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COLLATERAL DESCRIPTION IN UCC1 INSUFFICIENT TO PERFECT SECURITY INTEREST IN ALL INTELLECTUAL PROPERTY ASSETS

The following case summary is provided for informational purposes only. The information has not been prepared by an attorney and is not to be taken as legal advice.

In re: ProvideRx of Grapevine, LLC, Case No. 12-38039-BJH, Ch. 11, Adv. Proc. No 13-03015-BJH; Related to DKT Nos. 53 and 66; 2013 Bankr. LEXIS 3115 (Bankr. N.D. Tex., August 2, 2013), the court found that language in loan documents was sufficient to give creditor CERx Pharmacy Partners, LP ("CERx"), a security interest in debtor Provider Meds LP's ("PM") assets. However, the collateral description contained in the UCC1 financing statement filed by CERx with the Texas Secretary of State was insufficient to perfect CERx's security interest in PM's intellectual property (IP) assets, other than the patent applications specified in the financing statement.

Between June 2010 and January 2012, CERx loaned approximately $8.92 million in principal amount to PM, which is represented by many loan and security documents. Included among these documents was a Patent Application Security Agreement executed by PM and CERx (the PSA).

CERx also filed a UCC-1 financing statement with the Texas Secretary of State which listed CERx's collateral in terms nearly identical to the collateral contained in the PSA.

The court held, as a matter of law, that PM granted CERx a security interest in its IP assets and that such interest attached to the IP assets in accordance with the provisions of the Texas UCC. It found, however, that the security interest was not properly perfected.

Texas UCC Section 9.502 states that a financing statement is sufficient only if it (1) provides the name of the debtor; (2) provides the name of the secured party or representative of the secured party; and (3) indicates the collateral covered by the financing statement. Pursuant to Texas UCC Section 9.504, a financing statement sufficiently describes the collateral that it covers if it provides either a description of the collateral pursuant to Section 9.108 or an indication that the financing statement covers all assets or all personal property.

The financing statement that CERx filed contained the following information:

> **DEBTOR:** Provider Meds, LP
>
> **SECURED PARTY:** CERx Pharmacy Partners, LP
>
> This FINANCING STATEMENT covers the following collateral: (a) U.S Provisional Patent Application Serial No. 61/323, 125, filed April 12, 2010, U.S. Patent Application Serial No. 13/085, 298 filed April 12, 2011, PCT Application No. PCT/US/2011/032150, filed April 12, 2011, each titled "On Site Prescription Management System and Methods for Health care Facilities," and all continuing patent applications (including, without limitation, continuation, continuation-inpart, and divisional applications), reissue applications, corresponding rights to patent and all other intellectual property protection of every kind (including, without limitation, all patent applications, industrial models,

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> invention registrations) in all countries of the world, and all patents, registrations, and certificates issuing therefrom (collectively, the "Patent Applications"); and (b) Any contract rights in, to or under the Patent Applications; Together with all Proceeds, products, offspring, rents, issues, right to recover past damages for infringement, profits and returns of and from any of the foregoing. UCC-1 Financing Statement, Filing No. 11-0018796992, filed June 27, 2011, (the "UCC-1"); Defendants' App. at 15.

The language notably mirrored the language in the PSA, but the UCC financing statement did not contain the broader "IP assets" language contained in the Term Sheet (loan document), the court stated.

According to the court, CERx correctly pointed out that the standard for evaluating the collateral description in a financing statement is more liberal than that of judging a collateral description in a security agreement, as the former need only be sufficient to put a third party on notice that there may be a security interest in the debtor's property. The third party must then inquire to discover the complete nature of the agreement between the debtor and his creditor. CERx cited various cases as analogies as to why the term "all other intellectual property" would put a reasonable third-party on inquiry notice regarding CERx's alleged interest in PM's IP assets.

The court found that the language in the UCC-1 could not be read to give inquiry notice that CERx claimed an interest in "all other intellectual property." Rather, CERx specifically chose to limit the language's application to patent and patent related rights. The collateral description chosen by CERx makes no mention of "all the Debtor's assets," "all IP assets," "copyrights," "trademarks", "software," "source code" or other non-patent related assets. Further, CERx titled its collateral package the "Patent Applications."

Although what parties in privity choose to title something may not be relevant to the analysis regarding attachment; with respect to perfection, the court concluded that a third party reviewing the UCC-1 would reasonably interpret the term "Patent Applications" to mean patent applications and patent related rights. The court held that as a matter of law, the collateral description contained in the UCC-1 was insufficient to give a reasonable person inquiry notice regarding the alleged nature of CERx's security interest in PM's IP Assets, other than the Patent Applications.

The court also construed CERx's Notice of Disposition of Collateral to have covered only the Patent Applications. Accordingly as of PM's bankruptcy petition date, CERx held an unperfected lien against the non-Patent Application IP Assets, which lien is subject to avoidance under 11 U.S.C. Section 544.