SUPREME COURT NO. 19-0657
(Muscatine County No. EQCV024741)

COMMUNITY BANK & TRUST COMPANY,
Defendant/Appellant,

vs.

BLUE GRASS SAVINGS BANK,
Plaintiff/Appellee.

Appeal from the Iowa District Court for Muscatine County
The Honorable John D. Telleen, District Court Judge

APPELLANT COMMUNITY BANK & TRUST COMPANY'S FINAL REPLY BRIEF

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ARGUMENT

I. BLUE GRASS'S INTERPRETATION OF IOWA CODE SECTION 654.12A CONTRAVENES THE STATUTE'S INTENDED MEANING & PURPOSE

Blue Grass argues the "plain language" of Iowa Code Section 654.12A only governs the priority of future advances made by a senior mortgagee after a junior mortgagee's lien is of record, notwithstanding the fact this "plain language" does not exist in Section 654.12A. Blue Grass also attempts to charge Community Bank, and by extension all junior lienholders when there is an existing mortgage of record, with a duty of inquiry. This attempt to shift a duty of inquiry onto junior lien holders completely disregards Iowa's statutory priority protections and public recording system, which, when used as intended, provides sufficient notice of existing creditors' rights. Setting aside what Blue Grass asserts is the "plain meaning" of the statute, Iowa Code Section 654.12A expressly provides:

> 1. Subject to section 572.18,[1] if a prior recorded mortgage contains the notice prescribed in this section and identifies the maximum credit available to the borrower, then loans and advances made under the mortgage, up to the maximum amount of credit together with interest thereon, are senior to the indebtedness to other creditors under subsequently recorded mortgages … The notice prescribed by this section for the prior recorded mortgage is as follows:

[1] Section 572.18 governs priority for certain types of liens, none of which are involved in the pending case.

> NOTICE: This mortgage secures credit in the amount of ..... Loans and advances up to this amount, together with interest, are senior to indebtedness to other creditors under subsequently recorded or filed mortgages and liens.

IOWA CODE Section 654.12A (emphasis supplied).

Nowhere in the "plain language" of this Section is there verbiage that the statute applies only in the narrow circumstances advanced by Blue Grass, applying only to advances made after a junior lienholder has recorded a mortgage or only after a junior lienholder has made the inquiry Blue Grass seeks to require. Blue Grass's argument ignores general principals of statutory interpretation which seek to give meaning to rules and statutes that are reasonable, logical and avoid results which are strained, absurd or extreme. *See State v. Berry*, 247 N.W.2d 263, 265 (Iowa 1976). In dealing with interpretation issues, the Court tries to give meaning and effect to every part of a statute or rule, which must include the "up to the maximum amount of credit" provision of Iowa Code Section 654.12A which Blue Grass has ignored. *See id*. Blue Grass's statutory interpretation argument, therefore, is without merit and must succumb to the express terms and intended purpose of the statute.

A. Blue Grass's Interpretation of Section 654.12A Requires Additional Language Be Read into the Statute

Under the guise of a "plain language" reading, Blue Grass reads into the statute material changes that violate the language and purpose of Iowa Code Section 654.12A. Blue Grass asks this Court to read the "subsequently filed mortgage" language of the statute as reading into the statute the ability of any senior lienholder to loan any amount of money, including amounts in excess of the maximum amount specified, while still retaining priority over any subsequent lien creditor. The correct reading of the statute very simply provides that an earlier lienholder may specify in its recorded mortgage that it may make future advances up to a maximum amount. In doing so, all future advances or additional loans made by the first creditor, in an amount up to the maximum credit amount specified in its recorded mortgage, will have priority over any subsequently recorded mortgage by a junior creditor. The recording of a maximum amount, as prescribed by Iowa Code 654.12A, accomplishes the very plain and simple objective of putting the world on notice of the priority of any loan or advance first lienholder may have up to the maximum specified amount.

The only significance of the statutory "subsequently recorded mortgages" language is to identify sequentially the opportunity of the first lienholder to make future advances up to the maximum amount and to put

any subsequent junior lienholder on notice that it will be junior to such advances up to the maximum amount specified by the first lienholder. The suggested interpretation proffered by Blue Grass would first read out of the statute any significance of the specification of the maximum amount of the secured obligation. Blue Grass's strained interpretation of the statute would improperly change it to mean that the first lienholder has priority for the amount of its lien and additional loans or advancements extended before any subsequent mortgage, with no significance to the express specified maximum amount contained in the first lienholder's recorded mortgage. The argument of Blue Grass is the opposite of the "plain language" of Iowa Code Section 654.12A.

The argument advanced by Blue Grass, that the priority recording statute does not limit the secured debt loaned by a senior mortgagee prior to subsequent loans being made by a junior lienholder, was squarely rejected by the New Mexico Supreme Court under a statute similar to Iowa's Section 654.12A. *See New Mexico Bank & Tr. Co. v. Lucas Bros.*, 582 P.2d 379, 381-382 (N.M. 1978). In *Lucas Bros.*, the senior lienholder argued its mortgage secured all subsequent loans made to the borrower or, in the alternative, that it was entitled to priority on the total amount loaned to the borrower prior to any loan made to the borrower by the junior lienholder.

Id. The senior lienholder's argument focused on the fact that it's mortgage contained a future advance clause, or dragnet clause, under which the mortgage expressly provided that it would cover "the payment of all loans, advances, indebtedness or liabilities, whether now existing or which hereinafter come into existence…" *Id*. at 380-81.

Based on the rationale and logic of its priority recording statute, which was not controlling as it was enacted after the controversy at issue arose but provided that for a mortgage to secure future advances "the lien of such mortgage shall not exceed at any one time the maximum amount stated in the mortgage," the Court rejected the senior lienholder's argument. *Lucas Bros.*, 582 P.2d at 381-382 (N.M. 1978) (citing N.M. STAT. ANN. Section 48-7-9 (1978)). The court refused to allow the senior lienholder priority over a junior lienholder in excess of the maximum amount recorded in the senior lienholder's mortgage. *Id.*

In rejecting the senior lienholder's argument, the same argument now advanced by Blue Grass that it should have priority under its future advance or dragnet clause on all amounts loaned in excess of the expressly stated maximum debt amount prior to any loan made by Community Bank, the New Mexico Supreme Court noted "[i]t would defeat the purpose of recording to allow 'dragnet clauses' to extend to the bounds argued by" the

senior lienholder. *Id*. at 381 (emphasis supplied). The court broadly opined "recording statutes provide for notice to other potential lenders and indicate the upper limits of that financing." *Id*. (emphasis added). The Court continued to explain the purpose of the recording statute, providing that "[b]ecause potential lenders rely upon the recorded mortgages to determine whether to make other loans there must be certainty as to the extent to which a mortgage encumbers property." *Id*. at 381 (emphasis supplied).

The Utah Supreme Court similarly precluded a senior lienholder from claiming priority against subsequent mortgagees "in any sum greater than the express limitation declared in its mortgage of record." *Bank of Ephraim v. Davis*, 559 P.2d 538, 540 (Utah 1977). In *Ephraim*, the senior lienholder argued the future advance or dragnet provision contained in its recorded mortgage "imparted notice the mortgage secured advancements, or indebtedness, in any amount," notwithstanding a contrary maximum obligation clause which provided that the "mortgage covers all additional advances on this loan, the total principal amount not to exceed $3,000." *Id*. at 539-540. The Utah Supreme Court disagreed with the senior lienholder, finding the senior lienholder would "not be permitted to so fashion a contract to mislead another, by setting forth clearly an apparent

representation [the maximum obligation clause], induce a contrary limitation or expansion elsewhere in the instrument [the dragnet clause]." *Id*. at 540.

Iowa's priority statute, requiring disclosure of the amount to which a lienholder will have priority notwithstanding the presence of a future advance clause, requires the same result here. Iowa's recording statute was designed to provide the same certainty regarding the amount of which a mortgage encumbers property, so that junior lienholders may rely upon it when determining whether to make additional loans secured by the same real estate. That rationale was the same as cited by the New Mexico court, above, in interpreting the analogous New Mexico recording statute and reaching the result advanced here by Community Bank.

The purpose of Iowa's statute is to preclude senior lienholders from secretly advancing funds in excess of the maximum obligation clause, which junior lienholders would have no knowledge of, to a junior lienholder's detriment. This result is avoided under Iowa Code Section 654.12A by capping the senior lienholder's priority to the express amount provided by the maximum obligation clause in its recorded mortgage. When a senior lienholder elects to exceed this amount, it does so at its own risk and with full knowledge of the amount of advancement(s) made in excess of the maximum obligation. This is not a risk that can be shifted to a junior

lienholder that has no knowledge of the amount of funds advanced by a senior lienholder beyond the maximum obligation amount disclosed by the senior lienholder in a prior recorded mortgage.

Blue Grass's strained interpretation of Section 654.12 seeks to remove the certainty, clarity and convenience afforded by the statute, and would shift all risk to junior lienholders and eliminate creditors' ability to rely on the maximum obligation clauses contained within prior recorded mortgages. This interpretation clearly offends the "plain language" and purpose of the statute.

B. Blue Grass's Interpretation of Section 654.12A Disregards the Priority Protections Afforded to Junior Lienholders

Blue Grass's incorrect interpretation of Iowa Code Section 654.12A would also read into the statute language that prospective junior lienholders have an obligation to first check with the senior lienholder as to the amount of the secured debt. Blue Grass attempts to eliminate a prospective junior lienholder's right to rely on the maximum obligation clause contained in the senior lienholder's publicly recorded mortgage. This proffered "duty of inquiry" is not required by, or even suggested in, the statute. Blue Grass's interpretation or suggested duty by a junior lienholder is completely contrary to the express language contained in the statute.

The obvious intention of the statute is to allow subsequent lienholders to rely upon clear, written, and recorded statements of the amounts of secured credit of existing mortgages when determining to advance funds notwithstanding the senior lienholder's priority in an amount up to the recorded maximum obligation. Again, the position advanced by Blue Grass would eviscerate the reliability of the specified maximum obligation clause contained in a prior recorded mortgage and create a nightmare scenario of a swearing contest at trial of what was or was not said in a phone conversation between lienholders regarding how much the senior lienholder had advanced. This would result in disputes concerning oral statements regarding amounts of credit that had been extended by the first lienholder or disagreement on what amounts the parties agreed between themselves would be given priority.

Iowa Code Section 654.12A is specifically drafted to avoid that type of subjective, undocumented discussion. The statute provides language for inclusion in all mortgages expressing the maximum amount of credit that will be extended and secured by the mortgage. The statute also clearly identifies the priority of future loans that will be afforded priority under any existing recorded mortgage. The maximum obligation clause, when enforced as written and intended by Iowa Code Section 654.12A, removes

the subjective framework and makes crystal clear what amount of debt will have priority over any future creditor's second interest.

As noted above, Iowa Code Section 654.12A provides where a mortgage contains the notice prescribed by Section 654.12A and identifies the maximum credit available to the borrower, like the Blue Grass Mortgage at issue in this case, loans and advances made under the mortgage up to the maximum amount of credit will be senior to liens held by junior creditors. Under the plain language of Iowa Code Section 654.12A and pursuant to Blue Grass's own maximum obligation clause, Blue Grass's mortgage is senior to Community Bank only up to the maximum amount of credit provided by the mortgage together with interest thereon, specified therein as $148,000 plus interest.

This interpretation is also consistent with Judge Collins' conclusions in *In re McMahon*, No. BR 18-00443, 2018 WL 3014067 (Bankr. N.D. Iowa June 8, 2018) where he agreed "that, under Iowa law, the 'Maximum Obligation Limit' does not limit the reach of a future advance clause as Debtors suggest. Instead, such clause appears to limit the amount of debt that will be senior to another security interest, not the total amount of collateral available to the Bank in a situation like this." *Id.* at *4 (emphasis supplied). The issue is not whether Blue Grass could advance additional

funds to the borrower, as it was entitled to do under its future advance and dragnet clauses, but instead concerns what priority those future loans would statutorily have as against junior lienholders when the loans exceeded Blue Grass's maximum obligation limit of $148,000.

Any other interpretation of the Iowa Code Section 654.12A, including the "plain meaning" interpretation advanced by Blue Grass, violates the clear language and purpose of the statute, requires the addition of provisions which the legislature elected to not include and renders parts of the statute meaningless.

II. BLUE GRASS MISCHARACTERIZED COMMUNITY BANK'S REMAINING ARGUMENTS & FAILED TO RESPOND TO THE ACTUAL ARGUMENTS MADE BY COMMUNITY BANK

Blue Grass makes a number of arguments where it first mischaracterizes Community Bank's position and argument only then to attack the mischaracterized articulation of Community Bank's position and argument. Each of these mischaracterizations will be addressed in turn to ensure the Court considers the actual argument advanced by Community Bank, not Blue Grass's mischaracterization of Community Bank's argument.

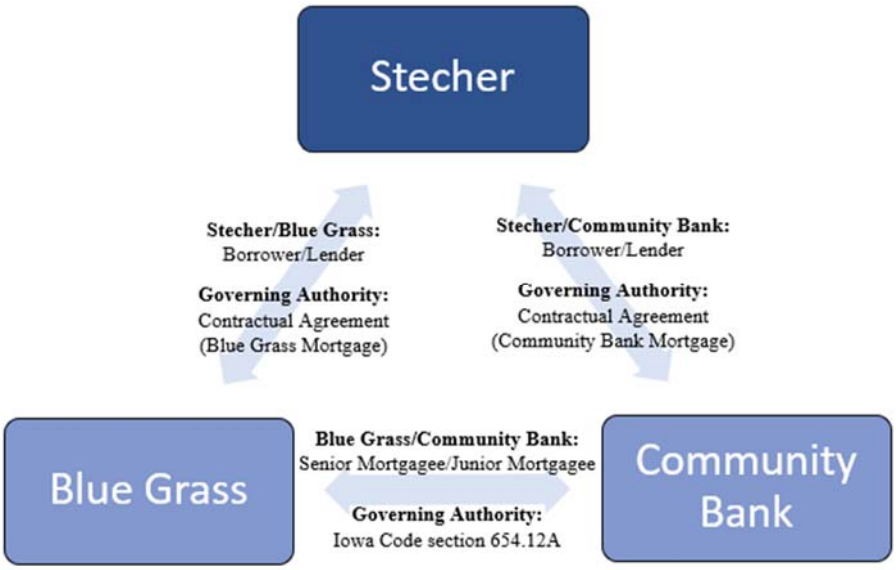
A. Community Bank Did Not Assert the "All Debts" Clause Was Unenforceable

Blue Grass first asserts Community Bank did not argue the "all debts" (which Community Bank understands to mean "future advances") at the District Court level, which is addressed in Section III of this Brief, before asserting the future advance, or dragnet, provision contained in the Blue Grass Mortgage is enforceable in Iowa. Blue Grass then sets forth the standard for enforcement based upon what the borrower and bank intended to be covered by under the future advance clause before denying that such clauses are to be "harshly restricted," citing *Freese Leasing, Inc. v. Union Trust and Sav. Bank, Stanwood*, 253 N.W.2d 921, 925 (Iowa 1977). Blue Grass goes on to reiterate that future advance clauses are enforceable in Iowa and chastises Community Bank for citing no authority to the contrary. Blue Grass has mischaracterized Community Bank's argument, as Community Bank never argued the clause was not enforceable and, therefore, had no need to cite to authority for an argument it did not make.

Community Bank's argument concerning the future advance or dragnet clause begins at page 36 of its Proof Brief and provides, in bold letters, Iowa precedent disfavors future advance clauses and requires such clauses be closely scrutinized. *See Freese Leasing* at 925 (noting future advance clauses "are not favored in equity" and should be "carefully scrutinized and strictly construed.") Noting the Iowa Supreme Court's

standard articulated in *Freese Leasing* which provides that while "such provisions are not favored and should be closely scrutinized," but that the provisions "will be enforced to the extent it appears to have been within the intent of the parties," Community Bank argued such intent, between the bank and the borrower, was irrelevant to the rights afforded to Community Bank as a non-party to the mortgage at issue.

Blue Grass's assertion that enforcement of the future advance clause is wholly dependent "on what the parties intended to secure" continues to conflate the tripartite relationship between the parties. This conflation advanced by Blue Grass subjects Community Bank to the terms of an agreement, the Blue Grass Mortgage, that it is not a party to while ignoring the statute which governs the relationship between Community Bank and Blue Grass. The interested parties, their respective relationships and the authority governing each relationship is as follows:



While the Blue Grass Mortgage executed by the borrower incorporates the notice prescribed by Iowa Code Section 654.12A, the relationship between Blue Grass and Stecher (the borrower) is contractual. Obviously, the intent of the parties to the contractual agreement would be important as it is a fundamental principal of contract interpretation.

However, there is no similar contractual agreement as between Blue Grass and Community Bank. Instead, the Blue Grass and Community Bank relationship is wholly governed by Iowa Code Section 654.12A. Again, this does not limit Blue Grass's ability to advance additional funds to the borrower, as it was entitled to do under contractual agreement, the Blue Grass Mortgage, with the borrower containing a future advance clause. Instead, the inquiry is what priority those advancements would have as against junior lienholders when the advancements exceeded Blue Grass's

maximum obligation limit, as governed by Iowa Code Section 654.12A. This renders the intent of the parties to a contractual agreement, the mortgage between Blue Grass and Stecher of which Community Bank is not a party, irrelevant to the pending dispute.

Notwithstanding the above, Community Bank simply asserted Iowa's "careful scrutinization" and "strict construction" of future advance clauses, which "are not favored in equity," further supported its argument that Blue Grass's Mortgage be capped at its maximum obligation limit of $148,000, plus interest. Blue Grass did not respond to any of this argument before merely asserting future advance clauses are enforceable, a position Community Bank does not disagree with but simply asserts is irrelevant in this appeal.

B. Community Bank Did Not Assert the District Court Erred Simply by Relying on an Unpublished Case

Blue Grass also asserts it was not error for the District Court to rely on the unpublished Court of Appeals decision in *Wells Fargo* and in doing so again mischaracterizes the argument raised by Community Bank. Community Bank argued that the District Court was not required by stare decisis to follow an unpublished Court of Appeals decision and should not follow it here because it is inapplicable even if the case had precedential value. At pages 37-46 of its Proof Brief, Community Bank in bold letters

articulated its position that the District Court erroneously relied on *Wells Fargo* because the majority opinion provided no analysis or guidance concerning the issue involved in this case, the import of maximum obligation clauses and/or application of Iowa Code Section 654.12A in the face of a future advance clause. The Wells Fargo case was also a "single" transaction, which is not the case in Blue Grass' extension of credit to the borrower on several occasions. Even if it was applicable to the case at bar, the *Wells Fargo* case is distinguishable for that reason alone.

At the summary judgment hearing, Blue Grass conceded this point while discussing whether the maximum obligation clause limited Blue Grass's interest noting:

> the drafting of the Wells Fargo decision by the Court of Appeals is less than clear writing, but if you look at the dissent in that case, it clearly had the issues, because in the mortgage in question in that case, it said exactly what we have here; that there was the 654.12A notice that limited the mortgage to $46,000, and then, the question in that case, was the second note for $111,000 ahead or behind the third mortgage, and the Court of Appeals held that after considering that exact issue …

(App. 197 at 4.1-4.12, emphasis supplied). Blue Grass ignored that the Court in *Wells Fargo* found both loans were made on the same date as the mortgage and constituted a single transaction. Blue Grass further acknowledged the only way any reader knows *Wells Fargo* contained a

maximum obligation clause, or other relevant facts which are central to analyzing the case at bar, is by looking at the dissenting opinion.

In fact, at no time in the *Wells Fargo* majority opinion is it noted that mortgage at issue contained a "maximum obligation limit" clause or the effect of Iowa Code Section 654.12A, which is only referenced in passing, relative to a future advance clause. The singular issue addressed by the *Wells Fargo* majority was the application a future advances clause as between the lender and borrower, and specifically whether such clause applied only to the loans and advances which identified the real estate at issue. *Wells Fargo*, 2013 WL 4767889 at *1 (Iowa Ct. App. Sept. 5, 2013). Again, because the singular issue decided in *Wells Fargo* is not the issue presented in the above-captioned case, it was error for the District Court to rely upon the majority's opinion. Blue Grass, therefore, erroneously articulated, and the District Court erroneously determined, what the Court of Appeals majority in *Wells Fargo* "held" concerning the relationship between 654.12A and a maximum obligation clause absent any mention, analysis or decision by the majority concerning priority issues and erroneously applied that "holding" to this case between two secured creditors.

However, because the issues involved in the case are squarely addressed by Judge Vogel's dissenting opinion, Community Bank

respectfully requests the Court follow the "thought-provoking," well-reasoned analysis set forth in the dissent authored by Judge Vogel in *Wells Fargo*. *See* Community Bank's Proof Brief at pp. 40 – 44. While the parties in *Wells Fargo* never sought further review and the Iowa Supreme Court was not afforded the opportunity to weigh in on the proper analysis, Community Bank requests this appeal be retained by the Iowa Supreme Court to provide clear guidance on the import, if any, of *Wells Fargo*. The case at bar also provides the Supreme Court with the opportunity to determine the relationship between future advancements or loans and maximum obligation clauses as between senior and junior lenders, an issue the majority in *Wells Fargo* did not analyze.

C. Blue Grass Failed to Respond to Community Bank's Maximum Obligation Clause Argument

After erroneously concluding Community Bank "waived any argument related to the maximum obligation clause," which is addressed in the following section, Blue Grass failed to respond to Community Bank's extensive analysis concerning how Iowa's sister courts have resolved maximum obligation clauses when confronted with priority disputes. As this is a case of first impression in Iowa, Community Bank directs the Court's attention to pages 46-53 of its Proof Brief outlining the approach taken by other states. Some of these cases analyzed other statutory priority

provisions, many of which were similar to Iowa Code Section 654.12A, and the decisions rendered by Iowa's sister courts when faced with facts analogous to those now before this Court, all support the position advanced by Community Bank in this appeal. Blue Grass's failure to provide this Court with contrary authority suggests no state has taken the approach advanced by Blue Grass.

III. COMMUNITY BANK PRESERVED ERROR ON THE ISSUES PRESENTED ON APPEAL

Blue Grass concedes Community Bank preserved error on the broad fundamental issue advanced in this appeal, the application of the Iowa Code Section 654.12A and statutory interpretation of that section. Accordingly, the issue presented on appeal was preserved. However, Community Bank acknowledges Blue Grass contends error was not preserved on select narrow, individual arguments advanced in support of the fundamental issues advanced on appeal. Community Bank disagrees such sub-arguments must be separately preserved and Blue Grass does not suggest error in the preservation of these sub-arguments would undermine error preservation of the fundamental issue which Blue Grass concedes was preserved for appellate review. Error preservation is viewed through the common-sense lens of the naked eye to see if an issue had been presented to the District Court so the District Court would have an opportunity to decide that issue.

Error preservation is not viewed through an appellee's self-serving microscope, exhaustively sorted argument by argument to determine whether each had been presented verbatim to the District Court, in support of the issue Appellee here concedes was presented to, and decided by, the District Court.

The "fundamental doctrine of appellate review" is that "issues must ordinarily be both raised and decided by the District Court" before the appellate court will decide them on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (emphasis supplied). Community Bank presents two issues on appeal: 1) whether the District Court erred in granting summary judgment finding Blue Grass's Mortgage secured all debts in excess of Blue Grass's Maximum Obligation Limit; and 2) whether the District Court erred in finding the applicable default rate, if the judgment was disturbed on appeal, would be set at 18 percent. These issues were preserved for appeal, for the reasons articulated in Community Bank's original briefing and further articulated herein.

Blue Grass provided no authority to support its assertion that select arguments, offered in support of the issues presented on appeal, must be individually preserved for appeal. Community Bank is aware of no such requirement given that Iowa's "issue preservation rules are not designed to

be hyper technical." *Griffin Pipe Prods. Co. v. Bd. of Review*, 789 N.W.2d 769, 772 (Iowa 2010). If parties were required to use the exact same words, in the exact same order to advance the exact same arguments as those advanced at the District Court level, there would be no need for appellate briefing. The parties would simply direct the appellate court to "see below." This, however, is not how appellate argument works as parties frequently reframe the issues and advance the same arguments but in new ways to convey the magnitude and breadth of the dispute in a concise yet comprehensive fashion. By asserting error was not preserved on select subsections of argument advanced by Community Bank in support of its analysis of the issue on appeal, Blue Grass erroneously contends this common practice of reframing and synthesizing constitutes failure to preserve error. *See e.g. Prybil Family Investments v. Bd. of Adjustment of Iowa City*, No. 13-0017, 2013 WL 4769376 at*5 (Iowa Ct. App. Sept. 5, 2013) (noting that while the "exact phrasing" of the appellant's argument on appeal was neither "referenced in its brief nor the District Court's opinion" the same argument the appellant asserts on appeal was the same claim argued before the District Court and that while the court did not specifically use certain words or reference specific sections, the court nonetheless

considered the same argument the appellant raises on appeal such that error was adequately preserved.).

The two issues presented on appeal in this case have not changed from those advanced by the parties in support of their respective positions during the summary judgment proceeding and decided by the Court's Ruling on Summary Judgment. Even if the Court agrees with Blue Grass's narrow error preservation requirements and finds such preservation was necessary, the arguments advanced in Community Bank's appellate briefing were presented to, and decided by, the District Court. Thus, both the issues raised in this appeal, and specific arguments made in support of those issues, have been preserved for appellate review.

A. The First Issue in This Case, Whether the District Court Erred in Granting Summary Judgment Finding Blue Grass's Mortgage Secured All Debts in Excess of Blue Grass's Maximum Obligation Limit, Was Preserved for Review

Within its Appeal Brief, Blue Grass summarized a portion of the underlying proceedings providing that during the summary judgment proceedings, it "filed a reply to Community Bank's Resistance, arguing that the 'all debts' clause (which Community Bank understands to mean the "future advance clause") controlled, despite the presence of the Iowa Code

§654.12A notice under the holding of *Wells Fargo*…" (Blue Grass Proof Brief, p. 8). Community Bank's Resistance, referenced above by Blue Grass, cited the maximum obligation clause contained in the Notice before noting the in rem judgment requested "far exceeds the Mortgage cap" and was "in excess of that permitted by Plaintiff's Mortgage." (App. 112-113 at ¶ 2-3, 6). In Community Bank's Memorandum in Support of Its Resistance, it again asserted Blue Grass's "Mortgage does not permit a principal cap in excess of $148,000 …," again focusing on the import of the maximum obligation clause. (App. 128).

Thus, even Blue Grass's summary of the relevant proceedings makes clear that the summary judgment issue to be decided, which Community Bank now contends was erroneously granted, was whether the future advance clause or "all debts" governed, the position which was argued by Blue Grass ignoring the mortgage cap, or was limited by the presence of the maximum obligation clause or "mortgage cap" prescribed by Iowa Code Section 654.12A, the position argued by Community Bank. Arguments concerning the future advance clause (or "all debts"), the maximum obligation clause (or "mortgage cap") and Iowa Code Section 654.12A, were, therefore, raised by the parties in support of their respective positions It is clear these provisions are so completely intertwined by virtue of the

summary judgment pleadings and arguments in support thereof such that it cannot be said one of the provisions was not adequately raised for consideration by the District Court. Additionally, because the parties' respective positions regarding the clauses and the notices were diametrically opposed, ruling in favor of one party on its argument(s) concerning the three provisions automatically constituted a ruling against the other party and rejection of any remaining provision(s).

Given the level at which the future advance clause, the maximum obligation clause and the notice provision were inextricably intertwined during the summary judgment proceedings, it is simply nonsensical for Blue Grass to assert that each argument either needed to be persevered independent of preservation of the summary judgment issue as a whole or that if error preservation was required for each specific argument, error was not preserved. The issue presented on appeal, whether Blue Grass's Mortgage secured all debts in excess of its maximum obligation limit, was clearly raised for the District Court's consideration.

So too did the District Court expressly ruled on the issue both in its Summary Judgment Ruling and simultaneous entry of Decree of Foreclosure, finding the Blue Grass Mortgage "secures all present and future debts," including all promissory notes and the Blue Grass Mortgage was

"prior, superior, and paramount to any lien, claim, right, title, or interest of any of the Defendants …" (App. 168-173; App. 174-179 at ¶13, 20). Given the diametrically opposed positions of the parties and Community Bank's argument that the Blue Grass Mortgage could not have priority in excess of the mortgage cap provided by the maximum obligation clause, the Court's rulings inherently rejected Community Bank's argument. The Court simply rejected the argument that Blue Grass's interest was capped at $148,000, the amount provided by the maximum obligation clause in the Blue Grass Mortgage or "mortgage cap." The Court found Blue Grass's rights in all preexisting, present and future debts superior to the rights of Community Bank as a junior lienholder with a secured interest in the mortgaged real estate above the Blue Grass Mortgage cap.

To the extent Blue Grass asserts the District Court failed to "decide" an "issue" concerning the future advance clause, the maximum obligation clause Iowa Code Section 654.12A and/or the applicability of *Wells Fargo* when the court executed the Summary Judgment Ruling and Foreclosure Decree prepared and drafted by Blue Grass, such assertion does not support Blue Grass's lack of preservation argument. The Supreme Court has explained on several occasions,

> the preservation of error rule 'requires a party seeking to appeal an issue presented to, but not considered by, the district court to call to

> the attention of the district court its failure to decide the issue. The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it.'

Lamasters v. State, 821 N.W.2d 856, 863 (Iowa 2012) (*quoting Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)). Review of the summary judgment transcript clearly reveals the Court was aware of Community Bank's claims which had been "litigated" in writing in advance of the hearing and advanced orally at the hearing. The first issue in this case was preserved for appellate review.

B. The Second Issue in this Case, Whether the District Court Erred in Finding the Applicable Default Rate of Interest Was 18 Percent, Was Preserved for Review

Iowa appellate preservation rules make clear that motions filed pursuant to Iowa Rule of Civil Procedure 1.904, formerly Rule 179(b) motions, "is necessary to preserve error 'when the district court fails to resolve an issue, claim, or other legal theory property submitted for adjudication.'" *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002) (*quoting Explore Info. Servs. v. Iowa Ct. Info. System*, 636 N.W.2d 50, 57 (Iowa 2001)). The Courts, however, distinguish the use of the motion to "challenge a ruling made by the district court and to address the failure of the district court to make a ruling," finding such motions are not available to a party to challenge a decision. *Id*. It is undisputed the interest rate at issue in

this case was addressed at the summary judgment hearing and included within the District Court's Summary Judgment Ruling. It would have been improper for Community Bank to challenge this decision anywhere but on appeal.

Concerning whether the issue was "raised," the transcript from the summary judgment hearing clearly provides the issue was raised and considered by the District Court. Counsel for Community Bank argued:

> I have not received, nor given today, a copy of the affidavit that was apparently filed this morning, whatever the response or reply was, so we don't know about what today's argument is about in terms of what has been submitted to the Court. I did get, this morning, a copy of one of the proposed decrees that limits the judgment to 148, plus interest. There's no explanation as to how the interest went from that alleged in the Amended Petition of $6,946.97 to a much greater sum, a sum in excess of $30,000. I haven't seen any calculations or explanation for why the judgment should accrue interest at a rate that's far in excess than alleged in paragraph 3 of the Amended Petition. I asked [counsel for Blue Grass] about that, and he said, "Oh, that's the default rate in the proposed decree," but I don't know how it was calculated.

(App. 205 at 12.8-12.23). Counsel for Community Bank, thereafter, continued to argue that the alleged default interest rate was not alleged in the Petition and the Mortgage at issue provided interest at 6 percent. (App. 211 at 18.12-18.18). Blue Grass's counsel subsequently explained that under the Blue Grass Mortgage "the bank can increase the interest rate" after default "not to exceed the lawful – the maximum lawful interest rate," and acknowledged that there is no lawful rate of interest for a commercial

mortgage. (App. 211-212 at 18.19-19.7). Blue Grass's counsel suggested counsel for Community Bank "would agree" 18 percent "is a pretty commonly used default rate by most banks," which counsel for Community Bank denied. (App. 211 at 9.8-19.14). Counsel for Community Bank argued default interest was "probably far less than 18 percent." (App. 212 at 19.14). Counsel for Community Bank continued by stating, "I would suggest that the note does not state a default rate, so that 18 percent is not the applicable rate." (App. 213 at 20.4-20.5). Clearly this issue was raised for the District Court's consideration.

So too was the issue decided by the District Court. Following the summary judgment hearing, the District Court's Ruling expressly found:

> Blue Grass was authorized to charge a default rate of interest at 18% under the Notes. However, the Court has declined to apply the default rate of interest. The Court finds that if the Notice provision in the Blue Grass's [sic] Mortgage limits the amount of its priority to $148,000, Blue Grass would be entitled to default interest at 18% in the amount of $43,134.90 through March 20, 2019, with interest accruing thereon at a rate of $72.00 per day after March 20, 2019. Because the Court finds that Blue Grass's Mortgage has priority for all of the amounts advanced to Stecher prior to the Community Bank mortgage, this amount is not used in the final Decree of Foreclosure.

(App. 169 at fn. 1). Once the issue had been decided, as the above findings make clear, it would have been improper for Community Bank to motion the Court simply to challenge the default interest ruling. Additionally, because the interest does not apply unless and until this Court finds the Notice

provision limits Blue Grass's priority to $148,000, this Court is the proper tribunal to address the default interest issue.

If this appeal is resolved in Community Bank's favor, Community Bank respectfully requests the Court find Blue Grass is only entitled to the contractual non-default rate of interest. Blue Grass, as the drafter of the Blue Grass Mortgage it sought to foreclose and the party with the burden on proof to establish it was entitled to default interest, shall not be afforded the right to simply select a default interest rate out of thin air at the eleventh hour at the time of the summary judgment hearing simply to increase the priority of its judgment over Community Bank. If such is allowed, senior lienholders will inflate their unstated default interest rates to usurp limited proceeds in efforts to recover amounts advanced in excess of their maximum obligation limits at the expense of junior lienholders.

Finally, Blue Grass's fatally flawed assertion that Community Bank "cannot claim the award of default interest surprised it" because the rate was presented before the summary judgment hearing and Community Bank warrants a brief clarification. The affidavit referenced at page 29 of Blue Grass's Brief, "the default rate was presented by affidavit before the summary judgment hearing," was filed at 8:32 AM on March 20, 2019, the same day as the 11:00 AM hearing on summary judgment. (App. 156-158;

App. 148-149). As this Court is aware, the file-stamped date and time contained on the affidavit is not necessarily the date or time it was received, as it takes the clerk time to process and approve the filings. Even if counsel for Community Bank had received the affidavit disclosing the 18 percent interest on the date and time revealed by the file stamp, which he did not, the filing at 8:32 AM would have been received during the time counsel was getting ready to travel or traveling from his residence in Cedar Rapids to Muscatine for the 11:00 AM summary judgment hearing. Counsel's argument at the hearing confirms he had not seen Blue Grass's most recent filings. (App. 205 at 12.17-12.23; App. 210-211 at 17.4-18.9).

Similarly, Blue Grass's critique that Community Bank "never filed any counter affidavits to contest the default rate of interest," is fatally flawed as Community Bank was unaware of the affidavit at issue until the summary judgment hearing. At the conclusion of the summary judgment hearing, the District Court ruled from the bench in favor of Blue Grass and requested counsel for Blue Grass prepare a ruling. (App. 213-214 at 20.18-21.20). The Court went on to explain "there's an issue as to what was the default rate, the Court will find that the applicable default rate should be 18 percent," before advising the parties that the Court's request for a draft ruling was "not an opportunity to re-argue the case." (App. 217 at 24.12-24.24). Thus, there

was simply no opportunity for Community Bank to file a counter affidavit on an issue it learned of during the middle of a hearing, but which was disposed of at the conclusion of the hearing. Nonetheless, it cannot be argued the interest issue was not preserved for appellate review considering the issue was both raised and decided by the District Court and only becomes ripe if the appeal is resolved in Community Bank's favor.

CONCLUSION

This Court must apply the plain meaning of Iowa Code Section 654.12A, Iowa's priority recording statute which ensures all parties with a legal interest in real estate are on notice of all other parties with an interest in the same real estate and the extent of each party's interest, to find the District Court erred by awarding Blue Grass priority over Community Bank in an amount equal to all the debt owed by the borrower to Blue Grass that far exceeds the maximum amount of secured credit contained in Blue Grass's Mortgage.

For all the reasons cited in Community Bank's Appeal Briefs, Community Bank respectfully requests this Court: 1) reverse the District Court's decision granting Blue Grass's Motion for Summary Judgment; 2) vacate the District Court's entry of Decree of Foreclosure in favor of Blue Grass; 3) find Community Bank's valid, recorded Mortgage has priority over

all sums advanced by Blue Grass in excess of its mortgage obligation limit; and 4) remand this matter to the District Court with directions to reduce Blue Grass's judgment to the mortgage obligation limit in the amount of $148,000.00, with interest at the contract rate on Note 123047.

REQUEST FOR ORAL SUBMISSION

Community Bank renews its requests for oral argument.

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CERTIFICATE OF COST

I hereby certify that the cost of printing Defendant/Appellant Community Bank's Proof Brief was $0.00.

/s/ H. Raymond Terpstra II — Signature

8-30-19 — Date

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Times New Roman size 14-point font and contains 6,956 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g).

/s/ H. Raymond Terpstra II 8-30-19

Signature Date

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, I electronically filed the foregoing document with the Clerk of the Iowa Supreme Court using the Iowa EDMS, which will send notification of such filing to the following attorneys of record:

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