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# ARTICLES

## Standard Search Logic Under Article 9 and the Florida Debacle\*

KENNETH C. KETTERING†

Users of commercial law generally crave the clarity and predictability of sharp-edged rules. That craving is acute with respect to the rules of Article 9 of the Uniform Commercial Code (“UCC”) that govern the priority of competing interests in personal property, and the subset of those rules that relate to perfection of a security interest. The 1998 revision of Article 9 was devoted in part, and the 2010 amendments were devoted primarily, to appeasing that craving, by sharpening the edges of its rules on perfection. This essay addresses an aspect of those rules that was introduced in the 1998 revision but as yet has received little attention from courts or commentators. That is the concept of “standard search logic.” The 1998 revision made that concept pivotal to perfection of a security interest by filing.

Perfection is critical to a secured party, for an unperfected security interest almost never qualifies for priority over any competing interest. The usual method by which perfection is achieved is for the secured party to file, in the appropriate public filing office designated by Article 9, a financing statement that serves to give public notice of the security interest.<sup>1</sup> One item of information that a financing statement must set forth in order to be effective is the name of the debtor.<sup>2</sup> Effectiveness also requires other information, but the debtor’s name is first among equals. That is because the financing statement fails of its purpose completely unless it can be found in a search of the filing office’s records, and in order for a searcher to find the financing statement it must set forth the debtor’s name, for the filing office indexes financing state-

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\* Copyright © 2012 by Kenneth C. Kettering. All rights reserved. I am grateful to Paul Hodnefield of Corporation Service Company for sharing his vast knowledge of filing office operations. He bears no responsibility for any errors, nor for any of the views expressed herein. Except where otherwise indicated, references to provisions of Article 9 are to the 2011 version (that is, after giving effect to the 2010 amendments), though it should be noted that the provision central to this essay, section 9-506, has not been altered since its introduction in 1998.

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1. U.C.C. § 9-310(a) (2011).

2. U.C.C. §§ 9-502(a)(1), 9-520(c) (2011).

ments by the debtor's name.<sup>3</sup>

The 1998 revision of Article 9 sharpened the rules applicable to the sufficiency of the debtor's name as stated on a financing statement, and the 2010 amendments honed them still further, but they remain simple. The applicable rules are two.<sup>4</sup>

The first is the rule that defines the name of the debtor for purposes of the financing statement. Since 1998 that rule has been the subject of section 9-503. Before 1998 the statute simply required the financing statement to set forth the debtor's name, with little elaboration, leaving the meaning of that word to be filled in by other law.<sup>5</sup> The 1998 revision retained that rule as the baseline,<sup>6</sup> but added a bevy of special rules to define more precisely the names of debtors of certain kinds. The most important of these declares that the name of a domestic corporation or other "registered organization" is the name indicated in the public record of its jurisdiction of organization.<sup>7</sup> Other elaborations were added for decedents' estates, trusts and trustees, and even the Lovecraftian oddity of a nameless debtor.<sup>8</sup> The centerpiece of the 2010 amendments was a further special rule that defines the name of an individual. The 2010 amendments also tidied up the special rules added in 1998, such as by eliminating any doubt that the public record that determines the name of a domestic corporation is its publicly-filed articles of incorporation, rather than some other public record that might purport to set forth a name for the corporation.<sup>9</sup>

The string of characters that section 9-503 defines to be the debtor's name for purposes of a financing statement is referred to in this essay as the debtor's "true name." For simplicity this essay generally uses that term in the singular, though for some debtors it may be the case

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3. U.C.C. § 9-519(a)(4), (c) (2011).

4. This essay is not concerned with the rules of Article 9 that address the effectiveness *vel non* of a financing statement after post-closing events that might affect the name that the financing statement should show. Such events include sale of the collateral, change of name by the debtor, and merger or other restructuring involving the debtor.

5. U.C.C. § 9-402(1), (7) (1972).

6. U.C.C. § 9-503(a)(4)(A) (1998) (redesignated as § 9-503(a)(5)(A) by the 2010 amendments).

7. U.C.C. § 9-503(a)(1) (1998); *id.* § 9-102(a)(70) (defining "registered organization") (redesignated as § 9-102(a)(71) by the 2010 amendments).

8. U.C.C. § 9-503(a)(2) (1998) (decedents' estates); *id.* § 9-503(a)(3) (trusts and trustees); *id.* § 9-503(a)(4)(B) (nameless debtors) (redesignated as § 9-503(a)(5)(B) by the 2010 amendments).

9. The definition of the debtor's name after the 2010 amendments remains in section 9-503. For registered organizations, see also the new definition of "public organic record" in U.C.C. § 9-102(a)(68) (2011). For a cogent analysis of the 2010 amendments applicable to the filing system, by a member of the drafting committee, see Harry C. Sigman, *Improvements (?) to the UCC Article 9 Filing System*, 46 GONZ. L. REV. 457 (2011).

that more than one character string will satisfy section 9-503, and hence constitute a true name of that debtor.

The second rule pertaining to the sufficiency of a financing statement, so far as the debtor's name is concerned, is the subject of this essay. That is the rule setting forth Article 9's tolerance for error in the debtor's name—that is, the extent to which Article 9 deems effective a financing statement that sets forth, as the debtor's name, a string of characters that differs from the string of characters that comprises the debtor's true name. Before 1998 that subject was governed by a fuzzy rule that applied to errors of any kind in a financing statement. That rule provided that an error does not render the financing statement ineffective if it is a "minor error" that does not make the financing statement "seriously misleading."<sup>10</sup>

The 1998 revision took a different approach, which was not altered by the 2010 amendments. As revised in 1998, the subject is governed by section 9-506.<sup>11</sup> Nominally subsection (a) of 9-506 continues to apply the "not seriously misleading" standard of pre-1998 law. The "not seriously misleading" standard is, however, irrelevant to errors in the debtor's name, because subsections (b) and (c) define comprehensively the circumstances in which an error in the debtor's name is to be considered "seriously misleading." Hence, in regard to an error in the debtor's name, only subsections (b) and (c) matter. Those subsections, taken together, set forth two different rules. Both are sharp-edged, unlike the former "not seriously misleading" standard. Which of those rules applies to a given financing statement depends upon whether the office in which the financing statement is filed has a "standard search logic." If the filing office has a "standard search logic," then both subsections (b) and (c) apply. In that event, the erroneous financing statement is sufficient if and only if a search against the debtor's true name, using that "standard search logic," would disclose that erroneous financing statement. If the filing office lacks a "standard search logic," then only subsection (b) applies. Subsection (b) states simply that a financing statement that does not set forth the debtor's true name is seriously misleading.<sup>12</sup> That unqualified statement means that Article 9 has no tolerance at all for

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10. U.C.C. § 9-402(8) (1972).

11. Section 9-506 is reproduced in the appendix to this essay.

12. Specifically, section 9-506(b) states that "a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a) is seriously misleading," and hence is ineffective under subsection (a). The word "sufficiently," and cognate terms elsewhere in section 9-506, were added only to parallel usage elsewhere (notably section 9-502, which speaks in terms of whether a financing statement is "sufficient," rather than "effective"). See Revision of Uniform Commercial Code Article 9—Secured Transactions; Sales of Accounts and Chattel Paper § 9-506, Reporter's Comment A (Draft of Oct. 1997) [hereinafter October 1997 Draft], available at the archive of the Uniform Law Commission ("ULC") at <http://www.law.upenn.edu/bll/>

error in the debtor's name in a financing statement filed in an office that lacks a "standard search logic." Any deviation, however minuscule, from the exact character string constituting the debtor's true name renders the financing statement ineffective.

The statement of these rules in section 9-506 is unambiguous.<sup>13</sup> Furthermore, their principal motivation is clear and sensible. Courts took different attitudes to the former fuzzy standard of "not seriously misleading," sometimes applying it in an abstract way detached from its function. Sensible courts came to interpret the term in light of its function, by judging whether a search conducted by a reasonable searcher would have disclosed the erroneous financing statement. Of course that still left open the question of just how much time and ingenuity a reasonable searcher should be expected to invest in a search. Courts differed in their attitudes to that question, leading to a wide variation in results. The widespread upgrading of filing offices' indexing systems from paper records that had to be searched manually, to digital databases searchable by computer, provided the 1998 revisers with a simple and natural way to define objectively what a reasonable searcher should do. Section 9-506 in effect takes the searcher-friendly position that a searcher need do no more than conduct a search against the debtor's true name (or, if the debtor has more than one true name, against each true name). That is because the section decrees that a financing statement cannot be effective unless it would be disclosed by such a search. Loosely speaking, if the filing office provides for search of its index by software that returns a list of hits, then all financing statements that are identified as hits in such a search, and only those financing statements, are deemed to be sufficient so far as the debtor's name is concerned, for the hypothetical searcher will be alerted to the existence of those financing statements, and only those. If the filing office lacks such search software, then only an exact match of the debtor's true name is deemed

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archives/ulc/ulc.htm. The word "sufficiently" thus is a stylistic flourish that does not affect the meaning of section 9-506(b).

13. The simplicity and clarity of section 9-506 has not prevented misreadings. One law school casebook issued immediately after the 1998 revisions stated that section 9-506 "does not say that financing statements that do not satisfy subsection (c)'s 'safe harbor' are seriously misleading and therefore ineffective." ROBERT L. JORDAN, WILLIAM D. WARREN & STEVEN D. WALT, *SECURED TRANSACTIONS IN PERSONAL PROPERTY* 59 (5th ed. 2000). On the contrary, subsection (b) says exactly that. The authors have since recanted (see WILLIAM D. WARREN & STEVEN D. WALT, *SECURED TRANSACTIONS IN PERSONAL PROPERTY* 64 (8th ed. 2010)), but their earlier misreading continues to be repeated approvingly in one treatise. See 1 BARKLEY CLARK & BARBARA CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* ¶ 2.09[1][b] (3rd ed. 2011). But see *Pankratz Implement Co. v. Citizens Nat'l Bank*, 130 P.3d 57, 63–65 (Kan. 2006) (rejecting that misreading).

to be sufficient, so the hypothetical searcher need not heed any financing statement that does not set forth an exact match.

Subsection (c) of 9-506 does not refer to “a search by software that returns a list of hits.” Rather it uses the broader and more abstract phrase “standard search logic.” That phrase is not defined explicitly by the statute or the official comments. The statute is explicit that, whatever a “standard search logic” is, a given filing office need not have one.<sup>14</sup> There is no real need for an explicit definition, however, because the meaning of the phrase follows from its function in the statute. That meaning has several elements.

First, an essential requisite of a “standard search logic” is that the filing office in fact has a standard procedure for searching its index of financing statements. There is no need for a declaration, by the filing office, the legislature or anyone else, that a given procedure constitutes the “standard search logic” for that office. The drafters of the 1998 revision of Article 9 consciously rejected any such requirement. Early drafts of the provision that eventually became section 9-506(c) contemplated that the filing office would identify the relevant search procedure by rule, but that requirement was deleted.<sup>15</sup> This is not to say that an official declaration is pointless. A filing office might offer more than one search procedure, raising the question of which is the “standard,” and an official designation would settle the issue. For that reason, no doubt, some filing offices that have enabled online searching have designated a particular search mode as being the “standard.”<sup>16</sup> Moreover, Article 9

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14. Section 9-506(c) declares that an error in the debtor’s name does not render a financing statement seriously misleading “[i]f a search of the records of the filing office under the debtor’s correct name, using the filing office’s standard search logic, *if any*, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a) . . . .” (Emphasis added.) Official Comment 2 repeats the quoted language in slight paraphrase, carefully including “if any.” The words “if any” were added late in the drafting process, after circulation of several drafts that lacked recognition that a filing office need not have a “standard search logic.” See Revision of Uniform Commercial Code Article 9—Secured Transactions § 9-506(c), (Am. Law Inst. Proposed Final Draft, Apr. 6, 1998), available at the ULC’s archive site, *supra* note 12.

15. The October 1996 draft was the latest to contain such a requirement. See Uniform Commercial Code Revised Article 9—Secured Transactions; Sales of Accounts and Chattel Paper § 9-506 (Draft of Oct. 1996), available at the ULC’s archive site, *supra* note 12.

16. For example, New York’s central filing office permits search on its website, which states as follows: “NYS Standard Debtor Search: This search option provides the ability to search and receive the same results as would be provided by an ‘official’ search performed by our office. The search logic used in the NYS Standard Debtor Search is the ‘standard search logic’ of this office.” *Uniform Commercial Code Public Inquiry System UCC Lien Search*, NEW YORK DEP’T OF STATE, [http://appsext7.dos.ny.gov/pls/ucc\\_public/web\\_search.main\\_frame](http://appsext7.dos.ny.gov/pls/ucc_public/web_search.main_frame) (last visited Apr. 10, 2012). Cf. *In re Augusta Tissue Mill, LLC*, 63 U.C.C. Rep. Serv. 2d (West) 882, 885–87 (Bankr. M.D.N.C. 2007) (denying motion to lift stay because of doubt as to perfection, due in part to lack of evidence as to which of two search modes provided by the Georgia central indexing system’s website constituted “standard search logic”).

requires each filing office to provide a search report on request, and in the absence of an official designation of a given search procedure as “standard” the procedure employed by the filing office to produce such a search report is the obvious choice.<sup>17</sup>

Second, “standard search logic” is platform neutral, in the sense that it should not matter how the search procedure is implemented or memorialized. “Standard search logic” is not by its terms limited to search procedures implemented by computer, nor is there any reason to imply such a limitation. Any search procedure that can be reliably repeated will serve the function contemplated by section 9-506(c). A search procedure memorialized in written rules and implemented by manual search should suffice, so long as the rules are sufficiently algorithmic that their application to a given character string will reliably yield the same result no matter who implements them. Indeed, the premier search logic of the Article 9 world, that promulgated by the International Association of Commercial Administrators, is implemented on paper in its Model Administrative Rules.<sup>18</sup>

Third, the requirement of reliable repeatability implies that a filing office’s search procedure should not be considered a “standard search logic” unless it is reasonably stable—that is, the procedure should not be changed too frequently.<sup>19</sup>

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17. The search report requirement is at U.C.C. § 9-523(c) (2011). At least two states, Florida and Maryland, appear not to have enacted that provision. It is imaginable that a filing office might muddy the waters by having a website that designates a given online search procedure as “standard,” but using a different search procedure to prepare search reports itself. The policies underlying the relevant provisions do not clearly identify which search procedure should be determinative in that event. The webpage of the New York central filing office quoted in the preceding footnote emphasizes that searches on the website “are not official searches” and “are not considered to be certified by the New York Secretary of State’s Office.” Such statements are not dispositive of the foregoing question. *Cf.* First Cmty. Bank v. Jones (*In re* Silver Dollar, LLC), 388 B.R. 317 (Bankr. E.D. Tenn. 2008) (declining to grant summary judgment on sufficiency of a financing statement in the Tennessee central filing office, given conflicting results of a search at the filing office’s webpage and the filing office’s search report, as well as lack of evidence as to whether the filing office’s search report had been prepared in accordance with the search logic stated in the office’s administrative rules), *modified*, 66 U.C.C. Rep. Serv. 2d (West) 588, 590 (Bankr. E.D. Tenn. 2008) (granting summary judgment based on an affidavit by a filing officer affirming that the filing office’s search had been performed per the search logic stated in the office’s administrative rules, and that searches at the filing office’s webpage “are not official searches and do not employ the standard search logic of our Office.”).

18. INT’L ASS’N OF COMM’L ADMIN’RS, MODEL ADMINISTRATIVE RULES: UNIFORM COMMERCIAL CODE, ARTICLE 9, §§ 503, 503.1 (2010 ed.) (setting forth a set of rules to be followed in identifying hits in a search, and noting that under those rules “Human judgment does not play a role in determining the results of the search.”). Of course the same rules could be implemented in software, rather than by manual search.

19. To the extent that “standard search logic” is considered to be consistent with some degree of periodic revision, the question arises how the “standard search logic” test should be applied to a financing statement that passes the test at one time (that is, the financing statement would be disclosed by a search against the debtor’s true name under the search logic applicable at that time),

Fourth, a search procedure cannot qualify as a “standard search logic” unless the result of the procedure is to identify the set (which might be empty) of financing statements on file that constitute hits for the search. The whole point of the “standard search logic” rule is to establish an objective procedure for determining whether a given financing statement is sufficient. A procedure that does not identify which financing statements are hits and which are not is alien to the purpose of the rule. Unambiguous identification of hits is, of course, a familiar feature of search engines in general, use today (such as that of Google for search of the World Wide Web), and others used by the legal community (such as those employed by the Westlaw and Lexis services for their legal databases).<sup>20</sup>

Finally, a search procedure cannot qualify as a “standard search logic” unless it effects a meaningful search. For example, a search procedure that returns as hits, for any search string, all financing statements in the filing office’s database cannot rationally be treated as a “standard search logic.” If it were, then section 9-516(c) would validate a filing in that office that has any random string of characters at all in the debtor’s name field. Slightly less extreme would be a search procedure that returns as hits all financing statements in the database on which the debtor’s name has the same first letter as the first letter of the search

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but fails the test at a different time (that is, the financing statement would not be disclosed by a search against the debtor’s true name under the different search logic applicable at that different time). If a financing statement fails the test when filed but passes the test at a later time, no reason is apparent to deny the financing statement effectiveness as of the later time. More problematic is the case of a financing statement that passes the test when filed but later fails the test. It is at least arguable that such a financing statement should be treated as still effective, on the ground that in other settings Article 9 validates a financing statement that is effective when filed but that cannot be found by a later searcher due to action or inaction by the filing office. *See* U.C.C. § 9-517 (2011) (effectiveness of a filed financing statement is not affected by failure of the filing office to index it correctly); *id.* § 9-523, cmt. 8 (“The failure of the filing office to comply with performance standards, such as [section 9-523(e)], has no effect on the private rights of persons affected by the filing of records.”). Resolution of a case involving a change in search logic is, however, likely to be dominated by the practical difficulty of reconstructing the search logics employed by the filing office in the past.

20. In the course of drafting the 1998 revision of Article 9, the drafting committee took note of the fact that some filing offices’ search reports would divide the results into two categories, as follows: financing statements reported “above the line” are thought to match the name submitted, whereas those reported “below the line” consist of near misses that the filing office thought may be of interest to the searcher. *See* October 1997 Draft, *supra* note 12, § 9-506, Discussion Question. Confusion could arise with regard to whether items reported “below the line” count as hits under the “standard search logic” test. A clear statement by the filing office on the report should dispel any confusion. The issue has largely faded away, apparently because few state filing offices now issue search reports in which there is any reasonable doubt as to which reported items are hits. *But see In re Augusta Tissue Mill, LLC*, 63 U.C.C. Rep. Serv. 2d (West) 882, 886–87 (Bankr. M.D.N.C. 2007) (denying motion to lift stay because of doubt as to perfection, due in part to uncertainty on this point with regard to a search report prepared by the Georgia central indexing office).

string. As with the preceding example, such a procedure should not qualify as a “standard search logic” because it does not effect a meaningful search. It gives the searcher no practically useful information about which filings in the filing office relate to his debtor.

A filing office’s search procedure must have the foregoing attributes in order rationally to be considered a “standard search logic.” As section 9-506(c) recognizes, not every filing office need have such a search procedure. In such a filing office subsection (b) applies, and that provision has no tolerance for any deviation whatever from the debtor’s true name. It is important to appreciate just how tightly that rule turns the screw on filers. The common run of name-error cases involve deviations from an exact match that amount to gross blunders (at least by the standards of Article 9 cognoscenti): misspellings, omitted words, or use of trade names. Damning such blunders is one thing, but subsection (b)’s requirement of an exact match goes far beyond that. For example, against a debtor whose true name is “Microsoft Corporation” a financing statement naming “Microsoft Corp.” would be ineffective. Likewise ineffective would be a filing against “A&W CONCENTRATE COMPANY”, without a space before or after the ampersand, if the debtor’s true name included such spaces—or *vice versa*. Or, to take the result of a search I assigned to my students, the true name of the owner of a certain professional sports team, as shown on its certificate of limited partnership, is of the form “Alpha Beta, Ltd.”. Searches in the proper filing office disclosed, among other financing statements, one against “ALPHA BETA LTD” and another against “Alpha Beta, LTD”. Even giving the filers the benefit of the doubt that a capital letter is equivalent to lower case, the omission of the comma and the period in the first, and of the period in the second, is fatal to each.

Deviations from an exact character-by-character match are commonplace in practice. Carl Ernst analyzed the incidence of debtor name errors in the central filing offices of California, Florida and Vermont for the years 2002 through 2006.<sup>21</sup> Even excluding individual debtors, as to whom calculation of error rates is clouded by the fuzziness of the definition of the true name of an individual under then-current Article 9, and considering only registered organizations, whose names are precisely defined, he found that approximately 50% of those financing statements failed the test of character-by-character accuracy that section 9-506(b) mandates. Even if errors in punctuation are ignored (for which there is no warrant in the text of that provision or in the policy that motivated its adoption), the failure rate was still approximately 33%. No doubt many

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21. See *The Debtor Name Disaster*, THE UCC FILING FLASH (The UCC Guide Inc., Clarksville, N.Y.), Dec. 2006, at 1–2.

of those errors are gross blunders, but no doubt many are subtle deviations akin to those illustrated in the preceding paragraph.

Whether a given filing office has a “standard search logic” is thus critical to determining the effectiveness of financing statements filed in that office. The attributes of a “standard search logic” are neither exotic nor exacting. But, as section 9-506(c) recognizes, it cannot be assumed that every filing office will qualify. County-level recording offices, at which fixture filings and other real-property-related financing statements are filed, differ widely in operational procedures, and those procedures are not easy to ascertain. Opinions differ among search professionals as to whether any significant number of county-level offices have search procedures that qualify as “standard search logic.”<sup>22</sup> All state-level filing offices have computerized their indexes at least to some degree, and one would expect that the computerized searching this allows typically would give rise to a “standard search logic” for that filing office. But at least one state-level filing office that has computerized its search operations does not have a “standard search logic”—though courts have yet to realize that fact. That state is Florida.

The operation of Florida’s central filing office has been outsourced to a private firm since 2001. The filing office maintains a website at which its database of financing statements is freely searchable.<sup>23</sup> That is a necessity, not a luxury, for Florida’s enactment of Article 9, unlike the official text, does not require the filing office to respond to search requests, and the filing office has announced that it will not do so.<sup>24</sup> To search against a debtor name in that database, one first chooses between two search modes, “compact” and “actual.”<sup>25</sup> The difference between the two search modes is described on the website, with “compact” declared, on the authority of the Florida Department of State, to be the

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22. This according to informal inquiry and hearsay; there seems to be no formal study.

23. FLORIDA SECURED TRANSACTION REGISTRY, <http://www.floridaucc.com/UCCWEB/> (last visited Apr. 10, 2012). Florida’s enactment of Article 9 defines Florida’s central filing database as the “Florida Secured Transaction Registry.” FLA. STAT. § 679.527 (2011).

24. Compare U.C.C. § 9-523(c) (2011) (requiring filing office to respond to search request) with FLA. STAT. § 679.523 (2011) (not enacting that subsection). The filing office vendor announced that “[e]ffective Sunday, April 17, 2005, FloridaUCC, Inc. staff will no longer perform searches of the Florida Secured Transaction Registry.” *UCC News*, FLORIDA SECURED TRANSACTION REGISTRY, <http://www.floridaucc.com/UCCWEB/news.aspx/> (last visited Apr. 10, 2012).

25. *UCC Search*, FLORIDA SECURED TRANSACTION REGISTRY, <http://www.floridaucc.com/UCCWEB/search.aspx> (last visited Apr. 10, 2012). The “compact” and “actual” search modes are both offered in three versions, namely “filed,” “lapsed” and “filed/lapsed,” among which one must choose to perform a search. The website does not appear to state which of “filed” or “filed/lapsed” should be used in a search under “standard search logic,” but that should make no difference so long as both versions contain the same “filed” data and the filings tagged as “lapsed” (which are identified as such in the search results) have indeed lapsed.

“standard search logic.”<sup>26</sup> Whichever mode is chosen, a search against a given character string produces a webpage, ordered alphabetically, or nearly alphabetically (possibly with differences in order depending upon which search mode is chosen), having 20 entries, with the exact or nearest match at the top of the page. Links to “previous” and “next” pages appear at the top of that page, and permit one to proceed to other webpages preceding or succeeding in alphabetical (or near-alphabetical) order, a process that can be repeated indefinitely to scroll through the entire database.

The important point is that the search does not result in the identification of any particular entries as hits. The search returns the filing office’s entire index. It merely places the closest match at the top of the first page shown to the searcher.

It is a usable system, but it is not a “standard search logic” as that term is used in section 9-506(c). As discussed previously, the whole point of the statutory concept of “standard search logic” is to direct courts to make use of the filing office’s objective procedure for identifying hits, if the filing office has such an objective procedure. The Florida filing office does not, because its procedure does not identify which filings constitute hits. If the Florida procedure were considered to be a “standard search logic,” then every filing in its database would suffice, because every filing is returned by the search. That would be absurd. The only alternative that section 9-506 provides (and Florida has not altered the uniform text of that section) is to conclude that the filing office has no “standard search logic,” with the result that, pursuant to section 9-506(b), there is zero tolerance for any deviation from the character string defined by 9-503 to be the debtor’s true name.

To be sure, the Florida Department of State has declared that a search in “compact” mode constitutes the “standard search logic” for the Florida central filing office. But an administrative declaration cannot change the fact that the Florida search procedure does not do what section 9-506(c) requires a “standard search logic” to do. Abraham Lincoln’s observation that a calf has four legs even if you call a tail a leg, because calling a tail a leg doesn’t make it a leg, comes to mind.<sup>27</sup> Even

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26. “The search feature called a ‘Compact Name’ has been designated by the Florida Department of State as the standard search logic for searching the records in the Registry.” *Terms of Use*, FLORIDA SECURED TRANSACTION REGISTRY, <http://www.floridaucc.com/UCCWEB/downloadsdisclaimer.aspx> (last visited Apr. 10, 2012). The search page, at <http://www.floridaucc.com/UCCWEB/search.aspx>, provides a link to “see the details of the search logic used on this website,” and that link accesses a short document entitled “UCC Debtor Name Compaction and Search Rules.” That document can be accessed directly at [http://www.floridaucc.com/UCCWEB/forms/UCC\\_Debtor\\_Name\\_Compaction\\_and\\_Search\\_Rules.pdf](http://www.floridaucc.com/UCCWEB/forms/UCC_Debtor_Name_Compaction_and_Search_Rules.pdf).

27. Unlike many anecdotes attributed to Lincoln, this one is reasonably well attested. *See*

that analogy does not capture fully the meaninglessness of the Florida Department of State's declaration, for a legislature in its wisdom, or an administrator exercising delegated authority, might indeed insist that a tail be counted as a leg for some defined purpose, if so moved. Closer analogues are the Indiana legislature's famous bill declaring the value of pi to be 3.2,<sup>28</sup> and King Canute's legendary command to the tide. The dogs may bark, but the caravan moves on.

Courts have not yet realized this fact about Florida's central filing system. The two reported cases to date that have considered debtor name errors in financing statements filed in the Florida central filing office under post-1998 Article 9 ignored what the statute says. Both cases took it for granted that Florida's search procedure is a "standard search logic"; then, faced with the fact that it does not satisfy the necessary function of identifying hits, the courts proceeded to make up their own rules on what constitutes a hit. Predictably, the two courts made up different rules. That approach is exactly what the 1998 revision repudiated.

Thus, *In re Summit Staffing Polk County, Inc.*<sup>29</sup> applied the subjective "not seriously misleading" test of pre-1998 law, not recognizing that the 1998 revision had abolished the applicability of that test to debtor names. In the later case of *In re John's Bean Farm of Homestead, Inc.*,<sup>30</sup> the judge shunned the subjectivity of *Summit Staffing* and concluded that only the 20 items displayed on the webpage initially displayed in a search using the Florida search tool are hits. Uneasy with that conclusion, however, she hedged it as follows:

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George W. Julian, *Lincoln and the Proclamation of Emancipation*, in REMINISCENCES OF ABRAHAM LINCOLN 227, 241 (Allen Thorndike Rice ed., Harper & Bros. new & rev. ed. 1909).

28. H.B. 246, 60th Gen. Assem., Reg. Sess. (Ind. 1897). See PETR BECKMANN, A HISTORY OF  $\pi$  [Pi] 174–77 (3rd ed. 1976).

29. 305 B.R. 347 (Bankr. M.D. Fla. 2003). The court stated as follows:

In Florida, where the results of a search produce an alphabetical listing of debtors, a searcher is still required to use reasonable diligence in examining the results of the search. If a reasonably diligent searcher would find the erroneous financing statement among the results of a proper search, then notice of the financing statement has been provided. Such a financing statement meets the requirements of [section 9-506(c)] and is not seriously misleading.

*Id.* at 355. In that case, the debtor was a corporation whose true name was "Summit Staffing of Polk County, Inc." and the filing in question named "Summit Staffing". Using the Florida search tool, a search against the debtor's true name resulted in a webpage listing 20 items, none of which was the filing in question. The filing in question appeared on the webpage of 20 items generated by clicking the "previous page" link on that initial results page. *Id.* at 349–50. The court held that the filing was sufficient.

30. 378 B.R. 385 (Bankr. S.D. Fla. 2007). In that case the debtor was a corporation whose true name was "John's Bean Farm of Homestead, Inc." and the filing in question named "John Bean Farms, Inc." The filing in question was about 1200 entries distant from the first item on the initial results page and thus was located about 60 20-item webpages away from it. The court held that the filing was not sufficient.

[I]f I am incorrect, and in fact, the Florida search result includes more than the initial page displayed, then, in order to interpret [section 9-506] so as to avoid an absurd result, I would be compelled alternatively to hold, as did Chief Judge Glenn [in *Summit Staffing*], that there is a reasonable limit to the search, which I find is no more than one page “previous” or “next” from the initial result screen.<sup>31</sup>

Not only do both of the rules suggested in *John’s Bean Farm* contravene the statute, neither is workable. Each is both overbroad and underbroad. To treat as hits the 20 items displayed on the initial results screen, or the 60 items displayed on that screen plus the two adjacent screens, validates all of those financing statements, which would mean validating financing statements that may deviate enormously from the debtor’s true name. Conversely, the “initial results screen” test (for example) would invalidate filings shown on later results screens even if they were completely accurate, which would occur if the debtor has more than 20 filings against it.

Courts will in time, no doubt, realize that under post-1998 Article 9, a filing in the Florida central filing office, as in any other filing office that lacks a “standard search logic,” must set forth the debtor’s true name exactly, with no deviation whatever, in order to be effective. Users of the system must either reconcile themselves to that result, or take action to change it. Two possible courses of action suggest themselves to irreconcilables.

The best solution by far would be to induce the relevant filing office to adopt a search procedure that constitutes a “standard search logic” and that also, ideally, satisfies the Goldilocks criterion of being not too strict but not too lax.<sup>32</sup> Universal adoption of a reasonable “stan-

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31. *Id.* at 396.

32. Some filing offices evidently have search procedures that qualify as “standard search logic,” but that apply either the same exact match standard that section 9-506(b) ordains for filing offices that lack a “standard search logic,” or something only slightly more forgiving. Such a stern search logic satisfies the basic purpose of section 9-506(c) by providing an objective test for sufficiency, but the harsh price it exacts from filers, for whom any subtle deviation from exactness is fatal, is not offset by any practical benefit to searchers, who are not materially worse off under a more forgiving search logic. For cases invalidating financing statements for subtle deviations from the debtor’s true name in filing offices having an unforgiving “standard search logic,” see *In re C. W. Mining Co.*, 69 U.C.C. Rep. Serv. 2d (West) 830, 848–49 (Bankr. D. Utah 2009) (Utah central filing office; financing statement named “CW Mining Company”, true name was “C. W. Mining Company” (with periods and spaces)); *In re Jim Ross Tires, Inc.*, 379 B.R. 670, 675–79 (Bankr. S.D. Tex. 2007) (Texas central filing office; financing statement named “JIM ROSS TIRE INC”, true name was “Jim Ross Tires Inc”); *Tyringham Holdings, Inc. v. Suna Bros., Inc.* (*In re Tyringham Holdings, Inc.*), 354 B.R. 363, 364 (Bankr. E.D. Va. 2006) (Virginia central filing office; financing statement named “Tyringham Holdings”, true name was “Tyringham Holdings, Inc.”); *Host Am. Corp. v. Coastline Fin., Inc.*, 60 U.C.C. Rep. Serv. 2d (West) 120, 124–25 (Bankr. D. Utah 2006) (Utah central filing office; financing statement named “K W M Electronics Corporation” (with spaces between the first three letters), true name was either “K.W.M.

dard search logic” is the panacea that would cure most ills of the Article 9 filing system. Adoption by any given filing office would be applauded by users of the system. The difficulty, of course, is political. Among other things, state filing offices are chronically underfunded; county-level filing offices likewise, with the additional problems of their numbers and diversity.<sup>33</sup>

To the extent that the ideal solution cannot be realized, a second-best alternative would be to amend the relevant state’s enactment of Article 9 to change its tolerance for error in the debtor’s name in a filing made in an office that lacks a “standard search logic.” The 1998 revision is a vast unambiguous improvement over former law in regard to tolerance for error in the debtor’s name in a filing office that has a “standard search logic.” But the wisdom of the 1998 change in the tolerance for error in a filing office that lacks a “standard search logic,” from the former “not seriously misleading” standard to the current exact match requirement, is doubtful. Awareness of this point may be clouded by the fact that the exact match standard imposed by section 9-506(b) serves two quite different functions. In the case of a filing in an office that has a “standard search logic,” both subsections (b) and (c) of section 9-506 apply: subsection (c) validates the filing if it passes the “standard search logic” test, and subsection (b) completes the rule by invalidating the filing if it fails the “standard search logic” test. The exact match requirement imposed by subsection (b) is unnecessary in that setting. By contrast, in the case of a filing in an office that lacks a “standard search logic,” only subsection (b) applies. And it is by no means clear that the zero tolerance prescribed by subsection (b) is better than former law in that setting.

Users’ opinions on that point are likely to vary with the nature of their practice. The zero tolerance rule would naturally appeal to high-end transactional lawyers, whose deals are large enough to support extreme care at every step of the filing process, as by ordering a fresh copy of the debtor’s articles of incorporation to confirm the exact placement of every character in the debtor’s true name, and by having the financing statement prepared by professionals and double-checked by lawyers. Yet even such a user, reflecting on the fatal difference between “Microsoft Corporation” and “Microsoft Corp.” and the fatal conse-

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Electronics Corporation” (with periods instead of spaces) or “K. W. M. Electronics Corporation” (with periods and spaces)).

33. Yet hope springs eternal. See Margit Livingston, *A Rose by Any Other Name Would Smell as Sweet (or Would It?): Filing and Searching in Article 9’s Public Records*, 2007 BYU L. REV. 111, 154 (2007) (urging amendment of Article 9 to require filing offices to adopt a “uniform, flexible search logic”). If only it were that easy.

quence of inexact use or nonuse of spaces around an ampersand, might doubt the wisdom of the exact match requirement.

A collateral benefit of returning to the “not seriously misleading” standard for errors in a filing office that lacks a “standard search logic” is that it would patch a gap in Article 9 with respect to debtor names having characters that are not in the character set supported by the filing office. A name might use only one or two such characters (“Gabriel Garcia Márquez”, “Øle & Lena’s Café, Inc.”), or it might be composed entirely of such characters (such as a name in Japanese kanji characters or in Arabic script). Filing offices differ in the character sets they support, and in how they deal with financing statements in which the debtor’s name includes unsupported characters. Some may reject the financing statement, particularly if the name is composed mostly or entirely of unsupported characters. If the filing office accepts the financing statement, different offices take different approaches to indexing it: for example, by omitting the unsupported character (“Mrquez”), or by replacing it with a space (“M rquez”), or by replacing it with the filing office’s idea of the closest character in the supported set (in which case “Márquez” and “Øle” would likely be indexed as “Marquez” and “Ole”).<sup>34</sup>

Article 9 does not cope well with such situations. The financing statement must set forth the debtor’s true name, but if the debtor’s true name is composed partly or entirely of unsupported characters, the filing office might well reject a filing that uses it. In such a case the filer’s best course would seem to be to transliterate the debtor’s name into supported characters in order to get the filing accepted.<sup>35</sup> Unfortunately, Article 9 does not clearly support the effectiveness of such a transliterated financing statement.<sup>36</sup>

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34. For a discussion of filing office practices pertaining to supported character sets, see Memorandum from the Joint Task Force on Filing Office Operations & Search Logic to Lynn Soukup, Chair of the Comm’l Fin. Comm., & Penelope Christophorou, Chair of the Unif. Comm’l Code Comm., FOOSL Report on Debtor Name Indexing: Special Characters and Field Lengths (Aug. 5, 2009), available at the ULC’s archive site, *supra* note 12.

35. The fact that there is typically no method of transliteration that is both universally accepted and algorithmic should not be overlooked. For an amusing and instructive illustration of the impossibility of consistently transliterating Arabic names into the Latin alphabet, by no less an Arabist than Lawrence of Arabia, see the “Preface by A.W. Lawrence” to T. E. LAWRENCE, *THE SEVEN PILLARS OF WISDOM* (Anchor Books ed. 1991) (1926, 1935).

36. If a filer tenders a financing statement that sets forth the debtor’s true name using unsupported characters and the filing office rejects it for that reason, section 9-516(d) arguably may apply, and that provision would perfect the filer at least against the debtor’s bankruptcy trustee. However, section 9-516(d) would apply only if the filing office’s rejection is considered to be unjustified under section 9-516, and it would be plausible to conclude that rejection is justified under section 9-516(c)(1) (pertaining to information that the filing office “is unable to read or decipher”). Furthermore, even if section 9-516(d) is considered to apply, it would not generally perfect the filer as against later secured creditors or buyers.

Revising section 9-506 to return to the “not seriously misleading” standard for deviation from the debtor’s true name in the absence of a “standard search logic” would provide a clear way for a court to navigate to the sensible result in such cases. Specifically, even if the filing office has a “standard search logic” for run-of-the-mill filings, the filing office could reasonably be said to lack a “standard search logic” for searches against a name that contains unsupported characters. A transliterated financing statement would not show the debtor’s true name, but the transliterated name could reasonably be viewed as a deviation from the debtor’s true name that is “not seriously misleading,” and hence sufficient.

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This essay proposes that a state having a filing office that lacks a “standard search logic,” and that cannot be induced to adopt one, should consider amending its enactment of Article 9 to tolerate errors in the debtor’s name in a filing made in that office under the former “not seriously misleading” standard, rather than the zero tolerance rule that Article 9 now imposes.

This proposal is made gingerly. Intractable problems often come to attract solutions that make the situation worse. Attainment of certainty in the Article 9 filing system is intractable, and the quest for it has already attracted its share of dubious solutions.<sup>37</sup> Nonuniform amendments merit special skepticism; for uniformity is precious. Moreover, changes made without the benefit of the official UCC drafting process, which brings to bear great substantive and drafting expertise, are all too apt to be ill thought out and poorly drafted. The nonuniform provisions adopted by some states in the last decade that attempted to define the name of an individual debtor, to which the 2010 amendments were a defensive reaction, are an instructive example of what not to do.<sup>38</sup> You have been warned.

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37. The “dubious solution” referred to is the “Alternative A” version of section 9-503 as amended in 2010, pertaining to the name of an individual debtor for financing statement purposes. The story is well told in Sigman, *supra* note 9.

38. See Sigman, *supra* note 9, at 457–58, 467–68.

**Appendix: Section 9-506 (1998)<sup>39</sup>****Section 9-506. Effect of Errors or Omissions.**

(a) **[Minor errors and omissions.]** A financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.

(b) **[Financing statement seriously misleading.]** Except as otherwise provided in subsection (c), a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a) is seriously misleading.

(c) **[Financing statement not seriously misleading.]** If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a), the name provided does not make the financing statement seriously misleading.

(d) **[“Debtor's correct name.”]** For purposes of Section 9-508(b), the “debtor's correct name” in subsection (c) means the correct name of the new debtor.

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39. Section 9-506 was not altered by the 2010 amendments to Article 9.