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

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Appellate Division–First Department Docket No. 2020-04842

Court of Appeals

of the

State of New York

WORTHY LENDING, LLC,

Plaintiff-Appellant,

– against –

NEW STYLE CONTRACTORS, INC.,

Defendant-Respondent.

BRIEF FOR PLAINTIFF-APPELLANT

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DISCLOSURE STATEMENT

Pursuant to N.Y. Court of Appeals Rule of Practice § 500.1(f), Plaintiff-Appellant Worthy Lending, LLC ("Worthy"), states 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.)

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STATEMENT OF THE QUESTIONS PRESENTED

This is an action by a secured lender, Plaintiff-Appellant Worthy Lending, LLC ("Worthy"), which holds a security interest in all accounts of its borrower, non-party, Checkmate Communications LLC ("Checkmate"). [R 13 ¶ 1][1] Worthy sent a Uniform Commercial Code Section 9-406 notice of assignment (the "Notice of Assignment") to Checkmate's account debtors, including Defendant-Respondent, New Style Contractors, Inc. ("New Style"). [R 15 ¶ 8] New Style ignored the Notice of Assignment and paid the amount due to Checkmate instead. [R 7] After Checkmate defaulted under its financing agreement with Worthy, Worthy brought this action against New Style for payment of the accounts. [R 18-19]

Upon New Style's motion to dismiss, the Supreme Court entered an Order [R 5-11], which misinterpreted and misapplied Sections 9-406 and 9-607 of the Uniform Commercial Code. Specifically, the Supreme Court held that Worthy's security interest was not an assignment under Section 9-406 of the New York Uniform Commercial Code ("N.Y. UCC"), and that Worthy could not collect from New Style because of an assumed "dispute" between Checkmate and Worthy (*i.e.*, Checkmate's default under its financing agreement with Worthy). *Id.* The Appellate Division affirmed. [R 70-71]

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[1] References to "R__" are to the Record on Appeal. References to "C__" are to the Appellant's Compendium.

The questions presented on this appeal are therefore:

1. Whether, contrary to the UCC itself, 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, when the borrower has defaulted under its agreement with the secured lender because such default is deemed a "dispute"?

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this 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, the Appellate

Order finally determined the action, and this Court granted permission to take this appeal by Order dated January 11, 2022. Therefore, this Court has jurisdiction.

The Questions raised on this appeal were raised and preserved initially in the Complaint [R 12-60], then on pages 3 and 4 of Worthy's brief submitted in support of its appeal to the Appellate Division, First Department, and reviewed by the Supreme Court [R 8-10] and Appellate Division. [R 71]

PRELIMINARY STATEMENT

This Court should enter an Order that unambiguously confirms the right of secured lenders, under Sections 9-406 and 9-607 of the New York Uniform Commercial Code, to collect directly from their borrowers' account debtors, where the secured lender and borrower have so agreed. 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. Without a ruling from this Court that expressly clarifies the existing rights of secured lenders under Article 9 of the UCC—which the Appellate Division erroneously stripped away—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 Section 9-406 notice, like the one in this case.

The erroneous and commercially dangerous rulings below that a security interest is not the same as an assignment under Section 9-406 will, if not reversed, turn commercial finance on its head. This is because the result below contravenes the express direction of the Permanent Editorial Board for the UCC ("PEB") and the Official Comments to the UCC, as well as commercial practice generally and the interpretations of courts throughout the country. *See* Official Comment 26 to UCC § 9-102, expressly stating that the term "assignment" includes "security interests." Importantly, the PEB has explained that a security interest, like Worthy's, is (and always has been under prior versions of Article 9), the same as an assignment under the UCC, and any court that now holds they are different under Section 9-406 is "incorrect". [C 4] In fact, this Court has itself historically treated a security interest as an assignment under prior versions of Article 9. Thus, the lower Courts' creation of a distinction is novel, and will require (a) account debtors and secured lenders to start looking beyond the UCC, to non-uniform state law, to determine their rights, and (b) account debtors to look to non-uniform law to determine to whom they must make payment in order to discharge the obligation—the secured lender or to the borrower—which is contrary to the stated purpose of the UCC: uniform application of commercial law.

The Appellate Order also creates a new rule, 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, because the borrower has defaulted. [R 71] The idea that a default could prevent a secured lender from recovering its collateral is inimical to the intent and purpose of Article 9 of the UCC, which sets forth a rubric 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). That section expressly permits a secured lender to enforce an account debtor's obligations "[i]f so agreed, and in any event after default." The lower Courts' holdings here can only encourage borrowers and account debtors to undermine secured lenders' rights by ignoring the requirements of the UCC and feigning a dispute and will lead to mischief and the loss of collateral.

The holdings below, unless reversed, would discourage secured lenders from providing financing based on New York accounts, and lead to uncertainty in interstate commerce and finance as it would require lenders to research and determine the domicile of each of the borrowers' customers and then try to figure out their potential remedies on a case by case, and invoice by invoice basis. Such a result is contrary to the public policy of New York state, as codified in the General Obligations Law, which is designed to reinforce New York's standing as a commercial and financial center—not as an outlier. This Court's reversal of the Appellate Order is critical to protecting existing statutory and contractual rights in New York, and maintaining New York's status as a center for commercial finance.

STATEMENT OF FACTS

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 from time to time. [R 14 ¶ 6; R 20-36] In exchange, in Section 3(a) of the Financing Agreement, Checkmate granted Worthy a security interest in its assets:

> 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]

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]. Accounts are the accounts receivable arising from invoices Checkmate issues to its customers, such as New Style.

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 notify its customers to pay Worthy. Thus, Worthy was authorized:

> at any time and from time to time in its discretion, [to] 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]

The Notice of Assignment further stated that "[p]ursuant to Section 9-406 of the Uniform Commercial Code, payments of Accounts made by [New Style] to [Checkmate] or to anyone other than [Worthy] 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 Accounts." [R 37]

New Style hired Checkmate as a subcontractor on two public construction projects in New York City. [R 6] New Style has failed to pay Worthy at least $1,473,581.42 for work performed by Checkmate (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 the principal, interest, and other amounts owing by Checkmate to Worthy under the Financing Agreement. [R 15 ¶ 11] The defaults are not disputed; nor are they the result of a dispute. Simply put, Checkmate did not pay Worthy what it owed when due. 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 never cured its default and its obligations to Worthy exceed $3 million, 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; R 17 ¶ 21] It is undisputed that New Style has not paid Worthy.

THE COURSE OF THE PROCEEDINGS

Plaintiff-Appellant 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, a secured lender, asserted a claim for collection of accounts pursuant to the New York Uniform Commercial Code against Defendant-Respondent 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, despite the UCC Section 9-406(a) notice Worthy sent to New Style, informing it 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 (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, without hearing argument, 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, contrary to 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] As explained by the PEB, any court that ruled as the Supreme Court did here is "incorrect." [C 4][2] The Supreme Court also 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]

[2] The PEB Commentary, dated March 11, 2020 ("PEB Commentary No. 21"), https://www.ali.org/media/filer_public/a1/67/a167ba0e-8983-4ec4-9ad0-8c77899c3c06/commentary-21-final.pdf, referenced throughout this Brief, is submitted with Appellant's Brief as a separate Compendium. All references to "[C __]" are to the PEB Commentary.

On November 18, 2020, New Style served a Notice of Entry with a copy of the Supreme Court Order by electronic filing. On December 10, 2020, Worthy timely filed and served by electronic filing a Notice of Appeal in the Supreme Court. [R 3-4] By Decision and Order dated and entered July 6, 2021, the Appellate Division affirmed the Supreme Court Order (the "Appellate Order"). [R 70-71]

In its Order, the Appellate Division ignored the guidance and instruction of the Permanent Editorial Board for the Uniform Commercial Code and the important policy reasons for treating a security interest as an assignment, including preventing commercial parties from having to look outside the Code for interpretation of their rights to collateral under their agreements. [C 1-7]. The Appellate Division also relied on the same non-precedential opinion of the Michigan Court of Appeals that the Supreme Court did, in affirming the erroneous new rule that a "default" precludes an account debtor's liability to a secured lender. [R 71]

New Style served a Notice of Entry with a copy of the Appellate Order by electronic filing on July 6, 2021. On August 5, 2021, Worthy timely moved for leave to appeal this Court (the "Motion for Leave"). By Motion dated August 19, 2021, The Secured Finance Network, Inc. ("SF Net"), an international trade organization with over 260-member organizations in the U.S., including asset-based lenders and factors, sought leave to appear as amicus curiae in support of Worthy's Motion for Leave and if leave to appeal were granted, to accept its brief on the appeal itself (the

"Amicus Curiae Motion"). On August 12, 2021, New Style opposed Worthy's Motion for Leave, and on August 26, 2021, New Style opposed SF Net's Amicus Curiae Motion. On January 11, 2022, this Court granted both the Motion for Leave and the Amicus Curiae Motion, so the SF Net amicus brief is presently before this Court.

ARGUMENT

RULES OF LAW REQUESTED

Worthy asks this Court to issue the following rules of law:

1. Section 9-406 of the UCC treats security interests in accounts and assignments of accounts the same such that a notice by a secured creditor to an account debtor of its security interest and a direction to pay only the secured lender is enforceable. Under such circumstance, an account debtor may only be discharged from the debt by paying the secured creditor—payment to the original obligor does not discharge the debt.

2. A borrower's default for failure to pay a loan when due is not a "dispute" that renders void the borrower's assignment of its accounts to the secured lender.

POINT I
WORTHY'S STATUTORY RIGHTS DERIVE FROM SECTIONS 9-406 AND 9-607 OF THE UNIFORM COMMERCIAL CODE

This appeal involves the application of Sections 9-406 and 9-607 of the Uniform Commercial Code. These two provisions, which the lower Courts failed to properly apply, together support Worthy's cause of action against New Style.

First, N.Y. UCC Section 9-406(a) states:

> [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.

Accordingly, Section 9-406 provides that, upon receipt of a notice of assignment, like the one New Style received here, an account debtor of a receivable or payment intangible (New Style) can discharge its obligation for the receivable or payment intangible by paying the assignee (Worthy) and may not discharge its obligation by paying the assignor (Checkmate). The UCC provides the framework for what an account debtor in this situation, like New Style, who receives notice of the security interest and a direction to pay should do:

(a) pay the secured creditor as directed, and receive a discharge of the obligation. N.Y. UCC § 9-406(a); or

(b) seek proof from the secured creditor, as provided in N.Y. UCC § 9-406(c) that the assignment has been made; or

(c) if actually confused, interplead the funds. N.Y. CPLR § 1006.

The one thing the account debtor cannot do to discharge the obligation is what New Style did here—pay Checkmate.

In 1995, this Court explained the effect of a UCC notice of assignment. *Gen. Motors Acceptance Corp. v. Clifton-Fine Cent. Sch. Dist.*, 85 N.Y.2d 232, 236 (1995) (citing N.Y. UCC Section 9-318(3), the predecessor provision to Section 9-406) ("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.").

Second, N.Y. UCC Section 9-607(a)(3), in turn, provides:

> If 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 ... 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 . . .

"[I]f the account debtor has not been discharged under U.C.C. § 9-406(a) on its contractual obligation to the debtor [*i.e.*, borrower], the account debtor remains liable to the debtor." [C 6, n.21] "Article 9 gives the secured party the right to enforce the debtor's [borrower's] rights against the account debtor." *Id.* (citing U.C.C. § 9-607) Thus, Section 9-607 provides a mechanism for the secured party to bring suit against an account debtor that fails to remit payments to the secured party, as required by Section 9-406. *See ImagePoint, Inc. v. JPMorgan Chase Bank, Nat'l*

Ass'n, 27 F. Supp. 3d 494, 507 (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) ("[C]ase law routinely recognizes that secured creditors have the right to collect from account debtors pursuant to § 9–607(a)(3)."") (citing *Agri-Best Holdings, LLC v. Atlanta Cattle Exch., Inc.*, 812 F. Supp. 2d 898, 901 (N.D. Ill. 2011); *Wells Fargo Bank Nat'l Ass'n v. Kal-Rich, Inc.*, 2010 Mass. App. Div. 103, 2010 WL 174603, at *3 (Mass. App. Div. Apr. 26, 2010); *Mecco, Inc. v. Capital Hardware Supply, Inc.*, 486 F. Supp. 2d 537, 546 (D. Md. 2007)).

Section 9-607 also permits collection before a default, if the parties so agree. *See* N.Y. UCC Section 9-607, Official Comment 4 ("[T]his 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."). Here, Checkmate did just that. Under Section 4(k) of the Financing Agreement, Checkmate "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] . . ." [R 24]

Therefore, Worthy was authorized to collect directly from the account debtors upon notice.

Thus, Section 9-607 allows Worthy to step into the Checkmate's shoes to enforce New Style's duty to Checkmate after the Notice of Assignment, and Section 9-406 correspondingly prevents New Style from asserting as a defense its payment of those accounts to New Style. As set forth below, the Appellate Order turns Article 9 on its head by preventing secured lenders like Worthy from enforcing their interest in accounts, as expressly permitted by these two provisions.

POINT II
UNDER UCC SECTION 9-406 A SECURED LENDER IS AN ASSIGNEE

The fundamental error of the Supreme Court's holding, as affirmed by the Appellate Division, is that Worthy's Notice of Assignment to New Style was "not sufficient under UCC § 9-406 to require [New Style] to start making payments to [Worthy]." [R 10] The lower Courts' holdings improperly distinguished between a security interest and an assignment. As the Official Comments to the UCC and the Permanent Editorial Board for the UCC—the two preeminent authorities on interpretation of the UCC—have instructed, no such distinction exists and any Court that would hold otherwise, like the Supreme Court and the Appellate Division both did, is "incorrect." [C 4] Moreover, unless reversed, the Appellate Division's new rule will require commercial lenders, like Worthy, financing borrowers whose

customers are in New York, to look outside New York's Uniform Commercial Code, and their contracts, to determine, in each instance, their rights to accounts. Such uncertainty in the law is contrary to the essential purpose of the UCC.

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

The purpose of the Uniform Commercial Code is to be just that—uniform. *See* UCC § 1-103(a)(3) ("[The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are … (3) to make uniform the law among the various jurisdictions."). The PEB[3] and the Official Comments are each designed to ensure this fundamental purpose. Specifically, the Official Comments to the UCC are provided by the drafters to instruct contracting parties and courts on how the UCC's provisions are 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 values the instruction of both the PEB and the Official Comments. *See, e.g.*, *US Bank Nat'l Ass'n v. Nelson*, 36 N.Y.3d

[3] "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." [C 2] The PEB Commentaries are contained in an Appendix to the Official Text of the Uniform Commercial Code.

998, 1000, n.1 (2020) (Wilson, J., concurring) (citing Report of the Permanent Editorial Board for the Uniform Commercial Code: Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes 4–7 [Nov. 14, 2011]); *Albany Disc. Corp. v. Mohawk Nat'l Bank of Schenectady*, 28 N.Y.2d 222, 227 (1971) (citing PEB commentary on former UCC Section 9-302); *Banque Worms v. BankAmerica Int'l*, 77 N.Y.2d 362, 373 (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 two years ago, the PEB, anticipating the mischief and uncertainty that would ensue if courts were to hold as the lower Courts did here—that there is a distinction between a security interest and an assignment under UCC Section 9-406—explained that any such holding would be "incorrect" and there is no such distinction. [C 4] This is because the UCC itself—as also reflected in New York's statutorily enacted Code—already demonstrates the lack of a distinction between the two terms. [C 3] 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.'" [C 3, n. 11] (citing UCC Section 1-201(b)(35)). Thus, the definition is the same whether the matter involves a security interest or collateral for an obligation, or an assignment in connection with an outright acquisition of accounts.

As the PEB notes [C 3, n. 9], this definition of a security interest is also reflected in Section 9-209 of the UCC (which identical provision is also contained in the N.Y. UCC). This section, titled "Duties of Secured Party If Account Debtor Has Been Notified of Assignment" demonstrates that Section 9-406 applies to security interests, by setting forth the duties of a secured party, following payment of the underlying loan such that there is no further need for the collateral. Section 9-209 provides that the lender is required to advise the previously notified account debtors that the security interest is released and they may now pay the vendor directly. 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 . . . This section does not apply to an assignment constituting the sale of an account, chattel paper, or payment intangible. UCC § 9-209(b)-(c).

Official Comment 2 to Section 9-209 (also contained in the N.Y. UCC) further explains, "[t]his section addresses the case in which account debtors have been notified to pay a secured party to whom the receivables have been assigned. It

requires the secured party (assignee) to inform the account debtors that they no longer are obligated to make payment to the secured party."

The PEB's instruction is also based on the historical treatment of assignments as including security interests under former Article 9. [C 4] This treatment is reflected in caselaw, which applied former Section 9-318(1), now Section 9-404, setting forth defenses 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. [C 4]; *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 former 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 this Court, 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 (1979) (affirming denial of defendant-account debtor's right of setoff under former N.Y. UCC Section 9-318(1) and summary judgment in favor of plaintiff secured lender against account debtor); *Chase Manhattan Bank (N.A.) v. State*, 40 N.Y.2d 590, 592-93 (1976) (analyzing whether filing a financing statement reflecting a security interest in accounts is itself sufficient notice of an assignment to the State as account debtor, and finding such notice was not sufficient to preclude the account debtor's right to setoff under former N.Y. UCC Section 9-318(1)).[4]

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) (finding secured lender's

[4] 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).

rights to publisher's accounts were subject to rights of author in two-thirds of paperback royalties under N.Y. UCC § 9–318(1)(a)); *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. 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 § 9-318."); *Banque de Paris et des Pays-Bas v. Amoco Oil Co.*, 573 F. Supp. 1464, 1470-72 (S.D.N.Y. 1983) (analyzing whether assignee of security interest was required to comply with arbitration provision in contract between borrower and account debtor under former Section 9-318); *see also 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), now Section 9-607)).[5]

The Southern District of New York, interpreting New York's commercial law, has similarly recognized a security interest as an assignment under current Article 9. In *ImagePoint, Inc.*, the Court 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 at 508-09 (explaining that "ImagePoint [the borrower] is the 'assignor' with respect to the relevant security interest and JPM [the defendant] is the 'account debtor.'").

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

[5] 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).

term 'assignment' in Section 9-406, or elsewhere in Article 9, to an outright transfer of ownership." [C 5] 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 SISO [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 SISO [security interest that secures an obligation], an account debtor should not be expected to make that determination."). *Id.* A distinction between a security interest and an assignment under Section 9-406 would 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.'" [C 6] (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 what the UCC compels.

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).[6]

[6] Official Comment 5 to UCC Section 9-406—which identical provision is also contained in New York's UCC—also explains that a security interest and an assignment are treated the same:

> 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) or prohibited a security assignment of a general intangible for the payment of money due or to become due. Subsection (d) essentially follows former Section 9-318(4), but expands the rule of free assignability to chattel paper (subject to Sections 2A-303 and 9-407) and promissory notes and explicitly overrides both restrictions and prohibitions of assignment.

Thus, as informed and instructed by the PEB, the Official Comments, and the historical treatment of a security interest under Article 9, including by this Court, there is no distinction between a security interest and an assignment under UCC Article 9, and any development of commercial law that creates such a distinction would lead to costly uncertainty for each party to a commercial transaction. To prevent New York's commercial law from developing in such a direction, this Court should hold that Worthy's Notice of Assignment to New Style required that New Style make payments directly to Worthy to discharge the obligation, because there is no distinction between a security interest and an assignment under Article 9. New York cannot be an outlier when it comes to commercial finance under the UCC.

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

Courts in other jurisdictions have held consistently with the PEB's instruction that a security interest should be treated as an assignment under Section 9-406. *See, e.g., 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 lender'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]

A 2020 decision by the Supreme Court of Nebraska, *First State Bank Nebraska v. MP Nexlevel, LLC*, is particularly on point and illustrates the proper application of the Uniform Commercial Code (as distinguished from the lower Courts' application here). 948 N.W.2d 708 (Neb. 2020). In *First State Bank Nebraska*, the borrower, like Checkmate, was a subcontractor of construction services and granted its lender a security interest in receivables and other amounts due from the general contractor to the borrower. *Id.* at 714-15. The plaintiff-lender sent notices of its assignment to its borrower's general contractor after the borrower

[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.'").

defaulted,[8] instructing the general contractor to pay all amounts it owed to the subcontractor directly to the plaintiff. *Id.* at 715. After the general contractor, like New Style, continued to pay the borrower despite having received the notice, the lender sued the general contractor. *Id.* at 716.

The Nebraska lower court had wrongly held, like the Supreme Court did here, that Neb. Rev. Stat. UCC Section 9-406(a) only applies to transfers of ownership and not to security interests, and therefore, the notice of assignment sent after the debtor's default was insufficient to require that the general contractor remit payment to the plaintiff. *Id.* at 717. The Nebraska Supreme Court reversed the lower court's decision, and, finding in favor of the secured lender, held that the holder of a security interest is an "assignee" for purposes of Section 9-406, and that Section 9-406 prevents the account debtor from claiming it satisfied its payment obligation by paying the debtor. *Id.* at 719-22. Thus, the holding of the Nebraska Supreme Court is in line with the instruction of the PEB, and just like the notices sent by the secured lender in *First State Bank Nebraska*, Worthy's Notice of Assignment [R 37-38] obligated New Style to make payments directly to Worthy.

[8] Unlike in this case, the plaintiff-lender and its borrower in *First State Bank Nebraska* did not have an agreement that permitted the plaintiff to collect accounts "at any time and from time to time in its discretion" [R 24], which would have permitted the plaintiff to collect accounts prior to its borrower's default. *See*, supra, Point I.

As demonstrated by *First State Bank Nebraska*, and other cases cited above, there is no reason for New York's commercial law to follow a path contrary to the instruction of the PEB and Official Comments. The Appellate Order 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.

C. *IIG Capital LLC v. Archipelago, L.L.C.* does not Support a Distinction between a Security Interest and an Assignment Under Article 9

Because New Style based much of its argument below on *IIG Capital, LLC*, and the Supreme Court cited to *IIG* as the basis for its holding, we address *IIG* here and show why the PEB correctly stated that any court which follows *IIG* would be wrong.

The Supreme Court Order, affirmed by the Appellate Division, cited a decision from the Appellate Division, *IIG Capital LLC v. Archipelago, L.L.C.*, as holding that a security interest is not treated as an assignment under Section 9-406. [R 10] (citing 36 A.D.3d 401, 404 (1st Dep't 2007)). However, *IIG Capital* does not support a distinction between a security interest and an assignment under New York law, and is not applicable to the facts here. Specifically, the portion of the opinion in *IIG Capital* on which the Supreme Court relied, was dicta. Moreover, the

PEB, has explained that any court which relies on *IIG Capital* for the interpretation that the Supreme Court did is wrong [C 4], and the Official Comment 26 to UCC § 9-102 confirms that there is no difference between an assignment and a security interest.

In *IIG Capital*, the Appellate Division found that, despite the defendant's arguments to the contrary, a commercial factor did have a cause of action against an account debtor on accounts, which the factor had purchased from the debtor. 36 A.D.3d at 403. Later in its opinion, after it had already affirmed the denial of the defendant's motion to dismiss, the *IIG* Court also noted that the plaintiff's security interest could not serve as the basis for its cause of action for collection—as an alternative to its purchase of the accounts—since the factoring agreement "expressly conditioned" the plaintiff's right to collect on an event of default, which was not alleged. *Id.* at 404. Finally, in dicta, again after its decision to deny the motion to dismiss, the *IIG* Court appeared to discount the plaintiff's argument that a secured party is the equivalent of an assignee under 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), unlike Worthy here. *Id.*

Thus, the portion of the *IIG* opinion cited by the Supreme Court has no bearing on the holding of that case. The *IIG* court had determined that the defendant failed to clearly refute the plaintiff's allegation that it had purchased all of the defendant's accounts under the factoring agreement and thus, the plaintiff's ability to collect did not rely on its security interest in the same accounts. *Id.* at 403. The *IIG* Court therefore had no need to determine whether an assignment is the same as a security interest. *Id.*; *see also First State Bank Nebraska*, supra, 948 Neb. at 721 (discussing and ultimately declining to apply this portion of the *IIG* opinion as dicta). Moreover, the facts of *IIG* are distinguishable from this case. As the *IIG* Court pointed out, the factoring agreement in that case had expressly conditioned plaintiff's right to collect on an event of default, which the plaintiff did not allege. *Id.* at 404. That is not the case here. *See* [R 24] (Financing Agreement, Section 4(k)).

Thus, the holding in *IIG* does not support a distinction between a security interest and an assignment. Regardless, even if the *IIG* Court had held that that such a distinction exists, the PEB, the Official Comments, and precedent in other jurisdictions demonstrate that such a holding is "incorrect," and this Court has no reason to follow it. [C 4] ("This narrow reading of the term 'assignment' is contrary to the use of the term in Article 9 and the holding of other courts, and is incorrect."). Rather, this Court can and should hold that a security interest is treated as an

assignment under the UCC, so that New York courts do not make the same error that the Supreme Court and Appellate Division in this case did.

POINT III
CHECKMATE'S DEFAULT DOES NOT PREVENT WORTHY FROM COLLECTING THE NEW STYLE ACCOUNTS UNDER SECTION 9-607

Article 9 permits a secured lender to "enforce the obligations of an account debtor" "[i]f so agreed, and in any event after default." N.Y. UCC Section 9-607(a)(3). The Appellate Division's holding that a "dispute" exists between Worthy and Checkmate preventing Worthy from collecting directly from New Style, turns Article 9 on its head, because it concludes that a borrower's default constitutes a dispute that actually prevents a secured lender from recovering collateral pledged by that borrower. A default is not a dispute; it is just a failure to pay when due, and there is no other evidence in the Record, or even noted in the Appellate Order, or the Supreme Court Order, of any "dispute" between Worthy and Checkmate.

As a matter of policy, New York's commercial law cannot instill an illogical rule that prevents a secured lender from collecting on its collateral because the borrower has defaulted. The whole purpose of collateral is that it can be collected if the borrower fails to pay. If a failure of the borrower to pay excused the account debtor from complying with the instruction in the Section 9-406 notice 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 lenders' rights. The most important time to get payment directly from the account debtor is when the borrower stops paying the loan; in other words, when the borrower defaults.

Moreover, the lower Courts' holdings are incorrect as a matter of law. Both rely on the misapplication of *Buckeye Retirement Co., LLC, Ltd. v. Meijer, Inc.* and N.Y. UCC Subsection 9-607(e), which provides that "[t]his section [Section 9-607] does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party." Subsection 9-607(e) does not prevent a secured lender from collecting accounts from an account debtor because the account debtor has defaulted. Rather, that subsection merely clarifies that "the secured party's rights, as between it and the debtor [borrower], to collect from and enforce collateral against account debtors and others obligated on collateral" are subject to Part 4 of Article 9, which includes Section 9-406. UCC § 9-607, Official Comment 6.

In *ImagePoint, Inc.*, the Court explained that UCC § 9-607(e) does not operate to prevent a suit against an account debtor, where, as here, the secured lender is asking the account debtor "to simply fulfill its obligations to [the debtor]," *i.e.* New Style's contractual obligations to Checkmate. 27 F. Supp. 3d at 506. In *ImagePoint, Inc.*, Wachovia Bank ("Wachovia") and ImagePoint entered into a Loan and Security Agreement, under which Wachovia agreed to make loans to ImagePoint

and in exchange, ImagePoint granted Wachovia a security interest in ImagePoint's collateral, including its accounts. *Id.* at 497-98. ImagePoint and JP Morgan Chase Bank ("JP Morgan") subsequently entered into a Procurement Agreement, "in which [JP Morgan] agreed to pay ImagePoint for performing various services and supplying certain materials." *Id.* at 498. Wachovia's rights under the Loan and Security Agreement were later assigned to the plaintiff, Martin. *Id.* JP Morgan failed to pay the amounts due under the Procurement Agreement, and Martin and ImagePoint sought to collect payments from JP Morgan pursuant to Wachovia's assignment of its security interest. *Id.* at 499-500.

JP Morgan challenged Martin's entitlement to recourse under Section 9-607, arguing that Section 9-607(e) prevents a secured creditor from collecting from an account debtor. *Id.* at 505. The court rejected this argument, explaining that:

> On its face, the language of § 9–607(e) imposes no limitation on the remedy provided in § 9–607(a)(3). It merely states that § 9–607 does not create any obligation to a secured party. But the obligation that Martin purports to sue on was not created by Article 9 but rather consists of an obligation contained in the original contract between ImagePoint and [JP Morgan]—that is, [JP Morgan's] debt to ImagePoint under the Procurement Agreement. *Id.*

Here, just like the plaintiff Martin in *ImagePoint, Inc.*, Worthy's suit is based on New Style's obligation to pay money to Checkmate arising from the subcontract agreements between New Style and Checkmate, and Worthy has simply stepped into Checkmate's shoes via its security interest to enforce New Style's obligations. *See*

id.; *see also Mecco, Inc.*, supra, 486 F. Supp. 2d at 546 (finding that a bank with a perfected security interest in a debtor's collateral could, upon the debtor's default, "step into [the debtor's] shoes and enforce the obligations of its account debtors.").

In contrast, in *Buckeye Retirement Co., LLC, Ltd.*, the unpublished and non-precedential opinion from the Michigan Court of Appeals,[9] on which the lower Courts relied, the court found that a lender could not bring suit against the borrower's account debtor, where the borrower actually denied the lender's entitlement to payment from the defendant or any assignment of accounts. *See* No. 279625, 2008 WL 4278038 (Mich. Ct. App. Sept. 18, 2008). Specifically, in *Buckeye Retirement Co., LLC, Ltd.*, when the plaintiff attempted to collect from the defendant, who owed money to plaintiff's borrower, the borrower told the defendant that it did not believe the plaintiff 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 the plaintiff referenced an assignment of money held by defendant on behalf of plaintiff. *Id.* at *2. That did not happen here.

As the court in *ImagePoint, Inc.* explained, the holding in *Buckeye Retirement Co., LLC, Ltd.* is limited to "situations . . . where there is a dispute between the secured creditor and the debtor as to who has the right to collect from an account

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

debtor . . ." *See* 27 F. Supp. 3d at 506. In such a case, "the secured creditor cannot be said to be 'exercis[ing] the rights of the debtor with respect to the obligation of the account debtor.'" *Id.* (quoting N.Y. UCC § 9–607(a)(3)) ("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.'"). Thus, unlike here and in *ImagePoint, Inc.*, the plaintiff in *Buckeye Retirement Co., LLC, Ltd.* could not collect on accounts because its borrower disputed its assignment of those accounts. No such dispute is in the Record here.

Another case that demonstrates the correct application of Section 9-607 is *First State Bank Nebraska*, which similarly rejected the account debtor's argument, based on Section 9-607(e), that a default is a dispute that must be adjudicated before the secured lender can sue the account debtor. 948 N.W.2d at 723. The court explained that the default as defined by the agreements between the borrower and the plaintiff was the borrower's failure to make payment when due, it was presently uncontested that the borrower had failed to make payments on time, and the fact that the borrower initially disputed this default did not change it. *Id.* at 723-24 ("[D]efault is not contingent on an adjudication or agreement. Article 9 leaves to the agreement of the parties the circumstances giving rise to a default; default is whatever the security agreement says it is."). *Id.* at 723. The court further stated

that if the account debtor "did not have sufficient information to determine whether the default occurred and [the plaintiff] was presently authorized to collect on the collateral, it could have requested additional proof from [the plaintiff] pursuant to § 9-406(c)[10] . . ." *Id.* at 724; *see also IIG Capital*, supra, 36 A.D.3d at 403 ("[I]f defendants or their employees had any doubt as to the import of the assignment notices and invoices they signed for, the UCC provides a mechanism whereby the account debtor may require that the assignee 'furnish reasonable proof that the assignment has been made.'") (quoting N.Y. UCC § 9-406(c)).

Here, Checkmate has not, and could not, dispute its default, or even Worthy's right to collect from New Style, and in fact, expressly permitted Worthy to do so in the Financing Agreement. *See*, supra, Point I. While, as Section 9-607(e) explains, New Style's duty to pay Worthy is not created by Section 9-607, that section does provide the mechanism through which Worthy can sue New Style directly. And that Section—and Section 4(k) of the Financing Agreement—gave Worthy the right to collect accounts from New Style even prior to Checkmate's default, after the Notice of Assignment, which New Style simply ignored. Thus, there is no basis for the

[10] Subsection (c) of N.Y. UCC § 9-406 provides:

> Proof of assignment. Subject to subsection (g), if requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under subsection (a).

lower Courts' holdings that Checkmate's default prevented Worthy from collecting accounts.

Moreover, to the extent the lower Courts' findings of a "dispute" are based on the fact that New Style already made payments of accounts to Checkmate, such holding contradicts the plain language of Section 9-406, and this Court's own precedent. *See Gen. Motors Acceptance Corp.*, 85 N.Y.2d at 236. And under Article 9, New Style remains liable to Worthy for the full amount of misdirected payments after its receipt of the Notice of Assignment, regardless of any other recovery by Worthy of Checkmate's debt. *See Reading Co-Op. Bank v. Suffolk Constr. Co.*, 464 Mass. 543, 553 (Mass. 2013) (proper measure of assignee's recovery, is the total value of all payments wrongfully misdirected). The rule created by the Appellate Order therefore prevents a secured lender from recovering the full value of its collateral, because its borrower and account debtor have ignored their obligations under the UCC. A rule that so disrupts the function of Article 9 and strips secured lenders of their ability to recover their borrowers' debts, must not be permitted to stand.

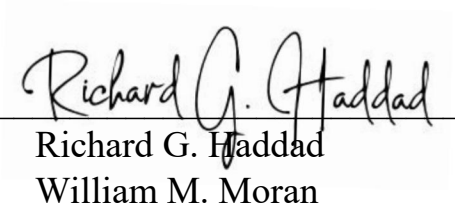
CONCLUSION

This is a case of a secured lender seeking to recover its collateral, through a statutory scheme that expressly permits it to do so. In entering into the Financing Agreement and lending millions of dollars, Worthy, like many other lenders, relied

on its ability to collect Checkmate's accounts pursuant to New York's UCC. This is because Article 9 provides a framework that sets forth the rights of all parties, most importantly, when the borrower defaults. The certainty of a secured lender's—and borrower's and account debtor's—rights under Article 9 is critical to the availability of accounts receivable financing in New York. The Appellate Order would strip away that certainty and, likely, the possibility of financing for many borrowers. This Court must determine and set forth the correct application of Sections 9-406 and 9-607 of the UCC, as instructed by the PEB and the Official Comments, to ensure that parties can be certain of their rights when entering into agreements, without resort to non-uniform state law, as the drafters of Article 9 intended. The rules of law requested above at page 13 should be entered, the Appellate Order should be reversed, the Complaint reinstated, and the matter remanded to the Supreme Court, New York County.

Dated: New York, New York
March 11, 2022

OTTERBOURG P.C.

By: 

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

The foregoing Brief for Plaintiff-Appellant was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

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Dated: March 11, 2022

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STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

On March 11, 2022

deponent served the within: **Brief for Plaintiff-Appellant**

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at the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on
March 11, 2022

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2022

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