Circuit Court for Montgomery County
Case No.: 441351V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3379

September Term, 2018

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SEAN GOURLAY, *et al.*

v.

BRIAN BUCHNER, *et al.*

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Leahy,
Gould,
Moylan, Charles E.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Gould, J.

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Filed: August 27, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The sale of a business can be a complicated transaction with many moving parts. That's particularly the case when the buyer is purchasing a business with borrowed funds; even more so when there are multiple lenders; and even more so if one of those lenders is the seller. The interested parties—the seller, buyer, lenders, and guarantors—pay close attention to the price and terms of the deal, and all have their own interests to protect. Those interests are frequently not aligned.

The buyer, for example, wants to pay as little as possible; the seller wants to be paid as much as possible. But the buyer may agree to pay more, or the seller may agree to receive less, in return for more favorable terms. For example, if a portion of the price will be paid to the seller over time, the seller may be willing to accept a lower overall price in return for a larger up-front payment. And vice-versa.

The lender, of course, wants to be fully paid per the terms of the loan, and, therefore doesn't want the buyer/borrower to overpay for the business. Lenders also want security for the loan in case the business falters and the borrower defaults. That could include collateral to secure the loan and/or personal guarantees.

If there are multiple lenders, each lender would be concerned—in the event of a borrower's default—about competing with the other creditors for a limited pool of assets, or that another creditor would take action against the borrower that could precipitate a bankruptcy that could doom any chance of recovery. Thus, lenders will often come to an agreement—sometimes called a "subordination agreement"—addressing the priority of the right to receive payments, restrictions on taking action to enforce the borrower's obligations, and other related matters.

The foregoing is an over-simplification of a complicated transaction, but it illustrates why transactions involving the sale of a business usually consist of multiple contract documents among the various interested parties. Such documents are the mechanism by which the risks, obligations, and rights in a commercial transaction are allocated among the parties. *Mass Transit Admin. v. Granite Constr. Co.*, 57 Md. App. 766, 776 (1984). For example, the seller and buyer will enter into a purchase and sale contract, and if seller-financing is involved, a promissory note and personal guaranty are often included among the contract documents. The lender and buyer will enter into a loan agreement, which will, in turn, require other agreements with or from the borrower such as promissory notes, pledges of collateral, and personal guarantees from the buyer's principals. And, because of the entangled nature of the allocation of risks and obligations across the various documents, it is not uncommon for some (or even all) of the documents to cross-reference or incorporate one another in some fashion. Hence, the canon of contract interpretation that multiple documents arising from a single transaction should be construed harmoniously.

In the sale of the business at the heart of this case, $4,000,000 of the $6,000,000 purchase price was financed by a commercial bank and $1,000,000 was financed by the sellers. The principals of the buyer personally guaranteed both loans. The bank and the sellers entered into a subordination agreement that prohibited the sellers from enforcing the buyer's promissory notes unless certain conditions were met, one of which was that the bank had to be fully repaid on all of its loans to the buyer. The buyer stopped making payments to the seller, prompting the seller to file a lawsuit in the Circuit Court for

Montgomery County, Maryland. In their defense, the buyer and its principals, who had guaranteed the buyer's obligations, invoked the subordination agreement's restrictions on the seller's rights to receive payment and enforce the promissory notes. After a three-day trial, the trial court found that the buyer and guarantors did not have standing to invoke the subordination agreement's restrictions, and entered judgment in favor of the sellers. One of the guarantors appealed.

For the reasons that follow, we shall reverse the judgment against the guarantor.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Albert Winfield and his wife, Katherine Winfield (the "Winfields") together owned approximately 76 percent of the issued and outstanding shares of common stock of Power Services, Inc. ("PSI" or the "Company"), an electrical contractor doing business in the mid-Atlantic region and internationally.[1]

### *The Stock Purchase Agreement*

In 2013, the Winfields sold their stock in PSI to Gourley Buchner JV, LLC ("GBJV") pursuant to a Stock Purchase Agreement dated October 10, 2013 (the "SPA"). The principals of GBJV were Brian Buchner and Sean Gourlay.

[1] The remaining 24 percent was owned in equal shares by six individuals, the identities of whom are not relevant to this appeal.

The purchase price under the SPA was $6,000,000.[2] GBJV paid $5,000,000 of the purchase price with borrowed funds, specifically, $4,000,000 from Access Bank (the "Bank") and two loans totaling $1,000,000 from the Winfields.

The SPA was a sophisticated contract that contained representations by the Winfields and GBJV as well as conditions precedent to the parties' obligation to close the transaction. One of the conditions precedent to GBJV's obligation to close was that it "shall have obtained bank financing to fund the Purchase Price hereunder on such terms as are satisfactory to the Buyer." GBJV had the right to terminate the SPA if it didn't obtain such financing.

*The Winfields' Loan*

The loans from the Winfields were evidenced by two promissory notes—one each payable to Mr. Winfield and Mrs. Winfield—in amounts of $899,000 and $101,000, respectively (individually, a "Note" and together, the "Notes"). The interest rate on the loans was 3.25 percent, compounded annually. The maturity date for the Notes was October 31, 2020. Commencing on November 30, 2015, the Notes required 60 monthly payments of principal and interest, starting November 30, 2015. The monthly payment on the Note to Mr. Winfield was $17,324.57; the monthly payment on the Note to Mrs. Winfield was $1,946.70.

[2] Under the SPA, the purchase price was subject to various potential adjustments, none of which are relevant here.

The Notes referenced the SPA several times, including in a clause stating that the Note was "made pursuant to the [SPA]." In addition, both Notes contained the following legend—bolded and capitalized—at the top of the first page:

> **THIS NOTE IS SUBJECT TO THE TERMS AND CONDITIONS OF THAT CERTAIN SUBORDINATION AGREEMENT DATED AS OF OCTOBER 31, 2013 BY AND AMONG ACCESS NATIONAL BANK, BORROWER AND HOLDER. THE SUBORDINATION AGREEMENT CONTAINS PROVISIONS RESTRICTING, AMONG OTHER THINGS, CERTAIN PAYMENTS AND THE EXERCISE OF CERTAIN RIGHTS AND REMEDIES BY THE PARTIES HERETO.**

Each Note also contained a personal guaranty, signed by Mr. Gourlay and Mr. Buchner (together, the "Winfield Guarantors"), stating:

> The undersigned hereby, jointly and severally, unconditionally and irrevocably guarantee to Holder the payment of all obligations and liabilities of Borrower hereunder, and, as payment guarantor, hereby waives presentment for payment, demand for payment, notice of non-payment and dishonor, protest and notice of protest, and all defenses ordinarily available to payment guarantors under applicable law other than payment in full. The undersigned assents to and agrees to be bound by all of the terms and provisions of this Commercial Promissory Note.

*The Bank Loan*

The loan from the Bank was evidenced by a Loan and Security Agreement dated October 30, 2013 (the "Loan Agreement"), along with a variety of other loan documents (collectively, the "Loan Documents"). The parties to the Loan Agreement were the Bank, GBJV, and PSI.[3]

[3] GBJV and PSI were defined in the Loan Agreement as the Borrowers. For ease of reference, we shall do the same.

The Loan Agreement contemplated four credit facilities: (1) a $4,000,000 term loan to fund GBJV's purchase of the Winfields' stock; (2) a $3,000,000 revolving line of credit for PSI, based on a percentage of receivables meeting certain defined criteria; (3) a $320,000 supplemental term loan to pay off PSI's existing secured loans; and (4) a $500,000 line of credit for PSI's purchase of equipment.[4]

The Loan Agreement further required Mr. Buchner and Mr. Gourlay and their respective wives to sign personal guarantees with respect to all of GBJV's obligations to the Bank (the "Bank Guarantors"). The Bank Loan was collateralized with, among other things, the Bank Guarantors' membership interests in GBJV, GBJV's stock in PSI, and certain real properties owned by the Bank Guarantors.

One of many conditions to the Bank's obligation to make the $4,000,000 term loan was its right to receive and approve the SPA and other documents regarding the underlying stock purchase transaction. Another condition was the execution of the Subordination Agreement identified in the legend of the two Notes.

The Loan Agreement also defined the circumstances—called "Events of Default"—under which the Bank was entitled to exercise its numerous rights and remedies under the Loan Documents. Such remedies included accelerating all amounts due for each of the four credit facilities and taking control and selling the collateral pledged by GBJV, PSI, the Buchners, and the Gourlays.

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[4] The four credit facilities are collectively referred to herein as the "Bank Loan."

The Events of Default included both monetary and non-monetary breaches or infractions. An example of a monetary breach would be the failure to make any payment due to the Bank. An example of a non-monetary breach would be a violation of GBJV's covenants in the Loan Agreements, including its agreement not to "make or permit any payment" to the Winfields that was not expressly permitted under the Subordination Agreement. Another non-monetary Event of Default by Borrowers under the Loan Agreement was the *Winfields'* breach of the Subordination Agreement.

*The Subordination Agreement*

The parties to the Subordination Agreement were defined as Mr. Winfield, Mrs. Winfield, and the Bank. In addition, GBJV and PSI signed the Subordination Agreement under the following prefatory statement: "The undersigned approves of the terms of this Agreement."

Under the Subordination Agreement, the Winfields agreed that their rights under the Notes would take a back seat to the Bank's rights with respect to any credit facility provided to Borrowers, present or future. In addition, the Winfields agreed that their right to receive payment under the Notes was subordinated to all obligations of Borrowers and the Bank Guarantors to the Bank "now existing or hereafter arising," including "without limitation" any obligations under the Loan Agreement. The Winfields also agreed not to accept any payments on the Notes, with one exception: GBJV was allowed to make, and the Winfields were allowed to accept, regularly scheduled payments under the Notes provided there was no Event of Default under the Loan Agreement and that the payment would not trigger an Event of Default. The Subordination Agreement prohibited the

Winfields from enforcing any rights under the Notes or taking any legal action against Borrowers or the Winfield Guarantors until all of the credit facilities to the Bank were fully paid and the Bank had no further obligations to make any additional loans to Borrowers.

Section 8 of the Subordination Agreement required the Winfields to "affix a legend to the [Notes] stating that the [Notes] are subject to the terms of the [Subordination Agreement]."

Under section 1 of the Subordination Agreement, the Winfields "acknowledge[ed] and consent[ed] to . . .the entering into of the Loan Agreement and all documents in connection therewith" by Borrowers and the Bank Guarantors.

The Subordination Agreement contained various provisions that protected the Bank in the event that the GBJV, PSI, Mr. Buchner, or Mr. Gourlay went into bankruptcy, were declared insolvent by a court, or suffered any other specifically enumerated adverse financial event. For example, the Winfields agreed that the Bank would make all decisions for the Winfields (as the latter's attorney-in-fact) in connection with any such proceedings. In other words, the Winfields agreed that in the event of any non-payment of any of GBJV's, PSI's, Mr. Buchner's, or Mr. Gourlay's obligations to either the Winfields or the Bank, the Bank would have the sole authority to determine for itself and the Winfields what, if any, course of action would be taken, and the Winfields' hands would be tied.

Finally, section 13 stated that the Subordination Agreement was "solely for the benefit" of the Winfields and the Bank, and not for the benefit of GBJV, PSI, Mr. Gourlay, Mr. Buchner, or anyone else.

*Buyer's Default on the Bank Loan*

By November 2015, GBJV and PSI were in default under the Loan Agreement for breach of non-monetary covenants. This default prompted the Bank and Borrowers to enter into a forbearance agreement. The Bank and Borrowers also amended the Loan Agreement to, among other things, permit GBJV to continue making payments to the Winfields notwithstanding Borrowers' breaches.[5] Thus, even though it was in default with the Bank, GBJV was permitted to and did make eight payments under the Notes between December 7, 2015 and June 15, 2016.

Several months later, Borrowers were in default once again and GBJV discounted its payments under the Notes. The cessation of GBJV's payments to the Winfields coincided with a letter from the Bank to the Winfields on July 26, 2016 explaining that Borrowers had breached the Loan Agreement. The letter referred to a "failure to pay monetary obligations under the Loan Agreement when due, and failure to maintain timely delivery of financial and other reports as required under the Loan Agreement." The letter cited, among other things, the provisions of the Subordination Agreement that prohibited Borrowers and the Winfield Guarantors from paying the Winfields, and also prohibited the Winfields from demanding or accepting any payments under the Notes if there was a default under the Bank Loan. The letter demanded that the Winfields not demand or

[5] The Loan Agreement underwent a series of other amendments over the ensuing years. The amendments altered various loan provisions, including increasing borrowing limits and extending maturity dates, among other matters.

receive any further payments under the Notes, and advised that the Bank reserved all rights under the Subordination Agreement.

*Bank Settlement Agreement and Mr. Buchner's Exit*

On May 26, 2017, the Bank, Borrowers and the Bank Guarantors entered into a Settlement and Security Agreement (the "Bank Settlement Agreement"). Under the agreement, Borrowers and the Bank Guarantors stipulated to the various monetary and non-monetary defaults as well as the outstanding balances of the four credit facilities. The agreement required certain up-front payments by Borrowers or Bank Guarantors, the Guarantors to liquidate collateral securing the loans, restructured loan terms, among other things. The agreement also contained a release by the Bank of the Borrowers and Bank Guarantors provided certain conditions were met.

Closing on the Bank Settlement Agreement was initially scheduled for the end of June, but was postponed until October 6, 2017. At that time, the Borrowers and Bank Guarantors reached their own agreement ("PSI Settlement Agreement") under which, among other things, Mr. Buchner resigned from his positions with Borrowers and agreed to make certain payments. In return, Mr. Buchner received, among other things, indemnifications from Borrowers and GBJV from claims by the Winfields or from any debts or obligations of GBJV or PSI.

*The Winfields' Collection Efforts*

On November 1, 2017, due to GBJV's cessation of payments, the Winfields sent separate default notices to Mr. Gourlay and Mr. Buchner, purporting to accelerate payment

of the entire outstanding balances under their respective Notes. Mr. Winfield's default notice stated:

> Dear Sean and Brian:
> By this notice, I am making formal demand for payment by you for the full unpaid balance under the default clause of this note, together with all accrued interest, within ten days of receipt of this letter.
>
> The total amount due is One Million One Thousand Three Hundred Nine Dollars ($1,001,309.00)
>
> Please note that the above amount does not include Collection Expenses incurred and due per note.
>
> Please contact me at the address below to initiate payment process.
>
> Albert E. Winfield

Ms. Winfield's notice differed only in the stated amount of the outstanding balance, which was $112,491.00.

GBJV's counsel responded to the Winfields on November 20, 2017 with a letter stating:

> I am in receipt of your November 1, 2017 letters wherein you demand payment of the full unpaid balance under the above referenced Commercial Promissory Notes. Please be advised that you are not currently entitled to demand or receive such amounts under the Commercial Promissory Notes.
>
> Pursuant to Section 3 of the Subordination Agreement dated October 31, 2013 among you, Access National Bank, and others, you agreed that "Creditor will not demand or receive from any Borrower or Guarantor (and such Borrower or Guarantor will not pay to Creditor) all or any part of the Subordinated Debt, by way of payment, prepayment, setoff, lawsuit or otherwise, nor will Creditor exercise any remedy with respect to any property of any Borrower or Guarantor, nor will Creditor accelerate the Subordinated Debt, or commence, or cause to commence, prosecute or participate in any administrative, legal or equitable action against any Borrower or Guarantor, until such time as (a) the Senior Debt has been fully paid in cash, (b) Bank has no commitment or obligation to lend any further funds to any Borrower,

> and (c) all financing agreements between Bank and any Borrower or Guarantor are terminated." These conditions have not been satisfied. Accordingly, you may not demand or be paid accelerated amounts under the Commercial Promissory Notes.

*The Lawsuit*

On December 15, 2017, the Winfields filed a two-count complaint in the Circuit Court for Montgomery County against GBJV, Mr. Gourlay, and Mr. Buchner (collectively, "Defendants"). Both counts were styled as breach of contract claims, with count one against GBJV to enforce the Notes, and count two against Mr. Gourlay and Mr. Buchner to enforce their guarantees.

Mr. Buchner filed a third-party complaint against PSI for indemnification against the Winfields' claims against him pursuant to the PSI Settlement Agreement. In addition, he filed a cross-claim against GBJV for indemnification, also pursuant to the PSI Settlement Agreement.

A three-day bench trial commenced on September 11, 2018. Under cross-examination, Mr. Winfield acknowledged that he didn't know whether GBJV's and PSI's obligations to the Bank were fully paid. He also confirmed that the Bank had never rescinded its July 26, 2016 letter.

At the close of the Winfields' case-in-chief, Defendants moved for judgment, arguing that the Winfields failed to make a prima facie case for breach of the Notes. They argued that the restrictions in the Subordination Agreement were incorporated into the Notes as conditions precedent to the Winfields' right to payment and to take enforcement action. They also contended that because those conditions precedent were not satisfied,

the Winfields were entitled to judgment as a matter of law. The Winfields, not surprisingly, opposed the motion with the same arguments they advance in this appeal, discussed below.

The court denied Defendants' motion for judgment. Defendants then put on their defense, followed by brief rebuttal case by the Winfields, followed by Mr. Buchner's brief case-in-chief on his indemnification claims against GBJV and PSI. The court then heard closing arguments, after which, it ruled from the bench. Ultimately, after observing the paucity of caselaw on the topic, the court concluded that GBJV and the Guarantors did not have standing to avail themselves of the restrictions imposed by the Subordination Agreement in defense of the Winfields' claims. The court grounded its decision on the following sentence in section 13 of the Subordination Agreement: "This Agreement shall remain effective until terminated in writing by Bank. This Agreement is solely for the benefit of [the Winfields] and Bank and not for the benefit of Borrowers, Guarantors or any other party."

After the court announced its decision, there was some post-trial wrangling over the Winfields' claim for attorneys' fees and the wording of the judgment in Mr. Buchner's favor on his indemnification claims. Ultimately, judgments were entered on December 11, 2018, as follows:

1) Judgment in favor of Mr. Winfield and against GBJV, Mr. Gourlay, and Mr. Buchner in the amount of $467,763.39;
2) Judgment in favor of Mrs. Winfield and against GBJV, Mr. Gourlay, and Mr. Buchner in the amount of $52,560;[6]

[6] The judgments in favor of Mr. Winfield and Mrs. Winfield shall be referred to as the "Winfield Judgments."

3) Judgment in favor of Mr. Buchner against GBJV and PSI in the amount of $520,325.09 on his indemnification claims, representing the combined amount of the judgments entered in favor of the Winfields (the "Indemnification Judgment"); and

4) Judgment in favor of Mr. Buchner against GBJV and PSI in the amount of $18,807.53 for reasonable attorney's fees and costs (the "Attorneys' Fees Judgment").

On December 20, 2018, Mr. Buchner moved for reconsideration as to the Indemnification Judgment.[7]

On January 9, 2019, GBJV, Mr. Gourlay, and PSI filed a notice of appeal, and Mr. Buchner did the same on January 16, 2019. These notices of appeal were premature because a timely motion for reconsideration under Rule 2-532, 2-534, or 2-535 tolls the commencement of the 30-day appeal period. Md. Rule 8-202(c); *Edery v. Edery*, 213 Md. App. 369, 383 (2013).

The court granted in part and denied in part Mr. Buchner's motion for reconsideration on February 5, 2019, which rendered the premature notices effective on that date. *Edsall v. Anne Arundel County*, 332 Md. 502, 508 (1993).

The Winfields filed a notice of cross-appeal on March 7, 2019.[8]

PSI filed a notice of cross-appeal on March 14, 2019.

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[7] Although Mr. Buchner prevailed on his claim for indemnification from the Winfield Judgments, the trial court added language in the judgment stating that he "may execute upon the judgment only to the extent that he has satisfied the [Winfield Judgments]." Mr. Buchner appealed from the Indemnification Judgment, claiming error in the trial court's inclusion of that restriction.

[8] The Winfields claimed error in the trial court's rejection of their request to accelerate the entire remaining balance of the Notes.

On August 16, 2019, a settlement was reached among PSI, GBJV, Mr. Gourlay, and the Winfields.

By the end of January 2020, PSI, GBJV, and Mr. Gourlay dismissed their respective cross-appeals and appeals.

On August 20, 2020, PSI and GBJV filed two motions, one to supplement the record on appeal with the August 2019 Settlement Agreement, and the other to strike the Winfields' cross-appeal. The latter motion became moot on August 25, 2020, when the Winfields filed a notice of dismissal of their cross-appeal.

By the time oral argument was held on this appeal, only Mr. Buchner's appeal remained, in which he presented us with the following questions:

> 1. Whether the Circuit Court erred by limiting the Indemnity Judgment to amounts actually paid by Mr. Buchner in satisfaction of the Winfield Judgments?
>
> 2. Whether the Circuit Court erred in holding that the Subordination Agreement did not preclude entry of the Winfield Judgments?

On November 30, 2020, PSI and GBJV moved to dismiss Mr. Buchner's appeal as to the first question presented. They argued that the Indemnification Judgment was fully paid, thus his appeal was moot. Mr. Buchner argued in his opposition that he remained at risk for future claims by the Winfields on the balance of the Notes that were not awarded as part of the judgments against him.

In our discussion below, we will first address the second question presented by Mr. Buchner, namely, whether the Winfield Judgments were precluded by the restrictions set forth in the Subordination Agreement. Because we find that the Winfield Judgments were

in error and must be reversed, we then explain why we vacate the Indemnification Judgment without reaching the first question presented.

## STANDARD OF REVIEW

Maryland Rule 8-131(c) provides:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witness.

The trial court's findings of fact "are not clearly erroneous as long as they are supported by any competent material evidence in the record." *Saxon Mortg. Servs., Inc. v. Harrison*, 186 Md. App. 228, 262 (2009). "The clearly erroneous standard . . . does not apply to a trial court's determinations of legal questions or conclusions of law based on findings of fact." *Webb v. Nowak*, 433 Md. 666, 676 (2013)(quotation omitted); *Turner v. Bouchard*, 202 Md. App. 428, 442 (2011). Additionally, the clearly erroneous standard "does not apply to a trial court's determinations of legal questions or conclusions of law based upon findings of fact." *Id.* (quoting *Garfink v. Cloisters at Charles, Inc.,* 392 Md. 374, 383 (2006)).

The interpretation of unambiguous contracts is a question of law that we review without deference. *Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232, 250 (2001). The determination of whether a contract is ambiguous is likewise a question of law which is reviewed without deference. *Calomiris v. Woods*, 353 Md. 425, 434 (1999) ("[T]he determination of ambiguity is one of law, not fact, and that determination is subject to *de novo* review by the appellate court."); *State Highway Adm. v. David A. Bramble, Inc.*, 351

Md. 226, 239 (1998) ("The question of whether a contract is ambiguous ordinarily is determined by the court as a question of law.").

## DISCUSSION

### I.

### THE PARTIES' CONTENTIONS

Mr. Buchner argues that the restrictions imposed by Subordination Agreement—including the right to accept or demand payment and to take action to enforce the Notes—were incorporated into the Notes. Consequently, he maintains that the restrictions constituted conditions precedent to the Winfields' right to demand payment or file a lawsuit to enforce the Notes, and that such conditions were not met. Mr. Buchner bases his argument primarily on the legend affixed at the top of both Notes.

The Winfields argue here, as they did in the circuit court, that GBJV did not have standing to enforce the Subordination Agreement, and therefore, could not rely on its restrictions to resist the Winfields' enforcement efforts. The Winfields acknowledge the presence of the legends on the Notes, but liken them to recitals in a contract that give way to any inconsistent provisions in the substantive provisions of the Notes, which the Winfields contend unconditionally obligated GBJV to make all payments set forth in the Notes. In addition, the Winfields maintain that even if the legend incorporated by reference the Subordination Agreement, section 13 of the Subordination Agreement—which explicitly states that only the Bank and the Winfields may benefit from the Subordination Agreement—was incorporated into the legend as well. Contending that "[a]ll roads that

lead to the Subordination Agreement also lead to Section 13[,]" the Winfields argue that nobody other than the Winfields and the Bank may benefit from the restrictions in the Subordination Agreement.

Finally, the Winfields contend that under the SPA, the Winfields only agreed to be subordinated to at most, $4,300,000 in Bank debt, and that GBJV and PSI agreed to limit their borrowing to $7,820,000. In that regard, the Winfields argue that the subordination obligations were fulfilled because the Bank had been paid back more than $4,300,000, and the borrowing limit of $7,820,000—which the Winfields characterize as a condition precedent to the subordination obligation—was breached because PSI and GBJV together borrowed at least $9,900,000.

## II.

## CONTRACT ANALYSIS

This case requires us to construe provisions in multiple documents concerning the same transaction, particularly the Notes, Subordination Agreement, SPA, and the Loan Agreement. We apply the objective theory of contract interpretation to each of the contract documents, including the Notes. *Credible Behav. Health, Inc. v. Johnson*, 466 Md. 380, 393-94 (2019) (applying the objective theory of contract interpretation to a promissory note). "[W]hen the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed." *Taylor v. NationsBank, N.A.*, 365 Md. 166, 179 (2001). Under the objective approach, we are not concerned with the parties' subjective intentions, but rather "what a reasonable person in the position of the parties would have thought it meant." *Impac Mortg. Holdings, Inc. v.*

*Timm*, ____ Md. ____, No. 18 (Sept. Term 2020), slip op. at 7-8 (filed July 15, 2021) (internal citations omitted). "[W]e accord a word its usual, ordinary and accepted meaning unless there is evidence that the parties intended to employ it in a special or technical sense." *Clendenin Bros. v. U.S. Fire Ins. Co.*, 390 Md. 449, 459 (2006).

We construe the contract in its entirety, giving meaning to "every clause and phrase, so as to not omit an important part of the agreement." *Balt. Gas & Elec. Co. v. Com. Union Ins. Co.*, 113 Md. App. 540, 554 (1997); *DIRECTV, Inc. v. Mattingly*, 376 Md. 302, 320 (2003) ("This Court has long declined to unnecessarily read provisions of contracts as meaningless[.]"). "Where several instruments are made a part of a single transaction they will all be read and construed together as evidencing the intention of the parties in regard to the single transaction." *Rocks v. Brosius*, 241 Md. 612, 637 (1966); *see also Ford v. Antwerpen Motorcars Ltd.,* 443 Md. 470, 483 (2015)(loan agreement and sale agreement in a vehicle sales-and-financing transaction "indicate an intention that they are to be read together as constituting one transaction."). As we interpret a contract, we try to avoid "an absurd or unreasonable result." *Middlebrook Tech, LLC v. Moore*, 157 Md. App. 40, 66 (2004).

As the guarantor of the GBJV's obligations under the Notes, Mr. Buchner is entitled to avail himself of any defenses to the enforcement of the Notes that would be available to GBJV. *Bessette v. Weitz*, 148 Md. App. 215, 239 (2002) (quoting *McChord Credit Union v. Parrish*, 61 Wash. App. 8, 13-14 (1991)). Thus, given the derivative nature of Mr. Buchner's rights and obligations, our analysis will, for the most part, speak in terms of GBJV's rights, obligations, and defenses.

**A.**

**CONSTRUING THE TRANSACTION DOCUMENTS**

As noted above, when multiple contract documents give rise to a single transaction, the contracts should be construed as a single instrument, and the terms of each should be harmonized to the extent reasonably possible. *See Rocks*, 241 Md. at 637. That canon of contract interpretation applies here, as each of the contracts are inter-related and dependent on one another. We explain.

The SPA permitted GBJV to terminate the agreement if it was unable to secure bank financing on terms satisfactory to GBJV; thus, GBJV had the right to walk away if even a single requirement imposed by the Bank was unacceptable, including any of the provisions of the Subordination Agreement, which itself was a condition to the Bank's obligations under its Loan Agreement. The SPA also provided that the Notes from GBJV would be subordinate to the Bank Loan. The transaction contemplated by the SPA was, therefore, dependent on and inextricably linked to the Loan Agreement.

The Loan Agreement, in turn, was inextricably linked to and dependent on the Subordination Agreement. The Loan Agreement made clear that the Bank's obligations were contingent upon the execution of the Subordination Agreement. The Loan Agreement barred GBJV and PSI from making any payment to the Winfields unless such payment was allowed by the Subordination Agreement, which GBJV executed to signify its agreement to its terms. The Loan Agreement also specified that the Winfields' breach of the Subordination Agreement constituted a default by Borrowers. Further, the Winfields were hardly strangers to the Loan Agreement, because under section 1 of the Subordination

Agreement, they acknowledged and approved of "the entering into of the Loan Agreement" by the Bank and GBJV and PSI.

The Subordination Agreement, in turn, was inextricably linked to the Notes. As discussed above, the Subordination Agreement imposed various restrictions on the Winfields' ability to receive payment under the Notes, enforce the Notes, or act on its own behalf in the event GBJV went into bankruptcy or was declared insolvent.

Finally, the Notes were inextricably linked to the SPA. The Notes stated that they were executed pursuant to the SPA, and the SPA required GBJV to execute and deliver the Notes and Buchner's and Gourlay's personal guarantees.

The circle is thus complete: the Notes were linked to and would not have existed without the SPA, the SPA was linked to and would not have existed without the Loan Agreement, the Loan Agreement was linked to and would not have existed without the Subordination Agreement, and the Subordination Agreement was linked to and would not have existed without the Notes. The underlying transaction rested on a four-legged stool consisting of the SPA, Notes, Loan Agreement, and Subordination Agreement, the removal of any one of which would have cratered the deal. Their terms, therefore, must be construed harmoniously to the extent reasonably possible.

Construed together, the Notes, SPA, Loan Agreement, and Subordination Agreement establish unambiguously that the payment and enforcement restrictions of the Subordination Agreement were incorporated into the Notes. As noted above, the Loan Agreement barred GBJV from making any payments to the Winfields except as allowed under the Subordination Agreement. A reasonable person would have understood when

signing the transaction documents that GBJV would not be required to make payments to the Winfields if doing so would put it in breach of the Loan Agreement. Similarly, the Loan Agreement provided that a breach by the Winfields under the Subordination Agreement would trigger an event of default by GBJV under the Loan Agreement. A reasonable person would have understood that the Winfields would not be permitted to take an action forbidden under the Subordination Agreement—such as suing to enforce the Notes—if doing so would put GBJV in default with the Bank. The transaction documents were supposed to work in harmony, not at cross purposes.

There is yet a more direct route to the conclusion that the Notes were subject to the payment and enforcement restrictions in the Subordination Agreement. Section 8 of the Subordination Agreement required the Winfields to affix "a legend to the [Notes] stating that the [Notes] are subject to the terms of this Agreement." Mindful of the canon that contracts should be construed to avoid absurd results, it would have been absurd for the Bank to *require* the Notes to include a legend stating that the Notes "are subject to the terms of [the Subordinated Agreement]" unless the Notes were, in fact, "subject to the terms of the Subordination Agreement." And it would have made been more absurd for the other parties, particularly the Winfields, to acquiesce to the inclusion of such a legend unless the Notes were, in fact, "subject to the terms of the Subordination Agreement."[9]

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[9] Moreover, the specific wording to which the Winfields acquiesced further drives home the conditional nature of the Winfields' rights under the Notes:

We agree with the trial court that there is a dearth of authority on a borrower's rights to claim refuge in a subordination agreement between two of its creditors. And the canon of contract interpretation that states that multiple documents arising from a single transaction should be construed harmoniously has not, as far as we can tell, been applied in any reported Maryland case to a fact pattern similar to that confronting us here. But this principle has been embraced in the law of negotiable instruments, which is set forth in Title 3 of the Commercial Law Article of the Annotated Code of Maryland ("CL") (1975, 2013 Repl. Vol.).

Specifically, CL § 3-117 provides:

> Subject to applicable law regarding exclusion of proof of contemporaneous or previous agreements, the obligation of a party to an instrument to pay the instrument may be modified, supplemented, or nullified by a separate agreement of the obligor and a person entitled to enforce the instrument, if the instrument is issued or the obligation is incurred in reliance on the agreement or as ***part of the same transaction*** giving rise to the agreement. To the extent an obligation is modified, supplemented, or nullified by an agreement under this section, the agreement is a defense to the obligation.

(Emphasis added.)

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> **THIS NOTE IS SUBJECT TO THE TERMS AND CONDITIONS OF THAT CERTAIN SUBORDINATION AGREEMENT DATED AS OF OCTOBER 31, 2013 BY AND AMONG ACCESS NATIONAL BANK, BORROWER AND HOLDER. THE SUBORDINATION AGREEMENT CONTAINS PROVISIONS RESTRICTING, AMONG OTHER THINGS, CERTAIN PAYMENTS AND THE EXERCISE OF CERTAIN RIGHTS AND REMEDIES BY THE PARTIES HERETO.**

The phrase "part of the same transaction" as used in CL § 3-117 (formerly CL § 3-119) was first addressed in *Jenkins v. Karlton*, 329 Md. 510 (1993).[10] There, the promissory note was a "demand note," under which, as suggested by its name, payment is due on demand. *Id.* at 516. The issue in *Jenkins* was whether a subsequent written assurance by the lender that no demand would be made for at least one year would operate to modify the note under this section of the Maryland UCC. *See id*. at 529-30. The Court of Appeals held that the confirmatory letter in that case did not purport to modify the note, and therefore the due on demand feature of the note remained intact. *Id*. In arriving at that conclusion, the Court explained that documents are "part of the same transaction" if they are "substantially relevant to understanding the transaction out of which the note arose." *Id.* at 528-29.

Although *Jenkins* is helpful to our analysis in that it informs our understanding of what it means for multiple documents to arise out of the same transaction, for our purposes, its primary value comes from its reliance upon and discussion of the case *Sanden v. Hansen*, 201 N.W.2d 404 (N.D. 1972), which has facts parallel to those we have here. *Jenkins*, 329 Md. at 527-30. *Sanden* involved an action to enforce a promissory note arising out of the sale of a business. 201 N.W.2d at 407. The buyer financed the purchase of the business with two loans—one from the sellers in the amount of $10,000, and the other from

[10] Title 3 of the Commercial Law Article, by its terms, applies only to negotiable instruments. CL § 3-102. As explained below, the Notes do not qualify as negotiable instruments, thus, strictly speaking, CL § 3-117 does not apply. Nevertheless, the principles of Title 3 may be applied by analogy to notes that are not negotiable instruments. *See* CL § 3-104, Cmts. 2-3.

the Small Business Administration (the "SBA"). *Id.* The loan from the seller was also evidenced by a promissory note from the buyers. *Id.* As a condition of making its loan, the senior lender (the SBA) required the parties to execute an agreement, called a "standby agreement," that ensured the SBA would be repaid on its loan before the sellers were paid on the promissory note. *Id.* The standby agreement also barred the sellers from taking any action without the SBA's written consent to enforce the note until the SBA loan was fully repaid. *Id*. at 407-08. The standby agreement had an exception that allowed the buyer to make certain payments on the note, and when the buyer stopped making such payments, the seller sued the buyers to enforce the notes. *Id.* at 406-08.

In defense of the seller's action to enforce the note, the buyers in *Sanden* invoked the provisions of the standby agreement that prohibited the sellers from filing a lawsuit without the SBA's written consent before the SBA loan was fully paid. *Id.* at 408. Applying North Dakota's equivalent of CL § 3-117, the Court held that the note and standby agreement were part of the same transaction, and therefore, the latter modified the terms of the former. *Id*. Because the conditions in the standby agreement were not fulfilled, the court held that the lawsuit was properly dismissed. *Id*.

The relevant facts of this case are indistinguishable in any material respect from the transaction at issue in *Sanden*. Both cases involved the sale of a business with seller and bank financing. In both cases, the parties agreed in a separate writing that the seller was not entitled to receive payment on the promissory note or to take action to enforce the note unless certain conditions were met. In both cases, there was an exception in the separate writing that permitted the buyer to make certain payments on the seller's note, which, in

both cases, the buyer eventually stopped making. And, in both cases, the seller sought to enforce the promissory note before the conditions were met, including the condition that the bank must be fully repaid before enforcement action could be taken by the sellers. Just as the Court of Appeals in *Jenkins* found helpful and persuasive the North Dakota court's analysis in *Sanden*, so too do we here.

**B.**

**WERE THE RESTRICTIONS CONDITIONS PRECEDENT?**

Having determined that the Notes incorporated the terms and restrictions of the Subordination Agreement, we next address whether such terms and restrictions constituted conditions precedent to the Winfields' rights under the Notes. A condition precedent is "a fact, other than a mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance of a promises arises." *Chirichella v. Erwin*, 270 Md. 178, 182 (1973) (internal quotations omitted). "Although no particular language is required to create a condition precedent, words and phrases such as 'if,' 'provided that,' 'when,' 'after,' 'as soon as' and 'subject to,' have commonly been associated with creating express conditions." *Richard F. Kline, Inc. v. Shook Excavating & Hauling, Inc.*, 165 Md. App. 262, 274 (2005) (quotation omitted).

That standard has been met here: the Subordination Agreement required the legend to be included on the Notes stating that the Note was "subject to" the terms of the Subordination Agreement, and the legend used the same phrase. Thus, applying the objective approach to construing contracts, the only reasonable conclusion to be drawn from the plain language of these documents is that the "terms and conditions" of the

Subordination Agreement, and in particular the clause in the legend that specifies "provisions restricting . . . certain payments and the exercise of certain rights and remedies by the parties," were conditions precedent to the Winfields' rights under the Notes.[11]

As the plaintiffs in this action, the Winfields had the burden of proving that the conditions precedent were satisfied. *Laurel Race Course, Inc. v. Regal Constr. Co.,* 274 Md. 142, 154 (1975). Among the several restrictions of the Subordination Agreement that are implicated here, one stands out as clearly dispositive: under section 3, the Winfields were not permitted to "commence, prosecute or participate in any administrative, legal or equitable action against any Borrower or Guarantor" until each of the following conditions were met: "(a) the Senior Debt has been fully paid in cash, (b) Bank has no commitment or obligation to lend any further funds to any Borrower, and (c) all financing agreements between Bank and any Borrower or Guarantor are terminated."[12] There was no evidence

[11] The Winfields dismiss the legend as a recital with no substantive import. Recitals are "provisions that do not make binding promises but merely recite background information about factual context or the parties' intentions." *Sprint Nextel Corp. v. Wireless Buyback Holdings, LLC*, 938 F.3d 113, 127 (4th Cir. 2019). Here, the legend does not purport to set the context for the Notes, but instead substantively explained that the Notes were subject to the terms and conditions of the Subordination Agreement. And the legend does so unambiguously, as it not only states that the Note "is subject to the terms and conditions" of the Subordination Agreement, but it takes pains to specifically refer, and hence draw the payee's attention to, the "provisions restricting, among other things, certain payments and the exercise of certain rights and remedies by the parties hereto."

[12] Section 3 of the Subordination Agreement provided:

> Creditor will not demand or receive from any Borrower or Guarantor (and such Borrower or Guarantor will not pay to Creditor) all or any part of the Subordinated Debt, by way of payment, prepayment, setoff, lawsuit or otherwise, nor will Creditor exercise any remedy with respect to any property

these conditions were met. Thus, the failure of these conditions precluded the Winfields from taking action to enforce its rights under the Notes, including the initiation of this action. Mr. Buchner was, therefore, entitled to judgment as a matter of law. *Mitchell v. AARP Life Ins. Program N.Y. Life Ins. Co.,* 140 Md. App. 102, 127 (2001) (citing *Simpson v. Prudential Ins. Co. of America,* 227 Md. 393, 406 (1962) (noting that the burden of proof

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> of any Borrower or Guarantor, nor will Creditor exercise any remedy with respect to any property of any Borrower or Guarantor, nor will Creditor exercise any remedy with respect to any property of any Borrower or Guarantor, nor will Creditor accelerate the Subordinated Debt, or commence, or cause to commence, prosecute or participate in any administrative, legal or equitable action against any Borrower or Guarantor, until such time as (a) the Senior Debt has been fully paid in cash, (b) Bank has no commitment or obligation to lend any further funds to any Borrower, and (c) all financing agreements between Bank and any Borrower or Guarantor are terminated. Notwithstanding the foregoing prohibition on Creditor receiving (and Borrowers paying) any of the Subordinated Debt, provided that an event of Default, as defined in the Loan Agreement, has not occurred and is not continuing and would not exist immediately after such payment, Creditor shall be entitled to receive each regularly scheduled, non-accelerated payment of non-default interest or principal or disbursement of collections from claims (as applicable) from Borrowers as and when due and payable in accordance with the terms of (i) those certain Commercial Promissory Notes dated as of October 31, 2013 issued by Parent in favor of each of the Creditors, and (ii) Sections 2.3(a) and (b) of that certain Stock Purchase Agreement dated as of October 10, 2013, by and among Parent, Creditors, PSI and Guarantors, in each case, as in effect on hereof or as modified with the written consent of Bank (including any such payments or disbursements that were not paid when scheduled as a result of an Event of Default, upon the waiver of such Event of Default by Bank). Nothing in the foregoing paragraph shall prohibit Creditor from converting all or any part of the Subordinated Debt into equity securities of Borrowers, provided that, if such securities have any call, put or other conversion features that would obligate Borrowers to declare or pay dividends, make distributions, or otherwise pay any money or deliver any other securities or consideration to the holder, Creditor hereby agrees that Borrowers may not declare, pay or make such dividends, distributions or other payments to Creditor, and Creditor shall not accept any such dividends, distributions or other payments.

is on the plaintiff to show that the condition precedent of meeting the objective test of insurability is met)); *Hansen v. Antigua Condo. Ass'n v. Melba Invs. Atl., Inc.*, 307 Md. 700, 720 (1986) (plaintiff must allege facts establishing satisfaction of condition precedent of the right to sue).[13]

## III.

## THE WINFIELDS' REMAINING ARGUMENTS

### A.

### CASELAW

As noted above, the trial court observed that there was a dearth of authority to guide its analysis, but ultimately found most persuasive a case cited by the Winfields, *ITS Financial, LLC v. Advent Financial Services, LLC*, 823 F. Supp. 2d 758, 770-71 (S.D. Ohio 2011), in which the court found that the borrower did not have standing invoke provisions of a subordination agreement to defend an action on a note. The Winfields rely on this case on appeal as well. In our view, however, the underlying transactions in *ITS Financial* were far different than the transaction at issue here; thus the interpretative analysis from *ITS Financial* sheds little light on the meaning of the documents here.

[13] Mr. Buchner also contends that because GBJV was in default under the Bank Loans, the condition precedent that it not be in default under the Loan Agreement was likewise not satisfied, thus providing another basis to find in his favor as a matter of law. The Winfields contend that the Bank's release of Borrowers and the Bank Guarantors under the Bank Settlement Agreement took the Borrowers out of their default status and thus the condition was satisfied. We need not resolve this issue because we are finding that the condition precedent to the Winfields' right to enforce the Notes was not satisfied.

*ITS Financial* involved a borrower and two creditors, so, in that limited sense, it was similar to the instant case. 823 F. Supp. 2d at 759-60. Unlike here, however, the two creditors in *ITS Financial* did not become creditors out of a common underlying transaction. *Id.* There, the borrower took out a loan and granted the creditor a blanket security interest in all of borrower's assets, and then the borrower subsequently took out a loan from a different lender, to which it also granted a security interest in certain assets. *Id.* at 762-67. As is often the case when there are multiple lenders to a single borrower, the two creditors entered into a subordination agreement that, among other things, barred the second creditor from suing the borrower until the first creditor was fully paid. *Id.* at 769. The subordination agreement also expressly precluded any third party from benefitting from its terms. *Id.* When the second creditor sued anyway, the borrower invoked that clause of the intercreditor agreement in its defense, but the court concluded that the borrower did not have standing to do so. *Id.* at 770-71.

In reaching its decision, the court in *ITS Financial* focused its analysis on the terms of the subordination agreement, particularly the clause prohibiting third party beneficiaries, such as the borrower, but did not construe the loan documents with both creditors as part of a single overall transaction. *Id.* at 768-70. And it made sense for the court to decide the case in that manner, because the transactions between the borrower and the two creditors were *not* part of a single overall transaction. In contrast, as explained above, the SPA, Notes, Loan Agreement, and Subordination Agreement all arose out of the same transaction. And, as explained above, the language of section 8 of the Subordination Agreement and the corresponding legend on the Notes expressly provides that the Notes

are subject to the terms and conditions of the Subordination Agreement; as far as we can tell no such language appeared in the borrower's note with the first lender.[14] Thus, although the decisional process in *ITS Financial* may have been appropriate under the facts and circumstances of that case, it is of little value where, as here, all of the transaction documents should be construed harmoniously, and there is express language dictating the conclusion we have reached.[15]

**B.**

**HOLDER IN DUE COURSE**

The Winfields contend that the legend does not add to the substance of the Notes, arguing that it was required by the Bank to prevent the Winfields from assigning the Notes to a holder in due course. That strikes us as a logical explanation for the inclusion of the legend, but we fail to see how that supports the Winfields' position. If anything, that explanation supports our interpretation.

A "holder in due course" is a special type of status accorded to a qualifying holder of a negotiable instrument. As the Winfields point out, "[a] holder in due course is a holder who takes the instrument for value, in good faith, and without notice that it is overdue or

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[14] Although the Subordination Agreement also has an anti-third party beneficiary clause similar to the one in *ITS Financial*, as we explain below, the specific language in the Subordination Agreement and the legend in the Notes take precedence over the more general clause prohibiting third party beneficiaries.

[15] For the proposition that the borrower does not have standing to invoke the subordination agreement, the Winfields rely on several other cases: *In re El Paso Refinery, L P*, 171 F.3d 249 (5th Cir. 1999); *In re Kors, Inc.*, 819 F.2d 19 (2d Cir. 1987); *Capital Trust, Inc. v. Lembi*, No. C 09-02492 JSW, 2009 WL 2997493 (N.D. Cal. Sept. 16, 2009). These cases are inapposite for, among other reasons, the same reason as *ITS Financial*.

has been dishonored or of any defense against or claim to it on the part of any person." *Home Ctr. Supply of Md., Inc. v. Certainteed Corp.*, 59 Md. App. 495, 504 (1984).[16] Indeed, subject to limited exceptions (e.g., infancy, incapacity, duress, and illegality), under CL § 3-305, a holder in due course takes the instrument free from the same defenses typically asserted in defense of a claim on a simple contract.[17]

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[16] The full definition of holder-in-due course is set forth in CL § 3-302(a), which provides:

> Subject to subsection (c) and § 3-106(d), "holder in due course" means the holder of an instrument if:
>
> (1) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and
>
> (2) The holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in § 3-306, and (vi) without notice that any party has a defense or claim in recoupment described in § 3-305(a).

[17] CL § 3-305(a) & (b) provide:

> (a) Except as stated in subsection (b), the right to enforce the obligation of a party to pay an instrument is subject to the following:
>
> (1) A defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings;

Although the Winfields did not elaborate on why the legend would preclude the Notes from being held by a holder in due course, we see two possible explanations, neither of which supports the Winfields' position. *First*, the status of holder in due course applies only to negotiable instruments. CL § 3-302 ("'[H]older in due course' means the holder of an instrument[.]"); CL § 3-104(b) ("'Instrument' means a negotiable instrument."). To qualify as a negotiable instrument, the promissory note must be unconditional. CL § 3-106(a) ("'[N]egotiable instrument' means an unconditional promise or order to pay a fixed amount of money"). Under CL § 3-106(a), a promise is not unconditional if it states that the promise, rights or obligations are "subject to or governed by another writing[.]"[18]

> > (2) A defense of the obligor stated in another section of this title or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract; and
> >
> > (3) A claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument; but the claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought.
>
> (b) The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1), but is not subject to defenses of the obligor stated in subsection (a)(2) or claims in recoupment stated in subsection (a)(3) against a person other than the holder.

[18] Note 1 of the Official Comment amplifies this concept:

> For example, a promissory note is not an instrument defined by Section 3-104 if it contains any of the following statements: 1. "This note is subject to a contract of sale dated April 1, 1990 between the payee and maker of this note." 2. "This note is subject to a loan and security agreement dated April

Those standards are met here because, under the plain language of the legend, the promises, rights, and obligations memorialized in the Notes are subject to the Subordination Agreement. Put another way, the very conditions that preclude the Notes from qualifying as negotiable instruments are those that apply in defense of the Winfields' claims.

*Second*, the legend would prevent a holder of the Notes from achieving holder in due course status because, as the Winfields state, the legend puts the holder *on notice* that the Notes are subject to defenses based on another document—the Subordination Agreement. Again, those are the same defenses asserted here. Thus, unless the Notes were, in fact, subject to the defenses grounded in the Subordination Agreement, the legend would not serve its intended purpose of providing notice of such defenses.

**C.**

**THE ANTI-THIRD PARTY BENEFICIARY CLAUSE IN SECTION 13 OF THE SUBORDINATION AGREEMENT**

The Winfields contend that our conclusion cannot be reconciled with the sentence in section 13 of the Subordination Agreement that states "[t]his Agreement is solely for the benefit of Creditor and Bank and not for the benefit of Borrowers, Guarantors or any

1, 1990 between the payee and maker of this note." 3. "Rights and obligations of the parties with respect to this note are stated in an agreement dated April 1, 1990 between the payee and maker of this note." It is not relevant whether any condition to payment is or is not stated in the writing to which reference is made. The rationale is that the holder of a negotiable instrument should not be required to examine another document to determine rights with respect to payment. But subsection (b)(i) permits reference to a separate writing for information with respect to collateral, prepayment, or acceleration.

other party." For ease of reference, we will refer to this clause as the "anti-third party beneficiary clause." As the Winfields see it, our interpretation of the legend collapses under its own weight because if GBJV's promise to make payments to the Winfields is subject to the terms and conditions of Subordination Agreement, then one such term—the anti-third party beneficiary clause—negates GBJV's right to invoke any of those same terms and conditions.

We disagree. When clauses in a contract are in conflict, typically the more specific provision will take precedence over the more general one. *Pinnacle Grp., LLC v. Kelly*, 235 Md. App. 436, 456 (2018). Here, the Subordination Agreement required the Winfields to "immediately affix a legend to the instruments evidencing the Subordinated Debt stating that the instruments are subject to the terms of this Agreement." In addition, the legend specifically states that the "Notes are subject to the terms and conditions of [the Subordination Agreement]," including "provisions restricting, among other things, certain payments and the exercise of certain remedies by the parties hereto." These clauses are highly specific and, as explained above, would not have been included in both documents unless the parties agreed that the Notes were, in fact, subject to the terms and conditions of the Subordination Agreement. In comparison, the anti-third-party beneficiary clause is general. Thus, to the extent a conflict can be perceived, the language in the legend and its corresponding provision of the Subordination Agreement control.

We conclude, however, that the provisions are reconcilable, and to do so, we adopt a more nuanced interpretation of these provisions. Starting with the basics, a promissory note is a written promise to pay a sum of money at fixed or determined time in the future.

*Caucus Distribs., Inc. v. Md. Sec. Comm'r*, 320 Md. 313, 328 (1990). Here, the party making the promise was GBJV. As a matter of common sense, one who voluntarily chooses to make a promise is entitled to define the terms and conditions of such promise.[19] Thus, the phrase "terms and conditions" used in the Subordination Agreement and the legend are better understood to be referring to those terms and conditions in the Subordination Agreement that directly relate to GBJV's promises and the Winfields' right to enforce such promises. This interpretation is reinforced by the second sentence of the legend, which expressly identifies the restrictions regarding "certain payments and the exercise of certain rights and remedies by" parties to the Notes. The anti-third party beneficiary clause does not relate to payments or the exercise of remedies, and therefore was not one of the "terms and conditions" in the Subordination Agreement to which the legend referred.

So then what purpose does the anti-third beneficiary clause serve? The Winfields contend that our analysis renders that clause superfluous. We disagree. For starters, this clause would preclude GBJV, PSI, Mr. Buchner, and Mr. Gourlay from suing the Winfields for breach of the Subordination Agreement if the Winfields violated any of its terms. For example, if GBJV or PSI sought to refinance the Bank Loan, the Winfields would be

[19] By this, we mean only that a promissory note, like all contracts, is a voluntary undertaking. As explained above, each of the transaction documents were necessary to the underlying transaction. If GBJV did not agree with each provision in the Notes and the terms and conditions of the Subordination Agreement, it was under no duty to go forward with the transaction. GBJV's execution and delivery of the Notes with the legend represents its voluntary choice to condition the promises evidenced by the Notes on the payment and enforcement restrictions of the Subordination Agreement.

obligated, under another part of section 13 of Subordination Agreement, to execute a new subordination agreement on substantially the same terms with the new lender. The Winfields' refusal to comply with that term could potentially prevent Borrowers from refinancing their debt on more favorable terms. Similarly, under section 14 of the Subordination Agreement, the Winfields would be required to execute documents or take certain actions reasonably requested by the Bank to implement the intent of the Subordination Agreement. It would not be difficult to imagine a scenario in which GBJV, PSI, and/or Mr. Buchner and Mr. Gourlay could be damaged if the Winfields failed to comply with these provisions. If so, the anti-third party beneficiary clause would protect the Winfields from any such claims.[20]

In addition, the anti-third party beneficiary clause would preclude a third party creditor from benefitting from the priorities established in the Subordination Agreement. In the context of subordination agreements, the potential for a creditor to claim third party beneficiary status in order to leapfrog over the subordinated creditor to achieve first-priority status has been acknowledged and discussed by both courts and scholars. *See, e.g.*, George A. Nathan, *Circuity of Liens Arising from Subordination Agreements: Comforting Unanimity No More*, 83 B.U. L. REV. 591 (2003). Whether a non-party would be able to

[20] This is not an insignificant benefit. When a contract requires one of the parties to execute documents at the request of another, the failure to do so can indeed give rise to a claim for compensatory damages for breach of the contract and, under certain circumstances, the damages could include lost future profits. *See, generally*, *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387 (2012). The anti-third party beneficiary clause precludes PSI or GBJV from pursuing such a claim as a third party beneficiary of the Subordination Agreement.

do so hinges on whether the subordination agreement establishes a complete or partial subordination. As explained by the Supreme Court of Virginia,[21] the complete subordination rule "provides that ***in the absence of any language in the subordination agreement to the contrary***, a lienholder 'who holds a first lien and subordinates it to a third lien makes his lien inferior or subordinate to both the second and third liens.'" *Futuri Real Estate, Inc. v. Atl. Tr. Servs., LLC*, 298 Va. 147, 152 (2019) (emphasis added). "Thus, under a complete subordination, where A is the senior lienholder, B the second lienholder, and C the third, and A subordinates its lien to C, it would move B into the first place priority." *Id.* In that example, B was a third-party beneficiary to the subordination agreement between A and C, and in doing so was catapulted to the first-priority position. Having the "language in the subordination agreement to the contrary" is, therefore, critical to avoiding a complete subordination.

In contrast, a "partial subordination exists if the terms of the subordination agreement clearly intend to affect only the priority of the liens held by the parties to the agreement and if it does not affect the priority status of any intervening or other lienholders." *Id.* at 152-53.

Citing a case from California, the Supreme Court of Virginia gave the following example to illustrate the mechanics of a partial subordination:

> For example, where A is the senior lienholder, B the second lienholder and C the third, and A subordinates its lien to C, limited to the amount of A's lien, C becomes senior to A but remains junior to B and A remains senior to

[21] Pursuant to section 16 of the Subordination Agreement, the Subordination Agreement "shall be governed by and construed" under Virginia law.

> B but becomes junior to C to the amount subordinated not exceeding the amount of A's lien.

*Id.* at 153 (citing *Bratcher v. Buchner*, 90 Cal. App. 4th 1177, 1185-86 (2001)). This example illustrates why a creditor holding subordinated debt, such as the Winfields here, would prefer a partial subordination rather than a complete subordination. Here, the anti-third-party beneficiary clause is the "language to the contrary" referenced by the court in *Futuri Real Estate* that puts the Subordination Agreement in the partial subordination category, thereby protecting the Winfields if that scenario were ever to arise.[22]

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[22] The unlikelihood that the Winfields would have ever found themselves in such a situation is irrelevant. Likely or not, the parties contemplated the possibility, however remote, that both the Bank and the Winfields may, in the future, extend secured loans or credit to GBJV or PSI. This possibility is reflected in the recitals, which state:

> A. Gourlay Buchner JV LLC ("Parent") and Power Services' Inc. ("PSI," and together with Parent, each a "Borrower' and together, "Borrowers") has requested and/or obtained certain loans or other credit accommodations from Bank ***which are or may be from time to time secured by assets and property of Borrowers and the guarantors of such loans and credit accommodations***.
>
> B. [The Winfields have] extended loans or other credit accommodations to [GBJV and/or PSI], ***and/or may extend loans or other credit accommodations to [GBJV and/or PSI]from time to time***, and certain of such loans or other credit accommodations may be guaranteed by Sean Gourlay and Brian Buchner (each a "Guarantor" and together, "Guarantors").
>
> C. To induce Bank to extend credit to [GBJV and/or PSI] and, at any time or from time to time, at Bank's option, to make such further loans, extensions of credit, or other accommodations to or for the account of [GBJV and/or PSI], or to purchase or extend credit upon any instrument or writing in respect of which [GBJV and/or PSI]may be liable in any capacity, or to grant such renewals or extension of any such loan, extension of credit, purchase, or other accommodation as Bank may deem advisable, Creditor is willing to subordinate: (i) all of [GBJV's and/or PSI's] and Guarantors'

**D.**

**DEBT CEILING**

The Winfields make two arguments based on provisions of the SPA that, they contend, capped the amount of their subordination obligation and imposed debt limitations on GBJV and PSI. The trial court did not address these arguments because it didn't need to, having found that GBJV did not have standing to enforce the Subordination Agreement. Although the Winfields don't say so expressly, they are essentially contending that these arguments provide an alternative basis to affirm the trial court.

*First*, the Winfields argue that the SPA provides that "the Winfields would be subordinated to at most $4.3 million in [Bank] debt." According to the Winfields, it is undisputed that PSI and GBJV "paid down or retired more than $4.3 million in Bank principal debt and, without notice to the Winfields, borrowed well past their limit." From this, the Winfields contend, "the 4.3 million subordination figure agreed-upon in the [SPA] was well exceeded, fulfilling any possible subordination obligation enforceable by Buchner."

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> indebtedness and obligations to Creditor (including, without limitation, principal, premium (if any), interest, deferred payments, earn outs, fees, charges, expenses, costs, professional fees and expenses, reimbursement obligations, and any guaranties thereof), ***whether presently existing or arising in the future (the "Subordinated Debt")*** to all of [GBJV's and/or PSI's]or Guarantors' indebtedness and obligations to Bank; and (ii) all of Creditor's security interests, if any, to all of Bank's security interests in [GBJV's and/or PSI's]or Guarantors' property.

Thus, in that contemplated circumstance, the anti-third party beneficiary clause would protect the Winfields from inadvertently subordinating their interests to any other present or future creditors of GBJV or PSI, other than the Bank.

*Second*, the Winfields contend that the GBJV and PSI made a side agreement with the Winfields "that their total debt to [the Bank] would not exceed $7.82 million." The Winfields claim that it is undisputed that PSI and GBJV "took out loans from [the Bank] in a minimum amount of $9,956,755.14 between the execution of the [SPA] and May 26, 2017." Thus, the Winfields argue, their subordination obligations were, alternatively, discharged as a result of GBJV's and PSI's breach of the limit.

In our view, the Winfields have misconstrued these debt limit provisions. As to their first argument, section 2.2(a) of the SPA provides: "The Notes are automatically subordinated to the debt owed to [the Bank] by [GBJV or PSI], the principal amount of which shall not exceed Four Million Three Hundred Thousand Dollars ($4,300,000.00.)" Under the Winfields' interpretation of this provision, once GBJV or PSI paid the Bank $4,300,000 in principal, the Winfields' subordination obligations under the Subordination Agreement would be discharged as to GBJV. But that's not what this provision plainly says. The phrase "principal amount of which" refers to the phrase "debt owed to [the Bank]," meaning that the principal amount of the debt owed to the Bank shall not exceed $4,300,000. This clause, therefore, was merely a covenant by GBJV and PSI to the Winfields that notwithstanding the available credit of $7,820,000 under the Loan Agreement, the Winfields would be assured that GBJV and PSI would never let the total balance rise above $4,300,000. By its nature, this clause was designed to mitigate the risk that the Winfields assumed vis-à-vis the Bank under the Subordination Agreement, which imposed no limit to the debt to which the Notes would be subordinated.

The Winfields' second argument is based on a side agreement among GBJV, PSI and the Winfields that stated:

> In consideration for the Creditor entering into the above-referenced Subordination Agreement, Gourlay Buchner JV LLC and Power Services, Inc. (collectively, "Borrowers") hereby agree that the indebtedness of the Borrowers to the Bank shall not exceed Seven Million Eight Hundred Two Thousand Dollars ($7,820,000.00) while the debt subordinated by the Creditor under the Subordination Agreement remains due and owing to Creditor. This letter amends that certain Stock Purchase Agreement dated October 10, 2013 ("SPA") between the Creditor, Borrowers, Sean Gourlay and Brian Buchner and the terms and conditions of this letter shall control in the event of a conflict with the SPA (including, but not limited to Section 2.2).

The Winfields contend that the $7,820,000.00 figure represents the cumulative amount that GBJV and PSI were permitted to borrow from the Bank over time, and they contend that GBJV and PSI exceeded that amount. The Winfields base this argument on a summary exhibit admitted at trial that merely represents a list compiled by the Winfields, from documents obtained during discovery, of promissory notes executed at various points in time which purports to show that Borrowers borrowed at least $9,956,755.14. The Winfields have misconstrued the meaning of the side agreement and read far too much into the summary exhibit.

The phrase "total indebtedness of the Borrowers" simply means the amount of debt owed to the Bank at any given point in time, which makes sense in light of the nature of the credit facilities provided under the Loan Agreement. As explained above, the Loan Agreement contemplated four separate credit facilities—one for GBJV's benefit and three to fund PSI's current and on-going financial needs. The four credit facilities consisted of a term loan to GBJV of $4,000,000, a revolving credit line for advances to PSI on accounts

receivable up to a $3,000,000 limit, a supplemental term loan of up to $320,000 for PSI to pay off its debt to SunTrust Bank, and a line of credit up to $500,000 for PSI to pay for equipment. In total, these four credit facilities total $7,820,000.00. Seen in that light, the side agreement amended the $4,300,000 debt limit provided under section 2.2(a) so that the debt limit was the combined amount of the four credit facilities under the Loan Agreement.

The Winfields' interpretation would make no sense. The $3,000,000 advance against accounts receivable was a revolving line of credit. A *revolving* line of credit owes its name to the fact that the borrower may draw funds from the line, repay those funds, draw again, repay again, and so on, so long as the outstanding balance at any given point did not exceed $3,000,000. Thus, under a $3,000,000 revolving line such as the one provided here; a borrower could wind up repaying well in excess of $3,000,000 in principal. For example, if PSI were to draw down the entire $3,000,000 in one month, and repay that entire amount two months later, and then draw down the entire $3,000,000 the subsequent month and repay that entire amount two months later, under the Winfields' theory PSI would have used up a total of $6,000,000 of the $7,820,000 borrowing limit on that credit facility alone, not to mention the $4,000,000 that GBJV borrowed to pay the Winfields at closing. Such an interpretation defies any notion of commercial reasonableness as well as the plain language of the debt limit provisions.[23]

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[23] The Winfields' reliance on the summary exhibit is likewise flawed. The summary exhibit has a list of promissory notes by date and amount, but no details on the terms of the referenced notes. For example, one of the notes listed on the summary exhibit is the

At any rate, the foregoing debt limitation provisions applied to the subordination obligations under the Subordination Agreement, not to its restriction on the Winfields' right to file a lawsuit to enforce their rights under the Notes. As noted above, the Winfields were not permitted to take any enforcement action until the following three conditions were met: "(a) the Senior Debt has been fully paid in cash, (b) Bank has no commitment or obligation to lend any further funds to any Borrower, and (c) all financing agreements between Bank and any Borrower or Guarantor are terminated." Thus, even if the debt limit covenant was breached in some manner, it would not alter our analysis or decision because the conditions precedent to an enforcement action were not satisfied. Accordingly, we will reverse the Winfield Judgments.

**E.**

**MR. BUCHNER'S APPEAL FROM THE INDEMNIFICATION JUDGMENT**

Mr. Buchner also appealed the Indemnification Judgment. As noted above, Mr. Buchner's appeal is based on his contention that the court erred in restricting his right to execute on the Indemnification Judgment only to the extent he satisfied the Winfield Judgments. Because we are reversing the Winfields' Judgment on the basis that Mr.

$3,000,000 note for the accounts receivable revolving credit line. The summary exhibit counts the entire $3,000,000 as having been borrowed on the date that the underlying transaction closed—October 13, 2016, which is plainly wrong. At the moment of closing, PSI had not yet drawn any funds from the $3,000,000 line of credit, yet the Winfields apply the entire $3,000,000 to the $7,820,000 debt limit under the side agreement. The same can likely be said of one or more of the other notes listed on the exhibit. Notably, the summary exhibit does not purport to show the total indebtedness to the Bank as of any given date, thus, it provides no support for the Winfields' argument that GBJV breached the side agreement, even under the Winfields' interpretation.

Buchner was entitled to judgment on their claims as a matter of law, there is no longer an adverse judgment from which Mr. Buchner would be entitled to indemnification. Accordingly, we shall vacate the Indemnification Judgment and dismiss Mr. Buchner's claim for indemnification from an adverse judgment.[24]

**JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IN FAVOR OF THE WINFIELDS AND AGAINST BRIAN BUCHNER IS REVERSED. MR. BUCHNER'S JUDGMENT FOR INDEMNIFICATION AGAINST POWER SERVICES, INC. AND GOURLEY BUCHNER JV, LLC IS VACATED, AND MR. BUCHNER'S CLAIM AGAINST POWER SERVICES, INC. AND GOURLEY BUCHNER JV, LLC FOR INDEMNIFICATION FROM AN ADVERSE JUDGMENT IS DISMISSED. ALL PENDING MOTIONS IN THIS COURT ARE DENIED AS MOOT. COSTS TO BE PAID BY APPELLEES.**

[24] This decision does not disturb or effect the Attorneys' Fees Judgment or the basis on which said judgment was awarded.