To be Argued by:
RICHARD G. HADDAD
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Court of Appeals

of the

State of New York

WORTHY LENDING, LLC,

Plaintiff-Appellant,

– against –

NEW STYLE CONTRACTORS, INC.,

Defendant-Respondent.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases — Page

Statutes

Other Authorities

PRELIMINARY STATEMENT

The express purpose of the New York Uniform Commercial Code is "to make uniform the law among the various jurisdictions." N.Y. UCC § 1-103(a)(3). To achieve this purpose, the Code must be "liberally construed and applied." *Id.*

So that the Code may be properly applied in accordance with its goals, the drafters wrote Official Comments, providing explanation for the Code's provisions in various commercial situations. And, to ensure continued uniform application of the Code, the Permanent Editorial Board ("PEB") issues supplementary commentaries to provide guidance on issues as and when appropriate. [C-2]. Here, the Code, Official Comments and PEB Commentary show why the lower Courts' rulings are wrong, and why the interpretation advanced here by New Style[1] is at once "incorrect" and non-uniform.

Worse, the "solution" preferred by New Style, that lenders throughout the country, who take security interests in accounts receivable as collateral for loans, should change the nature of their transactions and have borrowers sign another document entitled "assignment" so lenders can realize on their collateral in New York (but which is unnecessary in all of the other states who contract by, and

[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.

uniformly apply the Code) would achieve the exact opposite of uniformity and commercial stability.

Official Comment 26 to Section 9-102 and Official Comment 8 to Section 9-401 make clear that for purposes of enforcing a lender's right to collect accounts receivable, the term "assignment" applies equally to outright assignments and to security interests as collateral to secure an obligation. The lower Courts and New Style would disregard this authority. Similarly, New Style asks this Court to disregard the on-point PEB Commentary with a plea that the PEB is not "binding."

To try to support its claim that the PEB is not "binding," New Style relies exclusively on dicta, non-precedential cases, and cases that are just not on point. Indeed, the PEB explained that any court that read the dicta in the *IIG* case the way New Style now urges would be "incorrect." [C-4]. This "incorrect" view must be rejected to achieve the uniformity required for the UCC to operate as the Legislature expressly intended.

Not only would the new distinction urged by New Style between security interests and assignments contradict the text of New York's Uniform Commercial Code, the Official Comments to the UCC, and commercial practice, it would require account debtors to determine, in each instance, what type of interest a lender has, and whether to analyze it under the UCC or state common law. This would create the exact chaos that the PEB warns against, and it would render New York

(commonly regarded as "the finance capital of the world") an outlier jurisdiction in commercial finance.

ARGUMENT

POINT I

THERE IS NO VALID BASIS TO DISTINGUISH BETWEEN A SECURITY INTEREST AND AN ASSIGNMENT UNDER ARTICLE 9

A. Reversal of the Appellate Order is Essential to Ensuring Uniformity and Certainty in Commercial Finance Law

An essential purpose of the Uniform Commercial Code is "to make uniform the law among the various jurisdictions." N.Y. UCC § 1-103(a)(3). New Style's assertions, and the lower Courts' holdings, that a security interest is not treated under Section 9-406 as an "assignment," obstruct this purpose. New Style finds a distinction where the authors of the Code said there was none and then New Style offers a "solution" by suggesting that a lender should rewrite its agreements and ask for and obtain an extra (and unnecessary) "assignment" in its agreement with its borrower. Resp. Br. at 23. The flaw is that Article 9's protections and remedies are intended to apply to all lenders and financiers, regardless of whether they have bargained for an outright assignment of accounts receivable, such as in a factoring agreement where receivables are purchased and assigned, or as here, where accounts

receivable are serving as collateral for a loan.[2] Official Comment 26 to Section 9-102 of the UCC explains this point and flatly contradicts New Style's position:

> This Article generally follows common usage by using the terms "assignment" and "assign" to refer to transfers of rights to payment, claims, and liens and other security interests…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. See Comment 8 to Section 9-401 and PEB Commentary No. 21, dated March 11, 2020.

Official Comment 8 to Section 9-401 of the UCC makes this point crystal clear:

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

Thus, Article 9 contemplates both assignments and security interests, and protects lenders uniformly, particularly and critically, in the event that the borrower fails to make payment to the lender on the loan.

The uniformity proscribed by the Uniform Commercial Code not only protects lenders in commercial transactions, but creates greater certainty in

[2] New Style seems to suggest that Worthy did not include or bargain for the word "assignment" in the Financing Agreement by "error". Resp. Br. at 4. What New Style fails to understand is that lenders and borrowers bargain for different rights depending upon what the parties agree in that transaction, and UCC Article 9 protects those lenders uniformly.

commercial law for all parties to a transaction. As the PEB has explained, creating a distinction between security interests and assignments would place the burden on an account debtor to determine in each instance, (a) whether the lender has an assignment or a security interest,[3] and (b) whether the UCC or common law applies to its rights. [C-5]. Such a burden and resulting uncertainty would have "a negative effect on the availability of financing," *id.*, because it would create a greater risk for lenders that account debtors would ignore the lender's interests. It would also create a greater risk for account debtors that they might fail to pay the correct entity because the law is unclear and could well develop differently in the fifty states. Thus, the PEB's "broader interpretation creates greater certainty for both the secured party and the account debtor and is consistent with expectations in commercial practice." [C-6]; *see also* N.Y. UCC § 1-103, Official Comment 1 ("[T]he application of the language [of each section of the UCC] should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.").

Tellingly, New Style urges this Court to ignore the direction of the PEB and the Official Comments to the UCC. However, New Style seems to confuse the PEB commentaries with the Official Comments to the UCC, by arguing that "PEB

[3] Notably, the financing statement (commonly known as a "UCC-1") that a secured lender files with the Secretary of State in the borrower's home jurisdiction does not distinguish between outright assignments and security interests, and only requires the names of the parties and a description of the collateral. Therefore, an account debtor would in every instance, under New Style's construct, have to look beyond public filings to determine its duties regarding payment. This is a recipe for commercial chaos.

commentaries have not been enacted by the legislature and do not have the force of law," while citing to cases, from states other than New York, concerning only the Official Comments. Resp. Br. at 13 (citing cases). In any event, this assertion is not compelling, because, as set forth in Worthy's Opening Brief, this Court has looked to both the PEB commentaries and the Official Comments to the UCC as providing authoritative guidance. Br. at 18-19 (citing *US Bank Nat'l Ass'n v. Nelson*, 36 N.Y.3d 998, 1000, n.1 (2020) (Wilson, J., concurring); *Albany Disc. Corp. v. Mohawk Nat'l Bank of Schenectady*, 28 N.Y.2d 222, 227 (1971); *Banque Worms v. BankAmerica Int'l*, 77 N.Y.2d 362, 373 (1991)).

New Style also argues, incorrectly, that the reasoning of the PEB—again one of the foremost authorities on interpretation of the UCC—"is flawed." Resp. Br. at 13. Specifically, New Style argues that the PEB incorrectly states that UCC Section 9-209 applies to both security interests and assignments. Resp. Br. at 13-14. New Style very clearly misses the mark here, because the PEB does not say that Section 9-209 applies to both security interest and assignments, but rather, that Section 9-209 "describes certain duties of a secured party if an account debtor has been notified of an 'assignment'" under Section 9-406(a), [C-3, fn. 9], and the secured party has already been paid in full (which is not the case here). Thus, Section 9-209 actually demonstrates that Section 9-406 applies to security interests as well as assignments, because it expressly contemplates a situation in which a secured party sends a notice

to an account debtor in accord with Section 9-406(a), but then later releases its security interest in the borrower's accounts. *See* N.Y. UCC § 9-209, Official Comment 2 ("[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.").[4]

New Style further suggests that the PEB is incorrect that security interests have historically been treated as assignments. Resp. Br. at 14. However, the first case to which New Style cites, from the Southern District of New York, was decided before the UCC was even enacted in New York. *Texas San Juan Oil Corp. v. An-Son Offshore Drilling Co.*, 194 F. Supp. 396, 397 (S.D.N.Y.1961). The second case, from the Eighth Circuit, referencing *Texas San Juan Oil Corp.* is entirely inapplicable because it did not involve an action pursuant to Article 9 of the UCC, nor did that Court interpret the UCC in its opinion. *See generally*, *Diversa-Graphics, Inc. v. Mgmt. & Tech. Servs. Co.*, 561 F.2d 725 (8th Cir. 1977). Rather, the plaintiff in that case, a bankruptcy debtor-in-possession, brought an action under the old Bankruptcy Act of 1898 to recover monies owed under a contract with the defendant.

[4] Contrary to New Style's argument, the fact that Section 9-209(c) specifically states that it is not applicable to sales, demonstrates that generally, throughout Article 9, the assumption is that reference to a security interest is also to an assignment and vice versa, as Official Comment 26 to UCC Section 9-102 and Official Comment 8 to UCC Section 9-401 explain.

Id. at 726. New Style's reference to those cases does not support a distinction between a security interest and an assignment under Article 9, but rather reflects the precise chaos and uncertainty in the law that the PEB warns against and that will occur if this Court does not reverse and bring New York law in line with the uniform interpretation.

B. Case Law Demonstrates that there is no Distinction Between a Security Interest and an Assignment Under UCC Section 9-406

Contrary to New Style's assertions, the precedent cited by Worthy establishes that there is no basis under Section 9-406 for treating a security interest differently from an assignment. First, as New Style concedes, the Supreme Court of Nebraska has recently held that there is no distinction between a security interest and an assignment—and explained why. *First State Bank Nebraska v. MP Nexlevel, LLC*, 948 N.W.2d 708, 719-22 (Neb. 2020). As New Style further concedes, *First State* also explained that the portion of *IIG* on which New Style relies is dicta, and the facts of *IIG* are distinguishable from cases like Worthy's where the security interest is presently exercisable. Resp. Br. at 17; *Id.* at 721-22.

The Court in *First State* (and Worthy in its Opening Brief) cited to several other cases which also conform with the interpretation of the PEB, including *ARA Inc. v. City of Glendale* and *Lake City Bank v. R.T. Milord Co.* In *ARA Inc.*, the Court rejected the defendant-account debtor's argument that it did not receive adequate notice of assignment, because the notice only identified the plaintiff-

lender's security interest, not an assignment. 360 F. Supp. 3d 957, 967 (D. Ariz. 2019). The Court held, as the Eighth Circuit had, that "there is 'no meaningful difference between a security interest and an assignment.'" *Id.* (quoting *In re Apex Oil Co.*, 975 F.2d 1365, 1369 (8th Cir. 1992), reh'g denied and opinion modified (Nov. 19, 1992)). Contrary to New Style's assertion, [Resp. Br. at 18], the Court in *ARA Inc.* did not rely on the Southern District of Florida's decision in *Durham Commercial Capital Corp. v. Ocwen Loan Servicing, LLC* for this holding. Rather, it only cited that decision when addressing, and rejecting as academic, the account-debtor's argument that there is no independent cause of action under Section 9-406.

First State also looked to the decision in *Lake City Bank v. R.T. Milord Co.*, which held that Section 9-406 was applicable to a secured lender's suit against an account debtor, who made payment of accounts to the secured lender's borrower, after it received notice of the secured lender's interest. No. 18 C 7159, 2019 WL 1897068, at *3 (N.D. Ill. Apr. 29, 2019). Contrary to New Style's assertion, [Resp. Br. at 18, fn. 6], the account debtor in that case argued that UCC § 9-406 was not applicable to the suit, and the court held that it was. *Id.* Thus, *Lake City Bank* supports the application of Section 9-406 to a security interest, in particular, where the account debtor, like New Style here, has wrongly paid the borrower after a

notice.[5] Moreover, New Style does not even address many of the cases cited in Worthy's brief that also support the application of Section 9-406 to security interests. *See* Br. at 28 (citing *Magnolia Fin. Grp. v. Antos*, 310 F. Supp. 3d 764, 765-67 (E.D. La. 2018); *Swift Energy Operating, L.L.C. v. Plemco-South, Inc.*, 157 So. 3d 1154, 1162 (La. Ct. App. 2015); *Rockland Credit Fin., LLC v. Fenestration Architectural Prods., LLC*, No. 06-3065, 2008 WL 1773234 (R.I. Super. Mar. 12, 2008) (Trial Order)).

Moreover, contrary to New Style's assertions, [Resp. Br. at 15-16], the cases from this Court, the Second Circuit, and other jurisdictions which have historically treated a security interest as an assignment under other provisions of the UCC demonstrate that there has not been any distinction between them historically and there should not be one now. Br. at 21-24 (citing *In re Apex Oil Co.*, 975 F.2d 1365, 1369 (8th Cir. 1992); *Septembertide Pub., B.V. v. Stein & Day, Inc.*, 884 F.2d 675, 682 (2d Cir. 1989); *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d

[5] New Style asserts that several of Worthy's cases are inapplicable because the account debtor in those cases had not made payments to anyone, including the borrower. Resp. Br. at 17 (citing *Cmty. Bank v. Newmark & Lewis, Inc.*, 534 F. Supp. 456, 460 (E.D.N.Y. 1982); *ImagePoint, Inc. v. JPMorgan Chase Bank, Nat. Ass'n*, 27 F. Supp. 3d 494, 498 (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); *Agri-Best Holdings, LLC v. Atlanta Cattle Exch., Inc.*, 812 F. Supp. 2d 898, 899 (N.D. Ill. 2011)). As *Lake City Bank* demonstrates, the account debtor's wrongful payment to the borrower does not change the result because the only way the account debtor can discharge the obligation is by paying the secured party. N.Y. UCC § 9-406(a); *see also Gen. Motors Acceptance Corp. v. Clifton-Fine Cent. Sch. Dist.*, 85 N.Y.2d 232, 236 (1995); *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).

1185, 1191 (7th Cir. 1990); *Fleet Cap. Corp. v. Yamaha Motor Corp., U.S.A.*, No. 01 CIV. 1047 (AJP), 2002 WL 31174470, at *28 (S.D.N.Y. Sept. 26, 2002); *Sea Spray Holdings, Ltd. v. Pali Fin. Grp., Inc.*, 269 F. Supp. 2d 356, 362 (S.D.N.Y. 2003); *Garber v. TouchStar Software Corp.*, No. 2009 CV 1189, 2011 WL 12526062, at *6 (Colo. Dist. Ct. Nov. 10, 2011); *Bank Leumi Tr. Co. of New York v. Collins Sales Serv., Inc.*, 47 N.Y.2d 888, 890 (1979)). New Style fails to make any plausible argument for why a security interest would be treated differently from an assignment in one provision of Article 9 when it is not in others, merely stating that there is "understandably" (but without explanation) no reason to differentiate between them in the context of a setoff. Resp. Br. at 15. As the PEB explains, former versions of Article 9 used the term assignment for a security interest, and "[t]he 1999 revisions of Article 9 retained that terminology to avoid any suggestion that the scope or substance of the applicable rules had been changed." [C-4].[6]

Finally, New Style fails to even address the compelling analysis of several cases cited in Worthy's brief, which further reflect a proper application of the Code.

[6] New Style further asserts that Worthy's Opening Brief cites cases that do not deal with Section 9-406. Resp. Br. at 16, fn. 4 (citing *Agri-Best Holdings, LLC v. Atlanta Cattle Exch., Inc.*, 812 F. Supp. 2d 898, 901 (N.D. Ill. 2011); *Wells Fargo Bank Nat. Ass'n v. Kal-Rich, Inc.*, 2010 Mass. App. Div. 103 (Dist. Ct. 2010); *Mecco, Inc. v. Cap. Hardware Supply, Inc.*, 486 F. Supp. 2d 537, 546 (D. Md. 2007)). However, Worthy did not cite those cases in support of the applicability of Section 9-406 to a security interest, but rather, to demonstrate how Section 9-607 permits a secured lender to step into the shoes of the borrower to sue the account debtor. Br. at 16. A secured lender who has not sent prior notice pursuant to Section 9-406 may also utilize Section 9-607 in the event of a default.

See 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)); *Royal Bank & Tr. Co. v. Midwest Boutiques, Inc.*, No. 86 CIV. 3386 (RLC), 1988 WL 140876, at *7, n. 5 (S.D.N.Y. Dec. 19, 1988) (citing *Chase Manhattan Bank (N.A.)* for its holding that former Section 9-318(1)(b) was applicable to a security interest); *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).

C. New Style does not Cite a Single Case Holding that Section 9-406 is not Applicable to Worthy's Security Interest

Not one of the cases that New Style relies on provides any reason for this Court to find that a security interest is not treated the same as an "assignment" under Section 9-406 of the UCC. Rather, New Style misapplies the dicta in the divided decision in *IIG*, and cites to non-New York cases, with facts wholly distinct from this case. Even if any of these cases were applicable to the facts here, their reasoning, which is contradictory to the text of the UCC itself, the Official Comments, and the direction of the PEB, is not compelling.

1. *IIG Capital LLC v. Archipelago, L.L.C.* Does Not Support a Distinction Between a Security Interest and an Assignment Under Article 9

New Style's reliance on *IIG* for the assertion that a security interest is not treated as an assignment under Article 9 is wrong. First, New Style incorrectly asserts that the portion of *IIG* analyzing the effect of the lender's security interest was part of the holding rather than dicta. Resp. Br. at 8, fn. 3. However, that portion of the opinion was unnecessary to the holding of the case, which denied the motion to dismiss the plaintiff-lender's complaint based on an assignment of accounts, where the plaintiff sufficiently alleged that it had purchased the accounts. *IIG Cap. LLC v. Archipelago, L.L.C.*, 36 A.D.3d 401, 403 (1st Dep't 2007); *see also First State Bank Nebraska*, 948 N.W.2d at 721.

Moreover, contrary to New Style's assertion, [Resp. Br. at 8, fn. 3], the issue of whether Section 9-406 applies to security interests was not "properly presented" to the Court in *IIG*. As the Court explained, the cases the *IIG* 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). *IIG Cap. LLC*, 36 A.D.3d at 404. While Worthy's Opening Brief includes the same cases to demonstrate the historical understanding of assignments and security interests under Article 9, it has also demonstrated that the text of the New York UCC itself, the Official Comments to the UCC, cases dealing with current Section 9-406, and the PEB all support the

conclusion that a security interest is treated as an assignment under Article 9. *See* Br. at 17-30.

Critically, New Style concedes at page 8 of its Brief, that the creditor in *IIG* "actually had a true assignment . . . but its rights as an assignee had not yet ripened" because the contract in *IIG* required a default to exercise remedies, which had not occurred in *IIG.* 36 A.D.3d at 404. Conversely, here the contractual trigger for Worthy's right to collect was notice or default, and Worthy pleaded both. [R 15 at ¶¶ 8-12]. Thus, even if the portion of *IIG* that New Style relies on were not dicta, it is entirely inapplicable to the facts here, as set forth in Worthy's Opening Brief. Br. at 30-31. In *IIG*, the factoring agreement had expressly conditioned the plaintiff's right to collect on an event of default, which the plaintiff did not allege. 36 A.D.3d at 404. That is not the case here, because (a) Checkmate has defaulted, and (b) under Section 4(k) of the Financing Agreement, Checkmate authorized Worthy at Worthy's discretion at any time to notify and instruct account debtors of Checkmate of Worthy's interest in the Accounts and to remit payment of Accounts and other Collateral directly to Worthy. [R 24, Financing Agreement, Section 4(k)]. Thus, New Style has presented no reason for this Court to rely on the divided Appellate Division in *IIG* to support a holding that is contrary to the text of the UCC itself and harmful to commercial law.

2. Not One of the Cases from Other Jurisdictions to which New Style Cites is Applicable Here

New Style has failed to present any cases from outside of New York which properly determine that Section 9-406 does not apply to Worthy's security interest. First, New Style cites to the unpublished and non-precedential opinion, *Durham Commercial Capital Corp. v. Ocwen Loan Servicing, LLC*, which reflects a fundamental misunderstanding of the application of Sections 9-406 and 9-607 of the UCC. In *Ocwen Loan Servicing, LLC*, the Court, referring to *IIG* in precisely the way the PEB stated is wrong,[7] found that the plaintiff could not assert a single cause of action pursuant to Section 9-406, because it had a security interest rather than an assignment. 777 F. App'x 952, 956 (11th Cir. 2019). Notably, the *Ocwen* Court further stated that Section 9-607 of the UCC already provides a secured creditor with the right to enforce the obligations of an account debtor, and thus, providing for a private right of action under Section 9-406 would be inconsistent with the legislative scheme. *Id.*

Not only is the non-precedential holding in *Ocwen Loan Servicing, LLC* inapplicable to Worthy's action here, its reasoning is flawed. As set forth in Worthy's Opening Brief, [Br. at 13-17], Sections 9-406 and 9-607 do not provide separate and distinct causes of action under the UCC, nor does Worthy's action

[7] The PEB specifically stated in its commentary that the interpretation in *Ocwen Loan Servicing*, citing to *IIG*, is "incorrect."

against New Style rely on a private right of action under Section 9-406. Rather, both provisions work in tandem to permit a secured creditor (Worthy) to step into the borrower's (Checkmate's) shoes after a notice of assignment and the account debtor's (New Style's) failure to make payments to the lender, regardless of whether the account debtor has already paid the assignor. As the PEB explains in its commentary:

> Some courts have expressed skepticism that a secured party is entitled to sue an account debtor whose payment obligation to the debtor has not been discharged under U.C.C. § 9-406(a). *See, e.g.*, *Forest Capital, LLC v. BlackRock, Inc.*, 658 F. App'x 675 (4th Cir. 2016). However, if the account debtor has not been discharged under U.C.C. § 9-406(a) on its contractual obligation to the debtor, the account debtor remains liable to the debtor. Article 9 gives the secured party the right to enforce the debtor's rights against the account debtor. *See* U.C.C. § 9-607. [C-6, n. 21]

Thus, because Worthy has not brought an action pursuant to Section 9-406, as the plaintiff apparently did in *Durham Commercial Capital Corp.*, but rather has stepped into the shoes of Checkmate to enforce its contract with New Style, *Durham* is entirely inapplicable here, and New Style's assertion that Worthy does not have a cause of action under Section 9-406 is an inapposite distraction.

Moreover, in holding that a security interest is distinct from an assignment, the Court in *Ocwen Loan Servicing, LLC* specifically stated that "[a]s a federal court applying state law, we are bound by *IIG Capital LLC*, a decision of New York's intermediate appellate court, unless there is some persuasive indication that the

highest court of the state would decide the issue differently." 777 F. App'x at 957 (quotations omitted). "Durham provides no authority suggesting that the New York Court of Appeals would rule differently on this issue." *Id.* In contrast here, Worthy has provided the text of the N.Y. UCC itself, the Official Comments to the UCC, the express direction of the PEB, and precedent in New York and other jurisdictions, [Br. at 17-30], which together demonstrate that this Court should "decide the issue differently" and ensure that every other court in this state does as well.

The other cases that New Style relies on are similarly inapplicable. 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.*, the Florida District Court found that the plaintiff's motion for summary judgment failed because there was a fact issue as to whether the plaintiff had purchased all of the accounts for which it was seeking payment. No. 3:14-CV-877-J-34PDB, 2016 WL 6071633, at *18 (M.D. Fla. Oct. 17, 2016). 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.[8]

[8] 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 as a procedural matter, 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).

Similarly, in *Platinum Funding Services, LLC v. Petco Insulation Co.*, No. 3:09CV1133 MRK, 2011 WL 1743417, at *9 (D. Conn. May 2, 2011), 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. ("Here, the only right that Petco Insulation assigned to Platinum funding was *an option* to purchase invoices from Petco Insulation.") (italics in original). It was the unexercised option that doomed the claim in *Platinum*. Thus, neither case defeats, or even 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. [R 15 at ¶¶ 8-12; 24, Financing Agreement, Section 4(k)]. First, in *CapitalPlus Equity, LLC v. Glenn Rieder, Inc.*, the court 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-CV639-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 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. There, the Connecticut appellate court held that "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]." 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 1191 ("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 claim failed for failure to satisfy the contractual condition precedent of default. Unlike the Financing Agreement in this case, the factoring agreement in *Factor King* did not permit the plaintiff to demand payment of accounts prior to an event of default.

Thus, none of the cases New Style cites compels the result it seeks.

POINT II

THERE IS NO "DISPUTE" THAT PREVENTS WORTHY FROM ENFORCING ITS RIGHTS AS A SECURED LENDER UNDER ARTICLE 9

The lower Courts' creation of a rule that prevents a secured lender from collecting its collateral because its borrower has defaulted is nonsensical and contradictory to the fundamental purpose of Article 9 of the UCC. The most critical time the lender needs to enforce its rights to the collateral is after the borrower defaults. Claiming that a default prevents the remedy turns commercial law and commercial finance upside down.

New Style argues that a dispute between Checkmate and Worthy prevents Worthy from collecting accounts from New Style, and that *ImagePoint* and the unpublished and non-precedential opinion from *Buckeye Retirement Co., LLC, Ltd.* support this. [Resp. Br. at 18-20]. First, no such dispute was pleaded. Second, as set forth in Worthy's Opening Brief, [Br. at 36-37], *ImagePoint* specifically rejected the defendant's argument that Section 9-607(e) prevented the lender's action against it, and explained 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));[9] *Buckeye Ret. Co., LLC v. Meijer, Inc.*, No. 279625, 2008 WL 4278038, at *2 (Mich. Ct. App. Sept. 18, 2008)). No such dispute exists here. Rather, the only fact in the Record on which the lower Courts' relied for the assertion of any dispute was Checkmate's default under the Financing Agreement.

A borrower's default is not the same as a dispute as to who has the right to collect accounts, and because New Style knows this, it now makes up new facts that are not in the Record to suggest a dispute. Specifically, New Style now asserts, without citation to the Record, that "Checkmate continued to submit and demand payment of invoices to NSC . . ."[10] Resp. Br. at 3 and "Checkmate itself has disputed" records provided to Worthy concerning the New Style Accounts. *Id.* at 4,

[9] 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 8. 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*, 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* 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 516. This California district court case is thus 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.

[10] New Style further asserts that the amounts demanded by Checkmate included "amounts required to pay for trust claims of Checkmate's own suppliers and other materialmen under Article 3-A of the New York Lien Law, which NSC paid, only for Checkmate to fail to use those funds to pay materialmen . . ." Resp. Br. at 3. There is nothing in the Record to support this assertion, it was not considered below, and therefore, it should not be considered by the Court.

fn. 2. New Style even admits that the second assertion is "not part of the record" and "beyond the scope of matters before this Court . . ." *Id.* None of these assertions are in the Complaint, and thus have no effect on a motion to dismiss. Even if these were contained in the Record, they would still not change the result, because they do not demonstrate that Checkmate disputed the existence of Worthy's security interest in those accounts, as the borrower in *Buckeye* did. Rather, they would merely suggest that Checkmate and New Style purposefully ignored Worthy's notice of assignment.

New Style's argument that "it is the account debtor who is having the role of judge and jury being thrust upon it" when a secured lender exercises its rights under Section 9-607, [Resp. Br. at 18], falls flat, particularly here, where New Style was sent a notice of Worthy's interest in the New Style Accounts, and could have at the very least inquired about it. Critically, the UCC provides a remedy to the account debtor who is unsure whom to pay. N.Y. UCC § 9-406(c) provides:

> 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).

Moreover, as this Court has long held, an account debtor is liable to the assignee under Section 9-406, regardless of whether it has already made payment to the assignor. *Gen. Motors Acceptance Corp.*, 85 N.Y.2d at 236.[11]

One flaw that permeates New Style's position is that New Style never availed itself of the protections under Section 9-406(c). Instead, New Style assumed the very risk of having to "pay twice" as this Court explained in *General Motors Acceptance Corp.*, 85 N.Y.2d at 236.

New Style's attempts to recharacterize Worthy's claim into something other than one to collect its collateral as expressly provided for under the UCC, also fail. First, New Style cites to a case brought by a lender against a borrower's principal for misdirecting payments of accounts from account debtors to the borrower, asserting that Worthy should instead bring a claim against Checkmate. Resp. Br. at 19, 21 (citing *In re Mlsna*, No. 01 A 0422, 2003 WL 21785648, at *8 (Bankr. N.D. Ill. July 31, 2003). This assertion fails because there is no requirement under the law, nor does New Style point to any, that Worthy bring any type of action against Checkmate before seeking to collect accounts from New Style.

[11] New Style suggests that *Gen. Motors Acceptance Corp.* is inapplicable here because it involves an assignment of accounts rather than a security interest, but this non-uniform application urged by New Style to lenders' interests is exactly what the New York UCC, the Official Comments to the UCC, and the PEB seek to prevent.

Second, New Style attempts to characterize Worthy's suit as one for impairment of collateral, citing to *McCullough v. Goodrich & Pennington Mortgage Fund, Inc.* Resp. Br. at 21. In that case, the plaintiff 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. *McCullough*, 644 S.E.2d 43, 46 (S.C. 2007). Worthy has not alleged any such claim, and thus, *McCullough* is inapplicable. *See ImagePoint, Inc.*, 27 F. Supp. 3d at 507 (analyzing the same case cited by New Style and finding "[b]ecause [plaintiff] is not seeking to pursue an independent claim of any kind, let alone a tort claim, the holding of *McCullough* is irrelevant to this case.").

Thus, New Style has not provided any support for its assertion that Section 9-607, which expressly permits a secured lender, like Worthy, to bring a claim against an account debtor, like New Style, is not applicable because Checkmate has defaulted.

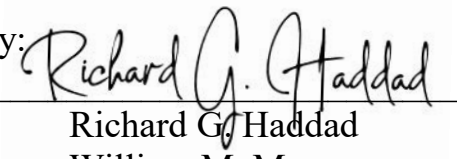
CONCLUSION

Worthy respectfully requests that this Court issue the rules of law requested at page 13 of Worthy's Opening Brief, reverse the Appellate Order, vacate the dismissal of the Complaint and remand this case to the Supreme Court, New York County. 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.

Dated: New York, New York
May 13, 2022

OTTERBOURG P.C.

By: 

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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

Name of typeface:	Times New Roman
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Dated: May 13, 2022

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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 May 13, 2022

deponent served the within: **Reply 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
May 13, 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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