To be Argued by:
RICHARD G. HADDAD
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

WORTHY LENDING, LLC,

Appellate Case No.: 2020-04842

Plaintiff-Appellant,

– against –

NEW STYLE CONTRACTORS, INC.,

Defendant-Respondent.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

RICHARD G. HADDAD
WILLIAM M. MORAN
ALESSANDRA M. DAGIRMANJIAN
OTTERBOURG P.C.
Attorneys for Plaintiff-Appellant
230 Park Avenue
New York, New York 10169
(212) 661-9100
rhaddad@otterbourg.com
wmoran@otterbourg.com
adagirmanjian@otterbourg.com

New York County Clerk's Index No. 653406/20

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

Statutes

Other Authorities

PRELIMINARY STATEMENT

Respondent New Style[1] does not cite a single New York case holding that a secured creditor (Worthy) cannot pursue payment of accounts from an account debtor (New Style), under the Uniform Commercial Code, simply because its agreement with the debtor granting it a security interest in those accounts—and expressly permitting it to demand that such accounts be remitted directly to it at any time—does not contain the word "assignment." Nor does Respondent provide any reason to hold differently from the guidance and logic provided by the Permanent Editorial Board of the UCC, which this Court has previously cited to as an authoritative source, and which explicitly rejected the notion that a security interest is different from an assignment under Section 9-406, and which stated that any court that rules as the lower court did here would be "incorrect."

Rather, in stark contrast to the cases that Worthy cited in its Opening Brief, from both New York and other jurisdictions, Respondent cites to four opinions from jurisdictions outside New York, the facts of which are entirely distinct from those here, to support its strained and "incorrect" interpretation of Section 9-406. (Resp. Br. at 7-10) Moreover, just as the Supreme Court erroneously did, Respondent looks for support from *IIG Capital LLC v. Archipelago, L.L.C.*, in which this Court

[1] Capitalized terms shall have the same meaning as in Plaintiff-Appellant's Opening Brief. References to "Br." refer to the Brief for Plaintiff-Appellant and references to "Resp. Br." refer to the Brief for Defendant-Respondent.

affirmed the denial of defendant-account debtors' motion to dismiss, holding the plaintiff-factor had stated a claim to collect on the debtor's accounts. 36 A.D.3d 401, 403-04, 829 N.Y.S.2d 10, 12-13 (1st Dep't 2007).

Respondent further misses the mark by misinterpreting and misapplying, again, just like the Supreme Court erroneously did, the Southern District of New York Magistrate's Report in *ImagePoint, Inc. v. JPMorgan Chase Bank, National Association*. Specifically, New Style argues that *ImagePoint* supports its distorted view of the UCC which denies a secured creditor's cause of action where its borrower has defaulted and the account debtor has already made payments to the borrower despite a notice of assignment. New Style's misinterpretation is contradicted by the actual holding of that case, as well as the express language and purpose of the Uniform Commercial Code. UCC Section 9-406 forecloses any defense by an account debtor based on its payment to an assignor after receipt of a notice of assignment. And, to condition the ability of a secured creditor to collect its collateral on the non-existence of a default would render a security interest, and Article 9, meaningless.

Finally, Respondent spends nearly a quarter of its Brief discussing its view on the application of New York's Lien Law to this case, which it even states was "not a basis of the [Supreme Court's] decision." (Resp. Br. at 15) The Lien Law is a diversion with no bearing on this case—no such facts are pleaded, no such

documentary evidence was submitted, no Lien Law claims are in the Complaint, and the Lien Law was not addressed in the decision below. The Lien Law argument is plainly New Style's attempt to distract this court from the fact that it paid Checkmate in violation of the Notice of Assignment and the UCC.

Worthy's cause of action is one that is typical of and supported by the language and purpose of the UCC. Worthy is a secured creditor, with a security interest in accounts, attempting to collect on those accounts after its borrower's failure to pay. New Style has failed to present any issues that disturb Worthy's cause of action, the longstanding commercial law of this state, and the direction of the PEB, all of which this Court now has the opportunity and obligation to enforce.

ARGUMENT

POINT I

SECTIONS 9-406 AND 9-607 OF THE UCC SUPPORT WORTHY'S CLAIM FOR COLLECTION OF ACCOUNTS FROM NEW STYLE

Respondent asserts in its Brief that Worthy's cause of action is disguised as one under Section 9-607 but is actually one brought under Section 9-406, (Resp. Br. at 4) and that there is a "critical distinction" between the rights provided by these two provisions, arguing that only Section 9-406 provides recovery to an assignee where an account debtor pays the assignor instead. (Resp. Br. at 6) This attempt to separate these two provisions reflects Respondent's misunderstanding not only of

Worthy's cause of action, but of the Uniform Commercial Code. Sections 9-406 and 9-607 do not provide separate and distinct causes of action under the UCC, but rather, work in tandem to permit recovery by a secured creditor on accounts after it has sent a notice of assignment, and the account debtor has failed to make payments to it, regardless of whether the account debtor has already paid the assignor.

Specifically, under Section 9-406, upon receipt of a notice of assignment, which Worthy sent to New Style, an account debtor on a receivable or payment intangible "may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor". N.Y. UCC § 9-406(a). Correspondingly, Section 9-607 allows a secured party to enforce the obligations of (*i.e.*, commence suit against) an account debtor obligated on collateral in which the secured party holds a security interest. N.Y. UCC § 9-607(a)(3).

Thus, contrary to New Style's mischaracterization, a claim by a secured creditor to collect on accounts in which it holds a security interest is not brought *either* under Section 9-406 or 9-607. Rather, Section 9-607 provides the mechanism by which the secured party may bring suit against an account debtor (as New Style even admits in its Brief (Resp. Br. at 6-7)), where that account debtor has failed to comply with Section 9-406 after receiving a notice of assignment. Section 9-406 operates to deny the account debtor the defense of payment where it continues to pay the debtor after receiving a notice of assignment. *Gen. Motors Acceptance Corp.*

v. Clifton-Fine Cent. Sch. Dist., 85 N.Y.2d 232, 236, 623 N.Y.S.2d 821, 823 (1995). Thus, pursuant to both Sections 9-607 and 9-406, Worthy is entitled to pursue any accounts of Checkmate, including those owed by New Style that arose after New Style's receipt of the Notice of Assignment.

POINT II

NEW STYLE HAS NOT AND CANNOT PROVIDE ANY SUPPORT FOR DENYING THE APPLICABILITY OF SECTION 9-406 TO WORTHY'S SECURITY INTEREST IN THE NEW STYLE ACCOUNTS

New Style cites no authority which would give this Court any reason to stray from the explicit direction of the Permanent Editorial Board of the Uniform Commercial Code ("PEB") or the cases, from both New York and other jurisdictions, which Worthy cited in its Opening Brief, that have enforced a secured creditor's ability to pursue collection of accounts under the UCC based on a valid security interest. Rather, New Style cites to four cases from jurisdictions other than New York, which lay out an erroneous interpretation of commercial law that is contrary to the drafters' intent and the Uniform Commercial Code. This is precisely the danger that the PEB warns against, and which this Court can and should prevent.

A. None of the Cases New Style Cites Suggest that Section 9-406 is Not Applicable to Worthy's Security Interest in the New Style Accounts

Not one of the cases that New Style cites in support of its argument that a security interest is not an assignment under UCC Section 9-406, is determinative in

this case, because each is from a jurisdiction other than New York. Moreover, each is distinguishable from the pleaded facts of this case.

First, two of the cases that New Style cites do not even address the applicability of Section 9-406 to a valid security interest. In *Durham Commercial Capital Corporation v. Select Portfolio Servicing, Inc.*, while the Florida District Court, interpreting New York law, found that the plaintiff's motion for summary judgment was precluded where there was a fact issue as to whether it had purchased all of the accounts for which it was seeking payment, that court did not analyze the applicability of the factor's security interest in the debtor's accounts or whether Section 9-406 applies to security interests generally. No. 3:14-CV-877-J-34PDB, 2016 WL 6071633, at *18 (M.D. Fla. Oct. 17, 2016).[2] Similarly, in *Platinum Funding Services, LLC v. Petco Insulation Co.*, the court did not address any security interest in analyzing the plaintiff's claim, because the plaintiff did not rely on a security interest in the debtor's accounts as a basis for its claims. No. 3:09CV1133 MRK, 2011 WL 1743417, at *3 (D. Conn. May 2, 2011) ("Here, the only right that Petco Insulation assigned to Platinum funding was *an option* to purchase invoices from Petco Insulation.") (italics in original). Thus, neither case defeats, or even

[2] After the court ruled on summary judgment motions in its 2016 opinion, it later denied the plaintiff's motion to amend its complaint to assert claims on unpurchased accounts, based on the plaintiff's security interest in all of its debtor's accounts, finding the plaintiff should have realized it had failed to do so in its original complaint and should have asserted it earlier. *Durham Commercial Capital Corp. v. Select Portfolio Servicing*, Inc., No. 3:14-CV-877-J-34PDB, 2017 WL 6406806, at *6 (M.D. Fla. Dec. 15, 2017).

addresses, the application of Section 9-406 to a security interest like the one granted to Worthy under the Financing Agreement, in all of Checkmate's accounts.

The other two cases that New Style cites for support are similarly inapposite. Both of these cases addressed the applicability of Section 9-406 in circumstances, not present here, where the debtor (borrower) was not in default and where the secured lender did not have the contractual right to collect accounts absent a default. Both cases are thus in stark contrast to the facts pleaded here, because under Section 4(k) of the Financing Agreement, Checkmate authorized 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].

First, in *CapitalPlus Equity, LLC v. Glenn Rieder, Inc.*, while the court, interpreting Wisconsin's commercial law, rejected the plaintiff's argument that "Wis. Stat. § 409.607, authorizes it, as a secured party, to gain the right to payment on an account after notice to the account debtor," it explained that the plaintiff there, unlike Worthy, did not allege "an express agreement permitting [it] to demand payment or a default on the account" as required by Section 9-607. *See* No. 17-CV-639-JPS, 2018 WL 276352, at *5 (E.D. Wis. Jan. 3, 2018) ("What [the plaintiff] conveniently leaves out, however, is the prefatory clause of [Section 409.607].").

The court further noted that the Plaintiff did not provide a "citation to a single legal authority substantiating its claim that its rights as a secured party are coextensive with its rights had it been an assignee." *Id.* In contrast, Worthy cited to two New York district court cases in its Opening Brief, which found that a plaintiff could pursue payment of accounts from an account debtor based on a security interest in those accounts, in addition to several cases from other jurisdictions analyzing a security interest as an assignment under Section 9-406. *See* (Br. at 14-18) *(citing ImagePoint, Inc. v. JPMorgan Chase Bank*, *Nat'l Ass'n*, 27 F. Supp. 3d 494, 497, 503-04 (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); *Cmty Bank v. Newmark & Lewis*, 534 F. Supp. 456, 460 (E.D.N.Y. 1982)).

The other case that Respondent relies on, but which bears no relation to the facts of this case, is *Factor King, LLC v. Housing Authority for City of Meriden*, an unpublished case from the Superior Court of Connecticut. In that case, the court held that a factor could not recover on invoices which it did not purchase. *See* No. CV176010391S, 2018 WL 6016838, at *3 (Conn. Super. Ct. Oct. 29, 2018), aff'd sub nom. *Factor King, LLC v. Hous. Auth. of City of Meriden*, 197 Conn. App. 459, 231 A.3d 1186 (2020). However, that court's holding was based on the fact that the case the plaintiff relied on to support its argument, "*In re Apex Oil Co.*, 975 F.2d

1365 (8th Cir. 1992), dealt with a separate and distinct section of the UCC; formerly § 9-318(1), now § 9-404.". *See id.*

Moreover, while the Connecticut appellate court affirmed the unpublished lower court decision, holding that the plaintiff's security interest in the accounts could not operate as an assignment, it explained that, unlike here, "there [was] no evidence or claim that [the borrower] defaulted on any of its obligations pursuant to the agreement, which would have been a precondition to the plaintiff's right to seek satisfaction from this receivable due from the defendant to [the borrower]." *See* 197 Conn. App. 459, 474, 231 A.3d 1186, 1191 cert. denied, 335 Conn. 927, 234 A.3d 979 (2020). The court further noted that "the provisions of the factoring agreement contain no language authorizing the collection the plaintiff seeks here, in the absence of some default by [the borrower] on any of its obligations to the plaintiff." *Id.* at 467 ("Nowhere does the agreement indicate that either party intended for unpurchased accounts to be subject to collection upon the notice and demand of the plaintiff in the absence of a breach by [the borrower]. . ."). Thus, the notice of assignment in *Factor King* was inadequate, because, unlike the Financing Agreement in this case, the factoring agreement there did not permit the plaintiff to demand payment of accounts prior to an event of default.

Unlike the plaintiffs in *CapitalPlus Equity* and *Factor King,* Worthy is entitled to collect on the New Style Accounts—and New Style should have made

payments to Worthy on these accounts when it received the Notice of Assignment—because, contrary to Respondent's bald assertion (Resp. Br. at 14), Worthy did in fact bargain for the right to collect on Checkmate's accounts at any time, not just after an event of default. This "bargain" is made clear by the language of the Financing Agreement, which reflects Checkmate's express authorization to Worthy to demand that its account debtors remit payment directly to Checkmate "at any time and from time to time in its discretion." (R-24) Thus, none of the cases that New Style cites to is applicable to the facts here.

B. New Style Mischaracterizes the Holding of *IIG Capital LLC v. Archipelago, L.L.C.*, which is not Applicable to this case

Respondent's reliance on *IIG Capital LLC v. Archipelago, L.L.C.* to support its assertion that a security interest is not an assignment under N.Y. UCC Section 9-406 is also flawed. First, Respondent ignores the fact that the portion of the *IIG* case on which it relies came after this Court had already affirmed denial of the account debtor's motion to dismiss, on the basis that the defendant failed to provide any evidence that plaintiff had not purchased its accounts. 36 A.D.3d at 403. Thus, even if this Court had stated an opinion as to the application of Section 9-406 to a security interest, it was not part of the binding and precedential holding of that case. *See First State Bank Nebraska v. MP Nexlevel, LLC*, 948 N.W.2d 708, 721 (Neb. 2020), where the Nebraska Supreme Court makes this very point.

Second, contrary to Respondent's assertion, (Resp. Br. at 8) Worthy did not rely in its Opening Brief on any of the cases that the plaintiff in *IIG* did, which, as this Court in *IIG* and Worthy in its Opening Brief explain, only deal with former UCC Section 9-318(1), now Section 9-404, not Section 9-318(3), the predecessor to Section 9-406. (Br. at 19); 36 A.D.3d at 404. Rather, Worthy cited to cases interpreting Section 9-406. (Br. at 15-18). Thus, the *IIG* Court's interpretation of a security interest in light of cases analyzing only former Section 9-318(1) is irrelevant here.

Moreover, one of the cases that Respondent relies on, *Factor King,* actually emphasizes the fact that this Court in *IIG* rejected the plaintiff's alternative theory of recovery on its security interest because the cases presented to it by the plaintiff dealt only with former UCC Section 9-318(1). *See* 2018 WL 6016838, at *3 (citing *IIG*, 36 A.D.3d at 404). The *Factor King* court explained:

> "The plaintiff factor in *IIG* made the same argument posited here—that a secured party with a security interest is the equivalent of an assignee pursuant to § 9-406—and similarly relied on cases that dealt with former § 9-318(1). *Id.*, 404. The court rejected said proposition, writing: 'While these cases treat assignees and holders of security interests similarly for purposes of holding them subject to defenses available to the original account debtors, they provide no authority to treat plaintiff's security interest as an assignment for collection purposes under UCC 9-406.'" *Id.*

Thus, neither *IIG*, nor any of the other cases that New Style cites supports its argument that Worthy's security interest is not an assignment.

C. New Style Provides no Reason for this Court to Stray from the PEB's Instruction that a Security Interest is Treated no Differently from an Assignment under Section 9-406

New Style attempts to diminish the importance of PEB Commentary No. 21 to the resolution of this case, by citing to cases, again, from jurisdictions outside of New York, that note the UCC Comments, not the actual commentary on disputed issues published by the PEB, are not binding precedent. (Resp. Br. at 10-11). We understand why New Style does not want this Court to consider and rely on PEB Commentary No. 21—as should this Court. Notably, recognizing its importance to commercial law and uniform interpretation and application, this Court has itself looked to the PEB as authoritative on UCC issues in the past. *See, e.g., Receivers of Sabena SA v. Deutsche Bank, A.G.*, 142 A.D.3d 242, 246-47, 254, 257-60, 36 N.Y.S.3d 95, 98-99, 104, 106-08 (1st Dep't 2016) (interpreting and applying PEB Commentary No. 16). That is because a declared purpose of the PEB is "to state a preferred resolution of an issue on which judicial opinion or scholarly writing diverges" thus, creating uniformity in commercial law amongst the various states. PEB Commentary No. 21, *Preface to PEB Commentary*.

Moreover, contrary to the cases from other jurisdictions that New Style cites to, "New York courts routinely rely on the official comments in interpreting the U.C.C." *See Elden v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 08 CIV. 8738 RJS, 2011 WL 1236141, at *11, n. 11 (S.D.N.Y. Mar. 30, 2011); *see also, 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."); *Tenavision, Inc. v. Neuman*, 45 N.Y.2d 145, 150, 379 N.E.2d 1166, 1168 (1978) (citing to Official Comment 2 to UCC § 2-610); *P.T. Bank Cent. Asia v. Chinese Am. Bank*, 229 A.D.2d 224, 225–26, 654 N.Y.S.2d 117, 118 (1st Dep't 1997) (basing its holding "upon an analysis of the applicable provisions and the intent expressed in the Comment to UCC 9–401 . . ."); *Berler v. Barclays Bank of New York*, 82 A.D.2d 437, 439, 442 N.Y.S.2d 54, 55-56 (1st Dep't 1981) (relying on Official Comments 4 and 8 to § 4-403). That is because the Official Comments inform the interpretation of the Code, and Courts, in enforcing uniformity of commercial law, should strive to be consistent with them.

Particularly where New Style has not cited to any case law in New York which holds that a security interest should not be treated as an assignment under Section 9-406, or any case outside this state which is applicable to the facts here, this Court has no reason to stray from the direction of the PEB, a body tasked with "elaborate[ing] 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." *See id.*

Tellingly, New Style fails to even address the sound reasoning of PEB Commentary No. 21, which is that the exclusion of a security interest from Article 9 would place a heavy burden on both the account debtor and assignees to determine whether an interest is an assignment or a security interest, a task which courts even struggle with. *Id.* at 3.[3] To do so would halt the clear process set forth under the UCC, that allows both an account debtor and an assignee to rely on and act based on a notice of assignment. In light of the PEB's sound reasoning, which upholds the purpose and effect of the Uniform Commercial Code, this court will correct an error below and do service to the commercial bar and community by clarifying that, as the PEB explains, there is no distinction between a security interest and an assignment under the UCC, including Section 9-406.

[3] The PEB further elaborates on this point:

> 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. PEB Commentary No. 21 at 3.

POINT III

NEW STYLE MISINTERPRETS AND MISAPPLIES THE HOLDING OF *IMAGEPOINT, INC. V. JPMORGAN CHASE BANK, NAT'L ASS'N* WHICH SUPPORTS A CAUSE OF ACTION UNDER SECTION 9-607

Worthy's suit against New Style is based on New Style's contractual obligation, existing at the time that Checkmate granted Worthy a security interest, to pay money to Checkmate. As assignee of Checkmate's right to payments, Worthy is entitled to "step into [Checkmate's] shoes" and enforce its obligations against New Style. *See Mecco, Inc. v. Capital Hardware Supply, Inc.*, 486 F. Supp. 2d 537, 546 (D. Md. 2007). As the court in *ImagePoint* explained, this is because 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 . . ." 27 F. Supp. 3d at 505. Nevertheless, New Style misstates the holding of *ImagePoint*, as well as the function of the Uniform Commercial Code, to craft nonexistent issues in an attempt to deflect Worthy's cause of action against it.

First, relying on the Supreme Court's erroneous holding and interpretation of *ImagePoint* and *Buckeye*, New Style argues that a "dispute" exists between Worthy and Checkmate regarding this obligation, in order to avoid payment. This is of no avail. The court in *ImagePoint* specifically points to the fact that in *Buckeye* there was a dispute between the secured creditor and the debtor "as to who has the right to collect from an account debtor . . ." *See* 27 F. Supp. 3d at 506 (citing N.Y. U.C.C.

§ 9–607(a)(3)); *Buckeye Ret. Co., LLC v. Meijer, Inc.*, No. 279625, 2008 WL 4278038, at *2 (Mich. Ct. App. Sept. 18, 2008)). Thus, the situation in *Buckeye* is not even applicable here, as the plaintiff's borrower in that case told the defendant it did not believe Buckeye was entitled to any payment from the defendant of any amounts owed by the defendant to the borrower, and that none of the documents provided by Buckeye referenced an assignment of money held by defendant on behalf of Buckeye. 2008 WL 4278038, at *2.

In contrast, here, there is no dispute that exists, much less any in the Record on this appeal, between Worthy and Checkmate as to whether Worthy or Checkmate has the right to collect accounts from New Style, nor has New Style pointed to any such disagreement. New Style's suggestion, in a footnote in its Brief (Resp. Br. at 12, n. 3) that the Financing Agreement's lack of the word "assignment" reflects any sort of dispute between Worthy and Checkmate is belied by the express language of Section 4(k) permitting Worthy to "at any time and from time to time in its discretion" collect from Checkmate's account debtors. (R-24) Under Section 4(k) Checkmate further agreed that "it will not . . . (i) interfere with the collection of Collateral in the manner set forth in this Section or (ii) cause, instruct or direct, whether verbally, in writing or in any other manner, any account debtor or other Person to remit payment of Collateral other than in accordance with this Section." *Id.*

New Style further misinterprets the holding of *ImagePoint* as supporting a defense based on New Style's prior payment to Checkmate. The court in *ImagePoint* did not even rule on this issue. Moreover, to hold that any account debtor could ignore a notice of assignment, particularly where it does not even attempt to inquire about it before paying the assignor rather than the assignee, would defeat the entire purpose of Section 9-406. That is precisely why courts in this jurisdiction, and others, have held that payment by an account debtor to an assignor in violation of a notice of assignment is not a defense. *Clifton-Fine Cent. Sch. Dist.*, 85 N.Y.2d at 236 ("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."); *Reading Co-Op. Bank v. Suffolk Constr. Co.*, 464 Mass. 543, 464 (Mass. 2013) (finding the account debtor was obligated to pay the assignee all payments wrongfully misdirected to the assignor despite mistakenly paying the assignor).

Finally, in a last-ditch attempt to find some issue with Worthy's cause of action against it, New Style attempts to characterize Worthy's suit as one for impairment of collateral, citing, yet again, a case outside this jurisdiction, which as

the court in *ImagePoint* explained, is irrelevant here.[4] (Resp. Br. at 14) (citing *McCullough v. Goodrich & Pennington Mortg. Fund, Inc.*, 373 S.C. 43, 50, 644 S.E.2d 43, 47 (2007)). In that case, the plaintiff, a secured creditor, alleged a claim for "negligent/wrongful impairment" of its security interest in its borrower's right to contractual payments from the defendant, arguing that its borrower's default was a result of the defendant's negligent servicing of the loans. *Id.* at 46. Thus, on its face, this case is entirely distinguishable from Worthy's in that Worthy is not bringing a claim for negligent impairment of collateral.

Moreover, the court in *ImagePoint* actually distinguished *McCullough* from cases like Worthy's, explaining that while "*McCullough* specifically recognizes that Section 9–607 authorizes the 'subrogation' of a debtor's rights by a secured creditor," the plaintiff in that case, unlike Martin in *ImagePoint*—and unlike Worthy here—was pursuing an independent tort claim. 27 F. Supp. 3d at 507. Worthy's sole stated cause of action in its Complaint is for collection under UCC Section 9-607.

[4] New Style cites to another case in its Brief which further demonstrates its misunderstanding of *ImagePoint* and Worthy's cause of action. (Resp. Br. at 7) In *J D Factors, LLC v. Reddy Ice Holdings Inc.*, the Central District Court of California held that an assignee could not pursue a breach of contract claim against an account debtor, where there was no contract between the assignee and the account debtor. No. CV 14-06709 DDP FFMX, 2015 WL 630209, at *2 (C.D. Cal. Feb. 12, 2015). The court cited to *ImagePoint, Inc*., stating that the obligation sued upon in that case was "*not* created by Article 9 of the UCC, but rather by a separate, direct agreement between the parties." *Id.* (italics in original). The only agreement sued upon in *ImagePoint, Inc.* was the Procurement Agreement between JP Morgan, the account debtor, and ImagePoint, the assignor, just like the contract between New Style and Checkmate here. 27 F. Supp. 3d at 498, 516. This California district court case is irrelevant to Worthy's claim, which is not for breach of a separate contract, and misconstrues the holding of *ImagePoint* to suggest that a contract between an account debtor and an assignee is required for an assignee to collect on accounts.

(R-18) Thus, *McCullough* is inapplicable to the facts here. New Style has not, nor can it, present any excuse for making payments to Checkmate, rather than Worthy, after the Notice of Assignment, in violation of the UCC.

POINT IV

NEW STYLE IS NOT A TRUSTEE UNDER NEW YORK'S LIEN LAW AND EVEN IF IT WERE, NEW STYLE'S POTENTIAL PROSPECTIVE DEFENSES AGAINST WORTHY ARE BEYOND THE SCOPE OF A MOTION TO DISMISS AND ARE NOT RELEVANT TO THIS APPEAL

Further demonstrating its lack of any viable argument to support the dismissal of Worthy's Complaint, New Style spends four pages of its nineteen-page brief on an issue which New Style itself admits was "not a basis of the [Supreme Court's] decision." (Resp. Br. at 15). Respondent is correct that the application of New York's Lien Law to the New Style Accounts was not a basis of the Supreme Court's Order, as the Supreme Court did not even address it. (R-5-11). In fact, the Supreme Court could not have addressed the Lien Law issue, nor can this Court on appeal, as the factual statements upon which Respondent now relies to assert the application of the Lien Law in its Brief, are not even in Worthy's Complaint, which sets the boundaries of a motion to dismiss. New Style's allegations outside the four corners of the Complaint, as set forth below, show why this argument is improper:

(i) "NSC is a general contractor engaged in general contracting and construction management for public construction projects in the New York metropolitan area." (Resp. Br. at 3)

(ii) "NSC retained Checkmate as a subcontractor on two public construction projects in New York City." (Resp. Br. at 3)

(iii) "Checkmate continued to submit invoices to NSC purportedly for payment of trust claims of materialmen under the New York Lien Law . . ." (Resp. Br. at 3)

(iv) "NSC forwarded the funds to Checkmate for the costs that Checkmate owed to its vendors and subcontractors. . ." (Resp. Br. at 16)

Matters such as these that are not in the Complaint may not be a basis of a motion to dismiss for failure to state a cause of action. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 185 (1977) (On a motion to dismiss, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail."). Moreover, even if this Court could consider the application of the Lien Law to the facts of this case, New Style has failed to cite a single case in which a secured creditor, like Worthy, was

prevented from collecting on accounts from a general contractor because of the claimed application of Lien Law.[5]

Moreover, New Style does not even assert that it paid the suppliers or materialmen of Checkmate, but rather that it paid Checkmate, apparently assuming that those same funds would ultimately be paid to Checkmate's suppliers or materialmen. (Resp. Br. at 3, 16). Thus, New Style's assertion that it failed to pay Worthy due to its "concern" for claims against it by Checkmate's subcontractors is not genuine, but rather a means to distract from the fact that it made payments to Checkmate in ignorance of the Notice of Assignment and in violation of the UCC.

CONCLUSION

For all of the reasons set forth above and in Worthy's Opening Brief in this appeal, Worthy respectfully requests that this Court reverse and vacate the dismissal of the Complaint. In the alternative, to the extent this Court believes that there is a pleading deficiency or omission, Worthy respectfully requests leave to re-plead to remedy any such issue.

[5] One of the cases that New Style cites to, *Richmond Crane Rigging & Drayage Co. v. Liberty Nat. Bank*, is a California Court of Appeals case that has nothing to do with New York's Lien Law, or even any parallel lien law in California, but rather an indemnification provision in a subcontract. *See* 27 Cal. App. 3d 968, 971, 104 Cal. Rptr. 277, 279 (Ct. App. 1972).

Dated: New York, New York
April 30, 2021

OTTERBOURG P.C.
By: 
Richard G. Haddad
230 Park Avenue
New York, NY 10169-0075
Tel: (212) 661-9100
rhaddad@otterbourg.com
Attorneys for Plaintiff-Appellant Worthy Lending, LLC

Of Counsel:

Richard G. Haddad
William M. Moran
Alessandra M. Dagirmanjian

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(f) that the foregoing Reply Brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 5,520.

Dated: New York, New York
April 30, 2021

OTTERBOURG P.C.
By: 
Richard G. Haddad
230 Park Avenue
New York, NY 10169-0075
Tel: (212) 661-9100
rhaddad@otterbourg.com
Attorneys for Plaintiff-Appellant Worthy Lending, LLC