

NO. A09-2059

State of Minnesota
In Court of Appeals

American Bank of St. Paul,
Plaintiff/Respondent,

v.

Coating Specialties, Inc., et al.,
Defendants,

and

Co-op Credit Union of Montevideo,
Plaintiff/Appellant,

v.

Coating Specialties, Inc., et al.,
Defendants.

RESPONDENT AMERICAN BANK OF ST. PAUL'S
RESPONSE BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

	Page
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	3
STATEMENT OF THE FACTS	5
I. Prior to American Bank Disbursing Loaned Funds to Coating Specialties, the Co-op Expressly Agreed in Writing to Subordinate Its Secured Interest in Coating Specialties’ Inventory, Account Receivables and Equipment to American Bank.	5
II. American Bank and the Co-op Separately Commence Prior Litigation Against Coating Specialties and Obtain Judgments in their Favor Based upon Coating Specialties’ Defaults under the Respective Loan Documents.....	7
III. After judgment in favor of American Bank against Coating Specialties was Entered, the Co-op Informed American Bank of an Account Receivable and Represented to American Bank that American Bank has a Superior Interest in the Account and Should Levy Upon the Account.	8
IV. The Co-op’s Conversion of American Bank’s Collateral.....	9
SUMMARY OF ARGUMENT	10
STANDARD OF REVIEW	11
ARGUMENT	12
I. The District Court Properly Determined that American Bank’s Interest in the Collateral at Issue is Prior and Superior to Any Interest by the Co-op Pursuant to the Express and Unambiguous terms of the Subordination Agreement.	12
A. The Subordination Agreement is Unambiguous and the Co- op’s Citation to Extrinsic Facts in an Attempt to Create Ambiguity Fails.	13

B.	The District Court Properly Declined to Address the Untimely and Novel Legal Theory of a Purported “Absence” of Terms in the Subordination Agreement, Which, Regardless, Fails on Its Merits.	18
II.	Even where the Extrinsic Facts are Considered, the Co-op’s New Theories of the Case Fail.	21
A.	American Bank’s Security Was Not Released by the Acceptance of a Subsequent Note.....	21
B.	The Co-op’s Attempts for a Judgment on the Pleadings must Fail.	22
C.	The Operable Agreement here is the Subordination Agreement.....	23
III.	The District Court Properly Declined to Address the Co-op’s Untimely and Novel Legal Argument that American Bank Has an Obligation to Trace “Unidentified, Commingled” Funds and, Regardless, the Argument Fails on Its Merits.....	24
CONCLUSION.....		25

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>In re Oriental Rug Warehouse Club, Inc.</i> , 205 B.R. 407 (D. Minn. Bankr. 1997).....	11, 25
STATE CASES	
<i>Anglo-California Trust Co. v. Wallace</i> , 58 Cal. App. 625, 209 Pac. 78 (1922)	21
<i>Art Goebel, Inc. v. N. Suburban Agencies, Inc.</i> , 567 N.W.2d 511 (Minn.1997)	1, 14, 15
<i>Blackburn, Nickels & Smith, Inc. v. Erickson</i> , 366 N.W.2d 640 (Minn. Ct. App. 1985).....	2, 10, 11
<i>Blattner v. Forster</i> , 322 N.W.2d 319 (Minn. 1982)	16
<i>Carl Bolander & Sons, Inc. v. United Stockyards Corp.</i> , 298 Minn. 428, 215 N.W.2d 473 (1974)	16
<i>City of Virginia v. Northland Office Props. Ltd. P'ship</i> , 465 N.W.2d 424 (Minn. Ct. App. 1991).....	16
<i>Current Tech. Concepts, Inc. v. Irie Enter., Inc.</i> , 530 N.W.2d 539 (Minn. 1995)	1, 10, 14, 15, 21
<i>Denelsbeck v. Wells Fargo & Co.</i> , 666 N.W.2d 339 (Minn. 2003)	1, 14
<i>Donnay v. Boulware</i> , 275 Minn. 37, 144 N.W.2d 711(1966)	2, 16
<i>Employers Mut. Liab. Ins. Co. v. Eagles Lodge</i> , 282 Minn. 477, 165 N.W.2d 554 (Minn. 1969).....	14
<i>Hilligoss v. Cargill, Inc.</i> , 649 N.W.2d 142 (Minn. 2002)	15

<i>Indep. Sch. Dist. No. 877 v. Loberg Plumbing & Heating Co.,</i> 266 Minn. 426, 123 N.W.2d 793 (1963)	14
<i>Interstate Trust Co. v. Headlund,</i> 51 Utah, 171 Pac. 515 (1918)	21
<i>Lamb Plumbing & Heating Co. v. Kraus-Anderson,</i> 296 N.W.2d 859 (Minn. 1980)	14
<i>Lehman v. Norton,</i> 191 Minn. 211, 253 N.W. 663 (1934)	12, 19, 24
<i>Lowry v. Kneeland,</i> 263 Minn. 537, 117 N.W.2d 207 (1962)	15
<i>Metro Office Parks Co. v. Control Data Corp.,</i> 295 Minn. 348, 205 N.W.2d 121 (1973)	14
<i>Midway Nat'l Bank of St. Paul v. Bollmeier,</i> 462 N.W.2d 401 (Minn. Ct. App. 1990).....	19
<i>Miller v. McCarty,</i> 47 Minn. 321, 50 N.W. 235 (1891)	22
<i>Montgomery v. American Hoist & Derrick Co.,</i> 350 N.W.2d 405 (Minn. Ct. App. 1984).....	20
<i>Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp.,</i> 279 N.W.2d 349 (Minn. 1979)	16
<i>Starr v. Starr,</i> 312 Minn. 561, 251 N.W.2d 341 (1977)	16
<i>State Bank of Young Am. v. Vidmar Iron Works, Inc.,</i> 292 N.W.2d 244 (Minn. 1980)	22
<i>Sullivan v. Spot Weld, Inc.,</i> 560 N.W.2d 712 (Minn. Ct. App. 1997).....	2, 19
<i>Turner v. Alpha Phi Sorority House,</i> 276 N.W.2d 63 (Minn. 1979)	15
<i>Wick v. Murphy,</i> 237 Minn. 447, 54 N.W.2d 805 (1952)	16

Wisc. Trust Co. v. Cousins,
172 Wis. 486, 179 N.W. 801 (1920) 22

STATUTES

Minn. Stat. § 336.9-306..... 25
Minn. Stat. § 336.9-315..... 25

OTHER AUTHORITIES

Minn. R. Gen. Prac. 115.11 2, 19, 24
Renewal Note as Discharging Original Obligation or Indebtedness, 52 A.L.R.
1416 at II(c)(5)..... 21

STATEMENT OF THE ISSUES

1. Did the district court properly enter judgment in favor of American Bank of St. Paul based on its findings that the express terms of the Subordination Agreement that the Co-op executed in favor of American Bank are clear and unambiguous when the law states that courts may grant summary judgment where the material terms of a contract are not susceptible to more than one interpretation and the Co-op fails to identify a term of the Subordination Agreement that could be susceptible to more than one interpretation?

District Court Ruling: The district court found the Subordination Agreement to be unambiguous that the Co-op subordinated \$50,000 of its interest in the collateral of Coating Specialties, Inc. and accordingly ordered judgment against the Co-op and in favor of American Bank in the amount of \$50,000.00.

Most Apposite Cases:

Current Tech. Concepts, Inc. v. Irie Enter., Inc., 530 N.W.2d 539 (Minn. 1995);

Art Goebel, Inc. v. N. Suburban Agencies, Inc., 567 N.W.2d 511 (Minn.1997);

Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339 (Minn. 2003).

2. Did the district court properly decline to consider extrinsic facts outside the four corners of the Subordination Agreement in determining whether the contract is ambiguous when the law holds that courts should ignore all extrinsic facts where a contract is unambiguous?

District Court Ruling: Because the district court found the Subordination Agreement unambiguous on its face, the district court correctly refused to consider the extrinsic facts offered by the Co-op.

Most Apposite Cases:

Donnay v. Boulware, 275 Minn. 37, 144 N.W.2d 711(1966);

Blackburn, Nickels & Smith, Inc. v. Erickson, 366 N.W.2d 640 (Minn. Ct. App. 1985).

3. Did the district court properly exercise its discretion by not addressing certain arguments presented by the Co-op after the district court ordered summary judgment in favor of American Bank when Minnesota law holds that courts have broad discretion to disregard new legal theories presented after summary judgment?

District Court Ruling: The district court correctly disregarded the Co-op's novel and untimely arguments.

Most Apposite Case and other Provisions:

Sullivan v. Spot Weld, Inc., 560 N.W.2d 712 (Minn. Ct. App. 1997);

Minn. R. Gen. Prac. 115.11.

STATEMENT OF THE CASE

This case presents a contract dispute between American Bank of St. Paul (“American Bank”) and the Co-op Credit Union of Montevideo (“Co-op”) arising out of a Subordination Agreement dated June 1, 2006, by which the Co-op subordinated its security interest in certain collateral of Coating Specialties, Inc. (“Coating Specialties”). Despite the Subordination Agreement, the Co-op ultimately proceeded to liquidate collateral of Coating Specialties without providing American Bank notice of its intent to do so and recovered over \$66,000 in funds and refused to acknowledge that the first \$50,000 of its recovery was subject to the Subordination Agreement.

On February 5, 2009, after thoroughly reviewing the evidence presented and the terms of the Subordination Agreement, the Honorable Bruce W. Christopherson, district judge of the Chippewa County Court, granted summary judgment in favor of American Bank and against the Co-op in the amount of \$50,000. (A.131-34.) The court found that the Subordination Agreement was “unambiguous on its face” and as “a matter of law the subordination of security was valid to apply to the presently existing indebtedness even through it may have changed in form from the initial promissory notes.” (A.133.) Because the district court found the Subordination Agreement “clear, complete and unambiguous on its face” it refused to entertain any extrinsic evidence to attempt to modify the terms in the Subordination Agreement. (A.134.)

Unsatisfied with the district court’s ruling, counsel for the Co-op began to inundate the court with correspondence and new legal theories in the hopes for a second

chance. On February 9, 2009, the Co-op's counsel submitted a letter to the district court requesting that the court reconsider its order for judgment against the Co-op. (R.1.) The Co-op's request in its February 9th correspondence to the district court focused on whether the court should consider the costs the Co-op incurred in connection with collecting the collateral at issue. (*Id.*) The Co-op claimed that the value of the collateral it liquidated minus the costs it incurred was less than the judgment entered against the Co-op. (*Id.*)

On February 11, 2009, in another letter, and later in its memoranda in support of a motion to reconsider, the Co-op began to expand its request. (R.2; A.138-39.) The first additional theory the Co-op encouraged the district court to consider was whether American Bank must trace funds that are the result of the Co-op's efforts to liquidate the collateral at issue. (R.2; A.138-39.) On March 5, 2009, the Co-op presented the district court with a second novel argument in support of a motion to reconsider. In its memorandum, the Co-op acknowledged "that this issue was not outlined in the original letter requesting permission to file the present motion." (A.138.) The district court refused to address these two additional issues that were not raised by the Co-op on summary judgment. (A.166.) The Judge specifically granted the Co-op's motion to reconsider only "as to a narrow issue – whether costs necessary for collection and sale of mutually secured assets should be reviewed as to reimbursement from American Bank of St. Paul, and if so in what amount" and not on "all other issues now urged by" the Co-op. (*Id.*) After an evidentiary hearing on this limited issue, having denied the Co-op's motion

for reconsideration in all other respects, the district court reaffirmed its original summary judgment on September 15, 2009. (A.156-63.) This appeal follows.

STATEMENT OF THE FACTS

I. Prior to American Bank Disbursing Loaned Funds to Coating Specialties, the Co-op Expressly Agreed in Writing to subordinate Its Secured Interest in Coating Specialties' Inventory, Account Receivables and Equipment to American Bank.

On June 1, 2006, the Co-op agreed, in writing, to subordinate \$50,000 of its secured interest to American Bank in relation to loaned funds from American Bank to Coating Specialties (“the Subordination Agreement”). (A.112.) In consideration of American Bank’s agreement to loan funds to Coating Specialties for operating expenses, the Co-op allowed Coating Specialties to obtain a loan from American Bank and agreed to subordinate to American Bank “and its successors and assigns all liens, security interests, rights, claims, and demands of every kind against the property of premises specifically described as inventory, accounts receivable and equipment.” (*Id.*) The Subordination Agreement does not reference any specific loan number, promissory note or any specific lending instrument. (*Id.*) The Subordination Agreement does not contain a termination date. (*Id.*) Rather, the Subordination Agreement is a blanket agreement to subordinate the Co-op’s secured interest in the inventory, accounts receivable and equipment of Coating Specialties in consideration for American Bank agreeing to loan Coating Specialties \$50,000 for operating expenses. (*Id.*)

The reason behind American Bank’s requirement of a Subordination Agreement prior to lending any funds to Coating Specialties was simple. Diane Zuidema, Market

President of American Bank's Olivia, Minnesota branch, was aware that the Co-op had a prior UCC Financing Statement recorded against certain property of Coating Specialties and therefore required a subordination of that debt prior to agreeing to lend Coating Specialties any new debt. (A.45, at 19-20.) Thus Ms. Zuidema requested, and the Co-op agreed to subordinate its interest to American Bank prior to agreeing to the Bank engaging in any loan to Coating Specialties. (A.46, at 22.) This verbal agreement was confirmed in writing on June 1, 2006, in the Subordination Agreement.

In reliance on the Co-op's verbal and written representations in the Subordination Agreement, American Bank moved forward with its loan arrangement with Coating Specialties. On May 26, 2006, Coating Specialties signed a \$25,000 Promissory Note, and other loan documents, including a Commercial Security Agreement. (A.55-A.73.) The business loan agreement defines the term "Note" to mean "the Note executed by Coating Specialties, Inc. in the principal amount of \$25,000 dated May 26, 2006, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions for the note or credit agreement." (A.60.) On June 2, 2006, Coating Specialties signed a second \$25,000 Promissory Note and related loan documents, including a Commercial Security Agreement. (A.74-A.92.) The June 2nd business loan agreement defined the term Note the same as the May 26th Business Loan Agreement. (A.79.) As the district court found in its order for judgment in favor of American Bank dated April 3, 2007 (the "2007 Order"), as a result of the aforementioned loan documents, American Bank was granted a security interest by Coating Specialties in two

Commercial Security Agreements in, but not limited to, all inventory, chattel paper, accounts, equipment and general intangibles of Coating Specialties. (A.168, at ¶ 6.)

The May 26th and June 2nd notes were both short term notes that were ultimately consolidated into the \$100,000 revolving line of credit that American Bank issued Coating Specialties on June 23, 2006. (A.50, at 38-40.) As the district court found in the 2007 Order, on June 23, 2006, American Bank agreed to refinance and consolidate the then-existing \$50,000 in debt into a \$100,000 revolving line of credit. (A.93-A.108; *see also* A.168, at ¶ 4.) On the same day, June 23, 2006, Coating Specialties also executed and delivered to American Bank a Promissory Note in the original principal amount of \$100,000 to secure repayment of a \$100,000 revolving line of credit. (A.100-02; A.168, at ¶ 5.)

II. American Bank and the Co-op Separately Commence Prior Litigation Against Coating Specialties and Obtain Judgments in their Favor Based upon Coating Specialties' Defaults under the Respective Loan Documents.

Coating Specialties ultimately defaulted on its obligations under the Promissory Note with American Bank. On or about September 18, 2006, American Bank provided written notification to Coating Specialties of its default under the Loan Documents. (A.169, at ¶ 11.) Coating Specialties did not cure the default and otherwise failed to make payments as required by the loan documents. (A.169, at ¶ 12.) American Bank accelerated the balance of the Note in accordance with its rights upon Coating Specialties' default. (A.169, at ¶ 13.)

As a result of the default, American Bank filed an action against Coating Specialties and its owner, Chad Toftness (“Toftness”); and on April 3, 2007, the district court ordered that judgment be entered in favor of American Bank and against Coating Specialties and Toftness, jointly and severally, in the amount of \$76,851.93. (A.170.) In a separate and unrelated action, the Co-op sought judgment against Coating Specialties for default on its notes; and a judgment in favor of the Co-op and against Coating Specialties was entered on September 1, 2007 in the amount of \$613,539.87.

III. After judgment in favor of American Bank against Coating Specialties was Entered, the Co-op Informed American Bank of an Account Receivable and Represented to American Bank that American Bank has a Superior Interest in the Account and Should Levy Upon the Account.

The Co-op’s actions confirm its acknowledgement of American Bank’s secured interest under the Subordination Agreement. As far back as June 20, 2007, the Co-op’s counsel contacted American Bank’s counsel and advised American Bank that Coating Specialties may have an amount due and owing from a third party, Fagen, Inc. (“Fagen”). The Co-op’s counsel went so far as to encourage American Bank to levy upon such an account in light of its prior interest in accounts receivables. (See A.37-38, at ¶¶ 3 and 4.)

Based on the information conveyed to American Bank by the Co-op’s counsel and the Co-op’s express acknowledgment that American Bank has a superior interest in Coating Specialties’ account receivables, American Bank investigated the claimed account payable. As a result, on February 15, 2008, American Bank filed a Second Amended Complaint naming Coating Specialties, LLC, (the “LLC”) as a party to the

underlying action and asserted additional claims of fraudulent transfer and successor liability.¹

IV. The Co-op's Conversion of American Bank's Collateral.

After judgment was entered in favor of American Bank, unbeknownst to American Bank, from October 8, 2007 through January 23, 2008, the Co-op levied upon, seized and sold multiple pieces of inventory and equipment of Coating Specialties and received, at a minimum, \$66,115.25. (R.6-R.17.) The inventory and equipment liquidated by the Co-op was American Bank's collateral in which it has a prior, secured interest pursuant to the Subordination Agreement, the Commercial Security Agreements and American Bank's UCC-1 Financing Statement filed with the Minnesota Secretary of State on June 1, 2006. (A.64-69, A.83-88.)

Pursuant to the express terms of the Subordination Agreement, as the district court found, the Co-op subordinated \$50,000 of its interest in the inventory, equipment and account receivables of Coating Specialties. (A.112.) The Co-op liquidated American Bank's collateral by levying upon and seizing inventory and equipment—despite being fully aware of American Bank's superior interest in the inventory and equipment of Coating Specialties pursuant to the Subordination Agreement. The Co-op not only liquidated American Bank's collateral, there is no evidence on the record or otherwise

¹ The result was that the amounts Fagen owed Coating Specialties or Coating Specialties LLC were deposited into the Court. The Co-op then moved to intervene, claimed entitlement to the entire amount of these funds, and more importantly, denied the validity of the Subordination Agreement.

that demonstrates the Co-op provided American Bank with notice of its intent to levy upon the inventory and equipment of Coating Specialties.

SUMMARY OF ARGUMENT

Given the plain reading of the contract at issue – the Subordination Agreement between the Co-op and American Bank – the district court correctly found that it is unambiguous and as a matter of law, judgment must be entered against the Co-op and in favor of American Bank in the amount of \$50,000. Minnesota law has long held where a contract is unambiguous it is a question of law and summary judgment may be entered. *Current Tech. Concepts, Inc. v. Irie Enter., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995). In its brief, the Co-op fails to pinpoint one term in the Subordination Agreement that is susceptible to two different interpretations, or how. Absent ambiguity, there is nothing to interpret. As such, this Court should affirm the district court’s decision.

Further, instead of concentrating on the dispositive issue of whether the Subordination Agreement is ambiguous, the Co-op instead focuses on extrinsic evidence in an attempt to create ambiguity where none otherwise exists. But where a contract is unambiguous, courts must disregard all extrinsic facts. *Blackburn, Nickels & Smith, Inc. v. Erickson*, 366 N.W.2d 640, 644 (Minn. Ct. App. 1985). The district court properly declined to entertain irrelevant extrinsic evidence, and this Court should do the same.

Moreover, the Co-op apparently now maintains that the Subordination Agreement is missing a material term and thus extrinsic evidence should be introduced. The Co-op never presented this argument to the district court prior to the district court’s entry of its

February 5, 2009 summary judgment order. The Co-op is unable to show that the district court abused its discretion by not addressing this untimely argument. But even on the merits, the argument fails. As the district court found, the Subordination Agreement's material terms are clear and unambiguous. The agreement unambiguously outlines the specific secured interest the Co-op subordinated to American Bank.

Finally, the Co-op's additional claim that the district court erred because it did not address whether American Bank correctly identified the proceeds from the liquidated proceeds must fail for two reasons. First, again, this theory was also presented only after summary judgment was issued by the district court and the Co-op cannot show that the district court abused its discretion by not addressing this novel, untimely argument. Further, the Co-op's argument fails on the merits. Based on the facts – or the lack of facts, namely, that there is no evidence on the record that the proceeds at issue are commingled – there is no need for American Bank to trace the funds at issue. *In re Oriental Rug Warehouse Club, Inc.*, 205 B.R. 407, 413 (D. Minn. Bankr. 1997).

STANDARD OF REVIEW

Although the Court “may make a determination of whether a contract is ambiguous without deference to the trial court's determination” (*Blackburn, Nickels & Smith, Inc.*, 366 N.W.2d at 643), considering the clear and unambiguous language of the Subordination Agreement, American Bank maintains the Court should affirm the district court's sound decision in all respects.

With respect to the novel legal theories the Co-op raised below only in post-summary judgment requests for leave to file a motion to reconsider, which was denied by the district court in all respects except as to the narrow issue of expenses incurred in execution, this Court reviews a decision by the district court to decline to entertain new legal theories on a motion to reconsider for abuse of discretion. *Lehman v. Norton*, 191 Minn. 211, 213, 253 N.W. 663, 664 (1934). The district court properly and thoughtfully exercised its discretion to allow the Co-op to submit further briefing and new legal theories only on the issue of fees and costs incurred by the Co-op in execution and the Court should affirm the district court's exercise of its discretion.

ARGUMENT

I. The District Court Properly Determined that American Bank's Interest in the Collateral at Issue is Prior and Superior to Any Interest by the Co-op Pursuant to the Express and Unambiguous terms of the Subordination Agreement.

The district court properly held that the Co-op unambiguously subordinated \$50,000 of its interest to American Bank and therefore American Bank has a superior interest in the liquidated collateral up to \$50,000. Considering that the material terms of the Subordination Agreement are not susceptible to more than one meaning, the district court was correct to find that the agreement is unambiguous and enter judgment in favor of American Bank. Further, because the Subordination Agreement is unambiguous, the district court was correct to ignore the extrinsic facts offered by the Co-op in an attempt to create ambiguity.

A. The Subordination Agreement is Unambiguous and the Co-op's Citation to Extrinsic Facts in an Attempt to Create Ambiguity Fails.

The Subordination Agreement is not ambiguous. As the district court found, the Subordination Agreement expressly states that the Co-op subordinates its security interest to American Bank. (A.112.)

Thus, rather than arguing whether any single term is ambiguous, the Co-op apparently now argues that there are material terms missing in the agreement that, without more, defeats the enforcement of the contract itself. (App. Brief at 7-8.) The district court properly declined to exercise its discretion to entertain this novel theory on a motion to reconsider. As such, unless the Court finds the district court abused its broad discretion for not addressing this issue, the Court must affirm the district court's decision. However, the argument itself lacks merit. The Subordination Agreement, which was drafted by the Co-op and executed by the Co-op's officer, Lee Sorenson (whose signature was witnessed by the Co-op's President, Linda Givan), specifies the secured interest the Co-op subordinated to American Bank, which includes the equipment of Coating Specialties that the Co-op ultimately chose to liquidate without notice to American Bank. (A.112.)

(a) The Subordination Agreement is Unambiguous.

The district court correctly found that the Subordination Agreement is not ambiguous. As the Co-op correctly itself concedes, the agreement is rather straightforward. (*See* The Co-op's Br. at 7) ("at first glance, it appears that the amount of subordination agreed to by [the Co-op] is \$50,000.00"). Because there is no ambiguity,

the construction and effect of the Subordination Agreement presents a question of law; and as such the district court's determination for summary judgment was appropriate.

It has long been the case that whether a contract is ambiguous is purely a question of law. *Current Tech. Concepts, Inc.*, 530 N.W.2d at 543 (citing *Lamb Plumbing & Heating Co. v. Kraus-Anderson*, 296 N.W.2d 859, 862 (Minn. 1980)). When making that determination, a court must give the contract language its plain and ordinary meaning. *Id.* (citing *Employers Mut. Liab. Ins. Co. v. Eagles Lodge*, 282 Minn. 477, 479, 165 N.W.2d 554, 556 (Minn. 1969)). Further, a contract must be interpreted in a way that gives all of its provisions meaning. *Id.* (citing *Indep. Sch. Dist. No. 877 v. Loberg Plumbing & Heating Co.*, 266 Minn. 426, 436, 123 N.W.2d 793, 799-800 (1963)).

The determination of ambiguity depends "not upon words or phrases read in isolation, but rather upon the meaning assigned to the words or phrases in accordance with the apparent purpose of the contract as a whole." *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). Upon a determination that a contract is not ambiguous, the contract "must be given its plain and ordinary meaning." *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003) (internal quotations omitted). A contract can only be ambiguous where its language is reasonably susceptible of more than one interpretation. *Current Tech. Concepts, Inc.*, 530 N.W.2d at 543 (citing *Metro Office Parks Co. v. Control Data Corp.*, 295 Minn. 348, 351, 205 N.W.2d 121, 123 (1973); *Lamb*, 296 N.W.2d at 862); see also *Art Goebel, Inc.*, 567 N.W.2d at 515 (finding a "contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation"). Even where a court finds that a

contract is ambiguous, it must be construed against its drafter. *Id.* (citing *Lowry v. Kneeland*, 263 Minn. 537, 541, 117 N.W.2d 207, 210 (1962)).

The terms of the Subordination Agreement are not reasonably susceptible to more than one interpretation. As such, there is no ambiguity here. In fact, after a thorough reading of the Co-op's brief, it is clear that it does not argue that any portion of the Subordination Agreement is ambiguous and can be susceptible to more than one interpretation. Further, it is axiomatic that if there is any ambiguity in the Subordination Agreement, the ambiguous term or terms must be construed against the drafter, the Co-op. *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 148 (Minn. 2002) (finding that it is a "fundamental principle of contract law [] that when contract language is reasonably susceptible of more than one interpretation it is ambiguous, [and the] ambiguous contract terms must be construed against the drafter") (citing *Current Tech. Concepts, Inc.*, 530 N.W.2d at 543; *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979)). Therefore, even if the Court assumes the yet-to-be identified ambiguous term exists – which it does not – any such ambiguity is required to be construed in favor of American Bank and against the Co-op and result in the same holding the district court correctly made based on the express terms of the contract.

(b) Extrinsic Evidence cannot Change the Terms of an Unambiguous Contract.

Because it is unable to identify any single term in the Agreement that may be considered ambiguous, in order to create ambiguity, the Co-op relies on additional facts

and extrinsic evidence. The Co-op thus maintains that the terms of the Subordination Agreement do not reflect the drafter's apparent intent. (App. Brief at 9.)

However, the drafter's intention is irrelevant. Only where the terms are ambiguous or reasonably susceptible to more than one interpretation may prior negotiations be considered in order to determine the meaning and intent of the parties. *Donnay v. Boulware*, 275 Minn. 37, 44, 144 N.W.2d 711, 716 (1966) (citing *Wick v. Murphy*, 237 Minn. 447, 54 N.W.2d 805 (1952)). It is well established, and long held, that a party cannot create ambiguity by introducing extrinsic evidence. *Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn. 1982) (finding that if a court may only resort to extrinsic evidence to determine the intent of the parties after it is determined the contract's language is ambiguous) (citing *Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349 (Minn. 1979); see also *City of Virginia v. Northland Office Props. Ltd. P'ship*, 465 N.W.2d 424, 427 (Minn. Ct. App. 1991) (holding that the "general rule for construction of contracts is that where language is plain and unambiguous, there is no room for construction") (citing *Starr v. Starr*, 312 Minn. 561, 562-63, 251 N.W.2d 341, 342 (1977); *Carl Bolander & Sons, Inc. v. United Stockyards Corp.*, 298 Minn. 428, 433, 215 N.W.2d 473, 476 (1974)). Because the extrinsic evidence is being presented for the sole purpose of creating ambiguity, the evidence should not be taken into account.

Therefore, contrary to the Co-op's argument, the fact that American Bank ultimately consolidated two \$25,000 notes into a \$100,000 line of credit has no bearing upon the meaning or effect of the Subordination Agreement. As stated in the

Subordination Agreement and as the district court found, the Co-op subordinated its interest to American Bank, and therefore, American Bank has a superior interest in the liquidated collateral up to \$50,000.² This is not changed, in any way, by subsequent acts taken by American Bank in consolidating the notes with Coating Specialties. The Agreement is clear that in recognition of American Bank's agreement to lend at least \$50,000 to the Co-op's client, Coating Specialties, to cover operating expenses, the Co-op agreed to subordinate its interests in Coating Specialties' "inventory, accounts receivable, and equipment."

There is nothing vague or ambiguous about these terms. The Co-op's displeasure in having the agreed upon terms enforced against it after it liquidated in excess of \$50,000 of equipment (without providing American Bank notice) does not change that the Co-op previously agreed to subordinate this amount. The Co-op's failure to identify any ambiguity confirms that the district court properly granted summary judgment in favor of American Bank and that this Court should affirm that holding.

² The Co-op maintains that the district court "improperly added a term to the subordination agreement that called for CCU's subordination to all... consolidations... of two \$25,000.00 notes." (App. at 9.) The Co-op's conclusion is contrary to the facts and the district court's findings. The court found that the Co-op "had subordinated its security interest to [American Bank] in the amount of \$50,000.00" and the "subordination was unambiguous on its face." (A.159.) The district court further found that the "plain reading of the subordination clearly shows the intention of the Co-op to subordinate its security interest in the only dollar amount shown, which was \$50,000.00, the amount of the indicated loan." (A.160.)

B. The District Court Properly Declined to Address the Untimely and Novel Legal Theory of a Purported “Absence” of Terms in the Subordination Agreement, Which, Regardless, Fails on Its Merits.

Rather than arguing whether any single term is ambiguous, the Co-op apparently argues that there are material terms missing in the agreement that, without more, defeats the enforcement of the contract itself. (App. Brief at 7-8 (stating that the Subordination Agreement “was silent” to what The Co-op agreed to subordinate to American Bank.) This same argument was presented to the district court only after the court entered an order for summary judgment in American Bank’s favor in February, 2009, and was not even included in the Co-op’s written request for leave to file a motion for reconsideration of issues never previously briefed. In fact, the Co-op’s theory first came to light on March 5, 2009 when it filed its memorandum in support of its motion to reconsider and acknowledged it never even requested permission to brief the issue. (See A.138-39 (stating the Co-op “realizes that this issue was not outlined in the original letter requesting permission to file the present motion.”) Ultimately, the district court did not address this issue because, appropriately, the district court exercised its discretion to grant the motion to reconsider only “as to a narrow issue – whether costs necessary for collection and sale of mutually secured assets should be reviewed as to reimbursement from American Bank of St. Paul, and if so in what amount” and not on “all other issues now urged by [the Co-op].” (A.166.)

For this Court to overturn the district court’s decision on this issue, the Co-op must show that the court abused its broad discretion by making a clearly erroneous

conclusion against logic and facts on the record. *Lehman v. Norton*, 191 Minn. at 213, 253 N.W. at 664 (finding that the abuse of discretion standard applies to motions to reconsider). Given the record, the Co-op cannot meet this standard.

A motion for reconsideration is only granted under “compelling circumstances,” which are lacking in this matter. *See* Minn. R. Gen. Prac. 115.11. Moreover, the Comment of the Advisory Committee notes courts may only grant these motions:

where intervening legal developments have occurred (e.g., enactment of an applicable statute or issuance of a dispositive court decision) or where the earlier decision is palpably wrong in some respect. Motions for reconsideration are not opportunities for presentation of facts or arguments available when the prior motion was considered. Motions for reconsideration will not be allowed to “expand” or “supplement” the record on appeal.

Minn. R. Gen. Prac. 115.11, cmt. (emphasis added). A motion for reconsideration, and corollary briefing, is not designed to allow parties to continue to come up with new legal theories and arguments, after a court has ruled against them, that they failed to raise in the first instance.

As far as supplementing the record, in Minnesota, it has long been held courts must disregard facts and new legal theories presented after summary judgment, when those facts or law were known to the dilatory party at the time the dispositive motion was made. *Sullivan v. Spot Weld, Inc.*, 560 N.W.2d 712, 716 (Minn. Ct. App. 1997) (*citing Midway Nat'l Bank of St. Paul v. Bollmeier*, 462 N.W.2d 401, 404-05 (Minn. Ct. App. 1990) (concluding that the district court correctly refused to consider materials submitted in a motion to reconsider that were not presented to the court on motion for summary

judgment)). Essentially, the bright line rule is: Minnesota courts do not allow parties to supplement the record with additional facts or argument after summary judgment has been granted. *See Montgomery v. American Hoist & Derrick Co.*, 350 N.W.2d 405, 408 (Minn. Ct. App. 1984) (finding that a party should not be allowed to supplement the record at the summary judgment hearing, instead the hopeful party should request a continuation).

In this matter, the Co-op has not cited any evidence on the record why it failed to present this new theory prior to the district court's original summary decision. Since there is no evidence on the record or otherwise that demonstrates that the novel legal argument proposed by the Co-op subsequent to the entry of summary judgment was not available before February 5, 2009, the district court did not abuse its discretion by not considering this new argument on reconsideration.

Regardless of whether the Co-op is precluded, procedurally, from addressing this issue on appeal, the argument itself lacks merit. The Subordination Agreement, which was drafted by the Co-op, specifies the following: (1) the Co-op's specific secured interest; (2) the amount American Bank agreed to lend Coating Specialties; (3) the purpose of the loan, which was to allow Coating Specialties to finance its "operating expenses;" and (4) the property the Co-op agreed to subordinate, which was Coating Specialties' "Inventory, accounts receivable, and equipment." (A.112.) These terms (namely The Co-op's specific secured interest it subordinated to American Bank) are the only terms material to the contractual relationship and, as admitted by the Co-op, there is

no ambiguity related to these terms. (*See* App. Brief at 7.) Consequently, the Court should affirm the district court's decision.

II. Even where the Extrinsic Facts are Considered, the Co-op's New Theories of the Case Fail.

In a scattershot fashion, the Co-op presents many theories and goes to great lengths to conclude that summary judgment should have been granted in its favor despite having never moved the district court for summary judgment. (App. Brief at 11.) While the Co-op's conclusion fails for a number of reasons and is without legal support, the Court should primarily consider, as discussed above, even if there is any ambiguity here, the contract still would be construed against the Co-op. *Current Tech. Concepts, Inc.*, 530 N.W.2d at 543 (finding that when a contract is ambiguous, it must be construed against its drafter). Thus the Co-op's request to have this Court instruct the district court to enter judgment for the Co-op must be denied.

A. American Bank's Security Was Not Released by the Acceptance of a Subsequent Note.

The Co-op essentially maintains that American Bank's rights to its security – Coating Specialties' "Inventory, accounts receivable, and equipment" and the proceeds therefrom – was exhausted once the two \$25,000 notes were consolidated into a \$100,000 line of credit. (App. Brief at 11-14.) The Co-op's contention is contrary to existing law. As a matter of law, "[w]here collateral security has been pledged for the payment of a debt, it is not released by the acceptance of a new note." *Renewal Note as Discharging Original Obligation or Indebtedness*, 52 A.L.R. 1416 at II(c)(5) (citing *Anglo-California Trust Co. v. Wallace*, 58 Cal. App. 625, 209 Pac. 78 (1922); *Interstate Trust Co. v.*

Headlund, 51 Utah, 543, 171 Pac. 515 (1918); *Wisc. Trust Co. v. Cousins*, 172 Wis. 486, 179 N.W. 801 (1920)). Furthermore, in Minnesota, it has long been held that the renewal note between the same parties does not affect the lender's collateral. *Miller v. McCarty*, 47 Minn. 321, 50 N.W. 235 (1891); see also *State Bank of Young Am. v. Vidmar Iron Works, Inc.*, 292 N.W.2d 244, 248-249 (Minn. 1980) (finding that a renewal between the same parties do not discharge the security agreement between the parties). Simply put, pledged collateral is never released by the acceptance of a new note. Thus it is irrelevant in this matter that the two initial notes entered into by American Bank and Coating Specialties, which pledged collateral in favor of American Bank, was later consolidated into a \$100,000 line of credit. Any argument to the contrary is unfounded. As such, summary judgment in favor of American Bank was appropriate.

B. The Co-op's Attempts for a Judgment on the Pleadings must Fail.

The Co-op maintains that American Bank somehow admitted to certain facts that favor the Co-op's theory of the case and as a result, this Court should instruct the district court to grant summary judgment in the Co-op's favor. (App. Brief at 11-12.) The focus of the Co-op's argument centers on American Bank's Amended Cross-Claim, which states:

The Subordination Agreement contains no termination date. Rather, the Subordination Agreement acknowledges that American Bank agreed to lend Coating Specialties, Inc. \$50,000.00 for "operating expenses." That \$50,000 amount originally contemplated the May 2006 Note and the June 2, 2006, Note...

On or about June 23, 2006, Defendant Coating Specialties, Inc., executed and delivered to American Bank a Business Loan Agreement, a \$100,000 Promissory Note (the "June 23, 2006, Note")...

The June 23, 2006, Note included a consolidation of the outstanding \$50,000 in principal due and owing under the May 2006 and June 2, 2006 Notes, neither of which were paid in full by Coating Specialties Inc.

(A.10-A.11, at ¶¶ 7, 9, and 10.) Nowhere in the above or any other section of American Bank's Amended Cross-Claim did American Bank "admit" that the Co-op's subordination was limited to two specific \$25,000.00 notes. As such, the Co-op's claim that judgment in its favor, based on the pleadings, must fail.

C. The Operable Agreement here is the Subordination Agreement.

Finally, the Co-op makes the incomprehensible argument that on the one hand, the contractual relationship between American Bank and Coating Specialties does not affect the Co-op's rights or interests, but on the other, the Co-op should benefit from the contractual relationship between American Bank and Coating Specialties. (App. Brief at 12-13.) While American Bank cannot decipher the Co-op's argument, American Bank can state that it agrees that the Co-op is not bound by the terms of any contract between American Bank and Coating Specialties. Rather, the focus here is the Subordination Agreement between the Co-op and American Bank and any reference to a separately negotiated contract between American Bank and Coating Specialties is inapposite.

The terms of the Subordination Agreement between the parties have never changed. Moreover, as explained above, because pledged collateral is never released by the acceptance of a new note, the collateral at issue was never released by American

Bank when the two \$25,000.00 notes were consolidated. Thus the district court's summary judgment decision in favor of American Bank should not be disturbed by the myriad of issues presented by the Co-op.

III. The District Court Properly Declined to Address the Co-op's Untimely and Novel Legal Argument that American Bank Has an Obligation to Trace "Unidentified, Commingled" Funds and, Regardless, the Argument Fails on Its Merits.

Only after summary judgment in favor of American Bank was issued on February 5, 2009, did the Co-op first argue that American Bank must trace funds that are the result of the Co-op's efforts to liquidate the collateral at issue. (R.2; A.139.) However, the district court denied the Co-op's request to reconsider its original summary judgment decision on this basis. (A.164-66.) As stated above, this Court thus cannot overturn the district court's decision on this issue, unless the Co-op shows that the court abused its broad discretion. *Lehman v. Norton*, 191 Minn. at 213, 253 N.W. at 664. The Co-op has not argued that the district court abused its discretion by not addressing this novel theory, and given the record, the Co-op would be hard-pressed to meet this standard.

As stated above, a motion for reconsideration is only granted under "compelling circumstances," which are lacking in this matter. See Minn. R. Gen. Prac. 115.11. In this matter, the Co-op has not demonstrated why it failed to present this new line of argument prior to the district court's original decision. Given that the Co-op relies on a 1997 case, it would be hard-pressed to satisfy the stringent standard. Since there is no evidence on the record or otherwise that demonstrates that the novel legal argument proposed by the

Co-op subsequent to the issuance of summary judgment was not available before February 5, 2009, the district court did not abuse its discretion by not considering the argument on reconsideration.

However, even if the Court considers the Co-op's novel theory on the merits, it fails. There is no evidence in the record that demonstrates that the proceeds that resulted from the Co-op's liquidation of American Bank's collateral are commingled. Where non-commingled cash proceeds are at issue, Minnesota law does "not impose any new test for the continuation of a perfected security interest." *In re Oriental Rug Warehouse Club, Inc.*, 205 B.R. at 413 (citing the former version of Minn. Stat. § 336.9-315 (Minn. Stat. § 336.9-306) and finding that when cash proceeds are not commingled there is no need to show "that the proceeds be 'identifiable'"). The proposal the Co-op now submits is simply not believable. It apparently contends that a co-op or bank, such as the Co-op, commingles proceeds that derive from liquidating debtors' collateral with other funds it may hold to the benefit of others or itself. This is a disturbing notion and obviously not established by the facts in the record. As such, the Court should deny the Co-op's novel legal theory.

CONCLUSION

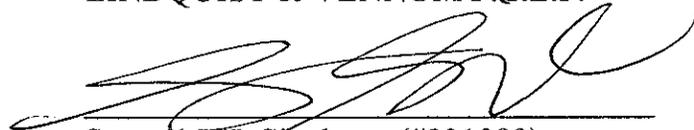
The Co-op cannot show one term in the Subordination Agreement that may be susceptible to more than one meaning. Instead, the Co-op relies on novel arguments and extrinsic evidence in attempt to create ambiguity. Given the law, the Court should disregard the Co-op's attempts to prevent enforcement of the express and plain terms of

the Subordination Agreement. Further, the Co-op fails to show how the district court may have abused its discretion by not entertaining new legal theories after the court ordered summary judgment in favor American Bank. Therefore, the Court should affirm the district court's summary judgment order in favor of American Bank and against the Co-op in the amount of \$50,000 in all respects.

Respectfully submitted,

Dated: January 13, 2010

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