No. 19-870

In the Supreme Court of the United States

IN RE: I80 EQUIPMENT, LLC,

Debtor.

JEANA K. REINBOLD,
Not Individually But Solely in Her Capacity as
Chapter 7 Trustee of the Estate of I80 Equipment, LLC,

Petitioner,

v.

FIRST MIDWEST BANK,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF SECURED TRANSACTION PROFESSORS AND UNIFORM LAW COMMISSIONERS WILLIAM H. HENNING AND JOHN T. MCGARVEY AS AMICI CURIAE IN SUPPORT OF THE PETITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

JUDICIAL RULES

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

INTEREST OF THE AMICI CURIAE[1]

Amici curiae are two lawyers who have been actively involved for decades in the drafting, teaching, and application of Article 9 of the Uniform Commercial Code ("UCC" or "Code") concerning secured transactions. They both have a deep and longstanding commitment to law reform at the state level and both are Commissioners serving with the Uniform Law Commission ("ULC").[2] The ULC promulgated the UCC in partnership with the American Law Institute ("ALI"). *Amici* are the current Chair and Vice-Chair of the ULC's Committee on the Uniform Commercial Code, and they are members of the Permanent Editorial Board for the Uniform Commercial Code ("PEB"). The PEB was formed by agreement of the sponsoring organizations in the 1960s and charged with oversight of the Code's development.[3]

William H. Henning currently serves as Executive Professor of Law at Texas A&M University School of Law. He previously served as Distinguished Professor of Law at the University of Alabama School of Law

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than the *amici curiae* or their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] The official name of the organization is the National Conference of Commissioners on Uniform State Laws.

[3] The opinions of the *Amici* do not necessarily represent those of the ULC, the ALI, or the PEB.

(2003-2015) and as R.B. Price Professor of Law at the University of Missouri-Columbia School of Law (1980-2003). Since becoming a professor, he has regularly taught on the law of secured transactions. His primary area of research is the UCC, particularly Article 9, about which he has published numerous books, book chapters, and law review articles. He was appointed to the ULC by Missouri's governor in 1994 and became the organization's Executive Director in 2001. He became an Alabama Commissioner upon stepping down from that position in 2007 and is now a Life Member of the organization. He is a member of the American Law Institute and a Fellow of the American College of Commercial Finance Attorneys. He also served from 2011 to 2019 as a member of the U.S. Department of State's delegation to Working Group VI of the United Nations Commission on International Trade Law, which developed a Model Law of Secured Transactions.

John T. McGarvey was an adjunct professor at the University of Kentucky School of Law teaching secured transactions from 2002 through 2016, and his skills and service were recognized by his induction into the College of Law Hall of Fame. He remains a member of the Planning Committee for the UK College of Law's annual Legal Issues for Financial Institutions where he has taught on the UCC for over three decades. He has represented the Commonwealth of Kentucky as a Commissioner to the ULC since 2006, and he currently is the chair of the ULC's UCC Committee. He also chaired Kentucky's drafting committee for Revised Article 9 of the UCC and has headed all Kentucky UCC drafting and implementation efforts since 1986. He is involved in numerous committees

of the American Bar Association relating to the UCC, including serving as co-chair of the ABA's Task Force for enactment of the 2010 Amendments to Article 9. Mr. McGarvey is a member of the American Law Institute, and he has twice served as a Special Justice for the Kentucky Supreme Court.

SUMMARY OF ARGUMENT

Amici are concerned that the instant decision of the Seventh Circuit Court of Appeals, coming as it does from such a prestigious court, has the capacity to seriously undermine the purposes and policies of the UCC, among which are simplifying, clarifying, and modernizing the law governing commercial transactions and making uniform the law among the various jurisdictions.[4] Put more simply, the UCC is designed to facilitate commerce. It accomplishes this through an integrated code applicable to numerous discrete areas of commercial law, largely uniform from state to state[5] and adopted in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands (the 53 jurisdictions that comprise the ULC). It is especially important that Article 9 be applied in a uniform manner because, more than any other article, it

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[4] UCC § 1-103(a). All references to the UCC are to the most recent official text which is available at law.cornell.edu/ucc.

[5] The UCC becomes law in a jurisdiction only when adopted by the jurisdiction's legislature, and legislatures occasionally make changes to the language drafted by the Code's sponsoring organizations. However, there is complete uniformity as to the provisions relevant to and cited in this brief.

implicates the rights of third parties. The drafting of the most recent wholesale revision of Article 9 was completed in 1999 and the jurisdictions were asked to enact it with a delayed effective date of July 1, 2001. Virtually all complied. The sponsors promulgated a set of amendments to Article 9 in 2010, and this time the jurisdictions were asked to adopt them effective July 1, 2013. Again, virtually all jurisdictions complied. The need for uniformity among the states in this vital area is underscored by these efforts.

An essential part of the Article 9 system is the government offices established in every jurisdiction for the filing of publicly searchable financing statements which are used to give notice of security interests in personal property or fixtures created by private agreement between parties known as the secured party and the debtor.[6] The filing with one of these offices of a properly completed financing statement generally "perfects" the security interest,[7] and this has the effect of giving the secured party priority over most subsequently arising third-party interests in the collateral. For example, the security interest of a subsequent party taking a security interest in the same collateral will generally be subordinated to a perfected security interest,[8] and most buyers of collateral from the

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[6] The basic scope of Article 9 is transactions, regardless of form, that create a security interest in personal property or fixtures by contract. UCC § 9-109(a)(1).

[7] The Code establishes other methods of perfection with respect to certain types of collateral but the filing of a financing statement is the default method if an exception does not apply. UCC § 9-310(a).

[8] UCC § 9-322(a).

debtor will take subject to a perfected security interest.[9]

A financing statement is "sufficient" to achieve perfection only if it *inter alia* "[i]ndicates the collateral covered by the financing statement."[10] It is critical that third-party searchers be given sufficient information in the filed financing statement to permit them to assess the risk that any interest they acquire will be subordinate to that of a secured party. The decision of the Seventh Circuit for which review is sought ignored this critical policy and UCC requirement by deciding it was sufficient for the filing creditor to merely reference a security agreement and not describe in any other way the claimed collateral.

The decision of the Seventh Circuit in *In re I80 Equipment, LLC*, 938 F.3d 866 (7th Cir. 2019), *petition for cert. filed* (Jan. 8, 2020) (No. 19-870), is at odds with decisions of all other courts, misapplies the plain language of Article 9, and if followed by other courts has the potential to undermine a critical system that is at the very core of commercial law in the United States. *Amici* appear in order to explain the nature of the Seventh Circuit's mistakes and why review by this Court is essential.

9 UCC § 9-315(a)(1), § 9-317(b).

10 UCC § 9-502(a)(3).

ARGUMENT

I. ARTICLE 9 MUST BE APPLIED IN A MANNER THAT PROTECTS THE RIGHTS OF THIRD PARTIES SEARCHING THE FILING SYSTEM.

Before addressing further any of the specific issues related to the requirements for a sufficient financing statement, it is important to establish the principle that Article 9's rules relating to the perfection of a security interest must be applied in a manner that protects the interests of searchers of the filing system, who are not privy to the contract that creates the security interest.

As applied to the immediate parties to a contract within its scope, the UCC relies on a combination of bright-line rules and flexible standards (*e.g.*, reasonableness, good faith) to provide the predictability and flexibility required to facilitate deal making. As applied to a third party that might be affected by a contract between others, however, the UCC in general and Article 9 in particular rely almost exclusively on bright-line rules designed to protect the legitimate interests of the third party. For example, a third party must be able to ascertain which jurisdiction's filing system must be searched in order to learn whether a financing statement has been filed affecting assets in which it is considering acquiring an interest. Although the secured party and the debtor have some flexibility when it comes to selecting the law governing their transaction,[11] a third party has no means of learning the contents of their agreement and accordingly the law governing perfection is generally the law of the juris-

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11 UCC § 1-301(a).

diction in which the debtor is located.[12] A contractual choice of another jurisdiction is ineffective.[13] Under this approach, a searcher can know with a high degree of confidence which jurisdiction's filing system to search. It would be anomalous for Article 9 to invalidate a choice-of-law provision in a security agreement affecting a third party while at the same time referring that party to the same security agreement in order to determine the collateral covered by it.

Similarly, the name of the debtor in which the financing statement is indexed must be readily discoverable by a searcher and the Code's rules in this regard are quite rigorous.[14] A financing statement that provides a name that deviates from these rules in any respect is deemed seriously misleading, and therefore insufficient to perfect the security interest to which it relates, unless "a search of the records of the filing office under the debtor's correct name, using the filing office's standard logic, if any, would disclose" the erroneous filing.[15] The debtor name rules are clearly designed to provide the best possible information for the searcher.

The principle is the same when it comes to the contents of the financing statement relating to the collateral—the parties' private arrangement is hidden from the searcher and thus the financing statement must provide sufficient information for the searcher to be able to assess its risks. The test

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[12] UCC § 9-301(1).

[13] UCC § 1-301(c)(8).

[14] UCC § 9-502(a)(1), § 9-503.

[15] UCC § 9-506(b), (c).

devised by the Seventh Circuit is oriented towards the convenience of the filer, which should be irrelevant.

II. THE COLLATERAL MUST BE REASONABLY IDENTIFIABLE BASED ON INFORMATION CONTAINED IN THE FINANCING STATEMENT ITSELF.

As the Seventh Circuit correctly noted, the general rule for the contents of a financing statement is set forth as follows in UCC § 9-502(a):

> (a) Subject to subsection (b), a financing statement is sufficient only if it:
>
> (1) provides the name of the debtor;
>
> (2) provides the name of the secured party or a representative of the secured party; and
>
> (3) indicates the collateral covered by the financing statement. [Emphasis added]

One critical point that the Seventh Circuit omitted analyzing is the word "it" in the introductory clause of Section 9-502(a). "It"—the financing statement and not some other document—is what must "indicate the collateral covered by the financing statement."

Section 9-504 addresses how to indicate the collateral in the financing statement:

> A financing statement sufficiently indicates the collateral that it covers if the financing statement provides:
>
> (1) A description of the collateral pursuant to Section 9-108; or

(2) An indication that the financing statement covers all assets or all personal property. [Emphasis added]

The same critical point bears repeating. Section 9-504 also uses "it" and reinforces that word by including the phrase "if the financing statement provides . . . .". Again, the place for a searcher to look for information about the collateral is "it"—the financing statement and not somewhere else, particularly not a private agreement to which the searcher is not privy.

One might think that a searcher dealing with the debtor that created the security interest could ask to see a copy of the security agreement, but the secured party may have the only fully authenticated copy, and nothing in Article 9 requires the secured party to provide the debtor with a copy.[16] Perhaps the secured party would give the debtor a copy upon request, but it is unlikely to verify to the searcher that the copy is accurate. Moreover, the person with whom the searcher is dealing might not be the debtor that dealt with the secured party. For example, the debtor that created the security interest might have sold the collateral to a third party that took it subject to the perfected security interest. A financing statement remains effective notwithstanding the sale[17] and this adversely affects the rights of transferees subsequent to the buyer, but the secured party is unlikely, often due to confidentiality reasons, to provide a copy

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[16] UCC § 9-210 provides a debtor with the right to obtain certain information from the secured party but the specified information does not include a copy of the security agreement.

[17] UCC § 9-507(a).

of the security agreement to anyone other than the debtor with whom it dealt.

There is another scenario in which a cross-reference to a private agreement for information about collateral disadvantages a searcher. A secured party that wishes to obtain purchase-money priority over another secured party that has previously filed a financing statement covering inventory must send the other secured party an authenticated notification stating that the person sending the notification has or anticipates having a purchase-money security interest in inventory of the debtor and describing the inventory.[18] There is great convenience and efficiency in permitting the potential purchase-money secured party to do a simple search and send notice only if it finds a financing statement indexed in the debtor's name that describes the collateral as inventory or states that it covers all the debtor's assets or other property.[19] Permitting a financing statement to refer to a private agreement significantly increases the costs and perhaps makes entirely impractical some purchase-money financing transactions.

Section 9-504(2) creates a special rule permitting the filing of a financing statement indicating that the secured party claims a security interest in all assets or all personal property. This was needed because the collateral description rules of Section 9-108, which require that a description must reasonably identify the collateral[20] and which apply both to security agree-

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[18] UCC § 9-324(b)

[19] UCC § 9-324(b)(2), (4).

[20] UCC § 9-108(a),

ments and financing statements, specifies in subsection (c) that a description using supergeneric language such as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import "does not reasonably identify the collateral." [Emphasis added] Nothing mitigates this rule with regard to security agreements and a security agreement that provides that the collateral consists of all the debtor's assets or personal property is ineffective to create a security interest in anything. Without Section 9-504(2), supergeneric language in a financing statement would be similarly ineffective.

The policies underlying the description requirements for security agreements and financing statements are different because their functions are different. The description of the collateral in the security agreement is evidence of the agreement of the parties and Section 9-108(c) 9-110 expresses the policy that a supergeneric description is simply too vague. The policy underlying the similar requirement in a financing statement is to give notice to third parties, however, and in this context it can be very efficient to use supergeneric language.

The supergeneric language clearly places searchers on notice that any asset with which they deal might be subject to a security interest. It also performs another useful function. Because supergeneric language can't be used in a security agreement it is unlikely that even an agreement intended to create a security interest in all of a debtor's personal property and fixtures will list each and every type of collateral that might exist under Article 9. If the debtor disposes of collateral described in the security agreement and acquires proceeds that do not fit within that description, there

is a significant risk that it will become unperfected as to the proceeds on the 21st day after its security interest attaches to them unless its financing statement covers them.[21] Learning of the existence of proceeds and amending a financing statement to add their description within 20 days is an onerous task and many secured parties simply become unperfected as to proceeds. The use of supergeneric language ameliorates the situation by providing in advance sufficiently broad language to perfect the security interest in unexpected proceeds of a type capable of being perfected by filing. Supergeneric language is perfectly appropriate for a financing statement but only if the language appears in "it," the financing statement.

Having determined that supergeneric language should not be a sufficient description for purposes of Section 9-108, which applies to security agreements and financing statements alike, but having also made the policy choice to permit such language in a financing statement, the drafters of the UCC needed a way to implement the policies. They could not state that a financing statement had to contain a "description" because Section 9-108(c) already uses the word "description." They needed an alternative to the word "description." They chose to use "indicate" and they stated directly in Section 9-504(2) that "[a] financing statement sufficiently indicates the collateral it covers if the financing statement provides . . . an indication that the financing statement covers all assets or all personal property." [Emphasis added] It is obvious what the drafters were trying to accomplish. Under Section 9-504(1), a description sufficient under Section

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[21] UCC § 9-315(c), (d).

9-108 satisfies the indication requirement, as does a supergeneric statement. Nothing in the use of the words "indicates" and "indication" suggests an intent to expand the universe of methods for providing information about the collateral beyond these methods.

In this case, the financing statement filed by the Respondent, First Midwest Bank, attempted to describe the collateral by requiring the searcher to look at the "Collateral described in First Amended And Restated Security Agreement dated March 9, 2015 between Debtor and Secured Party." Had First Midwest Bank filed that security agreement as an exhibit to the financing statement, there would be no cause for challenge. A person wanting to know the collateral claimed (and perfected) could acquire that information by reading the financing statement as it appears in the public record. *See In re The Holladay House, Inc.*, 387 B.R. 689, 696 (Bankr. E.D. Va. 2008)(citing cases), *aff'd* 2008 WL 4682770 (E.D. Va. 2008).

The question, however, that the Seventh Circuit considered is whether Clause (6) of Section 9-108(b) allowed First Midwest Bank to file a financing statement that did not disclose within its four corners the collateral it was claiming? Subsection (b) lists 5 methods by which collateral may be reasonably identified but no such list could be complete and thus paragraph (6) is a catchall that states, with the notable exception of the supergeneric language rule of subsection (c), "any other method, if the collateral is objectively determinable."

Until the Seventh Circuit's decision, no court had decided that it was sufficient for a financing statement to require the searching party to examine an entirely different document than the financing state-

ment to determine the collateral being claimed in "it", the financing statement.

Until the Seventh Circuit's decision, no court had held that a collateral description in the financing statement would be "objectively determinable" by reference solely to a document other than the financing statement itself.

Rather, as the Petitioner points out, numerous cases suggest or reach a result contrary to the Seventh Circuit's ruling. *In re Financial Oversight and Management Board for Puerto Rico*, 914 F.3d 694, 710 (1st Cir. 2019), *cert. denied* 140 S.Ct. 47 (Oct. 7, 2019); *In re H.L. Bennett Co.*, 588 F.2d 389 (3rd Cir. 1978); *In re Softalk Pub. Co.*, 856 F.2d 1328 (9th Cir. 1988); *Maxl Sales Co. v. Critiques, Inc.*, 796 F.2d 1293 (10th Cir. 1986); *In re Lynch*, 313 B.R. 798 (Bankr. W.D. Wisc. 2004); *In re Lexington Hospitality Group, LLC*, 2007 WL 5035081, Bankr. No. 17-51568 (Bankr.E.D.Ky. 2017); *In re Burival*, 2010 WL 4115493, Bankr. Nos. 07-42271, 07-42273, Adv. No. A10-4012 (Bankr. D. Neb. 2010); *In re Bailey*, 228 B.R. 267 (Bankr. D. Kan. 1998); *In re Dubman*, 1968 WL 9197 Bankr. No. 92, 5 UCC Rep. Serv. (Callaghan) 910 (W.D. Mich. 1968); *Allis-Chalmers Corp. v. Staggs*, 117 Ill.App.3d 428 (5th Dist. 1983).

Professor Barkley Clark's treatise, *The Law of Secured Transactions Under the Uniform Commercial Code* (3rd ed. & Supp. Aug. 2019), specifically discusses why it is not sufficient for a financing statement to refer just to the security agreement:

> If the business security agreement is not attached to the financing statement as an exhibit, does such an incorporation by reference

> pass muster on the ground that the underlying collateral is "objectively determinable" under UCC 9-108? The argument is strong that such a description does not do the job. The financing statement on its face (without reference to an attached exhibit) must indicate the nature of the collateral. The only way a searcher could discover what collateral was covered would be to get the information from an extrinsic document—the security agreement. Doesn't this put the searcher too much at the mercy of the filer as a source of information? Aren't there limits on inquiry notice? If this simple cross-reference device were to pass muster, the collateral description in the financing statement would really add nothing to the name of debtor and secured party.

Id. at § 2.09[6]][e] "How To Perfect A Security Interest," p. 2-231.

Moreover, clause (b)(6) of Section 9-108 refers to the "method" of identification and not the location. The location is in "it," the financing statement. Official Comment 2 to Section 9-108 does not refer to any location other than the financing statement. It states:

> Subsection (a) retains substantially the same formulation as former Section 9-110. Subsection (b) expands upon subsection (a) by indicating a variety of ways in which a description might reasonably identify collateral. Whereas a provision similar to subsection (b) was applicable only to investment property under former Section 9-115(3), subsection (b) applies to all types of collateral, subject to

> the limitation in subsection (d). Subsection (b) is subject to subsection (c), which follows prevailing case law and adopts the view that an "all assets" or "all personal property" description for purposes of a security agreement is not sufficient. Note, however, that under Section 9-504, a financing statement sufficiently indicates the collateral if it "covers all assets or all personal property." [Emphasis added]

There is nothing in this Comment, or any other Comment, that would indicate that the location of the collateral description may be in any location other than the financing statement. Rather, the Comment refers specifically to "a financing statement" as being the location to be examined to determine a sufficient indication of a supergeneric collateral indication.

The "method" mentioned in Section 9-108(b)(6) refers to ways to describe collateral in the financing statement and is not authorization to refer simply to an entirely different document. *Compare Baldwin v. Castro County Feeders I, Ltd.*, 678 N.W.2d 796 (S.D. 2004) (description referring to cattle "being specifically located in Lot(s) #___ at Castro County Feeders, I, Ltd., Hart, Castro County, Texas" was an objectively determinable method); *Newsome v. Rabo Agrifinance, Inc.*, 427 S.W.3d 688, 80 UCC Rep.Serv.2d 628 (Ark. Ct.App. 2013) (description referring to "all soybean seed, all crops grown, growing or to be grown" by and other items of certain farmers was sufficient); *Community Trust Bank v. First Nat. Bank*, 924 So.2d 498 (La.App. 2006) (description including "all cut timber located on the Ruston Timber Company Inc. woodyard located at 165 Woodland Drive, Simsboro,

LA" was a sufficient description); *with In re Baker*, 511 B.R.41 (Bankr. N.D.N.Y. 2012) (where dairy cows did not have numerical ear tags, providing names of dairy cows in a financing statement was not an objectively determinable method).

The Seventh Circuit focused on an earlier version of Section 9-108 (Section 9-110 in the prior version) which was amended by Illinois in 2001 when it adopted the revisions to Article 9 promulgated by the ULC and ALI. *See I80 Equipment*, 938 F.3d at 871. The Seventh Circuit opinion then quotes the first paragraph of Official Comment 2 to Section 9-504 in the revision:

> To comply with Section 9-502(a), a financing statement must 'indicate' the collateral it covers. A financing statement sufficiently indicates collateral claimed to be covered by the financing statement if it satisfies the purpose of conditioning perfection on the filing of a financing statement, *i.e.*, if it provides notice that a person may have a security interest in the collateral claimed. *See* Section 9.502, Comment 2. In particular, an indication of collateral that would have satisfied the requirement of former section 9-402(1) (*i.e.*, "a statement indicating the types, or describing the items, of collateral") suffices under Section 9-502(a). An indication may satisfy the requirements of section 9-502(a), even if it would not have satisfied the requirements of former Section 9-402(1).

The error here is that the Seventh Circuit focuses on the word "indicates" in the Comment when what the Court of Appeals should have focused on is the "it" in the clause "it provides notice". Again, the "it" is the

financing statement and not some other document not filed with the filing office. As explained in detail above, the words "indicates" and "indication" serve a different function under revised Article 9 and have no bearing on the issue before the Seventh Circuit.

Had the ULC and the ALI intended to recommend dramatically changing Article 9 to allow simple cross-referencing in a financing statement to a security agreement, the Official Comments would have clearly stated that such a dramatic change was intended and explained why it was needed and appropriate. The Official Comments do not do so because that was not the meaning or intention of Section 9-108(b)(6) or Section 9-504(2). Paraphrasing this Court's language in *Whitman v. American Trucking Assn's, Inc.*, 531 U.S. 457, 468 (2001), the ULC "does not, one might say, hide elephants in mouseholes." The drafters would have made a much more affirmative indication of intent if they actually meant to make financing statements nothing more than a way for a creditor to name the document in which the security interests were created. *See also Czyzewski v. Jevic Holding Corp.*, ___ U.S. ___, 137 S.Ct. 973, 984 (2017) (repeating the "hiding elephants in mouseholes" concern and noting that the "importance of the priority system [in bankruptcy] leads us to expect more than simple statutory silence if, and when, Congress were to intend a major departure.").

Furthermore, the uniform view of commentators on the Seventh Circuit's decision in *I80 Equipment* is that it is erroneous. *See* Bruce A. Markell, *The Road to Perdition: I80 Equipment, Woodbridge and Liddle Pave the Way*, 39 Bankruptcy Law Letter 11 (Nov. 2019); George H. Singer & Adam C. Ballinger, *Does*

Identifying The Security Agreement "Indicate" The Collateral Under Article 9?, 39 Am. Bankr. Inst. J. 34 (Jan. 2020) (hereinafter, the "Bankruptcy Institute Comments"). The Petition in this case quoted extensively from Professor Markell's criticism. The criticism from the bankruptcy attorneys in the American Bankruptcy Institute Journal was published last month, and *amici* agree completely with their commentary:

> The Seventh Circuit's conclusion in *In re I80 Equipment LLC* undermines the notice function that financing statements are intended to serve in secured transactions—a function that the court itself recognized as being significant to its analysis. The ruling leads one to the following question: Does a collateral description box in a financing statement serve any purpose at all?
>
> As the bankruptcy court correctly observed, the financing statement provided no information whatsoever, and therefore no notice to any third party, as to which of the debtor's assets the lender was claiming an interest. The statute's plain language specifically provides that a financing statement is sufficient "only if it . . . indicates the collateral covered." In other words, the description must make possible the thing being described. A financing statement that does not describe the collateral at all but merely cross-references an extrinsic document located outside the public filing office does not further the aims of the statute nor comport with its mandate that the four corners of the instrument

provide a means for which the "identity of the collateral is objectively determinable."

If the drafters of Article 9 intended to permit a simple recitation of the existence of a security agreement in a financing statement to suffice, it would have been a simple matter to have said as much. They did not.

The effect of the Seventh Circuit's holding is to expand the obligation of searchers in instances with ambiguous (or nonexistent) collateral descriptions in financing statements to investigate the nature of the collateral granted by a debtor to a prior secured party. This investigation may require interested parties to pursue direct contacts with a prior secured party in an effort to obtain a copy of the related security agreement with no assurance of a timely or accurate response, much less any response at all.

However, the requirement that third parties might now need to search for records outside of the filing office would "undercut . . . several key goals of the UCC and its filing system. These goals include fair notice to other creditors and the public of a security interest." An interested party should not be forced to bear the burden and expense of figuring out the extent of a relatively generic collateral description; the notice function of Article 9's public-filing system requires something more. . . . Article 9 requires the financing statement itself to indicate the collateral-not vague language that sets in motion a scavenger hunt by which information about

> the collateral can be obtained from a source extrinsic to the public filing office.

See Bankruptcy Institute Comments at pp. 35, 74 (footnotes omitted).

While your *amici* believe that the Seventh Circuit's decision is completely inconsistent with the language, purposes, and policies of the UCC, the Court at this stage is not making that decision. The decision is whether the Seventh Circuit's opinion deserves review. It does, and for the following reasons.

III. THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

A. A Review of the Decision of the Seventh Circuit Is Necessary to Resolve a Conflict in the Courts of Appeals on a Substantial Question of Article 9 of the Uniform Commercial Code Concerning the Requirements of a Financing Statement.

This Court's Rule 10.1(a) recognizes the appropriateness of review when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . . ." There is no question that the effective functioning of the UCC is an important matter, and this Court has reviewed UCC matters when there was a conflict among the Circuits. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (resolving conflict between the Second and Ninth Circuits over the extent to which an action under UCC 7-210 relating to enforcement of a warehouseman's lien is limited by the Fourteenth Amendment). The Court has also reviewed disputes which involve

the functioning of the UCC's lien system. *See Slodov v. United States*, 436 U.S. 238, 256-257 & n. 22 (1978) (discussing the practical dilemmas confronting a debtor facing both UCC secured creditors and IRS tax liens and how lien priorities under the UCC and the Internal Revenue Code affect that situation).

In this case, the Seventh Circuit's decision is in direct conflict with the decision of the United States Court of Appeals for the First Circuit in *In re Financial Oversight and Management Board for Puerto Rico*, 914 F.3d 694. (1st Cir. 2019), *cert. denied,* 140 S.Ct. 47 (Oct. 7, 2019). *See generally* Muhammad S. Alkhidhr & Stephen L. Sepinuck, *Circuits Disagree About Financing Statements That Indicate the Collateral Solely by Reference to Unfiled Documents*, 9 The Transactional Lawyer at pp. 1-3 (Dec. 2019); Am. Bankr. Inst., *Seventh Circuit Splits with the First Circuit on the Sufficiency of Financing Statements*, Rochelle's Daily Wire (Sept. 16, 2019).

In the *In re Financial Oversight* decision, the First Circuit held as insufficient the creditor's financing statements that described the collateral as "[t]he pledged property described in the Security Agreement attached as Exhibit A hereto," because the attached security agreement did not define the pledged property and instead referenced a bond resolution that defined the term but which was not attached. *In re Financial Oversight*, 914 F.3d at pp. 709-712. The First Circuit then addressed the sufficiency of later filed financing statement amendments that actually attached an Exhibit A that "contained a detailed definition of 'Pledged Property'" and found those amendments to be sufficient because it was a "specific listing" that

satisfied the "reasonable identification" requirement of UCC Section 9-108(a). *Id.* at pp. 713-714.[22]

In light of the importance of financing statements to the functioning of Article 9, review by this Court is plainly warranted to review this split in the Courts of Appeals. The Seventh Circuit's decision makes it all too easy for a secured lender to avoid any chance of a problem with the collateral description/indication requirement by the simple expedient of cross-referencing its security agreement. This result would negate the predictability and certainty that facilitate secured lending and the economic impact on the country would be significant.

B. Immediate Review Is Appropriate Since the Seventh Circuit's Decision Was Manifestly Flawed.

This is not a case where the Court should wait for additional decisions from other Courts of Appeals. Quite simply, and as the petition for writ of certiorari (and the public criticism from important participants in the business of secured transaction) plainly demonstrates, the analysis of the Seventh Circuit was so seriously flawed that it should not be permitted to

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[22] The original financing statements in the case were recorded when the pre-1998 UCC amendments were in effect in Puerto Rico while the amended financing statements were governed by the 1998 UCC Amendments at issue in *I80 Equipment*. Regarding the "requirements for financing statements," the First Circuit described these changes as "modest" and gave no indication that its decision against non-attached documents containing the collateral description would have been different under either version. *In re Financial Oversight and Management Board*, 914 F.3d at. p. 705.

remain as precedent. This Court should review the Seventh Circuit's decision to avoid enmeshing other federal bankruptcy courts and the participants in the business of secured transactions in the kind of collateral perfection quagmire that the Seventh Circuit's decision created and has the potential to encourage.

CONCLUSION

When the UCC was initially being considered for adoption in Illinois, the provisions of Article 9 were positively endorsed by the Northwestern University School of Law Professor and Chicago Bar Association Secretary, William M. Trumbull. He wrote that the Article 9 provisions on priorities of security interests "are sensible and workable and have the further advantage of reducing uncertainties which plague existing law." *See* William A. Trumbull, *The Uniform Commercial Code In Illinois*, 8 De Paul Law Review 1, 23 (Autumn-Winter 1958). These advantages are at risk of being lost if this Court does not review the Seventh Circuit decision in this case.

In light of the conflict in the circuits, the importance of the issue, and the reoccurring nature of the dispute, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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