



**IT IS ORDERED** as set forth below:

**Date: December 23, 2009**

**W. H. Drake**  
**U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
NEWNAN DIVISION**

<b>IN THE MATTER OF:</b>	:	<b>CASE NUMBERS</b>
	:	
AROUND TOWN TRANSP.	:	BANKRUPTCY CASE
PRODUCTS, LLC,	:	NO. 08-11554-WHD
	:	
Debtor.	:	
_____	:	
	:	
COMFORT CARE TRANSP.	:	
PRODUCTS, LLC,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 09-1084
v.	:	
	:	
ADVANTAGE FUNDING	:	
COMMERCIAL CAPITAL CORP.	:	
AROUND TOWN TRANSP.	:	
PRODUCTS, LLC,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendants.	:	BANKRUPTCY CODE

**ORDER**

Before the Court is the Motion to Dismiss Complaint, filed by Advantage Funding

Commercial Capital Corp. (hereinafter “Advantage”). This matter arises in connection with a complaint filed by Comfort Care Transportation Products, LLC (hereinafter the "Plaintiff"). The Court has determined that this matter constitutes a noncore proceeding over which it lacks subject matter jurisdiction. *See* 28 U.S.C. § 157(b); 1334.

Because this is a noncore proceeding, the Court’s duty is to hear the matter and submit proposed findings of fact and conclusions of law to the District Court for *de novo* review. *See* 28 U.S.C. § 157(c)(1); FED. R. BANKR. P. 9033. Based on the proposed findings and conclusions set forth below, the undersigned recommends that the District Court dismiss the complaint for lack of subject matter jurisdiction.

#### **PROPOSED FINDINGS OF FACT**

Defendant Around Town Transportation Products, LLC (hereinafter the “Debtor”) filed a Chapter 7 petition on May 1, 2009. The Debtor had been in the business of selling customized, retrofitted vans. The Plaintiff purchased five such vans (hereinafter the "Vans") from the Debtor at some time between April 2008 and March 2009, prior to the filing of the Debtor’s petition. The Plaintiff asserts that it paid for the Vans in full and that the Debtor delivered the Vans to the Plaintiff, but did not deliver the titles to the Vans.

On May 26, 2009, Advantage filed an *ex parte* motion for relief from the stay, asserting that it had a perfected security interest in the Vans. On May 28, 2009, this Court entered an order modifying the stay to permit Advantage to exercise its state law rights with

regard to the Vans. On August 11, 2009, Advantage filed a complaint against Phil Colston, Sr., in which it alleged that Colston hid, converted, or transferred collateral in which Advantage had a security interest, including the Vans.

The Plaintiff's counsel contacted Advantage's counsel on August 21, 2009 and requested copies of the titles to the Vans, at which time Advantage's counsel represented that he would have to request the titles from his client. Counsel for Advantage later provided copies of the titles, which had been issued postpetition in the name of Advantage.

The Plaintiff's complaint seeks a determination as to the ownership of the Vans. The Plaintiff asserts that the Vans belonged to the Plaintiff on the petition date because they had been delivered and paid for by the Plaintiff prior to the petition date. Alternatively, the Plaintiff contends that it had a purchase money resulting trust in the Vans and that the titles were held by either the Debtor or Advantage in trust for the Plaintiff. Further, to the extent that Advantage asserts that it had a perfected security interest in the Vans, the Plaintiff asks the Court to determine that the Vans were sold free and clear of Advantage's security interest insomuch as the Plaintiff purchased the Vans from a dealer in the ordinary course of business. Finally, the Plaintiff seeks the entry of an order directing Advantage to turn over the titles to the Vans to the Plaintiff.

Advantage has filed the instant motion to dismiss, asserting that this Court lacks subject matter jurisdiction over this matter because it involves a claim of a nondebtor, located in Texas, against another nondebtor, located in New York. Additionally, the claim

involves titles, which are in the possession of Advantage, to Vans that are possession of the Plaintiff. Advantage also seeks dismissal of the complaint for failure to state a claim upon which relief can be granted.

#### **PROPOSED CONCLUSIONS OF LAW**

Rule 12(b)(1) governs the dismissal of a complaint for lack of subject matter jurisdiction. *See* Fed. R. Bankr. P. 7012 (incorporating Fed. R. Civ. P. 12(b)(1)). When ruling on a motion to dismiss for lack of subject matter jurisdiction, "[a] court must accept the material factual allegations in the complaint as true, but need not draw inferences favorable to the plaintiff." *In re General Media, Inc.*, 335 B.R. 66, 71-72 (Bankr. S.D.N.Y. 2005) (citing *J.S. v. Attica Cent. Schools*, 386 F.3d 107, 110 (2d Cir.2004), cert. denied, --- U.S. ----, 125 S.Ct. 1727, 161 L.Ed.2d 616 (2005)); *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir.1998)). The Court may consider "materials outside of the pleadings to resolve any jurisdictional disputes, but cannot rely on conclusory or hearsay evidence." *Id.* at 72. The Plaintiff has the burden of proving the Court's subject matter jurisdiction by a preponderance of the evidence. *See id.* (citing *Luckett v. Bure*, 290 F.3d 493, 497 (2d Cir.2002)).

Advantage submits that the Court lacks subject matter jurisdiction because the Plaintiff seeks relief with regard to the rights between the Plaintiff and Advantage, third parties who are not debtors before the Court, and with regard to a claim against vehicles that

are not property of the estate and are not in the possession of the estate or the Debtor. Advantage argues that this Court lacks even “related to” jurisdiction over the Plaintiff’s request for declaratory relief, since such relief could have no conceivable effect on the Debtor or on the bankruptcy estate.

This Court is required to examine its subject matter jurisdiction at the earliest opportunity. Pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(a), this Court may exercise “jurisdiction in three categories of civil proceedings: those that ‘arise under title 11,’ those that ‘arise in cases under title 11,’ and those ‘related to cases under title 11.’” *In re Happy Hocker Pawn Shop, Inc.*, 212 Fed. Appx. 811 (11th Cir. 2006).

The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy. The proceeding need not necessarily be against the debtor or the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

*In re Lemco Gypsum, Inc.*, 910 F.2d 784 (11th Cir. 1990).

Having considered the parties' arguments, the Court is persuaded that the requested relief does not implicate property of the estate and would not impact the estate or its administration. The Plaintiff alleges that the Debtor held legal title to the Vans on the petition date and that this legal title was transferred without authorization postpetition, which would mean that legal title to the Vans remained in the Debtor upon filing, thus becoming property of the estate. The titles were transferred, however, and are no longer property of

the estate. The trustee of the estate is the only party with standing to seek to avoid the transfer of the Debtor's legal interest in the Vans, pursuant to section 549, and he has not seen fit to do so.

Further, the purpose of the requested declaratory and injunctive relief is to determine whether the Plaintiff will be permitted to retain possession of the Vans and whether the Plaintiff can obtain possession of the titles to the Vans, without which the Plaintiff would be unable to register and operate the Vans. If the Plaintiff litigates this matter in another forum, and it is determined that Advantage has a superior interest in the Vans and is entitled to retain the titles, the Plaintiff would have a claim against the Debtor for the purchase price of the Vans, which it paid in full before the filing of the Debtor's bankruptcy case. Accordingly, the Plaintiff asserts, the declaratory relief requested could affect the liabilities against the Debtor's estate.

The Court agrees that the Plaintiff may have a claim against the estate for the purchase price of the Vans. If, however, the Plaintiff prevails against Advantage and receives the titles to the Vans, Advantage's secured claim would become an additional unsecured claim against the estate in approximately the same amount as the Plaintiff's claim. Therefore, the outcome of this dispute, whether in the Plaintiff's favor or Advantage's favor, will create an additional unsecured liability against the estate. Further, assuming that the Plaintiff's claim resulted in a significant increase in the unsecured claims against the estate, the true financial impact of such an increase, if any, would be exceedingly slight. According

to the Debtor's schedules, the Debtor has in excess of \$3 million in unsecured claims and approximately \$20,000 in priority tax claims. According to the Trustee's interim report, the estate has \$6,300 in assets to be liquidated and distributed to creditors. Adding an additional \$100,000 to \$150,000 in unsecured claims would have no impact on the distribution to unsecured creditors, who currently already stand to receive no distribution ahead of the priority tax claimants.

For this reason, the Court finds that “related to” jurisdiction does not exist, and this Court lacks subject matter jurisdiction to consider the matter. Having determined that the complaint should be dismissed for lack of subject matter jurisdiction, the Court need not address Advantage's contentions that the complaint should be dismissed for failure to state a claim.

#### **CONCLUSION**

The Court has considered the record in this case in connection with the determination of jurisdictional issues and Advantage's motion to dismiss. Based thereon, the Court submits the above-stated proposed findings of fact and conclusions of law for the District Court’s consideration and de novo review in accordance with 28 U.S.C. § 157(c)(1) and Federal Rule of Bankruptcy Procedure 9033. It is the recommendation of this Court that the Plaintiff's complaint be dismissed for lack of subject matter jurisdiction.

Pursuant to Rule 9033, the Clerk of this Court is **DIRECTED** to serve a copy of this

Order on all parties by mail and note the date of the mailing on the docket.

**END OF DOCUMENT**