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IN THE SUPREME COURT OF THE STATE OF IDAHO

STILWYN, INC., Appellant, vs. ROKAN CORPORATION, et al. Appellees.	Supreme Court No. 41451-2013 Blaine Co. Case No. CV 2011-785

APPELLANT'S REPLY BRIEF

CROSS-RESPONDENT'S BRIEF

Appeal from the Fifth Judicial District, Blaine County, Idaho
HONORABLE JONATHAN BRODY, Presiding

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FILED - COPY
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Supreme Court Court of Appeals
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APPELLANT'S REPLY BRIEF

I. INTRODUCTION

Stilwyn has not had its day in court. It has been denied the opportunity to expose the tortious conduct of Idaho First Bank and the Page Defendants regarding their attempted manipulation of the FDIC bank-only auction. The Court should reverse the district court's summary judgment rulings for the following separate reasons.

First, as Stilwyn demonstrated in its Opening Brief, the district court committed reversible error by failing to apply Rule 13(a). Under this Court's clear edict in *Joseph*, only Rule 13(a) applies to counterclaims; res judicata is inapplicable in the counterclaim context. As shown below, Stilwyn was not required to plead a counterclaim when Anaconda/Portfolio made no claims against Stilwyn in the Federal Case.

Notwithstanding *Joseph*, the district court and the Respondents barely gave lip service to Rule 13(a). In the court below and in this appeal, Stilwyn has made Rule 13(a) the cornerstone of its defense to summary judgment and to its attack on the district court's decision. Yet Respondents utterly fail to rebut Stilwyn's case law, which demonstrates that because Anaconda/Portfolio asserted no claims against it, Stilwyn had no claims to "counter," and that Anaconda/Portfolio was not "an opposing party," a term of art with a particularized meaning under Rule 13(a). And they cite no on-point authority of their own. They instead rely on sweeping statements, unsupported by authority, that Stilwyn became duty-bound to assert counterclaims by the mere act of intervening. No law supports this broad, bald assertion. And as the district court essentially adopted IFB's analysis in its summary judgment briefing, there is no such authority contained in its Memorandum Decision. *See infra* Argument § A.

Second, even if the doctrine of res judicata supplied the controlling legal principles in this case—which it does not—the district court still erred in granting Respondents' summary judgment motions. The declaratory judgment exception applies and permits Stilwyn to assert it claims against all Respondents. Anaconda/Portfolio filed a simple declaratory judgment action in an effort to implement its scheme to obtain an interest in the Stilwyn Loan by having its rights declared as between it and the FDIC. It filed no other claim, and in particular, no claim for coercive relief such as a claim for injunctive relief or damages. These facts establish the declaratory injunction exception. Stilwyn rightfully joined the Federal Case as an intervenor because it had a legally protectable property interest at stake, but given the nature of Anaconda/Portfolio's claim, it had no duty to assert claims or be barred by res judicata. As shown below, FDIC's slander of title counterclaim against Anaconda/Portfolio does not change this analysis. *See infra* Argument § B.

Finally, IFB cannot escape liability in any event. The plaintiffs in the Federal Case were Anaconda Investments, LLC and Portfolio FB-Idaho, LLC. Idaho First Bank was not a party to the Federal Case. It asserted no claims in that case. Given that IFB did not participate, was not a party, and asserted no claim in the Federal Case, Stilwyn had no obligation to file a counterclaim against it under Rule 13(a)—the only rule applicable here. And even if res judicata somehow applied, IFB was not entitled to summary judgment because it was not a party to, or in privity with a party to, the Federal Case. Indeed, the federal court conclusively determined that IFB's attempted assignment to Anaconda failed, and thus, it never had a contractual relationship with Anaconda. It is a separate entity that does not enjoy any protection from the existence and resolution of the Federal Case. Stilwyn therefore cannot be said to be relitigating any claim against IFB that it should have asserted in that case. *See infra* Argument § C. The summary judgment ruling must therefore be reversed.

II. ARGUMENT

A. STILWYN HAD NO OBLIGATION TO ASSERT COUNTERCLAIMS IN THE FEDERAL CASE UNDER APPLICABLE RULE 13(a), BECAUSE THERE WAS NO OPPOSING PARTY IN THAT ACTION AS NO PARTY ASSERTED A CLAIM AGAINST STILWYN.

1. Rule 13(a), not Res Judicata or Claim Preclusion, Controls.

Rule 13(a) controls the analysis and answers the question whether Stilwyn had to assert compulsory counterclaims in the Federal Case. *Joseph v. Darrar*, 93 Idaho 962, 472 P.2d 328 (1970). This Court squarely held in *Joseph* that res judicata does not apply to the litigation of counterclaims and that only claims properly classified as Rule 13(a) counterclaims are barred by a failure to raise them in an earlier action. *Id.* at 965, 472 P.2d at 331. At Respondents' urging, the district court disregarded *Joseph* and engaged solely in a res judicata analysis. The court thus erred.

Respondents never address the relevant holding in *Joseph* that res judicata does not apply to the litigation of counterclaims. Instead, they merely point out that *Joseph* involved a permissive counterclaim and thus does not answer the question of who is an opposing party under Rule 13(a). Respondents ignore the import of *Joseph*. While *Joseph* may not directly answer the opposing party question, it provides the appropriate analytical framework to do so.

2. Under Rule 13(a), Anaconda/Portfolio Were Not Opposing Parties Because They Did Not Assert a Claim against Stilwyn.

Under Idaho Rule of Civil Procedure 13(a), a party must assert a counterclaim only if an "opposing party" has made a "claim" against it:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . .

I.R.C.P. 13(a).

This rule must be enforced as written. The Court must give the words of this rule "their plain, usual, and ordinary meaning." *In re Adoption of Doe*, 156 Idaho 345, 350, 326 P.3d 347, 352 (2014) (interpreting statute).

The terms contained within the Idaho Rules of Civil Procedure must be interpreted within the context of a civil action. The terms "claim," "counterclaim," and "opposing party" are all terms of art in civil litigation. *Black's Law Dictionary* defines "claim" as "a demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for." *Black's Law Dictionary* (9th ed. 2009) available at Westlaw Blacks; *see J&M Cattle Co., LLC v. Farmers Nat. Bank*, 156 Idaho 690, 694, 330 P.3d 1048, 1052 (2014) (citing *Black's Law Dictionary* to define statutory terms). A "counterclaim" is "[a] claim for relief asserted against an opposing party after an original claim has been made." *Black's Law Dictionary*, available at Westlaw Blacks.[1]

In the Federal Case, Anaconda/Portfolio asserted a "claim" *only* against the FDIC. They alleged as follows:

> Portfolio and Anaconda seek a judicial determination of their rights in the Stilwyn loan and the collateral and documents securing said loan. Portfolio seeks a ruling from this Court that it is the lawful owner of a 58% interest in the Stilwyn Loan and is entitled to the transfer of all documents evidencing the security interest held by the lender including but not limited to the Deed of Trust and the Commercial Security Agreement.

R. Vol. III, p. 558-59.

Anaconda/Portfolio claimed that they, as opposed to the FDIC, held superior title to the collateral and a 58% interest in the loan. They did not and could not have made this claim against Stilwyn because Stilwyn did not hold title to, or assert an ownership interest in, the

[1] *See* App. Br., p. 20, fn. 14 for discussion regarding the appropriateness of using Black's Law Dictionary to define terms and interpret civil rules.

collateral or loan documents. "It is self-evident that in order to have a counterclaim, there must first be a claim against the party asserting the counterclaim." *Kearney v. A'Hearn*, 210 F. Supp. 10, 20 (S.D.N.Y. 1961) *aff'd* 309 F.2d 487 (2d Cir. 1962); *see also United States v. Raefsky*, 19 F.R.D. 355, 356 (E.D. Pa. 1956) ("A counterclaim pre-supposes the existence of a claim against the party filing the counterclaim."). Stilwyn, having had no "claim" asserted against it, had no obligation to assert a counterclaim.

Likewise, the term "opposing party" is a term of art under Rule 13(a). Respondents insist that because Stilwyn was an intervening party in the Federal Case, Anaconda/Portfolio were an "opposing party." Opposing party status must be defined consistent with Rule 13(a) before counterclaims become compulsory.

No Idaho case defines "opposing party" or applies the term within the context of Rule 13(a). The dissent in *Kootenai Electric Co-op., Inc. v. Lamar Corp.*, 148 Idaho 116, 219 P.3d 440 (2009) *reh'g denied*, comes the closest. In that case, KEC and Lamar were co-defendants in federal court. KEC cross-claimed against Lamar seeking an apportionment of fault among all the parties. After the jury rendered a verdict and apportioned liability, KEC moved for relief against Lamar based on a statutory claim under the Idaho High Voltage Act (HVA). The federal court refused to rule on the motion because KEC had not pled the statutory HVA claim in its cross-claim. *Id.* at 118, 219 P.3d at 442.

KEC then filed a separate lawsuit in Idaho state court against Lamar for the HVA statutory claim. Lamar moved for summary judgment based on the doctrine of res judicata. The district court concluded that KEC could and should have included the HVA claim when it originally filed its cross-claim for apportionment. *Id.* at 119, 219 P.3d at 443. A majority of this Court affirmed, finding that although KEC was not required to bring a permissive cross-claim

under Rule 13(g), once it did so, it should have raised the additional HVA claim. *Id.* at 121-22, 219 P.3d at 445-446.

The dissent drew a distinction between a permissive Rule 13(g) cross-claim and a compulsory Rule 13(a) counterclaim. It reasoned that if Lamar had sued KEC, then KEC would have been compelled to bring all claims it had against Lamar under Rule 13(a), including the HVA claim. But because Lamar had not sued KEC, Lamar was not an opposing party under Rule 13(a), and KEC was not required to assert all of its claims as compulsory counterclaims. *Id.* at 123, 219 P.3d at 447 ("Lamar had not sued KEC, so any claim by KEC against Lamar was not an I.R.C.P. 13(a) compulsory counterclaim."). The majority opinion in *Kootenai* is not inconsistent. The majority concluded that once KEC elected to bring a permissive cross-claim, nothing prevented it from asserting the HVA claim.

The dissent's conclusion in *Kootenai* is consistent with the rule in other jurisdictions. Those jurisdictions uniformly conclude that Rule 13(a) means what it says: An opposing party is one who has asserted a claim against a potential counterclaimant, and the duty to file a counterclaim presupposes the existence of a claim against the potential counterclaimant. Courts regularly apply the "opposing party's claim" language of Rule 13(a) to require that an opposing party has asserted a claim against the prospective counterclaimant in the first instance. *See Nancy's Product, Inc. v. Fred Meyer, Inc.* 61 Wash.App. 645, 811 P.2d 250 (1991) ("We hold that an opposing party for purposes of CR 13(a) is one who first asserts a claim against the prospective counter claimant in the first instance."); *Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003) (same, following *Nancy's Product*); *Augustin v. Mughal*, 521 F.2d 1215, 1216 (8th Cir. 1975) (same); *Mirchandani v. BMO Harris Bank*, 326 P.3d 335, 338 (Ariz. Ct. App. 2014) (bank was not an "opposing party" in prior suit involving a loan transaction where it was a separate entity from the parties in the prior suit and asserted no claim against the guarantors).

Respondents fail to rebut these cases or provide contrary authority. IFB ineffectively distinguishes *Noel*, dismissing it as "factually distinguishable and procedurally convoluted," and does not even attempt to discuss *Nancy's Product*. And the Page Defendants do not cite to either case in their response brief. The holdings from *Noel* and *Nancy's Product* stand untouched.

Anaconda/Portfolio plainly were not "opposing parties" to Stilwyn in the Federal Case because they had not asserted a claim against Stilwyn in the first instance.[2] *Noel* and *Nancy's Product* are directly on point and answer the question on appeal. This Court should follow these courts' interpretation of an identical rule of civil procedure. Anaconda/Portfolio did not assert a claim against Stilwyn, and because it was not an opposing party to Stilwyn as required by Rule 13(a), Stilwyn had no claims it was compelled to assert.

3. Respondents Have Provided No Authority to Support Their Contention that Stilwyn's Claims were Compulsory Counterclaims.

The foregoing authorities show that no "opposing party" made a "claim" against Stilwyn which would have required the assertion of "counterclaims" within the meaning of Rule 13(a). Stilwyn challenged the Respondents to provide the Court with contrary authority. *See e.g.,* App. Br., p. 18. Yet, in over 70 pages of briefing, Respondents failed to identify a rule, case, or other authority that compels a different result. Instead, they continue to ignore the Rule 13(a) analysis or simply refer back to the district court's flawed analysis. In fact, in its "Summary of the Argument" section, IFB does not even refer to the dispositive Rule 13(a) opposing party issue. *See* IFB Br., p. 28-33. IFB's entire summary is devoted to claim preclusion. Given the holding

[2] IFB argues that Stilwyn became an opposing party when it filed an answer in the Federal Court. IFB Br., p. 26-27. That act, however, does not determine opposing party under Rule 13(a) because it is the plaintiff's claim that determines opposing party status for a defendant.

in *Joseph* and the case authority supporting Stilwyn's Rule 13(a) argument, Respondents' reticence on this issue is telling.

Respondents make a handful of secondary arguments in an attempt to sidestep Rule 13(a)'s "claim," "counterclaim," and "opposing party" requirements. For instance, they assert Stilwyn is avoiding the "arising out of transaction or occurrence" Rule 13(a) requirement. *See* IFB Br., p. 38-39. But the "transaction or occurrence" language in Rule 13(a) only becomes applicable once an opposing party's claim compels the assertion of counterclaims. *See Nancy's Prod.,* 61 Wash.App. at 650, 811 P.2d at 253 ("since we conclude the opposing party requirement has not been met, we need not decide whether, for purposes of CR 13(a), Nancy's claim in this lawsuit was logically related to the subject matter of the [prior] lawsuit."). Here, without a claim made against it by an opposing party it was compelled to counter, there was no need for Stilwyn to analyze this language.

Respondents also repeatedly refer back to the district court's ruling. *See e.g.,* IFB Br., p. 27, 28, 31, 35, 37, 39. But the district court didn't even apply the Rule 13(a) analysis. *See* App. Br., p. 16 (the district court failed to engage in any discussion, analysis, or citation to authority regarding Rule 13(a)). And this Court has no deference to that flawed analysis on appeal.

Finally, Respondents continue to rely on *Ticor* in an attempt to define a "claim" (i.e., a broad transactional approach) and to support their argument that Stilwyn should have brought counterclaims and third-party claims in the Federal Case. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 157 P.3d 613 92007). *Ticor* holds only that "[*r*]*es judicata* will apply if Ticor's claim was or should have been litigated during the bankruptcy proceeding." *Id.* 144 Idaho at 123, 157 P.2d at 617. Here, whether Stilwyn should have litigated its claims is answered solely by Rule 13(a). *Ticor* never references Rule 13(a), does not answer the opposing party question, and should not

have been relied upon by the district court. It is simply inapplicable to any analysis under *Joseph* as to whether Stilwyn's claims were compulsory counterclaims under Rule 13(a).

4. Stilwyn's Intervention as a Defendant in Anaconda/Portfolio's Declaratory Judgment Against the FDIC Did Not Require That It Bring Any Claims Against the Plaintiffs or Third Parties.

In the absence of any on-point authority interpreting Rule 13(a), Respondents make the sweeping assertion that Stilwyn was an opposing party to Anaconda/Portfolio's declaratory judgment claim against the FDIC by virtue of its mere status as an intervenor in the Federal Case:

> Stilwyn, by virtue of its voluntary determination to intervene as a matter of right in the Federal Case, placed itself in the adversarial position with the plaintiffs therein such that it not only subjected itself to whatever relief might be afforded to those plaintiffs, but also, by logical extension the consequence of any relief it either sought or could have sought in those proceedings.

Page Br., p. 8-9.

This is a non-sequitur. An "adversarial position" does not equate with an "opposing party" within the meaning of Rule 13(a). And the cases Respondents cite merely state that an intervenor is a party in the sense that it is bound by any judgment entered. *See id.* at 8. This principle does not "logically extend" to a holding that an intervenor must also make counterclaims to non-existent claims that are not asserted against it. In short, while an intervenor subjects itself to whatever relief might be afforded to the other parties in the litigation (here, the determination of who held superior rights in the loan as between Anaconda/Portfolio and the FDIC), there is no law compelling an intervenor, with no claims asserted by it or against it, to assert "counterclaims" or third-party claims or risk having those claims later barred.

IFB and the Page Defendants' responses are thus long on conclusory assertions but short on legal authority. Their simplistic approach (intervention = party = party required to bring

counterclaims and third-party claims) has no legal support, and none of the authorities they cite involve facts even remotely analogous to the facts here.

Respondents rely on *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981) as "characterizing the status of intervenors." IFB Br., at 34-35. That case stands for the principle that intervenors under Rule 24(a)(2) "enter the suit with the status of original parties and are fully bound by all future court orders." 657 F.2d at 1014. However, that quotation constitutes the sum total of *Oregon*'s usefulness here. On the subject of intervention, the *Oregon* court held only that an Indian tribe that intervened as a party in an adjudication of fishing rights had waived tribal immunity due to its participation in the case. *See id.* at 1013-14. Consequently, the tribe could not later assert tribal immunity as a defense to a modification of the injunction entered against the tribe in the action in which the tribe had intervened. *See id.* To hold otherwise would "transform[tribal immunity] into a rule that tribes may never lose a lawsuit." *Id.* at 1014. Similarly, *United States v. Bd. of Educ. of Waterbury, Conn.*, 605 F.2d 573 (2d Cir. 1979) and *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), cited by IFB, only reinforce the general proposition that intervenors under Rule 24(a)(2) are treated like original parties. *See* 605 F.2d at 576-77 (holding intervenor was a "prevailing party" within the meaning of the attorney fee statute); 974 F.2d at 469-70 (holding that district court had impermissibly denied intervenors the opportunity to conduct discovery).

These cases, and the treatises that discuss an intervenor's status as equal to an original party, merely stand for the hornbook proposition that Stilwyn, having intervened, took the risk that it would lose and that Anaconda/Portfolio would prevail on their claim that they owned the rights to the Stilwyn Loan. As a consequence, Stilwyn would be precluded from thereafter asserting that it was not bound by an order adverse to its interests on that issue. *See Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985) ("'[T]he possibility that the

plaintiff will be able to obtain relief against the intervenor-defendant' is part of the 'price' paid for intervention.") (quoting *Dist. of Columbia v. Merit Sys. Protection Bd.*, 762 F.2d 129, 132 (D.C. Cir. 1985)). IFB Br., p. 35. Respondents' authorities on the effect of intervention stop well short of the sought-after proposition that Stilwyn was required to assert a counterclaim against Anaconda/Portfolio even though no claim had been made against it. Anaconda/Portfolio asserted a claim against the FDIC, not Stilwyn. If the Court were to adopt Respondents' theory, it would accord Stilwyn with the status not only of *an* original party but *the* original party—the FDIC. Conflating the rights and duties of two parties like the FDIC and Stilwyn in this manner appears to be unprecedented. Respondents cited no such law.

Moreover, melding the FDIC's and Stilwyn's rights, as Respondents would have the Court do, is inconsistent with Anaconda/Portfolio's vigorous opposition to Stilwyn's request to assert a slander of title claim. *See* R. Vol. II, p. 331-338 (Plaintiff's Opposition to Stilwyn's Motion to Confirm Status). In the Federal Case, Anaconda/Portfolio opposed Stilwyn's request even though the FDIC had asserted its own slander of title counterclaim. In stark contrast to the arguments they advance here regarding the effect of Stilwyn's intervention, Anaconda/Portfolio stated:

- At no time during the pendency of this litigation has Defendant Intervenor Stilwyn, Inc. (Stilwyn) ever filed a pleading asserting a counterclaim against Plaintiffs for its damages allegedly resulting from slander of title.

- Stilwyn moved to intervene seeking "the opportunity to oppose the plaintiffs' pending motion for summary judgment [and] . . . the FDIC's cross-motion for partial summary judgment . . . ."

- Stilwyn's exclusive purpose in intervening was to defend against the claims in the Plaintiffs' Verified Complaint.

- Indeed, this exclusive purpose is clearly evident in the pleading filed by Stilwyn in connection with its motion to intervene. Federal Rule of Civil

> Procedure 24(c) provides that a motion to intervene "must ... be accompanied by a pleading that sets out the claim or defense for which intervention is sought." . . . "The purpose of requiring an intervenor to file a pleading is to place the other parties on notice of the position, claim, and relief sought by the intervenor." *WJA Realty Limited Partnership v. Nelson*, 708 F. Supp. 1268, 1272 (D. Florida 1989).

- Stilwyn's answer generally denies the allegations in the Plaintiffs' complaint and asserts a number of affirmative defenses. However, *the Answer filed by Stilwyn does not contain a single counterclaim against Plaintiffs.* Thus, it seemed clear to the Plaintiffs that Stilwyn's exclusive purpose in intervening was to defend against the claims in the Plaintiffs' Verified Complaint.

R. Vol. IV, pp. 860-862. Anaconda/Portfolio also noted that if "Stilwyn desired to seek its own alleged damages from Plaintiffs, it was required to assert its own counterclaim in its answer," and that FDIC's claim was distinct from Stilwyn's possible claim because "the counterclaim for FDIC's damages does not mirror a counterclaim for Stilwyn's damages." *Id.* at 864 (emphasis in original). Yet now Respondents wish to use the FDIC's counterclaim as evidence to conflate Stilwyn's rights and duties with the FDIC's.

Not only is Respondents' appellate argument inconsistent with their former position, but it fails because the FDIC and Stilwyn were (and are) on procedurally different footing: the FDIC's claim was compulsory in that Anaconda/Portfolio had directly made a claim against the FDIC. And neither the district court nor the Respondents provide any authority for the position that Stilwyn was required to join that claim. Indeed, as noted in Stilwyn's Opening Brief at pages 15-16, Anaconda/Portfolio would have had a sound argument to defeat such an effort by Stilwyn, arguing that it had made no claims against Stilwyn that Stilwyn was required to counter.

Nor does the procedural requirement that a party seeking intervention file an answer under Rule 24(c) have any significance. Although Respondents note that Stilwyn filed an answer and raised affirmative defenses, they provide no authority (and Stilwyn is aware of none)

that required the answer to contain a counterclaim. Again, *Rule 13(a)* governs the circumstances under which a party must plead a counterclaim. *See MCI Telecommunications Corp. v. The Logan Group*, 848 F. Supp. 86, 89 n.2 (N.D. Texas 1994) (parties may intervene as a right for purposes other than asserting affirmative claims). Rule 24(a)(2) does not somehow trump Rule 13(a), as Respondents would have the Court believe.

Put simply, Stilwyn's status as a party following its intervention does not translate to a mandate that it was required to plead a counterclaim against Anaconda/Portfolio or third-party claims against IFB and the Page Defendants. Throughout its brief, IFB cites to the district court's memorandum decision as authority for the notion that Stilwyn was required to assert counterclaims and third-party claims in the Federal Case. *See e.g.,* IFB Br., p. 31, 36-37. Under the de novo standard of review, however, those references, which are unsupported by authority and are not fact findings, are of no avail to IFB.

B. EVEN IF RES JUDICATA APPLIED, IT WOULD NOT BAR STILWYN'S CLAIMS.

Rule 13(a) controls the outcome here; res judicata does not apply. *Joseph*, 93 Idaho at 965, 472 P.2d at 331. But even if res judicata otherwise applied, Stilwyn's claims would not be barred for two separate reasons. First, the declaratory judgment exception applies; second, there was no final judgment in the Federal Case.

1. The Declaratory Judgment Exception to Res Judicata Applies.

Respondents contend that the declaratory judgment exception does not apply here because the FDIC filed a counterclaim for slander of title. *See* IFB Br., p. 44-47. Respondents, however, make no attempt to explain the legal significance of the FDIC's counterclaim to the declaratory judgment action exception. That is because there is none. The reason why Restatement § 33 can be properly applied is because Anaconda/Portfolio, the plaintiff in the declaratory judgment action filed *only* a claim for declaratory relief. It did not, for example, file

with that request a claim for what the courts refer to as coercive relief. Because the FDIC is not a party to this case, its counterclaim is not at play.

The determinative relationship is between Anaconda/Portfolio and Stilwyn. The district court dismissed Stilwyn's claims against IFB and the Page Defendants on the assumption that Stilwyn was required to have asserted counterclaims and third-party claims in the Federal Case. But Anaconda/Portfolio filed a declaratory judgment action *only* against the FDIC. Although the FDIC did file a slander of title counterclaim against Anaconda/Portfolio, that counterclaim did not change the nature of the affirmative relief Anaconda/Portfolio was seeking, or against whom it was seeking it.

Respondents repeatedly chastise Stilwyn for stating that the Federal Case started and ended as a declaratory judgment action. The statement is absolutely accurate as between Anaconda/Portfolio and Stilwyn, the relationship that counts for purposes of this case. A brief review of the procedure posture of the Federal Case illustrates this. After the federal court ruled on the cross-motions for summary judgment regarding the rights to the Stilwyn Loan, Stilwyn did "actually" participate in discovery regarding the FDIC's slander of title counterclaim. Stilwyn did not, however, amend its pleadings to assert a counterclaim or move to join in the FDIC's counterclaim. Although Stilwyn filed a motion to be deemed a de facto party to that counterclaim and to assert its own claim for damages, Anaconda/Portfolio opposed the motion, Stilwyn withdrew it, and the court never ruled that Stilwyn was a counterclaimant as to Anaconda/Portfolio. Subsequently, the FDIC and Anaconda/Portfolio resolved the FDIC's slander of title claim stipulated to dismiss it with prejudice. Notably, however, Stilwyn was not a party to the stipulation.

This is the procedural context in which to consider the declaratory judgment exception. At the outset, IFB selectively quotes from § 33, and leaves out critical language. Section 33 reads in full as follows:

> A valid and final judgment in an action brought to declare rights and other legal relations of the parties is conclusive in a subsequent action between them as to matters declared, ***and, in accordance with the rules of issue preclusion***, as to any issues actually litigated by them and determined in the action.

RESTATEMENT (SECOND) JUDGMENTS § 33 (1982) (emphasis added). IFB left out the bolded language. The question is whether the district court erred in applying the rules of issue preclusion to Stilwyn's claims. IFB's argument is thus misleading. *See* IFB Br., p. 43.

Moreover, the Restatement language supports Stilwyn's position. The only issue "actually litigated" and determined in the declaratory judgment action involved the rights to the Stilwyn loan. Obviously, Stilwyn is not attempting to relitigate that issue. And if the federal court had ruled in favor of Anaconda/Portfolio, Stilwyn would be bound by that decision. No matter how hard IFB and the Page Defendants try, they cannot make a straight-faced argument that in the Federal Case, Stilwyn actually litigated the separate tort claims being raised here.[3]

IFB claims that Stilwyn incompletely examined *Duane Read, Inc. v. St. Paul Fire and Marine Insurance Co.*, 600 F.3d 190, 196 (2nd Cir. 2010), and argues that this case supports its position. IFB Br., p. 44-45. However, this case illustrates very well Stilwyn's views regarding the applicability of the declaratory judgment exception, as well as Stilwyn's position that Rule 13 alone governs the pleading of counterclaims.

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[3] IFB's argument that the final judgment in the Federal Case amounts to an adjudication of these claims is wrong, for the reasons discussed in section II.B.2, *supra*. *See also* Stilwyn Op. Br. at § V.D.3.

The parties to that case, Duane Read and St. Paul, both asserted claims for coercive relief apart from Duane Read's request for a declaratory judgment. "Duane Read brought two claims for declaratory relief and two claims for breach of contract, and St. Paul counterclaimed with its own breach of contract claims." IBR Br. at 44, quoting 600 F.3d at 196. The procedural posture and alignment of parties was thus far different from the present case. Anaconda/Portfolio brought *only* a declaratory judgment claim against the FDIC. When Stilwyn intervened, Anaconda/Portfolio did not amend its Complaint to seek a declaration or coercive relief against Stilwyn.

IFB continues its misleading analysis by referring to Rule 13 and stating that the Second Circuit "found that once counterclaims were 'raised,' the parties were then obligated to bring all the claims they had arising from the same transaction . . . ." IFB Br., p. 44. By putting "raised" in quotation marks, IFB is suggesting that the case supports the proposition that Stilwyn raised counterclaims in the Federal Case. This is nonsense. As the quote from the court's opinion on the following page of IFB's brief establishes:

> When St. Paul raised its counterclaims, Duane Reade was compelled by Rule 13 to file its own claims arising out of the same transaction or occurrence or else be precluded from pursuing those claims in a subsequent lawsuit. See *Critical-Vac Filtration Corp v. Minuteman Int'l, Inc.*, 233 F.3d 697 (699 2d Cir 2000) ("If party has a compulsory counterclaim and fails to plead it, the claim cannot be raised in a subsequent lawsuit."). The declaratory judgment exception does not provide safe haven from Rule 13.

IFB Br., p. 45, *quoting* 600 F.3d at 197. St. Paul was the defendant; it raised its counterclaims by filing a pleading. When that happened, the plaintiff, Duane Read, had been sued, had claims made against it by "an opposing party" and thus was compelled by Rule 13 to file its own counterclaims arising out of the same transaction.

This is precisely the point Stilwyn is making. Anaconda/Portfolio made no claims against it. Thus, it had no claims to "counter." Stilwyn did not have a compulsory counterclaim that it failed to plead. Stilwyn is not attempting to use the declaratory judgment exception as a "safe haven from Rule 13." Stilwyn's safe haven is Rule 13 itself.

Finally, IFB's snide comment, attempting to analogize what the Second Circuit said about Duane Read's litigation strategy with the decisions Stilwyn made here is out of place. IFB Br. at 45. The decision to withdraw Stilwyn's motion to confirm status in the face of Anaconda/Portfolio's adamant opposition and to pursue its rights against IFB and the Page Defendants in a state court case was a decision Stilwyn was entitled to make under Rule 13 and existing law. The district court's decision represents an unfounded departure from established principles of Idaho law regarding the litigation of counterclaims and the applicability of claim preclusion to the circumstances of this case.

IFB cites a number of additional cases (IFB Br., p. 45-46) for the proposition that the declaratory judgment exception does not apply because of the FDIC's counterclaim or, even more remotely, because of counterclaims Stilwyn *did not* assert. But in each case IFB cited, the *plaintiff* sought *both* declaratory *and* coercive relief. The following string cite from IFB's brief demonstrates this:

> *See, Allan Block Corp. v. County Materials Corp.*, 512 F.3d 912, 917 (7th Cir. 2008) (there is "an exception to the exception: a plaintiff who joins his request for a declaratory judgment with a request for an injunction or damages cannot avoid the bar of res judicata should he later seek additional such relief") (citation omitted); *Harborside Refrigerated Services, Inc. v. Vogel, supra*, 959 F.2d 368, 373 (2d Cir. 1992) ("Many jurisdictions recognize an exception to ordinary res judicata principles where, as here, the prior action involved only a request for declaratory relief") (emphasis added); *Cimasi v. Fenton*, 838 F.2d 298, 299 (8th Cir. 1988) ("where a party seeks declaratory relief as well as affirmative relief through a coercive remedy, the exception under [the declaratory judgment

> exception to res judicata] does not apply"); *Horn & Hardart Co. v. National Rail Passenger Corp.*, 843 F.2d 546, 549 (D.C. Cir. 1988) ("Where a party asks only for declaratory relief, courts have limited the preclusive effect to the matters declared...") (emphasis added); *Mandarino v. Pollard*, 718 F.2d 845, 848 (7th Cir. Ill. 1983) (" . . . permitting Mandarino to proceed with his federal lawsuit would not further the purpose of declaratory actions, since his state court action did not seek 'solely' declaratory relief").

IFB Br., p. 45-46 (emphasis added). Anaconda/Portfolio, by contrast, sought *solely* declaratory relief in the Federal Case.

IFB concludes its argument regarding the declaratory judgment exception by offering *ipse dixit* and a non-sequitur. IFB first states that Stilwyn's intervention in the declaratory judgment action renders the exception inapplicable. As discussed above, it did not. Stilwyn's intervention did nothing to alter the Federal Case from something other than an action filed by Anaconda/Portfolio seeking solely declaratory relief against the FDIC. IFB next asserts that the FDIC's counterclaim for slander of title "enlarged the scope of the action" such that adopting the declaratory judgment exception would not alter the district court's analysis; that is, Stilwyn's claims would be barred anyway. IFB Br., p. 47. At no point in the prior 46 pages of its brief did IFB cite any authority that the FDIC's counterclaim somehow required Stilwyn to assert a compulsory counterclaim against Anaconda/Portfolio, to join the FDIC's counterclaim, or to assert claims against third-parties.

The declaratory judgment exception fits the circumstances here. The court should adopt and apply this sensible exception.

2. The Amended Judgment from the Federal Case Does Not Satisfy the Final Judgment Prong for Purposes of Claim Preclusion.

Respondents fail to sustain their burden to prove all three essential elements of claim preclusion by a preponderance of the evidence. *Kootenai Electric*, 148 Idaho at 120, 219 P.3d at

444, *citing Ticor Title*, 144 Idaho 124, 157 P.3d at 618 ("the burden of proof for res judicata is on the party asserting the affirmative defense and it must prove all of the essential elements by a preponderance of the evidence."). The three requirements for claim preclusion are: same parties, same claims, and final judgment. *Id.*

The Amended Judgment entered in the Federal Case does not satisfy the final judgment prong for the application of claim preclusion as against Stilwyn. Respondents argue that Stilwyn is treated as an original party once it was granted leave to intervene, and therefore, the Amended Judgment is effective. That argument, however, is contradicted by and is inconsistent with the conduct of the original parties, as well as the federal court.

Stilwyn set forth in detail the procedural history in the Federal Case regarding the genesis and filing of the Rule 41(a) Stipulation to Dismiss which resulted in the entry of the Amended Judgment. *See* App. Br., p. 33-37. The Amended Judgment is the document relied exclusively upon by Respondents to support their argument that Stilwyn is bound by a final judgment. Respondents argue here that Stilwyn must be treated as an original party because it intervened in the Federal Case. If so, then why was Stilwyn's signature on the Rule 41(a) Stipulation to Dismiss not necessary? Respondents cannot have it both ways. As against Stilwyn, the federal court's Amended Judgment does not constitute a final judgment for purposes of claim preclusion.

C. IFB CANNOT ESCAPE LIABILITY BECAUSE IT WAS NOT A PARTY OR IN PRIVITY WITH A PARTY TO THE FEDERAL CASE.

Finally, and in any event, neither the compulsory counterclaim rule nor claim preclusion bars Stilwyn's claims against IFB. IFB was not a party to the Federal Case and filed no claim against Stilwyn. Stilwyn therefore had no duty to file a compulsory counterclaim under Rule 13(a). *See Mirchandani*, 326 P.3d at 338 (for Rule 13(a) purposes, bank was not an "opposing

party" in prior suit involving a loan transaction where it was a separate entity from the parties in the prior suit and asserted no claim against the guarantors); *see generally Joseph*, 93 Idaho at 965, 472 P.2d at 331 (only Rule 13(a), not res judicata, applies to counterclaims). And of course, a third-party claim against IFB would have been purely permissive, not compulsory. *See Mirchandani*, 326 P.3d at 338.

Even if res judicata applied, the same result would obtain. IFB contends, and the district court held, that IFB was in privity with the parties in the Federal Case. *See* IFB Br. at 43; R. Vol. V. p. 1096-97. This is demonstrably wrong. The federal court specifically held that any purported assignment between IFB and Anaconda was void and of no effect. R. Vol. II, p. 522-23. The attempted contractual relationship failed *ab initio* because it was invalid. *Id.* IFB cannot assert any form of privity with Anaconda based on a purported contractual assignment because the federal court found that the attempted assignment failed from inception.

IFB was not a successor-in-interest of Anaconda because it did not *derive* any interest from Anaconda. "To establish privity, it must be shown that the plaintiff *derived* a direct interest in the outcome of the former litigation from the prior defendant." *Lohman v. Flynn*, 139 Idaho 312, 320, 78 P.3d 379, 387 (2003) (emphasis added). IFB never derived any interest from Anaconda. And Anaconda never derived anything from IFB. As the federal court held, "IFB never obtained an interest in the Stilwyn Loan." R. Vol. V, p. 522-23.[4]

[4] IFB also argues that Rule 19 required Stilwyn to join additional persons to the Federal Case. IFB Br., p. 42-43. IFB, however, fails to point to any facts in the record to support the conclusion that the Federal Court could not accord complete relief on Anaconda/Portfolio's claim for judicial determination of title absent the joinder of additional persons. Stilwyn's opening brief at pages 26-27 establishes that there is no rule of law or civil procedure requiring Stilwyn to bring claims against non-parties in the Federal Case.

IFB, therefore, cannot reap a windfall from anything that happened in the Federal Case. IFB was not a party to that case and was not in privity with any party. The district court's holding that "the contractual relationship between Anaconda and Idaho First resulted in Idaho First being in privity with Anaconda" is in error. R. Vol. V, p. 1097. Because IFB cannot claim privity with any party in the Federal Case, res judicata does not bar Stilwyn's claims against IFB. The entry of summary judgment in favor of IFB must be reversed.

CROSS-RESPONDENT'S BRIEF

I. STATEMENT OF THE CASE

Cross-Appellants IFB and the Page Defendants appeal the district court's denial of attorney fees under I.C. §§ 12-121 and 12-123. The district court exercised its discretion in denying all requested attorney fees. R. Vol. V, p. 1303. It properly perceived the attorney fee issue as one of discretion, acted within the outer bounds of such discretion, and reached its decision by the exercise of reason. The district court correctly found that Stilwyn did not bring or pursue the action frivolously, unreasonably, or without foundation. R. Vol. V, p. 1302. The Cross-Appellants fail to meet their burden on appeal to show the district court abused its discretion in denying attorney fees.

II. STANDARD OF REVIEW

"The district court's determination as to whether an action was brought or defended frivolously will not be disturbed absent an abuse of discretion." *Idaho Military Hist. Soc'y, Inc. v. Maslen*, 156 Idaho 624, 630, 329 P.2d 1072, 1078 (2014) citing *Anderson v. Ethington*, 103 Idaho 658, 660, 651 P.2d 923, 925 (1982).

III. ARGUMENT

Cross-Appellants' primary argument below was that the application of res judicata always results in a finding of frivolity or unreasonableness. The district court rejected that argument and concluded that "[w]hile this Court applied the doctrine of *res judicata*, there are no undisputed facts or controlling Idaho case law that would render the Plaintiff's position plainly fallacious." R. Vol. V, p. 1300.

The district court specifically addressed, and rejected, the case law cited by the Cross-Appellants in their request for attorney fees. This is the same case cited by the Cross-Appellants to this Court. The Page Defendants state that Stilwyn did not "counter" this case law. Page App. Br., p. 6. That statement is grossly in error. Stilwyn took on and distinguished every case cited by the Cross-Appellants in its objection to the request for attorney fees. R. Vol. V, p. 1295D(4)-(6). Addressing the same case law, the district court stated that "it was not obviously clear whether the doctrine of *res judicata* applied." R. Vol. V, p. 1301-02.

The Cross-Appellants chide the district court for stating that Stilwyn's claims were "fairly debatable" and then extrapolate that term to somehow argue the district court applied the wrong legal standard. The Cross-Appellants cherry-pick an isolated statement, but conveniently ignore the following findings by the district court:

- The Plaintiff's claims were not frivolous, unreasonable, or without foundation under I.C. § 12-121 neither the Plaintiff or its counsel engaged in frivolous conduct. R. Vol. V, p. 1300.
- This Court does not find that the Plaintiff's claims were brought or pursued frivolously, unreasonably, or without foundation. *Id.*
- Also, there is no evidence presented to this Court that the Plaintiff's engaged in any frivolous conduct, as defined in I.C. § 12-123. *Id.*
- Although, the Defendants won on the issue before this Court, resulting in the dismissal of the suit, the Plaintiff's suit was not brought or pursued frivolously, unreasonably, or without foundation. *Id.*

- "An action is not deemed to have been brought frivolously simply because it ultimately fails." *Id.* citing *Auto. Club Ins. Co. v. Jackson*, 124 Idaho 874, 879, 865 P.2d 965, 970 (1993), *Edwards v. Donart*, 116 Idaho 687, 688, 778 P.2d 809, 810 (1989).
- While this Court applied the doctrine of *res judicata*, there are no undisputed facts or controlling Idaho case law that would render the Plaintiff's position plainly fallacious. R. Vol. V, p. 1300.
- In the present case, there are a number of debatable issues and matters of first impression that were presented on summary judgment by the Plaintiff. R. Vol. V, p. 1301.
- Although, this Court ruled that *res judicata,* specially claim preclusion, applied on summary judgment, the Plaintiff presented many arguments to debatable questions of law. *Id.*
- The Plaintiff presented reasonable arguments on these issues, which more than satisfies the standard in I.C. § 12-121 as not unreasonable or frivolous, and I.C. § 12-123 as brought in an unfrivolous manner. *Id.*
- The question of whether the claims were precluded was not obvious and the Plaintiff's position was not plainly fallacious. *Id.*
- However, unlike the cases some of the Defendants cite, here it was not obviously clear whether the doctrine of *res judicata* applied. R. Vol. V, p. 1302.
- While awarding of attorney fees in some *res judicata* cases has been done in the past, there is no rule that his must happen in every *res judicata* case. *Id.*
- Determination of attorney fees is left to the sound discretion of the trial court; being such, this Court does not find reason to award attorney's fees here. The claims presented by the Plaintiff were not brought or pursued frivolously, unreasonably, or without foundation. *Id.* (citations omitted).

Here, it is abundantly clear that the district court perceived the attorney fee issue as one of discretion, acted within the outer bounds of that discretion, and reach its decision by the exercise of reason. The district court rejected the Cross-Appellants argument that every case involving the doctrine of res judicata automatically results in an award of attorney fees. The Cross-Appellants have failed to meet their burden to show that the district court abused its

discretion in denying an award of attorney fees. The district court's decision denying the Cross-Appellants' requests for attorney fees should be affirmed.

IV. PAGE DEFENDANTS' REQUEST FOR ATTORNEY FEES' ON APPEAL SHOULD BE DENIED.

The Page Defendants request an award of attorney fees on appeal, arguing that Stilwyn's appeal is frivolous. Page Br., p. 17; Page App. Br., p. 10. Their argument for attorney fees on appeal is based on the same authority and reasoning as made to the district court below.

Attorney fees under I.C. § 12-121 are only awarded in the Court's discretion "when it is left with the abiding belief that the action was pursued, defended or brought frivolously, unreasonably, or without foundation." *Garner v. Povey*, 151 Idaho 462, 468, 259 P.3d 608, 614 (2011); *C&G Inc. v. Rule*, 135 Idaho 763, 769, 25 P.3d 76, 82 (2001). Moreover, "when a party pursues an action which contains fairly debatable issues, the action is not considered to be frivolous or without foundation." *Id.*

> When deciding whether attorney fees should be awarded under I.C. § 12-121, the entire course of the litigation must be taken into account and if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation.

Michalk v. Michalk, 148 Idaho 224, 235, 220 P.3d 580, 591 (2009) citing *McGrew v. McGrew,* 139 Idaho 551, 562, 82 P.3d 833, 844 (2003).

Under I.C. § 12-121, the "sole question is whether the losing party's position is so plainly fallacious as to be deemed frivolous, unreasonable or without foundation." *Automobile Club Ins. Co. v Jackson*, 124 Idaho 874, 879, 865 P.2d 965, 970 (1993) (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 92, 803 P.2d 993, 998 (1991) (quoting *Severson v. Hermann*, 116 Idaho 497, 777 P.2d 269 (1989)).

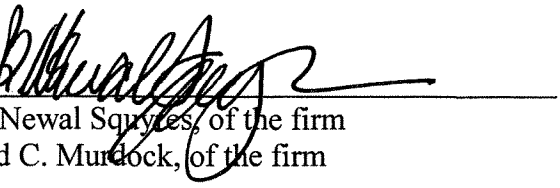
The Page Defendants have failed to meet their burden to show a right to an award of attorney fees on appeal. For all the same reasons the district court found in rejecting the Page Defendants request for attorney fees under I.C. § 12-121, the Page Defendants' request should be denied here.

V. CONCLUSION

Stilwyn, Inc. respectfully requests that this Court reverse the district court's entry of summary judgment. Contrary to the district court's conclusion, Rule 13(a), and not res judicata, controls the analysis whether Stilwyn had a legal duty or obligation to assert claims or counterclaims in the Federal Case. Because Anaconda/Portfolio made no claims against Stilwyn, Stilwyn had no claims to "counter" and Anaconda/Portfolio was not an "opposing party" against whom Stilwyn was compelled to assert counterclaims. And Stilwyn was not required to make claims against non-parties, like IFB and Page Defendants. IFB is not entitled to any protection from the Federal Case. Moreover, the declaratory judgment exception properly applies under the circumstances of this case. Finally, the Court should affirm the district court's denial of attorney fees, and deny the Page Defendants' request for attorney fees on appeal. For these reasons, the Court should reverse the summary judgment decision and remand this case for trial.

DATED this 14th day of October, 2014.

HOLLAND & HART LLP

By 

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that two bound copies were served on each party via U.S. mail.

DATED AND CERTIFIED this 14th day of October, 2014.

By: _____
B. Newal Squyres

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2014, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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