No. 18-1389

IN THE

Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Petitioner,

v.

ANDALUSIAN GLOBAL DESIGNATED ACTIVITY COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR *AMICUS CURIAE* COMMERCIAL FINANCE ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

This *amicus curiae* brief is filed by the Commercial Finance Association ("CFA") in support of the Petition for Writ of Certiorari ("Petition") filed by Petitioner the Financial Oversight Management Board for Puerto Rico, as representative for the Employees Retirement System of the Government of the Commonwealth of Puerto Rico.[1]

CFA is the principal U.S. trade association for financial institutions that provide asset-based financing, factoring services, supply chain finance, equipment finance and leasing, leveraged and cash-flow loans, and asset-backed securities to commercial borrowers (collectively referred to as "asset-based lending"). Its 268 members include substantially all of the major money-center banks, regional banks, and other large and small commercial lenders engaged in asset-based lending in the United States and in various other jurisdictions. Financing by CFA members comprises a substantial portion of the United States credit market, with aggregate outstanding loan commitments totaling hundreds of billions of dollars. CFA members generated nearly $300 billion of the $4 trillion of secured commercial financing was provided place in 2018 alone. For many borrowers, including many U.S. small and

1. Pursuant to S. Ct. R. 37.2(a), CFA states that counsel of record for all parties received timely notice of the intent to file this brief *amicus curiae* and granted consent to the filing of this brief. Pursuant to S. Ct. R. 37.6, CFA states that no counsel for a party to this action authored any portion of this brief *amicus curiae* and that no person or entity, other than the CFA, made a monetary contribution to the preparation or submission of this brief.

medium-sized businesses, asset-based lending is the only form of financing available to them.[2]

In an asset-based loan, a lender extends credit to a borrower based on the value of, and secured by, the borrower's assets, principally receivables and inventory. All lenders who seek to perfect their security interests in the borrower's assets, including all of CFA's members, are required to follow the procedures set forth in Article 9 of the Uniform Commercial Code ("UCC"). Although asset-based lending exists to some extent in countries other than the U.S., it thrives here because the U.S. has a legal regime, embodied in the UCC, that allows for the efficient creation, perfection, and enforcement of security interests in receivables, inventory and other personal property. The UCC is at the heart of this case,[3] and the CFA's members are subject to the UCC's strictures every day, and have been for decades.

For these reasons, CFA respectfully submits that its views will assist the Court. The opinion of the United States Court of Appeals for the First Circuit in *Altair Global Credit Opportunities Fund (A), LLC v. The Financial Oversight and Management Board for Puerto Rico (In re Financial Oversight and Management Board*

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2. Additional information about CFA may be found at www.cfa.com.

3. Puerto Rico's enactment of the UCC is identical to the uniform version of the UCC in all material respects. As this Court has recognized, the UCC has also been adopted across the United States, including by all fifty States, the District of Columbia, Guam, and the Virgin Islands. *Barnhill v. Johnson*, 503 U.S. 393, 398 n. 5 (1992). This brief will focus on Article 9 of the UCC.

for Puerto Rico), 914 F.3d 694 (1st Cir. 2019), reprinted in the Appendix ("App.") to the Petition (the "Opinion"), implicates matters of exceptional commercial importance and is inconsistent with the holdings of many other Circuit, District, and State courts. Accordingly, the writ of certiorari should be granted.

SUMMARY OF ARGUMENT

The First Circuit recognized, as it must, that the UCC requires that to properly perfect a security interest in a registered organization's assets, a financing statement filed pursuant to Article 9 of the UCC must provide the name that is stated to be the registered organization's name on the applicable "public organic record." App. 42a. It also stressed the importance of "literal compliance" with the UCC and recognized that forcing creditors and interested parties to undertake additional work and expense to ascertain security interests in a debtor's property undermines Article 9's goal of facilitating the expansion of commercial practices. App. 32a-33a and 34a-35a.

However, the First Circuit nonetheless incorrectly deviated from its stated adherence to the statute and held that the use of a registered organization's former name on a financing statement was sufficient to perfect a security interest against that organization's assets. In so holding, the First Circuit reasoned that "a searcher, whether another creditor or merely an interested party, would conclude that a search under the [debtor's former/trade] name was required [and] a reasonable filer would have concluded that the [debtor's former/trade] name was a correct name for the debtor for UCC purposes." App. 52a. This is not, and cannot be, the law.

The UCC—the sole, uniform statute that governs the perfection of security interests—does not speak in terms of what purportedly "reasonable" filers might subjectively conclude or the possibility of there being more than one correct "name of the debtor." Rather, to promote the certainty and predictability on which the viability of commercial transactions depend, the UCC provides only a single method of perfecting a security interest, and this method is subject to an objective bright-line test. The Opinion has the perverse effect of punishing lenders that (correctly) follow the strict requirements of the UCC, by permitting their security interests to be primed by security interests of which no searcher could be aware.

As the District Court (Swain, J.)[4] opinion, reported at 509 B.R. 577 (D.P.R. 2018) and reprinted in the Appendix, recognized below, the relevant question under Article 9 for purposes of perfection is whether the name that appears on the UCC financing statement is identical to the name reflected in the "public organic record most recently filed with or issued or enacted by the registered organization's jurisdiction of organization which purports to state, amend, or restate the registered organization's name" or, in the alternative, that the name is not "seriously misleading." App. 84a. Resort to what any given "reasonable" filer might subjectively conclude was *a* correct name for the debtor—rather than *the* name of the debtor that is stated

4. In 2017, the Chief Justice appointed The Honorable Laura Taylor Swain under the Puerto Rico Oversight, Management and Economic Stability Act to oversee the debt restructuring cases in the Puerto Rican government-debt crisis. As a former Bankruptcy Judge, and current District Judge, Judge Swain's analysis and conclusion on this issue was well grounded in law, policy, logic, and commercial sense.

in the applicable public organic record—would subvert the objectives of Article 9. In fact, a search under the debtor's correct name in this case would not reveal the existence of the financing statements filed under the incorrect name, thereby rendering such financing statements "seriously misleading." Giving effect to these financing statements defeats the entire purpose of the UCC filing system. App. 83a n. 16.

Although the First Circuit noted that its Opinion on this issue was "narrowly decided" based on the "unique confluence of circumstances" presented, bad (or unusual) facts can, and often do, make bad law. The First Circuit itself has cautioned against such abuse of discretion in this precise same context: "Efforts by courts to fashion equitable solutions to mitigate the hardship on particular creditors of literal application of statutory filing requirements would have the deleterious effect of undermining the reliance which can be placed upon them. The harm would be more serious than the occasional harshness resulting from strict enforcement." *Uniroyal, Inc. v. Univ. Tire & Auto Supply Co.*, 557 F.2d 22, 23 (1st Cir. 1977).

The Opinion brings this warning to fruition. It has the potential to have far-reaching consequences that threaten to turn settled UCC principles on their head and inject uncertainty and subjectivity into the clear and objective requirements of Article 9. The resulting potential negative ramifications on the secured credit market cannot be understated. By not clearly requiring that a debtor's correct organizational name (of which there can only be one) be used as the name of the debtor on a financing statement, the Opinion increases credit costs borne by all borrowers and creates irremediable credit risk.

Absent reversal, secured lenders will face heightened risks that security interests will not be revealed by searches conducted against the borrower's correct name. According to the First Circuit, secured lenders seeking to minimize these risks would have to guess at, and search, former names and trade names—even notwithstanding that the use of such names is expressly declared to be insufficient under the UCC. These additional searches have the potential to increase search costs that are typically borne by borrowers. Yet, despite those added searches and costs, the lender still cannot be sure of finding all security interests purportedly perfected by filers that listed an arguably "reasonably" correct name of the debtor on their financing statement. If lenders cannot be absolutely certain that their perfected liens will not be primed by other, hidden security interests, lenders will impose potentially onerous terms and costs to mitigate such risks, greatly reduce the credit made available, or not extend credit at all. This will likely force into bankruptcy (or close to it) some borrowers that might otherwise have been able to obtain financing if not for the lender's justified fear of undiscoverable security interests.

Inevitably, the Opinion will also unduly burden secured lenders, other interested parties, and the courts by opening the door to litigation on the adequacy of a party's subjective determination of the "correct" name of the debtor based on the "confluence of circumstances" present on a case-by-case basis. This metric strays far afield of the objective criteria set forth in the revised UCC, which specifically eliminated such an amorphous "reasonableness" standard.

In view of the critical role that Article 9's filing system plays in secured lending transactions across the

United States, the Opinion implicates an issue of national importance that is ripe for resolution by this Court. This Court should grant the Petition so as to make clear, in an absolute and unwavering way, that the statutory UCC filing requirements must be literally, objectively, and uniformly applied to foster certainty in secured credit transactions. Absent granting the Petition, lenders will be left groping in the dark for direction because the Opinion offers no standard or guidance as to how extensively a secured lender must search to avoid having its security interest primed by a financing statement that provides a factually incorrect, but arguably "reasonably" correct, debtor name.

ARGUMENT: THE PETITION SHOULD BE GRANTED

The Petition should be granted because the Opinion contradicts the holdings of other Circuits and has profound public policy ramifications that will affect the cost and availability of commercial credit to U.S. companies.

I. The Opinion Deviates From the Clear and Objective Requirements of the UCC

As the Opinion itself recognized, the "UCC filing requirements are clear." App. 36a (citing *Uniroyal*, 557 F.2d at 23). Article 9 of the UCC sets forth precise and exacting requirements for filing financing statements that perfect a security interest in a debtor's collateral. Under the UCC, a financing statement is sufficient "*only*" if it, as pertinent, "[p]rovides *the* name of the debtor…," and not a name that is reasonable or "close enough." UCC § 9-502(a)(1); P.R. Laws Ann. Tit. 19, § 2322(a)(1) (emphasis added).

In the case, as here, of a registered organization, this requirement is met "*only* if the financing statement provides the name that is stated to be the registered organization's name on the public organic record most recently filed with or issued or enacted by the registered organization's jurisdiction of organization which purports to state, amend, or restate the registered organization's name…." UCC § 9-503(a)(1); P.R. Laws Ann. Tit. 19, § 2323(a)(1) (emphasis added).[5] The use of any other name, such as a trade name, does not suffice. UCC § 9-503(c); P.R. Laws Ann. Tit. 19, § 2323(c).

It is critical that a filer set forth the correct legal name of the debtor on the financing statement. UCC § 9-503 cmt. 2 ("The requirement that a financing statement provide the debtor's name is particularly important."). "Financing statements are indexed under the name of the debtor, and those who wish to find financing statements search for them under the debtor's name." *Id*. This straightforward system was created out of necessity to foster certainty in commercial lending transactions:

> [D]etermination of a debtor's name in the context of the Article 9 filing system must take into account the needs of both filers and searchers. Filers need a simple and predictable system in which they can have a reasonable

5. The "public organic record," in relevant part, is "a record consisting of legislation…which forms or organizes an organization, any record amending the legislation, and any record…which amends or restates the name of the organization." UCC § 9-102(68)(C); P.R. Laws Ann. Tit. 19, § 2212(68)(C). The Opinion found, and the parties do not appear to dispute, that the "public organic record" here is the 2014 English translation of the amendment to the 1951 Enabling Act. App. 45a.

> degree of confidence that, without undue burden, they can determine a name that will be sufficient so as to permit their financing statements to be effective. Likewise, searchers need a simple and predictable system in which they can have a reasonable degree of confidence that, without undue burden, they will discovery all financing statements pertaining to the debtor in question.

Id.

As multiple Circuit Courts and State supreme courts have recognized, such clear-cut filing requirements serve the ultimate aim of Article 9, which is "to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty." *Octagon Gas Sys., Inc. v. Rimmer*, 995 F.2d 948, 954 (10th Cir. 1993) (citing Oklahoma law); *see State Bank of Toulon v. Covey (In re Duckworth)*, 776 F.3d 453, 459 (7th Cir. 2014) (same, citing precedent and Illinois law); *Assocs. Commercial Corp. v. Sel-O-Rak Corp.*, 746 F.2d 1441, 1443 (11th Cir. 1984) (same, citing Florida law); *Auto Credit of Nashville v. Wimmer*, 231 S.W.3d 896, 902 (Tenn. 2007) (same, citing Tennessee law); *see also Boatmen's Nat'l Bank of St. Louis v. Sears, Roebuck and Co.*, 106 F.3d 227, 230-231 (8th Cir. 1997) ("A fundamental purpose of Article 9 is to create commercial certainty and predictability by allowing creditors to rely on the specific perfection and priority rules that govern collateral within the scope of Article 9") (internal quotation and citation omitted).

A filing office's standard search logic under Article 9 will return filings using the exact name of the debtor

requested. Failure to set forth the correct name of the debtor in a financing statement may result in that name (and thus, the financing statement) not being returned in a search query under the correct name, rendering the financing statement "seriously misleading," and therefore ineffective, as a matter of law. UCC § 9-506(b) & (c); P.R. Laws Ann. Tit. 19, § 2326(b) & (c).

While a potentially Draconian result to some, this reflects the sound commercial policy that "[s]earchers are not expected to ascertain nicknames, trade names, and the like by which the debtor may be known and then search under each of them. Rather, it is the secured party's responsibility to provide the name of the debtor sufficiently in a filed financing statement." UCC § 9-506 cmt. 2. *See Trailer Training Inc. v. Jersey Tractor Trailer Training, Inc. (In re Jersey Tractor Trailer Training Inc.)*, 580 F.3d 147, 158 (3d Cir. 2009) (stating that "revised Article 9 rejects the duty of a searcher to search using any names other than the name of the debtor….") (citation omitted); *see also Covey*, 776 F.3d at 461 ("We must hew to the necessary technicalities inherent in any law governing commercial transactions, even when the result is harsh.") (citation and internal quotation omitted). "When a UCC search of the debtor's legal name does not provide any matches, parties in interest should be able to presume that the property is not encumbered, and they should not be charged with guessing what to do next if the legal name search does not result in any matches." *Clark v. Deere & Co. (In re Kinderknecht)*, 308 B.R. 71, 76-77 (B.A.P. 10th Cir. 2004).

In view of these underlying purposes and policy considerations, federal and state courts across the country, including panels of the Fifth, Eighth, and Tenth Circuits, have adjudicated financing statements insufficient where

they do not use the debtor's precise legal name and would not be found in a search under the debtor's precise legal name. *See, e.g.*, *id.* at 75 (concluding that only the debtor's legal name is sufficient under the "clear-cut" test of the UCC, which "shows a desire to foreclose fact-intensive tests, such as those that existed under the former Article 9 of the UCC, inquiring into whether a person conducting a search would discover a filing under any given name"); *Fishback Nursery, Inc. v. PNC Bank, Nat'l Assoc.*, 920 F.3d 932, 936-37 (5th Cir. 2019) (affirming determination that financing statements were insufficient under Michigan and Tennessee enactments of UCC § 9-503, "which require listing the debtor's name exactly as it appears on the public documents creating the entity"); *Hastings State Bank v. Stalnaker (In re EDM Corp.)*, 431 B.R. 459, 466-67 (B.A.P. 8th Cir. 2010) ("interpret[ing] § 9-503 to mean exactly what it says" and holding that financing statement which included both the debtor's organizational name and its trade name did not sufficiently provide the name of the debtor and was seriously misleading); *Genoa Nat'l Bank v. Southwest Implement, Inc. (In re Borden)*, No. 4:07CV3048, 2007 WL 2407032, *2 (D. Neb. Aug. 20, 2007) (finding that "an individual debtor's legal name, as opposed to a commonly used nickname, must be used in a financing statement in order to properly perfect a creditor's security interest"); *Myers v. Am. Exch. Bank (In re Alvo Grain and Feed, Inc.)*, Adv. Proc. No. A08-08029-TLS, 2009 WL 5538645, *3 (Bankr. D. Neb. Nov. 20, 2009) (holding that financing statements which used "&" instead of "and" in debtor's name did not contain debtor's correct legal name, even though the debtor appeared to use the terms interchangeably for many years and the "&" symbol literally means "and"); *Pankratz Implement Co. v. Citizens Nat'l Bank*, 281 Kan. 209, 211 (2006) (holding that

minor misspelling of debtor's name on financing statement rendered it seriously misleading and thus ineffective).

In this case, the "name of the debtor" for purposes of the UCC is expressly set forth in legislation. The applicable provision of the statute provides: "A retirement and benefit system *to be designated* as the 'Retirement System for Employees of the Government of the Commonwealth of Puerto Rico', which shall be considered a trust, *is hereby created*." P.R. Laws Ann. Tit. 3, § 761 (emphasis added). This is the only portion of the statute that forms the debtor and serves to officially state (in quotation marks) its name. Indeed, the term "designate" means to "[t]o represent or refer to (something) using a particular symbol, sign, *name*, etc." *See* Black's Law Dictionary (10th ed. 2014) (emphasis added).

In view of the UCC's clear, objective requirements and the unequivocal expression of the name of the debtor set forth in the public organic record that created the debtor, one should have to look no further to ascertain the "name of the debtor" for purposes of perfection under Article 9. *See Gold v. Pasternak (In re Harvey Goldman & Co.)*, 455 B.R. 621, 626 (Bankr. E.D. Mich. 2011) (registered assumed name under which debtor did business was insufficient because it was not the name of the debtor indicated on the applicable public record which showed the debtor to have been organized); *First Cmty. Bank of East Tenn. v. Jones (In re Silver Dollar, LLC)*, 388 B.R. 317, 321-324 (Bankr. E.D. Tenn. 2008) ("the name given to the debtor at the time it was organized or established, rather than a name it later assumed, even if that assumed name is properly registered with the state," was the correct "name" for purposes of UCC § 9-503(a),

which "contemplates the use of a single legal name for a registered organization"); *see also* UCC § 9-506 cmt. 2 (stating that a financing statement that is insufficient under UCC § 9-506 is "ineffective even if the debtor is known in some contexts by the name provided on the financing statement and even if searchers know or have reason to know that the name provided on the financing statement refers to the debtor. Any suggestion to the contrary in a judicial opinion is incorrect."). However, the Opinion holds otherwise.

Under the reasoning employed in the Opinion, a lender would be required to search for what it guesses a filer may have subjectively believed was "a" correct name of the debtor, including prior names and trade names, or else run the risk of its security interest being primed by a pre-existing security interest. Given that even "reasonable" minds will differ, the lender can never be completely assured that it has searched the entire landscape of possible names. Such a subjective analysis is directly at odds with the objective, bright-line rules created under the UCC to "simplify, clarify and modernize the law governing commercial transactions" and facilitate "the continued expansion of commercial practices." *See* P.R. Laws Ann. Tit. 19, § 401(2).

II. The Opinion Will Reduce the Availability of Credit and Increase the Costs of Borrowing

Although the Opinion is wrong as a matter of law for the reasons set forth above, the Opinion's practical implications are alarming for the commercial lending industry. There is substantial risk that parties and courts may be encouraged to export the Opinion's subjective

standard for determining a financing statement's compliance with the requirement to "provide[] the name of the debtor" and apply it to less unusual circumstances or use it to craft other fact-dependent tests, eroding the certainty and enforceability upon which the UCC is premised.

However, even before such a circumstance were to come to pass, the Opinion's negative effects will be palpable. In practice, the Opinion, if allowed to stand, will unfairly and needlessly impose added costs and risks on lenders and other parties who must routinely comply with, and who depend on, the UCC and its regime of official, state-operated, computerized filing systems and standard search logic. The Opinion compels lenders and other parties to conduct multiple searches of names of the debtor—whether or not such name has since been replaced or is otherwise not the correct name of the debtor—lest they lose priority to undiscoverable security interests filed under names other than a debtor's correct name. The Opinion also requires the lender to perform potentially extensive research in addition to simply referencing the debtor's public organic record as required by the UCC, including, potentially, familiarizing itself with the applicable jurisdiction's law, researching the legislative history of the statute in question, performing a digest of prior longstanding official names of the debtor and amendments thereto, and researching past practices of the debtor with respect to its name over the course of decades. App. 48a-51a.

Yet, despite undertaking a burdensome and costly effort to protect itself by performing additional research and ordering numerous searches under name variations,

a lender still remains in jeopardy of its liens being subordinated if it fails to guess which incorrect version of the borrower's name actually appears on the financing statement. Under typical contracts for asset-based financing, the costs to the lender of performing multiple lien searches are borne by the borrower. Thus, the Opinion is a double-edged sword: it increases transaction costs to borrowers while penalizing commercial lenders for not uncovering security interests that are undiscoverable through lien searches performed using long-settled practices sanctioned by the UCC and judicial precedent from around the country.

When lenders cannot mitigate their credit risks with reasonable commercial behavior, the cost of credit to borrowers rises. In cases where the creditworthiness of the borrower is marginal, a secured lender may elect not to lend at all or to reduce the credit made available because of the additional risks of undiscovered security interests generated by the Opinion. This availability of credit could be the difference between the survival or bankruptcy of a company. If the Opinion (and its possible progeny) causes even one loan not to be made, that is one too many.

The uncertainty engendered by the Opinion will open the door to litigation as debtors, creditors' committees, and other parties in interest in distressed situations inevitably search for litigation leverage to obtain commercial advantage. While the consequences to lenders, borrowers, and the court system are immeasurable, such consequences can easily be averted by affirming that the UCC places the risk of an incorrect name on the filer, who alone bears the burden of providing the correct name of the debtor in the "Debtor's Name" section of the financing statement.

CONCLUSION

For the foregoing reasons, CFA respectfully submits that the Petition should be granted.

Dated: June 3, 2019

Respectfully submitted,

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