To be submitted by: The Secured Finance Network, Inc.

COURT OF APPEALS
STATE OF NEW YORK

WORTHY LENDING, LLC, Plaintiff-Appellant -against- NEW STYLE CONTRACTORS, INC., Defendant-Respondent.	APL-2022-00004 New York County Index No. 653406/20

SECURED FINANCE NETWORK'S *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT

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Date completed: March 29, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, The Secured Finance Network, Inc. states as follows: the Secured Finance Network, Inc. is the principal U.S. trade organization that represents the asset-based lending, factoring, trade and supply chain finance industries. The Secured Finance Network's 260 plus member organizations include regulated money center banks, independent finance companies, community banks, factors and leasing companies. The Secured Finance Network has no parents or subsidiaries, and its one affiliate is The Secured Finance Foundation.

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PRELIMINARY STATEMENT

The Secured Finance Network, Inc. ("SFNet") respectfully submits this *amicus curiae* brief in support of Plaintiff-Appellant Worthy Lending, LLC ("Appellant") and its appeal to this Court from the July 6, 2021 Decision and Order (the "Decision") of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, which Decision affirmed the November 18, 2020 Decision and Order of the Supreme Court (the "Supreme Court Order," and collectively with the Decision, the "Lower Court Orders") granting the motion to dismiss of Defendant-Respondent New Style Contractors, Inc. ("Respondent").

The Lower Court Orders erroneously establish a distinction between a borrower assigning its accounts to its lender as opposed to granting its lender a security interest in its accounts, and then rely on that distinction to prejudice the rights of a lender holding a security interest.[1] No such distinction exists under New York law, nor should it.

SFNet believes that this *amicus curiae* brief will assist this Court by explaining how the Lower Court Orders depart from widely accepted legal principles governing secured transactions and long-standing industry practice, and, if allowed

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[1] The term "account" is used herein with the same meaning set forth in section 9-102 of the New York Uniform Commercial Code (*i.e.* "a right to payment of a monetary obligation…"), which meaning includes accounts receivable.

to stand, would have severe negative consequences beyond the impact to the parties in interest in this case.

SFNet is interested in this appeal in its capacity as the national trade association for financial institutions that provide asset-based financing and factoring services to commercial borrowers. SFNet has a lengthy history and unique interest in advocating for uniform and consistent development and application of New York secured lending law such that its perspective on the policy and practical implications of the disputed issues in this case will be useful to the Court.

The Supreme Court Order, affirmed by the Appellate Division's Decision, together appear to elevate dicta from a prior Appellate Division order to erroneously find that the New York Uniform Commercial Code ("N.Y. UCC") materially distinguishes between the rights of an assignee of accounts and the rights of a grantee of a security interest in accounts. That distinction is contrary to the uniform understanding and practice of market participants within and beyond this state. Uniform Commercial Code scholars, as well as courts of other jurisdictions, agree that no such distinction exists under the Uniform Commercial Code. If allowed to stand, the Lower Court Orders will have an immediate and serious adverse impact on commercial finance in New York, as well as in other jurisdictions that follow New York's legal interpretations.

CONTEXT OF THE COMMERCIAL LOAN AT ISSUE

At issue is a commercial loan collateralized by the borrower's accounts, sometimes referred to as an asset-based revolving loan facility. Many of SFNet's members engage is such transactions every day.

In a typical asset-based revolving loan facility, a borrower pledges some or all of its accounts as collateral to secure the borrower's repayment obligations to the lender. Under such a loan facility, the lender commits to advance funds at the borrower's request (up to the maximum amount of the facility) at an agreed-upon percentage of the value of the borrower's accounts, typically in the range of 70% to 85% but as high as 90% or more in some circumstances.[2] *See e.g.*, *"Asset Based Lending" Booklet* of the *Comptroller's Handbook*, page 17, version 1.1, published by the United States Office of the Comptroller of the Currency on January 17, 2017.[3] Such relatively high advance rates reflect lenders' confidence in: (i) the value of accounts as a collateral asset class, and (ii) the lenders' ability to realize upon that value efficiently through non-judicial default remedies provided by contract and the N.Y. UCC.

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[2] Borrowers routinely pledge various types of assets as collateral, but accounts are the only type of collateral relevant here.

[3] Available from the United States Office of the Comptroller of the Currency at: https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/asset-based-lending/index-asset-based-lending.html. Last accessed Wednesday, March 23, 2022.

Asset-based revolving loan facilities are wholly dependent on commercial lenders' willingness to accept accounts as collateral. That willingness, in turn, is premised upon the uniform understanding that application of the N.Y. UCC will ensure lender recourse to the borrower's accounts if and when a loan default occurs, or when the parties may otherwise agree the lender should have such recourse. More specifically, both lenders and borrowers rely upon the interplay of rights and remedies of secured parties and account debtors under N.Y. UCC sections 9-406 and 9-607.

ARGUMENT AND CITATION OF AUTHORITIES

I. New York Does Not and Should Not Distinguish Between Security Interests and Assignments for Purposes of N.Y. UCC Section 9-406.[4]

The Permanent Editorial Board for the Uniform Commercial Code (the "PEB")[5] advises that there is no meaningful difference between a borrower granting

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[4] As *amicus*, SFNet avoids repeating legal arguments and case citations ably presented in Appellant's Memorandum of Law in Support of Motion for Leave to Appeal to the Court of Appeals dated August 5, 2021 ("Appellant's Memorandum of Law"), and the Brief for Plaintiff-Appellant dated March 11, 2022 ("Appellant's Brief"). SFNet highlights herein certain key points that merit particular consideration by this Court, which demonstrate the need for this Court to reverse the Lower Court Orders.

[5] Acting 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, the PEB provides scholarly analysis interpreting and resolving issues raised by the Uniform Commercial Code and/or its Official Comments. This Court has previously looked to the instruction of the PEB for guidance. See *Albany Disc. Corp. v. Mohawk Nat'l Bank of Schenectady*, 28 N.Y.2d 222, 227, 321 N.Y.S.2d 94, 98 (1971) (citing PEB commentary on former UCC Section 9-302).

its secured lender a security interest in its accounts and a borrower granting its secured lender an assignment of such accounts when the secured lender seeks to collect the pledged accounts directly from the borrower's account debtors, a right expressly conveyed upon them by N.Y. UCC section 9-607(a). As set forth in the Appellant's Memorandum of Law at pp. 14-20 and Appellant's Brief at pp. 27-30, the PEB's view is in accord with numerous jurisdictions outside New York. The PEB's conclusion is grounded in analysis of the relevant statutory language, the purpose of the Uniform Commercial Code, and history.

A. N.Y. UCC section 9-607 grants clear rights to secured parties.

SFNet suggests that the proper analysis starts with N.Y. UCC section 9-607:

> *(a) Collection and enforcement generally.* If so agreed, **and in any event after default**, a secured party:
>
> (1) may notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party;
>
> (2) may take any proceeds to which the secured party is entitled under Section 9-315;
>
> (3) may enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral;
>
> …
>
> *(e) Duties to secured party not affected.* This section does not determine whether an account debtor, bank, or other

> person obligated on collateral owes a duty to a secured party.

N.Y. UCC § 9-607 (emphasis added).

N.Y. UCC section 9-607 makes clear:

- In all circumstances after a default, and otherwise in whatever other circumstances to which parties may agree, a secured party has the right to take certain actions, including notifying account debtors and enforcing account obligations, with respect to collateral in which it has been granted a security interest.
- When collateral for an obligation includes accounts or other rights to receive payments, a secured party may "notify an account debtor…to make payment…to or for the benefit of the secured party."
- In addition, a secured party may "enforce the obligations of an account debtor…and exercise the rights of the debtor with respect to the obligation of the account debtor."

N.Y. UCC section 9-607 recognizes that transacting parties may agree to additional rights and additional exercise triggers for rights. N.Y. UCC § 9-607(a) ("If so agreed . . . ."). As but one example, in *Hamilton Grp. (Delaware), Inc. v. Fed. Home Loan Bank of New York*, 1 A.D.3d 973, 974 (N.Y. App. Div. 2003), the secured party was granted the right to notify account debtors prior to default.

B. N.Y. UCC section 9-406 gives clear direction to account debtors.

Whereas N.Y. UCC section 9-607 addresses a secured party's rights with respect to an account debtor obligated on collateral, section 9-406 addresses the account debtor's obligations and rights in connection with the secured party's exercise of its rights:

> *(a) Discharge of account debtor; effect of notification*. Subject to subsections (b) through (h), an 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.
> …
> *(c) 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).

N.Y. UCC § 9-406.

Subsection (a) of section 9-406 describes the manner by which account debtors properly may discharge their obligations on accounts. Until the account debtor receives notification in accordance with N.Y. UCC section 9-406, the account debtor is obligated only to the borrower. Once the account debtor receives a

statutorily compliant notification, however, the account debtor must pay the secured party in order to discharge its account obligation. The exception to this rule is that the account debtor may demand proof of the account assignment and, if such proof is not "seasonably" made, the account debtor may discharge its obligation by paying the borrower.

Read together, N.Y. UCC sections 9-607 and 9-406 establish the framework for commercial finance transactions secured by accounts: Borrowers know that they may effectively finance accounts; lenders know that they have actionable recourse against accounts to support that financing; and account debtors know how they may discharge their account obligations.

C. References to the undefined terms "assignor," "assignee," and "assigned" do not change the plain meaning of N.Y. UCC section 9-406.

That N.Y. UCC section 9-406 uses the undefined terms "assignor," "assignee," and "assigned" to refer to the pledged account receivable transaction is no impediment to the correct analysis and reaching the proper outcome. More important, in the context of the operation of N.Y. UCC sections 9-607 and 9-406, these terms merely describe the process by which a secured party's interest in accounts arises. Referring to the debtor as an assignor and to the secured party as the assignee simply and accurately reflects that the debtor has transferred collateral rights to the secured party. Had the UCC drafters intended to create a separate

requirement, they would have defined the term "Assignment" and been explicit as to the requirement.

For good reason, the PEB agrees. In Commentary No. 21 (the "Commentary") issued on March 11th, 2020, to address this very issue, the PEB makes clear that the terms "assignment," "assignor" and "assignee" were adopted for use in the UCC as they are used in the ordinary contract context: "assignment" can mean an outright transfer of, **or** the creation of a security interest in, a right under a contract. Commentary, p.2, fn.12 (emphasis added).

Likewise, other comments to provisions of Article 9 of the UCC agree with the interpretation of the PEB. Official Comment 26 to UCC section 9-102 of the UCC states in relevant part that "[d]epending on the context, [each of the terms "assignment" and "transfer"] may refer to the assignment or transfer of an outright ownership interest or to the assignment or transfer of a limited interest, such as a security interest."

Put simply, for financing collateralized by accounts, there is and should be no distinction between an assignment and a security interest in the N.Y. UCC. SFNet respectfully submits that this Court should review and overturn the Appellate Division's Decision affirming the Supreme Court Order. In so doing, this Court should issue a clear ruling that, under New York law: (a) a secured party holding a security interest in a right to receive payment may proceed in accordance with the

clear language of N.Y. UCC section 9-607(a)(1) and notify account debtors to make payments to the secured party, and (b) an account debtor that receives an authenticated notice of assignment meeting the requirements of section 9-406 of the N.Y. UCC can discharge its obligation only by making payment to the secured party in accordance with such notice, or it must otherwise request proof of assignment.

II. Affirming the Decision Will Harm New York's Commercial Finance Industry and its Participants.

The Appellate Division's Decision affirming the Supreme Court Order, if allowed to stand as New York law, will cause immediate and future harm to this state's commercial finance industry and its participants. The Lower Court Orders represent a serious departure from existing law and practice. Viable commerce abhors uncertainty and the Lower Court Orders introduce uncertainty by deviating from the long-standing, accepted, and reliable understanding of vital commercial lending practice.

A. The Lower Court Orders harm New York lenders.

Billions of dollars of existing asset-based loans were extended and are currently administered under the accepted practice that a secured party need not have a formal assignment to exercise rights in collateral. Affirming the Lower Court Orders will immediately cast into doubt the ability of secured parties to exercise remedies to collect existing loans. While Respondent may suggest the overly simplistic remedy that, in response to the Lower Court Orders, lenders can establish

new formal assignment requirements, that fix likely is unavailable to most existing loan transactions. Instead, uncertainty will prevail.

Affirmance of the Decision below is likely to discourage new asset-based finance activity in New York given that the uniform laws of other states do not impose a formal assignment requirement upon secured parties for direct recourse to accounts. *See, e.g., First State Bank Nebraska v. MP Nexlevel, LLC*, 948 N.W.2d 708, 719-23 (Neb. 2020); *Lake City Bank v. R.T. Milord Co.*, No. 18 C 7159, 2019 WL 1897068, at *3 (N.D. Ill. Apr. 29, 2019); *ARA Inc. v. City of Glendale*, 360 F. Supp. 3d 957, 967 (D. Ariz, 2019). In other words, the law of many other jurisdictions will be more favorable in this regard than New York law. This result contravenes one of the primary purposes of the N.Y. UCC: "… to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties" and "to make uniform the law among the various jurisdictions." N.Y. UCC sections 1-102(2)(b)-(c).

B. The Lower Court Orders harm New York borrowers.

As the Lower Court Orders cast doubt on the ability of borrowers to grant enforceable rights with respect to accounts as collateral, they necessarily devalue one of the primary assets available to secure borrowing. This is especially true for New York's small- and middle-market companies, which depend on accounts to support working capital financing. Commercial borrowers utilize asset-based

financing to match borrowings to current assets - the amount of debt is commensurate to current accounts. By making such loans more difficult to secure, the Lower Court Orders harm all borrowers, and potential borrowers, dependent on this important form of financing.

Uncertainty as to the enforceability of security interests in New York accounts necessarily will discourage lenders from offering account-based financing to New York borrowers. Lacking access to this source of working capital, borrowers will be compelled to seek more costly or administratively burdensome forms of alternative sources of funding, which may not be structured to provide the same day-to-day operational funding provided by account-based financing.

At a minimum, if the Decision stands, lenders across the industry may immediately demand sweeping loan amendments to address the formalistic requirements those orders appear to impose and require documentation and delivery of formal "assignments" of accounts, with notice thereof to all account debtors. Borrowers will be burdened by the significant cost of documenting and delivering such amendments and assignments. Furthermore, borrowers' business relationships with their account debtors will be negatively affected by this unnecessary, formalistic process. Account debtors may take this as an indication

of financial weakness, and demand concessions, to the detriment of New York borrowers.

C. The Lower Court Orders harm New York account debtors.

New York account debtors may be the link in the commercial chain that is most negatively affected and burdened if the Lower Court Orders are allowed to stand. Prior to the Lower Court Orders, New York law provided New York account debtors with clear direction and safe harbors upon receipt of a notice of assignment of accounts. This case arose because the account debtor did not follow that direction and lost its safe harbor.

As described in Section I.B. above, N.Y. UCC section 9-406 provides clear direction on who an account debtor must pay to discharge an account obligation. After receiving notice of assignment, the account debtor may pay the secured party or demand proof that the secured party holds rights to the accounts. Appellee below did neither, yet the Supreme Court afforded relief by reading a new requirement into the N.Y. UCC that there be no dispute between the borrower and secured party before a secured party exercises its rights under N.Y. UCC section 9-607. *See* Supreme Court Order, p. 6; Appellate Division Decision, p. 2. Moreover, beyond the conclusory statement of the Supreme Court that the notice of assignment was not sufficient under N.Y. UCC 9-406 (Supreme Court Order, p. 6), neither of the lower

Courts provided any discussion of or basis for their conclusion that there was some deficiency with the notice given to the account debtor.

Respondent has never disputed receiving Appellant's notice of assignment. It unilaterally decided to ignore the notice, perhaps on a mistaken understanding of controlling law. Regardless, by re-interpreting the N.Y. UCC to afford relief to the Appellee below, the Lower Court Orders inject uncertainty for all account debtors. Under the Lower Court Orders, every single New York account debtor will be forced to undertake a legal determination of the sufficiency of every notice of assignment it receives and be ready to litigate disputes over such determination. Account debtors, most of all, need clear direction and the uncertainty raised by the Lower Court Orders will hurt them the most.

III. Public Policy Supports Review and Reversal of the Decision.

New York has a very strong public interest in ensuring that secured lenders, borrowers, and account debtors may engage in commercial transactions with a significant degree of certainty as to how such transactions will be treated under existing law. Likewise, New York has a strong public interest in ensuring continuity and consistency in the application of commercial law. The Lower Court Orders will disrupt and change commercial law and commercial practice in New York, contrary to the transacting parties' longstanding understanding of the law.

To allow the Lower Court Orders to stand as law would be anathema to the efficient and proper functioning of New York's secured lending market, which stands as a model for the world. Accordingly, SFNet respectfully requests that this Court grant Appellant's appeal and overturn the Appellate Division's Decision affirming the Supreme Court Order.

CONCLUSION

For the reasons stated above, SFNet respectfully urges the Court to reverse the Decision and issue a clear ruling that there is no distinction between a borrower securing its commercial loan by granting a security interest in its accounts or assigning its accounts to secure it obligations when the secured party seeks to collect the accounts directly from the borrower's account debtors. Such a distinction has no basis in the law, and is in direct opposition to the correct interpretation and proper application of N.Y. UCC sections 9-406 and 9-607. Because the Lower Court Orders make commercial account-based commercial financing less certain, less reliable, and riskier for all parties, the Decision should be reversed.

Dated: Atlanta, Georgia
March 29, 2022

PARKER, HUDSON, RAINER & DOBBS LLP

By: /s/ John C. Wright

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that this computer-generated brief was prepared using a proportionally spaced typeface.

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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the signature block, the corporate disclosure statement, the table of contents, table of authorities, proof of service and certificate of compliance, is 3,436 words.

Dated: Atlanta, Georgia
March 29, 2022

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AFFIRMATION OF SERVICE

John C. Wright, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms the following to be true under the penalties of perjury:

1. I am Of Counsel with the law firm Parker, Hudson, Rainer & Dobbs LLP, counsel for proposed *amicus curiae*, The Secured Finance Network, Inc. in this action.

2. On April 22, 2022, I served two true copies of the within *Secured Finance Network's Amicus Curiae Brief in Support of Appellant* on each of the following:

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3. I made such service by enclosing the aforementioned documents in a sealed, properly addressed express envelope wrapper, which I deposited into the custody of Federal Express, prior to the latest time designated to allow for the scheduled express delivery, for delivery on Monday, April 25, 2022.

Dated: April 22, 2022
Atlanta, Georgia

/s/ John C. Wright
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