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IN THE SUPREME COURT OF THE  
STATE OF IDAHO

IDAHO FIRST BANK,  
Appellant/Cross-Respondent,

v.

MAJ-LE TATE BRIDGES, and HAROLD  
A. BRIDGES, individuals,

Respondents/Cross-Appellants.

SUPREME COURT CASE NO. 44532

(Dist. Court Case No. CV-2015-145-C)

**CROSS-APPELLANTS MAJ-LE TATE BRIDGES AND HAROLD A. BRIDGES'  
REPLY BRIEF**

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

**HONORABLE JASON D. SCOTT, District Judge, presiding**

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ARGUMENT .....	2
A.	The District Court’s Dismissal of IFB’s Deficiency Claim Should be Affirmed.....	2
1.	I.A.R. 13 grants the jurisdiction to enforce the final judgment. ....	3
2.	The Uniform Arbitration Act does not provide the support or context argued by IFB. ...	4
3.	IFB is precluded from pursuing its claim in another forum.....	5
4.	The arbitrator should not be allowed to interpret the final judgment. ....	7
5.	The Supreme Court has recognized that, based upon equitable principles, creditors are not allowed to seek additional deficiency recovery in a subsequent action if not pursued in the original action. ....	8
6.	Arbitration is not the forum to re-litigate key issues previously decided by courts. ....	9
B.	IFB Provides Scant Support to Claim that its Cross-Collateralization Provision is Effective.....	10
C.	The Bridges are entitled to Attorney’s Fees on Appeal.....	11
III.	CONCLUSION.....	11

## TABLE OF AUTHORITIES

### **Cases**

<i>AgStar Financial Services, ACA v. Northwest Sand &amp; Gravel, Inc.</i> , 161 Idaho 801, 391 P.3d 1271 (2017).....	8, 10
<i>Borah v. McCandless</i> , 147 Idaho 73, 205 P.3d 1209 (2009).....	9, 10
<i>Bryan Cty. v. Yates Paving &amp; Grading Co.</i> , 638 S.E.2d 302 (Ga. 2006).....	7
<i>Hansen v. State Farm Mut. Auto Ins. Co.</i> , 112 Idaho 663, 735 P.2d 974 (1987).....	3
<i>In re Y &amp; A Group Sec. Litigation</i> , 38 F.3d 380 (8th Cir. 1994).....	7
<i>Johannsen v. Utterbeck</i> , 146 Idaho 423, 196 P.3d 341 (2008).....	11
<i>John Hancock Mut. Life Ins. Co. v. Olick</i> , 151 F.3d 132 (3d Cir. 1998).....	7
<i>Kootenai Elec. Coop., Inc. v. Lamar Corp.</i> , 148 Idaho 116, 219 P.3d 440 (2009).....	6
<i>Martin v. Yasuda</i> , 829 F.3d 1118 (9th Cir. 2016).....	9
<i>Portland Cattle Loan Co. v. Biehl</i> , 42 Idaho 47, 245 P. 88 (1926).....	8
<i>Prehn v. Hodge</i> , 161 Idaho 321, 385 P.3d 876 (2016).....	11
<i>Storey Construction, Inc. v. Hanks</i> , 148 Idaho 401, 224 P.3d 468 (2009).....	6, 7
<i>Ticor Title v. Stanion</i> , 144 Idaho 119, 157 P.3d 613 (2007).....	6

### **Statutes**

Idaho Code § 7-902.....	4, 5
Idaho Code §12-120(3).....	11

### **Rules**

Idaho Appellate Rule 13.....	2, 3, 4
Idaho Rule of Civil Procedure 60.....	2

### **Other Authorities**

Restat 2d of Judgments, § 25 (2nd 1982).....	6
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## I. INTRODUCTION

The Bridges' cross-appeal addresses Idaho First Bank's ("IFB") attempt to recover in arbitration on the deficiency the District Court previously barred. The District Court ruled that IFB's deficiency action was dismissed with prejudice. (R., p. 351.) IFB has collaterally attacked this judgment by attempting to foreclose a separate deed of trust on Boise residential property for the sole purpose of recovering the amount already barred under I.C. § 45-1512. Despite the District Court's ruling, IFB claimed it could still recover the full amount of its claimed deficiency by enforcing a cross-collateralization provision in the separate deed of trust. However, IFB had previously attempted to enforce its rights to collect when it filed its Second Amended Complaint in the action before the District Court. (R., pp. 38-61.) This Second Amended Complaint contained no claim based on the theory it had subsequently pursued in arbitration, even though the current claim is related to the same facts and circumstances, with the same parties, as its claims before the District Court. That litigation properly placed the issue of amounts due under the Cabin Note clearly before the court. For apparently strategic reasons, IFB only chose to pursue two theories at that time (its Rule 13 and Article Nine arguments) and neglected to pursue any cross-collateralization arguments to support recovery of the deficiency as it was obliged to pursue. (*See id.*)

Instead, IFB continued to focus solely on these two theories in opposition to the Bridges' motion for summary judgment and in its motion for reconsideration. (*See R.*, pp. 282-83, 822-25.) Although given a full and fair opportunity to present all theories supporting an attempt to collect the deficiency, IFB elected to not introduce its cross-collateralization claims to support its

lawsuit. Consequently, the District Court's August 1, 2016 Order Denying Plaintiff's Motion to Reconsider concluded that IFB was unable to present a legal reason entitling it to recover the deficiency. (R., pp. 822-25.)

The Bridges have continually argued that the District Court's final judgment precludes IFB's attempt to pursue its afterthought and alternative argument in a new forum. IFB's Cross-Respondent's Brief fails to address preclusion issues, and instead focuses on Idaho's Uniform Arbitration Act (the "Act"), jurisdiction, and cross-collateralization clauses to give support to a regularly pursued matter; however, the Bridges maintain that Idaho law should not allow IFB the proverbial second bite of the apple or countenance IFB's wasteful and unfair re-litigation of the issue before a different forum. Therefore, the Bridges argue that the District Court incorrectly denied the motion they brought under IAR 13 and IRCP 60. IFB should be prevented from changing the forum to AAA arbitration as the dismissal of the deficiency action with prejudice precluded further claims attempting to resurrect the deficiency under the Cabin Note.

## **II. ARGUMENT**

### **A. The District Court's Dismissal of IFB's Deficiency Claim Should be Affirmed.**

Idaho Appellate Rule 13(b)(6) and (13) allow the District Court to rule during a pending appeal on I.R.C.P. 60 motions and in matters related to the enforcement of any judgment or order. Rule 60 motions for relief from a judgment or order may be pursued for reasons of mistake, inadvertence, surprise, excusable neglect, or any other reason justifying relief. I.R.C.P. 60(b)(1) and (6). The District Court stated that the judgment awarded the Bridges with "complete relief," dismissing IFB's deficiency claims with prejudice. (R., p. 959-960.) It also

stated that the judgment awarded IFB no relief on its deficiency claims and that the arbitration proceeding was somehow not an attempt to re-litigate the deficiency claims. (R., p. 960.) Thus, it wrongly concluded that the Bridges were not seeking enforcement of the judgment, but an expansion of the judgment. (*Id.*) In doing so, the District Court enabled IFB to undermine the judgment and overcome its previous failure to pursue all arguments in favor of its deficiency claim.

**1. I.A.R. 13 grants the jurisdiction to enforce the final judgment.**

IFB has been seeking a personal judgment against the Bridges on the Cabin Note since it first filed a complaint on June 19, 2015. Initially, IFB was seeking a judgment for the full Cabin Note amount. (*See* R., pp. 7-19.) Then, after selling the collateral, IFB filed an untimely deficiency action seeking a judgment for the resulting claimed deficiency on the Cabin Note. (*See* R., pp. 38-61.) Once IFB realized that its claims would likely fail on appeal, it suddenly decided that it wanted to arbitrate alternative arguments regarding its deficiency claim. Up to this point in the litigation, IFB never mentioned this alternative position that it apparently believes trumps everything the District Court had already ruled. Allowing IFB to now pursue its claims in arbitration would render the litigation process practically meaningless. *See, e.g., Hansen v. State Farm Mut. Auto Ins. Co.*, 112 Idaho 663, 670-71, 735 P.2d 974, 981-82 (1987) (finding that State Farm waived right to arbitration after submitting to the jurisdiction of the district court and proceeding with litigation, recognizing that when it appeared that things were not going its way, State Farm wanted out of the consequences of litigation). Basically, IFB is trying to avoid the

consequences of its failure in litigation and hoping the arbitrator would ignore the effect of the District Court's final judgment.

The District Court, however, refused to exercise the jurisdiction prescribed in I.A.R. 13(b) to enforce its judgment and instead found, without citation to any authority, that it lacked jurisdiction under I.A.R. 13(b)(13), suggesting incorrectly that the relief sought was not to enforce the judgment but to expand it. By the very nature of the Bridges' pleading seeking relief on the theory of claim preclusion, it is evident that the question of enforcement was at issue. Had no final judgment been filed, the Bridges would have no basis to rely on the claim preclusion principle. The court's refusal to enforce the judgment allows IFB to argue that the deficiency claim that was dismissed with prejudice can be resurrected and recovered in a separate forum by alternate means, and opens up the prospect for a contradictory holding undermining the finality of the judgment. As it is, IFB is allowed to split its claim in violation of *res judicata* principles.

**2. The Uniform Arbitration Act does not provide the support or context argued by IFB.**

Avoiding the claim preclusion issue in its responsive brief, IFB contends that the Act bars the Bridges' position. IFB suggests that the Bridges are unable to overcome the statutory requirements for compelling or staying arbitration found in I.C. § 7-902. More specifically, IFB cites to I.C. § 7-902(e), arguing that the Bridges failed to show that IFB's arbitration action lacked merit or bona fides per that provision's requirements. However, the Act has no applicability to the current issues.



Idaho Code § 7-902 applies to both a motion to compel arbitration and a motion to stay arbitration. *See* I.C. § 7-902 ((a) “[o]n application of a party . . . the court shall order the parties to proceed”; (b) “[o]n application, the court may stay”; (c) “application [for arbitration] shall be made”; (d) “if an order for arbitration [to stay] or an application therefor has been made”; (e) “[a]n order for arbitration . . . .”). Neither was filed in this or any other action. The Bridges did not ask the District Court to stay the arbitration; they requested that the judgment be enforced so that IFB would be prevented from pursuing its claims in another forum. Therefore, IFB’s cite to I.C. § 7-902(e) provides no support to its contention that the Uniform Arbitration Act provides the context necessary to uphold the District Court’s refusal to exercise jurisdiction to ensure enforcement of its judgment.

### **3. IFB is precluded from pursuing its claim in another forum.**

The District Court also refused to address the Bridges’ main contention – that any arguments that amounts are still owed on the Cabin Note and recoverable against any of the Bridges’ assets are now precluded by the District Court’s final judgment under the principle of claim preclusion. The Bridges are not contesting that IFB has initiated an arbitration proceeding, they contest the attempt to use that forum to address issues that have already been litigated or could have been litigated before the District Court. The arbitration’s sole purpose was seeking an alternative route to recovering under the Cabin Note. Claim preclusion is intended to prevent exactly that – it precludes subsequent actions on issues that could have been raised in the primary litigation between parties. Thus, the Bridges have asked the court to enforce its judgment so that IFB cannot pursue a claim that is precluded by law.

The principle of claim preclusion was developed to protect parties from the harassment of repetitive claims. *Ticor Title v. Stanion*, 144 Idaho 119, 125, 157 P.3d 613, 619 (2007). Courts are also protected from an added caseload from claims that should have been litigated by parties in a previous related case. *Id.* at 126, 157 P.3d at 620. Claim preclusion has been broadly applied in Idaho courts in such a manner that the doctrine’s application does not require substantial overlap of theories, but only that there is a final judgment, the same parties involved, and a claim that arises out of the same series of transactions to which the original cause arose. *Id.*; *Kootenai Elec. Coop., Inc. v. Lamar Corp.*, 148 Idaho 116, 120, 219 P.3d 440, 444 (2009). Basically, litigants are barred from pursuing any claims that are related to the same cause of action that was made or should have been made in previous litigation between the same parties. *Storey Construction, Inc. v. Hanks*, 148 Idaho 401, 411, 224 P.3d 468, 478 (2009). This includes remedies not sought in the initial litigation. Restat 2d of Judgments, § 25 (2nd 1982).

IFB does not deny that its arbitration demand sought recovery under the Cabin Note—the same recovery it sought in the underlying litigation. (Appellant/Cross-Respondent’s Brief, p. 4.) Its arguments in response to the Bridges’ appeal, unsurprisingly, focus entirely on the District Court’s decision and does not contravene the Bridges’ preclusion arguments. IFB dwells on language from that decision framing the Bridges’ motion as seeking to expand their recovery to include “an additional measures of relief that they didn’t seek: a declaratory judgment that the remaining balance of the 2006 [Cabin] loan is extinguished and not collectible by resort to collateral other than the McCall cabin.” *Id.* In so ruling, the District Court ignored fundamental claim preclusion principles that should have been applied to protect, not punish, the Bridges.

#### **4. The arbitrator should not be allowed to interpret the final judgment.**

IFB also fails to address the fact that the preclusive effect of the final judgment will ultimately need to be an issue decided by an Idaho court and not an arbitrator. While IFB suggests an advisory opinion is sought by the Bridges and that the arbitrator should instead address this significant issue, it provides no authority that the arbitrator has the authority to rule on this issue. The Bridges have already shown that other jurisdictions have recognized that the proper forum for determining the reach of claim preclusion on a final judgment should be resolved by the courts, not arbitrators. *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 139 (3d Cir. 1998).

As the Bridges already underscored in their opening brief, a court – not an arbitrator – “is the best interpreter of its own judgment.” *In re Y & A Group Sec. Litigation*, 38 F.3d 380, 383 (8th Cir. 1994). Ultimately, the Bridges contend that the issue not reached in *Storey Construction, Inc. v. Hanks*, 148 Idaho at 405-7, 224 P.3d at 472-4, should now be addressed in Idaho—whether *res judicata* issues should be resolved by a court and not an arbitrator. *See, e.g., Bryan Cty. v. Yates Paving & Grading Co.*, 638 S.E.2d 302, 304-05 (Ga. 2006) (“The principle stated ... is that ‘even when arbitration is involved ... ‘courts should not have to stand by while parties re-assert claims that have already been resolved.’ ‘*No matter what*, courts have the power to defend their judgments as *res judicata*, including the power to enjoin or stay subsequent arbitrations.’”) (internal citations omitted).

**5. The Supreme Court has recognized that, based upon equitable principles, creditors are not allowed to seek additional deficiency recovery in a subsequent action if not pursued in the original action.**

This Court has very recently expressed its view that equitable principles are applicable to debtor/creditor issues pertaining to deficiency judgments. In *AgStar Financial Services, ACA v. Northwest Sand & Gravel, Inc.* the Supreme Court addressed the applicability of equitable principles in deficiency matters. Most applicable to this case is that in the Court's review of previous cases, it realized that reasonable resolutions were reached after a balancing of the equities between the creditors and debtors. 161 Idaho 801, 813, 391 P.3d 1271, 1283 (2017). The District Court did not have the benefit of the *AgStar* decision when it ruled that the arbitration could proceed. However, these principles have application here even though the factual construct of *AgStar* was different. Of particular import here was *AgStar's* review of *Portland Cattle Loan Co. v. Biehl*, 42 Idaho 47, 245 P. 88 (1926). “[*Portland Cattle*] is of interest because it holds that where a creditor forecloses against a portion of its security and obtains a deficiency judgment, it cannot then seek to recover against the additional security that was not sought in the first instance.” 161 Idaho at 812, 391 P.3d at 1282.

Here, IFB sought to recover from security in the underlying action that was separate and distinct from the security it now seeks to recover in its arbitration demand. Under the principles reviewed in *AgStar* and drawn from *Portland Cattle*, regardless of the fact that IFB is unable to recover based on claim preclusion, equity also bars IFB from seeking to recover by means it chose not to pursue initially. Therefore, *AgStar's* equitable principles provide additional grounds to reverse the District Court.

**6. Arbitration is not the forum to re-litigate key issues previously decided by courts.**

Finally, IFB has failed to address the Bridges' argument that by pursuing litigation on the deficiency issue, it has waived its right to pursue arbitration on any claims related to the deficiency. IFB does not even attempt to argue that its arbitration demand is unrelated to its litigation, it just argues that its demand is beyond the reach of the courts in part because of this appeal. However, no authority permits IFB to use the pendency of an appeal to prohibit basic legal principles from applying to an attempt to re-litigate an issue in another forum.

The Bridges have cited to *Borah v. McCandless*, in support of their contention that IFB cannot be allowed to pursue a claim in arbitration that it had already litigated, no matter the timing of the demand. While most precedent related to the arbitration waiver issue applies to arbitration demands made during the ongoing litigation (*see, e.g., Martin v. Yasuda*, 829 F.3d 1118 (9th Cir. 2016)), in *Borah*, the issue was addressed because the appellant first argued on appeal that an arbitration clause deprived the district court of subject matter jurisdiction and the court could not therefore resolve the breach of contract claim. 147 Idaho 73, 77-8, 205 P.3d 1209, 1213-4 (2009). The Supreme Court found that the applicant, even in waiting to raise the issue on appeal, had waived his right to rely on the arbitration clause and cited to cases finding waiver where the arbitration was pursued by the party initiating, and still participating in, litigation. *Id.* at 78-9, 205 P.3d at 1214-5. The jurisdictional and procedural differences in *Borah* do not prevent the application of the waiver principle here.

Basically, since IFB's arbitration demand relates to its attempt to collect on the Cabin

Note, IFB is attempting to avoid the adverse ruling by looking to arbitration and claiming no jurisdiction, like the appellant in *Borah*. The only difference here is that IFB did not wait until arguments were filed on appeal and instead tested the waters while the appeal was still pending. Thus, the case law is just as applicable to the present case as it was in *Borah*—IFB has waived the benefit of the arbitration clause, as far as it applies to the deficiency on the Cabin Note, by proceeding with litigation on that issue. Unfortunately, the District Court erred by not applying, at the very least, the waiver doctrine thereby giving IFB an opportunity to re-litigate matters in a different forum.

**B. IFB Provides Scant Support to Claim that its Cross-Collateralization Provision is Effective.**

IFB's responsive brief does not provide any authority of substance to counter the arguments opposing the application of the cross-collateralization provision. IFB tries to differentiate between contemporaneous waivers and subsequent waivers of deficiency upon obtaining a loan. However, IFB presents no authority to support an argument that such waivers are or should be viewed differently in the eyes of a court. Similarly, IFB claims that Idaho does not disfavor deficiency claims which is at least inconsistent with this Court's announced principles in *AgStar*.

Further, IFB decries the Bridges' use of persuasive authority in support of its arguments. Surprisingly, the only authority that IFB does cite to in support of its cross-collateralization provision is from Alaska and Kentucky despite its hostility to foreign authority stated only one sentence earlier. Overall, IFB's scant support for the applicability of its cross-collateralization is

truly, in IFB's own words, "unavailing." In sum, IFB has failed to advance any cogent reasons why its cross-collateralization provision should be enforced.

**C. The Bridges are entitled to Attorney's Fees on Appeal.**

Finally, in response to the Bridges' argument entitling them to fees on appeal, IFB simply states that the Bridges' appeal is not a commercial transaction under I.C. § 12-120(3). However, I.C. § 12-120(3) clearly provides for fees to the prevailing party for any actions based on a note. *Prehn v. Hodge*, 161 Idaho 321, 385 P.3d 876, 887 (2016). As the Bridges stated in their Joint Respondents' and Cross-Appellants' Brief, the litigation is, if nothing else, an effort to recover under the promissory note. For attorney fee award purposes under the statute, the crucial test is whether the transaction comprises the gravamen of the lawsuit and the basis upon which the party is attempting to recover. *Johannsen v. Utterbeck*, 146 Idaho 423, 432, 196 P.3d 341, 350 (2008). IFB cannot dispute the primary role the note plays in this litigation. Therefore, if the Bridges are found to be the prevailing party on appeal, they are entitled to attorney fees under I.C. § 12-120(3).

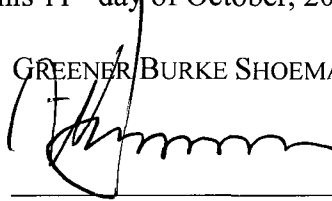
**III. CONCLUSION**

As described above, the District Court erred when it failed to enforce its judgment and refused to exercise jurisdiction, with the result being that the Bridges were afforded no protection for the relief they had previously pursued to final judgment below. For the reasons stated above, the Bridges respectfully request that the Court reverse the District Court's order that failed to apply *res judicata* principles to bar IFB's untimely attempt to raise a cross-collateralization argument to collaterally attack the final judgment, a result that is also supported by equity as

recently applied by the Court to debtor-creditor relationships. Further, this Court should proceed to the substantive determination that the cross-collateralization provisions in the Deed of Trust encumbering their Boise home cannot be enforced against the Bridges.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of October, 2017.

GREENER BURKE SHOEMAKER OBERRECHT P.A.



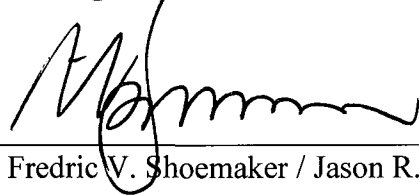
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### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11<sup>th</sup> day of October, 2017, I served a true and correct copy of the foregoing CROSS-APPELLANTS MAJ-LE TATE BRIDGES AND HAROLD A. BRIDGES' REPLY BRIEF to the following person by the following method:

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