In The

Supreme Court of Virginia

RECORD NO. 181501

FUTURI REAL ESTATE, INC.,
Appellant,

v.

ATLANTIC TRUSTEE SERVICES, LLC, SUNTRUST BANK, WELLS FARGO BANK, N.A., AND MILTON H. CORTEZ,
Appellees.

WELLS FARGO BANK, N.A.'S BRIEF OF APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

I. Statement of Facts 1

II. Relevant Procedural History 3

III. Summary of Argument 6

ARGUMENT 8

A. Standard of Review 8

B. The trial court correctly ruled that the Subordination Agreement did not subordinate the First Wells Fargo Lien completely to the SunTrust Lien and was correct in utilizing the partial subordination approach adopted by the majority of courts 8

C. The trial court correctly found that the Subordination Agreement is unambiguous on its face 16

1. Wells Fargo's intent is clear on the face of the Subordination Agreement 16

2. Futuri cannot identify any ambiguity in the Subordination Agreement that would entitle the Court to review parol evidence 18

3. Even if the trial court had considered parol evidence, it does not demonstrate Wells Fargo "intended" to have a second lien position 21

CONCLUSION 23

CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

Page(s)

CASES

Ameribanc Savings Banks FSB v. Resolution Trust Corp.,
858 F. Supp. 576 (E.D. Va. 1994) 22

AmSouth Bank, N.A. v. J & D Fin. Corp.,
679 So.2d 695 (Ala. 1996).....12

Blickenstaff v. Clegg,
97 P.3d 439 (Idaho 2004) 14, 15

Bratcher v. Buckner,
90 Cal. App. 4th 1177 (Cal. Ct. App. 2001).....11, 14

C.F. Trust, Inc. v. Tyler,
318 B.R. 795 (E.D. Va. 2004) 19

Caterpillar Fin. Servs. Corp. v. Peoples Nat'l Bank, N.A.,
710 F.3d 691 (7th Cir. 2013) 15

Chavis v. Gibbs,
198 Va. 379 (1956) 22

Coal River Collieries v. Eureka Coal & Wood Co.,
144 Va. 263 (1926) 19

Co-Alliance, LLP v. Monticello Farm Serv., Inc.,
7 N.E.3d 355 (Ind. Ct. App. 2014) 11, 14

Cohan v. Thurston,
223 Va. 523 (1982) 19

Copenhaver v. Rogers,
238 Va. 361 (1989) 17

Eure v. Norfolk Shipbuilding & Drydock Corp., Inc.,
263 Va. 624 (2002) 21

Farneth v. Windson Dev. Corp.,
21 Va. Cir. 216 (Fairfax 1990) 16

Galloway Corp. v. S.B. Ballard Const. Co.,
250 Va. 493 (1995) 19

Goodman v. Rubenstein,
No. 16-1207, 2017 WL 4772897 (Va. Oct. 23, 2017) 8

High Knob, Inc. v. Allen,
205 Va. 503 (1964) 20

In Re Price Waterhouse, Ltd.,
202 Ariz. 397 (2002) 9, 10

ITT Diversified Credit Corp. v. First City Capital Corp.,
737 S.W.2d 803 (Tex. 1987) 10, 11, 12

Moore v. Gregory,
146 Va. 504 (1925) 13

Pellegrin v. Pellegrin,
31 Va. App. 753 (2000) 12

Shaddix et al. v. National Surety Co.,
128 So. 220 (Ala. 1930) 12

Shaheen v. Cty. of Mathews,
265 Va. 462 (2003) 22

Tomar Dev., Inc. v. Friend,
410 P.3d 578 (Colo. App. 2015) 13

VCS, Inc. v. Countrywide Home Loans, Inc.,
349 P.3d 704 (Utah 2015) 13

Wells Fargo Bank v. Neilsen,
178 Cal. App. 4th 602 (2009) 9, 13, 14

Wilson v. Holyfield,
227 Va. 184 (1984) 12

OTHER AUTHORITIES

29A *Am. Jur. 2d Evidence* § 1138 (1994) 19

Gilmore, *Security Interests in Personal Property* § 39.1 (1965) 11

STATEMENT OF THE CASE

Plaintiff Futuri Real Estate, Inc. ("Futuri") appeals from a final judgment entered by the Fairfax County Circuit Court dismissing its Cross-Claim against Defendant Wells Fargo Bank, N.A. ("Wells Fargo"). This case involves a determination of whether a lienholder can subordinate its first-in-priority lien to third-in-priority lien without waiving such priority with respect to any intervening liens. The trial court correctly ruled that subordination agreements, such as the one executed by Wells Fargo, have no impact on intervening liens, nor should they, given that the intervening lienholder is not a party to the subordination agreement and is not a third-party beneficiary of the subordination agreement. Despite the trial court's well-reasoned ruling, Futuri seeks to have this Court find that the Subordination Agreement, to which it was not a party, entitles it to a $415,000.00 windfall.

I. Statement of Facts.

Milton Cortez and Armida Cortez (collectively "Cortez") purchased the real property located at 6614 Quander Road, Alexandria, Virginia, 22307 (the "Property") in August, 2005. (J.A. at 68). At the time of purchase, Cortez obtained two loans on the Property. *Id.* Cortez first obtained a loan from Wells Fargo in the amount of $415,000.00 ("First Wells Fargo Lien"). *Id.* Cortez executed a Deed of Trust on August 23, 2005, which was recorded on September 23, 2005. *Id.* Cortez

obtained another loan against the Property in the amount of $220,000.00 from SunTrust Bank ("SunTrust"). SunTrust's Deed of Trust was executed on August 5, 2005 and recorded on September 30, 2005 ("SunTrust Lien"). *Id.* The SunTrust Lien was recorded one week after Wells Fargo recorded the First Wells Fargo Lien. *Id.*

One year later, Cortez obtained another loan from Wells Fargo in the amount of $252,007.33. *Id.* The Deed of Trust was executed on September 23, 2006 and recorded October 25, 2006 ("Second Wells Fargo Lien") (collectively, with the "First Wells Fargo Lien," referred to as "Wells Fargo Liens"). (J.A. at 69). At the time of execution of the Second Wells Fargo Lien, Wells Fargo executed a Subordination Agreement dated September 23, 2006 and recorded October 26, 2006, which provided that the Second Wells Fargo Lien "shall also have a prior and superior right over the [First Wells Fargo Lien]." *Id.*; (J.A. at 46). Below is a chart of the liens recorded against the Property, listed according to date of recordation:

	Lender	**Amount**	**Date of Execution**	**Date of Recordation**	**Deed Book and Page No.**
1	Wells Fargo	$415,000.00	August 23, 2005	September 23, 2005	17773, 2161
2	SunTrust Bank	$220,000.00	August 5, 2005	September 30, 2005	17806, 0158, modified in January 2016 24421, 1184
3	Wells Fargo	$252,007.33	September 23, 2006	October 25, 2006	18859, 1535

Cortez defaulted on their obligations to SunTrust, which appointed Atlantic Trustee Services, LLC, Substitute Trustee ("Atlantic") as a Substitute Trustee. *Id.* Atlantic held a foreclosure sale on January 19, 2017 where the Property was sold to Futuri for $468,000.00. *Id.* After the foreclosure sale, Atlantic filed an interpleader action because, after all funds were paid to satisfy SunTrust and any tax liens and costs, there remained $201,647.94 in surplus. *Id.*; Compl. at 12, (J.A. at 13, 42-44). Futuri filed the Cross-Claim seeking a declaration that the SunTrust Lien was first in line at the time of foreclosure, and that the Wells Fargo Liens were inferior at the time of the foreclosure and were therefore extinguished at the time Futuri acquired the Property. (J.A. at 48-52). Wells Fargo filed a Motion to Dismiss and the trial court entered a Final Order dismissing Futuri's claims with prejudice on February 27, 2018 as the First Wells Fargo Lien was superior to the SunTrust Lien and therefore survived the foreclosure sale.

II. Relevant Procedural History.

Futuri, as successor-in-interest to Wachovia Bank, filed a Cross-Claim against Wells Fargo, Atlantic, SunTrust, and Trste, Inc. seeking a declaration that, at the time of the foreclosure sale on the Property, a deed of trust recorded by SunTrust on the Property was superior to two deeds of trust recorded by Wells Fargo.

On October 24, 2017, Wells Fargo filed a Motion to Dismiss Futuri's Cross-Claim. In its Motion to Dismiss, Wells Fargo argued that the Cross-Claim, on its face, failed to state a cause of action because Wells Fargo had a superior lien to SunTrust at the time of the foreclosure and, therefore, its lien survived the foreclosure and continued to encumber the Property. Further, Wells Fargo argued that the Subordination Agreement, to which SunTrust was not a party, had no effect on SunTrust's deed of trust, and did not oust Wells Fargo from its first position, which otherwise would give SunTrust an extraordinary windfall. Wells Fargo furthermore argued that because the First Wells Fargo Lien was recorded first, it was superior to the SunTrust Lien, regardless of whether Wells Fargo had notice of the SunTrust Lien. The trial court heard Wells Fargo's Motion to Dismiss on December 8, 2017.

The trial court took the matter under advisement and issued its well-reasoned decision in a twenty-two-page letter opinion dated January 10, 2018, granting Wells Fargo's Motion to Dismiss Futuri's Cross-Claim. In the January 10, 2018 Letter Opinion, the trial court reaffirmed the principle of first in time, first in right, finding that the foreclosure sale did not extinguish the First Wells Fargo Lien because Wells Fargo had recorded its lien prior to SunTrust recording its lien. The trial court further ruled that a lienholder can subordinate its first-in-priority lien to a third-in-priority lien without waiving such priority with respect to intervening

liens. In this case, the Subordination Agreement, by its language, had the effect of subordinating the First Wells Fargo Lien to the Second Wells Fargo Lien, leaving the position of the SunTrust Lien (second in time) unchanged. The trial court determined that the Subordination Agreement had no impact on SunTrust's rights.

On February 8, 2018, Futuri filed a Motion for Reconsideration, which was denied. The trial court amended its Letter Opinion on February 27, 2018 to correct a minor clerical error ("Op. Ltr.") and entered a Final Order dismissing Futuri's claims with prejudice.

Subsequently, Futuri appealed this matter and filed a Petition for Appeal. Wells Fargo filed a Brief in Opposition to the Petition for Appeal. However, by order dated August 13, 2018, this Court found that no final order had been entered by the Circuit Court and remanded the case to the Circuit Court. The Circuit Court entered a Final Order on August 24, 2018. Futuri again petitioned this Court for an appeal and this Court granted an appeal as to Assignments of Error Nos. 1 and 2.

III. Summary of Argument.

Futuri has failed to identify a single error in the trial court's Letter Opinion. This is because the trial court correctly examined the recorded documents and interpreted the unambiguous Subordination Agreement. As Futuri concedes, the First Wells Fargo Lien was recorded before the SunTrust Lien. The foreclosure on the Property did not extinguish the First Wells Fargo Lien, which was superior to the SunTrust Lien, because the First Wells Fargo Lien was recorded first. Further, whether Wells Fargo had knowledge of SunTrust's unrecorded deed is irrelevant because a lien creditor's rights are protected upon recordation, a legal principle that Futuri utterly fails to dispute.

The Subordination Agreement, which the trial court held to be unambiguous, did not oust Wells Fargo from its first priority position because the Subordination Agreement is an agreement between and for the benefit of Wells Fargo. SunTrust was not a party to the Subordination Agreement, did not provide consideration for the agreement, and is not a third-party beneficiary to that agreement. The Subordination Agreement never even referenced SunTrust. Despite this, SunTrust requests that this Court declare that Wells Fargo is ousted from its first lien position and place SunTrust in the second lien position. In support of its position, Futuri requests that the Court adopt the complete subordination approach, adopted by a small minority of courts, under which a subordination agreement will be

presumed to have the effect of a complete subordination absent express language that excludes a change in priority as to other liens. In contrast, the partial subordination approach has been adopted by the overwhelming majority of courts and is a significantly more practicable and equitable approach. The trial court correctly adopted the partial subordination approach, which holds that a subordination agreement essentially has no impact on intervening lienholders, who are no better or worse off because of the existence of the subordination agreement.

Furthermore, the trial court did not err in finding the Subordination Agreement unambiguous on its face. The Subordination Agreement, when read in its entirety, clearly states that Wells Fargo subordinated its first lien to its second lien and nothing more. Because Futuri knows the writing is unambiguous, it attempts to create an ambiguity by referencing Wells Fargo's internal communications. However, parol evidence is inadmissible to prove the existence of an ambiguity, and even if the trial court had considered the internal communications, the communications do not demonstrate Wells Fargo intended to subordinate both of its liens below SunTrust's Lien.

ARGUMENT

A. Standard of Review.

Respondent agrees that both Assignments of Error are subject to *de novo* review. *Goodman v. Rubenstein*, No. 16-1207, 2017 WL 4772897, at *2 (Va. Oct. 23, 2017). Wells Fargo filed a Motion to Dismiss, rather than a demurrer, because the Cross-Claim did not contain any of the recorded deeds, which were attached to the original complaint filed in the matter. In fact, the Cross-Claim did not contain a single exhibit. *See* Op. Ltr. ("The factual evidence is thus not in dispute; the legal interpretation the Court is to derive therefrom however, is contested.") (J.A. at 156). The Court considered the documents attached to the Complaint which included the First Wells Fargo Lien, the Second Wells Fargo Lien, the Subordination Agreement and the SunTrust Lien – all documents recorded among the land records of Fairfax County.

B. The trial court correctly ruled that the Subordination Agreement did not subordinate the First Wells Fargo Lien completely to the SunTrust Lien and was correct in utilizing the partial subordination approach adopted by the majority of courts (Assignment of Error No. 1).

Futuri concedes that the First Wells Fargo Lien was recorded before the SunTrust Lien. However, disagreeing with the trial court's adoption of the partial subordination approach adopted by the vast majority of states, Futuri argues that this Court should adopt the "complete subordination" approach followed by a very small minority of jurisdictions in the nation.

Under the partial subordination approach, the alteration of the priority of liens between the first and third lienholders had no effect on the second lienholder. In *Wells Fargo Bank v. Neilsen*, 178 Cal. App. 4th 602 (2009), a first deed of trust was given to American Express Centurion Bank ("AMEX"), a second deed of trust was given to Wells Fargo, and a third deed of trust was given to PHH Mortgage Corporation ("PHH"). AMEX executed a subordination agreement subordinating its loan to PHH. The court held that the subordination agreement had no effect on the intervening lienholder, Wells Fargo. Thus, the court instructed that PHH was to be paid first, but only to the amount of AMEX's claim, and that AMEX was to receive nothing until Wells Fargo and PHH were paid, except to the extent that AMEX's claim exceeded the amount of PHH's claim. *Id.* at 611-12. Similarly, in *In Re Price Waterhouse, Ltd*., the Arizona Supreme Court held that a subordination agreement between the first and third lienholders had no effect on the second lienholder and "[t]he consequence of a subordination agreement is that the amount of the first lien simply goes toward satisfying in whole or in part two liens as opposed to one." 202 Ariz. 397, 400 (2002). Specifically, the court explained the partial subordination approach as follows:

> The shift in priority relates only to the amount of the original third priority lien. If the third priority lien is larger than the original first priority lien, then the original first priority lien moves completely to the third position. The original third priority lien moves into first position but only to the amount of the original first priority lien. If the third priority lien is smaller than the original first priority lien, then the

> difference between the two amounts, up to the total of the original first priority lien, is still in a priority position relative to the second priority lienholder. **The holder of the second priority lien is neither advantaged nor disadvantaged by the agreement. The second priority lienholder is not a party to the agreement and should not be affected by it. His status remains the same to the extent of any remaining assets available once the amount of the first priority lien has been satisfied.**

Id. (emphasis added).

Likewise, in *ITT Diversified Credit Corp. v. First City Capital Corp.*, the Texas Supreme Court held that a subordination agreement between first and third lienholders gave the third lienholder priority over the second lienholder to extent of first lienholder's claim. 737 S.W.2d 803, 804 (Tex. 1987). The court explained the partial subordination approach where A, B, and C have claims against the debtor, which are entitled to priority in alphabetical order, and where A subordinates his claim to C:

1. Set aside from the fund the amount of "A"'s claim.

2. Out of the money set aside, pay "C" the amount of its claim, pay "A" to the extent of any balance remaining after "C"'s claim is satisfied.

3. Pay "B" the amount of the fund remaining after "A"'s claim has been set aside.

4. If any balance remains in the fund after "A"'s claim has been set aside and "B"'s claim has been satisfied, distribute the balance to "C" and "A."

Id. (citing Gilmore, *Security Interests in Personal Property* § 39.1 at 1021 (1965)); *see also Co-Alliance, LLP v. Monticello Farm Serv., Inc*., 7 N.E.3d 355, 360 (Ind. Ct. App. 2014) ("We embrace [the partial subordination] approach, rather than the minority position that says any such agreement between "A" and "C" moves "A" to the back of the line as respects the full extent of its security. Co–Alliance was not a party to the subordination agreement, gave no consideration, and should not be entitled to a windfall. Moreover, the Bank and Monticello clearly did not intend to make Co–Alliance a third-party beneficiary of their subordination agreement."); *Bratcher v. Buckner*, 90 Cal. App. 4th 1177 (2001) (adopting partial subordination approach).

In the present case, the trial court was correct to adopt the partial subordination approach because that approach does not change the rights of SunTrust. Adopting the partial subordination approach, the First Wells Fargo Lien, in the principal amount of $415,000.00, remained in first priority position notwithstanding the execution of the Subordination Agreement. The result of the Subordination Agreement is that the Second Wells Fargo Lien would be satisfied prior to satisfaction of the First Wells Fargo Lien, but only to the amount of the First Wells Fargo Lien. SunTrust's priority status remained the same—it was behind a lien in the principal amount of $415,000.00. Essentially, the Subordination Agreement only impacted how the trustee distributed the proceeds

from the foreclosure sale. *See* (J.A. at 162) ("The Subordination Agreement does not bind or affect SunTrust's interest, but it does affect which lien the trustee satisfies after the payout to SunTrust.").

Futuri argues for the complete subordination approach. Under such an approach, Futuri argues, a subordination agreement will be presumed to have the effect of complete subordination absent express language that excludes a change in priority as to other liens, as was the case in *AmSouth Bank, N.A. v. J & D Fin. Corp.*, 679 So.2d 695 (Ala. 1996).[1] This approach runs contrary to well-settled law that Virginia courts "cannot read into [the contract] language which will add to or take away from the meaning of the words already contained therein" to the favor of either party. *Wilson v. Holyfield*, 227 Va. 184, 187(1984); *Pellegrin v. Pellegrin*, 31 Va. App. 753, 759 (2000) (noting that "[i]n determining the intent of the parties, courts will generally not infer covenants and promises which are not contained in the written provisions."). Indeed, the vast majority of courts have chosen not to adopt the complete subordination approach, which often has the effect of an

[1] In fact, in *AmSouth*, the Alabama Supreme Court examined the *ITT Diversified* case, and then relied upon the lower court's decision in that case, which was overturned by the Texas Supreme Court. Moreover, the court in *AmSouth* appeared to expressly limit its holding to the case before it, stating "[a]lthough the Texas Supreme Court reversed the ruling of the Court of Appeals, we hold the language of the Texas Court of Appeals opinion and the reliance on *Shaddix* therein to be a more compelling argument under the facts of this case." 679 So.2d 695, 698 (Ala. 1996).

unintended windfall to intermediary lienholders contrary to the intent of the parties to a subordination agreement.

The trial court recognized the perils of adopting the complete subordination approach, holding "[u]nder Futuri's view, it would be the third-party beneficiary of a windfall of the discharge of the secured liens on the property . . . a circumstance for which there is no evidence the loan contracting parties intended." (J.A. at 163). Instead, the trial court found that the partial subordination approach was consistent with Virginia law that prohibited the courts from interfering with the parties' freedom to enter into contracts. Op. Ltr. at 20 (J.A. at 169) (citing *Moore v. Gregory*, 146 Va. 504 (1925)); *see also Wells Fargo Bank v. Neilsen*, 178 Cal. App. 4th 602, 616-17 (2009) (finding that, because the party in the position of the intervening lienholder is not usually a party to the subordination agreement, the court was convinced that such subordination agreements "should have no effect, negative or positive, on the intervening lienholder"); *VCS, Inc. v. Countrywide Home Loans, Inc.*, 349 P.3d 704, 708 (Utah 2015) ("[T]he partial subordination approach most accurately reflects the intentions of parties who enter into subordination agreements and it also prevents nonparty creditors . . . from obtaining a windfall."); *Tomar Dev., Inc. v. Friend*, 410 P.3d 578, 582 (Colo. App. 2015) (holding that the partial subordination approach "promotes the intent of the parties and is less likely to impact the security interests of the intermediary

lienholders, either positively or negatively, than the complete subordination approach"); *Co-All., LLP v. Monticello Farm Serv., Inc.*, 7 N.E.3d 355, 359 (Ind. Ct. App. 2014) (stating that the complete subordination approach conflicts with the "bedrock principle" that "the intent of the parties controls the contract").[2]

Futuri takes issue with the trial court's reliance on the California decision *Bratcher v. Buckner* to support its adoption of the partial subrogation approach. 90 Cal. App. 4th 1177 (Cal. Ct. App. 2001). Appellant's Br. at 14. While it is true that *Bratcher* involved a subordination agreement whose clear terms stated that it only applied to certain loans, *Bratcher* was subsequently cited and quoted extensively by the California Court of Appeals in *Wells Fargo Bank v. Neilsen*, in which the court held that partial subrogation applies to "inadequate and/or incomplete subordination agreement[s]." 178 Cal. App. 4th 602, 613 (2009). Futuri's reliance on the Idaho case of *Blickenstaff v. Clegg*, 97 P.3d 439 (Idaho 2004), is also

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[2] Futuri argues that adopting partial subordination as the default rule would be the more confusing approach. Appellant's Br. at 17-18. However, this is simply not true. Adoption of the complete subordination approach would ultimately be more confusing and result in far more cumbersome subordination agreements and related litigation. Forcing contracting parties to explicitly state which other liens outside of those affected by the agreement (whose lenders may not be parties to the subordination agreement) are to remain where they are with respect to their priority will result in far longer and more complicated subordination agreements. Furthermore, there will be more litigation as parties seek windfall by arguing that the language in a subordination agreement is ambiguous. Otherwise, under partial subordination, parties would only have an incentive to litigate when the subordination agreement could reasonably be inferred to attempt complete subordination.

misplaced by the arguments in its own brief. The Idaho court made clear that a subordination can never result in partial subordination without the intervening lienholder's acquiescence. *Id.* at 448. However, even Futuri admits that this is not the case in Virginia. *See* Appellant's Br. at 11 ("This is not to say that a Subordination Agreement could not be drafted and recorded in Virginia which detailed how other liens were to be treated or how subordination was to be interpreted.").

Moreover, courts addressing subordination agreements that, as in the case at bar, do not include express language regarding the effect of the agreement on non-party lienholders have followed the partial subordination agreement approach. In *Caterpillar Fin. Servs. Corp. v. Peoples Nat'l Bank, N.A.*, the United States Court of Appeals for the Seventh Circuit held that a subordination agreement "simply swaps the priorities of the parties to the subordination agreement" and nonparties to a subordination agreement are unaffected by it. 710 F.3d 691, 693-94 (7th Cir. 2013). The court noted that it "c[ould]n't think why" the subordinating party would have agreed on complete subordination given that complete subordination would "drop the subordinating creditor to the bottom of the priority ladder" and benefit "a nonparty to the subordination agreement." *Id.* Accordingly, the trial court properly utilized the partial subordination approach in analyzing the Subordination Agreement and Futuri's Cross-Claim was properly dismissed.

C. <u>The trial court correctly found that the Subordination Agreement is unambiguous on its face (Assignment of Error No. 2).</u>

1. <u>Wells Fargo's intent is clear on the face of the Subordination Agreement.</u>

"It is the universal rule that the intent of the parties must be ascertained in the instrument as a whole, and not from particular words, phrases or clauses." *Farneth v. Windson Dev. Corp*., 21 Va. Cir. 216, 220 (Fairfax 1990). Moreover, "all clauses and provisions should, if possible, be construed to harmonize with one another and to serve the intention of the parties. The entire contract and each and all of its parts and provisions must be given meaning and effect if it can be consistently and reasonably done." *Id.*

The Subordination Agreement makes clear that it is an agreement between and for the benefit of Wells Fargo such that its effect is only to subordinate the First Wells Fargo Lien to the Second Wells Fargo Lien, without yielding to any other liens, including the SunTrust Lien. The Subordination Agreement states "WHEREAS, [Wells Fargo] has been requested to and has agreed to subordinate the [First Wells Fargo Lien] to the [Second Wells Fargo Lien]." (J.A. at 46). "Lender has been requested to and has agreed to subordinate the lien of the [First Wells Fargo Lien] to the [Second Wells Fargo Lien] …" (J.A. at 46). The Subordination Agreement further provides:

> NOW, THEREFORE, for a good and valuable consideration, the receipt of which is hereby acknowledged, Lender hereby agrees that the lien of the Original Security Instrument is subordinate and junior to the lien of the Subsequent Security Instrument and that the lien of the Subsequent Security Instrument shall also have a prior and superior right over the lien of the Original Security Instrument.

(J.A. at 46).

In analyzing the intent of the Subordination Agreement, the trial court noted, "The language in this paragraph is careful to specify in detail the relationship between the two liens. The document fails to mention any other liens. The last paragraph states the officers of Lender entered into the agreement on September 23, 2006." *Id.*

Futuri argues that the lack of any reference in the Subordination Agreement to any other liens, including the SunTrust Lien, requires one to conclude that the Subordination Agreement has the effect of completely subordinating the First Wells Fargo Lien to all other liens, known or unknown, including the Second Wells Fargo Lien and the SunTrust Lien. This interpretation is plainly wrong and would result in SunTrust being a third-party beneficiary, which would be inconsistent with the Subordination Agreement. *See Copenhaver v. Rogers*, 238 Va. 361, 367 (1989) (holding that to proceed on a third-party beneficiary claim, a party must show that the contracting parties "clearly and definitely intended" to confer a benefit on him). In fact, the trial court examined this assertion and rejected it, finding:

> The intent of the parties in the Subordination Agreement is clear. Wells Fargo was asked to and agreed to subordinate its original lien to its subsequent lien, and Wells Fargo did not agree to anything else. The Agreement focuses solely on the relationship between the two Wells Fargo liens. The language in paragraph five is very deliberate. It describes the impact of the Agreement on both liens in relation to one another. There would additionally be no logically inferable purpose for the parties to agree to subordinate the first Wells Fargo lien to the subsequent SunTrust lien.

Op. Ltr. at 11 (J.A. at 159).

The trial court correctly recognized that the Subordination Agreement was meant to impact the two liens it expressly referenced and finding any other meaning would be "inferring a promise that is not supported by the language contained in the Agreement." (J.A. at 164).

2. <u>Futuri cannot identify any ambiguity in the Subordination Agreement that would entitle the Court to review parol evidence.</u>

Futuri attempts to create an "ambiguity" in the unambiguous Subordination Agreement by pointing to Wells Fargo's internal documents. *See* Appellant's Br. at 25-26. Futuri's argument lacks merit for several reasons. First, Wells Fargo's internal documents constitute parol evidence that may not be considered by the Court. This Court has set forth the contours of the parol evidence rule as follows:

> The parol evidence rule in effect declares that where parties have reduced their contract to a writing which imposes a legal obligation in clear and explicit terms, the writing shall be the sole memorial of that contract, and it is conclusively presumed that the writing contains the whole contract. The writing alone is the evidence of the contract and no other will be received.

Coal River Collieries v. Eureka Coal & Wood Co., 144 Va. 263, 282 (1926); *Galloway Corp. v. S.B. Ballard Const. Co.*, 250 Va. 493, 502 (1995) ("If the terms of the parties' agreement are contained in a clear and explicit writing, that writing is the sole memorial of the contract and the sole evidence of the agreement. In that event, parol evidence cannot be used to explain the written contractual terms."). It is only where there has first been a determination by the court that an agreement is ambiguous that a court can then consider evidence outside the agreement, parol evidence, in order to analyze and interpret that ambiguity. *See Galloway Corp.*, 250 Va. at 502. That is, "parol evidence cannot be used to first create an ambiguity and then remove it." *Cohan v. Thurston*, 223 Va. 523, 525 (1982). Rather, the "ambiguity must be apparent on the face of the instrument." *Id.*; *see also C.F. Trust, Inc. v. Tyler*, 318 B.R. 795, 805 (E.D. Va. 2004) ("[To] avoid having the ambiguity exception swallow the general rule, the law considers that a writing is not ambiguous under the parol evidence rule unless settled rules of interpretation, applied to the writing as a whole, leave a genuine uncertainty as to which of two or more possible meanings represents the contracting parties' true intent.") (citing 29A *Am. Jur. 2d Evidence* § 1138 (1994)).

Here, Futuri attempts to turn this exception to the parol evidence rule on its head by pointing to parol evidence (the Wells Fargo internal documents) to support its argument that the Subordination Agreement is ambiguous and, therefore the

Wells Fargo internal documents should be considered. That is, the purported ambiguity proffered by Futuri stems not from the Subordination Agreement, which is clear on its face, but from the Wells Fargo internal documents, which constitute inadmissible parol evidence. In fact, the trial court could not consider any parol evidence, including the Wells Fargo internal documents, because the first requirement of the exception to the parol evidence rule has not been met, namely the Subordination Agreement is not ambiguous. *See, e.g.*, *High Knob, Inc. v. Allen*, 205 Va. 503 (1964) (noting that parol evidence is not admissible "when offered to add to, subtract from, vary or contradict the terms of a written agreement."). Indeed, Futuri does not cite to a single ambiguity in the Subordination Agreement.

While Futuri asserts that internal Wells Fargo documents "muddy" the facts, in actuality, Futuri intends to muddy the facts itself by leaping to unfounded conclusions based on insignificant parol evidence in a desperate attempt to create an ambiguity in the unambiguous Subordination Agreement.

Futuri further contends that the trial court inferred an unexpressed intent (i.e., that Wells Fargo intended to not give up any position of priority) that, in reality, is clearly expressed by the terms of the Subordination Agreement. Appellant's Br. at 23-24. Futuri's support for this inferred intent is that partial subordination results in "labyrinthine circuity" which cannot be possible when Wells Fargo simply agreed to subordinate its first loan to its second loan and

nothing else. However, as discussed above, partial subordination results in no such "labyrinthine circuity" and, even if it did, it would not negate Wells Fargo's clear intent as expressed by the four corners of the Subordination Agreement. That Futuri disagrees as to the meaning of the Subordination Agreement is insufficient to render it ambiguous such that parol evidence may be considered. *See Eure v. Norfolk Shipbuilding & Drydock Corp., Inc*., 263 Va. 624, 632 (2002) ("[a] contract is not ambiguous merely because the parties disagree as to the meaning of the terms used.").

Wells Fargo's internal documents do not support Futuri's position that Wells Fargo intended to have a second lien position but, more importantly, these documents are parol evidence which cannot be used to create an ambiguity in the first place. As such, the trial court correctly found that the Subordination Agreement was unambiguous on its face and Futuri's Cross-Clam was properly dismissed.

3. <u>Even if the trial court had considered parol evidence, it does not demonstrate Wells Fargo "intended" to have a second lien position.</u>

Even if the trial court had considered Wells Fargo's internal documents, which are dated after the First Wells Fargo Lien was recorded, those notes do not demonstrate that Wells Fargo "intended" to have a second lien position. At best, they demonstrate that an employee entering information into the Wells Fargo

system thought that Wells Fargo had a second lien position. The other documents merely show that Wells Fargo ran a credit report that showed SunTrust was a creditor of Cortez. *See* (J.A. at 126-29). This does little to aid Futuri in its claim that parol evidence supports its position. This is particularly true given that "a lien creditor's rights are protected upon recordation, irrespective of the lien creditor's actual or constructive knowledge of conflicting interests in the property." *Ameribanc Savings Banks FSB v. Resolution Trust Corp*., 858 F. Supp. 576, 582 (E.D. Va. 1994); (J.A. at 153). To that end, Wells Fargo's internal documents are not helpful to Futuri's claims.

Even if there were a question (which there is not) regarding whether the First Wells Fargo Lien was intended to secure the subject Property, the recordation of the First Wells Fargo Lien constitutes evidence of the indebtedness, was signed by the party taking out the loan, and provided notice of the encumbrance to all creditors, including lien creditors such as SunTrust. *See Chavis v. Gibbs*, 198 Va. 379, 381 (1956) ("The recordation of an instrument gives constructive notice of all the facts expressly stated in the instrument and other matters therein suggested which might be disclosed upon prudent inquiry."); *Shaheen v. Cty. of Mathews*, 265 Va. 462 (2003) ("If a party's rights are disclosed in the chain of title, the purchaser (and the mortgagee) are charged with notice of all that the title work

may disclose."). The SunTrust Lien explicitly states that "THIS CONVEYANCE is made expressly subject to restrictions, covenants, conditions, easements and prior liens, if any, of record." (J.A. at 40). Therefore, Futuri had notice of the encumbrance.

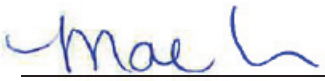
CONCLUSION

The trial court correctly ruled that the Subordination Agreement did not subordinate the First Wells Fargo Lien completely to the SunTrust Lien and correctly utilized the partial subordination approach. This approach, which has been adopted by the majority of jurisdictions to address the issue, neither advantages nor disadvantages the rights of the holder of the second priority lien, SunTrust, who is also not a party and is not affected by the Subordination Agreement. The trial court properly utilized the partial subordination approach in analyzing the Subordination Agreement and Futuri's Cross-Claim was properly dismissed.

Furthermore, the trial court correctly held that the Subordination Agreement is unambiguous on its face. Wells Fargo's intent that the Subordination Agreement was meant to impact the two liens expressly referenced therein is clear on the face of the agreement. Futuri cannot identify any ambiguity in the Subordination Agreement that would entitle the Court to review parol evidence because the Subordination Agreement is unambiguous. As such, the trial court correctly found

that the Subordination Agreement was unambiguous on its face and Futuri's Cross-Claim was properly dismissed.

For the foregoing reasons, Respondent-Appellee Wells Fargo Bank, N.A. respectfully requests that the ruling of the trial court be affirmed and that the Court award any other relief it deems proper.



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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2019, pursuant to Rule 5:26, three paper copies of the Brief of Appellee have been hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Brief of Appellee was served, via email, upon:

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One copy of the same has been served, via UPS Ground Transportation, this 16th day of August, 2019 upon the following:

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