Volvo dealer, brought an action against manufacturer Volvo for truck sales that were made by a Volvo subsidiary in Georgia to purchasers with South Carolina addresses, which Carolina Trucks contended violated the Dealers Act. *Id*. at 487.

The Fourth Circuit held that the text of the Dealers Act was ambiguous, and that the language "in this State" did not clarify whether it meant a consumer who resided in South Carolina regardless of where the transaction occurred, or if it referred to transactions occurring within South Carolina's borders regardless of the residence of the consumer. *Id.* at 489. Under South Carolina rules of statutory construction, the Fourth Circuit construed the act to mean sales that were made within South Carolina's physical borders. *Id.*

As an additional argument, Carolina Trucks contended that, because Volvo had advertised in South Carolina, any sales to South Carolina residents should be presumed to have occurred in South Carolina. *Id*. at 490-91. However, the Fourth Circuit observed there was no evidence that

any of the South Carolina customers who had bought trucks directly from Volvo had seen and acted upon any of Volvo's advertisements, so the challenged sales could not be attributed to Volvo's advertisements in South Carolina. *Id*. at 492.

In the instant case, in contrast, Defendants have alleged Plaintiff solicited them for loans in North Carolina, discussed loans with them and offered loans to them in North Carolina, and that they acted on Plaintiff's conduct by driving to South Carolina to sign loan documents. (Counterclaim ¶¶8-16) Further, *Carolina Trucks* involved sales of goods that were completed at the point of the sale in another state, rather than loans that involve ongoing contacts with consumers in their home state, including placement of liens, payments by borrowers, collections activity, and repossessions. Indeed, the Third Circuit has readily distinguished *Carolina Trucks* from car title lending transactions: "Unlike the sale of a good, a [car title] loan has a longer lifespan: it involves later payments and permits a physical taking (repossession) from inside another state. Because [the Delaware-based car title lender] both receives payment from within Pennsylvania and maintains a security interest in vehicles located in Pennsylvania that it can act upon, its conduct is not 'wholly outside' of Pennsylvania." *Weissmann,* 24 F.4th at 239 & n.10 (citing *Carolina Trucks*). Such reasoning equally renders *Carolina Trucks* inapplicable to this case.

III. EVEN IF THE NORTH CAROLINA STATUTES REGULATE SPEECH, THEY DO NOT VIOLATE THE FIRST AMENDMENT

Any First Amendment-protected speech at issue in this case is commercial speech. (Doc. 23 at 2) The Supreme Court's decisions "have recognized the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993). This means the relevant speech "can be subjected to modes of regulation that might be impermissible in the realm of noncommercial expression" and "[s]trict scrutiny is . . .

improper when reviewing laws" regulating it. *Recht v. Morrisey*, 32 F.4th 398, 408 (4th Cir. 2022); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("[W]e . . . have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values . . . ."). The North Carolina Statutes comfortably satisfy the First Amendment analysis applicable to commercial speech.

A. When Statutes Validly Regulate Economic Conduct, Incidental Burdens on Speech Are Permissible and Do Not Violate the First Amendment

As set forth above, the North Carolina Statutes are part of a regulatory scheme regulating the making of loans; they are not intended to regulate or restrict speech, and they do not do so. However, even if the provisions could be construed as restricting speech, any such restriction is an incidental effect of a permissible government regulation of conduct that does not violate the First Amendment.

Recognizing the "'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech," *Edge Broad.*, 509 U.S. at 426, courts have routinely upheld government regulation focused on economic conduct to protect the public interest when a restriction on commercial speech is an incidental effect of such regulation. "[I]t has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. . . . [T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik*, 436 U.S. at 456.

For example, the Fourth Circuit has held a Virginia law that required out-of-state securities brokers who advertised in Virginia, and did business with Virginia customers, to register with the State Corporation Commission did not violate the First Amendment because "any inhibition of th[e] right [to advertise] is merely the incidental effect of observing an otherwise legitimate

regulation." *Underhill Assocs., Inc. v. Bradshaw*, 674 F.2d 293, 296 (4th Cir. 1982); *see also Ford Motor Co. v. Tex. DOT*, 264 F.3d 493, 506 (5th Cir. 2001) (holding a Texas statute that prohibited auto manufacturers from acting as dealers in Texas, which resulted in Ford being unable to advertise preowned vehicles sold through certain channels, was not a violation of the First Amendment because "the restriction on Ford's ability to advertise on their website is only incidental to [the statute's] prohibition on Ford's right to engage in the economic activity of retailing automobiles"). Notably, the Fourth Circuit in *Underhill Associates* held there was no First Amendment violation even though the brokers there were seeking to advertise conduct that was legal in other states where they were registered. 674 F.2d at 295-96. Accordingly, the North Carolina Statutes' (at most) incidental burden on Plaintiff's speech about activities legal in South Carolina similarly complies with the First Amendment.

B. The North Carolina Statutes Satisfy the *Central Hudson* Test Even if They Impose More than an Incidental Burden on Speech

Even if the North Carolina Statutes impose more than an incidental burden on commercial speech, they are constitutional under the applicable analysis. Courts apply the "four-part intermediate-scrutiny analysis from *Central Hudson*" in reviewing First Amendment challenges to laws imposing more than an incidental burden on commercial speech. *Recht*, 32 F.4th at 408. These four prongs are:

- First, "whether the expression is protected by the First Amendment." To satisfy that test, among other things, the expression must "concern lawful activity." A challenge that fails this test must be rejected.
- Second, "whether the asserted governmental interest is substantial."
- Third, "whether the regulation directly advances the governmental interest asserted."

- Fourth, "whether [the challenge law] is not more extensive than is necessary to serve that interest. . . . Here, the State is not required to employ the least restrictive means conceivable."

Id. at 408, 414 (quotation marks omitted). Moreover, "[t]hese four parts are not entirely discrete; they are all important and, to a certain extent, interrelated, as the answer to one part may inform a judgment concerning the other three." *Id*. at 408 (cleaned up).

Plaintiff's argument that the North Carolina Statutes are unconstitutional fails at each step of the *Central Hudson* test. Even assuming the challenged laws implicate speech contrary to the arguments in Section II, the commercial speech at issue fails the first step because it concerns unlawful activity. Car title loans with the interest rates charged by Plaintiff – who acknowledges posting a 300% interest rate in its South Carolina stores (Complaint ¶48) – violate North Carolina law. *See* N.C. Gen. Stat. § 53-176(a) (maximum allowable rate of 33% for loans not exceeding $12,000 made by licensed lenders); *id*. § 24-1.1(a)(1), (c) (maximum allowable rate of 16% for loans under $25,000 by non-licensed lenders).

Plaintiff nevertheless argues it satisfies *Central Hudson*'s first step because its lending is legal under South Carolina law and South Carolina is "where the loans are in-fact made." (Pl's Mem. at 15-16) Such argument assumes it is dispositive for purposes of determining lawfulness under the *Central Hudson* test that North Carolina residents had to visit a storefront in South Carolina as part of the loan origination process. However, as explained earlier, the whole purpose of the challenged North Carolina laws is to determine the situs of loans where various aspects of the lending process take place on both sides of the border. *See also Weissmann*, 24 F.4th at 239 (cross-border car title lending "is not 'wholly outside' of" borrower's state).

Accordingly, this case is wholly unlike the cases cited in Plaintiff's first-step analysis (Pl's Mem. at 15), like *Bigelow v. Virginia*, in which there was no question that the transaction being advertised would occur entirely in another state. Instead, this case is most like *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), in which the Supreme Court "reject[ed] categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction otherwise proper under the Due Process Clause."[7] *Id*. at 780 n.12; *see also Ryan*, 571 F.2d at 1161 (relying on personal jurisdiction case law to uphold Oklahoma's regulation of mail order lending). Because the North Carolina General Assembly has determined in the unique context of lending that certain commercial speech (along with numerous non-speech acts) causes a lending transaction to take place in North Carolina, the speech at issue involves illegal conduct regardless of its status under South Carolina law.

The North Carolina Statutes also satisfy the second, third, and fourth steps of the *Central Hudson* test and thus are constitutional. They satisfy the second step because North Carolina has a substantial interest in protecting its residents from high-cost lending as exhaustively discussed at the beginning of this memorandum. Indeed, the North Carolina General Assembly has expressly codified it is a "paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws." N.C. Gen. Stat. § 24-2.1(g). Similarly, the North Carolina courts have held it is the "fundamental public policy of North Carolina to broadly construe and apply the [North Carolina Consumer Finance Act] to cover loan contracts made outside this state," at least so long as all activities related to the loan do not occur entirely outside the state. *Wall*, 877 S.E.2d at 49 & n.3; *see also Hengle v. Treppa*, 19 F.4th 324,

[7] Plaintiff's present motion does not challenge the constitutionality of the North Carolina Statutes on any ground but the First Amendment.

351-52 (4th Cir. 2021) (holding Virginia's usury law was a "fundamental policy of the State" and therefore voided a loan's choice-of-law provision). Plaintiff's argument to the contrary again wrongly depends on the premise that South Carolina is the exclusive situs of the transactions (Pl's Mem. at 17-18), so fails for the same reason as its argument on the first *Central Hudson* step.

The North Carolina Statutes satisfy the final two *Central Hudson* steps because North Carolina's substantial interest in protecting its residents from high-cost lending is directly advanced by appropriately tailored laws. As noted earlier, all of the challenged provisions of these laws were enacted by the North Carolina General Assembly in 1979 to address jurisdictional uncertainty created by lending offers made by mail order companies in the 1970s that resulted in one litigious company challenging states' ability to regulate its interest rates in four different federal circuit courts. 1979 N.C. Sess. Law c. 706, sec. 2-3.[8] These uncertainties have continued in more recent years through schemes like predatory lending offers made over the internet. *See Quick Payday, Inc. v. Stork*, 549 F.3d 1302, 1303, 1305 (10th Cir. 2008) (holding Kansas usury law that covered loans where "the creditor induces the consumer who is a resident of this state to enter into the transaction by solicitation in this state by any means, including but not limited to: Mail, telephone, radio, television or any other electronic means" was a constitutionally permissible regulation of internet-based payday lenders physically located in another state (quoting Kan. Stat. Ann. § 16a-1-201(1)(b) (cleaned up)).

[8] The "Loans made elsewhere" title of section 53-190 dates from the 1961 enactment of the Consumer Finance Act. 1961 N.C. Sess. Law c. 1053, sec. 1. The portions of section 53-190 enacted in 1961 address enforcement of loans made wholly outside North Carolina. *Id*. Accordingly, notwithstanding the repeated use of the "loans made elsewhere" shorthand in Plaintiff's memorandum, the statutory title was not directed to the portion of section 53-190 (or section 24-2.1) actually challenged in this lawsuit, which was added in 1979.

Allowing North Carolina's interest rate caps to apply when "solicitation or communication to lend," or "solicitation [or] discussion" related to the transaction, occur within the State of North Carolina is necessary to capture predatory lending in its various twenty-first century forms. N.C. Gen. Stat. §§ 24-2.1, 53-190(a). Moreover, limiting the applicability of North Carolina's interest rate caps to instances when repossession activity occurs in North Carolina, or when misleading communications are sent into the state, as Plaintiff proposes (Pl's Mem. at 19-20), would be substantially underinclusive of North Carolina's substantial interest in protecting its residents from multiple types of high-cost lending.

Indeed, Plaintiff concedes regulating loans solicited through "'mail order' transactions" poses no First Amendment problem. (Pl's Mem. at 15) Yet its arguments for why the challenged statutes do not directly advance North Carolina's interests, or are more extensive than necessary, fault the North Carolina General Assembly for including terms like "solicitation" in the North Carolina Statutes. (Pl's Mem. at 19, 21) The legislature should not be held to have violated the First Amendment by using terms well-designed to create a jurisdictional hook to regulate mail order and internet payday lending. *See Quick Payday,* 549 F.3d at 1304 (describing internet payday lender as having "sent solicitations by e-mail directly to previous borrowers"); *LaFollette*, 552 F.2d at 747 (describing mail order company as having "solicited approximately 350,000 Wisconsin residents by mailing them catalogs and 'flyers'"). This is particularly true because North Carolina "is not required to employ the least restrictive means conceivable" to regulate commercial speech in a constitutionally permissible way. *Recht*, 32 F.4th at 414. Accordingly, for the above reasons, even if the *Central Hudson* test is applied, the North Carolina Statutes amply satisfy the test, and do not violate the First Amendment.

CONCLUSION

The Court should deny Plaintiff's motion to dismiss the counterclaims on constitutional grounds.

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Respectfully submitted,

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