New York County Clerk's Index No. 653406/20
Appellate Division–First Department Case No. 2020-04842

Court of Appeals

of the

State of New York

WORTHY LENDING, LLC,

Plaintiff-Appellant,

– against –

NEW STYLE CONTRACTORS, INC.,

Defendant-Respondent.

MOTION FOR LEAVE TO APPEAL

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COURT OF APPEALS
STATE OF NEW YORK

WORTHY LENDING, LLC,	:	
	:	New York County
Plaintiff-Appellant,	:	Index No. 653406/2020
	:	
- against -	:	
	:	**NOTICE OF MOTION**
NEW STYLE CONTRACTORS, INC.,	:	**FOR LEAVE TO**
	:	**APPEAL TO THE**
Defendant-Respondent.	:	**COURT OF APPEALS**

PLEASE TAKE NOTICE, that upon the annexed moving papers, the exhibits thereto, the Record on Appeal in the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, the Decision and Order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered on July 6, 2021, the Notice of Entry thereof dated July 6, 2021, the Briefs filed therein, and upon all of the proceedings previously had in this case, Plaintiff-Appellant Worthy Lending, LLC ("Worthy") will move this Court at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on the 16th day of August, 2021, at the opening of Court, or as soon thereafter as counsel may be heard, for an Order pursuant to CPLR 5516 and 5602(a) and 22 N.Y.C.R.R. § 500.22, granting Plaintiff-Appellant leave to appeal to this Court from each and every part of the July 6, 2021 Decision and Order of the Appellate Division

of the Supreme Court of the State of New York, First Judicial Department, and for such other and further relief as the Court deems proper.

The grounds upon which leave to appeal is requested are set forth in detail in Plaintiff-Appellant Worthy Lending, LLC's annexed memorandum, and are concisely stated as follows:

1. This motion requests that the Court of Appeals decide the question of law, which has never been addressed by this Court, of whether, consistent with the direction of the Permanent Editorial Board for the Uniform Commercial Code ("PEB"), the Official Comments to the UCC, and precedent in other jurisdictions, Section 9-406 of the New York Uniform Commercial Code applies equally to security interests as it does to outright assignments for ownership. The Appellate Division affirmed an unprecedented Supreme Court order which squarely and wrongly held that the contract "provided plaintiff with a security interest and was not an assignment." [R-8]

2. Section 9-406 of the UCC is a fundamental protection afforded to secured parties and provides that when an account debtor receives a notice from an assignor (borrower) or assignee (lender) that a specified payment right has been assigned and is payable to the assignee, the account debtor may thereafter discharge its obligation to make that payment only by paying the assignee, and is not discharged by paying the assignor. Therefore, this new precedent destroys the

secured lender's rights, is contrary to the UCC itself, and renders the New York UCC non-uniform. If not reversed, the decision would require commercial parties to look outside the UCC to determine their rights and would place Section 9-406 of the N.Y. UCC in conflict with Section 9-406 of the UCC in other states. Both of these outcomes would be in direct contravention to the fundamental purposes of the UCC, which are to provide uniformity and certainty in commercial law. In 2020, the PEB foresaw the very problem presented by this case and advised that any court that ruled as the lower Courts did here would be "incorrect" because Section 9-406 applies equally to outright assignments of ownership and assignments for security (i.e., security interests).

3. This appeal further presents the creation of new commercial law by the Appellate Division, which would prevent a secured lender from collecting accounts directly from its borrower's account debtor pursuant to the New York Uniform Commercial Code, because the borrower has defaulted under its agreement with the secured lender. This new rule conflicts with the plain language of N.Y. UCC Section 9-607(a)(3), which permits a secured lender to collect from an account debtor after a default, or in any event as so agreed, as well as the express intent and purpose of UCC Article 9. The new incorrect rule created by the Appellate Division is based exclusively on an expressly non-precedential intermediate appellate decision in Michigan, and is contrary to established commercial precedent.

4. The questions of law raised in this appeal are of public importance, because, if left unreviewed, the Appellate Division's order would create confusion among many secured lenders and account debtors located in New York. Presented with such uncertainty, lenders in New York and elsewhere would be discouraged from providing financing based on a security interest in accounts, and would be discouraged from financing sales to New York customers. Such a result would also be in conflict with the Legislature's interest in encouraging the application of New York law and New York forum to commercial contexts, as codified in General Obligations Law Sections 5-1401 and 5-1402.

This motion and this appeal present critical and novel issues of commercial law, including whether New York will follow the instructions of the March 2020 PEB Commentary No. 21 which instructs on the very issues presented here. These issues impact secured lenders, borrowers and account debtors alike. The Uniform Commercial Code must be enforced uniformly throughout the nation; and, if there is to be any state-by-state difference, that should be determined by the Court of Appeals. Lenders need to know if their security interests and notices to account debtors will be enforced by the courts of this state, because, if not, they will have to look to other states and other laws under which to make secured loans and commercial borrowers will lose the opportunity to borrow secured by their accounts receivables due from New York customers, impairing and impeding commerce.

Dated: New York, New York
August 5, 2021

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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PROCEDURAL HISTORY AND TIMELINESS

Plaintiff-Appellant Worthy Lending, LLC ("Worthy") commenced this action by filing a Summons and Complaint with Exhibits in the Supreme Court, New York County on July 27, 2020. [R-12-60] Worthy asserted a claim for collection of accounts pursuant to the New York Uniform Commercial Code against Defendant-Respondent New Style Contractors, Inc. ("New Style") [R-18-19]. Worthy's claim is based on New Style's failure to remit payments of accounts that New Style owed to Worthy's borrower Checkmate Communications LLC ("Checkmate"), despite Worthy's sending New Style a UCC Section 9-406(a) notice informing New Style that Checkmate had assigned all of its accounts to Worthy and directing New Style to make payment of accounts directly to Worthy and only to Worthy. [R-13-19; 37-38].

On October 19, 2020, New Style filed a Motion to Dismiss the Complaint ("Motion to Dismiss") with prejudice pursuant to CPLR 3211(a)(1) and 3211(a)(7). [R-61-65] Worthy filed a Memorandum of Law in Opposition to the Motion to Dismiss [R-66] and New Style filed a Reply Memorandum of Law. [R-66] On November 18, 2020, the Supreme Court entered a Decision and Order granting New Style's Motion to Dismiss (the "Supreme Court Order"). [R-5-11]

The Supreme Court Order created new commercial law, contrary to Sections 9-406 and 9-607 of the New York Uniform Commercial Code ("N.Y. UCC"). First,

the Supreme Court held, ignoring the instruction of the Official Comments to the UCC, and uniform holdings in other jurisdictions, that a security interest is not treated as an assignment under Section 9-406, such that Worthy's notice to New Style directing it to remit payments to Worthy rather than to Checkmate was ineffective. [R-10] The Supreme Court based its decision on its erroneous interpretation of dicta in *IIG Capital LLC v. Archipelago, L.L.C.*, which had affirmed a lower Court's decision that, despite the defendant's arguments to the contrary, a factor did have a cause of action against an account debtor on accounts which the factor alleged it had purchased from the debtor. *See* 36 A.D.3d 401, 403, 829 N.Y.S.2d 10, 12-13 (1st Dep't 2007). The portion of the Court's opinion in *IIG Capital LLC* cited by the Supreme Court had no bearing on the holding of that case, because the plaintiff's ability to collect in that case did not rely on its security interest in the same accounts, as Worthy's does here, but rather, its purchase of those accounts, which the defendant had failed to clearly refute. *See id.* at 403. The Court in *IIG* therefore had no need to opine on the question of law, nor did it, of whether an assignment is the same as a security interest. *See id.* As explained in PEB Commentary No. 21[1], any court that ruled as the lower Court did here is "incorrect." Exhibit 4 at 2.

[1] Permanent Editorial Board for the Uniform Commercial Code, Commentary No. 21 (March 11, 2020) [PEB Commentary No. 21] is annexed as Exhibit 4 to this Motion.

The Supreme Court also relied on New Style's payment of accounts, after the notice of assignment, to Checkmate, as precluding Worthy's recovery [R-10], even though, under N.Y. UCC Section 9-406(a), and this Court's own precedent, an account debtor's payment to a borrower contrary to a notice of assignment does not allow the account debtor to escape liability. *Gen. Motors Acceptance Corp. v. Clifton-Fine Cent. Sch. Dist.*, 85 N.Y.2d 232, 236, 623 N.Y.S.2d 821, 823 (1995) ("Generally, after the account debtor receives notification that the right has been assigned and the assignee is to be paid, and it continues to pay the assignor, the account debtor is liable to the assignee and the fact that payment was made to the assignor is not a defense in an action brought by the assignee.") (citing N.Y. UCC Section 9-318(3), the predecessor provision to Section 9-406).

Finally, the Supreme Court created a new rule, based on a non-precedential opinion from the intermediate Michigan Court of Appeals, that a secured creditor like Worthy does not have a cause of action against an account debtor under N.Y. UCC Section 9-607 where there is a "dispute" between the secured lender and its borrower. [R-8-10] The only support for a "dispute" in the Record and that the Supreme Court pointed to, was the fact that Checkmate had defaulted on its loans with Worthy by failing to make payments to Worthy. [R-9-10] The Supreme Court also ignored the fact that Checkmate had irrevocably authorized Worthy, under Section 4(k) of the parties' Promissory Note and Security Agreement dated October

11, 2019 (the "Financing Agreement"), to, at any time in Worthy's discretion, direct its account debtors to make payments directly to Worthy. [R-24] And, if the account debtor has any question about whom to pay, UCC Section 9-406(c) provides the remedy—a request to the lender to provide proof of the assignment. New Style did not use this statutory remedy and instead simply paid Checkmate, without inquiry. Thus, the Supreme Court Order amounted to a determination that a secured lender cannot, despite an agreement by its borrower pledging its collateral to the secured lender, collect on that collateral if the borrower has defaulted under the parties' loan agreement.

On November 18, 2020, New Style served a Notice of Entry with a copy of the Supreme Court Order by electronic filing. A copy of the Supreme Court Order, together with Notice of Entry thereon, is annexed hereto as Exhibit "1". On December 10, 2020, Worthy timely filed and served by electronic filing a Notice of Appeal in the Supreme Court. [R-3-4] A copy of the Notice of Appeal is annexed hereto as Exhibit "2". By Decision and Order dated and entered July 6, 2021, the Appellate Division affirmed the Supreme Court Order (the "Appellate Order"). A copy of the Appellate Order, together with Notice of Entry thereof is annexed hereto as Exhibit "3".

The Appellate Division affirmed the Supreme Court Order, which had incorrectly held that under Article 9 of the UCC a security interest is different from

an assignment. [R-8] The Appellate Division ignored the guidance of the Permanent Editorial Board for the Uniform Commercial Code and the important policy reasons for treating a security interest as an assignment set forth in its Comment No. 21, including preventing commercial parties from having to look outside the Code for interpretation of their rights to collateral under their agreements. PEB Commentary No. 21, Exhibit 4 at 3. The Appellate Division further affirmed—citing to the same non-precedential opinion of the Michigan Court of Appeals that the Supreme Court did—the erroneous creation of law by the Supreme Court that a default precludes an account debtor's liability to a secured lender. *See* Exhibit 3 at 2.

New Style served a Notice of Entry with a copy of the Appellate Order by electronic filing on July 6, 2021. Consequently, this Motion is timely.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this motion and the appeal pursuant to CPLR 5602(a)(1)(i), which provides that an appeal may be taken to the Court of Appeals by permission of the Court of Appeals, in an action originating in the Supreme Court, from an order of the Appellate Division that finally determines the action and is not appealable as of right. This case originated in the Supreme Court and the Appellate Order finally determined the action, such that this Court has jurisdiction.

STATEMENT OF THE QUESTIONS PRESENTED

1. Whether, contrary to the express guidance of the Permanent Editorial Board for the Uniform Commercial Code and the Official Comments to the UCC, there is a distinction between a security interest and an assignment under N.Y. UCC Section 9-406, thus preventing commercial parties from relying on the Uniform Commercial Code and their lending agreements to determine their rights to collateral?

2. Whether New York will adopt a rule, which is contrary to the plain language of N.Y. UCC Section 9-607, as well as the express and stated intent and purpose of UCC Article 9, that prevents a secured lender from collecting accounts directly from its borrower's account debtor, because the borrower has defaulted under its agreement with the secured lender?

The Questions raised on this appeal were raised and preserved on pages 3 and 4 of Worthy's brief submitted in support of its appeal to the Appellate Division, First Department.

THE QUESTIONS PRESENTED MERIT REVIEW BY THIS COURT

PRELIMINARY STATEMENT

The Appellate Order contravenes the plain language of the New York Uniform Commercial Code, to the detriment of the many secured lenders who have

agreed to lend money, based on the assurance of their bargained-for right—and as provided by Sections 9-406 and 9-607 of the New York Uniform Commercial Code—to collect accounts pledged to them as collateral directly from their borrowers' account debtors. Such an order cannot stand.

The Permanent Editorial Board for the UCC ("PEB") has unambiguously directed that a security interest is the same as an assignment under the UCC, including under Section 9-406, and courts that hold otherwise are just plain wrong. The Official Comments to the UCC also confirm this instruction. That is because creating a novel distinction under Section 9-406 between security interests and assignments would not only prevent secured lenders from protecting their bargained-for right to a debtor's accounts merely because their lending contract uses the words "security interest" rather than the word "assignment," it would also require account debtors and secured lenders to look beyond the UCC to determine, in each instance, whether they are obligated to the secured lender or to the borrower. Thus, to prevent uncertainty and a lack of uniformity in commercial law, as created by the Appellate Order, this Court must, as it has done before, ensure that New York's commercial law follows the instruction of the preeminent authorities on interpretation of the UCC—and adopt a uniform interpretation of the Uniform Commercial Code.

This Court must also address the new rule created by the Appellate Division, based on a non-precedential opinion from the Michigan Court of Appeals that now

would prevent secured lenders from collecting on accounts pledged to them as collateral, where there is a "dispute" between the secured lender and its borrower. *See* Exhibit 3 at 2. The "dispute" to which the Appellate Division referred, is one where the borrower simply failed to pay the loan under its agreement with the secured lender. That is not a "dispute." The idea that a default could prevent a secured lender from collecting on its collateral is inimical to the intent and purpose of Article 9 of the UCC, which sets forth a scheme protecting secured lenders' rights to do just that, and is also contrary to the plain language of N.Y. UCC Section 9-607(a)(3), permitting a secured lender to enforce an account debtor's obligations "in any event after default."

Without resolution of these issues by this Court, secured lenders and their borrowers will be left with significant uncertainty as to the enforceability of their existing lending agreements and the effect of a notice of assignment. Many commercial lenders are headquartered in New York, lenders and borrowers regularly apply New York law to their transactions, and the accounts of New York suppliers and customers are regularly pledged as collateral to secure loans which support New York commerce. The Appellate Order would discourage secured lenders from providing financing based on New York accounts, and would encourage lenders in and outside of New York to rely on the law of other jurisdictions for enforcement of their contracts. Such a holding is contrary to the public policy of New York State as

codified in the General Obligations Law, which expressly encourages out-of-state commercial entities to apply New York law and forum to their transactions, and opens New York courts to their disputes so that New York can be a pre-eminent commercial jurisdiction. *See* General Obligations Law §§ 5-1401 and 5-1402.

In short, the widespread uncertainty and disruption to New York's commercial lending industry that will follow from the Appellate Order make it necessary for this Court to review and decide the legal issues presented on this Appeal.[2]

BACKGROUND

A. The Financing Agreement and Worthy's Security Interest

Pursuant to a Promissory Note and Security Agreement dated October 11, 2019 (the "Financing Agreement"), Worthy made loans to Checkmate Communications LLC ("Checkmate") from time to time. [R-14 ¶ 6; R-20-36] In exchange, Section 3(a) of the Financing Agreement provided that:

> To secure the prompt payment and performance of [all of Checkmate's obligations to Worthy], [Checkmate] hereby pledges and grants to [Worthy] a continuing security interest in and lien upon the Collateral, whether now existing or hereafter arising and wherever located. [R-14 ¶ 6; R-23]

[2] Conversely, if New York is going to be an outlier on the Uniform Commercial Code, such a policy should be the result of a Court of Appeals decision, not a summary Appellate Division order affirming a poorly-reasoned Supreme Court decision.

The "Collateral" as defined in the Financing Agreement, is substantially all existing and future assets and properties of Checkmate, including, "all right, title and interest of [Checkmate] in and to its (a) accounts . . .". [R-14 ¶ 6; R-27-28].

Under Section 3(b) of the Financing Agreement, Checkmate "irrevocably and unconditionally authorize[d] [Worthy] to file . . . such financing statements with respect to the Collateral naming [Worthy] or its designee as the secured party and [Checkmate] as debtor." [R-23] Thus, to evidence and perfect its interest in the Collateral, Worthy filed UCC-1 Financing Statements against Checkmate with the Secretary of State of New Jersey (as amended and/or continued, the "UCC Statements"). [R-15 ¶ 9; R-39-54] The UCC Statements were initially filed on November 30, 2016, October 29, 2017, and August 10, 2018, and assigned to Worthy on October 12, 2019. [R-15 ¶ 9] Worthy has maintained the UCC Statements without interruption from the date they were filed through the present. [R-15 ¶ 10]

Of critical import, Checkmate authorized Worthy to provide account debtors, i.e., Checkmate's customers, notice of Worthy's security interest in Checkmate's accounts receivable and an instruction to make payments only to Worthy. [R-14-15 ¶ 7; R-24] Specifically, Section 4(k) of the Financing Agreement provides that Checkmate authorizes Worthy to:

> at any time and from time to time in its discretion, notify and instruct account debtors of [Checkmate] (including pursuant to a notice of assignment in form and substance satisfactory to [Worthy]) of the

> interest of [Worthy] in the Accounts and to remit payment of Accounts and other Collateral directly to [Worthy]… [R-24]

B. The New Style Accounts and the Notice of Assignment

On October 2, 2019, in accordance with the Financing Agreement and Section 9-406 of the Uniform Commercial Code, Worthy sent New Style a notice of its security interest and collateral assignment in the New Style Accounts (the "Notice of Assignment") which stated:

> [Checkmate] has granted to [Worthy] a security interest in, and [Checkmate] assigned to [Worthy] as collateral security, the full amount of all accounts and other amounts now or hereafter owing by [New Style] to [Checkmate] (collectively, the "Accounts"). Notice is hereby given to [New Style] of such security interest and such collateral assignment. All remittances for Accounts shall be made payable only to [Worthy] . . . [R-15 ¶ 8; R-37-38]

New Style hired Checkmate as a subcontractor on two public construction projects in New York City. [R-6] According to Worthy's books and records, and according to documents and information Worthy received from Checkmate, New Style has failed to pay Worthy at least $1,473,581.42 for its services (the "New Style Accounts"). [R-16 ¶ 15]

After, as it had become clear that Checkmate was in financial difficulty, on March 24, 2020 Worthy sent a letter to New Style (the "March 24 Letter") enclosing another copy of the Notice of Assignment and explaining that "pursuant to Section 9-406 of the [UCC], payments of Accounts made by [New Style] to Checkmate or to anyone other than Worthy in accordance with the enclosed notice will not

discharge any of [New Style's] obligations with respect to such Accounts and, notwithstanding any such payments, [New Style] shall remain liable to Worthy for the full amount of such indebtedness." [R-16 ¶ 17; R-57-58] Counsel for Worthy sent another letter to New Style on April 8, 2020 requesting an accounting of all payments made by New Style to Checkmate from October 1, 2019 forward. [R-17 ¶ 18; R-59-60]

C. Events of Default Under the Financing Agreement

Events of default exist and are continuing under the Financing Agreement, including, without limitation, the failure of Checkmate to pay when due principal, interest, and other amounts owing by Checkmate to Worthy under the Financing Agreement. [R-15 ¶ 11] By letter dated April 9, 2020 (the "Default Letter"), Worthy notified Checkmate of such defaults and, in accordance with the Financing Agreement, Worthy accelerated all indebtedness, liabilities and obligations of Checkmate under the Financing Agreement (the "Obligations") and demanded immediate repayment of all such Obligations. [R-15 ¶ 12; R-55-56] Checkmate continues to be in default of its Obligations to Worthy in an amount in excess of $3,271,292, plus interest, fees, costs and attorneys' fees [R-16 ¶ 13], and Checkmate has filed for bankruptcy in the United States Bankruptcy Court for the District of New Jersey. *In re Checkmate Communications, LLC*, (No. 20-21872-JKS).

D. Defendant's Failure to Remit Payment to Worthy

As of the date hereof, New Style has not remitted payment to Worthy of the New Style Accounts. [R-17 ¶ 19] As described by the Supreme Court, despite the Notice of Assignment, New Style continued to pay Checkmate rather than Worthy. [R-7; R-10] It is undisputed that Worthy was not paid by New Style.

LEAVE TO APPEAL SHOULD BE GRANTED

A. THE APPLICATION OF N.Y. UCC SECTION 9-406(a) TO SECURITY INTERESTS MUST BE DETERMINED TO ENSURE UNIFORMITY AND CERTAINTY IN COMMERCIAL LAW

The Appellate Division's affirmance of the Supreme Court Order finding a difference between an Article 9 security interest and an assignment under N.Y. UCC Section 9-406[3] is wrong and will lead to commercial parties in New York having to look outside New York's Uniform Commercial Code, and their contracts, to determine their rights as to accounts. This is contrary to the essential purpose of Article 9 of the UCC, misapplies the statute, and disregards the Official Comments

[3] N.Y. UCC Section 9-406(a) provides:

> [A]n account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

to the UCC and the PEB. The Official Comments and the Permanent Editorial Board, the two preeminent authorities on interpretation of the UCC, which this Court has looked to for guidance in the past, unambiguously instruct that a security interest is treated as an assignment under Section 9-406, and any Court that would hold otherwise is just plain wrong—"incorrect" is the exact word the PEB uses to describe what was held here.

1. The PEB and the Official Comments to the UCC both Instruct that a Security Interest is an Assignment under Article 9

The PEB and the Official Comments are each designed to ensure the fundamental purpose of the UCC "to make uniform the law among the various jurisdictions." *See* UCC § 1-103(a)(3). The Official Comments to the UCC are provided by the drafters to instruct contracting parties and courts on how the UCC's provisions were to be applied and interpreted, while the PEB was established to ensure continued uniform application throughout the country. In interpreting the N.Y. UCC, this Court has previously looked to the instruction of both the PEB, *see Albany Disc. Corp. v. Mohawk Nat'l Bank of Schenectady*, 28 N.Y.2d 222, 227, 321 N.Y.S.2d 94, 98 (1971) (citing PEB commentary on former UCC Section 9-302), as well as the Official Comments. *See, e.g.*, *Banque Worms v. BankAmerica Int'l*, 77 N.Y.2d 362, 373, 568 N.Y.S.2d 541, 548 (1991) ("Although no provision of article 4–A calls, in express terms, for the application of the 'discharge for value' rule, the statutory scheme and the language of various pertinent sections, as amplified by the

Official Comments to the UCC, support our conclusion that the 'discharge for value' rule should be applied in the circumstances here presented.").

Just last year, the PEB addressed the very question presented in this Appeal, and explained that a security interest is the same as an assignment under UCC Section 9-406(a), and Article 9 generally. *See* PEB Commentary No. 21, Exhibit 4. This is in part, because the UCC itself—as also reflected in New York's statutorily enacted Code—already reflects the lack of a distinction between the two terms. *See id.* at 1-2. For example, a security interest is defined in the general definitions of the UCC "to include both 'an interest in personal property…which secures payment or performance of an obligation' and 'any interest of…a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9.'" *See id.* at 1, n. 11 (citing UCC Section 1-201(b)(35)).[4]

The PEB also explained that an assignment has historically been understood to include a security interest under former Article 9. *See id.* at 2. For example, courts have applied former Section 9-318(1), now Section 9-404, which sets forth defenses

[4] Section 9-209 of the UCC (which identical provision is also contained in the N.Y. UCC), also explains that Section 9-406 applies to security interests, by setting forth the duties of a secured party after an account debtor's receipt of a notice of assignment. It states "[w]ithin 10 days after receiving an authenticated demand by the debtor, a secured party shall send to an account debtor that has received notification of an assignment to the secured party as assignee under Section 9-406(a) an authenticated record that releases the account debtor from any further obligation to the secured party" where the secured party no longer holds a security interest in the collateral. UCC § 9-209(b). "This section does not apply to an assignment constituting the sale of an account, chattel paper, or payment intangible." UCC § 9-209(c).

of the "account debtor" against the "assignee", as well as Section 9-318(4), now Section 9-406(d), to security interests as well as assignments. *See id.* at 2; *First Nat'l Bank of Bos. v. Thomson Consumer Elecs., Inc.*, 84 F.3d 397, 400 (11th Cir. 1996) ("If, as the Bank claims, it has only a perfected security interest in the accounts receivable, it is nevertheless still an 'assignee' within the meaning of [N.C. Gen. Stat.] section 25–9–318."); *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1190 (7th Cir. 1990) ("[T]reatment under [Wis. Stat.] section 409.318 of one with a security interest in an account receivable as an 'assignee' of the account receivable is consistent with section 409.502's [now section 409.607] implicit description of a secured party who exercises his rights to collect on an 'assignor's' accounts receivable as an assignee."); *In re Johnson*, 439 B.R. 416, 432 (Bankr. E.D. Mich. 2010), aff'd on other grounds, No. 10-14292, 2011 WL 1983339 (E.D. Mich. May 23, 2011) (analyzing applicability of N.Y. UCC Section 9-318(4) to a security interest and finding "[d]ebtor is an 'assignor' because he transferred an interest in property to Comerica, by granting Comerica a security interest in his contractual right to receive disability payments.").

Precedent in New York, including from the Court of Appeals, interpreting former Article 9, also reflects the historical treatment explained by the PEB. *See, e.g.*, *Bank Leumi Tr. Co. of New York v. Collins Sales Serv., Inc.*, 47 N.Y.2d 888, 890, 419 N.Y.S.2d 474, 475 (1979) (affirming denial of an account debtor's right of

setoff under former N.Y. UCC Section 9-318(1) and summary judgment in favor of plaintiff secured creditor against account debtor); *Chase Manhattan Bank (N.A.) v. State*, 40 N.Y.2d 590, 592-593, 388 N.Y.S.2d 896, 897-898 (1976) (finding "the constructive notice provided by perfection of a security interest by filing a financing statement under Uniform Commercial Code" was not sufficient to "preclude an account debtor's right to set off subsequent debts" under former N.Y. UCC Section 9-318(1)). [5]

Federal Courts interpreting the N.Y. UCC similarly treated a security interest as an assignment under former Section 9-318. *See, e.g.*, *Septembertide Publ'g, B.V. v. Stein & Day, Inc.*, 884 F.2d 675, 682 (2d Cir. 1989); *Sea Spray Holdings, Ltd. v. Pali Fin. Grp., Inc.*, 269 F. Supp. 2d 356, 362 (S.D.N.Y. 2003) ("Through the Security Agreement, Sea Spray stands as an assignee of Infotopia's interests in the specified collateral, which includes the Note."); *Fleet Cap. Corp. v. Yamaha Motor Corp., U.S.A.*, No. 01 CIV. 1047 (AJP), 2002 WL 31174470, at *28, n. 35 (S.D.N.Y.

[5] In *Royal Bank & Tr. Co. v. Midwest Boutiques, Inc.*, the Southern District of New York, citing to *Chase Manhattan Bank (N.A.)* explained:

> Defendant argues that N.Y.U.C.C. § 9–318(b) [sic 9-318(1)(b)] is inapplicable to the case at bar, distinguishing between assignments and security interests. The court finds this distinction unpersuasive in light of the facts in *Chase Manhattan Bank*. In that case, plaintiff Chase Manhattan Bank had a security interest against which the State of New York claimed certain setoffs under § 9–318(b). The Court of Appeals found no difficulty in applying § 9–318(b) to this situation . . .
>
> No. 86 CIV. 3386 (RLC), 1988 WL 140876, at *7, n. 5 (S.D.N.Y. Dec. 19, 1988).

Sept. 26, 2002) ("Although Article 9 usually refers to a creditor with a security interest as a 'secured party,' a secured party with a security interest in accounts is the 'assignee' under section [sic] § 9-318."); *Banque de Paris et des Pays-Bas v. Amoco Oil Co.*, 573 F. Supp. 1464, 1470-72 (S.D.N.Y. 1983); *Cmty. Bank v. Newmark & Lewis, Inc.*, 534 F. Supp. 456, 460 (E.D.N.Y. 1982) (rejecting the defendant's argument on a motion for summary judgment that the plaintiff did not have standing to sue on certain invoices because it did not have a formal assignment of them, where the "plaintiff acquired a security interest through its security agreement with [the debtor], 'in all accounts, [and] accounts receivable . . .' of [the debtor] 'now existing or hereafter arising,' and not merely the specific accounts on which plaintiff loaned [the debtor] money.") (citing former UCC Section 9-502(1)).[6]

Anticipating the mischief and uncertainty that would ensue if courts were to hold as the lower Courts did here, the PEB explained that such a holding would be

[6] The Second Circuit also cited favorably to Community Bank in an analogous maritime lien case wherein the Court offered a comparison with the provisions of the UCC, stating in pertinent part:

> Article 9 of the UCC gives the secured party two distinct remedies for enforcing this security interest, only one of which is available to the holder of a maritime lien on subfreights. First, upon default by the primary debtor, the secured party is entitled to notify account debtors that they are to make payments directly to it, rather than to the primary debtor. *See* UCC § 9–502(1); *Community Bank v. Newmark & Lewis, Inc.*, 534 F.Supp. 456, 460 (E.D.N.Y.1982). In effect, notice to the account debtor under section 9–502(1) subrogates the secured party to the rights of the primary debtor—the remedy that is available to enforce a shipowner's lien.
>
> *Cornish Shipping Ltd. v. Int'l Nederlanden Bank*, 53 F. 3d 499, 505 (2d Cir. 1995).

improperly "narrow", contrary to the use of the term assignment in Article 9, and quite simply, is "incorrect." *See* PEB Commentary No. 21, Exhibit 4 at 2.

In addition to the historical treatment of a security interest as an assignment under Article 9, the PEB also explains that "[t]here is no policy reason to limit the term 'assignment' in Section 9-406, or elsewhere in Article 9, to an outright transfer of ownership." PEB Commentary No. 21, Exhibit 4 at 3. To do so would place on the account debtor the "heavy and unjustifiable" burden of "determin[ing] whether the assignment was a sale or a [security interest that secures an obligation] in order to know whether, for example, the obligations and rights in Part 4 apply to the account debtor." *Id.* ("Given the difficulty that courts often have in determining whether an assignment of a payment right is a sale or a [security interest that secures an obligation], an account debtor should not be expected to make that determination."). A distinction between a security interest and an assignment under Section 9-406 would similarly place a burden on assignees to determine whether their rights will be adjudicated under Section 9-406 or contractual common law, which uncertainty would "have a negative effect on the availability of financing." *See id.*

Treating assignments and security interests differently under the UCC would thus undermine "one of the purposes of the UCC [which is] 'to permit the continued expansion of commercial practices through custom, usage, and agreement of the

parties.'" *Id.* at 4 (citing UCC Section 1-103(a)(2)). While "[t]he narrow interpretation would leave to other law whether the account debtor may discharge the account debtor's payment obligation by paying the debtor or by paying the secured party… [t]he broader interpretation creates greater certainty for both the secured party and the account debtor and is consistent with expectations in commercial practice." *Id.* This greater certainty is precisely what commercial parties in New York require, and such certainty can be provided through this case.

PEB Commentary No. 21 has also been incorporated into Official Comment 26 to Section 9-102 of the UCC. That Comment to the definitions of "Assignment" and "Transfer" states "[t]his Article generally follows common usage by using the terms 'assignment' and 'assign' to refer to transfers of rights to payment, claims, and liens and other security interests…Except when used in connection with a letter-of-credit transaction (see Section 9-107, Comment 4), no significance should be placed on the use of one term or the other. Depending on the substance of the transaction, each term as used in this Article refers to the assignment or transfer of an outright ownership interest, to the assignment or transfer of a limited interest, such as a security interest, or both." UCC § 9-102, Official Comment 26 (citing PEB Commentary No. 21) (emphasis added).

Thus, as informed and instructed by the PEB and the Official Comments, the UCC does not reflect a distinction between a security interest and an assignment,

and the development of commercial law that creates such a distinction would lead to costly uncertainty for each party to a commercial transaction. This Court cannot permit New York's commercial law to develop in a direction that so negatively affects one of its most important industries.

2. Precedent in Other Jurisdictions Reflects the Direction of the PEB and the Official Comments

Courts in other jurisdictions have held consistently with the PEB that a security interest should be treated as an assignment under Section 9-406. *See, e.g.*, *First State Bank Nebraska v. MP Nexlevel, LLC,* 948 N.W.2d 708, 719-23 (Neb. 2020) (decision by the Nebraska Supreme Court reversing the lower Court's holding that Section 9-406(a) does not apply to security interests, and finding that the account debtor failed to discharge its obligations by paying the secured lender's borrower after notice of its security interest); *Lake City Bank v. R.T. Milord Co.*, No. 18 C 7159, 2019 WL 1897068, at *3 (N.D. Ill. Apr. 29, 2019) (affirming the applicability of UCC Section 9-406 to the plaintiff secured creditor's claim where it sufficiently pled that the defendant was an account debtor and the money owed was an account); *ARA Inc. v. City of Glendale*, 360 F. Supp. 3d 957, 967 (D. Ariz. 2019) (analyzing a notice and proof of assignment under Ariz. Rev. Stat. Ann. § 47-9406(a) and finding "[t]here is 'no meaningful difference between a security interest and an assignment…' That ARA was claiming a security interest in the payments, rather than an assignment, does not render the notice insufficient.") (quoting *In re Apex Oil*

Co., 975 F.2d 1365, 1369 (8th Cir. 1992), reh'g denied and opinion modified (Nov. 19, 1992)).[7]

The Supreme Court cited to *IIG Capital LLC,* 36 A.D.3d 401, for the proposition that a security interest is not an assignment. As the PEB explained, *IIG* is an example of an incorrect application of the law. PEB Commentary No. 21, Exhibit 4 at 2. In any event, the cited portion of *IIG* is dicta and the mis-citing of *IIG* by the Supreme Court is another reason why this Court should set the law. In *IIG*, the court found, despite the defendant's arguments to the contrary, that a factor did have a cause of action against an account debtor on accounts, which the factor alleged it had purchased from the debtor. *See id.* at 403. Later in dicta, after it had already denied the defendant's motion to dismiss, the court appeared to discount the plaintiff's argument that a secured party is the equivalent of an assignee under

[7] The list of cases conforming with the PEB's instruction to treat a security interest as an assignment under Section 9-406 is extensive. *See, e.g.*, *Magnolia Fin. Grp. v. Antos*, 310 F. Supp. 3d 764, 765-67 (E.D. La. 2018) (analyzing a pledge and security agreement giving a lender the right to payment of proceeds of a settlement agreement as an assignment under La. Rev. Stat. Ann. Section 10:9-406); *Swift Energy Operating, L.L.C. v. Plemco-South, Inc.*, 157 So. 3d 1154, 1162 (La. Ct. App. 2015) (citing to La. Rev. Stat. Ann. Section 10:9-102, Official Comment 26 and noting error in the lower Court's holding that a security interest in accounts receivable was not the same as an assignment under La. Rev. Stat. Ann. Section 10:9-406); *Rockland Credit Fin., LLC v. Fenestration Architectural Prods., LLC*, No. 06-3065, 2008 WL 1773234 (R.I. Super. Mar. 12, 2008) (Trial Order) (rejecting defendant's argument that the plaintiff's notice of assignment was ineffective under R.I. Gen. Laws Section 6A-9-406 because the plaintiff "had not specifically purchased this set of receivables; rather, it held a security interest in them . . ."); *see also Garber v. TouchStar Software Corp*, No. 2009CV1189, 2011 WL 12526062, at *4 (Colo. Dist. Ct. Nov. 10, 2011) (Trial Order) (quoting *Bank of Waunakee*, 906 F.2d at 1190) ("Significantly, the courts and the UCC make 'no distinction between a party with a security interest in a debtor's accounts receivable and a party who is an assignee of a debtor's accounts receivable.'").

Section 9-406, where the cases the plaintiff cited for support of its argument only dealt with defenses available to the account debtor against the assignee under former UCC Section 9-318(1), now Section 9-404 (not Section 9-318(3), the predecessor to Section 9-406). *See id.* at 404. Thus, the portion of the case discussing the applicability of Section 9-406 to security interests was not only irrelevant to its holding, but was based on the plaintiff's failure to cite any cases regarding Section 9-406(a), unlike Worthy here. *See id.*; *see also First State Bank Nebraska*, supra, 948 Neb. at 721 (discussing and ultimately declining to apply this portion of the *IIG Capital* opinion as dicta); PEB Commentary No. 21, Exhibit 4 at 2 (explaining that any court relying on *IIG* for the interpretation New Style did was wrong.)

Moreover, the Southern District of New York, interpreting New York commercial law, has recognized a security interest as an assignment under Article 9. In *ImagePoint, Inc. v. JPMorgan Chase Bank, National Association,* the Magistrate analyzed a security interest in payments owed under a procurement agreement between the borrower and its debtor as an assignment under Section 9-406(d), explaining that Section 9-406(d) rendered an anti-assignment clause in the procurement agreement invalid, such that the clause "did not affect [the lender's] security interest in [the payments owed under the agreement] . . ." *See* 27 F. Supp. 3d 494, 508-09 (S.D.N.Y. 2014), report and recommendation, adopted and objections overruled sub nom. *ImagePoint, Inc. v. JPMorgan Chase Bank*, No. 12-

CV-7183 LAK, 2014 WL 3891326 (S.D.N.Y. Aug. 8, 2014) (explaining that "ImagePoint [the borrower] is the 'assignor' with respect to the relevant security interest and JPM is the 'account debtor.'").

The authorities above are in line with the instruction of the PEB, that there is no distinction between a security interest and an assignment under Article 9. This case is an outlier, and if left unchecked, would upend commercial finance. The development of commercial law in New York contrary to the PEB's instruction would prevent uniformity of commercial law in the country, as intended by the Uniform Commercial Code, and would also substantially disrupt existing and future commercial lending practices in this State. This Court cannot leave open such a possibility, and should determine the law.

B. THE APPELLATE DIVISION'S HOLDING CONTRAVENES THE PLAIN LANGUAGE OF SECTION 9-607 AS WELL AS THE INTENT AND PURPOSE OF ARTICLE 9 OF THE UCC

The Appellate Division's holding that a "dispute" exists between Worthy and Checkmate preventing Worthy from collecting directly from New Style, relies on the creation of a new rule that a secured lender cannot collect on its collateral where the borrower has defaulted on payments to the secured lender—there is no other evidence in the Record, or even noted in the Appellate Order, or the Supreme Court Order for that matter, of any other type of dispute between Worthy and Checkmate.

As a matter of policy, the idea that a secured lender cannot collect on its collateral because the borrower has defaulted is contrary to the intent and purpose of Article 9. A default is not a dispute; it is just a failure to pay when due. If a failure of the borrower to pay excused the account debtor from complying with the instruction in the notice of assignment to pay the lender, then the security interest and collateral would be meaningless and worthless, and financially troubled borrowers would pressure their customers to pay them directly in violation of the secured creditor's rights. The most important time to get payment from the account debtor is when the borrower stops paying the loan.

Moreover, the Appellate Division's rule contravenes the plain language of N.Y. UCC Section 9-607(a)(3), which provides the mechanism for a secured lender to collect from its borrower's account debtors. *See ImagePoint, Inc.*, 27 F. Supp. 3d at 505 (explaining that Section 9-607(a)(3) "by its terms gives the secured party . . . the right to sue the account debtor [] to enforce the obligations that the [account debtor] owes to the debtor . . ."). The prefatory language of this provision permits a

secured party to bring suit against its borrower's account debtors at any time the borrower and lender have agreed to[8], or after an event of default:

> [i]f so agreed, and in any event after default, a secured party: . . . (3) may enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral . . . N.Y. UCC § 9-607.

Official Comment 4 to Section 9-607 of the N.Y. UCC further rejects the notion that a secured lender must sue the account debtor either before or after the borrower's default. It states:

> Like Part 6 generally, this section deals with the rights and duties of secured parties following default. However, as did former Section 9-502 with respect to collection rights, this section also applies to the collection and enforcement rights of secured parties even if a default has not occurred, as long as the debtor has so agreed. It is not unusual for debtors to agree that secured parties are entitled to collect and enforce rights against account debtors prior to default. N.Y. UCC Section 9-607, Official Comment 4.

In light of the language of Section 9-607(a)(3), the lower Courts' reliance on *Buckeye Retirement Co., LLC, Ltd. v, Meijer, Inc.*, an unpublished, and therefore not

[8] Checkmate, under Section 4(k) of the Financing Agreement, "irrevocably authorize[d] [Worthy] to, at any time and from time to time in its discretion, notify and instruct account debtors of [Checkmate] (including pursuant to a notice of assignment in form and substance satisfactory to [Worthy]) of the interest of [Worthy] in the Accounts and to remit payment of Accounts and other Collateral directly to [Worthy] . . ." App. Br. at 20; [R-24]. Thus, according to Section 9-607, Worthy had the option to collect from New Style at any time after New Style received the notice of assignment.

precedentially binding[9], opinion from the Michigan Court of Appeals, is particularly problematic. *See* No. 279625, 2008 WL 4278038 (Mich. Ct. App. Sept. 18, 2008). Moreover, that case did not, as the lower Courts erroneously found, hold that a lender cannot collect from its borrower's account debtors where the borrower has defaulted. *See id.* at 1-2. Rather, the court in *Buckeye* found—based on Section 9-607(5), the equivalent of N.Y. UCC Section 9-607(e)[10]—that a lender cannot bring suit against the borrower's account debtor, where the borrower actually denies the lender's entitlement to payment from the defendant or any assignment of accounts. *Id.* at 2-3. That did not happen here.

The Southern District of New York, in *ImagePoint, Inc. v. JPMorgan Chase Bank, National Association*, interpreting the N.Y. UCC, further clarified and distinguished the holding in *Buckeye*, explaining that a secured party cannot collect from an account debtor, pursuant to Section 9-607(e), where there is a dispute between the secured party and the account debtor "as to who has the right to collect from an account debtor." 27 F. Supp. 3d at 506. In contrast, under New York law, a

[9] "An unpublished opinion is not precedentially binding under the rule of stare decisis." Mich. Ct. R. 7.215.

[10] N.Y. UCC 9-607(e) provides: "Duties to secured party not affected. This section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party." As the Court in *ImagePoint* clarifies, *see supra*, this provision does not prevent a secured lender from bringing suit against an account debtor; rather, it merely clarifies that the ability of a secured lender to collect under Section 9-607 must be based on an existing right of the borrower to collect from the account debtor, here, New Style's contractual obligation to Checkmate and the notice of assignment. *See ImagePoint, Inc*, 27 F. Supp. 3d at 506.

secured party can collect from an account debtor where it is asking the account debtor to "simply fulfill its obligations to [the borrower] under [the contract between the borrower and the account debtor]—an action which is explicitly permitted by N.Y. UCC § 9–607(a)(3)." *See id.*

Thus, the Appellate Division's new rule that a secured lender cannot collect on its collateral after its borrower has defaulted not only defeats the intent and purpose of Article 9 to protect lenders' rights to collect their collateral in the event of a default, but is contrary to the plain language of Section 9-607 and common sense. Such a rule cannot stand as it alters the construct of the contract, notices, and statute.

The lower Courts' orders fail to recognize the distinction between rights and remedies. The secured lending construct is straightforward: (a) the contract creates the lender's right; (b) the notice informs the account debtor of the lender's right and interest; (c) Section 9-406 codifies and explains the parties' duties and obligations; (d) Section 9-607 provides the remedy—a suit against the account debtor. The lower Courts compounded their error by ruling that Section 9-607(e) does not determine to whom payment must be made. But that misses the point of Section 9-607(e), because that section only says that it does not grant any rights, but it is wrong to hold that Section 9-607(e) deprives a lender of its remedy.

C. THE DECISION OF THE APPELLATE DIVISION IS HARMFUL TO THIS STATE'S COMMERCIAL LENDING INDUSTRY

The Appellate Order, unless reviewed by this Court, would have a significant adverse effect on the commercial lending industry of this State. First, secured lenders would be left uncertain as to their ability to later collect from an account debtor in the event their borrower defaults, as they have bargained for in their lending agreements. The prospects for mischief are apparent and palpable. Borrowers could simply instruct their account debtors to not pay their secured lenders or to feign a "dispute," despite an agreement between the borrower and the secured lender that explicitly permits the secured lender to collect from those account debtors. This uncertainty in contrast to clear law in other states would discourage the many asset-based lenders in New York from entering into agreements based on a security interest in the borrower's accounts, or financing sales to New York customers, thus creating a lack of available financing for borrowers that seek to offer accounts as collateral.

Uncertainty as to the enforceability of a security interest in New York would also discourage secured lenders from New York and elsewhere from lending based on New York accounts because their ability to enforce their agreements under New York's commercial law has been jeopardized. Such a result runs counter to the interests of commerce.

Thus, to prevent uncertainty and a decline in the availability of commercial lending, this Court must determine that a secured lender with a security interest in its borrower's accounts can, as set forth in N.Y. UCC Sections 9-406 and 9-607, and after the account debtor's receipt of a notice of assignment, collect on those accounts, after the borrower has defaulted, or, if agreed, prior to a default.

CONCLUSION

By reason of all of the foregoing, it is respectfully requested that the Court grant Worthy's motion for leave to appeal to this Court so these important commercial issues can be decided.

Dated: New York, New York
August 5, 2021

OTTERBOURG P.C.
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APPENDIX LISTING COPIES OF
PRIOR ORDERS AND BRIEFS AND RECORD
(N.Y. Court of Appeals Rules of Practice § 500.22(b)(6))

Exhibits Annexed to Memorandum of Law

Exhibit "1": Memorandum Decision and Order of the Supreme Court of the State of New York, County of New York, entered on November 18, 2020, with Notice of Entry thereon filed and served on November 18, 2020

Exhibit "2": Notice of Appeal filed and served on December 10, 2020

Exhibit "3": Decision and Order of the New York Supreme Court, Appellate Division, First Department, entered on July 6, 2021, with Notice of Entry thereon filed and served on July 6, 2021

Exhibit "4": Permanent Editorial Board for the Uniform Commercial Code, Commentary No. 21 (March 11, 2020)

Additional Documents Submitted Herewith

Plaintiff-Appellant's Brief on Appeal

Defendant-Respondent's Brief in Opposition

Plaintiff-Appellant's Reply Brief

Record on Appeal

COURT OF APPEALS
STATE OF NEW YORK

WORTHY LENDING, LLC,	:	
	:	New York County
Plaintiff-Appellant,	:	Index No. 653402/2020
	:	
- against -	:	Disclosure Statement
	:	Pursuant to N.Y. Court of
NEW STYLE CONTRACTORS, INC.,	:	Appeals Rules of Practice
	:	§§ 500.22(b)(5) and
Defendant-Respondent.	:	500.1(f)

Pursuant to N.Y. Court of Appeals Rules of Practice §§ 500.22(b)(5) and 500.1(f), counsel for Plaintiff-Appellant Worthy Lending, LLC ("Worthy"), certifies that the following entities are Worthy's corporate parents, affiliates and/or subsidiaries:

Worthy Peer Capital, Inc. (parent of Worthy)

Worthy Financial, Inc. (parent of Worthy Peer Capital, Inc.)

Worthy Management, Inc. (subsidiary of Worthy Financial, Inc.)

Worthy Peer Capital II, Inc. (subsidiary of Worthy Financial, Inc.)

Worthy Lending II, LLC (subsidiary of Worthy Peer Capital II, Inc.)

Worthy Community Bonds, Inc. (subsidiary of Worthy Financial, Inc.)

Worthy Lending III, LLC (subsidiary of Worthy Community Bonds, Inc.)

Worthy Community Bonds II, Inc. (subsidiary of Worthy Financial, Inc.)

Worthy Lending IV, LLC (subsidiary of Worthy Community Bonds II, Inc.)

Worthy Property Bonds, Inc. (subsidiary of Worthy Financial, Inc.)

Worthy Lending V, LLC (subsidiary of Worthy Property Bonds, Inc.)

Dated: New York, New York
August 5, 2021

OTTERBOURG P.C.
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EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

WORTHY LENDING, LLC,

Index No.: 653406/2020

Plaintiff,

-against-

NOTICE OF ENTRY

NEW STYLE CONTRACTORS, INC.,

Defendant.

----------x

PLEASE TAKE NOTICE that the within is a true and correct copy of a Decision and Order of the Hon. Arlene P. Bluth in the above-captioned action, that was duly entered and filed by the New York County Clerk on November 18, 2020.

Dated: New York, New York
November 18, 2020

Very truly yours,

JAFFE & ASHER LLP

By: */s/ Glenn P. Berger*
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

----------X

WORTHY LENDING, LLC,

Plaintiff,

- v -

NEW STYLE CONTRACTORS, INC.,

Defendant.

----------X

INDEX NO. 653406/2020

MOTION DATE 11/12/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for DISMISSAL.

The motion to dismiss by defendant is granted.

Background

Plaintiff contends that it is a secured lender of non-party Checkmate Communications LLC d/b/a Checkmate Communications & Electric LLC ("Checkmate"). It argues that defendant is an account debtor of Checkmate and owes Checkmate $1,473,581.42 arising from accounts receivable.

Plaintiff claims that pursuant to a promissory note dated October 11, 2019, it made various loans to Checkmate and in exchange, Checkmate allegedly granted plaintiff a security interest in, and a lien upon, existing and future assets of Checkmate. Plaintiff asserts that on October 2, 2019, plaintiff notified defendant in writing that it had acquired a security interest in the accounts that defendant had with Checkmate. It insists that it filed a UCC-1 financing statement in New Jersey.

In April 2020, plaintiff allegedly sent Checkmate a notice of a default and demanded payment of all obligations. Plaintiff says it has attempted to resolve the underlying debt owed by Checkmate but that Checkmate continues to be in default. With respect to defendant, plaintiff claims that Checkmate assigned a security interest in defendant's accounts with Checkmate and plaintiff now seeks to recover those debts. It argues that defendant has not paid plaintiff despite a notice of assignment it sent to defendant dated October 2, 2019 directing it to pay plaintiff instead of Checkmate.

Plaintiff brings a single cause of action under UCC § 9-607 to collect any proceeds that defendant owed to Checkmate and to enforce the rights of Checkmate with respect to defendant.

Defendant moves to dismiss on the ground that plaintiff has not submitted any evidence that it actually purchased Checkmate's accounts and instead offers a security agreement that does not confer an assignment. It points out that this agreement only provides a security interest but does not constitute an assignment; defendant insists that Checkmate's accounts are merely collateral. Defendant argues that absent proof of a valid assignment, plaintiff cannot pursue its cause of action.

Defendant explains that it retained Checkmate as a subcontractor on two public construction projects in New York City (on the performing arts center at Queens Community College and renovation of a building at City College in Manhattan). Defendant insists that sending a notice of assignment is not sufficient to establish that there was a valid assignment and that UCC § 9-406 requires an actual assignment.

Defendant also argues that even if there was an assignment, it would be void because plaintiff did not file notices of assignment in accordance with Lien Law § 16, which contains

specific filing requirements for contracts involving public improvement projects. Defendant maintains that it kept paying Checkmate.

In opposition, plaintiff contends that defendant has mischaracterized the nature of this action. It argues that the motion to dismiss does not address the specific cause of action set forth in the complaint. Plaintiff maintains that pursuant to its financing contract with Checkmate, it notified defendant that Checkmate had assigned to plaintiff all amounts due by defendant. Plaintiff complains that despite receiving the notice, defendant continued to pay Checkmate and therefore remains liable for payments it made to Checkmate after having received the notice of assignment. Plaintiff contends that a security interest is treated as an assignment for purposes of the UCC.

In reply, defendant asserts that there is no dispute that there is no actual assignment for the accounts receivable and there only was a security interest. It emphasizes that the rights of a secured party are not the same as those of an assignee under the UCC. Defendant concludes that absent an actual assignment, plaintiff is limited to its standing as a secured creditor and those rights are governed by UCC § 9-607. Defendant maintains that this UCC section does not, by itself, create any direct obligation to a secured party as a successor in interest. Defendant argues that it actually paid the accounts at issue to Checkmate pursuant to Checkmate's instructions and it owes no duty to plaintiff. Defendant insists that plaintiff's remedy is against its debtor—Checkmate.

Discussion

"In general, Article 9 [of the UCC] applies to a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract"(*ImagePoint, Inc. v JPMorgan Chase Bank, Nat. Assn.*, 27 F Supp 3d 494, 503 [SD NY 2014]).

As an initial matter, the Court finds that the agreement between plaintiff and Checkmate provided plaintiff with a security interest and was not an assignment (NYSCEF Doc. No. 2). "An assignment is a transfer or setting over of property, or of some right or interest therein, from one person to another, and unless in some way qualified, it is properly the transfer of one whole interest in an estate, or chattel, or other thing" (*id*.at 502 [internal quotations and citation omitted]). There is no question that the agreement only grants plaintiff a security interest rather than an assignment of all of Checkmate's accounts.

The next issue is whether plaintiff can state a cause of action under the UCC under the theory that defendant, the account debtor, must make payments to the secured party (plaintiff) rather than the debtor (Checkmate). The basis for plaintiff's claim that defendant should have made payments to plaintiff is that plaintiff sent a notice of assignment to defendant (NYSCEF Doc. No. 3). Defendant claims that it paid Checkmate and did not have to recognize plaintiff's notice of assignment because it was not accompanied by proof of an assignment. However, plaintiff's cause of action is brought pursuant to UCC § 9-607, which governs the rights of a secured party to bring certain actions.

"N.Y. U.C.C. § 9–607(a)(3) provides that a secured party has the right to enforce the obligations of an account debtor ... and exercise the rights of the debtor with respect to the obligation of the account debtor ... to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor" (*id*. at

505). This section of the UCC also provides that "[t]his section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party" (UCC 9-607[e]). In other words, the section upon which plaintiff's cause of action is based does not determine whether defendant owes a duty to plaintiff.

The Michigan Court of Appeals, when considering similar circumstances and interpreting the same UCC provisions, found that a secured party could not bring an action under UCC § 9-607 and that it should have brought a claim under UCC § 9-406 (*Buckeye Retirement Co., LLC, Ltd. v Meijer, Inc.*, 279625, 2008 WL 4278038, at *3 [Mich Ct App 2008]). In *Buckeye*, just as here, a secured party attempted to collect from an account debtor while a dispute between the secured party and a debtor persisted. The Michigan court dismissed the UCC claim on the ground that the notice provided by the secured party did not comply with UCC § 9-406 (*id.*).

In *ImagePoint* (cited above), the Southern District of New York opined that "In situations like *Buckeye*, where there is a dispute between the secured creditor and the debtor as to who has the right to collect from an account debtor, the secured creditor cannot be said to be exercising the rights of the debtor with respect to the obligation of the account debtor. In other words, to hold that an account debtor is obligated to pay the secured creditor and not the debtor would be tantamount to creating a duty owed by the account debtor to the secured creditor that was separate and distinct from the duty it owed to the debtor. Such a result is barred by the plain language of § 9–607(e), which states that the secured party's right to collect from an account debtor does not determine whether an account debtor ... owes a duty to a secured party" (*ImagePoint, Inc.*, 27 F Supp 3d at 506) [SD NY 2014] internal quotations and citation omitted]).

This description captures the situation here. Plaintiff's complaint admits that there is an underlying dispute between it and Checkmate, and that Checkmate owes plaintiff over $3 million

(NYSCEF Doc. No. 1, ¶ 13). The existence of that dispute bars plaintiff from bringing a cause of action under UCC § 9-607. In other words, that ongoing dispute prevents plaintiff from bringing a case against one of Checkmate's debtors based on the notion that defendant should have started paying plaintiff before Checkmate even defaulted (the notice of assignment to defendant is dated October 2, 2019 and the complaint contends Checkmate defaulted on its obligations to plaintiff in April 2020).

The Court also finds that the notice of assignment was not sufficient under UCC § 9-406 to require defendant to start making payments to plaintiff. Of course, a secured party with a security interest is not the same as an assignee (*IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 404, 829 NYS2d 10 [1st Dept 2007] [noting that there is no authority to treat a security interest and an assignment as the same for purposes of UCC § 9-406]).

Summary

The Court concludes that plaintiff cannot sustain a cause of action under UCC § 9-706 or under 9-406 (even though it did not plead under that section). To be clear, the Court finds that plaintiff cannot maintain a case where it alleges that defendant should have started paying it despite the fact that it has an ongoing dispute with Checkmate. The question, then, is what happens if plaintiff is not successful against Checkmate. Should defendant be required to pay both plaintiff and Checkmate? The purpose of the UCC is not to facilitate double recovery. As defendant points out, plaintiff can recover from Checkmate, especially if defendant did in fact pay Checkmate.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant is granted, and the Clerk is directed to enter judgment accordingly along with costs and disbursements after presentation of proper papers therefor.

11/17/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

EXHIBIT 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

WORTHY LENDING, LLC,	
Plaintiff,	Index. No. 653406/2020 IAS Part 14 Justice Bluth
v.	
NEW STYLE CONTRACTORS, INC.,	**NOTICE OF APPEAL**
Defendant.	

PLEASE TAKE NOTICE that Plaintiff Worthy Lending, LLC, hereby appeals to the Supreme Court, Appellate Division, First Department from each and every part of the Decision and Order of the Supreme Court, New York County, dated November 17, 2020, and entered in the Office of the New York County Clerk on November 18, 2020, granting the Motion to Dismiss the Complaint (Motion Sequence No. 001) by Defendant New Style Contractors, Inc. A copy of the Decision and Order appealed from is annexed hereto as Exhibit "A". Notice of Entry for the Decision and Order was served on November 18, 2020.

Dated: New York, New York
December 10, 2020

OTTERBOURG P.C.

By: */s/ Richard G. Haddad*_____
Richard G. Haddad
William M. Moran
230 Park Avenue
New York, NY 10169-0075
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rhaddad@otterbourg.com
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Attorneys for Plaintiff Worthy Lending, LLC

TO: Lawrence M. Nessenson
Gregory E. Galterio
Glenn P. Berger
600 Third Avenue
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gberger@jaffeandasher.com
Tel: (212) 687-3000

Attorneys for Defendant New Style Contractors, Inc.

Supreme Court of the State of New York
Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

WORTHY LENDING, LLC,

Plaintiff,

- against -

NEW STYLE CONTRACTORS, INC.,

Defendant.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ☒ Civil Action
- ☐ CPLR article 75 Arbitration
- ☐ CPLR article 78 Proceeding
- ☐ Special Proceeding Other
- ☐ Habeas Corpus Proceeding

Filing Type

- ☒ Appeal
- ☐ Original Proceedings
  - ☐ CPLR Article 78
  - ☐ Eminent Domain
  - ☐ Labor Law 220 or 220-b
  - ☐ Public Officers Law § 36
  - ☐ Real Property Tax Law § 1278
- ☐ Transferred Proceeding
  - ☐ CPLR Article 78
  - ☐ Executive Law § 298
- ☐ CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

☐ Administrative Review	☐ Business Relationships	☒ Commercial	☒ Contracts
☐ Declaratory Judgment	☐ Domestic Relations	☐ Election Law	☐ Estate Matters
☐ Family Court	☐ Mortgage Foreclosure	☐ Miscellaneous	☐ Prisoner Discipline & Parole
☐ Real Property (other than foreclosure)	☒ Statutory	☐ Taxation	☐ Torts

Appeal	
Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

☐ Amended Decree	☐ Determination	■ Order	☐ Resettled Order
☐ Amended Judgement	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme Court	County: New York
Dated: 11/17/2020	Entered:11/18/2020
Judge (name in full):Hon. Arlene P. Bluth	Index No.:653406/2020
Stage: ☐ Interlocutory ■ Final ☐ Post-Final	Trial: ☐ Yes ■ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ☐ Yes ■ No
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court	County: Choose County
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Decision and Order dated November 17, 2020, and entered on November 18, 2020 as for motion sequence No. 001 which granted the Defendant's Motion to Dismiss the Complaint pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7).

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Did the IAS Court err in granting Defendant's Motion to Dismiss the Complaint where Plaintiff's allegations set forth a cause of action for collection under the New York Uniform Commercial Code ("N.Y. UCC"), based on Plaintiff's valid security interest in accounts owed by Defendant to Plaintiff's debtor, a notice of assignment pursuant to N.Y. UCC § 9-406 of the same accounts sent by Plaintiff to Defendant, and Defendant's failure to make payment of the accounts directly to Plaintiff after Defendant's receipt of the notice of assignment?

The Decision and Order of the IAS Court dated November 17, 2020 and entered on November 18, 2020 should be reversed and the case remanded to the Supreme Court because the IAS Court erred in granting Defendant's Motion to Dismiss the Complaint.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Worthy Lending, LLC	Plaintiff	Appellant
2	New Style Contractors, Inc.	Defendant	Respondent
3			
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name:Richard G. Haddad/Otterbourg, P.C.			
Address:230 Park Avenue			
City:New York	State:New York	Zip:10169	Telephone No:(212) 661-9100
E-mail Address:rhaddad@otterbourg.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1. Worthy Lending, LLC			
Attorney/Firm Name: William M. Moran/Otterbourg, P.C.			
Address:230 Park Avenue			
City:New York	State:New York	Zip:10169	Telephone No:(212) 661-9100
E-mail Address:wmoran@otterbourg.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1. Worthy Lending, LLC			
Attorney/Firm Name: Lawrence M. Nessenson/Jaffe & Asher LLP			
Address:600 Third Avenue			
City:New York	State:New York	Zip:10016	Telephone No:(212) 687-3000
E-mail Address:lnessenson@jaffeandasher.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 2. New Style Contractors, Inc.			
Attorney/Firm Name: Gregory E. Galterio/Jaffe & Asher LLP			
Address:600 Third Avenue			
City:New York	State:New York	Zip:10016	Telephone No:(212) 687-3000
E-mail Address:ggalterio@jaffeandasher.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 2. New Style Contractors, Inc.			
Attorney/Firm Name: Glenn P. Berger/Jaffe & Asher LLP			
Address:600 Third Avenue			
City:New York	State:New York	Zip:10016	Telephone No:(212) 687-3000
E-mail Address:gberger@jaffeandasher.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 2. New Style Contractors, Inc.			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

----------X

WORTHY LENDING, LLC,

Plaintiff,

- v -

NEW STYLE CONTRACTORS, INC.,

Defendant.

----------X

INDEX NO. 653406/2020

MOTION DATE 11/12/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for DISMISSAL.

The motion to dismiss by defendant is granted.

Background

Plaintiff contends that it is a secured lender of non-party Checkmate Communications LLC d/b/a Checkmate Communications & Electric LLC ("Checkmate"). It argues that defendant is an account debtor of Checkmate and owes Checkmate $1,473,581.42 arising from accounts receivable.

Plaintiff claims that pursuant to a promissory note dated October 11, 2019, it made various loans to Checkmate and in exchange, Checkmate allegedly granted plaintiff a security interest in, and a lien upon, existing and future assets of Checkmate. Plaintiff asserts that on October 2, 2019, plaintiff notified defendant in writing that it had acquired a security interest in the accounts that defendant had with Checkmate. It insists that it filed a UCC-1 financing statement in New Jersey.

In April 2020, plaintiff allegedly sent Checkmate a notice of a default and demanded payment of all obligations. Plaintiff says it has attempted to resolve the underlying debt owed by Checkmate but that Checkmate continues to be in default. With respect to defendant, plaintiff claims that Checkmate assigned a security interest in defendant's accounts with Checkmate and plaintiff now seeks to recover those debts. It argues that defendant has not paid plaintiff despite a notice of assignment it sent to defendant dated October 2, 2019 directing it to pay plaintiff instead of Checkmate.

Plaintiff brings a single cause of action under UCC § 9-607 to collect any proceeds that defendant owed to Checkmate and to enforce the rights of Checkmate with respect to defendant.

Defendant moves to dismiss on the ground that plaintiff has not submitted any evidence that it actually purchased Checkmate's accounts and instead offers a security agreement that does not confer an assignment. It points out that this agreement only provides a security interest but does not constitute an assignment; defendant insists that Checkmate's accounts are merely collateral. Defendant argues that absent proof of a valid assignment, plaintiff cannot pursue its cause of action.

Defendant explains that it retained Checkmate as a subcontractor on two public construction projects in New York City (on the performing arts center at Queens Community College and renovation of a building at City College in Manhattan). Defendant insists that sending a notice of assignment is not sufficient to establish that there was a valid assignment and that UCC § 9-406 requires an actual assignment.

Defendant also argues that even if there was an assignment, it would be void because plaintiff did not file notices of assignment in accordance with Lien Law § 16, which contains

specific filing requirements for contracts involving public improvement projects. Defendant maintains that it kept paying Checkmate.

In opposition, plaintiff contends that defendant has mischaracterized the nature of this action. It argues that the motion to dismiss does not address the specific cause of action set forth in the complaint. Plaintiff maintains that pursuant to its financing contract with Checkmate, it notified defendant that Checkmate had assigned to plaintiff all amounts due by defendant. Plaintiff complains that despite receiving the notice, defendant continued to pay Checkmate and therefore remains liable for payments it made to Checkmate after having received the notice of assignment. Plaintiff contends that a security interest is treated as an assignment for purposes of the UCC.

In reply, defendant asserts that there is no dispute that there is no actual assignment for the accounts receivable and there only was a security interest. It emphasizes that the rights of a secured party are not the same as those of an assignee under the UCC. Defendant concludes that absent an actual assignment, plaintiff is limited to its standing as a secured creditor and those rights are governed by UCC § 9-607. Defendant maintains that this UCC section does not, by itself, create any direct obligation to a secured party as a successor in interest. Defendant argues that it actually paid the accounts at issue to Checkmate pursuant to Checkmate's instructions and it owes no duty to plaintiff. Defendant insists that plaintiff's remedy is against its debtor—Checkmate.

Discussion

"In general, Article 9 [of the UCC] applies to a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract"(*ImagePoint, Inc. v JPMorgan Chase Bank, Nat. Assn.*, 27 F Supp 3d 494, 503 [SD NY 2014]).

As an initial matter, the Court finds that the agreement between plaintiff and Checkmate provided plaintiff with a security interest and was not an assignment (NYSCEF Doc. No. 2). "An assignment is a transfer or setting over of property, or of some right or interest therein, from one person to another, and unless in some way qualified, it is properly the transfer of one whole interest in an estate, or chattel, or other thing" (*id*.at 502 [internal quotations and citation omitted]). There is no question that the agreement only grants plaintiff a security interest rather than an assignment of all of Checkmate's accounts.

The next issue is whether plaintiff can state a cause of action under the UCC under the theory that defendant, the account debtor, must make payments to the secured party (plaintiff) rather than the debtor (Checkmate). The basis for plaintiff's claim that defendant should have made payments to plaintiff is that plaintiff sent a notice of assignment to defendant (NYSCEF Doc. No. 3). Defendant claims that it paid Checkmate and did not have to recognize plaintiff's notice of assignment because it was not accompanied by proof of an assignment. However, plaintiff's cause of action is brought pursuant to UCC § 9-607, which governs the rights of a secured party to bring certain actions.

"N.Y. U.C.C. § 9–607(a)(3) provides that a secured party has the right to enforce the obligations of an account debtor ... and exercise the rights of the debtor with respect to the obligation of the account debtor ... to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor" (*id*. at

505). This section of the UCC also provides that "[t]his section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party" (UCC 9-607[e]). In other words, the section upon which plaintiff's cause of action is based does not determine whether defendant owes a duty to plaintiff.

The Michigan Court of Appeals, when considering similar circumstances and interpreting the same UCC provisions, found that a secured party could not bring an action under UCC § 9-607 and that it should have brought a claim under UCC § 9-406 (*Buckeye Retirement Co., LLC, Ltd. v Meijer, Inc.*, 279625, 2008 WL 4278038, at *3 [Mich Ct App 2008]). In *Buckeye*, just as here, a secured party attempted to collect from an account debtor while a dispute between the secured party and a debtor persisted. The Michigan court dismissed the UCC claim on the ground that the notice provided by the secured party did not comply with UCC § 9-406 (*id.*).

In *ImagePoint* (cited above), the Southern District of New York opined that "In situations like *Buckeye*, where there is a dispute between the secured creditor and the debtor as to who has the right to collect from an account debtor, the secured creditor cannot be said to be exercising the rights of the debtor with respect to the obligation of the account debtor. In other words, to hold that an account debtor is obligated to pay the secured creditor and not the debtor would be tantamount to creating a duty owed by the account debtor to the secured creditor that was separate and distinct from the duty it owed to the debtor. Such a result is barred by the plain language of § 9–607(e), which states that the secured party's right to collect from an account debtor does not determine whether an account debtor ... owes a duty to a secured party" (*ImagePoint, Inc.*, 27 F Supp 3d at 506) [SD NY 2014] internal quotations and citation omitted]).

This description captures the situation here. Plaintiff's complaint admits that there is an underlying dispute between it and Checkmate, and that Checkmate owes plaintiff over $3 million

(NYSCEF Doc. No. 1, ¶ 13). The existence of that dispute bars plaintiff from bringing a cause of action under UCC § 9-607. In other words, that ongoing dispute prevents plaintiff from bringing a case against one of Checkmate's debtors based on the notion that defendant should have started paying plaintiff before Checkmate even defaulted (the notice of assignment to defendant is dated October 2, 2019 and the complaint contends Checkmate defaulted on its obligations to plaintiff in April 2020).

The Court also finds that the notice of assignment was not sufficient under UCC § 9-406 to require defendant to start making payments to plaintiff. Of course, a secured party with a security interest is not the same as an assignee (*IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 404, 829 NYS2d 10 [1st Dept 2007] [noting that there is no authority to treat a security interest and an assignment as the same for purposes of UCC § 9-406]).

Summary

The Court concludes that plaintiff cannot sustain a cause of action under UCC § 9-706 or under 9-406 (even though it did not plead under that section). To be clear, the Court finds that plaintiff cannot maintain a case where it alleges that defendant should have started paying it despite the fact that it has an ongoing dispute with Checkmate. The question, then, is what happens if plaintiff is not successful against Checkmate. Should defendant be required to pay both plaintiff and Checkmate? The purpose of the UCC is not to facilitate double recovery. As defendant points out, plaintiff can recover from Checkmate, especially if defendant did in fact pay Checkmate.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant is granted, and the Clerk is directed to enter judgment accordingly along with costs and disbursements after presentation of proper papers therefor.

11/17/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION		
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐	REFERENCE

EXHIBIT 3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

WORTHY LENDING, LLC,

Index No.: 653406/2020

Plaintiff,

-against-

NOTICE OF ENTRY

NEW STYLE CONTRACTORS, INC.,

Defendant.

----------x

PLEASE TAKE NOTICE that the within is a true and correct copy of a Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, duly entered and filed by the clerk of said Court on July 6, 2021.

Dated: New York, New York
July 6, 2021

Very truly yours,

JAFFE & ASHER LLP

By: */s/ Glenn P. Berger*
Glenn P. Berger
Attorneys for Defendant
NEW STYLE CONTRACTORS, INC.
600 Third Avenue
New York, New York 10016
(212) 687-3000

TO: OTTERBOURG, P.C.
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(212) 381-9212
Attorneys for Plaintiff
WORTHY LENDING, LLC

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Acosta, P.J., Kapnick, Moulton, Scarpulla, JJ.

14171 WORTHY LENDING LLC,
Plaintiff-Appellant,

-against-

NEW STYLE CONTRACTORS, INC.,
Defendant-Respondent.

Index No. 653406/20
Case No. 2020-04842

Otterbourg P.C., New York (Richard G. Haddad of counsel), for appellant.

Jaffe & Asher LLP, New York (Glenn P. Berger of counsel), for respondent.

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered November 18, 2020, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

In this debt collection action, plaintiff alleges that it notified defendant in writing that, as a result of its loans to a nonparty debtor, plaintiff had a security interest and lien in all of the nonparty debtor's assets, including amounts due to the nonparty debtor from defendant pursuant to a separate contract. Plaintiff demanded that all remittances from defendant to the nonparty debtor under that contract were to be made only to plaintiff, however, defendant continued to remit some payments directly to the nonparty debtor. The nonparty debtor subsequently defaulted in its obligations to plaintiff and plaintiff accelerated all amounts due under its agreement with the nonparty debtor. Plaintiff then commenced this action against defendant and alleged a single cause of action pursuant to UCC 9-607. In its complaint, plaintiff seeks recovery of the amount

defendant paid to the nonparty debtor after defendant's receipt of the notice of assignment but before the nonparty debtor defaulted under its contract with plaintiff.

The motion court properly determined that plaintiff did not have an independent cause of action against defendant pursuant to UCC 9-607. Plaintiff and defendant have no contractual or other relationship or duty to one another. Plaintiff seeks to impose upon defendant a separate obligation to repay plaintiff the same amount it has already paid the nonparty debtor under their contract. Because there was a dispute between plaintiff, the secured creditor, and the nonparty debtor as to who had the right to collect from the defendant, section 9-607(e) applied (*see Buckeye Retirement Co., LLC Ltd. V Meijer, Inc.*, 2008 WL 4278038, at *2, 2008 Mich App LEXIS 1931, *6 [Mich App, Sept. 18, 2008, No. 279625]).

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: July 6, 2021

Susanna Molina Rojas
Clerk of the Court

EXHIBIT 4

Permanent Editorial Board for the Uniform Commercial Code

PEB COMMENTARY NO. 21

USE OF THE TERM "ASSIGNMENT" IN ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE

March 11, 2020

PREFACE TO PEB COMMENTARY

The Permanent Editorial Board for the Uniform Commercial Code acts under the authority of the American Law Institute and the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws). In March 1987, the Permanent Editorial Board resolved to issue from time to time supplementary commentary on the Uniform Commercial Code to be known as *PEB Commentary*. These *PEB Commentaries* seek to further the underlying policies of the Uniform Commercial Code by affording guidance in interpreting and resolving issues raised by the Uniform Commercial Code and/or the Official Comments. The Resolution states that:

> A *PEB Commentary* should come within one or more of the following specific purposes, which should be made apparent at the inception of the Commentary: (1) to resolve an ambiguity in the Uniform Commercial Code by restating more clearly what the PEB considers to be the legal rule; (2) to state a preferred resolution of an issue on which judicial opinion or scholarly writing diverges; (3) to elaborate on the application of the Uniform Commercial Code where the statute and/or the Official Comment leaves doubt as to inclusion or exclusion of, or application to, particular circumstances or transactions; (4) consistent with U.C.C. § 1-102(2)(b),[*] to apply the principles of the Uniform Commercial Code to new or changed circumstances; (5) to clarify or elaborate upon the operation of the Uniform Commercial Code as it relates to other statutes (such as the Bankruptcy Code and various federal and state consumer protection statutes) and general principles of law and equity pursuant to U.C.C. § 1-103;[†] or (6) to otherwise improve the operation of the Uniform Commercial Code.

For more information about the Permanent Editorial Board for the Uniform Commercial Code, visit www.ali.org or www.uniformlaws.org.

[*] Current U.C.C. § 1-103(a)(2).
[†] Current U.C.C. § 1-103(b).

PEB COMMENTARY NO. 21
USE OF THE TERM "ASSIGNMENT" IN ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE
(March 11, 2020)

INTRODUCTION

Article 9 of the Uniform Commercial Code (the "UCC") addresses in Part 4 the rights of third parties in secured transactions. The third parties are typically "account debtors,"[1] i.e., persons obligated on accounts,[2] chattel paper,[3] or general intangibles[4] (including payment intangibles[5]). However, many of the provisions of Part 4, instead of referring to a "debtor,"[6] "secured party,"[7] and "security interest,"[8] all of which terms are defined in the UCC, refer to an "assignor," an "assignee," and an "assignment," or sometimes to an "assigned contract," none of which terms are defined in the UCC.[9]

This Commentary explains what constitutes an "assignment" and the scope of the terms "assignor" and "assignee" in relation to the statutory scheme of Article 9.

DISCUSSION

Article 9 applies to both a sale of certain payment rights—accounts, chattel paper, payment intangibles, and promissory notes (for convenience, referred to herein as "specified payment rights")—and to the grant of an interest in specified payment rights to secure an obligation.[10] Put another way, Article 9 applies both to an outright assignment of ownership of specified payment rights and to an assignment of specified payment rights for security. The terms "debtor" and "secured party" are defined to include the participants in both types of transactions.[11]

---

[1] U.C.C. § 9-102(a)(3) (defining "account debtor").
[2] U.C.C. § 9-102(a)(2) (defining "account").
[3] U.C.C. § 9-102(a)(11) (defining "chattel paper").
[4] U.C.C. § 9-102(a)(42) (defining "general intangible").
[5] U.C.C. § 9-102(a)(61) (defining "payment intangible").
[6] U.C.C. § 9-102(a)(28) (defining "debtor").
[7] U.C.C. § 9-102(a)(73) (defining "secured party").
[8] U.C.C. § 1-201(b)(35) (defining "security interest").
[9] Section 9-403 addresses an agreement of an account debtor not to assert claims or defenses against an "assignee." Section 9-404 addresses the rights acquired by an "assignee" and certain claims and defenses that an account debtor can assert against an "assignee." Section 9-405 focuses on modifications to an "assigned contract." Section 9-406 sets forth the rights of an account debtor when notified of an "assignment." Sections 9-406, 9-407, 9-408, and 9-409 generally address certain contractual and legal restrictions on "assignment." Section 9-209 describes certain duties of a secured party if an account debtor has been notified of an "assignment."
[10] *See* U.C.C. § 9-109(a)(1), (3).
[11] Section 9-102(a)(28) states that a "debtor" includes both "a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor" and "a seller of accounts, chattel paper, payment intangibles, or promissory notes." Section 9-102(a)(73) states that a "secured party" includes both "a person in whose favor a security interest is created or provided for under a security agreement" and "a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold." U.C.C. § 9-102(a)(73). In addition, Section 1-201(b)(35) defines a "security interest" to include both "an interest in personal property … which secures payment or performance of an obligation" and "any interest of … a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9." U.C.C. § 1-201(b)(35).

For ease of reference, we refer in this Commentary to a security interest that secures an obligation as a "SISO."

Article 9's use of the term "assignment," and the correlative terms "assignor" and "assignee," is largely historical. Former versions of Article 9 used these terms as they were used in general contract law.[12] In that context, it was understood that an "assignment" could be either an outright transfer of ownership of a specified payment right or a SISO in a specified payment right.[13] The 1999 revisions of Article 9 retained that terminology to avoid any suggestion that the scope or substance of the applicable rules had been changed. Although revised Article 9 does not define the terms "assignment," "assignor," and "assignee," Comment 26 to Section 9-102 states that "[d]epending on the context, [the term "assignment"] may refer to the assignment … of an outright ownership interest or to the assignment … of a limited interest, such as a security interest." Accordingly, unless there is good reason for any of these terms to apply more narrowly, each applies, as appropriate, both to an outright assignment of ownership and to a SISO.

Some courts have interpreted the term "assignment," especially in the context of Section 9-406(a),[14] as referring only to an outright assignment of ownership. This narrow reading of the term "assignment" is contrary to the use of the term in Article 9 and the holdings of other courts[15] and is incorrect.

Section 9-406(a) provides that, when an account debtor receives a notification from an assignor or an assignee that a specified payment right has been assigned to the assignee and an instruction to pay the assignee, the account debtor may thereafter discharge its obligation to make the payment owed by paying the assignee. After receipt of the notification and payment instruction, the account debtor may not discharge the account debtor's payment obligation by paying the assignor. Under some courts' erroneously narrow interpretation, Section 9-406(a) applies only when the assignment is a sale of the specified payment right and does not apply when the assignment is a SISO.[16]

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[12] *See generally* RESTATEMENT (SECOND) OF CONTRACTS ch. 15, "Assignment and Delegation" (AM. LAW INST. 1981) (using "assignment" to refer interchangeably to the outright transfer of a right under a contract and to the creation of a security interest in a right under a contract).

[13] *See* U.C.C. § 9-406, cmt. 5 ("Former Section 9-318(4) rendered ineffective an agreement between an account debtor and an assignor which prohibited assignment of an account (whether outright or to secure an obligation)…."); 7 THOMAS M. QUINN, QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST (Rev. 2d ed. 2011), at 961-62 (discussing former U.C.C. § 9-318). Case law under former U.C.C. § 9-318 was consistent with the broad interpretation of the term "assignment" to include both an outright transfer and a SISO. *See, e.g., First Nat'l Bank of Boston v. Thomson Consumer Elecs., Inc.*, 84 F.3d 397, 399 (11th Cir. 1996); *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1190 (7th Cir. 1990); *In re Johnson*, 439 B.R. 416, 432 (Bankr. E.D. Mich. 2010), *aff'd on other grounds*, No. 10-14292, 2011 WL 1983339 (E.D. Mich. May 23, 2011).

[14] *See, e.g., Durham Capital Corporation v. Ocwen Loan Servicing, LLC*, 777 F. App'x 952 (11th Cir. 2019), citing *IIG Capital LLC v. Archipelago, L.L.C.*, 36 A.D.3d 401, 404 (N.Y. App. Div. 2007).

[15] *See, e.g., ARA Inc. v. City of Glendale*, 360 F. Supp. 3d 957 (D. Ariz. 2019); *Nisbet, Inc. v. Wells Fargo Bank*, No. SA–14–CV–00469–RP, 2015 WL 1408839 (W.D. Tex. Mar. 26, 2015) (order denying motion to dismiss for failure to state a claim); *Swift Energy Operating, L.L.C. v. Plemco-South, Inc.*, 157 So. 3d 1154 (La. Ct. App. 2015).

[16] Presumably, under the narrow interpretation, if the assignment is a SISO in a specified payment right and is therefore outside of the scope of Section 9-406(a), other law determines whether an account debtor may discharge the account debtor's payment obligation by paying the assignee or by continuing to pay the assignor after receipt of the notification and instruction.

There is no policy reason to limit the term "assignment" in Section 9-406, or elsewhere in Article 9, to an outright transfer of ownership. Doing so would place a burden on the account debtor to determine whether the assignment was a sale or a SISO in order to know whether, for example, the obligations and rights in Part 4 apply to the account debtor. That burden is both heavy and unjustifiable. The account debtor is not a party to the assignment transaction and typically has no basis for making that determination. Nor does it make sense to require the account debtor to obtain the assignment documentation from the assignor or the assignee, and then to analyze the transaction between the assignor and the assignee to ascertain whether the transaction is actually a sale, merely to be confident that the account debtor may discharge its payment obligation by paying the assignee or to have other rights, claims, duties, and defenses of an account debtor under Part 4. Given the difficulty that courts often have in determining whether an assignment of a payment right is a sale or a SISO,[17] an account debtor should not be expected to make that determination.[18] In the context of Section 9-406(a), for example, all that should matter to the account debtor is to know whom the account debtor may pay in order to discharge the account debtor's payment obligation.[19] Similarly, an assignee often would not have certainty on whether Part 4 of Article 9 applies to its rights or whether the common law of contracts applies. This lack of certainty would have a negative effect on the availability of financing.

One court has expressed the view that the narrow interpretation of the term "assignment" is consistent with Article 9's "legislative scheme." According to the court, because a secured party's right to enforce a SISO in a specified payment right is addressed in Section 9-607, there is no need for Section 9-406(a) to afford to such a secured party a "parallel" right.[20] However, the court failed to consider subsection (e) of Section 9-607. That subsection states, in relevant part, that "[t]his section does not determine whether an account debtor … owes a duty to a secured party." In other words, Sections 9-607 and 9-406 address different rights. Section 9-607 addresses the rights of a secured party *vis-à-vis the debtor* to collect a specified payment right. Section 9-406 addresses a secured party's rights *against the account debtor* to collect a specified payment right. If Section 9-406—and Part 4 of Article 9 more generally—did not apply to an assignment constituting a SISO, there would be a gap in Article 9: nothing in Article 9 would address the rights, claims, duties, and defenses of an account debtor with respect to that type of assignment.

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[17] "In many commercial financing transactions the distinction is blurred." U.C.C. § 9-109, cmt. 4.

[18] Similarly, an assignor should not have to make these judgments to determine if Part 4 applies to rights that the assignor may have under Part 4, such as the assignor's right under U.C.C. § 9-405 to make good faith modifications to an assigned contract that bind the assignee.

[19] *See* U.C.C. § 9-406, cmt. 5 (applying U.C.C. § 9-406(a) to an account debtor's right to a discharge on an account that secures an obligation). Likewise, there is no reason to limit the term "assignment" in the opposite direction, i.e., to a SISO in a specified payment right to the exclusion of a sale of the specified payment right, as the court apparently did in *Contrarian Funds, LLC v. Woodbridge Group of Companies (In re Woodbridge Group of Companies)*, 606 B.R. 201 (D. Del. 2019). In this decision dealing *inter alia* with the anti-assignment provisions in Section 9-406 and 9-408, the court incorrectly held that Section 9-408(a), rather than Section 9-406(d), applied to the assignment of a promissory note that secured an obligation and that neither Section applied to the sale of a promissory note. The court misunderstood Section 9-406(e). That section provides that Section 9-406(d) does not apply to the sale of a promissory note, and Section 9-408(b), which provides that Section 9-408(a) specifically does apply to the sale of a promissory note. For a critique of the *Woodbridge* decision, *see* Bruce A. Markell, *The Road to Perdition: 180 Equipment, Woodbridge and Liddle Pave the Way*, 39 BANKRUPTCY LAW LETTER 1 (Nov. 2019); *see also* Stephen L. Sepinuck, *Personal Property Secured Transactions*, 74 THE BUSINESS LAWYER, 1291, 1297-98, and Carl S. Bjerre and Stephen L. Sepinuck, *Spotlight*, 9 THE TRANSACTIONAL LAWYER (Feb. 2019), each of which critiques the bankruptcy court's decision upheld by the district court.

[20] *Durham*, 777 F. App'x at 956.

As explained in Section 1-103(a)(2), one of the purposes of the UCC is "to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties." The narrow interpretation of the term "assignment" in Part 4 would undermine that purpose. Suppose, for example, that pursuant to Section 9-406(a), a debtor who has granted a SISO in a specified payment right notifies the account debtor that the right has been assigned and instructs the account debtor that payment is to be made to a particular assignee. The narrow interpretation would leave to other law whether the account debtor may discharge the account debtor's payment obligation by paying the debtor or by paying the secured party. The broader interpretation makes clear when the account debtor may discharge the account debtor's payment obligation by paying the debtor and when the account debtor may discharge the obligation by paying the secured party.[21] The broader interpretation creates greater certainty for both the secured party and the account debtor and is consistent with expectations in commercial practice.[22]

The broader interpretation of the term "assignment" is relevant not only for Section 9-406(a) but also for other provisions of Article 9 in which the term "assignment" is used, such as in the balance of the provisions of Part 4 and in Section 9-209. Likewise, the term "assignor" in those provisions includes a debtor who grants a SISO, and the term "assignee" includes the secured party in whose favor such a security interest is granted.

AMENDMENTS TO OFFICIAL COMMENTS

With the discussion in this Commentary in mind, the Official Comments to Section 9-401 are amended to add the following new Official Comment:

8. **Use of the Term "Assignment."** The term "assignment," as used in this Article, refers to both an outright transfer of ownership and a transfer of an interest to secure an obligation. See Comment 26 to Section 9-102 and PEB Commentary No. 21, dated March 11, 2020.

In addition, Official Comment 26 to Section 9-102 is amended as follows:

26. **Terminology: "Assignment" and "Transfer."** In numerous provisions, this Article refers to the "assignment" or the "transfer" of property interests. These terms and their derivatives are not defined. This Article generally follows common usage by using the terms "assignment" and "assign" to refer to transfers of rights to payment, claims, and liens and other security interests. It generally uses the term "transfer" to refer to other transfers of interests in property. Except when

[21] Some courts have expressed skepticism that a secured party is entitled to sue an account debtor whose payment obligation to the debtor has not been discharged under U.C.C. § 9-406(a). *See, e.g., Forest Capital, LLC v. BlackRock, Inc.*, 658 F. App'x 675 (4th Cir. 2016). However, if the account debtor has not been discharged under U.C.C. § 9-406(a) on its contractual obligation to the debtor, the account debtor remains liable to the debtor. Article 9 gives the secured party the right to enforce the debtor's rights against the account debtor. *See* U.C.C. § 9-607.

[22] *See, e.g.*, FORMS UNDER ARTICLE 9 OF THE UCC, AMERICAN BAR ASSOCIATION BUSINESS LAW SECTION UNIFORM COMMERCIAL CODE COMMITTEE (3d ed. 2016) at 595-96. Form 4.6 is a form of "Demand for Payment on Account Debtor of Borrower." The form, invoking U.C.C. § 9-406, assumes that the account debtor is obligated on collateral that secures a loan by the secured party to a debtor who is the "borrower."

used in connection with a letter-of-credit transaction (see Section 9-107, Comment 4), no significance should be placed on the use of one term or the other. Depending on the ~~context~~ substance of the transaction, each term as used in this Article ~~may~~ refers to the assignment or transfer of an outright ownership interest, ~~or~~ to the assignment or transfer of a limited interest, such as a security interest, or both. See Comment 8 to Section 9-401 and PEB Commentary No. 21, dated March 11, 2020.