To Be Argued By:
GLENN P. BERGER
Time Requested: 15 Minutes

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Court of Appeals

STATE OF NEW YORK

WORTHY LENDING, LLC,

Plaintiff-Appellant,

—against—

NEW STYLE CONTRACTORS, INC.,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT

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DISCLOSURE STATEMENT

Pursuant to N.Y. Court of Appeals Rules of Practice §§ 500.22(b)(5) and 500.1(f), counsel for Defendant-Respondent NEW STYLE CONTRACTORS, INC. ("NSC"), certifies that NSC has no corporate parents or subsidiaries, and that the following entity is an affiliate of NSC:

NSC Associates Corp.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Plaintiff-Appellant Worthy Lending, LLC ("Worthy") brought this action against Defendant-Respondent New Style Contractors, Inc. ("NSC"), an account debtor of Worthy's borrower Checkmate Communications LLC ("Checkmate"), asserting rights as a purported assignee of Checkmate's accounts receivable. However, Worthy admits that it did not actually purchase any accounts of Checkmate, and that its rights derive solely from an agreement that contains no assignment and is in fact a security agreement.

Worthy, and a lobbying group, the Secured Finance Network, Inc. ("SFNet") in its amicus brief, effectively concede that controlling New York law does not confer the rights that they claim, and ask this Court to be the instrumentality to make that change for them. However, the Appellate Division and Supreme Court correctly determined that without an assignment of Checkmate's rights, Worthy does not have an independent cause of action against NSC, with whom it has no contractual or other relationship, and cannot impose upon NSC a separate obligation to repay Worthy the same amounts it had already paid Checkmate where there is an issue over who has the right to collect.

The issue on this appeal is straightforward: what rights does Worthy have against its borrower's account debtors, having only a security interest in, but not an assignment of, its borrower's accounts receivable? The Supreme Court and

Appellate Division correctly followed the settled law in this state, as set forth in IIG Capital LLC v. Archipelago, L.L.C., 36 A.D.3d 401, 829 N.Y.S.2d 10 (1st Dep't 2007), in holding that a secured party with a security interest is not the same as an assignee for purposes of asserting rights against its borrower's account debtors. Because there is no reason to depart from this precedent, these rulings should be affirmed.

1) Inasmuch as it is undisputed that Worthy did not have an assignment of Checkmate's receivables but only a security interest, did the Courts below correctly hold that Worthy could not recover against NSC under section 9-607 of the Uniform Commercial Code ("UCC"), inasmuch as that section does not impose on third-parties an independent duty to a secured party?

2) Whether Worthy, inasmuch as it is undisputed that it did not have an assignment of Checkmate's receivables but only a security interest, may invoke the provisions of UCC § 9-406 to hold NSC liable for payments NSC made to Worthy's debtor, Checkmate, rather than to Worthy?

PRELIMINARY STATEMENT

On appeal, Worthy challenges the Order of the Appellate Division based upon a handful of non-binding decisions from other states and the non-binding and flawed opinion of the Permanent Editorial Board for the Uniform Commercial Code ("PEB"), none of which alters New York precedent. Worthy also claims that

a host of supposed "dangers" would be faced by secured creditors if security interests are not treated like assignments under UCC § 9-406. However, these "dangers" are illusory because, *inter alia*, it is within every secured creditor's power to demand and contract for an actual assignment if it wishes to avail itself of section 9-406.

COUNTER-STATEMENT OF FACTS

NSC is a general contractor engaged in general contracting and construction management for public construction projects in the New York metropolitan area. NSC retained Checkmate as a subcontractor on two public construction projects in New York City.

Worthy alleges having sent NSC a notice purporting to be assignee of Checkmate's accounts receivable, and directing remittances to be made to Worthy [R 15]. Meanwhile, Checkmate continued to submit and demand payment of invoices to NSC, including 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[1], which NSC paid, only for Checkmate to fail to use those funds to pay materialmen and then file for bankruptcy protection in the United States

[1] Article 3-A of New York's Lien Law creates "trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction." NY Lien Law § 70; Aspro Mech. Contracting, Inc. v. Fleet Bank, N.A., 1 N.Y.3d 324, 328, 773 N.Y.S.2d 735, 737 (2004).

Bankruptcy Court for the District of New Jersey (*In re Checkmate Communications, LLC*, case no. 20-21872-JKS).[2]

On or about July 27, 2020, Worthy commenced this action against NSC, asserting the right to collect Checkmate's receivables as assignee. Although nominally commenced under the secured creditor provisions of UCC § 9-607, the complaint in substance pleaded a right to recovery as assignee of accounts under UCC § 9-406, to collect monies already paid to Checkmate [R 13 - 19]. In putative support of this claim, Worthy attached to its complaint an exhibit entitled "Promissory Note and Security Agreement" dated October 11, 2019 between Plaintiff and Checkmate Communications LLC and Checkmate Communications & Electric, LLC (the "Security Agreement") [R 20 - 36]. However, while the Security Agreement makes references to Checkmate's accounts as collateral security, upon scrutiny the document does not effectuate any assignment of accounts. Nowhere does that document contain words to the effect that the debtor "assigns" its accounts, as would be typical in a factoring agreement. Worthy's failure (if not error) in omitting to include an actual assignment, is not justification for overturning New York law.

[2] In its Statement of Facts, Worthy erroneously presents as "fact" that NSC owes "at least $1,473,581.42 for work performed by Checkmate." Appellant Brief, p. 8. However, that is no more than an allegation in Worthy's complaint [R 16], based, purportedly, on records of Checkmate that it reviewed, which Checkmate itself has disputed. These matters are not part of the record, and are beyond the scope of matters before this Court, but are noted here solely so as not to permit Worthy's allegations to go uncontested.

On October 19, 2020, NSC moved to dismiss the Complaint [R 61– 68], arguing that Worthy's Security Agreement is not a factoring agreement, but a revolving security agreement. NSC further noted that while the agreement authorizes Worthy to send "notices of assignment" to account debtors, nowhere within the four corners of the agreement is there any actual underlying assignment to be found.

In opposition, Worthy did not assert that it was or is an assignee, but argued instead, only that its rights as a secured creditor under UCC § 9-607 are coextensive with those of an assignee.

In reply, NSC cited New York authority holding that the rights of a secured creditor are not coextensive with those of an assignee for purposes of UCC § 9-406, to argue that Worthy could not assert double-liability against NSC for payments already made to Checkmate, Worthy's borrower.

The Trial Court Decision

In dismissing the complaint, the Trial Court held that, absent an assignment, Worthy's notice to NSC did not comply with UCC § 9-406, and that Worthy could not be said to be exercising the rights of Checkmate with respect to the obligations of the account debtor, NSC [R 10]. The Court recognized that that "would be tantamount to creating a duty owed by the account debtor to the secured creditor

that was separate and distinct from the duty it owed to the debtor", in contravention of UCC § 9-607(e) [R 9].

Accordingly, the Court held that Worthy's remedy, if any, is against its debtor Checkmate and that it could not seek recovery against NSC under UCC § 9-607 or § 9-406 [R 10].

The Appellate Division Affirmance

The Appellate Division likewise recognized that UCC § 9-607 expressly states that it confers no direct, independent recourse between a secured party and a third-party account debtor. [R 70 - 71]. As the Appellate Division noted in its Decision:

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

[R 71].

For the reasons below, the action was properly dismissed, given the absence of an underlying assignment.

ARGUMENT

I

THE APPELLATE DIVISION CORRECTLY AFFIRMED DISMISSAL OF THE COMPLAINT, AS WORTHY IS NOT AN ACTUAL ASSIGNEE OF CHECKMATE'S ACCOUNTS

A. The Rulings Below Are Amply Supported By Well-Established Precedent

There is a critical distinction between a secured creditor's rights under UCC § 9-607 and the rights of an assignee who has actually purchased a debtor's receivables under UCC § 9-406. In both cases, the secured creditor may demand that its borrower's account debtor pay it directly. However, it is only in the latter instance where, upon proper notice, the borrower's account debtor may be liable to the assignee if it pays the borrower instead.

Thus, UCC § 9–607, titled "Collection and Enforcement by Secured Party," allows a secured creditor, *inter alia*, to "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." NY UCC § 9-607(a). However, as the Trial Court and Appellate Division noted, subsection (e) of this section contains the proviso that "[t]his section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party." NY UCC § 9-607(e). (Emphasis supplied.) In fact, § 9-607 does not impose any direct duty

upon an account debtor to a secured party, in contrast with an actual assignee. § 9-607(e); J D Factors, LLC v. Reddy Ice Holdings Inc., No. CV 14-06709 DDP FFMX, 2015 WL 630209, at *2 (C.D. Cal. Feb. 12, 2015).

In stark contrast with UCC § 9-607, a creditor invoking UCC § 9-406 must necessarily be an assignee, in order to establish direct liability to that creditor. This very distinction was recognized in the First Department's earlier decision in IIG Capital LLC v. Archipelago, L.L.C. There, a factor actually had a true assignment of accounts receivable as well as a security interest, but its rights as an assignee had not yet ripened. Just as Worthy argues in the instant case, the factor in IIG contended that its status as a secured party was the equivalent to that of an assignee for purposes of UCC § 9–406. The Appellate Division rejected and distinguished much of the same legal precedent relied upon by Worthy herein, stating that: "[w]hile these cases treat assignees and holders of security interests similarly for purposes of holding them subject to defenses available to the original account debtors, they provide no authority to treat plaintiff's security interest as an assignment for collection purposes under UCC § 9–406." Id.[3]

[3] Worthy mischaracterizes this holding as "dicta." Appellant's Brief, p. 30. This is a misconception. The creditor in IIG clearly sought recovery under both theories, and the court unequivocally rejected one of those theories based on a critical examination of the applicable statutory provisions at issue. That the creditor prevailed on its alternative claim in no way renders the court's determination on its security interest gratuitous or extraneous. See In re Fay, 291 N.Y. 198, 215, 52 N.E.2d 97, 103 (1943) ("It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course

Similarly, in Durham Com. Cap. Corp. v. Ocwen Loan Servicing, LLC, 777 F. App'x 952 (11th Cir. 2019), a case decided under New York law, a lender purchased certain accounts receivable from its borrower but retained a security interest in all of the borrower's accounts. The lender sought to hold an account debtor liable for funds that the account debtor paid to the borrower after receiving a purported "notice of assignment" from the lender, and brought an action against the account debtor based on an alleged violation of § 9-406. However, the lender failed to introduce any evidence establishing that it was ever "assigned" the specific account in question. 777 F. App'x at 953.

Noting that UCC § 9-406 makes no mention of secured parties, the Eleventh Circuit analyzed under New York law whether the statute was intended to confer an implied right of action for secured parties who lack actual assignments of accounts. In this endeavor the court utilized the three factors set out in Cruz v. TD Bank, N.A., 22 N.Y.3d 61, 979 N.Y.S.2d 257 (2013), to determine whether a statutorily implied cause of action exists: (1) whether plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose behind the statute;

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of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question as properly presented, fully argued, and elaborately considered in the opinion") (quoting Fla. Cent. R. Co. v. Schutte, 103 U.S. 118, 143 (1880)).
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and (3) whether creation of such a right would be consistent with the legislative scheme. Ocwen, 777 F. App'x at 956.

The court recognized that secured parties' rights and recourse vis-à-vis account debtors are addressed elsewhere, namely, in UCC § 9-607(a)(3), which allows a secured party to exercise the rights of its borrower, but expressly does not confer any direct liability between the secured party and the account debtor. See UCC § 9-607(e). Because UCC § 9-607(a)(3) affords a secured party a right of action to enforce the obligations of an account debtor, the court noted that recognizing a parallel right of action under § 9-406(a) would be inconsistent with the overall legislative scheme. Id.

The court further noted that UCC § 9-406 was enacted for the benefit, not of secured parties, but of account debtors, to delineate an account debtor's rights as against an assignee before and after notice of assignment. Id. at 956. This led to two conclusions: (1) As a lender and not an account debtor, the secured party is not an intended beneficiary of § 9-406. Id. at 957. (2) Moreover, whether a secured party has a right of action against an account debtor is unrelated to § 9-406's purpose. Id.

Therefore, the court held that all three factors ruled against an implied right of action supplementing a secured party's rights expressly provided elsewhere. Id.

Contrary to Worthy's contentions, these cases are by no means "outliers."

See e.g., Factor King, LLC v. Hous. Auth. for City of Meriden, No. CV176010391S, 2018 WL 6016838, at *3 (Conn. Super. Ct. Oct. 29, 2018), aff'd sub nom. Factor King, LLC v. Hous. Auth. of City of Meriden, 197 Conn. App. 459, 231 A.3d 1186 (2020), cert. denied, 335 Conn. 927, 234 A.3d 979 (2020); Durham Commercial Capital Corp. v. Select Portfolio Servicing, Inc., No. 3:14-CV-877-J-34PDB, 2016 WL 6071633, at *16 (M.D. Fla. Oct. 17, 2016); Platinum Funding Services, LLC v. Petco Insulation Co., Inc., No. 3:09CV1133 MRK, 2011 WL 1743417, at *9 (D. Conn. May 2, 2011). The effectiveness of a "notice of assignment" cannot exist independent of an actual assignment of an account. Factor King, at *3; Platinum Funding Services, at *9.

In CapitalPlus Equity, LLC v. Glenn Rieder, Inc., No. 17-CV-639-JPS, 2018 WL 276352 (E.D. Wis. Jan. 3, 2018), the creditor, CapitalPlus, initially asserted rights as a purported assignee of receivables. Faced with a lack of evidence that any sale of accounts was effectuated under its agreement with its direct debtor, CapitalPlus claimed that its security interest gave it rights under UCC § 9–406. The court rejected this argument, ruling that the notice of assignment "would have no force or effect unless the accounts had actually been assigned to it," an issue it deemed "critical." Id. at *4.

In words which apply with equal force and effect to the instant case, the CapitalPlus court stated:

> CapitalPlus does not concede the existence of a triable issue of fact. Instead, it changes its tune: rather than claim the rights of an assignee of the accounts, it now relies on the fact that the agreement gave it a security interest in the accounts, which it says is enforceable to the same degree as an assignment. … What CapitalPlus does not provide, however, is citation to a single legal authority substantiating its claim that its rights as a secured party are coextensive with its rights had it been an assignee. In fact, CapitalPlus first tries to cover up this fatal flaw in its reasoning, blithely citing the same UCC cases it did in its opening brief without acknowledging that they pertain only to assignees of accounts. ... Notably, UCC section 9–406 only forces the account debtor to pay an "assignee," not a holder of a security interest, upon proper notification. Wis. Stat. § 409.406(1).

Id. at *5 (docket citations omitted).

In Factor King, LLC v. Hous. Auth. for City of Meriden, a factor sought recovery of monies from an account debtor by serving a purported notice of assignment. Although the factor's agreement with the debtor gave the factor a first priority security interest in accounts, it did not constitute a purchase of receivables, but only granted an option to purchase which had not been exercised. 2018 WL 6016838 at *1. The court, citing IIG Capital, and CapitalPlus Equity, held that: "[t]he plaintiff's security interest in AEG's accounts did not entitle it to payment as an assignee for purposes of UCC § 9-406." Id. at *4.

B. The PEB Commentary Cited By Worthy Is Neither Binding Nor Persuasive

On appeal, Worthy makes the same arguments rejected by the Court in IIG, as well as by the courts in Ocwen, CapitalPlus and Factor King. These cases from other jurisdictions are of no controlling effect, nor is Worthy's reliance upon UCC PEB Commentary No. 21 (March 11, 2020).

PEB commentaries have not been enacted by the legislature and do not have the force of law. Fisher Sand & Gravel Co. v. Neal A. Sweebe, Inc., 494 Mich. 543, 560, 837 N.W.2d 244, 254 (2013). While recognized as a useful aid to resolve ambiguities, they are not necessarily representative of legislative intent and cannot be used to contradict the plain language of the statute. Id.; Burk v. Emmick, 637 F.2d 1172, 1176 (8th Cir. 1980); Am. Ins. Co. v. Cuyahoga Cmty. Coll. Dist., 119 Ohio Misc. 2d 118, 122, 774 N.E.2d 802, 805 (2002); see also Halifax Corp. v. First Union Nat. Bank, 262 Va. 91, 101–02, 546 S.E.2d 696, 703 (2001) (Official Comments concerning the Uniform Commercial Code "should not become devices for expanding the scope of Code sections where language within the sections themselves defies such an expansive interpretation").

Indeed, the PEB Commentary on which Worthy relies, PEB Commentary No. 21 [C 1], is flawed, inasmuch as the statutory authority it relies on contradicts its very thesis. As statutory support for equating security interests and assignments, the Commentary cites, *inter alia*, UCC § 9-209 ("Duties of Secured

Party If Account Debtor Has Been Notified of Assignment"). [C 3, n. 9.] However, subsection (c) of that section expressly states that, "This section does not apply to an assignment constituting the sale of an account, chattel paper, or payment intangible." UCC § 9-209(c). Indeed, the Official Comment to that section reiterates that, "It does not apply to account debtors whose obligations on an account, chattel paper, or payment intangible have been sold." Official Comment 2.

Likewise, the Commentary's suggestion that the IIG line of cases is a new phenomenon is incorrect. Courts in New York and those interpreting New York law have long recognized a distinction between outright assignments and security interests. See e.g., Texas San Juan Oil Corp. v. An-Son Offshore Drilling Co., 194 F. Supp. 396, 397 (S.D.N.Y. 1961) (holding that while the 'real party in interest' under a complete assignment would be the assignee, under an assignment as collateral or as security for the payment of a debt, the assignor retains sufficient interest in the property or chose in action to be 'a real party in interest.'); Diversa-Graphics, Inc. v. Mgmt. & Tech. Servs. Co., 561 F.2d 725, 727 (8th Cir. 1977) (same, interpreting New York law).

Accordingly, this interpretation of otherwise-straightforward terms appears to be precisely the sort of danger cautioned against, "where language within the sections themselves defies such an expansive interpretation."

C. The Out-of-State Case Law Cited By Worthy Is Neither Binding Nor Persuasive

Upon scrutiny, the out-of-state cases supporting Worthy's position are far fewer in number than its extensive string-citing would suggest. Many of the cases cited by Worthy and other secured parties arguing for conflating assignments and security interests, are, as noted in IIG, offered in an entirely different context: the survivability of the account debtor's defenses and setoffs on the account, whether asserted against the original vendor, an assignee, or a secured party. In those situations, there is understandably no reason to differentiate between who holds the account. See e.g., In re Apex Oil Co., 975 F.2d 1365, 1369 (8th Cir. 1992) (whether the parties' agreement created a security interest or a complete assignment had no bearing on the account debtor's setoff rights); Septembertide Pub., B.V. v. Stein & Day, Inc., 884 F.2d 675, 682 (2d Cir. 1989) (lender's rights held subject to all the terms of the contract between the account debtor and the lender's borrower); Bank of Waunakee v. Rochester Cheese Sales, Inc., 906 F.2d 1185, 1191 (7th Cir. 1990) (same); 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) (same with respect to arbitration clause); Garber v. TouchStar Software Corp, No. 2009CV1189, 2011 WL 12526062, at *6 (Colo. Dist. Ct. Nov. 10, 2011) (same with respect to parties' right to invoke jury waiver clause); see also Bank Leumi

Tr. Co. of New York v. Collins Sales Serv., Inc., 47 N.Y.2d 888, 890, 419 N.Y.S.2d 474, 475 (1979) (upholding the right to assert setoffs generally, but rejecting the setoff asserted in that case as triangular).

It was this out-of-context argument that the Appellate Division, First Department, recognized in the IIG case as failing to provide any authority for treating a security interest as an assignment for collection purposes under UCC § 9-406. 36 A.D.3d at 404; 829 N.Y.S.2d at 13.

Other cases cited by Worthy are not cases in which a secured party seeks to invoke § 9-406 at all, but instead is merely seeking to enforce its security interest in unpaid accounts receivable collateral under the secured creditor provisions of UCC § 9-607.[4] Conversely, in other cases cited, the lender asserting § 9-406 was in fact an actual assignee.[5] As such, neither scenario addresses the instant situation in which a secured party claims to be an assignee.

Far fewer between are cases in which a secured party without an assignment has invoked UCC § 9-406 to place an account debtor in peril of double-liability for paying its vendor. In many such cases, as might be expected, the accounts sued

[4] See e.g., 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).

[5] See e.g., Gen. Motors Acceptance Corp. v. Clifton-Fine Cent. Sch. Dist., 85 N.Y.2d 232, 234, 623 N.Y.S.2d 821, 822 (1995).

upon have not been paid at all; that is, the account debtor has paid neither the lender nor its direct vendor; i.e., the lender's borrower. See e.g., Community Bank v. Newmark & Lewis, Inc., 534 F. Supp. 456, 458 (E.D.N.Y. 1982) (account debtor denied having to pay for goods it received, alleging that the seller orally agreed to supply "free" audio equipment); ImagePoint, Inc. v. JPMorgan Chase Bank, Nat. Ass'n, 27 F. Supp. 3d 494, 498 (S.D.N.Y. 2014) (the bank and its borrower jointly sued account debtor for unpaid services rendered by the bank's borrower to the account debtor); Agri-Best Holdings, LLC v. Atlanta Cattle Exch., Inc., 812 F. Supp. 2d 898, 899 (N.D. Ill. 2011) (same). In these cases, the secured creditor was seeking prospectively to collect unpaid accounts, not seeking retroactively to collect accounts already paid.

To be sure there are some decisions in other states conflating the interests as urged by Worthy. However, those cases are neither binding nor persuasive. For example, in First State Bank Nebraska v. MP Nexlevel, LLC, 307 Neb. 198, 948 N.W.2d 708 (2020), cited by Worthy, the Nebraska court distinguished IIG by noting that the security interest in IIG was not presently exercisable and concluding that the statement that a secured party is not an assignee was "dicta." 307 Neb. at 214, 948 N.W.2d at 721. However, again, the denial of the creditor's alternative claim for relief in the IIG case as a secured creditor is not dicta, but a recognition that UCC § 9–406 actually means what it says in terms of requiring an

assignment. IIG, 36 A.D.3d at 404, 829 N.Y.S.2d at 13.

In ARA Inc. v. City of Glendale, 360 F. Supp. 3d 957 (D. Ariz. 2019), also cited by Worthy, the sole authority cited in the court's decision for conflating security interests and assignments was Apex Oil, 975 F.2d 1365 (see ARA, 360 F. Supp. 3d at 867), the very case recognized by the Court in Ocwen as distinguishable. 777 F. App'x at 957. Indeed, the court in ARA relied on a subsequently-reversed decision, the very decision of the District Court in Florida that the Eleventh Circuit reversed (Durham Com. Cap. Corp. v. Ocwen Loan Servicing, LLC, 2017 WL 5643300 (S.D. Fla. Aug. 24, 2017), rev'd and remanded, 777 F. App'x 952 (11th Cir. 2019)), in support of an independent cause of action under UCC § 9-406. ARA, 360 F.Supp.2d at 971. [6]

Worthy oversimplifies its dispute with Checkmate merely as a unilateral "default" by Checkmate. Appellant Brief, p. 33. From Worthy's standpoint, it may be understandable for it to regard its dispute with Checkmate that way. However, it is the account debtor who is having the role of judge and jury being thrust upon it in such a scenario. As the Trial Court noted in its decision:

> The question, then, is what happens if plaintiff is not successful against Checkmate. Should defendant be required to pay both plaintiff and Checkmate? The purpose of the UCC is not to facilitate

[6] In Lake City Bank v. R.T. Milord Co., No. 18 C 7159, 2019 WL 1897068 (N.D. Ill. Apr. 29, 2019), also cited by Worthy purportedly on this issue, no issue was raised as to a distinction between security interests and assignments. Instead, the account debtor denied receiving proper notice of the assignment and attempted to raise a distinction between "voluntariness or involuntariness" of an assignment, a distinction that the court rejected. Id. at *3.

> double recovery. As defendant points out, plaintiff can recover from Checkmate, especially if defendant did in fact pay Checkmate.

[R 10].

The lender's borrower may in fact be liable to the lender for, as here, representing to the account debtor that its financing relationship with the lender had terminated, if that representation is false. But the account debtor is not the one guilty of conversion or misappropriation of the lender's collateral. See In re Mlsna, No. 01 A 0422, 2003 WL 21785648 (Bankr. N.D. Ill. July 31, 2003) (Liability of borrower's vice president to factor for misappropriation and diversion of receivables).

As the Trial Court and Appellate Division below recognized, Worthy is seeking to hold NSC retroactively liable for payments made to Checkmate before any declaration of default, therefore bringing the situation within the analysis set forth in ImagePoint, Inc. v. JPMorgan Chase Bank, Nat. Ass'n [R 9 –10, 71].

In ImagePoint, the account debtor had not yet paid the secured party's debtor. This was a critical distinction. In fact, the ImagePoint court indicated that a different result is warranted in situations where an account debtor had already paid its direct obligee (i.e., the creditor's debtor). The court cited Buckeye Ret. Co., LLC v. Meijer, Inc., No. 279625, 2008 WL 4278038 (Mich. Ct. App. Sept. 18, 2008), as an example of the latter scenario, in which an account debtor continued to pay the debtor because it was not established which party had a right to collect

those payments, observing that:

> In situations like Buckeye, where there is a dispute between the secured creditor and the debtor as to who has the right to collect from an account debtor, the secured creditor cannot be said to be 'exercis[ing] the rights of the debtor with respect to the obligation of the account debtor.' See N.Y. U.C.C. § 9–607(a)(3). In other words, to hold that an account debtor is obligated to pay the secured creditor and not the debtor would be tantamount to creating a duty owed by the account debtor to the secured creditor that was separate and distinct from the duty it owed to the debtor. Such a result is barred by the plain language of § 9–607(e), which states that the secured party's right to collect from an account debtor 'does not determine whether an account debtor ... owes a duty to a secured party.'

Id. (emphasis supplied).

The court in ImagePoint noted that the secured party in the case before it was "simply asking the court to enforce the duty that the account creditor already owes to the debtor," not asking "to recognize a duty owed by the account debtor to a secured party … independent from the account debtor's duty to the debtor." Id. In the instant case, Worthy, by contrast, is asking the Court to hold NSC directly liable to Worthy as secured creditor "separate and distinct from" NSC's duty to Checkmate, rendering ImagePoint inapposite [R 9].

Worthy mischaracterizes the decisions below in describing its dispute with Checkmate merely as a unilateral "default" by Checkmate. In fact, the Trial Court noted that Worthy itself admitted that the dispute between Worthy and Checkmate was, as in ImagePoint, over who has the right to collect Checkmate's receivables as between Checkmate and Worthy [R 9-10].

If Worthy's collateral was diminished by Checkmate's receipt of payment, *arguendo*, that is an issue between Worthy and Checkmate. See McCullough v. Goodrich & Pennington Mortg. Fund, Inc., 373 S.C. 43, 53-55, 644 S.E.2d 43, 49-50 (2007) (no independent right of action exists under UCC § 9-607 against a third party for negligent impairment of collateral); In re Mlsna, at *8 (debtor liable to factor for misappropriation of accounts as conversion). Worthy's recourse is against its debtor, Checkmate, not NSC.

Worthy's contention that the Order sets a "dangerous precedent" for commercial activity rings hollow. If it wishes to avail itself of rights as an assignee, Worthy's solution is exceedingly simple: bargain for and actually procure an assignment from its borrowers, rather than bluff as to its rights against account debtors. As the Court noted in Durham Commercial Capital Corp. v. Select Portfolio Servicing, Inc.:

> Although section 9-406(a) of the UCC states that, after receiving notice of an assignment, an 'account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor,' that provision necessarily requires an actual assignment. The effectiveness of a general notice of assignment simply cannot exist independent of an actual assignment of a particular account. Official Comment No. 4 to section 9-406 effectively states as much, albeit in the context of addressing the effectiveness of a notice of assignment when an account debtor has requested proof of the assignment. See N.Y. U.C.C. § 9-406, Official Cmt. 4. Although the Comment concludes that a notice of assignment is effective 'even if the proof [of assignment] is not seasonably forthcoming,' it also observes: 'Of course, if the assignee did not in fact receive an assignment, the account debtor cannot discharge its

> obligation by paying a putative assignee who is a stranger.' Id. That statement suggests what common sense also dictates—that a notice of assignment obligates an account debtor to pay the purported assignee only to the extent there is an actual, valid assignment from the assignor. Cf. Platinum Funding Servs., LLC v. Petco Insulation Co., No. 3:09cv1133 (MRK), 2011 WL 1743417, at *9 (D. Conn. May 2, 2011) ('The language of UCC § 9-406 ... presumes that an 'assignor' has already assigned its right to receive payment from an account debtor to an assignee.... Because the right to receive payments on ... particular invoices was never assigned to Platinum Funding, UCC § 9-406 ... [is] of no help to Platinum Funding's cause' (emphasis in original)).

Durham Commercial Capital Corp., at *16.

Therefore, merely sending a false Notice of Assignment does not create a cause of action against NSC for Worthy. Absent any underlying assignment by Checkmate to Worthy, NSC was not obligated to send any payments to Worthy for the account of Checkmate.

II

SF NET'S CONCERNS IN ITS AMICUS BRIEF ARE MISPLACED AND WITHOUT MERIT

In joining Worthy on this appeal, SFNet foretells "great disruption to existing and future commercial lending in New York" if the rulings below are upheld. As a threshold matter, this is a familiar refrain often heard whenever a burden falls on the secured lender to take steps to protect its rights. See e.g., Banque de Paris et des Pays-Bas v. Amoco Oil Co., 573 F. Supp. 1464, 1474 (S.D.N.Y. 1983) (rejecting the creditor's argument that a ruling requiring it to

arbitrate a dispute with the account debtor would frustrate the professed purpose of former UCC § 9–318 to promote accounts-receivable financing, where the creditor could have insisted on a financing arrangement that protected its rights, such as contracting to deprive the account debtor of any claim to arbitrate).

So, too, as noted above, in this case it was fully within Worthy's power to take the proper steps to attain the additional rights of an assignee.

SFNet contends that skipping the requirement of an assignment somehow benefits all parties to a commercial lending transaction. While there may indeed be a convenience to the lender to have automatic additional rights above and beyond those for which it contracted, such a windfall is hardly justified as a matter of policy. SFNet fails to explain what the difficulty is in bargaining for delivery of an actual, formal assignment of accounts, or how it is any more burdensome than documenting any other right granted to a creditor in a typical commercial financing transaction. Nor does SFNet explain why this particular right should be exempted from the requirement of a writing, or how requiring this single additional document will result in less opportunity for borrowers, let alone cause any of the other havoc it predicts for commercial lending. On the other hand, if the ruling below, which is based on established New York law, is not upheld, account debtors in the position of NSC, would be forced to determine the dispute between the secured party and

its debtor, and would be in peril of having to make double payment, if its determination was later found to be incorrect.

SFNet, and the PEB commentary on which it relies, contend, with some irony, that this expanded class of parties with recourse against account debtors somehow benefits the account debtors themselves, by supposedly affording greater certainty. To the contrary, no greater certainty could be provided than to require a party who claims rights through an assignment to have the actual assignment it professes to have. It hardly inures to the account debtor's benefit to expand the category of parties who can place it in peril of potential double-liability, as would occur here. As such, this solicitude is misguided.

Nothing in UCC § 9-607 or § 9-406 impairs a secured party's ability to pursue account balances that are unpaid. All it denies is the ability to claim rights that the secured party does not have, i.e., a right to claim ownership of accounts, even those that have been paid.

The bottom line is that Worthy's entire action against NSC is predicated on rights that its own documents annexed to its Complaint reveal that it does not have.

Accordingly, the complaint, predicated on purported rights as assignee, was properly dismissed.

CONCLUSION

For all of the foregoing reasons, the Order of the Appellate Division, First Department, entered July 6, 2021, affirming the Decision and Order of the Supreme Court, New York County dated November 17, 2020, and entered November 18, 2020, should be affirmed in all respects.

Dated: New York, New York
April 26, 2022

Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

The foregoing Brief of Defendant-Respondent was prepared on a computer. A proportionally spaced typeface was used, as follows:

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Dated: April 26, 2022

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