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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Appellate Case No. 2018-000436

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1,……...Respondent,

v.

The Estate of Patricia Ann Owens Houck; Tammy M. Bailey; South Carolina Department of Motor Vehicles, Defendants,

Of whom the Estate of Patricia Ann Owens Houck and Tammy M. Bailey are the.....Petitioners.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Appellate Case No. 2018-000436

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SC Court of Appeals

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1,.....Respondent/Appellant,

v.

Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles, Defendants,

Of whom Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey are the.....Appellants/Respondents.

RECORD ON APPEAL – VOLUME I

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
C/A No.: 2016-CP-32-03572

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2007-1,

Plaintiff,

vs.

PATRICIA OWENS A/K/A PATRICIA ANN OWENS; TAMMY M. BAILEY; SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES,

Defendants.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This matter is before the court pursuant to an order of reference filed November 29, 2016, and the partial summary judgment motions of the Plaintiff, Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1's ("Deutsche Bank") and Defendant, Patricia Owens a/k/a Patricia Ann Owens ("Owens") and Tammy M. Bailey ("Bailey") in the above-captioned action. The motions were heard on September 19, 2017. At the hearing, G. Benjamin Milam, Esquire, represented Deutsche Bank, and Andrew S. Radeker, Esquire, represented Bailey and Owens. At the hearing, the court requested proposed orders from counsel, and both counsel submitted ably drafted proposed orders. All arguments addressed in those proposed orders are recognized as having been made to the court.

This case presents issues about res judicata and the scope of the compulsory counterclaim pleading requirement under Rule 13(a), SCRCP, the effect of res judicata, the meaning of the term

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satisfaction under S.C. Code Ann. §§ 29-3-310 and -320, and the application of and potential conflict between various aspects of public policy.

After careful review, the court grants Bailey and Owens' motion for partial summary judgment and denies Deutsche Bank's motion.

This action was commenced by Deutsche Bank on October 19, 2016, seeking foreclosure of a mortgage of property at 111 Andrew Court, Gaston, South Carolina, given by Patricia Owens and seeking reformation of that mortgage. Bailey and Owens answered and, later, served an amended answer and counterclaim within the time of do so as of right under Rule 15, SCRCP. Their amended answer and counterclaim admits Deutsche Bank's allegation that "[t]he installments of principal and interest falling due from and after July 1, 2013 have not been paid although demand for payment thereof has been made." It asserts the defenses of res judicata, collateral estoppel, laches, unclean hands, waiver, and setoff or credit. It also asserts counterclaims for a declaratory judgment that Deutsche Bank holds no mortgage on the subject property or, in the alternative, that the mortgage is unenforceable, for liability under S.C. Code Ann. § 29-3-320 for failure to record satisfaction of the mortgage after due request, and for violation of S.C. Code Ann. § 37-10-102 (usually called the attorney preference statute.)

Deutsche Bank moved for summary judgment in its favor as to each of Bailey and Owens' counterclaims. Bailey and Owens have moved for 1) summary judgment in their favor on Deutsche Bank's claim for foreclosure, 2) summary judgment in their favor on their counterclaim seeking a declaratory judgment, and 3) summary judgment on liability in their favor on their counterclaim under S.C. Code Ann. § 29-3-320 for failure to enter satisfaction of the mortgage.

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Based on the following findings of fact and conclusions of law, the court denies Deutsche Bank's motion for partial summary judgment and grants Bailey and Owens' motion for partial summary judgment.

FINDINGS OF FACT

1. Bailey and Owens are residents of South Carolina. All parties have or claim an interest in real property in Lexington County, South Carolina. The court has personal jurisdiction over the parties, and venue is proper in Lexington County.

2. The following facts are undisputed and relevant to analysis of the issues subject of the parties' motions:

a. The note and mortgage sought to be foreclosed are dated June 15, 1998, and were given by Owens, who was then the owner of the property, to NovaStar Mortgage, Inc.

b. The note document contains a balloon provision under which, even if all the monthly payments under the note were made timely and in their required amounts, a substantial principal balance came due on July 1, 2013, the note's maturity date.

c. The mortgage was recorded on July 2, 1998, in Book 4743 at page 330, in the office of the Lexington County Register of Deeds, and assignments were recorded noting the transfer of the note and mortgage to Deutsche Bank.

d. Bailey is Owens' daughter and the grantee of a deed of the property from her mother through a deed executed and recorded after the mortgage.

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e. The note matured on July 1, 2013, and the complaint alleges that "[t]he installments of principal and interest falling due from and after July 1, 2013 have not been paid although demand for payment thereof has been made."

f. Bailey and Owens' amended answer and counterclaim alleges:

> A copy of a letter from Defendant Tammy M. Bailey to the Plaintiff (without its enclosures) is attached as Exhibit A to this pleading.
>
> The letter attached as Exhibit A to this pleading and its content are incorporated herein by reference as if here set forth verbatim.
>
> A copy of the certified mail return receipt card showing tne Plaintiff's receipt of the said letter is attached as Exhibit B to this pleading.
>
> A copy of a letter from an attorney on behalf of the Plaintiff is attached as Exhibit C to this pleading.

g. The referenced documents are attached to the amended answer and counterclaim, and the letter that is Exhibit A to the pleading is a request that Deutsche Bank enter satisfaction of the mortgage. The letter states that the note matured on July 1, 2013. It states there was a previous lawsuit between the parties that "was directly about whether the note and mortgage were valid and enforceable[,]" that Deutsche Bank never asserted a counterclaim for foreclosure in that suit, and that the case was ended by a jury verdict against Bailey and Owens.

h. The amended answer and counterclaim further alleges:

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Rule 13(a) of the South Carolina Rules of Civil Procedure says, "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 and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

The Defendants brought an action, Tammy M. Bailey, et al. v. Novastar Mortgage, Inc., et al., Case No. 2013-CP-32-02210, in which the Plaintiff was a defendant.

The Plaintiff in this instant action appeared in that earlier action and served an answer in it on September 26, 2013. That answer asserted no counterclaim, and no counterclaim was ever asserted in that action.

That action was about the origination and execution of the note and mortgage subject of this instant action.

That action was about the validity and enforceability of the note and mortgage subject of this instant action.

The note subject of both that action and this one matured on July 1, 2013.

When the aforesaid answer was served in that earlier action, the party who ultimately became the Plaintiff in this action had the very same claim for foreclosure that it has now brought in this case.
That claim for foreclosure arose from the same transactions and occurrences subject of that earlier action.

The claim for foreclosure brought in the instant action was [a] compulsory counterclaim in that earlier action.

. . .

The Plaintiff has acted unfairly. Strategically, the Plaintiff chose not to assert this foreclosure claim in the earlier action.

. . .

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> By failing to assert the claims the Plaintiff now brings in this case in the earlier action, the Plaintiff has waived those claims.
>
> . . .
>
> The Plaintiff holds no mortgage on the subject property.
>
> If the court determines that the Plaintiff holds a mortgage on the subject property, it is unenforceable.
>
> There is a justiciable controversy.
>
> The Defendants are entitled to declaratory judgment in their favor about the same.
>
> . . .
>
> It has been more than three months since the Plaintiff received the letter shown as Exhibit A to this pleading.
>
> The Plaintiff has not repaired to the proper office (the Lexington County Register of Deeds) to enter satisfaction of the mortgage subject of this case.
>
> The Plaintiff is liable for all damages, penalties, attorneys' fees, and relief available under S.C. Code Ann. § 29-3-320.

i. The parties agree, and public records show, that the Bailey v. Novastar action occurred, that Deutsche Bank was a defendant in that case, and that the case was tried to a final judgment.

j. The Bailey v. Novastar case was filed on June 27, 2013, and Deutsche Bank served its answer in that case on September 26, 2013. That answer asserted no counterclaim, and no counterclaim was ever asserted by Deutsche Bank in that action.

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k. The Bailey v. Novastar action was tried to a final judgment, in which the jury did not find for Bailey and Owens; the verdict was for the defendants.

l. In that case, Bailey and Owens asserted various claims against Deutsche Bank, most of which arose from the execution of the note and mortgage and the circumstances surrounding that. In a filing made in that case, Deutsche Bank stated those claims "arise out of a purported mortgage refinancing loan transaction involving a balloon note in 1998 by Plaintiff Owens" and "relate solely to [that] closing[.]"

m. The claims Bailey and Owens made included one against NovaStar and Deutsche Bank (as NovaStar's assignee) for violation of S.C. Code Ann. § 37-10-102, commonly called the attorney preference statute, under which a mortgage lender must ascertain a borrower's preference as to the legal counsel she desires to represent her in the mortgage loan closing. The thrust of that claim was that NovaStar did not ascertain Owens' preference as to legal counsel[1] and closed the loan without attorney supervision, and, as a result, that the balloon aspect of the note was kept hidden from Owens when she signed the signature page of the note document. That claim sought relief under S.C. Code Ann. § 37-10-105(C), which applies where all or part of a mortgage loan transaction is unconscionable or was induced by unconscionable conduct. That subsection provides, among other things, for a court to "refuse to enforce the agreement, or a term, or part of the

[1] As discussed further below, the parties agree that there exists a form labeled "South Carolina Notice of Rights Concerning the Selection of an Attorney and Insurance Agent" dated "5/15/98" and signed by Owens, without any of its other blanks filled in.

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agreement or transaction that the court determines to have been unconscionable at the time it was made." Id.

n. The prayer in the complaint in that action stated that Bailey and Owens sought, *inter alia*, "all relief available under S.C. Code Ann. § 37-10-105(C)[.]" If Bailey and Owens had prevailed in that case, that could have resulted in a judgment that the note and mortgage were unenforceable.

o. At no time did Deutsche Bank assert a claim for foreclosure in the Bailey v. Novastar action, despite the fact that the note had matured when Deutsche Bank served its answer.

p. Deutsche Bank admits that Bailey sent, and that it received, the letter requesting recording a mortgage satisfaction, with a $40.00 check enclosed to cover the fees for processing and recording the satisfaction document. Deutsche Bank replied with a letter stating that it did not consider the mortgage satisfied and that it would not be recording the satisfaction document.

q. The parties agree that more than three months passed between Deutsche Bank's receipt of the letter request and the assertion of Bailey and Owens' counterclaims through their amended answer and counterclaim in this case.

ISSUES

1. Was Deutsche Bank's foreclosure a compulsory counterclaim in the Bailey v. Novastar action?

2. If Deutsche Bank's foreclosure was a compulsory counterclaim in the Bailey v. Novastar action, is the foreclosure now barred by res judicata?

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3. If Deutsche Bank's foreclosure is barred by res judicata, was Deutsche Bank required under S.C. Code Ann. § 29-3-310 to record a satisfaction of mortgage in response to Bailey and Owens' demand?

4. If Deutsche Bank's foreclosure is not barred by res judicata, can Bailey and Owens seek a setoff from any foreclosure judgment based on NovaStar's alleged non-compliance with the attorney preference statute?

CONCLUSIONS OF LAW

SUMMARY JUDGMENT STANDARD

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. E.g., Shelton v. LS&K, Inc., 374 S.C. 294, 297, 648 S.E.2d 307 (Ct. App. 2007).

To determine whether there exists a genuine issue of material fact, the court views all the properly cognizable evidence in the record in the light most favorable to the nonmoving party. Dawkins v. Fields, 354 S.C. 58, 67-68, 580 S.E.2d 433 (2003); Shelton, 374 S.C. at 297. This deferential view applies to matters of fact and not to matters of law, which are not subject to factual judgments. See Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

Upon motion, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

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PUBLIC POLICY CONCERNS AT ISSUE

The court notes, consistently with the parties' arguments, that the issues presented by these motions bring up several public policy concerns. A public policy concern at issue here is one of the reasons underlying the existence of the doctrine of res judicata: finality of litigation about a given subject matter. Res judicata, a doctrine at the heart of the analysis here, "bars a second suit where there is (1) identity of parties; (2) identity of subject matter; and (3) adjudication of the issue in the first suit." Judy v. Judy, 393 S.C. 160, 173, 712 S.E.2d 408, 412 (2011). In addition to the issues litigated in the first case, res judicata bars the parties to the first case "from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Id. at 414 (quoting Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)).

Res judicata is "a principle of public policy[.]" Watson v. Goldsmith, 205 S.C. 215, 31 S.E.2d 317, 320 (1944). "The primary purposes of the doctrine . . . are to bring an end to litigation and prevent a defendant from being forced to defend the same action repeatedly." Garris v. Governing Bd. of S.C. Reinsurance Facility, 333 S.C. 432, 449, 511 S.E.2d 48 (1998); accord Nelson v. QHG of S.C., Inc., 362 S.C. 421, 427, 608 S.E.2d 855 (2005). Res judicata appears to spring originally from the principles stated in

> the two maxims which were its foundation in the Roman law, *nemo debet bis vexari pro eadem causa* (no one ought to be twice sued for the same cause of action) and *interest reipublicae ut sit finis litium* (it is the interest of the state that there should be an end of litigation.)

Watson, 31 S.E.2d at 319.

"[T]he law makes provision to prevent multiple and vexatious litigation[.]" James D. McGuire, "The Election of Remedies," 9 Rocky Mtn. Law Rev. 271, 272 (1936-37). A century

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and a half ago, a legal commentator wrote of the policy against litigants suing one another multiple times about the same thing, citing

> the rule which forbids circuity in legal proceedings, *circuitus est evitandus* [(the circuit should be avoided)]; in accordance with which a Court of law will endeavor to prevent circuity and multiplicity of suits . . . . The rule just cited . . . is intended to avoid "the scandal and absurdity" of a circuity of action[.]

Herbert Broom, Legal Maxims 259 (6th Am. ed., Philadelphia 1868) (originally published 1845).

Regarding S.C. Code Ann. §§ 29-3-310 and -320, those statutes speak to a public policy that mortgages that have been discharged ought to appear from the land records to have been extinguished, so they no longer cloud the title of a piece of land. "Clearly, the legislative intent in enacting these statutes was to provide an incentive for the mortgagee, once it no longer has a monetary interest in the mortgage loan, to promptly record the extinguishment of the lien." Kinard v. Fleet Real Estate Funding Corp., 319 S.C. 408, 412, 461 S.E.2d 833, 835 (Ct. App. 1995). "Once the mortgage has been satisfied and the mortgagor expresses this desire, it is incumbent upon the mortgagee 'to promptly record the extinguishment of the lien.'" Bostic v. Am. Home Mortgage Servicing, Inc., 375 S.C. 143, 650 S.E.2d 479, 485 (Ct. App. 2007) (quoting Kinard, 319 S.C. at 412).

There is also a public policy that favors negotiated settlement of mortgage default disputes. This is shown in South Carolina by the Supreme Court's mortgage foreclosure action administrative order, In re: Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011) (South Carolina Supreme Court Administrative Order 2011-05-02-01) (hereinafter "the Administrative Order"). Among the reasons for issuing the Administrative Order was that it was issued

> in order to insure that eligible homeowners and lender-servicers have been afforded the benefits of loan modification or other loss

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> mitigation where possible, and to insure that the procedures for handling issues relating to such efforts are handled uniformly throughout the State, so that mortgage foreclosure actions are not unnecessarily dismissed, delayed or inappropriately concluded while loan modification or other loss mitigation efforts are being pursued[.]

Id. at 210.

This same general policy of favoring negotiated resolution of mortgage loan defaults is shown nationally by the seven-year run of the recently ended Home Affordable Modification Program. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, div. O, tit. 7, § 709(b) (2015). It is also indicated by the adoption of federal regulations such as 12 CFR §§ 1024.39 and 1024.41, which require mortgage servicers to wait a specified period of time after sending a defaulting borrower information about ways to resolve that default before they refer out the matter for the bringing of a foreclosure action.[2] In its promulgation of mortgage servicing rules, the Consumer Financial Protection Bureau has specifically stated that its goals include "assist[ing] consumers with . . . options that may be available for consumers having difficulty with their mortgage loan obligations." See Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 FR 10696-01.

Finally, there is a public policy that people should not be without redress in the courts to correct situations that negatively affect them and warrant correction. Cf. S.C. Const. Art. I, § 9 ("[a]ll courts shall be public, and every person shall have speedy remedy therein for wrongs sustained"). "The boast of the law is that there can be no wrong without a remedy." Messervy v. Messervy, 82 S.C. 559, 64 S.E. 753, 754 (1909).

[2] As discussed further below and as the parties agree, these regulations had not taken effect at the time Deutsche Bank served its answer in the Bailey v. Novastar action.

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RES JUDICATA

Much of the analysis of whether Bailey and Owens are entitled to summary judgment on the mortgage foreclosure claim involves whether Deutsche Bank's claim for foreclosure had to be pled in the Bailey v. Novastar action. Bailey and Owens argue that it was, and Deutsche Bank argues that it was not.

"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 and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Rule 13(a), SCRCP. Such claims are usually called compulsory counterclaims. "A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Rule 13(a), SCRCP. Such claims are usually called permissive counterclaims.

It is generally accepted across the country that

> [f]ailure to assert a compulsory counterclaim precludes a later assertion of that claim in a subsequent or independent action, but failure to assert a permissive counterclaim does not preclude its assertion in a subsequent action. . . . The Restatement [Second, Judgments § 22(2)(a)] similarly provides that a party may be precluded from subsequently maintaining an action on a counterclaim that was not interposed in a previous suit where the counterclaim must be interposed by a compulsory counterclaim statute or rule of court.

47 Am.Jur.2d Judgments § 504 (2006).

South Carolina law follows these principles. In Jaynes v. County of Fairfield, 303 S.C. 434, 438 & n. 1, 401 S.E.2d 183, 185 & n. 1 (Ct. App. 1991), the Court of Appeals applied res judicata to hold that a claim that arose from the same transaction or occurrence and could have

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been asserted as a counterclaim in a previous case was barred. In Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188, 190-91, 417 S.E.2d 569, 571 (1992), the Supreme Court held the same, noting that "[t]he claims are now barred as arising out of the same transaction as the prior suit." In Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997), discussing res judicata, the Supreme Court noted that, "if a counterclaim is compulsory, but not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action." "Rules of procedure, like statutes, should be given their plain meaning." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 61, 566 S.E.2d 863 (Ct. App. 2002). Rule 13(a) plainly states that "[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[.]" Rule 13(a)'s purpose is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." Beach Co., 351 S.C. at 62. Accordingly, it serves the principles in which the doctrine of res judicata is rooted, Watson, 31 S.E.2d at 319, and it is a part of the res judicata analysis. 47 Am.Jur.2d Judgments § 504. Citing Crestwood Golf Club, the Court of Appeals in Beach Company stated:

> The South Carolina Reporter's Note following Rule 13 states: "[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are 'compulsory' under Rule 13(a) and are barred by res judicata or estoppel by judgment if not asserted."

Beach Co., 351 S.C. at 62.

But how do we determine what "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" and is a compulsory counterclaim? Rule 13(a), SCRCP. In N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), a bedrock case of modern South Carolina jurisprudence, the Supreme Court adopted the

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"logical relationship" test for determining whether a counterclaim is compulsory and held that most of DAV's counterclaims were compulsory because "there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture." The Court clarified the reason: of the four tests considered by the Court for whether a counterclaim is compulsory, the Court settled on the "logical relationship test," which is "by far the most widely accepted because of its flexibility." Id. (emphasis added). In the DAV case, the plaintiff's claim was for foreclosure of a mortgage.

The Court's description of DAV's counterclaims follows:

1) breach of a subsequent oral contract to arrange additional financing for interest payments and construction costs;

2) breach of the joint venture agreement as parent company of joint venturer NCF by bringing the foreclosure action;

3) breach of fiduciary duty to co-joint venturers;

4) wrongful dissolution of the joint venture by failing to voluntarily refrain from foreclosure as agreed;

5) violation of the Unfair Trade Practices Act by breaching the oral agreement;

6) breach of two subsequent oral contracts to purchase DAV's interest in the joint venture.

Id. at 517.

The Court, in a decision never overruled, held that all but the sixth counterclaim on this list was compulsory. Id. at 518. The logical relationship that each counterclaim had to the plaintiff's foreclosure claim was that each counterclaim arose out of the parties' relationship that was the subject of the foreclosure claim, dealt with how the loan was administered, or both. Id.

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In Carolina First Bank v. BADD, L.L.C., our Supreme Court, citing the rule that a counterclaim is compulsory if it has a "logical relationship" to the transaction or occurrence subject of the opposing party's claim, held that a counterclaim is compulsory in a foreclosure action if it arises out of the execution of the documents that form the basis of the plaintiff's claim. 414 S.C. 289, 295, 296, 778 S.E.2d 106, 109, 110 (2015). The Court emphasized that "the 'transaction or occurrence' for the purpose of determining the compulsory character of [the] counterclaim is the execution" of those documents. Id. at 296. The Court there found that the counterclaims were not compulsory where they assumed the enforceability of the guaranty agreements subject of the plaintiff's claim and were based on events that occurred years after the execution of the guaranty documents. Id. The Court stated that the claims did "not arise out of the underlying transaction or occurrence because [they do] not affect the execution or enforceability of the guaranty agreements." Id.

Only one reported case since BADD has discussed that decision in the context of whether a counterclaim is compulsory. In S.C. Community Bank v. Salon Proz, LLC, 420 S.C. 89, 97, 800 S.E.2d 488, 492 (2017), the Court of Appeals determined a claim for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, was compulsory, relying on BADD as authority.

> For example, the UTPA claim is an action at law seeking treble damages. The substance of Salon's UTPA claim alleges Bank "engaged in a pattern of reneging upon promises to modify or otherwise restructure loans, including, but [not] limited to, the loan subject of this case." Were this allegation true, it could affect the loan's enforceability. Cf. BADD, 414 S.C. at 296, 778 S.E.2d at 109 (holding a counterclaim was permissive when its allegations, if true, would not have rendered the guaranty agreements unenforceable). Therefore, we find the UTPA claim was both legal and compulsory. See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518-19, 381 S.E.2d 903, 904-05 (1989) (holding a

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> counterclaim alleging violation of the UTPA by breach of an oral agreement was both legal and compulsory).

Salon Proz, 420 S.C. at 97.

Deutsche Bank contends that a counterclaim for foreclosure, if it had been brought by Deutsche Bank in the Bailey v. Novastar case, would not have necessarily barred the enforcement of Bailey and Owens' rights under S.C. Code Ann. § 37-10-105(C) and thus argues that foreclosure was not a compulsory counterclaim. Deutsche Bank also argues that proof of its foreclosure claim involves elements distinct from those that were necessary for success on Bailey and Owens' claim seeking relief under S.C. Code Ann. § 37-10-105(C). Deutsche Bank is arguing that the test for whether a counterclaim is compulsory is that, to be so, success on the counterclaim must necessarily always bar success on the plaintiff's claim or that an element or elements of the counterclaim must exactly mirror those of the plaintiff's claim. This is too narrow a reading of the compulsory counterclaim rule.

Instructive in this regard is the Court of Appeals' summary of what must be shown in mortgage foreclosure actions:

> Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction.

U.S. Bank. Natl. Assn. v. Bell, 385 S.C. 364, 684 S.E.2d 199, 205 (Ct. App. 2009) (footnote omitted).

One remedy provided under S.C. Code Ann. § 37-10-105(C) is for a court to "refuse to enforce the agreement[.]" One outcome within the scope of what Bailey and Owens pled in Bailey v. Novastar was their establishment of a complete defense to a counterclaim for foreclosure: refusal to enforce the note and mortgage. See id. That Bailey and Owens could have received a judgment

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in the earlier case that would have constituted a complete defense to Deutsche Bank's foreclosure claim indicates these claims have a compulsory relationship to one another.

Case law provides further support and indicates that the compulsory counterclaim rule is not as narrow as Deutsche Bank contends. In Jaynes v. County of Fairfield, the Jaynes were defendants in an earlier road-closing action brought by Fairfield County that concerned, *inter alia*, whether a road was public property – a case that Fairfield County lost. 303 S.C. at 435-36, 438 & n. 1. The Court of Appeals held that the Jaynes' later inverse condemnation action against the county about that road was barred by res judicata, since the claims were about the same road and bore a logical relationship to one another. Id. The claims did not have elements that mirrored one another; rather, they arose out of a common matter: the road and who owned it. Id.

In First-Citizens Bank & Trust Co. v. Hucks, a case in which the compulsory or permissive nature of a counterclaim was put in issue by a jury demand on the counterclaim, the Supreme Court did not examine whether the plaintiff's and the defendants' claims had any mirroring elements; rather, the Court's analysis was:

> In the instant case, the trustee's equity action seeks a declaration of rights arising in the administration of a trust. The legal counterclaim alleges that the trustee has breached its contractual agreement and fiduciary duty. We find that there is a logical relationship between the counterclaim and the claim. Hence the counterclaim is compulsory, and appellants are entitled to a jury trial on their counterclaim.

305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). Again, the claims arose out of a common matter or set of transactions: the trust and its administration.

The purpose of the compulsory counterclaim rule is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." Beach Co., 351 S.C. at 62. If the scope of what is a compulsory counterclaim were instead limited to a

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counterclaim that mirrors one or more of the elements of the plaintiff's claim, Jaynes and Hucks could not have been decided in the way that they were.

Deutsche Bank's position is also inconsistent with the results in DAV Corp. and Salon Proz and inconsistent with the analysis in those cases and BADD.

The Supreme Court in DAV Corp. found claims to be compulsory that had less to do with the execution of and enforceability of the note and mortgage than Bailey and Owens' claims in the Bailey v. Novastar action did. 298 S.C. at 517-19. The Court in BADD used an analysis that reckons a counterclaim to be compulsory as "aris[ing] out of the underlying transaction or occurrence" where it either "affect[s] the execution *or* enforceability of the guaranty agreements." 414 S.C. at 296 (emphasis added). This follows general res judicata principles. The decision in Salon Proz held a counterclaim was compulsory where "it *could* affect the loan's enforceability." 420 S.C. at 97 (emphasis added). None of these decisions, nor any of which this court is aware, have held that, to be compulsory, a counterclaim must necessarily and always bar the plaintiff's claim if successful. Neither are there any South Carolina decision that hold there must be mirroring elements among the claims for a counterclaim to be compulsory. What may be gleaned from the jurisprudence is there are at least two recognized ways a counterclaim may be compulsory. If a counterclaim arises out of the same set of facts as the plaintiff's claim, it is compulsory. If success on a counterclaim could affect the enforceability of the plaintiff's claim, it is compulsory.

Deutsche Bank's foreclosure claim was both of those things regarding the Bailey v. Novastar case. In a typical mortgage foreclosure case, like this one, the subject documents are the note and mortgage, the execution of which must be proven for the foreclosure plaintiff to win. The factual occurrences at the heart of the Bailey v. Novastar case included the circumstances surrounding the execution of the note and mortgage document – the closing, as Deutsche Bank

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itself noted. Further, success by Bailey and Owens on their claim sounding under S.C. Code Ann. § 37-10-105(C) could have resulted in the note and mortgage being declared unenforceable – something that would have been utterly incompatible with success by Deutsche Bank on a counterclaim for foreclosure, as that would have determined that the note and mortgage *were* enforceable.

With In re: Bobo, C/A No. 07-01120-HB *5, *13-14 (Bankr. S.C. 2008), the United States Bankruptcy Court for South Carolina held that these claims bore a compulsory claim relationship to one another: on the one hand, a claim for a Truth-in-Lending Act violation and for violation of the attorney preference statute coupled with unconscionability that sought to "reform the financing" and "void the mortgage" and, on the other hand, the opposing party's mortgage foreclosure claim. The unappealed final judgment in the previously brought and concluded foreclosure action thus barred the TILA and attorney preference claims as res judicata in the later adversary proceeding brought on those claims, since they were not asserted as counterclaims in the foreclosure action. Id. at *12-14.

The court does not see why a different result would obtain simply because the roles here are reversed, i.e., Bailey and Owens' attorney preference violation and unconscionability claim were brought and resulted in an unappealed final judgment first, before Deutsche Bank asserted its foreclosure claim in a second action. The principle is the same, and the logical relationship between the claims is the same. See id. "General rules governing the conclusiveness of judgments and decrees ordinarily apply" to mortgage foreclosures, 59A C.J.S. Mortgages § 1051 (2009), and the court knows of no case law in South Carolina indicating an exception for mortgage foreclosure claims in the res judicata context.

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Indeed, a South Carolina case from 1930 – 55 years before the adoption of the Rules of Civil Procedure – held that the holder of a mortgage was bound in a later foreclosure action by the result of an earlier action that had been brought by someone who was now a defendant in the foreclosure action, with the Supreme Court holding that the foreclosure plaintiff could not foreclose against that defendant's interest and observing:

> On or about March 5, 1919, M. De Veaux Moore brought an action against William W. Arthur, Anne Moore Arthur, et al., in the court of common pleas for Sumter county, for the purpose of setting aside his deed to Mrs. Arthur, on the ground, among others, that it was procured through a conspiracy to deprive him of his property. The Palmetto National Bank was made a party to this action and filed an answer. On trial, the bank did not attempt to prove the allegations of its answer, or to establish in any way the validity of its mortgage as against the claims of the plaintiff Moore; but, on the contrary, its counsel entered into an agreement with plaintiff's counsel that the court's decree should be binding on the bank. The case eventuated in a decree dated January 3, 1921, by which the deed was canceled and set aside, and in which no reference was made to the bank's mortgage. There was no appeal.
>
> Subsequently, the Palmetto National Bank assigned and transferred the mortgage to the Columbia National Bank which in 1927 commenced the present action for its foreclosure. M. De Veaux Moore was made a party defendant and filed an answer alleging his ownership of a life estate in the land and his possession thereof.
>
> . . .
>
> Regardless of any agreement which may have been entered into by counsel for the bank with counsel for M. De Veaux Moore that the decree in that case should be binding on the bank, the question of the validity of the bank's mortgage, in so far as it affects the life interest of Moore, was settled by that case. In the present case the plaintiff stands in the shoes of its assignor, the Palmetto National Bank, and the same issue is now involved between it and the defendant Moore. As the decree in the former case adjudicated this issue, the matter is res judicata and cannot again be litigated in the present case.

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Columbia Natl. Bank of Columbia v. Arthur, 151 S.E. 274, 275, 276 (S.C. 1930). As far as this court can tell from South Carolina case law, there is not, and never has been, a res judicata exception for mortgage foreclosure claims. See id.; 59A C.J.S. Mortgages § 1051.

In the 2011 case of Judy v. Judy, our Supreme Court reiterated the conceptual framework of the earlier Plum Creek decision:

> Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.

Judy, 712 S.E.2d at 414 (quoting Plum Creek, 334 S.C. at 34).

"Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Id. A litigant's claim is barred even when he "is 'prepared in the second action (1) [t]o present evidence or *grounds or theories of the case* not presented in the first action or (2) [t]o seek remedies or forms of relief not demanded in the first action.'" S.C. Pub. Interest Foundation v. Greenville County, 401 S.C. 377, 386, 737 S.E.2d 502, 507 (Ct. App. 2013) (emphasis in original; quoting Restatement (Second) of Judgments § 25 (1982 & Supp. 2012)).

Parties cannot, simply by "changing their relative positions of plaintiff and defendant" in a second case, Broom, supra at 259, avoid the effect of an earlier final judgment in a case arising out of the same transaction or occurrence. Contrary to Deutsche Bank's argument, the scope of res judicata does not depend on the elements of the specific claims that were brought in the first suit; rather, it depends upon the transaction or transactions the first suit was *about*. When it applies, res judicata covers all rights and remedies "with respect to *all or part of the transaction, or series*

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of connected transactions, out of which the action arose." Id. at 388 (emphasis in original; quoting Restatement (Second) of Judgments § 24).

Deutsche Bank's foreclosure claim was a compulsory counterclaim in the Bailey v. Novastar case. At the time it served its answer in that case, Deutsche Bank had that same claim, based on the same default (maturity of the note), against the same two people, Bailey and Owens, who had sued it in that case about the execution of the same note and mortgage and were seeking relief that could have rendered the note and mortgage unenforceable. As the foreclosure claim was an unraised, compulsory counterclaim in the Bailey v. Novastar action, it is now barred by res judicata. Crestwood Golf Club, 328 S.C. at 217; Sub-Zero Freezer, 308 S.C. at 190-91; Beach Co., 351 S.C. at 62; Jaynes, 303 S.C. at 438 & n. 1.

APPLICATION OF RES JUDICATA HERE DOES NOT OFFEND PUBLIC POLICY

Deutsche Bank argues, in the alternative to its main argument against res judicata, that the court should not apply res judicata here for public policy reasons. The application of res judicata a "may be precluded where unfairness or injustice results, or public policy requires it." Mr. T v. Ms. T, 378 S.C. 127, 138, 662 S.E.2d 413, 419 (Ct. App. 2008). Noting the Administrative Order and federal regulations cited above, Deutsche Bank argues that applying the compulsory counterclaim to mortgage foreclosures would encourage mortgagees to bring foreclosure actions and would undermine the policy encouraging the resolution by agreement of mortgage loan defaults.

While this aspect of public policy is important, the public interest in foreclosure intervention and the public interest in finality of litigation served by res judicata are not necessarily in conflict. By complying with the Administrative Order at the same time as it asserted foreclosure

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as a counterclaim in the Bailey v. Novastar case, Deutsche Bank could have both served the interest of trying to avoid the property's foreclosure sale and held on to its foreclosure claim.

The Administrative Order does not require delay in *asserting* a foreclosure claim; rather, it requires the service on a mortgagor defendant of a notice of right to foreclosure intervention at the same time as the pleading asserting the foreclosure cause of action is served. In re: Mortgage Foreclosures, 396 S.C. at 212. The Administrative Order then provides that no "foreclosure hearing[,]" i.e., final hearing on the foreclosure cause of action, may be held until the mortgagee's attorney certifies the following to the court:

> (a) that the Mortgagor has been served with a notice of the Mortgagor's right to foreclosure intervention for the purpose of seeking a resolution of the foreclosure action by loan modification or other means of loss mitigation;
>
> (b) that the Mortgagee, or its designated agent, has received and examined all documents and records required to be submitted by the Mortgagor to evaluate eligibility for foreclosure intervention;
>
> (c) that the Mortgagor has been afforded a full and fair opportunity to submit any other information or data pertaining to the Mortgagor's loan or personal circumstances for consideration by the Mortgagee;
>
> (d) that after completion of the foreclosure intervention process, the Mortgagor does not qualify for loan modification or other means of loss mitigation, in accordance with any standards, rules or guidelines applicable to the mortgage loan, and the parties have been unable to reach any other agreement concerning the foreclosure process; and,
>
> (e) that notice of the denial of loan modification or other means of loss mitigation has been served on the Mortgagor by mailing such notice to all known addresses of the Mortgagor; provided, that such notice shall also state that the Mortgagor has 30 days from the date of mailing of notice of denial of relief to file and serve an answer or other response to the Mortgagee's summons and complaint.
>
> . . .

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> If within thirty days after having been served with notice of the Mortgagor's rights, the Mortgagor has failed, refused, or voluntarily elected not to participate in any foreclosure intervention process, the Mortgagee, through its attorney, shall certify that fact to the Court, and the foreclosure action may proceed.

Id. at 212-13. The process under the Administrative Order *uses* the pending foreclosure claim as a vehicle to facilitate negotiated resolution of mortgage loan defaults through foreclosure intervention. Id. It does not require a mortgagee to exhaust foreclosure intervention efforts *before* commencing its mortgage foreclosure claim. Id.

Accordingly, Deutsche Bank could have served the public policy of foreclosure intervention – and complied with the Administrative Order – by serving an answer and counterclaim asserting its foreclosure claim in the Bailey v. Novastar action and concurrently serving a notice of right to foreclosure intervention, then letting the ensuing foreclosure intervention process play out however it did. Id. If the foreclosure intervention process had resolved the foreclosure intervention claim, then the claim would have been ended by agreement; if not, Deutsche Bank would have retained that claim and its right to litigate it. See id.

The court does not see an imperative to depart from established doctrine and create a new res judicata exception, never before recognized in South Carolina, where existing law under the Administrative Order provides a vehicle that would serve the aim of avoiding the loss of property to foreclosure without compromising the law of compulsory counterclaims. Public policy does not, therefore, require that the court refuse to apply the rules of res judicata to Deutsche Bank's foreclosure claim in this action. Given that Deutsche Bank could have asserted the claim in Bailey v. Novastar *and* served the public policy of foreclosure intervention, Deutsche Bank's "policy considerations do not override the interest in bringing an end to litigation" and preventing

multiplicity of actions, an end that is served by res judicata and Rule 13(a). Nelson, 362 S.C. at 427.

OPERATION AND EFFECT OF RES JUDICATA

The parties agree there is a justiciable controversy between them about whether Deutsche Bank's mortgage continues to encumber the property. Whether it does so turns on the effect of res judicata on the mortgage.

Res judicata has roots in, and is no longer distinct in South Carolina from, the doctrine of bar and merger. 7 S.C. Jur. Estoppel and Waiver § 29 (1991). Historically, when applicable, the doctrine of bar and merger "per se destroyed the right of action and barred its prosecution absolutely[.]" Id. at n. 1. Bar and merger discharged a legal right absolutely, through "a discharge by judgment, . . . involving the doctrines of merger and res judicata." McGuire, supra at 272.

A look at historic definitions helps us discern the effect of res judicata as a bar. A law dictionary from 1912 gives one definition of *bar* – and the only one applicable in this context – as "[a] perpetual destruction of the action of the plaintiff." Walter A. Shumaker & George Foster Longsdorf, The Cyclopedic Law Dictionary 87 (Chicago 1912). The same dictionary gives one definition of *discharge*, under the subheading "Of Debt or Obligation[,]" as "[f]ull and final release from and termination of the obligation in whatever manner[.]" Id. at 284. It gives a definition of *extinguishment* as "[t]he destruction of a right or contract" and states that "[a]n extinguishment may be by matter of fact and by matter of law[,]" noting "[t]here are numerous cases where the claim is extinguished by operation of law." Id. at 350. In the context of these terms' applicability to this case, it is apparent that the words *bar*, *extinguish*, and *discharge* have significant overlap in definition and express a common historical concept.

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As a bar, res judicata discharges and extinguishes rights – which can include the mortgage rights of a mortgagee and the note rights of a note-owner. See Columbia Natl. Bank, 151 S.E. at 275; 59A C.J.S. Mortgages § 1051. A look at legal commentaries, juxtaposed to the historical understanding discussed above, illustrates this.

> While it has been laid down as a general rule that nothing will discharge a mortgage but payment of the debt secured or the release of the security by the mortgagee, it is perhaps more accurate to say that the lien of a mortgage continues until the debt is paid or the lien extinguished by release or operation of the law.

59 C.J.S. Mortgages § 564 (2009).

The scope of what rights res judicata will extinguish will always depend upon case-specific factors. Here, the note subject of the mortgage had matured at the time of Deutsche Bank's answer in the earlier action, and that is the ultimate and final default under the note and mortgage. The effect of the claim arising from that default being barred by res judicata is to discharge Deutsche Bank's rights in the note and mortgage, as it neither has nor can have any other right to enforce the mortgage. "The rule that anything which operates to extinguish the debt necessarily operates to discharge the mortgage is generally regarded as prevailing." 55 Am.Jur.2d Mortgages § 360 (2009). Deutsche Bank's rights in the note debt owed or due as a result of the maturity of the note have been discharged. That is all of the debt. The note is gone, and the mortgage is gone with it.

Accordingly, Bailey and Owens are entitled to prevail on their claim for a declaratory judgment that Deutsche Bank's mortgage does not encumber the property.

S.C. CODE ANN. §§ 29-3-310 & -320

Bailey and Owens argue that the mortgage subject of this case has been satisfied by operation of law, the operation of Rule 13(a), SCRCP. Deutsche Bank argues that, even if its foreclosure claim is barred by res judicata, that does not mean that the mortgage has been satisfied.

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Deutsche Bank claims that the mortgage has not been satisfied because the note has not been paid and it has not accepted an agreed-upon substitute for full payment.

Bailey and Owens argue that payment and satisfaction are not synonymous. The court agrees that *pay* and *satisfy* do not mean exactly the same thing. While payment is a kind of satisfaction, satisfaction is not limited to payment. Some dictionary definitions of these words illustrate these concepts overlap but are not fully congruent: in the fifth edition of Black's Law Dictionary, a definition of "pay" is given as "to discharge a debt by tender of payment due"; however, the definition of "satisfy," while including payment, also includes "to answer or discharge" and "to extinguish[.]" Black's Law Dictionary 1016, 1205 (5th ed.1979). Webster's New Universal Unabridged Dictionary 1705 (New York 2d ed. 2003) gives both "to pay (a creditor)" and "to discharge fully (a debt, obligation, etc.)" among several definitions of the word *satisfy*. The 2014 edition of Black's Law Dictionary provides the following definition:

> **satisfaction** *n.* (14c) **1.** The giving of something with the intention, express or implied, that it is to extinguish some existing legal or moral obligation. • Satisfaction differs from performance because it is always something given as a substitute for or equivalent of something else, while performance is the identical thing promised to be done. — Also termed *satisfaction of debt.* **2.** The fulfillment of an obligation; esp., the payment in full of a debt. See accord and satisfaction. — **satisfy,** *vb.*
>
> > "Satisfaction closely resembles performance. Both depend upon presumed intention to carry out an obligation, but in satisfaction the thing done is something different from the thing agreed to be done, whereas in performance the *identical* act which the party contracted to do is considered to have been done. The cases on satisfaction are usually grouped under four heads, namely, (i) satisfaction of debts by legacies; (ii) satisfaction of legacies by legacies; (iii) satisfaction (or ademption) of legacies by portions; and (iv) satisfaction of portion-debts by legacies, or by portions. Strictly, however, only the first and last of these heads are really cases of satisfaction; for satisfaction presupposes an obligation, which, of course, does not exist in the case of a

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> legacy in the will of a living person." R.E. Megarry, *Snell's Principles of Equity* 226–27 (23d ed. 1947).
>
> **3.** satisfaction piece. **4.** *Wills & estates.* The payment by a testator, during the testator's lifetime, of a legacy provided for in a will; advancement (1). Cf. ademption. **5.** *Wills & estates.* A testamentary gift intended to satisfy a debt owed by the testator to a creditor. **6.** *Int'l law.* In the law of state responsibility, a form of nonpecuniary reparation intended to repair immaterial damages, as opposed to material ones, caused by an internationally wrongful act.
>
> > "It is well established that immaterial damages caused to a State may be repaired by symbolic forms of satisfaction. They mostly correspond to the offences against the 'honour' of a State. In such cases, the most common forms of satisfaction are formal apologies, made in written form or orally, by high ranking officials or the head of State." Cristina Hoss, "Satisfaction," in 9 *The Max Planck Encyclopedia of Public International Law* 25, 27 (Rüdiger Wolfrum ed., 2012).

Black's Law Dictionary (10th ed. 2014).

Pomeroy's Equity Jurisprudence states that "[s]atisfaction may be defined, in a general manner, to be the donation of a thing, with the intention, either expressed or implied, that it is to be taken either wholly or in part in extinguishment, by way of substitution, of some prior claim in favor of the donee." II Pomeroy's Equity Jurisprudence Certain Distinctive Doctrines of Equity Jurisprudence § 527.

Satisfaction appears to embrace a number of things within its meaning. In other words, and as the parties appear to agree, payment will almost certainly constitute satisfaction under any circumstances, but satisfaction may be accomplished in ways other than by payment. Certainly, satisfaction includes "the discharge of an obligation by paying a party what is due to him or the performance of a substituted obligation in return for the discharge of the original obligation." Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 496, 649 S.E.2d 494, 501 (Ct. App. 2007) (internal quotations omitted). Payment, however, is just the most common form

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of satisfaction, not the only one. Satisfaction necessarily embraces discharge that occurs for reasons other than payment.

That satisfaction under S.C. Code Ann. §§ 29-3-310 and -320 embraces things other than only payment appears to have been expressly contemplated by the General Assembly in the drafting of those statutes:

> Any holder of record of a mortgage who has received full payment *or satisfaction* or to whom a legal tender has been made of his debts, damages, costs, and charges secured by mortgage of real estate shall, at the request by certified mail or other form of delivery with a proof of delivery of the mortgagor or of his legal representative or any other person being a creditor of the debtor or a purchaser under him or having an interest in any estate bound by the mortgage and on tender of the fees of office for entering satisfaction, within three months after the certified mail, or other form of delivery, with a proof of delivery, request is made, enter satisfaction in the proper office on the mortgage which shall forever thereafter discharge and satisfy the mortgage.

S.C. Code Ann. § 29-3-310 (emphasis added).

> Any holder of record of a mortgage having received such payment, *satisfaction*, or tender as aforesaid who shall not, by himself or his attorney, within three months after such certified mail, or other form of delivery, with a proof of delivery, request and tender of fees of office, repair to the proper office and enter satisfaction as aforesaid shall forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the mortgage, or twenty-five thousand dollars, whichever is less, plus actual damages, costs, and attorney's fees in the discretion of the court, to be recovered by action in any court of competent jurisdiction within the State. And on judgment being rendered for the plaintiff in any such action, the presiding judge shall order satisfaction to be entered on the judgment or mortgage aforesaid by the clerk, register, or other proper officer whose duty it shall be, on receiving such order, to record it and to enter satisfaction accordingly.
>
> Notwithstanding any limitations under Sections 37-2-202 and 37-3-202, the holder of record of the mortgage may charge a reasonable fee at the time of the satisfaction not to exceed twenty-five dollars to cover the cost of processing and recording the satisfaction or

> cancellation. If the mortgagor or his legal representative instructs the holder of record of the mortgage that the mortgagor will be responsible for filing the satisfaction, the holder of the mortgage shall mail or deliver the satisfied mortgage to the mortgagor or his legal representative with no satisfaction fee charged.

S.C. Code Ann. § 29-3-320 (emphasis added).

By listing both payment *and* satisfaction in these statutes, the General Assembly provided for these statutes to apply when a mortgage has been satisfied by means other than payment. "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." In re: Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). "Our courts are constrained to avoid a statutory construction that would have the effect of reading a provision out of a statute." Protection & Advocacy for People with Disabilities, Inc. v. Buscemi, 417 S.C. 267, 274, 789 S.E.2d 756, 760 (Ct. App. 2016).

Having determined that *satisfaction* is a concept broader than, but still embracing, *payment*, the question here then becomes whether what has occurred here is embraced within the statutory use of the word *satisfaction*. Deutsche Bank pointed out at argument on this motion that knowledge of the understood meaning of the word *satisfaction* when the original version of these statutes was enacted in 1817 may assist in determining whether *satisfaction* under the statutes embraces a mortgage discharged by operation of law. The language of the statutes has changed little since then. Deutsche Bank's counsel provided the court with the definition of *satisfaction* from Richard Burn & John Burn, A New Law Dictionary 316 (London 1792), which is given as follows:

> SATISFACTION, is the giving of recompense for an injury done; or the payment of money due on bond, judgment, or other security. A sum given in the testator's life-time, is a satisfaction for the same sum left in his will. And it is a rule generally, that a legacy in a will greater, or as great as the debt, shall be taken to be a satisfaction for that debt.

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That definition certainly includes payment, but it also seems to focus largely on the word's use as legal jargon. The definition of *satisfaction* given in the 1912 Cyclopedic Law Dictionary similarly speaks to the word's usage by lawyers as a noun referring to a physical thing, rather than to a state of being satisfied:

> SATISFACTION (Lat. *satis*, enough, *facio*, to do, to make). In practice. An entry made on the record, by which a party in whose favor a judgment was rendered declares that he has been satisfied and paid.

Shumaker, supra at 824.

Our modern English word *satisfy* comes from the Middle English *satisfien*, which in turn derives from the Vulgar Latin *satisficare*, from the Latin *satisfacere*, meaning "to do enough." http://www.dictionary.com/browse/satisfy?s=t. Interestingly, neither the 1792 nor 1912 dictionaries provides a definition for *satisfy*.

The Cyclopedic Law Dictionary's definition of *discharge*, however, includes "to satisfy or pay[.]" Shumaker, supra at 284. As discussed above, viewed in its historical context, none of which appears to be contradicted by modern law, the effect of the bar of res judicata is to discharge, to extinguish the thing that might be sued upon. The barring effect of the judgment *does enough* to end the barred right or rights, thus satisfying them, albeit not in the typical way.

This seems consistent with what a statute closely related to S.C. Code Ann. § 29-3-310 and -320 indicates is meant. Titled an "[a]lternative procedure for rule to show cause against satisfaction[,]" S.C. Code Ann. § 29-3-390, which appears to have been enacted originally in 1933, allows the application for an order "directing that the mortgage or record of the mortgage be satisfied and cancelled of record" and speaks of its application when "the debt or any other obligation secured by any mortgage on real estate has been fully paid, released, satisfied,

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discharged, or extinguished or when the lien of any mortgage on real estate has been released, discharged, or extinguished[.]" This statute and S.C. Code Ann. § 29-3-310 and -320 are all within Article 5 (entitled "Satisfaction and Release") of Chapter 3 of Tile 29 of the South Carolina Code of Laws. In construing ambiguous terms in statutes, our Supreme Court has stated that "[i]t is well-settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." Grant v. City of Folly Beach, 346 S.C. 74, 79, 551 S.E.2d 229 (2001). Indeed, harmony in definition among terms in statutes dealing with the same subject matter usually trumps disharmonious definitions, even when they come from dictionaries. See Williams v. Lexington Cnty. Bd. of Zoning Appeals, 413 S.C. 647, 654-55, 776 S.E.2d 749, 753-54 (Ct. App. 2015). Harmony among S.C. Code Ann. § 29-3-390 and S.C. Code Ann. § 29-3-310 and -320 supports a reading that the latter statutes apply where a mortgage has been "has been fully paid, released, satisfied, discharged, or extinguished[.]" S.C. Code Ann. § 29-3-390.

Deutsche Bank argues that a narrower definition of *satisfaction* is required because S.C. Code Ann. § 29-3-310 and -320 are penal statutes, with Deutsche Bank contending that Bailey and Owens argue for a liberal or overly broad definition. It is true that these are penal statutes, and they must be strictly construed. Dykeman v. Wells Fargo Home Mortg., Inc., 381 S.C. 333, 339-40, 673 S.E.2d 804, 806-07 (2009). That does not mean, however, that this strict construction changes the meaning of the word *satisfaction* within the statutory scheme as a whole. See Grant, 346 S.C. at 79; Williams, 413 S.C. at 654-55.

The court concludes that *satisfaction*, within the meaning of S.C. Code Ann. § 29-3-310 and -320, embraces the discharge of the mortgage by operation of law, which extinguishes the mortgage. That has happened here, as the undisputed facts show. Bailey and Owens are entitled

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to summary judgment in their favor as to Deutsche Bank's liability to them under S.C. Code Ann. § 29-3-320 as set forth below.

Reading the statute that includes discharge by operation of law within the meaning of *satisfaction* is also consistent with public policy, as "the legislative intent in enacting these statutes was to provide an incentive for the mortgagee, once it no longer has a monetary interest in the mortgage loan, to promptly record the *extinguishment* of the lien." Kinard, 319 S.C. at 412 (emphasis added). "Once the mortgage has been satisfied and the mortgagor expresses this desire, it is incumbent upon the mortgagee 'to promptly record the *extinguishment* of the lien.'" Bostic, 650 S.E.2d at 485 (quoting Kinard, 319 S.C. at 412) (emphasis added).

Were the opposite true, people in the position that Bailey and Owens occupy here – rare as they may be – would have no remedy for the mortgage still being of record, constituting a cloud on the title, despite its discharge and extinguishment as a matter of law. That is against established legal principle. "The boast of the law is that there can be no wrong without a remedy." Messervy, 64 S.E. at 754.

The court recognizes that satisfaction did not occur in a common manner here. Whether the mortgage had been satisfied remained an open one until this court's determination that satisfaction had occurred. The court believes it appropriate to provide a time frame within which Deutsche Bank must record a satisfaction document for the mortgage with the Register of Deeds for Lexington County. As the deadline to do so under S.C. Code Ann. § 29-3-320 is a three-month period running from delivery of the request for entry of satisfaction, the court adopts that time frame here and provides a date certain, noted below, by which Deutsche Bank must record that satisfaction document. If Deutsche Bank does so, Bailey and Owens shall not be entitled to further relief under S.C. Code Ann. § 29-3-320. In the event that Deutsche Bank does not do so, Deutsche

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Bank is liable to Bailey and Owens for the monetary relief to which they are entitled under S.C. Code Ann. § 29-3-320, and the court shall then hold a hearing to determine the amount of that relief.

ATTORNEY PREFERENCE VIOLATION COUNTERCLAIM

Both Deutsche Bank and Bailey and Owens argue that the undisputed fact of the blank attorney preference selection form means they are entitled to summary judgment on this claim. Another issue, however, makes whether receipt of this form constituted compliance or noncompliance with S.C. Code Ann. § 37-10-102 immaterial to the outcome of the attorney-preference violation claim.

As the court concludes that the foreclosure claim is barred by res judicata and that Bailey and Owens are entitled to summary judgment on that claim, the court must perforce conclude that the claim for violation of the attorney preference statute cannot survive the end of the foreclosure claim. Leaving aside any other potential obstacles to success on this counterclaim that may exist, the court notes there is normally a three-year statute of limitations under S.C. Code Ann. § 37-10-105(A), but that limitation "does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action." Id. As their counsel acknowledged at a previous hearing, Bailey and Owens' entitlement to such relief would come into play only if Deutsche Bank were to prevail on its foreclosure claim. Since the foreclosure claim is barred by res judicata and judgment for Deutsche Bank on it cannot occur, the counterclaim for violation of the attorney preference statute, which could at most have produced an offset against a judgment in Deutsche Bank's favor on the foreclosure claim, cannot survive.

MISCELLANEOUS OTHER MATTERS RAISED BY PARTIES

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While Deutsche Bank raised an interesting issue about 12 CFR §§ 1024.39 and 1024.41, that issue is not present, and deciding it would be a purely academic exercise. As shown by the Federal Register at 78 FR 10696, 10708, 10842, 10855 (Feb. 14, 2013), the rules under the federal regulations that Deutsche Bank references did not go into effect until January 10, 2014 – nearly four months after September 26, 2013, which is when Deutsche Bank served its answer in the Bailey v. Novastar case. The court makes no comment on how a case on similar facts might be analyzed if the operative events all occur while those regulations are in effect.

The court was not persuaded by Plaintiff's argument about a 2014 Consent Order between Ocwen Financial Corporation and the New York State Department of Financial Services.

Further, the court does not address how this decision might have been different if the note had not matured.

CONCLUSION

Accordingly, IT IS THEREFORE HEREBY ORDERED that:

1) Deutsche Bank's motion for summary judgment on the counterclaims is denied;
2) Bailey and Owens' motion for partial summary judgment is granted, as follows:
    a. Summary judgment in Bailey and Owens' favor is granted as to Deutsche Bank's foreclosure claim;
    b. Summary judgment in Bailey and Owens' favor is granted as to their declaratory judgment claim, and the court hereby adjudges that the subject mortgage does not encumber the property;
    c. Summary judgment in Bailey and Owens' favor is granted as to as Deutsche Bank's liability on Bailey and Owens' claim under S.C. Code Ann. § 29-3-320, as follows:

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i. The subject mortgage is satisfied;

ii. Deutsche Bank is hereby enjoined to execute, in proper recordable form, a document showing the satisfaction of the subject mortgage and to deliver the same to the Register of Deeds for Lexington County for recording, with any fees required by that office, on or before February 23, 2018 (the satisfaction document must be received by the register of deeds by that date);

iii. If Deutsche Bank does so, Bailey and Owens shall not be entitled to further relief under S.C. Code Ann. § 29-3-320;

iv. If Deutsche Bank does not do so by that date, Deutsche Bank is liable to Bailey and Owens for the monetary relief to which they are entitled under S.C. Code Ann. § 29-3-320, and the court shall then hold a hearing to determine that relief; and

3) Bailey and Owens' counterclaim for violation of the attorney preference statute is dismissed as a result of the grant of summary judgment as to the foreclosure claim.

And IT IS SO ORDERED.

Signature Page to Follow

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FORM 4

STATE OF SOUTH CAROLINA **COUNTY OF** **IN THE COURT OF COMMON PLEAS**	**JUDGMENT IN A CIVIL CASE** **CASE NO. 2016-CP-**
Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1,	**Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,**
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: Andrew S. Radeker	**Attorney for :** ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

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Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey	**Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1**	**$ N/A – mortgage satisfied of record; direction to record satisfaction**
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

Mortgage recorded on July 12, 1998, in Book 4743 at page 0330 in the office of the Register of Deeds for Lexington County is satisfied.

Property at 111 Andrew Court, Gaston, SC 29053, TMS No. 010027-01-001.

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available ~~at the time the form~~ when the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se~~) as follows~~):

ATTORNEY(S) FOR THE PLAINTIFF(S) **ATTORNEY(S) FOR THE DEFENDANT(S)**

CLERK OF COURT

Court Reporter: Kimberly T. Power, Veritext Legal Solutions

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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Lexington Common Pleas

Case Caption: Deutsche Bank National Trust Company VS Patricia Owens

Case Number: 2016CP3203572

Type: Order/Other

AND IT IS SO ORDERED.

S/JUDGE JAMES O. SPENCE-3068

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
C/A No.: 2016-CP-32-03572

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2007-1,

Plaintiff,

vs.

PATRICIA OWENS A/K/A PATRICIA ANN OWENS; TAMMY M. BAILEY; SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES,

Defendants.

ORDER ON MOTION TO ALTER OR AMEND AND MOTION TO STAY

This matter is before the Court pursuant to Defendants, Patricia Owens a/k/a Patricia Ann Owens ("Owens") and Tammy M. Bailey's ("Bailey") (Owens and Bailey collectively, "Defendants") Motion to Alter or Amend Relief Ordered Under S.C. Code Ann. § 29-3-320 ("Motion to Alter or Amend"), and pursuant to Plaintiff, Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1's ("Deutsche Bank") Motion to Stay Order on Motions for Summary Judgment ("Motion to Stay"). Both motions were heard January 31, 2018, with counsel for both Deutsche Bank and Defendants in attendance.

This action was commenced by Deutsche Bank on October 19, 2016, seeking foreclosure of a mortgage of property at 111 Andrew Court, Gaston, South Carolina given by Owens and seeking reformation of that mortgage. Defendants answered and, later, served an amended answer and counterclaims, raising defenses of res judicata, collateral estoppel, laches, unclean hands,

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waiver, and setoff or credit. Defendants also asserted counterclaims for a declaratory judgment that Deutsche Bank holds no mortgage on the subject property or, in the alternative, that the mortgage is unenforceable; for liability under S.C. Code Ann. § 29-3-320 for failure to record satisfaction of the mortgage after due request; and for violation of S.C. Code Ann. § 37-10-102 (commonly known as the Attorney Preference Statute).

On November 28, 2018, the Court entered an Order on Motions for Summary Judgment ("Summary Judgment Order") resolving the claims between the parties. In the Summary Judgment Order, the Court granted summary judgment in Defendants' favor on Deutsche Bank's foreclosure claim and on Defendants' counterclaims for declaratory relief and as to liability under S.C. Code § 29-3-320. Defendants' claim under the Attorney Preference Statute was dismissed as moot. The Court held that the mortgage was satisfied and enjoined Deutsche Bank to execute and record a satisfaction of the subject mortgage on or before February 23, 2018. The Court further held that if Deutsche Bank recorded the satisfaction of mortgage within the time ordered by the Court, Defendants would not be entitled to further relief under S.C. Code § 29-3-320.

Defendants now move to alter or amend the Summary Judgment Order to provide that Deutsche Bank is liable for monetary relief under S.C. Code § 29-3-320 and to set a hearing for the purpose of determining the amount of that relief. Deutsche Bank files a separate motion seeking a temporary stay of its deadline to comply with the injunction in the Summary Judgment Order. Having reviewed the pleadings as well as the briefs and other materials submitted by the parties, having heard the arguments of counsel, and being otherwise fully informed and advised in this matter, the Court makes the following Findings of Fact, Conclusions of Law, and Order:

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FINDINGS OF FACT

The following facts are undisputed and relevant to analysis of the issues that are the subject of the parties' motions:

1. This matter concerns a note and mortgage dated June 15, 1998 and given by Owens, who was then the owner of the subject property, to NovaStar Mortgage, Inc.

2. The mortgage was recorded on July 2, 1998, in Book 4743 at page 330, in the office of the Lexington County Register of Deeds, and assignments were recorded noting the transfer of the note and mortgage to Deutsche Bank.

3. Bailey is Owens' daughter and the grantee of a deed of the subject property from her mother through a deed executed and recorded after the subject mortgage.

4. There was a previous lawsuit between the parties filed June 27, 2013 in *Tammy M. Bailey, et al. v. Novastar Mortgage, Inc., et al.*, Case No. 2013-CP-32-02210 (the "Prior Action"), in which Deutsche Bank was a defendant. The Prior Action included claims by Defendants asserting that the loan terms were unconscionable and seeking relief under S.C. Code § 37-10-105(C). Deutsche Bank did not bring a counterclaim for foreclosure in the Prior Action, and that case ended in 2015 with a jury verdict against Defendants.

5. The Note matured on July 1, 2013. Bailey and Owens did not pay the balance due on the note after maturity.

6. On August 23, 2016, counsel for Bailey and Owens sent a letter to counsel for Deutsche Bank, demanding that Deutsche Bank record a satisfaction of the Mortgage on the grounds that foreclosure was a compulsory counterclaim in the Prior Action and that the mortgage was unenforceable. The letter enclosed a $40.00 check for recording and processing fees.

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Deutsche Bank declined to record a satisfaction in response to the letter, and more than three months elapsed prior to the filing of Defendants' counterclaims in this suit.

ISSUES

1. Did the Court err in denying monetary damages to Defendants under S.C. Code § 29-3-320 on the grounds that Deutsche Bank's obligation to record a satisfaction of mortgage did not arise, under the circumstances of this case, until after the Court's determination that the mortgage was unenforceable by operation of law?

2. Should the Court stay the injunctive relief granted in the Summary Judgment Order as a result of the filing of the Motion to Alter or Amend?

CONCLUSIONS OF LAW

I. Motion to Alter or Amend

In this action, the parties have contested (among other things) whether statutory penalties should be imposed against Deutsche Bank under S.C. Code § 29-3-210 and 29-3-320. Defendants have argued that because the Prior Action ended without the filing of a foreclosure counterclaim by Deutsche Bank, subsequent foreclosure was barred by Rule 13, and the note and mortgage were thereby "satisfied" by operation of law. Defendants have further argued that they are entitled to money damages as a result of Deutsche Bank's failure to record a satisfaction of mortgage within three months of Defendants' August 23, 2016 demand letter. For its part, Deutsche Bank has argued that the note and mortgage have never been "satisfied" within the meaning of Section 29-3-320 on the grounds that a satisfaction requires payment in full or performance of a substitute obligation agreed by the parties, and asserts that the damages provisions in the statute therefore have no application to the circumstances of this case.

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In its Order on Motions for Summary Judgment entered November 28, 2018 ("Summary Judgment Order"), the Court did not fully adopt either of the parties' positions. While the Court found that the mortgage had been satisfied, it noted that satisfaction had not occurred in the usual manner, and held that the question of whether the mortgage was satisfied remained open until the enforceability of the mortgage had been judicially determined. Accordingly, the Court issued an injunction requiring Deutsche Bank to record a satisfaction of mortgage, but held that no monetary damages would be awarded unless Deutsche Bank failed to abide by the Court's order.

In their Motion to Alter or Amend and supporting memorandum, Defendants argue that the Court has effectively created a "good faith" exception to Section 29-3-320 where none exists in the statute. Defendants further argue that the Court's determination that the mortgage was satisfied by operation of law means that satisfaction necessarily occurred at the time of the judgment in the Prior Action, and that upon the fulfillment of the remaining conditions in Sections 29-3-310 and 29-3-320, Defendants became entitled to the damages provided in the statute. Deutsche Bank argues that as penal statutes, Sections 29-3-310 and 29-3-320 must be strictly construed. Deutsche Bank further argues that the intent of the statutes is to incentivize mortgagees to eliminate encumbrances when the lender no longer has an interest in the property. Deutsche Bank contends that it would be inconsistent with this legislative intent to require a mortgagee to extinguish its interest on the basis of a borrower's bare assertion that the mortgage is unenforceable, when there has been no judicial determination of that claim.

"Rule 59(e) provides a procedure for correcting manifest errors of law or fact or considering the import of newly discovered evidence. A motion under Rule 59(e) is not intended to be utilized to relitigate issues previously considered . . . ." *Beca Soc. Club, d/b/a Third Shift v. S.Car. Dept. of Revenue*, 04-ALJ-17-0014-CC, 2004 WL 3154763, at *2 (SC Admin. Law Ct. May

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27, 2004) (internal citations omitted); *see also In re Pella Corp.*, 269 F. Supp. 3d 685 (D.S.C. 2017) (noting that under federal analogue to SCRCP 59(e), a motion is granted "only in very narrow circumstances: (1) to accommodate an intervening change in controlling law, (2) to account for new evidence not available at trial, or (3) to correct a clear error of law or prevent manifest injustice."). A party cannot use a Rule 59(e) motion to present to the court an issue the party could have raised prior to judgment but did not. *Gartside v. Gartside*, 383 S.C. 35, 43, 677 S.E.2d 621, 625 (Ct. App. 2009).

Sections 29-3-310 and 29-3-320 are penal statutes and "must be strictly construed, especially when the penalty may result in a windfall to the Plaintiff." *See Kinard v. Fleet Real Estate Funding Corp.*, 319 S.C. 408, 412, 461 S.E.2d 833, 835 (Ct. App. 1995); *Dykeman v. Wells Fargo Home Mortg., Inc.*, 381 S.C. 333, 339-40, 673 S.E.2d 804, 806-07 (2009). "[T]he requirements of a penal statute must be applied in a manner which results in fairness and justice to the parties." *Kinard*, 319 S.C. at 412, 461 S.E.2d at 835. Thus, "[a] statute is not to be read in an atmosphere of sterility, but in the context of what actually happens when human beings go about the fulfillment of its purposes." *Id.* According to the court in *Kinard*, the legislative intent in enacting these statutes was "to provide an incentive for the mortgagee, once it no longer has a monetary interest in the mortgage loan, to promptly record the extinguishment of the lien." *Id.* at 412, 461 S.E.2d at 835.

Prior cases interpreting Sections 29-3-310 and 29-3-320 have exhibited a legally determinable point in time at which the mortgage was "satisfied." *See Regions Bank v. Strawn*, 413 S.C. 206, 208 776 S.E.2d 72, 73-74 (2015) (delivery of payoff check brought debt to zero); *Dykeman v. Wells Fargo Home Mortg., Inc.*, 381 S.C. 333, 336, 673 S.E.2d 804, 805 (2009) (payoff check mailed to lender); *Bostic v. American Home Mortgage Servicing, Inc.*, 375 S.C.

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143, 145, 650 S.E.2d 479, 480 (Ct. App. 2007) (borrower sent lender check for payoff amount by certified mail); *Kinard v. Fleet Real Estate Funding Corp.*, 319 S.C. 408, 410, 461 S.E.2d 833, 834 (Ct. App. 1995) (parties stipulated as to date on which mortgage was paid in full). The parties have cited no prior decision interpreting the time of "satisfaction" under the statute when satisfaction occurs not by payment of the debt, but by operation of law. In the absence of precedent addressing this issue, the Court finds that requiring a legally determinable point in time for satisfaction is most consistent with the statute and case law.

Under the circumstances of this case, the Court concludes that the question of whether Defendants' mortgage was satisfied remained upon until the Court determined that the mortgage was legally unenforceable in its Summary Judgment Order. Defendants have not shown that this conclusion is in error, and thus have not established grounds to alter or amend the Summary Judgment Order.

I. Motion to Stay

The Summary Judgment Order enjoins Deutsche Bank to execute and record a satisfaction of mortgage on or before February 23, 2018, a date eighty-seven (87) days from the date of entry and service of the Summary Judgment Order. This date was agreed by the parties in the proposed order submitted for the Summary Judgment Order.

In its Motion to Stay, Deutsche Bank complains that Defendants' Motion to Alter or Amend, which extends the deadlines for both parties to appeal from the Summary Judgment Order, puts it at a procedural disadvantage if it records a satisfaction by the current deadline. Specifically, Deutsche Bank argues that Defendants would then be permitted to file an appeal from the Summary Judgment Order without the possibility of a cross-appeal by Deutsche Bank, because Deutsche Bank's cross-appeal from the injunction would then be moot. Deutsche Bank

requests that the injunction to record a satisfaction be stayed to allow it a suitable period of time to record a satisfaction after the parties' deadlines to appeal have run and the Summary Judgment Order can no longer be challenged.

The Court finds that due to the extension of the parties' appeal deadlines as a result of the Motion to Alter or Amend, it is appropriate to temporarily stay the Summary Judgment Order to extend the deadline for compliance with the Court's injunction for the same period following the parties' receipt of the instant order as the parties' previously agreed to in conjunction with the Summary Judgment Order.

IT IS THEREFORE ORDERED AND ADJUDGED:

A. Defendants' Motion to Alter or Amend the Summary Judgment Order is DENIED.

B. Deutsche Bank's Motion to Stay the Summary Judgment Order is GRANTED. Deutsche Bank's time for compliance with the injunction to record a satisfaction of mortgage is stayed such that Deutsche Bank must record the satisfaction no later than eighty-seven (87) days after the parties receive notice of entry of this order, receipt of such notice to be evidenced by the date on which a Notice of Electronic Filing is sent to the parties.

AND IT IS SO ORDERED.

_____
Hon. James O. Spence
Master in Equity

_____, 2018
Lexington, South Carolina

ELECTRONICALLY FILED - 2018 Feb 12 4:50 PM - LEXINGTON - COMMON PLEAS - CASE#2016CP3203572

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Lexington Common Pleas

Case Caption: Deutsche Bank National Trust Company VS Patricia Owens

Case Number: 2016CP3203572

Type: Master/Order/Other

AND IT IS SO ORDERED.

S/JUDGE JAMES O. SPENCE-3068

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

ORIGINAL

IN THE COURT OF COMMON PLEAS
C.A. NO.: 2016-CP-32-03572

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Home Equity Loan Asset-Backed Certificates, Series 2007-1,
Plaintiff,

vs.

Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,
Defendant(s).

ORDER OF REFERENCE
(Action for Foreclosure)

Upon motion of the undersigned attorney for Plaintiff, it appearing that this case is a foreclosure action; and it further appearing, pursuant to Rule 53(b) South Carolina Rules of Civil Procedure, that this is a proper matter to refer to The Honorable James O. Spence as Master In Equity for Lexington County.

Now therefore, IT IS ORDERED that the above entitled cause be, and the same is hereby, referred to The Honorable James O. Spence as Master In Equity for Lexington County for a final foreclosure hearing to be held, wherein the Master In Equity will make appropriate findings of fact and conclusions of law with authority to dispose of any and all issues and enter a final judgment in the cause, without further order of court, to order a judicial sale on any day, not just a regular judicial sales day and to hear any issues and make any orders after sale or judgment, including but not limited to, issues involving surplus funds pursuant to Rule 71(c) SCRCP, Petitions or Motions relating to Writ of Assistance or any other actions as to possession, and/or removal of property, and issues pursuant to appraisal proceedings under S.C. Code Ann. Section 29-3-680, et seq. (1976 SC Code of Laws, as amended).

FILED
2016 NOV 29 A 10:52
BETTY W. CROSS
CLERK OF COURT
LEXINGTON, SC

B&S No.: 16-16874

Any appeal from the final judgment in this cause shall be to the South Carolina Court of Appeals.

Clerk of Court

Lexington South Carolina
Date: 11-21-2016

WE SO MOVE:

Mary R. Powers, SCB# 16534

Attorney for Plaintiff
Brock & Scott, PLLC
3800 Fernandina Road, Suite 110
Columbia, SC 29210
Phone 803-454-3540
Fax 803-454-3541
Date: 11/11/16

FILED
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BETTY A. CARRIG
CLERK OF COURT
LEXINGTON SC

ORIGINAL

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF LEXINGTON	**CASE NO. 2016-CP-32-3572**
Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1, **Plaintiff,** **vs.** **Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,** **Defendants.**	**ORDER DENYING MOTION TO DISMISS COUNTERCLAIMS**

FILED
2017 MAY 30 PM 1:20
LISA M. COUSER
CLERK OF COURT
LEXINGTON, SC

This matter comes before me upon the motion of the Plaintiff (hereinafter, sometimes, "Deutsche Bank") to dismiss the counterclaims pled by Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey (hereinafter, sometimes, "Bailey and Owens") in the above-captioned action. After careful review, the court denies this motion.

SUMMARY OF CLAIMS IN THIS ACTION

Deutsche Bank filed this action on October 19, 2016, seeking foreclosure of a mortgage given by Patricia Owens and reformation of that mortgage. Tammy Bailey is Patricia Owens' daughter and the grantee of a deed of the subject property from her mother. The note and mortgage sought to be foreclosed are dated June 15, 1998, and were given to NovaStar Mortgage, Inc. The mortgage was recorded on July 2, 1998, in Book 4743 at page 330, in the office of the Lexington County Register of Deeds. The complaint alleges that "[t]he installments of principal and interest falling due from and after July 1, 2013 have not been paid although demand for payment thereof has been made."

Bailey and Owens answered and, later, served an amended answer and counterclaim within the time of do so as of right under Rule 15, SCRCP. Their amended answer and counterclaim asserted the defenses of res judicata, collateral estoppel, laches, unclean hands, waiver, and setoff or credit. It asserts counterclaims for a declaratory judgment that Deutsche Bank holds no mortgage on the subject property or, in the alternative, that the mortgage is unenforceable, for liability under S.C. Code Ann. § 29-3-320 for failure to enter satisfaction of the mortgage, and for violation of S.C. Code Ann. § 37-10-102 (usually referred to as the attorney preference statute.) The amended answer and counterclaim alleges the following:

> A copy of a letter from Defendant Tammy M. Bailey to the Plaintiff (without its enclosures) is attached as Exhibit A to this pleading.
>
> The letter attached as Exhibit A to this pleading and its content are incorporated herein by reference as if here set forth verbatim.
>
> A copy of the certified mail return receipt card showing the Plaintiff's receipt of the said letter is attached as Exhibit B to this pleading.
>
> A copy of a letter from an attorney on behalf of the Plaintiff is attached as Exhibit C to this pleading.

The referenced documents are attached to the amended answer and counterclaim, and the letter that is Exhibit A to the pleading is a request that Deutsche Bank enter satisfaction of the subject mortgage. The letter states that the subject note matured on July 1, 2013. It states that there was a previous lawsuit between the parties that "was directly about whether the note and mortgage were valid and enforceable[,]" that Deutsche Bank never asserted a counterclaim for foreclosure in that suit, and that the case was ended by a jury verdict against Bailey and Owens. The amended answer and counterclaim also alleges the following:

> Rule 13(a) of the South Carolina Rules of Civil Procedure says, "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 and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

The Defendants brought an action, Tammy M. Bailey, et al. v. Novastar Mortgage, Inc., et al., Case No. 2013-CP-32-02210, in which the Plaintiff was a defendant.

The Plaintiff in this instant action appeared in that earlier action and served an answer in it on September 26, 2013. That answer asserted no counterclaim, and no counterclaim was ever asserted in that action.

That action was about the origination and execution of the note and mortgage subject of this instant action.

That action was about the validity and enforceability of the note and mortgage subject of this instant action.

The note subject of both that action and this one matured on July 1, 2013.

At the time the aforesaid answer was served in that earlier action, the party who ultimately became the Plaintiff in this action had the very same claim for foreclosure that it has now brought in this case.
That claim for foreclosure arose from the same transactions and occurrences subject of that earlier action.

The claim for foreclosure brought in the instant action was [a] compulsory counterclaim in that earlier action.

. . .

The Plaintiff has acted unfairly in this matter. Strategically, the Plaintiff chose not to assert this foreclosure claim in the earlier action.

. . .

By failing to assert the claims the Plaintiff now brings in this case in the earlier action, the Plaintiff has waived those claims.

. . .

The Plaintiff holds no mortgage on the subject property.

If the court determines that the Plaintiff holds a mortgage on the subject property, it is unenforceable.

There is a justiciable controversy about these matters.

The Defendants are entitled to declaratory judgment in their favor concerning the same.

. . .

It has been more than three months since the Plaintiff received the letter that is shown as Exhibit A to this pleading.

The Plaintiff has not repaired to the proper office (the Lexington County Register of Deeds) to enter satisfaction of the mortgage subject of this case.

The Plaintiff is liable for all damages, penalties, attorneys' fees, and relief available under S.C. Code Ann. § 29-3-320.

THE PREVIOUS CASE OF *BAILEY V. NOVASTAR*[1]

The Bailey v. Novastar action was tried to a final judgment at a jury trial. The jury did not find for Bailey and Owens. In that case, Bailey and Owens asserted various claims against Deutsche Bank, most of which arose from the execution of the subject note and mortgage and the circumstances surrounding that. In a filing made in that case, Deutsche Bank stated that those claims "arise out of a purported mortgage refinancing loan transaction involving a balloon note in 1998 by Plaintiff Owens" and "relate solely to [that] closing[.]" The claims Bailey and Owens made included one seeking relief under S.C. Code Ann. § 37-10-105(C), which provides, among other things, for a court to "refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made."

[1] The parties submitted various documents from the court file and excerpts from the trial transcript in that case, and they appear to agree that, since these are part of the public record for that case, those submissions do not convert this motion into one for summary judgment. See Doe v. Bishop of Charleston, 407 S.C. 128, 135, 754 S.E.2d 494, 498 n. 2 (2014) (court "may consider facts subject to judicial notice, including orders and record in underlying case").

The prayer in the complaint in that action stated that Bailey and Owens sought, *inter alia*, "all relief available under S.C. Code Ann. § 37-10-105(C)[.]" If Bailey and Owens had prevailed in that case, that could have resulted in a judgment that the note and mortgage were unenforceable.

At no time did Deutsche Bank assert a claim for foreclosure in that action, despite the fact that the subject note had matured at the time Deutsche Bank served its answer. Bailey and Owens characterize this as Deutsche Bank having made a strategic decision not to assert foreclosure as a counterclaim so that it would not look to the jury like a bank trying to take someone's house away.

ANALYSIS

"A motion to dismiss a counterclaim must be based solely on the allegations set forth in the counterclaim." Charleston County Sch. Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001). "A Rule 12(b)(6) motion may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the [complainant] to any relief on any theory of the case." Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601 (1995). The question is whether in the light most favorable to the defendant asserting the counterclaim, and with every doubt resolved on her behalf, the counterclaim states any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).

There is much overlap analytically between aspects of two of the counterclaims here and the defense of res judicata pled by Bailey and Owens. Much of that analysis involves whether Deutsche Bank's claim for foreclosure was required by Rule 13(a), SCRCP, to be pled in the Bailey v. Novstar action. "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 and does not

require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Rule 13(a), SCRCP. Such claims are often referred to as compulsory counterclaims.

"Rules of procedure, like statutes, should be given their plain meaning." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 61, 566 S.E.2d 863 (Ct. App. 2002). Rule 13(a)'s purpose is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." Id. at 62.

In N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), a bedrock case of modern South Carolina jurisprudence in this area, the Supreme Court adopted the "logical relationship" test for determining whether a counterclaim is compulsory and held that most of DAV's counterclaims were compulsory because "there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture." The Court made clear the reason for doing so: of the four tests considered by the Court for whether a counterclaim is compulsory, the Court settled on the "logical relationship test," which is "by far the most widely accepted because of its flexibility." Id. (emphasis added). In the DAV case, the plaintiff's claim was for foreclosure of a mortgage.

The Court's description of DAV's counterclaims follows:

1) breach of a subsequent oral contract to arrange additional financing for interest payments and construction costs;

2) breach of the joint venture agreement as parent company of joint venturer NCF by bringing the foreclosure action;

3) breach of fiduciary duty to co-joint venturers;

4) wrongful dissolution of the joint venture by failing to voluntarily refrain from foreclosure as agreed;

5) violation of the Unfair Trade Practices Act by breaching the oral agreement;

6) breach of two subsequent oral contracts to purchase DAV's interest in the joint venture.

Id. at 517.

The Court, in a decision that has never been overruled, held that all but the sixth counterclaim on this list was compulsory. Id. at 518. The logical relationship that each of those counterclaims had to the plaintiff's foreclosure claim was that each counterclaim arose out of the parties' relationship that was the subject of the foreclosure claim, dealt with the manner in which the loan was administered, or both. Id.

In the recent case of Carolina First Bank v. BADD, L.L.C., our Supreme Court, citing the rule that a counterclaim is compulsory if it has a "logical relationship" to the transaction or occurrence subject of the opposing party's claim, held that a counterclaim is compulsory in a foreclosure action if it arises out of the execution of the documents that form the basis of the plaintiff's claim. 414 S.C. 289, 295, 296, 778 S.E.2d 106, 109, 110 (2015). The Court emphasized that "the 'transaction or occurrence' for the purpose of determining the compulsory character of [the] counterclaim is the execution" of those documents. Id. at 296. The Court there found that the counterclaims were not compulsory where they assumed the enforceability of the guaranty agreements subject of the plaintiff's claim and were based on events that occurred years after the execution of the guaranty documents. Id. The Court stated that the claims did "not arise out of the underlying transaction or occurrence because [they do] not affect the execution or enforceability of the guaranty agreements." Id.

Only one reported case since BADD has discussed that decision in the context of whether a counterclaim is compulsory. In S.C. Community Bank v. Salon Proz, LLC, Op. No. 5481 (S.C. Ct. App. filed April 26, 2017) (Shearouse Adv. Sh. No. 17 at 74, 79-80), the Court of Appeals determined a claim for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, was compulsory, relying on BADD as authority.

> For example, the UTPA claim is an action at law seeking treble damages. The substance of Salon's UTPA claim alleges Bank "engaged in a pattern of reneging upon promises to modify or otherwise restructure loans, including, but [not] limited to, the loan subject of this case." Were this allegation true, it could affect the loan's enforceability. Cf. BADD, 414 S.C. at 296, 778 S.E.2d at 109 (holding a counterclaim was permissive when its allegations, if true, would not have rendered the guaranty agreements unenforceable). Therefore, we find the UTPA claim was both legal and compulsory. See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518-19, 381 S.E.2d 903, 904-05 (1989) (holding a counterclaim alleging violation of the UTPA by breach of an oral agreement was both legal and compulsory).

Salon Proz, (Shearouse Adv. Sh. No. 17 at 80).

Deutsche Bank contends that a counterclaim for foreclosure, if it had been brought by Deutsche Bank in the Bailey v. Novastar case, would not have barred the enforcement of Bailey and Owens' rights under S.C. Code Ann. § 37-10-105(C) and thus argues that foreclosure was not a compulsory counterclaim. It seems that Deutsche Bank is arguing that the test for whether a counterclaim is compulsory is that, to be so, success on the counterclaim must necessarily always bar success on the plaintiff's claim. This is inconsistent with the results in DAV and Salon Proz and inconsistent with the analysis in those cases and BADD.

The Court in DAV Corp. found claims to be compulsory that had less to do with the execution of and enforceability of the subject note and mortgage than Bailey and Owens' claims in the Bailey v. Novastar action did. 298 S.C. at 517-19. The Court in BADD used an analysis

that reckons a counterclaim to be compulsory as "aris[ing] out of the underlying transaction or occurrence" where it either "affect|s| the execution *or* enforceability of the guaranty agreements." 414 S.C. at 296 (emphasis added). This is consistent with general res judicata principles discussed below. The decision in Salon Proz held a counterclaim was compulsory where "it *could* affect the loan's enforceability." (Shearouse Adv. Sh. No. 17 at 80) (emphasis added). None of these decisions, nor any of which this court is aware, have held that, to be compulsory, a counterclaim must necessarily and always bar the plaintiff's claim if successful. What may be gleaned from the jurisprudence in this area is that our courts have recognized two ways a counterclaim may be compulsory. If a counterclaim arises out of the same set of facts as the plaintiff's claim, it is compulsory. If success on a counterclaim could affect the enforceability of the plaintiff's claim, it is compulsory.

Here, and certainly when viewed in a light favorable to Bailey and Owens, Deutsche Bank's foreclosure claim was both of those things with regard to the Bailey v. Novastar case. In a typical mortgage foreclosure case, like this one, the subject documents are the note and mortgage, the execution of which must be proven for the foreclosure plaintiff to win. The factual occurrences at the heart of the Bailey v. Novastar case included the circumstances surrounding the execution of the note and mortgage document. Further, success by Bailey and Owens on their claim sounding under S.C. Code Ann. § 37-10-105(C) could have resulted in the note and mortgage being declared unenforceable – something that would have been utterly incompatible with success by Deutsche Bank on a counterclaim for foreclosure, as that would have determined that the note and mortgage *were* enforceable. Viewed in the light most favorable to Bailey and Owens, Deutsche Bank's foreclosure claim was a compulsory counterclaim in the Bailey v. Novastar case. At the time it served its answer in that case, Deutsche Bank had that same claim,

based on the same default (maturity of the note), against the same two people, Bailey and Owens, who had sued it in that case about the execution of the same note and mortgage and were seeking relief that could have rendered the note and mortgage unenforceable.

If the foreclosure claim was an unraised, compulsory counterclaim in the Bailey v. Novastar action, it is now barred by res judicata. In Jaynes v. County of Fairfield, 303 S.C. 434, 438 & n. 1, 401 S.E.2d 183, 185 & n. 1 (Ct. App. 1991), the Court of Appeals applied res judicata to hold that a claim that arose from the same transaction or occurrence and could have been asserted as a counterclaim in a previous case was barred. In Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188, 190-91, 417 S.E.2d 569, 571 (1992), the Supreme Court held the same, noting that "[t]he claims are now barred as arising out of the same transaction as the prior suit." In Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997), discussing res judicata, the Supreme Court noted that, "if a counterclaim is compulsory, but not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action." Citing Crestwood Golf Club, the Court of Appeals in Beach Company stated as follows:

> The South Carolina Reporter's Note following Rule 13 states: "[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are 'compulsory' under Rule 13(a) and are barred by res judicata or estoppel by judgment if not asserted."

Beach Co., 351 S.C. at 62.

"Res judicata bars a second suit where there is (1) identity of parties; (2) identity of subject matter; and (3) adjudication of the issue in the first suit." Judy v. Judy, 393 S.C. 160, 173, 712 S.E.2d 408, 412 (2011). In addition to the issues that *were* litigated in the first case, res judicata bars the parties to the first case "as to issues that might have been litigated in the first action." Nelson v. QHG of S.C., Inc., 354 S.C. 290, 580 S.E.2d 171 (Ct. App. 2003). In the

2011 case of Judy v. Judy, our Supreme Court reiterated the conceptual framework of Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999):

> Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.

Judy, 712 S.E.2d at 414 (quoting Plum Creek, 334 S.C. at 34).

"Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Id. A litigant's claim is barred even when he "is 'prepared in the second action (1) [t]o present evidence or *grounds or theories of the case* not presented in the first action or (2) [t]o seek remedies or forms of relief not demanded in the first action.'" S.C. Pub. Interest Foundation v. Greenville County, 401 S.C. 377, 386, 737 S.E.2d 502, 507 (Ct. App. 2013) (emphasis in original; quoting Restatement (Second) of Judgments § 25 (1982 & Supp. 2012)). Contrary to Deutsche Bank's argument, the scope of res judicata does not depend on the elements of the specific claims that were brought in the first suit; rather, it depends upon the transaction or transactions the first suit was *about*. When it applies, res judicata covers all rights and remedies "with respect to *all or part of the transaction, or series of connected transactions, out of which the action arose.*" Id. at 388 (emphasis in original; quoting Restatement (Second) of Judgments § 24).

Accordingly, Bailey and Owens argue that the mortgage subject of this case has been satisfied by operation of law, the operation of Rule 13(a), SCRCP. S.C. Pub. Interest Foundation, 401 S.C. at 388; Beach Co., 351 S.C. at 62. This is at the heart of their claims for a declaratory judgment and for relief under S.C. Code Ann. § 29-3-320.

While Deutsche Bank takes the position that the mortgage has not been satisfied because the note has not been paid, Bailey and Owens argue that payment and satisfaction are not synonymous. The court agrees that *pay* and *satisfy* do not mean the same thing. While payment is a kind of satisfaction, satisfaction is not limited to payment. Definitions of these words illustrate this: "pay" means "to discharge a debt by tender of payment due"; however, the definition of "satisfy," while including payment, also includes "to answer or discharge" and "to extinguish[.]" Black's Law Dictionary 5th ed. 1016, 1205.

Satisfaction necessarily embraces discharge that occurs for reasons other than payment. Payment is just the most common form of satisfaction, not the only one. Viewed in the light most favorable to Bailey and Owens, the facts they plead indicate the mortgage cannot be enforced and is functionally in the same position as one where the debt has been fully paid. Accordingly, Bailey and Owens have pled sufficient facts that, if proven, would establish that the mortgage is satisfied.

That satisfaction embraces things other than only payment appears to have been expressly contemplated by the General Assembly in the drafting of the statutes on which one of the counterclaims here is based. The statutes involved in the claim here for relief under S.C. Code Ann. § 29-3-320 are the following:

> Any holder of record of a mortgage who has received full payment *or satisfaction* or to whom a legal tender has been made of his debts, damages, costs, and charges secured by mortgage of real estate shall, at the request by certified mail or other form of delivery with a proof of delivery of the mortgagor or of his legal representative or any other person being a creditor of the debtor or a purchaser under him or having an interest in any estate bound by the mortgage and on tender of the fees of office for entering satisfaction, within three months after the certified mail, or other form of delivery, with a proof of delivery, request is made, enter satisfaction in the proper office on the mortgage which shall forever thereafter discharge and satisfy the mortgage.

S.C. Code Ann. § 29-3-310 (emphasis added).

> Any holder of record of a mortgage having received such payment, *satisfaction*, or tender as aforesaid who shall not, by himself or his attorney, within three months after such certified mail, or other form of delivery, with a proof of delivery, request and tender of fees of office, repair to the proper office and enter satisfaction as aforesaid shall forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the mortgage, or twenty-five thousand dollars, whichever is less, plus actual damages, costs, and attorney's fees in the discretion of the court, to be recovered by action in any court of competent jurisdiction within the State. And on judgment being rendered for the plaintiff in any such action, the presiding judge shall order satisfaction to be entered on the judgment or mortgage aforesaid by the clerk, register, or other proper officer whose duty it shall be, on receiving such order, to record it and to enter satisfaction accordingly.
>
> Notwithstanding any limitations under Sections 37-2-202 and 37-3-202, the holder of record of the mortgage may charge a reasonable fee at the time of the satisfaction not to exceed twenty-five dollars to cover the cost of processing and recording the satisfaction or cancellation. If the mortgagor or his legal representative instructs the holder of record of the mortgage that the mortgagor will be responsible for filing the satisfaction, the holder of the mortgage shall mail or deliver the satisfied mortgage to the mortgagor or his legal representative with no satisfaction fee charged.

S.C. Code Ann. § 29-3-320 (emphasis added).

By listing both payment *and* satisfaction in these statutes, the General thereby provided for these statutes to apply when a mortgage has been satisfied by means other than payment. "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." In re: Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). "Our courts are constrained to avoid a statutory construction that would have the effect of reading a provision out of a statute." Protection & Advocacy for People with Disabilities, Inc. v. Buscemi, 417 S.C. 267, 274, 789 S.E.2d 756, 760 (Ct. App. 2016).

"Clearly, the legislative intent in enacting these statutes was to provide an incentive for the mortgagee, once it no longer has a monetary interest in the mortgage loan, to promptly record the extinguishment of the lien." Kinard v. Fleet Real Estate Funding Corp., 319 S.C. 408, 412, 461 S.E.2d 833, 835 (Ct. App. 1995). "Once the mortgage has been satisfied and the mortgagor expresses this desire, it is incumbent upon the mortgagee 'to promptly record the extinguishment of the lien.'" Bostic v. Am. Home Mortgage Servicing, Inc., 375 S.C. 143, 650 S.E.2d 479, 485 (Ct. App. 2007) (quoting Kinard, 319 S.C. at 412).

The court evaluates this motion to dismiss based on what is pled in the amended answer and counterclaim, resolving all doubts and taking all reasonable inferences in favor of the pleader. See Rule 12(b)(6), SCRCP; Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). Viewed in the light most favorable to Bailey and Owens, the request attached to the amended answer and counterclaim complies with the requirements of S.C. Code Ann. § 29-3-320. An amount sufficient to cover the statutory fee was sent with the letter. Deutsche Bank received the letter. Deutsche Bank did not record any document to enter satisfaction of the mortgage. More than three months after that receipt, this cause of action was asserted. The amended answer and counterclaim pleads sufficient facts to constitute a cause of action under S.C. Code Ann. § 29-3-320.

Further, there appears to be no case law analyzing a claim under this statute where the satisfaction at issue was or was contended to have been done in a way other than payment, even though the statute contemplates that. This is another reason this counterclaim should not be dismissed at the 12(b)(6) stage. See Garner v. Morrison Knudsen Corp., 318 S.C. 223, 226, 456 S.E.2d 907, 909 (1995) (novel issues "should not ordinarily be decided in ruling on a 12(b)(6)

motion to dismiss"); Tyler v. Macks Stores of S.C., Inc., 275 S.C. 456, 459, 272 S.E.2d 633, 634 (1980) ("[a] novel issue . . . is best decided in light of the testimony to be adduced at trial").

Contrary to Deutsche Bank's argument, in South Carolina, declaratory judgment actions "are not in general limited by their express terms to cases where there is no other adequate remedy available, but, on the contrary, are expressly made applicable, like ours, without regard to other relief claimed." Eagle Container v. County of Newberry, 366 S.C. 611, 622 S.E.2d 733, 746 (Ct. App. 2005) *rev'd on other grounds*, 379 S.C. 564, 666 S.E.2d 892 (2008). When there exists a justiciable controversy, "the court is not bound to refuse to exercise its power to declare rights and other legal relations merely because there is another remedy available." Id. In fact, in Treasured Arts, Inc. v. Watson, 319 S.C. 560, 463 S.E.2d 90 (1995), the Supreme Court held that a party could bring a declaratory judgment action to determine a practice's legality rather than waiting to be charged by the solicitor. Further, a party is entitled to raise as many claims, independent or alternate, legal or equitable, as he has against the other parties to an action. Rule 18(a), SCRCP; Burnsed v. Greene, 291 S.C. 59, 351 S.E.2d 910 (Ct. App. 1986); Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374 (Ct. App. 1986). Under our Rules of Civil Procedure, Bailey and Owens are entitled to seek a judgment declaring that the subject mortgage no longer encumbers this property. While, if Bailey and Owens succeed in this case, the matters subject of that claim may be swept up in a favorable ruling for them on their claim under S.C. Code Ann. § 29-3-320, that possibility does not mean that they are not permitted to assert a declaratory judgment claim.

Another example of the permissible pleading of an alternate claim is the counterclaim for violation of S.C. Code Ann. § 37-10-102. If Deutsche Bank succeeds in its case, Bailey and Owens seek an offset for the alleged attorney preference violation. There is normally a three-

year statute of limitations under S.C. Code Ann. § 37-10-105(A), but that limitation "does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action." Id. As their counsel acknowledged at the hearing, Bailey and Owens' entitlement to such relief will come into play only in the event that Deutsche Bank prevails on its foreclosure claim.

CONCLUSION

Viewed in the light most favorable to Bailey and Owens, the amended answer and counterclaim pleads facts sufficient to constitute causes of action. It is therefore hereby ORDERED that the Plaintiff's motion to dismiss the counterclaims is denied.

And IT IS SO ORDERED.

James O. Spence

The Honorable James O. Spence
Master-in-Equity for Lexington County

Lexington, South Carolina

May 19, 2017

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-32-03572

Deutsche Bank National Trust Company, etc., — PLAINTIFF(S)

Patricia Owens, etc., et al., — DEFENDANT(S)

Submitted by: Andrew S. Radeker, per direction of court	**Attorney for :** ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order ☒ Statement of Judgment by the Court: A hearing on the Plaintiff's motion for a supersedeas pending the disposition of its cross-appeal was held on April 30, 2018. The court will issue a formal order on that motion later, after reviewing proposed orders to be submitted by counsel. Plaintiff's deadline to record the mortgage satisfaction document, as directed by the court's November 28, 2017 order and extended by the court's order of February 12, 2018, is hereby stayed pending the issuance of a formal order on the Plaintiff's motion for a supersedeas.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

ELECTRONICALLY FILED - 2018 May 04 8:23 AM - LEXINGTON - COMMON PLEAS - CASE#2016CP3203572

ELECTRONICALLY FILED - 2018 May 04 8:23 AM - LEXINGTON - COMMON PLEAS - CASE#2016CP3203572



Lexington Common Pleas

Case Caption: Deutsche Bank National Trust Company VS Patricia Owens

Case Number: 2016CP3203572

Type: Master/Order/Form 4

AND IT IS SO ORDERED.

S/JUDGE JAMES O. SPENCE-3068

Electronically signed on 2018-05-03 18:51:32 page 6 of 6

ELECTRONICALLY FILED - 2018 May 09 4:11 PM - LEXINGTON - COMMON PLEAS - CASE#2016CP3203572

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
C/A No.: 2016-CP-32-03572

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2007-1,

Plaintiff,

vs.

PATRICIA OWENS A/K/A PATRICIA ANN OWENS; TAMMY M. BAILEY; SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES,

Defendants.

ORDER ON MOTION FOR WRIT OF SUPERSEDEAS

This matter is before the Court pursuant to Plaintiff, Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1's ("Deutsche Bank") Motion for Writ of Supersedeas, which was heard on April 30, 2018, with counsel for Deutsche Bank and counsel for Patricia Owens a/k/a Patricia Ann Owens ("Owens") and Tammy M. Bailey's ("Bailey") (Owens and Bailey collectively, "Defendants") in attendance.

This action was commenced by Deutsche Bank on October 19, 2016, seeking foreclosure of a mortgage of property at 111 Andrew Court, Gaston, South Carolina, given by Owens and seeking reformation of that mortgage. Defendants answered and, later, served an amended answer and counterclaims, raising defenses of res judicata, collateral estoppel, laches, unclean hands, waiver, and setoff or credit. Defendants also asserted counterclaims for a declaratory judgment that Deutsche Bank holds no mortgage on the subject property or, in the alternative, that the

ELECTRONICALLY FILED - 2018 May 09 4:11 PM - LEXINGTON - COMMON PLEAS - CASE#2016CP3203572

mortgage is unenforceable; for liability under S.C. Code Ann. § 29-3-320 for failure to record satisfaction of the mortgage after due request; and for violation of S.C. Code Ann. § 37-10-102 (commonly known as the Attorney Preference Statute).

On November 28, 2018, the Court entered an Order on Motions for Summary Judgment ("Summary Judgment Order") resolving the claims between the parties. In the Summary Judgment Order, the Court held, in relevant part, that the mortgage was satisfied and, pursuant to S.C. Code Ann. § 29-3-320, enjoined Deutsche Bank to execute and record a satisfaction of the subject mortgage on or before February 23, 2018. Deutsche Bank sought a stay of that injunction, and on February 12, 2018, the Court granted Deutsche Bank's motion, allowing Deutsche Bank an additional eighty-seven (87) days to record the mortgage satisfaction.

On or around March 8, 2018, Bailey and Owens filed a notice of appeal with the South Carolina Court of Appeals. A few days later on or around March 13, 2018, Deutsche Bank filed a notice of appeal with the South Carolina Court of Appeals. The parties' cross-appeal is pending before the South Carolina Court of Appeals. Deutsche Bank now moves for a writ of supersedeas, staying the obligation to record a satisfaction of the mortgage pending the parties' appeal.

Following the hearing on Deutsche Bank's motion for a writ of supersedeas, the Court, on May 4, 2018, issued an initial order on the motion, indicating that a formal order on the motion would be forthcoming and staying Deutsche Bank's obligation to record a mortgage satisfaction pending further order of the Court.

Here, Deutsche Bank is appealing, *inter alia*, summary judgment on its foreclosure claim, summary judgment on Defendants' declaratory judgment action (relating to Deutsche Bank holding no mortgage on the subject property or, in the alternative, that the mortgage is unenforceable), and the Court's associated order requiring Deutsche Bank to record a satisfaction

ELECTRONICALLY FILED - 2018 May 09 4:11 PM - LEXINGTON - COMMON PLEAS - CASE#2016CP3203572

of mortgage. If, during the pendency of the parties' appeal, Deutsche Bank is required to record a satisfaction of mortgage, its claims on appeal would become moot. Therefore, the Court finds that a writ of supersedeas – staying Deutsche Bank's obligation to record a mortgage satisfaction pending appeal – is appropriate in this case.

The conditions for a stay in this case appear to be governed by S.C. Code Ann. §§ 18-9-150, -160, or both. Those statutes read as follows:

> If the judgment appealed from directs the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal unless the things required to be assigned or delivered be brought into court or placed in the custody of such officer or receiver as the court shall appoint or unless an undertaking be entered into on the part of the appellant, with at least two sureties and in such amount as the court or a judge thereof shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

S.C. Code Ann. § 18-9-150.

> If the judgment appealed from directs the execution of a conveyance or other instrument, the execution of the judgment shall not be stayed by the appeal until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

S.C. Code Ann. § 18-9-160

Accordingly, the parties report to the court that they have agreed that, within twenty (20) days after the parties receive notice of entry of this Order, the parties shall reach agreement on terms by which a fully executed satisfaction of the underlying mortgage is placed with a trustee, escrow agent, or similar custodian, with Deutsche Bank providing satisfactory proof of same to Bailey and Owens. The terms of said escrow agreement (or other similar arrangement mutually agreed to the parties) shall include, but not be limited to, instructions to the person or entity

possessing the fully executed mortgage satisfaction regarding what to do with the fully executed mortgage satisfaction following a ruling by the South Carolina Court of Appeals in this matter.

IT IS THEREFORE ORDERED AND ADJUDGED:

A. Deutsche Bank's Motion for Writ of Supersedeas is GRANTED. Deutsche Bank's obligation to record a satisfaction of the underlying mortgage is hereby stayed pending the outcome of the parties' appeal, unless Deutsche Bank fails to comply with this order or fails to abide by the parties' agreement to deposit the fully executed satisfaction document with the agreed upon party; and

B. As a condition of the relief granted herein, the parties shall enter into an arrangement for the security of a fully executed mortgage satisfaction and otherwise comply, in all respects, with the terms of Order.

AND IT IS SO ORDERED.

_____
Hon. James O. Spence
Master in Equity

_____, 2018
Lexington, South Carolina

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ELECTRONICALLY FILED - 2018 May 09 4:11 PM - LEXINGTON - COMMON PLEAS - CASE#2016CP3203572

Lexington Common Pleas

Case Caption: Deutsche Bank National Trust Company VS Patricia Owens

Case Number: 2016CP3203572

Type: Master/Order/Other

AND IT IS SO ORDERED.

S/JUDGE JAMES O. SPENCE-3068

2016-LP-32-00931

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

C/A NO.: _____

2016CP3203572

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Home Equity Loan Asset-Backed Certificates, Series 2007-1,

Plaintiff,

vs.

Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,

Defendant(s).

SUMMONS AND NOTICES

(Non-Jury)

FORECLOSURE OF REAL ESTATE MORTGAGE

FILED

JP

TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend by answering the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer on the subscribers at their offices at 3800 Fernandina Road, Suite 110, Columbia, SC 29210, within thirty (30) days after the service hereof, exclusive of the day of such service; except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

TO MINOR(S) OVER FOURTEEN YEARS OF AGE, AND/OR TO MINOR(S) UNDER FOURTEEN YEARS OF AGE AND THE PERSON WITH WHOM THE MINOR(S) RESIDES, AND/OR TO PERSONS UNDER SOME LEGAL DISABILITY:

YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian *ad litem* within thirty (30) days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by Attorney for Plaintiff.

YOU WILL ALSO TAKE NOTICE that Plaintiff will move for an Order of Reference or the Court may issue a general Order of Reference of this action to a Master-in-Equity/Special Referee, pursuant to Rule 53 of the *South Carolina Rules of Civil Procedure*.

YOU WILL ALSO TAKE NOTICE that under the provisions of S.C. Code Ann. § 29-3-100, effective June 16, 1993, any collateral assignment of rents contained in the referenced Mortgage is perfected and Attorney for Plaintiff hereby gives notice that all rents shall be payable directly to it by delivery to its undersigned attorneys from the date of default. In the alternative, Plaintiff will move before a judge of this Circuit on the 10th day after service hereof, or as soon thereafter as counsel may be heard, for an Order enforcing the assignment of rents, if any, and compelling payment of all rents covered by such assignment directly to the Plaintiff, which motion is to be based upon the original Note and Mortgage herein and the Complaint attached hereto.

Mary R. Powers, SC Bar #16534
Attorney for Plaintiff
Brock & Scott, PLLC
3800 Fernandina Road, Suite 110
Columbia, SC 29210
Phone 803-454-3540
Fax 803-454-3541
Date: 10/18/2016

2016-LP-32-00931

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

ORIGINAL

COUNTY OF LEXINGTON C/A NO. 2016 CP 32 03572

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Home Equity Loan Asset-Backed Certificates, Series 2007-1,

Plaintiff,

vs.

Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,

Defendant(s).

COMPLAINT

(Non-Jury)

REFORMATION OF MORTGAGE AND FORECLOSURE OF REAL ESTATE MORTGAGE

(Deficiency Judgment Waived)

JP

The Plaintiff above-named, complaining of the Defendant(s) herein, alleges that:

GENERAL ALLEGATIONS

1. Plaintiff, Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Home Equity Loan Asset-Backed Certificates, Series 2007-1, is a business entity duly authorized to conduct business in the State of South Carolina.

2. Upon information and belief, the Defendant(s), Patricia Owens, Tammy M. Bailey, and South Carolina Department of Motor Vehicles, may claim some interest in the real estate, which is the subject of this action and this Court has proper jurisdiction over said Defendants.

3. The real property hereinafter described, that is the subject of this action, is situated and located in the County of Lexington, State of South Carolina, and this Court has proper jurisdiction over the subject matter and the parties of this action.

4. Upon information and belief, South Carolina Department of Motor Vehicles is a governmental agency of the State of South Carolina and is responsible for issuing Certificates of Title for mobile/manufactured homes in the State.

FOR A FIRST CAUSE OF ACTION
(Reformation of Mortgage to Encumber Manufactured Home)

5. Plaintiff re-alleges and incorporates the allegations of the preceding paragraphs as if fully contained herein.

6. The Plaintiff is informed and believes a Titan 1991 mobile/manufactured home containing serial number "4914805294A&B" (hereinafter "Manufactured Home") is located on the Subject Property defined herein.

7. The Defendant(s) Patricia A Owens is listed on the certificate of title as owner(s) of the said Manufactured Home. Chemical Financial Corp is listed thereon as the lienholder of the said Manufactured Home. This information was obtained by a search of the DMV records and database.

8. The Plaintiff is informed and believes that said lien has been paid in full but never satisfied of record and should be removed from the title of the Manufactured Home.

9. The Plaintiff is informed and believes it was the intent of all parties to the subject loan transaction that i) that the Manufactured Home was already converted to be considered an improvement and/or permanent fixture of the Property, or that it would be converted as a part of this transaction; and ii) the Manufactured Home would be part of the secured collateral for the Mortgage. However, due to inadvertent error and mistake, the Manufactured Home was not fully described in the Mortgage. The Mortgage's legal description should be reformed to include the Manufactured Home's information as follows:

"Also included herewith is that certain 1991 Titan Manufactured Home bearing serial number 4914805294A&B."

FOR A SECOND CAUSE OF ACTION
(Mortgage Foreclosure)

10. Plaintiff re-alleges and incorporates the allegations of the preceding paragraphs as if fully contained herein.

11. Heretofore, Patricia Ann Owens (hereinafter, "Borrower(s)") made, executed, and delivered to NovaStar Mortgage, Inc. (hereinafter, "Lender") a certain Fixed Rate Note dated June 15, 1998, in writing (hereinafter, "Note"), wherein and whereby Patricia Ann Owens promised to pay to NovaStar Mortgage, Inc., the principal sum of $60,400.00, together with interest at the rate of 9.99% per annum on the unpaid balance; said principal and interest being payable in monthly installments thereafter until the said Note is fully paid.

12. In order to secure the payment of said Note, the said Patricia Ann Owens (hereinafter, "Mortgagor(s)"), did make, execute, and deliver to NovaStar Mortgage, Inc., its successors and assigns, a certain mortgage dated June 15, 1998 (hereinafter, "Mortgage") securing the below described real property, including any and all improvements to the property, located in the County and State aforesaid (hereinafter, "Property"):

> All that certain piece, parcel, or lot of land, with the improvements thereon, situate, located, lying, and being in the County of Lexington, State of South Carolina, the same being shown and designated as Lot (1), James McLendon Subdivision, Phase III, upon that certain plat dated July 17, 1989 prepared by Donald R. Sproles, for James G. McLendon, recorded in the RMC Office for Lexington County in Plat Book 233 at Page 150.
>
> Also included herewith is that certain 1991 Titan Manufactured Home bearing serial number 4914805294A&B.
>
> This being the same property conveyed to Patricia Ann Owens by deed of James G. McLendon and Carol S. McLendon dated May 23, 1991 and recorded May 23, 1991, in Deed Book 1840 at Page 299, In the Office of the Register of Deeds for Lexington County, South Carolina.

Thereafter, Patricia A. Owens conveyed her interest in the subject property to Tammy M. Bailey by deed dated March 2, 2001, and recorded March 2, 2001, in Deed Book 6219 at Page 345, in the Office of the Register of Deeds for Lexington County, South Carolina.

Parcel Number: 010027-01-001

Property Address: 111 Andrew Court, Gaston, SC 29053

13. Said Mortgage was recorded on July 2, 1998 in Book 4743 at Page 0330, in the Lexington County Registry.

14. Thereafter, the Mortgage was assigned to Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 by assignment recorded on October 12, 2011 in Book 15105 at Page 248. Thereafter, the Mortgage was assigned to Deutsche Bank National Trust Company, as Trustee for Novastar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset-Backed Certificates, Series 2007-1 by assignment recorded on May 15, 2012 in Book 15513 at Page 296.

15. The Mortgage evidences and secures the repayment of money advanced by the Lender to, or on behalf of, the Mortgagor(s) and constitutes a valid first lien on the Property.

16. As required by South Carolina Supreme Court Administrative Order 2009-05-22-01 (hereinafter, "the Administrative Order"), Plaintiff states that this loan is owned or guaranteed by Fannie Mae, or it is owned or guaranteed by FHLMC, or the Servicer has signed an agreement to participate in the Home Affordable Modification Program (hereinafter, "the HAMP"); however, Plaintiff alleges upon information and belief, that the HAMP review process has been completed without modification.

17. Any notice required by the terms of the Mortgage or by State or Federal law has been given to the applicable defendant(s) prior to the commencement of this action.

18. The Plaintiff herein is entitled to enforce said Note and has the right to foreclose by virtue of the Plaintiff's status as holder of the instrument, a nonholder in possession of the instrument who has the rights of a holder, or person not in possession of the instrument who is entitled to enforce the instrument pursuant to S.C. Code Ann. §§ 36-3-309 or 36-3-418(d) (2008).

19. In and by the terms of said Note and the Mortgage securing the same, it is provided, among other things, that on failure to pay any installment of either principal or interest or any portion thereof when due, or if any of the conditions and requirements in the Mortgage securing the same not be complied with, then the whole principal sum and accrued interest shall at the option of the legal holder thereof become at once due and payable without notice, and collectible by foreclosure.

20. In and by the terms of the said Note it is further provided that the maker thereof shall pay all collection costs including reasonable attorneys' fees if the said Note be placed in the hands of an attorney for collection after default.

21. Plaintiff waives its right to a deficiency judgment as to any defendant for amounts due on the herein described Note and Mortgage.

22. The installments of principal and interest falling due from and after July 1, 2013 have not been paid although demand for the payment thereof has been made. The Plaintiff, as holder of the said Note and Mortgage, has and does hereby elect to declare the entire balance of said principal and interest due and payable at once; that there is now due and owing and unpaid upon the said Note and Mortgage the full and just principal sum of $48,587.09, together with interest at the rate of 9.99% per annum, the current/modified rate of interest, from the date of the last payment, together with reasonable attorneys' fees for the collection thereof and the costs of this action. Plaintiff may be forced to pay sums for taxes, insurance and costs for securing the

property, which sums, according to the terms of the Mortgage, should be added to the amount of the debt.

23. Upon information and belief, said information having been obtained from the records of Lexington County, South Carolina, the Defendant(s) below named has/have or may claim to have some interest in or lien upon the Property by virtue of the matters and things herein below alleged, to-wit:

> A. The Defendant, Tammy M. Bailey, has or may claim to have some interest in the Property by virtue of a certain deed of Patricia A. Owens purporting to convey an interest in the subject property to aforementioned defendant. Said deed being recorded 03/02/2001 in the Lexington County Records in Book 6219 at Page 345. Any interest that this Defendant received in the subject property is "subject to" Plaintiff's Mortgage and this interest should be eliminated through a properly completed foreclosure sale.

WHEREFORE, Plaintiff prays judgment that:

A. Reforms the Mortgage as described herein.

B. The amount due upon the said Note and Mortgage held by the Plaintiff be ascertained and determined under the direction of this Court, together with attorney's fees and costs of this action.

C. Appoint a Receiver to collect the rents, issue, profits or designated sums from the mortgagor(s), and/or the grantee(s) of the mortgagor(s), and/or tenant(s) occupying or exercising control over the mortgaged premises and hold the same subject to the further order of this Court.

D. Plaintiff's Mortgage be declared a valid first lien and that Plaintiff have judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due or which may be or have been paid by Plaintiff, together with attorney's fees and for the costs of this action.

E. The Property be sold according to law and the practice of this Court, the equity of redemption be barred and that the proceeds of sale be applied as follows:

First, to the costs and expenses of the within action and said sale;

Second, to the payment and discharge of the amount due on Plaintiff's Note and Mortgage, together with attorney's fees as aforesaid; and

Third, the surplus, if any, be distributed according to law.

F. That the South Carolina Department of Motor Vehicles be ordered to issue a new certificate of title pertaining to the Manufactured Home to the successful bidder at the eventual foreclosure sale, free and clear of all liens.

G. For such other and further relief as may be just and proper.

FURTHER, in the event the successful bidder (at the time of this foreclosure sale) is other than the Defendant(s) in possession herein, the Sheriff of Lexington County will be ordered and directed to eject and remove from the premises the occupants of the property sold, together with all personal property located therein, and put the successful bidder or his assigns in full, quiet and peaceable possession of said Property without delay, and to keep the successful bidder or his assigns in such peaceable possession.

Mary R. Powers, SC Bar #16534
Attorney for Plaintiff
Brock & Scott, PLLC
3800 Fernandina Road, Suite 110
Columbia, SC 29210
Phone 803-454-3540
Fax 803-454-3541
Date: 10/18/2016

BROCK & SCOTT PLLC

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THOMAS E. BROCK *
GREGORY A. SCOTT *
JAMES P. BONNER *
MARK A. PEARSON **
BRIAN L. CAMPBELL**

SEAN M. CORCORAN *

ATLANTA, GA
CHARLOTTE, NC
RALEIGH, NC
WILMINGTON, NC
WINSTON-SALEM, NC
COLUMBIA, SC
FRANKLIN, TN

* Licensed in North Carolina
** Licensed in North Carolina and South Carolina

October 18, 2016

Patricia Owens
111 Andrew Court
Gaston, SC 29053

Dear Patricia Owens:

This notice pertains to your dealings with this law firm as a debt collector.

On October 3, 2016, this office mailed you a notice of your rights, namely to dispute the validity of the debt, to dispute in writing all or a portion of the debt, or to write to us asking for the name and address of the original creditor if different from the current creditor, are not affected by the lawsuit we have filed against you.

The notice described above does not affect your dealings with the court, and in particular it does not change the time at which you must answer the Summons and Complaint that are being served upon you together with this letter. The Summons is a command from the court, not from this law firm, and you must follow its instructions even if you dispute the validity or amount of the debt or request the name and address of the original creditor. The notice described above also does not affect this law firm's relations with the court. As a law firm, we may file papers in the suit according to the court's rules and the judge's instructions.

Sincerely,

Brock & Scott, PLLC

*** THIS IS AN ATTEMPT TO COLLECT A DEBT. ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. IF YOU HAVE BEEN DISCHARGED IN A CHAPTER SEVEN BANKRUPTCY, WE ARE NOT SEEKING PERSONAL LIABILITY AGAINST YOU, BUT ARE PURSUING THE RIGHTS AGAINST THE PROPERTY AS PROVIDED IN THE SECURITY AGREEMENTS***

BROCK & SCOTT PLLC

COLUMBIA OFFICE
WESTPARK CENTER
3800 FERNANDINA ROAD
SUITE 110
COLUMBIA, SC 29210
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* Licensed in North Carolina
** Licensed in North Carolina and South Carolina

October 18, 2016

Patricia Owens
193 Cassidy Road
Gaston, SC 29053

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STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

C/A NO.: _____

2016CP3203572

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Home Equity Loan Asset-Backed Certificates, Series 2007-1,

Plaintiff,

vs.

Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,

Defendant(s).

AFFIDAVIT
NON-MILITARY STATUS

JP

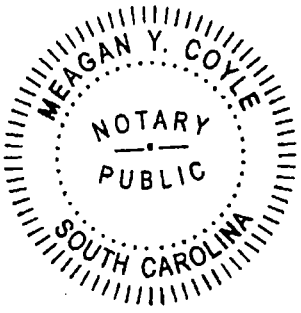
ORIGINAL

FILED
2016 SEP 19 A 8:57
REGISTER OF DEEDS
LEXINGTON SC

I the undersigned, being duly sworn, depose and say that I am an employee of Brock & Scott PLLC, attorneys for the Plaintiff in the above-entitled action. The attorneys for the Plaintiff are familiar with the provisions of 50 U.S.C.A. § 3901 *et seq.*, a/k/a *Servicemembers Civil Relief Act*. In compliance therewith I searched the Department of Defense Manpower Data Center's website database ("DOD database") for the names of each defendant who is a natural person and for whom Brock & Scott, PLLC possessed the minimum required information to perform such a search, Patricia Owens a/k/a Patricia Ann Owens, and Tammy M. Bailey. The

results of said searches do not indicate that said defendants are in the military service.

Further affiant sayeth naught.



Yvonne Holmes
Legal Assistant
Brock & Scott, PLLC
3800 Fernandina Road, Suite 110
Columbia, SC 29210
Phone 803-454-3540
Fax 803-454-3541
Date: 10/18/2016

Sworn to or affirmed, and subscribed before me this the
18 day of October, 2016.

Notary Public for South Carolina
Commission Expires: 08/23/2026

Non-Military Affidavit sent to be filed on:
Date: 10/18/2016
Printed Name: Yvonne Holmes
Signature:

Status Report
Pursuant to Servicemembers Civil Relief Act

Last Name: BAILEY
First Name: TAMMY
Middle Name: M.
Active Duty Status As Of: Oct-18-2016

On Active Duty On Active Duty Status Date			
Active Duty Start Date	Active Duty End Date	Status	Service Component
NA	NA	No	NA
This response reflects the individuals' active duty status based on the Active Duty Status Date			

Left Active Duty Within 367 Days of Active Duty Status Date			
Active Duty Start Date	Active Duty End Date	Status	Service Component
NA	NA	No	NA
This response reflects where the individual left active duty status within 367 days preceding the Active Duty Status Date			

The Member or His/Her Unit Was Notified of a Future Call-Up to Active Duty on Active Duty Status Date			
Order Notification Start Date	Order Notification End Date	Status	Service Component
NA	NA	No	NA
This response reflects whether the individual or his/her unit has received early notification to report for active duty			

Upon searching the data banks of the Department of Defense Manpower Data Center, based on the information that you provided, the above is the status of the individual on the active duty status date as to all branches of the Uniformed Services (Army, Navy, Marine Corps, Air Force, NOAA, Public Health, and Coast Guard). This status includes information on a Servicemember or his/her unit receiving notification of future orders to report for Active Duty.

Mary M. Snavely-Dixon

Mary M. Snavely-Dixon, Director
Department of Defense - Manpower Data Center
4800 Mark Center Drive, Suite 04E25
Arlington, VA 22350

Reporting System (DEERS) database which is the official source of data on eligibility for military medical care and other eligibility systems.

The DoD strongly supports the enforcement of the Servicemembers Civil Relief Act (50 USC App. ý 501 et seq, as amended) (SCRA) (formerly known as the Soldiers' and Sailors' Civil Relief Act of 1940). DMDC has issued hundreds of thousands of "does not possess any information indicating that the individual is currently on active duty" responses, and has experienced only a small error rate. In the event the individual referenced above, or any family member, friend, or representative asserts in any manner that the individual was on active duty for the active duty status date, or is otherwise entitled to the protections of the SCRA, you are strongly encouraged to obtain further verification of the person's status by contacting that person's Service via this URL: https://kb.defense.gov/PublicQueries/publicQuestions/FaqsAnswers.jsp?Subject=Locating Service Members or Getting a Mailing Addresss. If you have evidence the person was on active duty for the active duty status date and you fail to obtain this additional Service verification, punitive provisions of the SCRA may be invoked against you. See 50 USC App. ý 521(c).

This response reflects the following information: (1) The individual's Active Duty status on the Active Duty Status Date (2) Whether the individual left Active Duty status within 367 days preceding the Active Duty Status Date (3) Whether the individual or his/her unit received early notification to report for active duty on the Active Duty Status Date.

More information on "Active Duty Status"

Active duty status as reported in this certificate is defined in accordance with 10 USC § 101(d) (1). Prior to 2010 only some of the active duty periods less than 30 consecutive days in length were available. In the case of a member of the National Guard, this includes service under a call to active service authorized by the President or the Secretary of Defense under 32 USC § 502(f) for purposes of responding to a national emergency declared by the President and supported by Federal funds. All Active Guard Reserve (AGR) members must be assigned against an authorized mobilization position in the unit they support. This includes Navy Training and Administration of the Reserves (TARs), Marine Corps Active Reserve (ARs) and Coast Guard Reserve Program Administrator (RPAs). Active Duty status also applies to a Uniformed Service member who is an active duty commissioned officer of the U.S. Public Health Service or the National Oceanic and Atmospheric Administration (NOAA Commissioned Corps).

Coverage Under the SCRA is Broader in Some Cases

Coverage under the SCRA is broader in some cases and includes some categories of persons on active duty for purposes of the SCRA who would not be reported as on Active Duty under this certificate. SCRA protections are for Title 10 and Title 14 active duty records for all the Uniformed Services periods. Title 32 periods of Active Duty are not covered by SCRA, as defined in accordance with 10 USC § 101(d)(1).

Many times orders are amended to extend the period of active duty, which would extend SCRA protections. Persons seeking to rely on this website certification should check to make sure the orders on which SCRA protections are based have not been amended to extend the inclusive dates of service. Furthermore. some protections of the SCRA may extend to persons who have received orders to report for active duty or to be inducted, but who have not actually begun active duty or actually reported for induction. The Last Date on Active Duty entry is important because a number of protections of the SCRA extend beyond the last dates of active duty.

Those who could rely on this certificate are urged to seek qualified legal counsel to ensure that all rights guaranteed to Service members under the SCRA are protected

WARNING: This certificate was provided based on a last name, SSN/date of birth, and active duty status date provided by the requester. Providing erroneous information will cause an erroneous certificate to be provided.

Certificate ID: B0L2A266Y4F4T00

Status Report
Pursuant to Servicemembers Civil Relief Act

Last Name: OWENS
First Name: PATRICIA
Middle Name:
Active Duty Status As Of: Oct-18-2016

On Active Duty On Active Duty Status Date			
Active Duty Start Date	Active Duty End Date	Status	Service Component
NA	NA	No	NA
This response reflects the individuals' active duty status based on the Active Duty Status Date			

Left Active Duty Within 367 Days of Active Duty Status Date			
Active Duty Start Date	Active Duty End Date	Status	Service Component
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Mary M. Snavely-Dixon

Mary M. Snavely-Dixon, Director
Department of Defense - Manpower Data Center
4800 Mark Center Drive, Suite 04E25
Arlington, VA 22350

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WARNING: This certificate was provided based on a last name, SSN/date of birth, and active duty status date provided by the requester. Providing erroneous information will cause an erroneous certificate to be provided.

Certificate ID: C0K442F6S4F3GF0

2016-LP-32-00931

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

C/A NO.: _____

2016CP3203572

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Home Equity Loan Asset-Backed Certificates, Series 2007-1,
Plaintiff,

vs.

Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,
Defendant(s).

CERTIFICATE OF EXEMPTION/WITHDRAWAL FROM ARBITRATION AND MEDIATION

JP

I CERTIFY THAT THIS ACTION IS EXEMPT FROM ARBITRATION AND MEDIATION BECAUSE:

_____ This is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus or prohibition;
_____ This action is appellate in nature;
_____ This is a post-conviction relief matter;
_____ This is a contempt of court proceeding;
_____ This is forfeiture proceeding brought by the State; or,
__X__ This is a mortgage or HOA lien foreclosure action.

Mary R. Powers, SC Bar #16534
Attorney for Plaintiff
Brock & Scott, PLLC
3800 Fernandina Road, Suite 110
Columbia, SC 29210
Phone 803-454-3540
Fax 803-454-3541
Date: 10/18/2016

NOTE: Motion must be presented to the court, a hearing held, and a finding made, for exemption or withdrawal from arbitration for "strong and compelling reason" sought pursuant to Rule 1(d), Rules of Circuit Court Arbitration.

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

ORIGINAL

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Home Equity Loan Asset-Backed Certificates, Series 2007-1,

Plaintiff(s)

vs.

Patricia Owens a/k/a Patricia Ann Owens, *et al.*,

Defendant(s)

CIVIL ACTION COVERSHEET

2016 CP 32 03572

Submitted By:

Mary R. Powers, SC Bar #16534

Address: Brock & Scott, PLLC
3800 Fernandina Road, Suite 110
Columbia, SC 29210
Attorneys for Plaintiff
Telephone #: 844-856-6646
Fax #: 336-455-7305
Email: ConsumerContact@brockandscott.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

JP

FILED
OCT 19 2016
LEXINGTON COUNTY
CLERK OF COURT

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

☐ **JURY TRIAL** demanded in complaint. ☒ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/ Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case #
20____-NI-_____-_____

- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320) (310)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☒ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (320)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Sexual Predator (510)
- ☐ Permanent Restraining Order (680)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)

Submitting Party Signature: _____ **Date:** 10/18/2016

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

RE: Owens, Patricia

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
C/A NO.: _____

2016CP3203572

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Home Equity Loan Asset-Backed Certificates, Series 2007-1,
Plaintiff,

vs.

Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,
Defendant(s).

NOTICE OF RIGHT TO FORECLOSURE INTERVENTION

PLEASE TAKE NOTICE THAT pursuant to South Carolina Supreme Court Administrative Order 2011-05-02-01 if you are an owner, mortgagor, or debtor under the note and mortgage at issue then you have a right to be considered for Foreclosure Intervention.

Throughout this foreclosure action and any foreclosure intervention process, you also have the right to communicate with and otherwise deal with the Plaintiff through its law firm, Brock & Scott, PLLC.

Brock & Scott, PLLC represents the Plaintiff in this action. We do not represent you. The South Carolina Rules of Professional Conduct prohibit our firm from giving you any legal advice.

Please communicate your request for foreclosure intervention to Brock & Scott, PLLC to ensure compliance with South Carolina Supreme Court Administrative Order 2011-05-02-01, by

16-16874

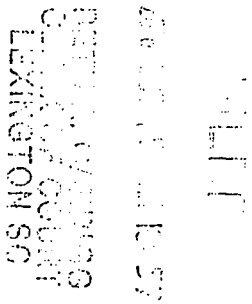
***THIS COMMUNICATION IS FROM A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. IF YOU HAVE RECEIVED A DISCHARGE IN BANKRUPTCY, AND YOU HAVE NOT REAFFIRMED THIS DEBT, THIS NOTICE CONSTITUTES NEITHER A DEMAND FOR PAYMENT NOR A NOTICE OF PERSONAL

RE: Owens, Patricia

returning the attached Foreclosure Intervention Response Form within 30 days from the receipt of this Notice.

IF YOU FAIL, REFUSE, OR VOLUNTARILY ELECT NOT TO PARTICIPATE IN FORECLOSURE INTERVENTION, THE FORECLOSURE ACTION MAY PROCEED.

Mary R. Powers, SC Bar #16534
Attorney for Plaintiff
Brock & Scott, PLLC
3800 Fernandina Road, Suite 110
Columbia, SC 29210
Phone 803-454-3540
Fax 803-454-3541
Date: 10/18/2016



16-16874

THIS COMMUNICATION IS FROM A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. IF YOU HAVE RECEIVED A DISCHARGE IN BANKRUPTCY, AND YOU HAVE NOT REAFFIRMED THIS DEBT, THIS NOTICE CONSTITUTES NEITHER A DEMAND FOR PAYMENT NOR A NOTICE OF PERSONAL LIABILITY.

RE: Owens, Patricia

Foreclosure Intervention Response Form

This information is requested for the express purpose of foreclosure intervention pursuant to S.C. Supreme Court Administrative Order 2011-05-02-01.

Please check one of the two choices below regarding (111 Andrew Court, Gaston, South Carolina 29053):

_____ I am the owner of and occupy the property as my principal residence.
_____ I am the owner but **do not** occupy the property.

If you own and occupy (111 Andrew Court, Gaston, South Carolina 29053) as your principal residence and are interested in the following type(s) of loss mitigation, please indicate your interest(s) below (check all that interest you):

_____ Reinstatement
_____ Loan Modification
_____ Payoff
_____ Deed in Lieu
_____ Payment Plan
_____ Short Sale
_____ Forbearance Agreement
Other: _____

PLEASE NOTE THAT YOU MAY NOT QUALIFY FOR ALL THE OPTIONS LISTED ABOVE. NO REPRESENTATION OF ANY KIND IS BEING MADE REGARDING THE AVAILABILITY OF ANY LOSS MITIGATION OPTION OR YOUR QUALIFICATION FOR ANY OPTION.

_____ I **do not** wish to participate in any Foreclosure Intervention Program.

So that we may offer you the fullest possible assistance, please provide the information requested below.

CONTACT INFORMATION

May we leave a phone message?

At home? □ Yes □ No
Home #: _____

On your cell? □ Yes □ No
Cell #: _____

At work? □ Yes □ No
Work #: _____

May we send you an e-mail message? □ Yes □ No

Email: _____

_____ (Signature) _____ (Signature) _____ (date)

_____ (Print Name) _____ (Print Name) _____ (date)

RETURN COMPLETED FORM VIA ONE OF THE FOLLOWING METHODS:
Brock & Scott, PLLC, Attn: SC-Foreclosure Intervention, 5431 Oleander Drive, Wilmington, NC 28403; 844-856-6646 (phone); 877-470-6313 (fax); SCFCNOFI@brockandscott.com (email)

16-16874

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

2016 NOV 17 CASE NO. 2013-CP-32[illegible]

2016

ORIGINAL

MB

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1,

Plaintiff,

vs.

Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,

Defendants.

ANSWER

Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey (hereinafter "the Defendants") in answer to the Plaintiff's Complaint, answer and allege as follows:

FOR A FIRST DEFENSE

1. Any allegation of the Complaint not herein admitted, qualified, or explained is denied. Any allegations of the Complaint subject of qualified admissions made herein are denied insofar as the allegations are not qualifiedly admitted, and any allegations of the Complaint subject of any other qualifications or explanations herein are denied insofar as they are not otherwise qualified or explained.

2. Answering the allegations of paragraphs 1 and 2 of the Complaint, the Defendants deny the same as written, except that they admit that Tammy Bailey is the owner of the property subject of this case.

3. Answering the allegations of paragraph 3 of the Complaint, the Defendants admit the same.

4. Answering the allegations of paragraph 4 of the Complaint, the Defendants admit the same.

5. Paragraph 5 of the Complaint does not require a response.

6. Answering the allegations of paragraph 6 of the Complaint, the Defendants admit there is a mobile home on the property.

7. Answering the allegations of paragraph 7 of the Complaint, the Defendants do not have sufficient knowledge or information to form a belief as to the truth of the allegations of the paragraph.

8. Answering the allegations of paragraph 8 of the Complaint, the Defendants admit, upon information and belief, that any such lien has been paid in full.

9. Answering the allegations of paragraph 9 of the Complaint, the Defendants deny the same.

10. Paragraph 10 of the Complaint does not require a response.

11. Answering the allegations of paragraph 11 of the Complaint, the Defendants admit the same.

12. Answering the allegations of paragraph 12 of the Complaint, the Defendants admit the same.

13. Answering the allegations of paragraph 13 of the Complaint, the Defendants admit the same upon information and belief.

14. Answering the allegations of paragraph 14 of the Complaint, the Defendants admit the same upon information and belief.

15. Answering the allegations of paragraph 15 of the Complaint, the Defendants deny the same.

16. Answering the allegations of paragraph 16 of the Complaint, the Defendants deny the same.

17. Answering the allegations of paragraph 17 of the Complaint, the Defendants deny the same as written.

18. Answering the allegations of paragraph 18 of the Complaint, the Defendants deny the same.

19. Answering the allegations of paragraph 19 of the Complaint, the Defendants answer that the mortgage says what it says.

20. Answering the allegations of paragraph 20 of the Complaint, the Defendants answer that the note says what it says.

21. Answering the allegations of paragraph 21 of the Complaint, the Defendants admit that such right has been waived, to the extent it existed.

22. Answering the allegations of paragraph 22 of the Complaint, the Defendants admit that the subject note matured on July 1, 2013 and that demand for payment was made, but the Defendants deny the remaining allegations of the paragraph.

23. Answering the allegations of paragraph 23 of the Complaint, the Defendants answer that Tammy Bailey owns the subject property free and clear of any mortgage.

24. No answer to the prayer in the Complaint is required.

25. The Defendants are interested in appropriate foreclosure intervention.

WHEREFORE, the Defendants pray for the Court to:

(a) Issue an order dismissing the Complaint with prejudice;

(b) Deny the Plaintiff the relief it seeks in this action;

(c) Award the Defendants the costs and expenses of this action; and

(d) Grant the Defendants such other and further relief as the court deems just and proper.

Respectfully submitted,

Andrew S. Radeker
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)
ATTORNEY FOR DEFENDANTS
OWENS AND BAILEY

Columbia, South Carolina
November 17, 2016

2016 NOV 17 PM 4:20

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

2016 NOV 17 PM 1:20

CASE NO. 2015-CP-32-[illegible]

ORIGINAL

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1,

Plaintiff,

vs.

Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,

Defendants.

CERTIFICATE OF SERVICE

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., Attorneys for Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey, do hereby certify that I, on the 17th day of November, 2016, served the foregoing document in the above-captioned action by depositing the same in the U.S. Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows:

Mary R. Powers, Esq.
Brock & Scott, PLLC
3800 Fernandina Rd. Suite 110
Columbia, SC 29210

Andrew S. Radeker

FILED
2016 DEC -9 AM 11:49
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

ORIGINAL MB

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

CASE NO. 2016-CP-32-

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1,

Plaintiff,

vs.

Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,

Defendants.

AMENDED ANSWER AND COUNTERCLAIM

Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey (hereinafter "the Defendants") in answer to the Plaintiff's Complaint and as counterclaim, answer and allege as follows:

FOR A FIRST DEFENSE

1. Any allegation of the Complaint not herein admitted, qualified, or explained is denied. Any allegations of the Complaint subject of qualified admissions made herein are denied insofar as the allegations are not qualifiedly admitted, and any allegations of the Complaint subject of any other qualifications or explanations herein are denied insofar as they are not otherwise qualified or explained.

2. Answering the allegations of paragraphs 1 and 2 of the Complaint, the Defendants deny the same as written, except that they admit that Tammy Bailey is the owner of the property subject of this case.

3. Answering the allegations of paragraph 3 of the Complaint, the Defendants admit the same.

4. Answering the allegations of paragraph 4 of the Complaint, the Defendants admit the same.

5. Paragraph 5 of the Complaint does not require a response.

6. Answering the allegations of paragraph 6 of the Complaint, the Defendants admit there is a mobile home on the property.

7. Answering the allegations of paragraph 7 of the Complaint, the Defendants do not have sufficient knowledge or information to form a belief as to the truth of the allegations of the paragraph.

8. Answering the allegations of paragraph 8 of the Complaint, the Defendants admit, upon information and belief, that any such lien has been paid in full.

9. Answering the allegations of paragraph 9 of the Complaint, the Defendants deny the same.

10. Paragraph 10 of the Complaint does not require a response.

11. Answering the allegations of paragraph 11 of the Complaint, the Defendants admit the same.

12. Answering the allegations of paragraph 12 of the Complaint, the Defendants admit the same.

13. Answering the allegations of paragraph 13 of the Complaint, the Defendants admit the same upon information and belief.

14. Answering the allegations of paragraph 14 of the Complaint, the Defendants admit the same upon information and belief.

15. Answering the allegations of paragraph 15 of the Complaint, the Defendants deny the same.

16. Answering the allegations of paragraph 16 of the Complaint, the Defendants deny the same.

17. Answering the allegations of paragraph 17 of the Complaint, the Defendants deny the same as written.

18. Answering the allegations of paragraph 18 of the Complaint, the Defendants deny the same.

19. Answering the allegations of paragraph 19 of the Complaint, the Defendants answer that the mortgage says what it says.

20. Answering the allegations of paragraph 20 of the Complaint, the Defendants answer that the note says what it says.

21. Answering the allegations of paragraph 21 of the Complaint, the Defendants admit that such right has been waived, to the extent it existed.

22. Answering the allegations of paragraph 22 of the Complaint, the Defendants admit that the subject note matured on July 1, 2013 and that demand for payment was made, but the Defendants deny the remaining allegations of the paragraph.

23. Answering the allegations of paragraph 23 of the Complaint, the Defendants answer that Tammy Bailey owns the subject property free and clear of any mortgage.

24. No answer to the prayer in the Complaint is required.

25. The Defendants are interested in appropriate foreclosure intervention.

26. A copy of a letter from Defendant Tammy M. Bailey to the Plaintiff (without its enclosures) is attached as Exhibit A to this pleading.

27. The letter attached as Exhibit A to this pleading and its content are incorporated herein by reference as if here set forth verbatim.

28. A copy of the certified mail return receipt card showing the Plaintiff's receipt of the said letter is attached as Exhibit B to this pleading.

29. A copy of a letter from an attorney on behalf of the Plaintiff is attached as Exhibit C to this pleading.

FOR A SECOND DEFENSE
(Res Judicata and/or Collateral Estoppel)

30. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

31. Rule 13(a) of the South Carolina Rules of Civil Procedure says, "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 and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

32. The Defendants brought an action, Tammy M. Bailey, et al. v. Novastar Mortgage, Inc., et al., Case No. 2013-CP-32-02210, in which the Plaintiff was a defendant.

33. The Plaintiff in this instant action appeared in that earlier action and served an answer in it on September 26, 2013. That answer asserted no counterclaim, and no counterclaim was ever asserted in that action.

34. That action was about the origination and execution of the note and mortgage subject of this instant action.

35. That action was about the validity and enforceability of the note and mortgage subject of this instant action.

36. The note subject of both that action and this one matured on July 1, 2013.

37. At the time the aforesaid answer was served in that earlier action, the party who ultimately became the Plaintiff in this action had the very same claim for foreclosure that it has now brought in this case.

38. That claim for foreclosure arose from the same transactions and occurrences subject of that earlier action.

39. The claim for foreclosure brought in the instant action was compulsory counterclaim in that earlier action.

40. The Plaintiff's claims in this case are barred by res judicata, collateral estoppel, and/or estoppel by judgment.

FOR A THIRD DEFENSE
(Laches)

41. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

42. The Plaintiff has delayed in bringing this action.

43. That delay was unreasonable and unreasonable in its length.

44. The delay has caused prejudice to the Defendants.

45. Laches bars the Plaintiff's claims.

FOR A FOURTH DEFENSE
(Unclean Hands)

46. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

47. The mortgage loan subject of this action was closed without the supervision of an attorney.

48. The mortgage loan subject of this action was closed under deceptive circumstances.

49. The Plaintiff's predecessor in interest acted with unclean hands.

50. The Plaintiff has acted unfairly in this matter. Strategically, the Plaintiff chose not to assert this foreclosure claim in the earlier action.

51. The Plaintiff has unclean hands.

52. The Defendants have been prejudiced as a result.

FOR A FIFTH DEFENSE
(Waiver)

53. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

54. By failing to assert the claims the Plaintiff now brings in this case in the earlier action, the Plaintiff has waived those claims.

FOR A SIXTH DEFENSE
(Setoff/Credit & Incorporation of Counterclaims)

55. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

56. The Defendants are entitled to all appropriate offsets or credits as may be just and applicable.

57. The Defendants assert by way of defense all applicable matter subject of their counterclaims.

FOR A FIRST COUNTERCLAIM
(Declaratory Judgment)

58. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

59. The Plaintiff holds no mortgage on the subject property.

60. If the court determines that the Plaintiff holds a mortgage on the subject property, it is unenforceable.

61. There is a justiciable controversy about these matters.

62. The Defendants are entitled to declaratory judgment in their favor concerning the same.

FOR A SECOND COUNTERCLAIM
(Liability for Failure to Enter Satisfaction)

63. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

64. It has been more than three months since the Plaintiff received the letter that is shown as Exhibit A to this pleading.

65. The Plaintiff has not repaired to the proper office (the Lexington County Register of Deeds) to enter satisfaction of the mortgage subject of this case.

66. The Plaintiff is liable for all damages, penalties, attorneys' fees, and relief available under S.C. Code Ann. § 29-3-320.

FOR A THIRD COUNTERCLAIM
(Violation of Attorney Preference Statute)

67. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

68. Defendant Owens was not given an opportunity to choose an attorney to represent her in the closing of the mortgage loan subject of this case.

69. The original creditor for the subject loan did not comply with the requirements of S.C. Code Ann. § 37-10-102, usually referred to as the attorney preference statute.

70. The Defendants are entitled to relief for violation of S.C. Code Ann. § 37-10-102.

WHEREFORE, the Defendants pray for the Court to:

(a) Issue an order dismissing the Complaint with prejudice;

(b) Deny the Plaintiff the relief it seeks in this action;

(c) Render declaratory judgment in favor of the Defendants as sought above;

(d) Award all damages, actual, consequential, special, and punitive, available to the Defendants;

(e) Award the Defendants all available statutory penalties;

(f) Award the Defendants reasonable attorneys' fees;

(g) Award the Defendants the costs and expenses of this action; and

(h) Grant the Defendants such other and further relief as the court deems just and proper.

FILED
2016 DEC -9 AM 11:49
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

Respectfully submitted,

Andrew S. Radcker
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)
ATTORNEY FOR DEFENDANTS
OWENS AND BAILEY

Columbia, South Carolina
December 8, 2016

9

From the desk of
Tammy M. Bailey
111 Andrew Court
Gaston, SC 29053

August 23, 2016

By Certified U.S. Mail
Restricted Delivery & Return Receipt Requested
Deutsche Bank National Trust Company, as trustee for Novastar Mortgage Funding Trust, Series 2007-1
Novastar Home Equity Loan Asset-Backed Certificates, Series 2007-1
2000 Avenue of the Stars
Los Angeles, CA 90067

Re: Mortgage in book number 4743 at page 330 in register of deeds records for Lexington County, SC

Dear Deutsche Bank:

I have enclosed with this letter a check to your company for $[illegible]0.00 to cover the fee for recording a satisfaction document for the mortgage referenced above and any processing fees of your company. As you know, I own the land that was covered by this mortgage. Your company is the holder of record of this mortgage, and you have not recorded a document showing satisfaction of this mortgage. This is a request for your company to record a document showing satisfaction of this mortgage in the Lexington County land records.

Along with my mother, Patricia Ann Owens (now known as Patricia Ann Owens Houck), I brought a lawsuit against several defendants, including your company, in 2013. A copy of our summons and complaint from that lawsuit is enclosed with this letter. The mortgage and the note matured on July 1, 2013. Your company served its answer (a copy of which I also enclose) in the lawsuit on September 26, 2013. As you can see, your company did not make a counterclaim for foreclosure of the mortgage or seeking collection of the note debt in any way. The case proceeded to trial, and my mother and I lost the case at trial, as shown by the enclosed copies of the verdict form and the order denying our motion for new trial. The case is over, ended by the final judgment of the jury verdict.

Rule 13(a) of the South Carolina Rules of Civil Procedure says, "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 and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." The lawsuit was directly about whether the note and mortgage were valid and enforceable. Your company's claim for foreclosure of the mortgage and any related claims were required to be made in your answer or be lost forever. Your company's failure to bring any such claims means that they are now forever extinguished and gone, and the final judgment of the jury verdict has operated to satisfy the mortgage as a matter of law. Please record the satisfaction document.

Sincerely, Tammy Bailey

Tammy M. Bailey

EXHIBIT
tabbies
A

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Deutsche Bank National Trust Company
2000 Avenue of the Stars
Los Angeles, CA 90067

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) [illegible] C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☑ Return Receipt ~~for Merchandise~~
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☑ Yes

2. Article Number (Transfer from service label) 7012 3460 0001 8584 9237

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

UNITED STATES POSTAL SERVICE

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4 in this box •

Tammy M. Barley
111 Andrew Court
Gaston, SC 29053

EXHIBIT
tabbies
B

Michael C. Griffin
Direct Dial: 704-338-6015
Direct Fax: 704-332-8858
mgriffin@babc.com

Bradley

September 2, 2016

Via Federal Express

Ms. Tammy M. Bailey
111 Andrew Court
Gaston, SC 29053

RE: Mortgage, Book No. 4743; Page 330
Lexington County, South Carolina

Dear Ms. Bailey:

This firm represents Deutsche Bank National Trust Company, as trustee for Novastar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset-Backed Certificates, Series 2007-1 ("Deutsche Bank"). I am writing in response to your letter dated August 23, 2016, whereby you demanded that Deutsche Bank record a satisfaction of mortgage for the referenced mortgage. We disagree with your contention that the prior litigation extinguished Deutsche Bank's right to demand full payment of the note and to initiate foreclosure to recover its collateral. As a result, Deutsche Bank will not record a satisfaction as requested. Accordingly, we are returning the cashier's check in the amount of $40.00 to you.

Very truly yours,

Michael C. Griffin

MCG/dch
Enclosure

EXHIBIT
C

1/4070549.1

Record on Appeal 114

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS CASE NO. 2016-CP-32-3572
Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1, **Plaintiff,** vs. **Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,** **Defendants.**	**CERTIFICATE OF SERVICE**

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., Attorneys for Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey, do hereby certify that I, on the 9th day of December, 2016, served the foregoing document in the above-captioned action by depositing the same in the U.S. Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows:

Mary R. Powers, Esq.
Brock & Scott, PLLC
3800 Fernandina Rd. Suite 110
Columbia, SC 29210

Andrew S. Radeker

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
C/A No.: 2016-CP-32-03572

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2007-1,

Plaintiff,

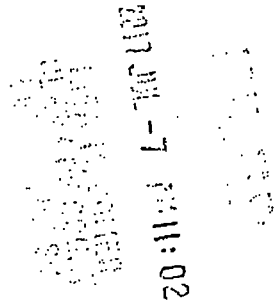
vs.

PATRICIA OWENS A/K/A PATRICIA ANN OWENS; TAMMY M. BAILEY; SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES,

Defendants.

ORIGINAL

DEUTSCHE BANK NATIONAL TRUST COMPANY'S REPLY TO COUNTERCLAIMS



Plaintiff, Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1 ("Deutsche Bank") hereby replies to the Answer and Counterclaims served by Defendants, Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey ("Defendants") as follows:

1-22. Paragraphs 1 through 22 of Defendants' Answer and Counterclaims make no allegations against Plaintiff and no response is required.

23. Plaintiff denies the allegations in Paragraph 23 of Defendants' Answer and Counterclaims.

24. Paragraph 24 of Defendants' Answer and Counterclaims makes no allegations against Plaintiff and no response is required.

25. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 25 of Defendants' Answer and Counterclaims, and therefore denies such allegations.

26. With respect to the allegations in Paragraph 26 of Defendants' Answer and Counterclaims, Plaintiff states that the referenced August 23, 2016 letter from Defendant Tammy M. Bailey speaks for itself.

27. With respect to the allegations in Paragraph 27 of Defendants' Answer and Counterclaims, Plaintiff states that the referenced August 23, 2016 letter from Defendant Tammy M. Bailey speaks for itself. Plaintiff denies the allegations of Paragraph 27 to the extent it incorporates Ms. Bailey's allegations in the letter.

28. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 28 of Defendants' Answer and Counterclaims, and therefore denies such allegations.

29. With respect to the allegations in Paragraph 29 of Defendants' Answer and Counterclaims, Plaintiff states that the referenced September 2, 2016 letter from Michael C. Griffin speaks for itself.

30. Paragraph 30 of Defendants' Answer and Counterclaims makes no new allegations and no response is required. To the extent a response is required, Plaintiff incorporates its answers to Paragraphs 1-29 of Defendants' Answer and Counterclaims.

31. Paragraph 31 of Defendant's Answer and Counterclaims makes no factual allegations against Plaintiff and no response is required. To the extent a response is required, Plaintiff states that Rule 13(a) of the South Carolina Rules of Civil Procedure speaks for itself.

32. Plaintiff admits the allegations in Paragraph 32 of Defendants' Answer and Counterclaims.

33. Plaintiff admits the allegations in Paragraph 33 of Defendants' Answer and Counterclaims.

34. Plaintiff denies the allegations in Paragraph 34 of the Defendants' Answer and Counterclaims.

35. Plaintiff denies the allegations in Paragraph 35 of the Defendants' Answer and Counterclaims.

36. Plaintiff admits the allegations in Paragraph 36 of Defendants' Answer and Counterclaims.

37. Paragraph 37 of Defendants' Answer and Counterclaims states a legal conclusion, to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 37.

38. Paragraph 38 of Defendants' Answer and Counterclaims states a legal conclusion, to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 38.

39. Paragraph 39 of Defendants' Answer and Counterclaims states a legal conclusion, to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 39.

40. Paragraph 40 of Defendants' Answer and Counterclaims states a legal conclusion, to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 40.

41-45. Paragraphs 41-45 of Defendants' Answer and Counterclaims pleads certain allegations as an affirmative defense, to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 41-45.

46-52. Paragraphs 46-52 of Defendants' Answer and Counterclaims pleads certain allegations as an affirmative defense, to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 46-52.

53-54. Paragraphs 53-54 of Defendants' Answer and Counterclaims pleads certain allegations as an affirmative defense, to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 53-54.

55-56. Paragraphs 55-56 of Defendants' Answer and Counterclaims pleads certain allegations as an affirmative defense, to which no response is required. To the extent a response is required, Plaintiff denies the allegations of Paragraph 55-56.

FOR A FIRST COUNTERCLAIM
(Declaratory Judgment)

58. Paragraph 58 of Defendants' Answer and Counterclaims contains no new factual allegations and no response is required. To the extent a response is required, Plaintiff incorporates its responses to Paragraphs 1-57.

59. Plaintiff denies the allegations in Paragraph 59 of Defendants' Answer and Counterclaims.

60. Plaintiff denies the allegations in Paragraph 60 of Defendants' Answer and Counterclaims.

61. Plaintiff denies the allegations in Paragraph 61 of Defendants' Answer and Counterclaims.

62. Plaintiff denies the allegations in Paragraph 62 of Defendants' Answer and Counterclaims.

FOR A SECOND COUNTERCLAIM
(Liability for Failure to Enter Satisfaction)

63. Paragraph 63 of Defendants' Answer and Counterclaims contains no new factual allegations and no response is required. To the extent a response is required, Plaintiff incorporates its responses to Paragraphs 1-62.

64. Plaintiff admits the allegations in Paragraph 64 of Defendants' Answer and Counterclaims.

65. With respect to the allegations in Paragraph 65 of Defendants' Answer and Counterclaims, Plaintiff admits that it has not recorded a satisfaction of the mortgage which is the subject of this action. Plaintiff denies any remaining allegations in Paragraph 65.

66. Plaintiff denies the allegations in Paragraph 66 of Defendants' Answer and Counterclaims.

FOR A THIRD COUNTERCLAIM
(Violation of Attorney Preference Statute)

67. Paragraph 67 of Defendants' Answer and Counterclaims contains no new factual allegations and no response is required. To the extent a response is required, Plaintiff incorporates its responses to Paragraphs 1-66.

68. Plaintiff denies the allegations in Paragraph 68 of Defendants' Answer and Counterclaims.

69. Plaintiff denies the allegations in Paragraph 69 of Defendants' Answer and Counterclaims.

70. Plaintiff denies the allegations in Paragraph 70 of Defendants' Answer and Counterclaims.

Plaintiff denies that Defendants are entitled to the relief requested in the Prayer for Relief. Plaintiff denies each and every allegation in Defendants' Answer and Counterclaims not expressly admitted herein.

FIRST AFFIRMATIVE DEFENSE
(Statute of Limitations)

The promissory note which is the subject of this action matured prior to the commencement of this action, and Defendants' claim for alleged violations of S.C. Code § 37-10-102 is barred by the statute of limitations.

SECOND AFFIRMATIVE DEFENSE
(Set-Off)

In the event Defendants are entitled to any damages Plaintiff is entitled to a set-off of said damages in the amount of any and all damages Defendant has incurred.

THIRD AFFIRMATIVE DEFENSE

Defendants' loan closed on June 15, 1998. Accordingly, Defendant may not base a cause of action on a closing conducted by a non-attorney. *BAC Home Loan Servicing, L.P., f/k/a Countrywide Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619 (S.C. 2012) (citing and clarifying *Matrix Financial Services Corp. v. Frazier*, 394 S.C. 134 (S.C. 2011).

FOURTH AFFIRMATIVE DEFENSE
(Waiver and Estoppel)

Plaintiff Patricia Owens reviewed and executed a "South Carolina Notice of Rights Concerning the Selection of an Attorney and Insurance Agent" informing her of her right to select legal counsel to represent her in the closing of the subject loan, and giving her a full

opportunity to select the attorney of her preference. Said notice was in compliance with the requirements of S.C. Code § 37-10-102. Any claims for alleged violations of S.C. Code § 37-10-102 are barred by the doctrines of waiver and estoppel.

FIFTH AFFIRMATIVE DEFENSE
(Additional Defenses)

Plaintiff presently has insufficient knowledge or information upon which to form a belief as to whether it may have additional affirmative defenses in this matter and, therefore, Plaintiff reserves the right to assert additional affirmative defenses in the event discovery indicates additional affirmative defenses are appropriate.

Respectfully submitted this 6 day of July, 2017.

Bradley Arant Boult Cummings LLP

Michael C. Griffin (SC Bar No. 72868)
G. Benjamin Milam (SC Bar No. 80311)
214 North Tryon Street, Suite 3700
Charlotte, NC 28202
(704) 338-6000 (phone)
(704) 332-8858 (fax)
bmilam@bradley.com

Attorneys for Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1

FILED
2017 JUL -7 AM 11:02

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2017 I served the above and foregoing on the following via U.S. Mail addressed to the following:

Drew Radeker, Esq.
PO Box 50143
Columbia, SC 29250

Attorney for Defendants/Counterclaim Plaintiffs

G. Benjamin Milam

2017 JUL -7 PM 11:02

ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

CASE NO. 2016-CP-32-3572

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1,

Plaintiff,

vs.

Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,

Defendants.

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

FILED
2016 AUG -8 PM 4:50
LISA COMER
CLERK OF COURT
LEXINGTON SC

YOU WILL PLEASE TAKE NOTICE that Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey (hereinafter "Bailey and Owens") hereby move before this court pursuant to Rule 56, SCRCP, as well as pursuant to all other applicable law, in the above-captioned action for an order that 1) grants summary judgment in their favor as to the Plaintiff's claim for foreclosure, 2) grants summary judgment in their favor as to their first counterclaim, and 3) grants summary judgment on liability in their favor as to their second counterclaim.

As grounds for this motion, Bailey and Owens note the following:

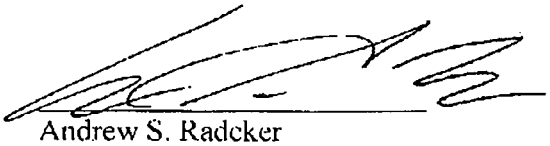
1. Bailey and Owens incorporate herein by reference as if here set forth verbatim their memorandum previously filed in opposition to the Plaintiff's motion to dismiss their counterclaims. Bailey and Owens incorporate herein by reference as if here set forth verbatim the court's order denying that motion.
2. The Plaintiff's claim for foreclosure is barred by res judicata. It was a compulsory counterclaim in an earlier action, Tammy M. Bailey, et al. v. Novastar Mortgage, Inc.,

et al., Case No. 2013-CP-32-02210, that was tried to judgment by jury verdict. The Plaintiff never asserted the foreclosure claim as a counterclaim in that case.

3. Bailey and Owens are entitled to a declaration that the subject mortgage is satisfied by operation of law and no longer encumbers the subject property.
4. The subject mortgage is satisfied by operation of law, and the Plaintiff did not record a satisfaction thereof after due demand, entitling Bailey and Owens to relief under S.C. Code Ann. § 29-3-320.
5. Further, the Plaintiff cannot prevail on its foreclosure claim in any event. The discovery documents attached hereto and filed herewith show that the Plaintiff cannot identify a witness who could provide the necessary testimony to support its foreclosure case and that it cannot provide the required debt component information to support a judgment of foreclosure in its favor.
6. This motion is also supported by the record and may be further supported by any memoranda that Bailey and Owens may submit.

No consultation with opposing counsel about the matter subject of this motion is required, as this is a motion for summary judgment; however, the undersigned has consulted with opposing counsel about the bringing of this motion.

Respectfully submitted,



Andrew S. Radcker
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)
ATTORNEY FOR DEFENDANTS
OWENS AND BAILEY

Columbia, South Carolina
August 8, 2017

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

CASE NO. 2016-CP-32-3572

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1,

Plaintiff,

vs.

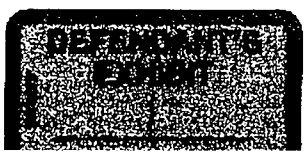
Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,

Defendants.

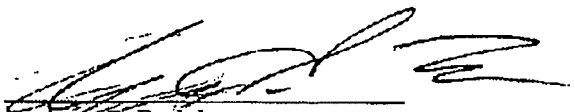
DEFENDANTS OWENS AND BAILEY'S FIRST SET OF REQUESTS TO PLAINTIFF TO ADMIT

Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey (hereinafter "the Defendants"), pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, hereby propound and serve on the Plaintiff the following Requests to Admit:

1. The Plaintiff cannot identify the person(s) who created the documents on which it bases its calculation of the amount that the Plaintiff seeks to be awarded in this lawsuit.
2. The Plaintiff cannot identify any witnesses who have personal knowledge of the matters contained in the documents on which it bases its calculation of the amount that the Plaintiff seeks to be awarded in this lawsuit.
3. By certified mail, the Plaintiff received the letter that is Exhibit A to these requests.
4. The certified mail return receipt card for the letter that is Exhibit A to these requests is attached as Exhibit B to these requests.
5. Exhibit C to these requests is a copy of a letter to Defendant Bailey from an attorney on the Plaintiff's behalf.
6. The Plaintiff has not recorded a satisfaction of the subject mortgage.
7. The subject mortgage is satisfied by operation of law.



Respectfully submitted,



Andrew S. Radeker
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)
ATTORNEY FOR DEFENDANTS
OWENS AND BAILEY

Columbia, South Carolina
December 9, 2016

From the desk of
Tammy M. Bailey
111 Andrew Court
Gaston, SC 29053

August 23, 2016

By Certified U.S. Mail
Restricted Delivery & Return Receipt Requested
Deutsche Bank National Trust Company, as trustee for Novastar Mortgage Funding Trust, Series 2007-1
Novastar Home Equity Loan Asset-Backed Certificates, Series 2007-1
2000 Avenue of the Stars
Los Angeles, CA 90067

Re: **Mortgage in book number 4743 at page 330 in register of deeds records for Lexington County, SC**

Dear Deutsche Bank:

I have enclosed with this letter a check to your company for $40.00 to cover the fee for recording a satisfaction document for the mortgage referenced above and any processing fees of your company. As you know, I own the land that was covered by this mortgage. Your company is the holder of record of this mortgage, and you have not recorded a document showing satisfaction of this mortgage. This is a request for your company to record a document showing satisfaction of this mortgage in the Lexington County land records.

Along with my mother, Patricia Ann Owens (now known as Patricia Ann Owens Houck), I brought a lawsuit against several defendants, including your company, in 2013. A copy of our summons and complaint from that lawsuit is enclosed with this letter. The mortgage and the note matured on July 1, 2013. Your company served its answer (a copy of which I also enclose) in the lawsuit on September 26, 2013. As you can see, your company did not make a counterclaim for foreclosure of the mortgage or seeking collection of the note debt in any way. The case proceeded to trial, and my mother and I lost the case at trial, as shown by the enclosed copies of the verdict form and the order denying our motion for new trial. The case is over, ended by the final judgment of the jury verdict.

Rule 13(a) of the South Carolina Rules of Civil Procedure says, "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 and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." The lawsuit was directly about whether the note and mortgage were valid and enforceable. Your company's claim for foreclosure of the mortgage and any related claims were required to be made in your answer or be lost forever. Your company's failure to bring any such claims means that they are now forever extinguished and gone, and the final judgment of the jury verdict has operated to satisfy the mortgage as a matter of law. Please record the satisfaction document.

Sincerely,

Tammy M. Bailey

EXHIBIT
tabbies
A

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Deutsche Bank National Trust Company
2000 Avenue of the Stars
Los Angeles, CA 90067

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☑ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☑ Yes

2. Article Number (Transfer from service label) 7012 3460 0001 8584 9237

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

UNITED STATES POSTAL SERVICE

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

* Sender: Please print your name, address, and ZIP+4 in this box *

Tammy M. Barley
111 Andrew Court
Gaston, SC 29053

EXHIBIT
tabbies B

Michael C. Griffin
Direct Dial: 704-338-6015
Direct Fax: 704-332-8858
mgriffin@babc.com

Bradley

September 2, 2016

Via Federal Express

Ms. Tammy M. Bailey
111 Andrew Court
Gaston, SC 29053

RE: Mortgage, Book No. 4743; Page 330
Lexington County, South Carolina

Dear Ms. Bailey:

This firm represents Deutsche Bank National Trust Company, as trustee for Novastar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset-Backed Certificates, Series 2007-1 ("Deutsche Bank"). I am writing in response to your letter dated August 23, 2016, whereby you demanded that Deutsche Bank record a satisfaction of mortgage for the referenced mortgage. We disagree with your contention that the prior litigation extinguished Deutsche Bank's right to demand full payment of the note and to initiate foreclosure to recover its collateral. As a result, Deutsche Bank will not record a satisfaction as requested. Accordingly, we are returning the cashier's check in the amount of $40.00 to you.

Very truly yours,

Michael C. Griffin

MCG/dch
Enclosure

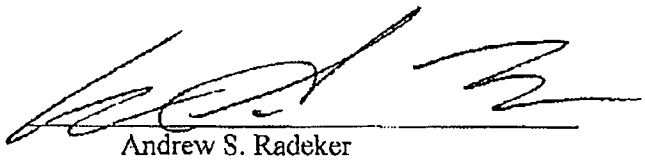
EXHIBIT
C

1/4070549.1

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS CASE NO. 2016-CP-32-3572
Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1, **Plaintiff,** **vs.** **Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,** **Defendants.**	**CERTIFICATE OF SERVICE**

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., Attorneys for Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey, do hereby certify that I, on the 9th day of December, 2016, served the foregoing document in the above-captioned action by depositing the same in the U.S. Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows:

Mary R. Powers, Esq.
Brock & Scott, PLLC
3800 Fernandina Rd. Suite 110
Columbia, SC 29210



Andrew S. Radeker

FEB 13 2017

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
C/A No.: 2015-CP-02-2244

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2007-1,

Plaintiff,

vs.

PATRICIA OWENS A/K/A PATRICIA ANN OWENS; TAMMY M. BAILEY; SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES,

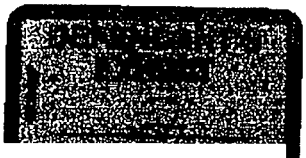
Defendants.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2007-1'S RESPONSES AND OBJECTIONS TO PATRICIA OWENS AND TAMMY BAILEY'S FIRST SET OF REQUESTS FOR ADMISSION

Plaintiff, Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1 ("Deutsche Bank" or "Plaintiff") responds to the requests for admission served by Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey (collectively, "Defendants") in the above captioned matter, and states as follows:

PRELIMINARY STATEMENT/GENERAL OBJECTIONS

1. Plaintiff objects to the Requests to the extent that they seek information, documents and things that are subject to any privilege, immunity, or obligation of confidentiality, including, without limitation, the attorney-client privilege and the attorney work product doctrine, on the grounds that they exceed the permissible scope of discovery under the South Carolina Rules of Civil Procedure or any local rule. These Requests are interpreted and



construed by Plaintiff as not encompassing any documents, things, or information protected by the attorney-client, work product, or other applicable privilege or protection unless otherwise stated. Any inadvertent identification or production of documents and things subject to such privilege or protection is not intended as a waiver of, and shall not waive, any such privilege or protection, and Plaintiff reserves its right to the return of all copies of any such document(s) and thing(s) inadvertently produced in response to the Requests. Plaintiff will construe and respond to the Requests in accordance with the South Carolina Rules of Civil Procedure or any local rule.

2. Plaintiff objects to the Requests to the extent that they purport to impose requirements beyond those imposed by the South Carolina Rules of Civil Procedure or any local rule.

3. Plaintiff objects to the Requests to the extent that they call for documents, things, or information that do not exist within the possession, custody, or control of Plaintiff or that are obtainable from some other source that is more convenient, less burdensome, or less expensive.

4. Plaintiff reserves the right to supplement its responses as more information is discovered through its own internal investigation and through discovery.

5. The response to each Request shall not be interpreted to concede the truth of any factual assertion or implication contained in the Request unless expressly stated. Plaintiff is providing these responses to the Requests without waiver of or prejudice to its rights to later raise objections to relevance, materiality, privilege or admissibility of any document produced in this response.

6. Plaintiff incorporates each of the foregoing General Objections into each and every response below; each General Objection shall have the same force and effect as if fully set forth below.

As far as Plaintiff is aware, according to information available to it at the present time, these responses are complete and correct. Plaintiff reserves the right to object to future discovery on the same or related matters and does not waive any objection by providing the information in these responses. Through Plaintiff's ongoing investigation and the formal discovery process, Plaintiff may learn additional facts, or may learn information that sheds new light on previously-known facts, or may discover the identity of additional persons and potential witnesses, or may learn that certain persons already known to Plaintiff have knowledge of which Plaintiff is currently unaware. For all these reasons, Plaintiff reserves the right to supplement these responses.

REQUESTS FOR ADMISSION

1. The Plaintiff cannot identify the person(s) who created the documents on which it bases its calculation of the amount that the Plaintiff seeks to be awarded in this lawsuit.

RESPONSE: Plaintiff objects to this request as irrelevant to any issue in this suit, and not reasonably calculated to lead to the discovery of relevant information. Plaintiff will provide a proper foundation for the admission of records of its regularly conducted business activities establishing the amount Plaintiff is entitled to collect pursuant to the subject note and mortgage. Subject to and without waiving the foregoing objection, Plaintiff states that Defendants Patricia Owens and Tammy Bailey are witnesses concerning their execution of the subject loan documents, and the request is therefore denied.

2. The Plaintiff cannot identify any witnesses who have personal knowledge of the matters contained in the documents on which it bases its calculation of the amount that the Plaintiff seeks to be awarded in this lawsuit.

RESPONSE: Plaintiff objects to this request as irrelevant to any issue in this suit, and not reasonably calculated to lead to the discovery of relevant information. Plaintiff will provide a proper foundation for the admission of records of its regularly conducted business activities establishing the amount Plaintiff is entitled to collect pursuant to the subject note and mortgage. Subject to and without waiving the foregoing objection, Plaintiff states that Defendants Patricia Owens and Tammy Bailey are witnesses concerning their execution of the subject loan documents, and the request is therefore denied.

3. By certified mail, the Plaintiff received the letter that is Exhibit A to these requests.

RESPONSE: Admitted.

4. The certified mail return receipt card for the letter that is Exhibit A to these requests is attached as Exhibit B to these requests.

RESPONSE: Plaintiff states that it has made a reasonable inquiry, but the information known or reasonably available to Plaintiff is insufficient to enable Plaintiff to admit or deny the request.

5. Exhibit C to these requests is a copy of a letter to Defendant Bailey from an attorney on the Plaintiff's behalf.

RESPONSE: Admitted.

6. The Plaintiff has not recorded a satisfaction of the subject mortgage.

RESPONSE: Admitted.

7. The subject mortgage is satisfied by operation of law.

RESPONSE: Denied.

Respectfully submitted this 9th day of February, 2017.

Bradley Arant Boult Cummings LLP

Michael C. Griffin (SC Bar No. 72868)
G. Benjamin Milam (SC Bar No. 80311)
214 North Tryon Street, Suite 3700
Charlotte, NC 28202
(704) 338-6000 (phone)
(704) 332-8858 (fax)
bmilam@bradley.com

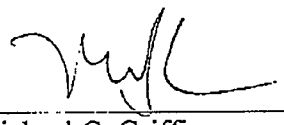
Attorneys for Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2017 I served the above and foregoing Deutsche Bank National Trust Company, as Trustee for Novastar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1's Responses and Objections to Patricia Owens and Tammy Bailey's First set of Requests for Admission on the following via U.S. Mail addressed to the following:

Drew Radeker, Esq.
PO Box 50143
Columbia, SC 29250

Attorney for Plaintiff



Michael C. Griffin

FEB 13 2017

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
C/A No.: 2015-CP-02-2244

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2007-1,

Plaintiff,

vs.

PATRICIA OWENS A/K/A PATRICIA ANN OWENS; TAMMY M. BAILEY; SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES,

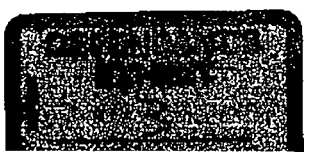
Defendants.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2007-1'S RESPONSES AND OBJECTIONS TO PATRICIA OWENS AND TAMMY BAILEY'S FIRST SET OF INTERROGATORIES

Plaintiff, Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1 ("Deutsche Bank" or "Plaintiff") responds to the interrogatories served by Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey (collectively, "Defendants") in the above captioned matter, and states as follows:

PRELIMINARY STATEMENT/GENERAL OBJECTIONS

1. Plaintiff objects to the Interrogatories to the extent that they seek information, documents and things that are subject to any privilege, immunity, or obligation of confidentiality, including, without limitation, the attorney-client privilege and the attorney work product doctrine, on the grounds that they exceed the permissible scope of discovery under the South Carolina Rules of Civil Procedure or any local rule. These Interrogatories are interpreted and



construed by Plaintiff as not encompassing any documents, things, or information protected by the attorney-client, work product, or other applicable privilege or protection unless otherwise stated. Any inadvertent identification or production of documents and things subject to such privilege or protection is not intended as a waiver of, and shall not waive, any such privilege or protection, and Plaintiff reserves its right to the return of all copies of any such document(s) and thing(s) inadvertently produced in response to the Interrogatories and Requests. Plaintiff will construe and respond to the Interrogatories and Requests in accordance with the South Carolina Rules of Civil Procedure or any local rule.

2. Plaintiff objects to the Interrogatories to the extent that they purport to impose requirements beyond those imposed by the South Carolina Rules of Civil Procedure or any local rule.

3. Plaintiff objects to the Interrogatories to the extent that they call for documents, things, or information that do not exist within the possession, custody, or control of Plaintiff or that are obtainable from some other source that is more convenient, less burdensome, or less expensive.

4. Plaintiff reserves the right to supplement its production as more information is discovered through its own internal investigation and through discovery.

5. The response to each Interrogatory shall not be interpreted to concede the truth of any factual assertion or implication contained in the Request. Plaintiff is providing these responses to the Interrogatories without waiver of or prejudice to its rights to later raise objections to relevance, materiality, privilege or admissibility of any document produced in this response.

6. Plaintiff incorporates each of the foregoing General Objections into each and

every response below; each General Objection shall have the same force and effect as if fully set forth below.

As far as Plaintiff is aware, according to information available to it at the present time, these responses are complete and correct. Plaintiff reserves the right to object to future discovery on the same or related matters and does not waive any objection by providing the information in these responses. Through Plaintiff's ongoing investigation and the formal discovery process, Plaintiff may learn additional facts, or may learn information that sheds new light on previously-known facts, or may discover the identity of additional persons and potential witnesses, or may learn that certain persons already known to Plaintiff have knowledge of which Plaintiff is currently unaware. For all these reasons, Plaintiff reserves the right to supplement these responses.

INTERROGATORIES

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case.

RESPONSE: Plaintiff states that the following persons may be witnesses concerning the facts of this case:

Corporate representative of Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1
c/o G. Benjamin Milam
Bradley Arant Boult Cummings LLP
214 N. Tryon Street, Suite 3700
Charlotte, NC 28202

Tammy M. Bailey

Patricia Owens a/k/a Patricia Ann Owens

Other individuals may be reflected in the documents produced to Defendants in response to Defendants' Requests for Production. At this time, Plaintiff is unsure as to what knowledge they may have, if any, regarding the facts of this case. Plaintiff states that discovery is ongoing and it reserves the right to supplement the response to this Interrogatory.

2. Indicate whether written or recorded statements have been taken from the witnesses and who has possession of such statements.

RESPONSE: Depositions of Tammy M. Bailey and Patricia Owens were taken on December 29, 2014 in Case No. 2013-CP-32-2210. To Plaintiff's knowledge, no other statements have been taken at this time.

3. Set forth a list of all photographs, plats, sketches, and any and all other documents in possession of the Plaintiff or counsel that relate to any claim or defense in the case.

RESPONSE: Pursuant to Rule 33(c) of the South Carolina Rules of Civil Procedure, Plaintiff directs Defendants to the Note, Mortgage, Assignments of Mortgage, Assignment and Assumption Agreement, loan payment history, origination documents, servicing notes, correspondence, and other documents produced to Defendants in response to Defendants' Requests for Production.

4. List the names and addresses of all expert witnesses whom the Plaintiff proposes to use as witnesses at the trial of this case and set forth a description of the expert's opinion(s) with regard to the case and the subjects about which the Plaintiff believes such expert may testify at trial.

RESPONSE: Plaintiff has not retained any experts as of the present date. Plaintiff reserves the right to designate experts within the time permitted by any scheduling order entered in this case.

5. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth a summary sufficient to inform the Defendant of the important facts known to or observed by such witness.

Plaintiff states that the following persons may be witnesses concerning the facts of this case:

Corporate representative of Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1
c/o G. Benjamin Milam
Bradley Arant Boult Cummings LLP
214 N. Tryon Street, Suite 3700
Charlotte, NC 28202

The corporate representative is expected to testify in accordance with the business records maintained by the servicer of Defendants' loan. In accordance with Rule 33(c) of the South Carolina Rules of Civil Procedure, Plaintiff directs Defendants to the Note, Mortgage, Assignments of Mortgage, Assignment and Assumption Agreement, loan payment history, origination documents, servicing notes, correspondence, and other documents produced to Defendants in response to Defendants' Requests for Production, for a copy of the relevant records to which the corporate representative is likely to testify.

Tammy M. Bailey

Patricia Owens a/k/a Patricia Ann Owens

Defendants Tammy M. Bailey and Patricia Owens a/k/a Patricia Ann Owens may have knowledge or information related to the matters alleged in the Complaint and Defendants' Counterclaims.

Other individuals may be reflected in the documents produced to Defendants in response to Defendants' Requests for Production. At this time, Plaintiff is unsure as to what knowledge they may have, if any, regarding the facts of this case. Plaintiff states that discovery is ongoing and it reserves the right to supplement the response to this Interrogatory.

6. Set forth an itemized statement of damages, exclusive of pain and suffering, claimed to have been sustained by the Plaintiff.

Plaintiff objects to this request as vague, in that it does not specify a date for calculation of the amount owed to Plaintiff. Subject to and without waiving the foregoing objection, Plaintiff states that it is entitled to recover all unpaid principal, interest, escrow disbursements, and other charges and fees authorized by the terms of Defendants' loan. Pursuant to Rule 33(c) of the South Carolina Rules of Civil Procedure, Plaintiff refers Defendants to the Note, Mortgage, and loan payment history produced in response to Defendant's requests for production. Plaintiff can produce a loan payoff statement through a specified date at a time and place mutually agreeable to counsel.

7. Itemize each amount the Plaintiff claims is due as a part of the debt subject of this action, giving for each such amount its exact dollar figure, its nature, and the date the Plaintiff claims it became due.

Plaintiff objects to this request as vague, in that it does not specify a date for calculation of the amount owed to Plaintiff. Subject to and without waiving the foregoing

objection, Plaintiff states that it is entitled to recover unpaid all principal, interest, escrow disbursements, and other charges and fees authorized by the terms of Defendants' loan. Pursuant to Rule 33(c) of the South Carolina Rules of Civil Procedure, Plaintiff refers Defendants to the Note, Mortgage, and loan payment history produced in response to Defendant's requests for production. Under the terms of the Note and Mortgage, Defendants' loan matured on July 1, 2013, and Defendants were obligated to pay all amounts owed in full on that date. Plaintiff was Plaintiff will produce a loan payoff statement through a specified date at a time and place mutually agreeable to counsel.

8. For each amount given in response to the interrogatory above, set forth with specificity the reason that the Plaintiff claims such amount became due on the date the Plaintiff claims it became due.

Pursuant to Rule 33(c) of the South Carolina Rules of Civil Procedure, Plaintiff refers Defendants to the terms of the Note.

9. State the date the Plaintiff's cause of action for foreclosure brought in this case arose.

Plaintiff objects to this request as vague and ambiguous, as it is unclear what the Interrogatory means by "date the Plaintiff's cause of action . . . arose." Defendant further objects to this request as it seeks a legal opinion from Plaintiff's counsel in violation of the work product doctrine. Subject to and without waiving the foregoing objection, and pursuant to Rule 33(c) of the South Carolina Rules of Civil Procedure, Plaintiff refers Defendants to the Note, Mortgage, Assignments of Mortgage, Assignment and Assumption Agreement, loan payment history, origination documents, servicing notes, correspondence,

and other documents produced to Defendants in response to Defendants' Requests for Production.

10. For each denial of an admission requested by the Defendants in this action, set forth with specificity the facts that support the denial.

Plaintiff objects to this request for each of the grounds stated in Plaintiff's objections to Defendants' Request to Admit. Subject to and without waiving the foregoing objections, and pursuant to Rule 33(c) of the South Carolina Rules of Civil Procedure, Plaintiff refers Defendant to the Note, Mortgage, and loan payment history produced to Defendants in response to Defendants' Requests for Production. As shown by the loan payment history, Defendants have not satisfied the Note and Mortgage by paying the amounts due for the subject loan.

11. For each denial of an allegation made by the Defendants in this action, set forth with specificity the facts that support the denial.

Plaintiff objects to this Request as premature, in that Plaintiff has filed a motion under Rule 12 of the South Carolina Rules of Civil Procedure and is not yet required to file an answer to the allegations made by the Defendants in this action. Plaintiff further objects to this Request as impermissibly compound, as it purports to request information regarding "each denial" of an allegation rather than specifying the allegation for which Defendants seek information. Subject to and without waiving the foregoing objection, and pursuant to Rule 33(c) of the South Carolina Rules of Civil Procedure, Plaintiff refers Defendants to the Note, Mortgage, Assignments of Mortgage, Assignment and Assumption Agreement, loan payment history, origination documents, servicing notes, correspondence,

and other documents produced to Defendants in response to Defendants' Requests for Production.

12. For each defense of the Plaintiff to the Defendants' claims in this action, set forth with specificity the facts that support the defense.

Plaintiff objects to this Request as premature, in that Plaintiff has filed a motion under Rule 12 of the South Carolina Rules of Civil Procedure and is not yet required to file an answer to the allegations made by the Defendants in this action. Subject to and without waiving the foregoing objection, and pursuant to Rule 33(c) of the South Carolina Rules of Civil Procedure, Plaintiff refers Defendants to the Note, Mortgage, Assignments of Mortgage, Assignment and Assumption Agreement, loan payment history, origination documents, servicing notes, correspondence, and other documents produced to Defendants in response to to Defendants' Requests for Production.

13. State with specificity how and when Plaintiff acquired whatever interest it has in the account subject of this action.

Plaintiff objects to this request as overly broad and unduly burdensome to the extent it seeks information beyond what is necessary to prove that Plaintiff is entitled to enforce the Note and Mortgage. Subject to and without waiving the foregoing objections, and pursuant to Rule 33(c) of the South Carolina Rules of Civil Procedure, Plaintiff refers Defendants to the copies of the Note, Mortgage, Assignments of Mortgage, and other documents produced to Defendants in response to Defendants' requests for production.

14. State with specificity each entity that has ever held any interest in the account subject of this action.

Plaintiff objects to this request as overly broad and unduly burdensome, as it seeks information that is not relevant to any claim or defense in this matter. Subject to and without waiving the foregoing objections, Plaintiff refers Defendants to the Note, Mortgage, Assignments of Mortgage, and other documents produced to Defendants in response to Defendants' requests for production.

15. State with specificity each servicer of the account subject of this action and that dates of servicing provided by each.

Plaintiff objects to this request as overly broad and unduly burdensome, as it seeks information that is not relevant to any claim or defense in this matter. Subject to and without waiving the foregoing objections, Plaintiff states that Ocwen Loan Servicing, LLC has serviced the subject loan account since April 2, 2012.

16. State whether there has ever been any charge-off of debt with regard to the account subject of this action.

Plaintiff objects to this request as vague and ambiguous, as the Interrogatory does not define "charge-off." Plaintiff further objects to this request to the extent it seeks information that is irrelevant to any claim or defense in this action. Subject to and without waiving the foregoing objections, Plaintiff states that Defendants' debt remains outstanding.

17. State with specificity each amount ever charged off with respect to the account subject of this action and, for each such amount, the date it was charged off.

Plaintiff objects to this request as vague and ambiguous, as the Interrogatory does not define "charged off." Plaintiff further objects to this request to the extent it seeks information that is irrelevant to any claim or defense in this action. Subject to and without

waiving the foregoing objections, Plaintiff states that Defendants' debt remains outstanding.

18. For each communication between each entity having any connection with the account subject of this action and the Defendants (or either of them), state the date of the communication, the means of the communication (e.g., telephone, letter), and the substance of the communication.

Plaintiff objects to this request as overly broad and unduly burdensome as it seeks information concerning "each communication" between "each entity having any connection with the account" and Defendants, without regard to whether such information is proportional to the needs of the case and without regard to whether such information is relevant to any claim or defense in this action. Plaintiff further objects to this request to the extent it seeks information not within Plaintiff's possession or control. Subject to and without waiving the foregoing objection, and pursuant to Rule 33(c) of the South Carolina Rules of Civil Procedure, Plaintiff refers Defendants to the correspondence and servicing notes produced in response to Defendants' requests for production.

19. For each document that the Plaintiff identifies in response to discovery requests in this case, state the author of the document and when it was written.

Plaintiff objects to this request as overly broad and unduly burdensome as it seeks information concerning "each" of numerous documents without regard to whether such information is proportional to the needs of the case and without regard to whether such information is relevant to any claim or defense in this action. Plaintiff further objects to this request as impermissibly compound. Subject to and without waiving the foregoing objection, and pursuant to Rule 33(c) of the South Carolina Rules of Civil Procedure,

Plaintiff refers Defendants to the documents produced in response to Defendants' requests for production.

20. For each document that the Plaintiff claims relates to the account subject of this case, state the date on which the Plaintiff claims the author of the document acquired the information stated in the document.

Plaintiff objects to this request as overly broad and unduly burdensome as it seeks information concerning "each" of numerous documents without regard to whether such information is proportional to the needs of the case and without regard to whether such information is relevant to any claim or defense in this action. Plaintiff further objects to this request as impermissibly compound. Subject to and without waiving the foregoing objection, and pursuant to Rule 33(c) of the South Carolina Rules of Civil Procedure, Plaintiff refers Defendants to the documents produced in response to Defendants' requests for production.

Respectfully submitted this 9th day of February, 2017.

AS TO OBJECTIONS:

Bradley Arant Boult Cummings LLP

Michael C. Griffin (SC Bar No. 72868)
G. Benjamin Milam (SC Bar No. 80311)
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bmilam@bradley.com

Attorneys for Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
C/A No.: 2015-CP-02-2244

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2007-1,

Plaintiff,

vs.

PATRICIA OWENS A/K/A PATRICIA ANN OWENS; TAMMY M. BAILEY; SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES,

Defendants.

VERIFICATION

Katherine Ortwerth, being duly sworn, deposes and states:

That he/she is a Senior Loan Analyst with Ocwen Financial Corporation, whose indirect subsidiary is Ocwen Loan Servicing, LLC, servicer the Plaintiff, and as such is authorized to verify the foregoing and attached Responses and Objections To Defendants' Interrogatories on behalf of said company, that he/she has read said Responses and Objections To Defendants' Interrogatories and knows the contents thereof and that the same are true of his/her own knowledge, except as to the matters therein alleged upon information and belief, and as to those matters, he/she believes them to be true.

By: Katherine Ortwerth
Name: Katherine Ortwerth
Title: Senior Loan Analyst

SWORN TO AND SUBSCRIBED before me this 8th day of February 2017.

Notary Public
My Commission Expires: 5/31/2017

MARZALE A. FOSDICK
Notary Public - Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: May 31 2017
Commission # 13524630

CERTIFICATE OF SERVICE

I hereby certify that on ~~January~~ February 9, 2017 I served the above and foregoing Responses and Objections to Interrogatories on the following via U.S. Mail addressed to the following:

Drew Radeker, Esq.
PO Box 50143
Columbia, SC 29250

Attorney for Plaintiff

G. Benjamin Milam

FEB 13 2017

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
C/A No.: 2015-CP-02-2244

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2007-1,

Plaintiff,

vs.

PATRICIA OWENS A/K/A PATRICIA ANN OWENS; TAMMY M. BAILEY; SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES,

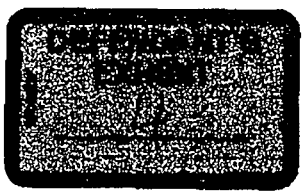
Defendants.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2007-1'S RESPONSES AND OBJECTIONS TO PATRICIA OWENS AND TAMMY BAILEY'S FIRST REQUESTS FOR PRODUCTION

Plaintiff, Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1 ("Deutsche Bank" or "Plaintiff") responds to the requests for production served by Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey (collectively, "Defendants") in the above captioned matter, and states as follows:

PRELIMINARY STATEMENT/GENERAL OBJECTIONS

1. Plaintiff objects to the Requests to the extent that they seek information, documents and things that are subject to any privilege, immunity, or obligation of confidentiality, including, without limitation, the attorney-client privilege and the attorney work product doctrine, on the grounds that they exceed the permissible scope of discovery under the South Carolina Rules of Civil Procedure or any local rule. These Requests are interpreted and



construed by Plaintiff as not encompassing any documents, things, or information protected by the attorney-client, work product, or other applicable privilege or protection unless otherwise stated. Any inadvertent identification or production of documents and things subject to such privilege or protection is not intended as a waiver of, and shall not waive, any such privilege or protection, and Plaintiff reserves its right to the return of all copies of any such document(s) and thing(s) inadvertently produced in response to the Requests. Plaintiff will construe and respond to the Requests in accordance with the South Carolina Rules of Civil Procedure or any local rule.

2. Plaintiff objects to the Requests to the extent that they purport to impose requirements beyond those imposed by the South Carolina Rules of Civil Procedure or any local rule.

3. Plaintiff objects to the Requests to the extent that they call for documents, things, or information that do not exist within the possession, custody, or control of Plaintiff or that are obtainable from some other source that is more convenient, less burdensome, or less expensive.

4. Plaintiff reserves the right to supplement its responses as more information is discovered through its own internal investigation and through discovery.

5. The response to each Request shall not be interpreted to concede the truth of any factual assertion or implication contained in the Request unless expressly stated. Plaintiff is providing these responses to the Requests without waiver of or prejudice to its rights to later raise objections to relevance, materiality, privilege or admissibility of any document produced in this response.

6. Plaintiff incorporates each of the foregoing General Objections into each and every response below; each General Objection shall have the same force and effect as if fully set forth below.

As far as Plaintiff is aware, according to information available to it at the present time, these responses are complete and correct. Plaintiff reserves the right to object to future discovery on the same or related matters and does not waive any objection by providing the information in these responses. Through Plaintiff's ongoing investigation and the formal discovery process, Plaintiff may learn additional facts, or may learn information that sheds new light on previously-known facts, or may discover the identity of additional persons and potential witnesses, or may learn that certain persons already known to Plaintiff have knowledge of which Plaintiff is currently unaware. For all these reasons, Plaintiff reserves the right to supplement these responses.

REQUESTS FOR PRODUCTION

1. All documents and statements identified in answer to any interrogatories in this action.

RESPONSE: Plaintiff will produce for inspection copies of the Note, Mortgage, Assignments of Mortgage, Assignment and Assumption Agreement, loan payment history, origination documents, servicing notes, correspondence, and other documents related to the loan at a time and location mutually agreeable to counsel.

2. All exhibits the Plaintiff has that are capable of being used at the trial of this case and any hearing herein.

RESPONSE: Defendant objects to this request as exceedingly vague and ambiguous, as it is not clear what documents are included in the request for "all exhibits . . . capable of being used at trial . . . or any hearing herein." Subject to and without waiving the foregoing objection, Plaintiff will produce for inspection copies of the Note, Mortgage, Assignments of Mortgage, Assignment and Assumption Agreement, loan payment history,

origination documents, servicing notes, correspondence, and other documents related to the loan at a time and location mutually agreeable to counsel.

3. Any and all statements, whether written, recorded, or otherwise, concerning the claims and defenses in the present lawsuit.

RESPONSE: Defendant objects to this request as overbroad and unduly burdensome as the request seeks "all statements . . . concerning the claims and defenses" without reference to whether the scope of production is proportional to the needs of the case. Subject to and without waiving the foregoing objection, Plaintiff will produce for inspection copies of the Note, Mortgage, Assignments of Mortgage, Assignment and Assumption Agreement, loan payment history, origination documents, servicing notes, correspondence, and other documents related to the loan at a time and location mutually agreeable to counsel.

4. A copy of any and all written or recorded statements made by any witness in this case.

RESPONSE: Plaintiff objects to this request to the extent it seeks documents already in Defendants' possession, including transcripts of depositions taken in Lexington County Case No. 2013-CP-32-2210. Subject to and without waiving the foregoing objections, Plaintiff states that it can provide transcripts of the foregoing depositions for inspection at a time and location mutually agreeable to counsel. No other recorded statements are known at this time. Plaintiff will additionally produce for inspection copies of correspondence between Plaintiff's loan servicer and Defendants related to the subject loan at a time and location mutually agreeable to counsel.

5. Any and all photographs, slides, video tape, motion pictures, film, data, data compilations, plats, sketches or diagrams associated with this litigation.

RESPONSE: Plaintiff objects to this request to the extent it seeks documents that are irrelevant to any claim or defense in this action, or that is not limited to documents proportional to the needs of the case. Subject to and without waiving the foregoing objection, Plaintiff will produce for inspection copies of the Note, Mortgage, Assignments of Mortgage, Assignment and Assumption Agreement, loan payment history, origination documents, servicing notes, correspondence, and other documents related to the loan at a time and location mutually agreeable to counsel.

6. A copy of each document referred to in the pleadings in this action.

RESPONSE: Plaintiff objects to this request to the extent it seeks documents already in Plaintiff's possession. Subject to and without waiving the foregoing objection, Plaintiff will produce for inspection copies of the Note, Mortgage, Assignments of Mortgage, Assignment and Assumption Agreement, loan payment history, origination documents, servicing notes, correspondence, and other documents related to the loan at a time and location mutually agreeable to counsel.

7. A copy all bills and/or other statements for the account subject of this action.

RESPONSE: Plaintiff objects to this request as overbroad and unduly burdensome, as the request for "all bills and/or other statements for the account" is disproportionate to the needs of the case. Subject to and without waiving the foregoing objection, Plaintiff will produce the loan payment history for the subject loan at a time and location mutually agreeable to counsel.

8. A copy of each check ever received by the Plaintiff or its predecessor(s) in interest with regard to the account subject of this action.

RESPONSE: Plaintiff objects to this request as overbroad and unduly burdensome, as the request for a copy of each check received by Plaintiff or its predecessors in interest for the account is disproportionate to the needs of the case. Subject to and without waiving the foregoing objection, Plaintiff will produce the loan payment history for the subject loan for inspection at a time and location mutually agreeable to counsel.

9. A copy of all assignment documents concerning the account involved in this action.

RESPONSE: Plaintiff objects to this request as vague and ambiguous, in that it is not clear what the request means by "assignment documents." Subject to and without waiving the foregoing objection, Plaintiff will produce copies of the Note, Mortgage, Assignments of Mortgage, and Assignment and Assumption Agreement for inspection at a time and location mutually agreeable to counsel.

10. A copy of all documents concerning how much the Plaintiff paid for the account which is the subject of this action.

RESPONSE: Plaintiff objects to this request as vague and ambiguous, as it is not clear what the request means by "paid for the account." Subject to and without waiving the foregoing objection, Plaintiff states that it will produce a copy of the loan payment history for the subject loan for inspection at a time and location mutually agreeable to counsel.

11. A thorough, readable payment history, understandable by an average member of the general public with average financial experience, for the account subject of this action.

RESPONSE: Plaintiff objects to this request to the extent it seeks to impose obligations greater than those required by the South Carolina Rules of Civil Procedure or other law. Subject to and without waiving the foregoing objection, Plaintiff states that it will produce a copy of the loan payment history for the subject loan for inspection at a time and location mutually agreeable to counsel.

12. All documents relevant to any claim or defense in this action that were received from any third party, regardless of whether a subpoena was utilized.

RESPONSE: Plaintiff objects to this request as vague, in that it is not clear what documents are sought by this request. Subject to and without waiving the foregoing objection, Plaintiff will produce for inspection copies of the Note, Mortgage, Assignments of Mortgage, Assignment and Assumption Agreement, loan payment history, origination documents, servicing notes, correspondence, and other documents related to the loan at a time and location mutually agreeable to counsel.

13. All documents that mention, describe, or otherwise relate to the charge-off of the account subject of this action.

RESPONSE: Plaintiff objects to this request as vague and ambiguous, in that it is not clear what the request means by a "charge-off" of the account. Subject to and without waiving the foregoing objection, Plaintiff states that the debt remains due and owing for the subject loan account.

14. All documents that mention, describe, or otherwise relate to the Plaintiff's treatment for taxation purposes of the account subject of this action.

RESPONSE: Plaintiff objects to this request as vague and ambiguous, in that it is not clear what the request means by "Plaintiff's treatment for taxation purposes of the

account." Plaintiff further objects to this request to the extent it seeks information that is irrelevant to any claim or defense at issue in this action.

15. All documents that mention, describe, or otherwise relate to the Plaintiff's treatment for internal accounting and/or bookkeeping purposes of the account subject of this action.

RESPONSE: Plaintiff objects to this request as it seeks production of confidential and proprietary matters that are irrelevant to any claim or defense at issue in this action.

16. All documents that mention, describe, or otherwise relate to the components of the debt the Plaintiff claims to be owed on the account subject of this action, and all documents that mention, describe, or otherwise relate to the Plaintiff's calculation of such components.

RESPONSE: **Plaintiff objects to this request as vague, in that it does not specify a date for calculation of the amount owed to Plaintiff. Plaintiff will produce for inspection copies of the Note, Mortgage, and loan payment history at a time and location mutually agreeable to counsel. Plaintiff can also produce a loan payoff statement through a specified date at a time and location mutually agreeable to counsel.**

17. All documents that support the Plaintiff's allegations in the first paragraph numbered 9 of the Plaintiffs complaint in this action.

RESPONSE: Plaintiff objects to this request as confusing, as there appears to be only one paragraph numbered "9" in Plaintiff's complaint. Subject to and without waiving the foregoing objection, Plaintiff states that it will produce for inspection documents related to the origination of the loan at a time and location mutually agreeable to counsel.

18. All documents that support the Plaintiff's allegations in the second paragraph numbered 9 of the Plaintiff's complaint in this action.

RESPONSE: Plaintiff objects to this request as confusing, as there appears to be only one paragraph numbered "9" in Plaintiff's complaint. Subject to and without waiving the foregoing objection, Plaintiff states that it will produce for inspection documents related to the origination of the loan at a time and location mutually agreeable to counsel.

19. A privilege log for each document withheld on any claim of privilege which includes at least the following:

a. date the document was created;

b. author(s) of the document;

c. description of the document, to include its nature (e.g. letter, memo, statement, draft of letter, report, etc.) and its subject matter;

d. original intended recipient, if any, of the document; and

e. all actual recipients of the document.

RESPONSE: Plaintiff objects to this request in that is seeks to impose obligations exceeding those required by the South Carolina Rules of Civil Procedure or other law. Subject to and without waiving the foregoing objection, Plaintiff states that it will provide a privilege log as to documents withheld or redacted on the basis of privilege, including a description of the material withheld or redacted.

20. All documents utilized in responding to any discovery requests of any party to this Litigation.

Plaintiff objects to this request to the extent it seeks to impose obligations exceeding those required by the South Carolina Rules of Civil Procedure or other law. Subject to and without waiving the foregoing objection, Plaintiff will produce non-privileged documents

reviewed in responding to Defendants' discovery requests at a time and location mutually agreeable to counsel.

Respectfully submitted this 9th day of February, 2017.

Bradley Arant Boult Cummings LLP

Michael C. Griffin (SC Bar No. 72868)
G. Benjamin Milam (SC Bar No. 80311)
214 North Tryon Street, Suite 3700
Charlotte, NC 28202
(704) 338-6000 (phone)
(704) 332-8858 (fax)
bmilam@bradley.com

Attorneys for Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2017 I served the above and foregoing Deutsche Bank National Trust Company, as Trustee for Novastar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1's Responses and Objections to Patricia Owens and Tammy Bailey's First Requests for Production on the following via U.S. Mail addressed to the following:

Drew Radcker, Esq.
PO Box 50143
Columbia, SC 29250

Attorney for Plaintiff



G. Benjamin Milam

ELECTRONICALLY FILED - 2017 Sep 14 12:20 PM - LEXINGTON - COMMON PLEAS - CASE#2016CP3203572

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
C/A No.: 2016-CP-32-03572

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2007-1,

Plaintiff,

vs.

PATRICIA OWENS A/K/A PATRICIA ANN OWENS; TAMMY M. BAILEY; SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES,

Defendants.

PLAINTIFF'S NOTICE OF AND MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANTS' COUNTERCLAIMS

Plaintiff, Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1 ("Deutsche Bank") moves for partial summary judgment as to each of the counterclaims filed by Defendants, Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey ("Defendants') pursuant to Rule 54 of the South Carolina Rules of Civil Procedure. This motion is set for hearing before the Lexington County Master in Equity, 205 East Main Street, Suite 204, Lexington, South Carolina 29072 at 11:00 am on September 19, 2017, or as soon thereafter as the motion may be heard. In support of its motion, Deutsche Bank states as follows:

1. The claims in this matter arise out of a $60,400.00 mortgage loan given by NovaStar Mortgage, Inc. ("NovaStar") to Defendant Owens in 1998 and subsequently assumed by her daughter, Defendant Bailey, in 2001. The mortgage loan is evidenced by a promissory note dated June 15, 2016 ("Note") and secured by a mortgage ("Mortgage") encumbering Defendants'

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real property located at 111 Andrew Court, Gaston, SC 29053 (the "Property"). See Aff. of Nichelle Jones at ¶¶ 9-10, Ex. 1.

2. NovaStar assigned the Note and Mortgage to Deutsche Bank as reflected by the Assignments of Mortgage dated October 6, 2011 and May 1, 2012 and recorded in the office of the Richland County Register of Deeds in Deed Book 15105, Page 248 and Deed Book 15513, Page 296, respectively. See Aff. of Nichelle Jones at ¶12, Ex. 1.

3. On June 27, 2013, Defendants filed suit against Deutsche Bank and other parties in a separate action under Case Number 2013-CP-32-2210 (the "2013 Action"), alleging that Deutsche Bank was liable for NovaStar's alleged failure to comply with the notification requirements in S.C. Code § 37-10-102.

4. The Note matured on July 1, 2013. At the time of maturity, the loan had an unpaid principal balance of $48,587.09. Defendants defaulted under the terms of the Note and Mortgage by failing to pay the balance due on the note after maturity. See Aff. of Nichelle Jones at ¶14, Ex. 1.

5. Following Defendants default under the terms of the Note, Deutsche Bank's loan servicer, Ocwen Loan Servicing, LLC ("Ocwen") attempted to inform the Defendants of alternative solutions to avoid foreclosure. On or around August 23, 2013, Deutsche Bank's loan servicer sent Defendants a letter informing them of potential loss mitigation options, including potential options for a modification under the Home Affordable Modification Program ("HAMP"), a proprietary modification, short sale, and deed-in-lieu of foreclosure. See Aff. of Nichelle Jones at ¶16, Ex. 1.

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6. Deutsche Bank served its answer in the 2013 Action on September 26, 2017, less than 90 days from the date the loan went into default and only 34 days after the date of Ocwen's August 23, 2017 foreclosure intervention letter.

7. Deutsche Bank filed the Complaint in this action on October 19, 2016, seeking foreclosure of the Property under the terms of the Note and Mortgage.

8. Defendants served their Amended Answer and Counterclaims on or around December 9, 2016, alleging three counterclaims against Deutsche Bank: (1) for a declaratory judgment that Deutsche Bank's mortgage is unenforceable; (2) for liability under S.C. Code § 29-3-320 for failure to enter a satisfaction; and (3) for alleged violation of S.C. Code § 37-10-102. As part of their counterclaims, Defendants assert that Deutsche Bank's foreclosure action was required to be brought as a compulsory counterclaim in the 2013 Action.

9. Contrary to Defendants' assertions, Deutsche Bank's foreclosure action was not required to be brought as a compulsory counterclaim in the 2013 Action because it does not arise out of the same transaction or occurrence as the subject matter of the Defendants' claims in that action, which alleged statutory violations of S.C. Code 37-10-102 by the originating lender. See Complaint in 2013 Action, Ex. 2.

10. Even if Deutsche Bank's foreclosure action were deemed to arise out of the same transaction or occurrence as the 2013 Action, SCRCP 13 should be construed to avoid conflict with federal foreclosure intervention requirements, including requirements that a loan servicer attempt to inform a borrower of the availability of loss mitigation options and prohibitions on foreclosure referral for loans less than 120 days delinquent. See, e.g., 12 CFR §§ 1024.39, 1024.41(f). To the extent Rule 13 is construed to require a lender to foreclose at the time it files

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its answer when the loan is less than 120 days delinquent, or before the lender has completed efforts to conduct pre-foreclosure intervention, it is preempted by federal law.

11. Additionally, the enabling act for the South Carolina Rules of Civil Procedure states that a rule of procedure may not be "construed to affect the substantive legal rights of any party to any civil litigation in the courts of this State but shall affect only matters of practice and procedure." 1985 S.C. Act No. 100 § 3 ("Act 100"). Application of Rule 13 in the manner prayed for by Defendants would limit the substantive legal rights of a creditor by forcing the creditor to foreclose while eliminating other legal remedies for default, such as modifying the terms of the Note, refinancing the loan at maturity, or temporarily delaying enforcement of the Note while pursuing these and other loss mitigation alternatives.

12. Furthermore, Rule 71 permits the lender to proceed before the master-in-equity when it files a foreclosure action. Allowing the borrower to compel the lender to file its foreclosure as a counterclaim would permit the borrower to deprive the lender of this forum.

13. Finally, forfeiture of the mortgage interest under the circumstances of this case would be grossly unjust and inequitable, and the compulsory counterclaim rule should be construed to avoid such a forfeiture where a lender makes bona fide effort to pursue pre-foreclosure intervention as an alternative to foreclosure. For each of the foregoing reasons, Defendants are not entitled to a declaratory judgment that the mortgage is unenforceable.

14. Deutsche Bank is entitled to summary judgment on Defendants' claim for failure to enter a satisfaction under S.C. Code § 29-3-320 because it is undisputed that Deutsche Bank has not received full payment or satisfaction of the underlying debt, as required for this claim.

15. Deutsche Bank is entitled to summary judgment on Defendants' claim under the Attorney Preference Statute, S.C. Code § 37-10-102, because Defendants do not allege that

Deutsche Bank originated the mortgage loan. Additionally, this claim is barred by the statute of limitations provided by S.C. Code § 37-10-105 because it has been brought subsequent to the maturity of the loan. Finally, Defendants have submitted evidence showing that the required closing attorney and insurance disclosures required by § 37-10-102 were made prior to the subject loan closing. Specifically, the loan records show that Defendant Owens signed a South Carolina Notice of Rights Concerning the Selection of an Attorney and Insurance Agent dated May 15, 1998 – one month prior to the loan closing on June 15, 1998. See Aff. of Nichelle Jones ¶ 8, Ex. 1.

WHEREFORE, for the reasons stated above, Deutsche Bank respectfully requests that this Court grant summary judgment on each of Defendants' Counterclaims, and for such other and further relief as the Court deems proper.

Bradley Arant Boult Cummings LLP

/s/ G. Benjamin Milam
Michael C. Griffin (SC Bar No. 72868)
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Attorneys for Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1

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ELECTRONICALLY FILED - 2017 Dec 08 9:52 AM - LEXINGTON - COMMON PLEAS - CASE#2016CP3203572

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS CASE NO. 2016-CP-32-3572
Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1, **Plaintiff,** **vs.** **Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,** **Defendants.**	**DEFENDANTS' MOTION TO ALTER OR AMEND RELIEF ORDERED UNDER S.C. CODE ANN. § 29-3-320**

YOU WILL PLEASE TAKE NOTICE that Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey (hereinafter "Bailey and Owens") hereby move before this court pursuant to Rules 52(b) and 59(e), SCRCP, as well as pursuant to all other applicable law, in the above-captioned action for an order that alters or amends the relief granted to Bailey and Owens under S.C. Code Ann. § 29-3-320 in the court's order filed November 28, 2017, as noted herein.

As grounds for this motion, Bailey and Owens note the following:

1. Bailey and Owens are quite pleased with the subject order in all respects other than the one narrow aspect subject of this motion. The language of S.C. Code Ann. §§ 29-3-310 and -320 provides that, when the circumstances making a mortgagee liable under those statutes for failure to record a mortgage satisfaction document after due demand are met, the mortgagee that failed to record the satisfaction is liable for the monetary relief set out in S.C. Code Ann. § 29-3-320. No exception to that principle is given in any South Carolina statute or case law.

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2. The court here seemed concerned that whether the subject mortgage was satisfied was not something that was clear to the Plaintiff (hereinafter "Deutsche Bank") at the time that the demand for a satisfaction to be recorded was made. The court perceived that this remained unclear to Deutsche Bank until the court's decision that the mortgage was satisfied as a matter of law by operation of res judicata. Accordingly, the court provided a mechanism for Deutsche Bank to exempt itself from the monetary liability S.C. Code Ann. § 29-3-320 requires.

3. Under S.C. Code Ann. § 29-3-320, however, any such lack of clarity or a mortgagee's confusion about satisfaction or good faith belief that a mortgage was not satisfied does not relieve the mortgagee from liability under the statute when the conditions for liability are met, as they are here. When the conditions are met, proper demand is made, and more than three months passes from the demand without the recording of a satisfaction document, liability attaches under S.C. Code Ann. § 29-3-320. Good faith arguments, even about unsettled law, are not a defense and do not provide an exception.

4. A decision of the Supreme Court of South Carolina illustrates this. In Regions Bank v. Strawn, 413 S.C. 206, 776 S.E.2d 72 (2015), the mortgagee had a good faith belief in the validity of arguments about whether the conditions of S.C. Code Ann. §§ 29-3-310 and -320 were met with respect to an open-ended line of credit mortgage. Regions Bank, 413 S.C. at 209-12. The questions presented by that case had never been squarely answered before. Id. Neither the trial court, the Court of Appeals, nor the Supreme Court gave the mortgagee an "out," however. Id. at 209, 212. The conditions of the statute were met, and that meant liability for the monetary relief provided under S.C. Code Ann. § 29-3-320, because that is what the statute says. Id. at 209-12.

ELECTRONICALLY FILED - 2017 Dec 08 9:52 AM - LEXINGTON - COMMON PLEAS - CASE#2016CP3203572

5. It is the same here. Bailey and Owens are entitled to the monetary relief provided under S.C. Code Ann. § 29-3-320. This court should alter or amend its November 28 order to so provide, to direct the recording of satisfaction document within a shorter (but reasonable) time frame, and to direct that a hearing be set to determine the amount of the monetary relief to which Bailey and Owens are entitled under S.C. Code Ann. § 29-3-320. The court's order should remain the same in its other respects.
6. This motion is also supported by the record and may be further supported by any memoranda that Bailey and Owens may submit.

The undersigned has consulted with opposing counsel about the bringing of this motion, and further consultation about it would have served no useful purpose.

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
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ATTORNEY FOR DEFENDANTS
OWENS AND BAILEY

Columbia, South Carolina
December 8, 2017

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF LEXINGTON

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2007-1,

Plaintiff,

vs. CASE NO. 2016-CP-32-03572

PATRICIA OWENS A/K/A PATRICIA ANN OWENS; TAMMY M. BAILEY; SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES,

Defendants.

TRANSCRIPT OF PROCEEDINGS - MOTION HEARING FOR PARTIAL SUMMARY JUDGMENT

DATE: September 19, 2017
TIME: 10:56 a.m.
LOCATION: Lexington County Judicial Center
205 East Main Street
Lexington, SC
BEFORE THE: Honorable James O. Spence
REPORTED BY: KIMBERLY T. POWER, CR

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THE COURT: We here on Deutsche vs. Owens. It's 2016-CP-32-3573. I believe we are here on defendants' motion for partial summary judgment.

MR. RADEKER: That's correct, Your Honor. The plaintiff also has a motion for partial summary judgment. I'm sure there will be a lot of overlap. They are seeking summary judgment on our counterclaims. But, in any event, we made ours first. So we'll go first, if it please the Court.

Your Honor, I suspect you probably remember something about this case. This is one in which my clients, Patricia Owens and Tammy Bailey, were -- had been sued for foreclosure on mortgage by Deutsche Bank, were previously plaintiffs in a case brought against a number of defendants, among them Deutsche Bank. And one of the things that they sought in that case was relief under South Carolina Code Section 37-10-105(c) which provides relief for violation of the attorney preference statute coupled with unconscionability. One of the things that a court can do if plaintiff prevails on such a claim is to render the underlying note and mortgage unenforceable obligations and that's what has brought us here.

We are here seeking summary judgment

on the plaintiff's foreclosure claim saying they can't win that as a result of res judicata because foreclosure would have been a compulsory counterclaim in that case. And we are here seeking summary judgment on our first counterclaim which seeks a declaratory judgment that this mortgage does not encumber this land or is otherwise unenforceable and for summary judgment on liability, but not damages, that as not to the remedy on the claim for violation of the failure to record satisfaction statutes.

I think the facts clearly establish that a demand under the statute was made by Ms. Bailey saying please go record satisfaction. I don't think there's going to be any dispute about that. That's been admitted. So I guess the question really comes down to what I guess we really both see as a matter of law. If there's a factual dispute here, probably neither I, nor Mr. Milam, guess what it is, these motions.

Okay. When is a counterclaim compulsory? If the counterclaim for foreclosure was compulsory, the failure to raise it in a previous action would have barred it. It's all based on the same default, maturity of the subject note. A counterclaim is compulsory in one of two ways. The

courts have recognized two situations where it is. Where it arises out of the same transaction or occurrence. That's the subject of the plaintiff's claim. And where it could affect the enforceability of the plaintiff's claim. Here we have both with respect to the Bailey vs. Novastar case.

The foreclosure claim arose out of the creation of the note and mortgage which was the subject of that case. It also, you know -- if the foreclosure claim had been pled and prevailed upon, it would have been completely inconsistent for Deutsche Bank to have won on that claim and for my clients to have won on their claim under 37-10-105(C). That could have produced utterly inconsistent results. So it could have affected the enforceability of my client's claim. So that's why that's barred. It's barred by res judicata as has been thoroughly briefed and everybody has given their opinions on that.

Why are we entitled to a declaration that the mortgage doesn't encumber the land or is otherwise unenforceable? Because it's barred by res judicata. Now, why are we entitled to summary judgment in our favor on liability under the failure to record satisfaction statute? Those --

THE COURT: Hold on. Let me stop there. So you are arguing on the first portion of it that it was legal and compulsory as opposed to equitable or -- or legal and permissive and you satisfy the BADD and the DAV and then the latest case, Salon Proz. Legal and compulsory wasn't pled. You win.

MR. RADEKER: Well, actually, their foreclosure claim would be legal. It would be equitable, but it was compulsory.

THE COURT: Compulsory?

MR. RADEKER: Right. It was a compulsory counterclaim. They are obligated to plead it under Rule 13A. They didn't do it. There's a significant line of cases that says in that situation, what would have been that counterclaim is barred by res judicata in a later action which brings us to where we are today.

Moving onto the failure to record satisfaction statutes. Really it comes down to interpreting the word "satisfy" and what that means. Pay and satisfied don't mean the same thing and they could not have been contemplated to have meant the same thing by legislature when they enacted the statute because they are separately listed. Our

jurisprudence about how to interpret statutes tells us that the legislature does not include words for meaningless surplusage, that courts are required to give effects to all the words in the statutes unless it would reach an absurd result. Surely payment is the most common form of satisfaction out there, but it's not the only form of satisfaction. Here this mortgage is functionally in the same position that it would be in as if it had been paid off. It can't be enforced as against this property. We're entitled to a declaration that it doesn't encumber it anymore. And so we have met the definition of satisfied under the statute.

And that's basically our motion. I've looked at the plaintiff's return to our motion. They state in there something about federal regulations that would have required the servicer of this, which is Ocwen, to wait for 120 days after sending out notices saying you may be entitled to loss mitigation options before bringing a foreclosure action.

THE COURT: Right.

MR. RADEKER: Those regulations did not go into effect until January 10, 2014, almost four months after the time that Deutsche Bank served

its answer in the case. So although that's a very interesting argument, and I don't know where it would end up if it were on the facts of this case, it's not on the facts of this case. We're talking about law that wasn't the law at the time in question. And so I would view that kind of as a red herring that that wasn't the law at the time and it wouldn't really have any bearing no matter how it would come out, perhaps, differently on facts today.

Deutsche Bank cites a bunch of law from other jurisdictions. I say that's irrelevant. We've got the Carolina First vs. BADD case, the DAV court case, the Salon Proz case, and they tell us what's compulsory and what's not. We don't need to look to other jurisdictions for that.

Further, they rely on some records from Ocwen and we attached to our reply memorandum a consent order that Ocwen, the servicer of the debt, entered into with the Attorney General's office in New York under which they admit, among other things, that they regularly give borrowers incorrect or outdated information, send them backdated letters, unreliably track data for investors and, importantly, maintain inaccurate records and that their core servicing function rely on inadequate systems. And

so I would note to the extent that they try to rely on anything that comes from Ocwen's records, there's a serious trustworthy problem with those given with what Ocwen has said. I mean, they signed the consent order about their own records there.

And so we note for those reasons, we are entitled to the summary judgment we seek. I don't see how further factual development could assist the court. I mean, possibly you do, but I don't see it.

THE COURT: All right. What I want to make sure is, is we had originally scheduled your motion and then y'all's was filed -- when did you file your motion for summary judgment?

MR. MILAM: Your Honor, we served it, I believe, 11 days ago. It was --

THE COURT: All right. This is plaintiff's motion, notice of motion for partial summary judgment as to defendants' counterclaims. That's electronically filed. It was filed September 14th.

MR. MILAM: That's correct, Your Honor. It was served, I believe, September 8th. We attempted to file it in paper form. Of course, they do not take paper filings anymore. I believe the

rule says that it must be served ten days prior to the hearing and it must be filed, I believe, within five days thereafter.

THE COURT: All right. Y'all have --

MR. RADEKER: I've consented to that being heard today.

THE COURT: -- consented. I thought you had said you consented and I just wanted to make sure because -- I wanted to make sure what we were doing.

MR. RADEKER: That's correct. For efficiency sake, no problem with me for these folks to be heard at the same time.

THE COURT: All right. So let's hear your response to his summary judgment and then we'll argue -- we'll do yours.

MR. MILAM: Yes, Your Honor. And before I forget, or so I don't forget, I do want to object to the introduction of evidence concerning the consent order entered between Ocwen and the New York Department of Financial Services in 2014 under Rule 402, 403, and 408. 408, you know, bars evidence concerning compromising settlement negotiations. There is case law in South Carolina saying that evidence related to settlements is not admissible.

We believe that falls under that rule. Even if it did not, the evidence of a consent judgment entered in an unrelated case is irrelevant to this case.

THE COURT: I'm going to -- without getting to the underlying is it barred straight on evidence, I'm not putting much weight on it because that's like saying I've sped once. I admit our couriers drive fast. Well, that doesn't mean every courier drives fast. I mean, it has a nice flavor to like the orphan, you know. I'm throwing myself on the mercy of the Court. I'm an orphan. How did you get to be an orphan? I killed my parents. I mean, it kind of has that. But, again, I'm not considering it. I mean, I don't think it's relevant without even getting to the underlying evidence.

MR. MILAM: And I just didn't want to have an argument and not waive any objection.

THE COURT: Sure.

MR. MILAM: Your Honor, as to whether this is the foreclosure logically related to the claims in the 2013 action, I would make a slight distinction with what Mr. Radeker said to be a compulsory counterclaim, it has to arise out of the same transaction or occurrence. What the case law has said is that South Carolina has adopted the

logical relationship test to determine when it arises out of the same transaction or occurrence. The South Carolina Courts have not defined all of the contours of the logical relationship test for determining when a counterclaim is logically related to the plaintiff's claims.

What they have clearly said is that if you have a counterclaim that would affect the enforceability of the plaintiff's claims, then that has to be -- that has to be brought as a compulsory counterclaim. So in the DAV case and the Salon Proz case, the borrowers in those cases were saying you, the lender, agree to modify the loan at some point; and, therefore, it's not in default. And the courts in those cases said if you're going to make that claim, that is a compulsory claim because it is a --

THE COURT: Affects the enforceability of the note and mortgage.

MR. MILAM: Exactly. Now, the Courts haven't articulated the rationale behind this, but it's perfectly consistent with that rule. Perfectly consistent is the traditional rule, is that the party cannot split its defenses. Just like you can't split your claim, you can't split your defenses and say I'm going to plead some of my defenses in this case; and

then after the case is decided, I'm going to go out and get a second bite at the apple and bring -- maybe bring a claim for injunction based on a defense that I could have raised in the first action. That rationale would not apply to this case and to Deutsche Bank's foreclosure because foreclosure is not a defense to the statutory claims that Ms. Owens and Ms. Bailey raised in the 2013 case.

In the 2013 case, they were alleging that the originating lender, Novastar Mortgage, had violated the requirements of the attorney preference statute and had engaged in unfair and deceptive trade practices in connection with the loan. There was no issue as to whether Ms. Owens signed the note and mortgage, there was no issue as to whether the loan was in default. Those issues were not in that case. So for Deutsche Bank to come in and prove those things, to prove, yes, there was a valid debt, yes, the debt was in default, that would not have been a defense to the plaintiff's claims. And so under the -- under what the South Carolina courts have said in DAV court, Salon Proz, BADD, this case does not fall -- does not have similar facts.

What I understand Mr. Radeker to say is he is making sort of the reverse argument which is

if I plead something in the 2013 case, that could be a defense to the foreclosure and then you have to bring the foreclosure as a compulsory counterclaim. The 2013 case, there was an allegation that the loan terms were unconscionable. That certainly could be pled as a defense to the foreclosure and which is why you have -- you have a collateral estoppel rule. So if that issue is decided in the 2013 case one way or the other, the collateral estoppel rule would apply if it's raised as a defense later in another case.

The compulsory counterclaim rule is different. Again, the way that the courts have articulated it, it's consistent with the idea that you can't split your defenses. You can't force the plaintiff to prove his case in one -- prove his claim in one case, come back in a second case and prove it again. Deutsche Bank filing its foreclosure in this action does not require the plaintiff to come back and relitigate the statutory claims they raised in the 2013 case. So we don't think that the logical relationship rule applies here.

If the court did decide that the foreclosure was logically related to the claims in the 2013 action, we, nevertheless, do not think that Rule 13 should be interpreted to require foreclosure

under the circumstances of this case. Here on our motion for partial summary judgment, we've attached an affidavit stating that Deutsche Bank's loan servicer, Ocwen, provided a letter to the defendants providing options for loss mitigation shortly before it filed its answer in this case. So they were seeking out loss mitigation as an option to avoid foreclosure in the case.

The South Carolina Supreme Court and the federal government have put in requirements to require lenders to try to engage in pre-foreclosure intervention prior to going through with the foreclosure. The South Carolina Supreme Court has done that in the context of foreclosures. The federal government has specified certain regulations, again, designed to say lender, if you have a loss mitigation option, if you allow --

THE COURT: Stop right there. All right. Stop right there because this is a fine, fine hair. All right. Here is what I want to know factually: The CFPB's or the 2011 order say you can't do both. You can't litigate and be doing loan modification stuff. The way the 2011 order was set up was it says before you start an action, you've got to certify that you've tried to do loan modification.

The attorney has to file the affidavit, right? We've done the foreclosure intervention. We've offered it. Now, what happens very often is they offer it, people don't do anything, they go onto foreclosure, they file a lawsuit, and then another servicer, another assignment, and they continue through the process doing different modifications. Foreclosure suit can continue on. You just can't sell it. I mean, you can't sell it.

So I want to make sure what I'm hearing you say here. Are you saying we couldn't have filed the foreclosure because we had not filed our initial foreclosure intervention certificate that was required under South Carolina?

MR. MILAM: No, Your Honor, that's not what I'm saying. I'm not saying that the 2011 order prevented us from filing the foreclosure. I'm not saying that the federal regulation prevented us from filing the foreclosure because, as Mr. Radeker said, the rule had been written and published at that point, but it had not yet gone into effect.

THE COURT: And we're not going to get into preemption of federal versus state because nobody -- that's the elephant in the room right now and we don't want it to start here in Lexington. All

right. But, again, what I'm saying is under our 2011 order, if y'all were going to foreclose, one of the prerequisites to foreclosure was filing the foreclosure intervention that we had offered it and either they didn't answer or they did not qualify. Had that occurred by the time it was time for you to answer and possibly file your counterclaim for foreclosure?

MR. MILAM: I don't think that the 2011 order applies to this situation. What I do think is that both the 2011 order and all of the --

THE COURT: Back up. Why would the 2011 order not apply? Because you've said they were in foreclosure. They were obviously in default, right?

MR. MILAM: They were in default. There was no foreclosure action filed.

THE COURT: I understand they were in default which is what triggered the loan modification letter because you don't normally do a loan modification -- most people don't do a loan modification request unless they are in default.

MR. MILAM: That's true. It was the default that triggered the pre-foreclosure intervention letter.

THE COURT: It triggered that.

MR. MILAM: Right.

THE COURT: So normally what happens is, is the person is in default. It triggers this here's what your options are. Then if they don't comply with it, you file the certificate, the foreclosure intervention, that you either plead it or you attach it with your complaint. You're supposed to do that under the 2011 order before you file your complaint.

So what I'm asking is, is was this a situation -- Mr. Radeker, help me out here. Was it a situation where they couldn't file it because they were still in that initial foreclosure intervention portion?

MR. RADEKER: No, and here is why. What the 2011 administrative order requires is that the notice of right to foreclosure intervention be served with the pleading that asserts the foreclosure claim. So all they would have had to do is attach a notice of right to foreclosure intervention or serve separately at the same time with their answer and counterclaim and that would have complied with the order.

THE COURT: So what you are arguing

is, is that if they sent it and they are in the process of considering it the first time, they can still file a foreclosure complaint?

MR. RADEKER: Yes.

THE COURT: All right. Because I'm not sure that's what the order says or was intended to say. What I thought it was supposed to do was to stop, as Chief Justice Toal said, dual tracking, give them an opportunity to modify it before you file the lawsuit which is why the foreclosure intervention thing that I always get served, they didn't comply, we're ready to go.

MR. RADEKER: But when it is served? It's served with the summons and complaint in a typical foreclosure case. So it's served at the time that the plaintiff asserts its foreclosure claim. What it stays is the time the servicer responds in pleading to that while that's going on. So it doesn't prevent the party who is seeking foreclosure from asserting their foreclosure claim.

THE COURT: They could have filed the foreclosure regardless of what the 2011 order said? That was not a bar?

MR. RADEKER: They could have done this -- and I'll tell you what they could have done

and it would have complied with the 2011 order. They could have served an answer and counterclaim and served with it a notice of right to foreclosure intervention.

MR. MILAM: And I don't want to make Mr. Radeker's argument for him. I've read over the order and I don't disagree with that characterization. What I do believe is that both the order, the federal regulations, other federal programs, reflect a public policy that we want lenders to try to work out defaults through some process other than through foreclosure. And that's the argument that we're making. First of all --

THE COURT: It's a public policy that we shouldn't have had to have started foreclosure while we were talking to them.

MR. MILAM: That's correct, Your Honor.

THE COURT: We ought to be exempted from this rule because we were trying to resolve it which reflects the public policy.

MR. MILAM: And the South Carolina Court of Appeals has said that the rule of res judicata, which is what is being relied on here, that that should not be applied rigidly or

mechanistically where it would lead to a result that is either unfair or contrary to public policy, and that's the Mr. T and Ms. T case says that.

Here where the lender has sent out a letter soliciting the borrower to apply for loss mitigation options 34 days before it files its answer, I think public policy should not -- is such that the lender should not be required to file a foreclosure action. And in this case if Rule 13 applies -- which we don't think it does -- but if it applies, an exception should be carved out for this circumstance.

Additionally, Your Honor, that federal rule that says you can't foreclose within 120 days of default, it is in place today. Rule 13 has not changed. So if the Court says Rule 13 requires the lender to file a compulsory counterclaim of foreclosure under these circumstances, it sets up a conflict with the rule as it exists today.

THE COURT: With whose rule?

MR. MILAM: With the federal regulation. If Rule 13 applies in that way, it sets up a conflict with the federal rule as it exists today. And our argument is Rule 13 should be construed in such a way as not to conflict with those

federal requirements.

THE COURT: All right. So what you're saying is, is while it wasn't in place when it was for y'all to do it, right now if a lawsuit was filed today and you filed your answer and counterclaim tomorrow under certain circumstances, you would be violating the federal reg because you didn't wait 120 days?

MR. MILAM: That's correct, Your Honor. And I think if the courts say this is a compulsory counterclaim under these circumstances, it sets up a conflict. We're asking for an interpretation that does not lead to that conflict.

And, finally, Your Honor, we think that both borrowers and lenders have a substantive right to opt for a loss mitigation as an alternative to foreclosure. Enacting the -- the statute enacting or authorizing the Rules of Civil Procedure says the Rules of Civil Procedure are procedure and should not affect the substantive rights of the parties. If a borrower files an action saying you, the lender, have violated this statute, that should not force the lender to file a foreclosure when that may be something that neither party wants. And I would say the vast majority of the cases when a borrower is

filing a lawsuit against their lender, they are not filing that with the intention of trying to compel a foreclosure. And we, again, think that Rule 13 should not be interpreted in a way to require that.

THE COURT: Well, the other way, though, if you do file a foreclosure, they've got to file all their stuff or they lose their opportunity to do it.

MR. MILAM: If it's a defense to the -- if it is a defense to the foreclosure, that is certainly true. If they are pleading something that's a defense to the foreclosure, then it would be compulsory. Same would be applied to us if --

THE COURT: Even if they came in and said we were talking? Since we were talking, we shouldn't have had to have done this defense. I mean, are you saying in essence if they start it, we get an exception because we're trying to resolve it? If we start it, they got to plead it. They can't come in -- because that's what they always come in and say. I mean, all the pro se people come in and say the reason we didn't file it is because we were talking with, you know, the servicer and there's never any -- you don't have any document or any proof and you have to rule. Well, you had to file it. You

had to do it. So you're saying there should be a carved-out exception for the bank, but not necessarily the consumer?

MR. MILAM: No, I don't think I'm saying that. I'm saying that --

THE COURT: Are you saying there should be a carved-out exception both ways that if people are talking about it, you should have your requirement to file compulsory stuff stay because of public policy?

MR. MILAM: I know that there's a public policy to -- for the lender not to foreclose. I honestly don't know how that applies to a borrower's counterclaim. I know that there is a public policy that says --

THE COURT: Hold on. But the public policy for the lender not to foreclose is tied to the concept that we want to talk about it and resolve it, right?

MR. MILAM: Right.

THE COURT: So if the borrower is saying the same thing, we were talking about it to resolve it which is why we didn't file this defense, you would say then, then the same public policy thing should apply to a homeowner arguing that as it does

the bank because it's the same public policy. We don't want foreclosure while we're talking.

MR. MILAM: Right. I think regardless of who it is, we don't want -- we don't want to compel a foreclosure while the parties are trying to work it out.

THE COURT: And either side could raise that.

MR. MILAM: I think that's probably right.

THE COURT: So if it's an exception, it would be both sides of the table. It would be goose and gander.

MR. MILAM: I think that's probably true. I don't usually see it come up in that context. The ways I've seen the issue come up is in the DAV case, the BADD case, the Salon Proz case. Usually the issue is, you know, the borrower has raised their claim and is it triable by a jury or is it triable by a judge. And usually the lender is arguing that it's permissive. Usually they are arguing, no, it's a permissive counterclaim or it's equitable, either one. Either it's permissive or it's equitable. And the borrower is saying, no, it's compulsory. Therefore, I'm entitled to a jury. I

don't think there's been an inconsistency on that argument.

THE COURT: Well, no. But what I'm saying is, is but you are arguing to create on one level of analysis a public policy exception.

MR. MILAM: That's correct, Your Honor.

THE COURT: And I'm trying to make sure I understand the parameters of it is that it fits on both sides of the table, not just for the lender, but for the homeowner because the public policy is the same thing.

MR. MILAM: Right. I think that if it would compel -- that the rule should not be applied in such a way as to compel a foreclosure if that is not what the parties want. If the parties are trying to work it out or the lender has, as in this case, sent out a solicitation in good faith, I don't think the compulsory counterclaim rule should be applied in that circumstance.

THE COURT: Okay. All right.

MR. MILAM: On the counterclaim for the mortgage satisfaction under 29-3-320, as Mr. Radeker has pointed out, the statute says it refers to full payment or satisfaction. The Diechman

case by the South Carolina Supreme Court says that the statute should be strictly construed because it's a penal statute that can, under some circumstances, lead to a windfall and the Court said it has to be strictly construed. We don't think that the defendants' argument is a strict construction of the statute. We cited the Ecclesiastes Production Ministries case which Mr. Radeker says, well, it says payment and satisfaction. Therefore, they must mean two different things.

The Ecclesiastes Production case does give two definitions for satisfaction. One definition of satisfaction is payment in full. A second definition of satisfaction is where a substitute obligation is offered to satisfy the original obligation. That would be like an accordance satisfaction. So maybe I breached my original obligation to pay the note, but I've offered this substitute performance that's been accepted, that satisfies -- that satisfies my obligation even though it wasn't payment in full.

So I think there are two possible definitions that would be perfectly sensible to say either of those things should result in satisfaction of the loan, either of those things should result in

the -- in a satisfaction being recorded for the mortgage. The question that the Court ultimately has to answer is what was in the legislature's mind when it enacted this statute. Since we argued the motion to dismiss, I've looked at some of the legislative history. This statute providing a penalty for failure to record a mortgage satisfaction actually goes back to 1817 and the language, at least as regards to this issue, has remained pretty much unchanged. It refers to full payment or satisfaction or to whom a legal tender has been made, which I believe is exactly the same language that is in the current statute.

Now, unfortunately, there is no -- there are no committee reports from 1817 to tell us what the legislature meant. There is no record that I've been able to find or debate or anything that would allow us to say what was in their mind. As I have told Mr. Radeker, I went down to the South Carolina law school library yesterday --

THE COURT: Did y'all check Pomeroy and all of that, the old 1820/1819 jurisprudence books?

MR. MILAM: What I was able to find -- I did not check Pomeroy. Maybe that's the

next step. I provided this to Mr. Radeker, but I did find a legal dictionary from 1792. To be honest, I had no idea there were legal dictionaries back then, but there apparently were. And, of course, I have no knowledge to know what legal dictionaries the South Carolina legislature had in 1817, but this legal dictionary from 1792 defines satisfaction as the giving of recompense for an injury done or the payment of money due on bond, judgment, or other security. It goes on to talk about the context of wills. But we would submit that the definition of satisfaction hasn't changed from --

THE COURT: You're saying money has got to pass hands?

MR. MILAM: There has to be an agreement of some kind that this satisfies you. This satisfies you, the obligee, either you have gotten payment in full or we've agreed to some substitute obligation. Now, what Mr. Radeker is arguing is this concept should be expanded to include situations in which the payment has been discharged by operation of law, as I understand the argument. I have not seen any indication of that circumstance being called a satisfaction by the South Carolina courts. We don't refer to it as a satisfaction when a bankruptcy court

discharges a debt because the lender hasn't -- they haven't actually been satisfied.

So we would contend that this is not a strict construction of the statute. It's a very expansive construction of the statute, and we believe as to that claim we're entitled to summary judgment.

THE COURT: Let me ask you a hypothetical -- y'all both a hypothetical on that. A couple years ago with loan closings -- we all got this more than a couple years ago. But when laser printing started, we learned down in Myrtle Beach that people were laser printing checks and showing up purporting to be people closing loans in Myrtle Beach.

So I guess what I'm asking you, let's say we have a situation where Jimmy Spence goes into an office and gets a loan and it ain't me. He gets a loan, you give him money, you record a mortgage, you put a mortgage on record on my property out in scenic Southern Lexington County. All right. There's a mortgage there. You gave the imposter money. It wasn't me. I learn one day there's a mortgage on my property. I file a declaratory judgment and say it wasn't me. I didn't participate in it. I didn't know about it. Take the mortgage off of it. You

gave money to somebody who wasn't me. You dealt with a bad guy. He frauded you. Take the mortgage off. Satisfy it. And I demand -- and I made a demand for you to satisfy the mortgage. A court orders you to do it and you didn't do it.

So what you're saying then is, is the only time you've got an obligation to take that mortgage off record or the only time you suffer a penalty would be money had to pass hands or you had to agree to some other form of payment. It couldn't be a judge or a court ordering you to take something off and you not doing it.

MR. MILAM: Well, first of all, I would say that ordinarily what the person who has been frauded in that situation would do is maybe they would file a declaratory judgment action, but they would typically also file a quiet title action and the quiet title judgment would serve the same purpose. It clears -- it clears that obligation. It shows that that obligation doesn't apply to that piece of property. As to --

THE COURT: But if part of that -- if you said sign the satisfaction because you've got all of these ROD people or the clerk's office who read all that stuff different and some of them require a

satisfaction, not just a judge's order, that they can tender -- put their stamp on it and then you say I've got no obligation to do -- I have no -- I cannot do it and not worry about this person suing me and get damages because the only time I have to do it is when I got paid money?

MR. MILAM: I would say that that's the scenario under which this statute provides for a penalty. It may be that the legislature should make the statute broader and there may be very good reasons to do that. I would say that is not -- that's not what they have said at this point. They've said it applies in these particular situations which the Supreme Court says has to be strictly construed.

THE COURT: I mean, I think we all have to agree the reason the statute -- the reason the statute, whenever it started, was designed was because you didn't want mortgages affecting people's property rights on record if they had been paid or satisfied, right? I mean, that's the public policy. If it doesn't apply, get it off record so you can sell -- so you don't, I'm not saying slander the title, but you don't affect somebody's property. And, obviously, the most common thing is we paid you,

send us the satisfaction so we can record it and you don't. But what you're saying is that because it's a court telling you to do it as opposed to payment, the statute doesn't apply?

MR. MILAM: I guess I would say that the legislature has, at least at this point, dealt with that scenario because the statute -- it's been a while since I've looked at it -- but it allows an attorney, including the borrower's attorney, to file a notice stating that the debt has been satisfied. Now, obviously you wouldn't -- no attorney would want to do that if there was any chance that it was going to be in question. But if you had a court order saying it must be satisfied, then the current law allows for -- would allow for the borrower's attorney to file that satisfaction.

THE COURT: That's if the closing attorney -- it's the closing attorney who wrote the check and they've got it in their trust account and it's come back from the bank and they know it's -- there's a way to do that because the banks still weren't doing it because loans were being sold and stuff like that.

MR. MILAM: Right.

THE COURT: But what you're saying is

limited to that, a judge's order doesn't -- we're clear for a judge's order because that wasn't contemplated when we did the statute?

MR. MILAM: Right. Well, and obviously we're not in that scenario, but I think a strict construction of the statute would require payment in full satisfaction or tender. Maybe if there's a judicial determination that the obligation has been satisfied, not just discharged by law, maybe if there's some judicial determination on that, then that would apply. But, you know, I can't -- I can't speak, you know -- it's difficult to speak to that issue because it's not what we're presented with. But I would say that the statute should apply specifically to satisfaction, payment in full, or tender the amount due.

THE COURT: Okay. And a court order is not a satisfaction?

MR. MILAM: I don't think that a --

THE COURT: A court order directing you is not a satisfaction?

MR. MILAM: I would say that a bankruptcy court's order of discharge is not a satisfaction. A court order might be a satisfaction if there's been a determination that the loan has

been satisfied, but I don't think that every order -- for example, a bankruptcy court order that might discharge the obligation, I don't think that that's the same as satisfaction.

THE COURT: All right. Yes, sir.

MR. RADEKER: Thank you. Speaking kind of to this point and maybe to respond to a few other things that Deutsche Bank has argued. Definition of satisfy truly includes payment, but it also includes to discharge and to extinguish and that's from Black's Law dictionary. I mean, I suppose you can find law dictionaries all day long, but certainly that's a definition.

THE COURT: Two other sources for y'all to look at are Cravendale and Verner's and Modern Mortgage Law. It last came out, I think, in 1978, but that has been cited by the United States Supreme court as a learning treatise in that area. If y'all want to both come by and check out my copy, you certainly can. Also, Restatement of Property Third Mortgages that was done in 1998, that may have some stuff in it too. In addition to Pomeroy.

MR. RADEKER: Thank you. I would say that as to the arguments about public policy and Rule 13(A) shouldn't apply in this situation. One of

the public policies under the 2011 administrative order, which is the one that was in effect at this time, could have been satisfied simply by serving an answer and counterclaim with a foreclosure claim -- and serving a notice of right to foreclosure intervention at the same time. So there's no inconsistency.

THE COURT: Could have done both.

MR. RADEKER: Right. There is no inconsistency. In fact, probably if they had answered and counterclaimed and not served the notice of right to foreclosure intervention at the same time, they would have violated the order.

But, in any event, to basically make a carve-out for foreclosure claims from the general principles of Rule 13(A) and res judicata would require legislative action and we're not there. I mean, that's essentially what Deutsche Bank is asking for is we want an exception for mortgagees with regard to this certain type of claim with no authority for that exception.

If the legislature wants to decide to do that and thinks that per the public policy, that's up to them. But public policy can't trump the plain meaning of a Rule of Civil Procedure that says at the

time you served your responsive pleading, you have a claim that arises out of the same transaction or occurrence, you need to assert it as a compulsory counterclaim or lose it forever.

We note -- I mean, pulling language from the Salon Proz case, the claim there was determined to be compulsory not because it necessarily would affect the loans enforceability, but because to use the court's words, it could affect the enforceability of the loan.

THE COURT: Here's what I want both of you to do on Salon Proz. And I don't know if either of you have a copy of the case with you, but I seem to recall Salon Proz basically said this: They pled 8, 9, 10, 11, 12 things. At least one of them was legal compulsory, period. No discussion. Just say it is because it was stated to be in an earlier case. Then it said we've got all these other things that we're going to remand back to the trial court to make a determination if it's legal and compulsory. i would like for y'all to check when you do your memos and see if they've got a new trial order on that.

MR. RADEKER: I am counsel for Salon Proz in that case and I'll be happy to inform the court as to what the status is right now.

THE COURT: Isn't that --

MR. RADEKER: The Court of Appeals said at least one of these counterclaims that is argued to be legal and compulsory is and said, for example, look at the Unfair Trade Practices Act claim and said why it was.

THE COURT: Right.

MR. RADEKER: So basically I think trial court, when we get to having that hearing, which we haven't had that yet, it's going to have a hard time if it wants to determine that the Unfair Trade Practices Act claim is not a legal and compulsory counterclaim.

THE COURT: What I'm saying is there is a whole list of other things that they can kick back to the trial court to make determination on.

MR. RADEKER: Right. They essentially left as to all the other claims to say it's possible for trial court to determine that it's permissive, it's possible the trial court to determine that it's compulsory. But just as to that one claim, they gave us a little analysis of like we say it's compulsory and here is why we say it is. It's the only case that interprets Carolina First vs. BADD.

THE COURT: I understand. And it wasn't very deep. Now, another question about that: When it said back to circuit court or back to trial court, does that mean it's going back to general circuit court or it's going back to the master?

MR. RADEKER: If I remember right and as I read it and my impression is consistent with the opinion was that it's, you know, the order of reference is vacated and undone. It's sent back to the, quote/unquote, regular general docket on circuit court for a hearing to eventually be had. I don't know why it hasn't been done yet. Probably someone should follow up on that.

THE COURT: I'm just curious because that could help us all on both sides of the bench because it's got all the stuff that's always pled. It would be good to get a catalog ruling, you know, on all the bifurcation stuff.

MR. RADEKER: That's where that is. I'm trying to think if I had anything else that I particularly wanted to say. Oh, the Ecclesiastes Production Case doesn't purport to give an exhaustive list of what satisfy means.

THE COURT: I understand that.

MR. RADEKER: And that's really all I

had to say in reply to Mr. Milam.

THE COURT: How long do y'all want to submit your proposed orders? Do this --

MR. RADEKER: Do you want us to do memos, proposed orders, or both?

THE COURT: I would rather do proposed orders. Here's what I want y'all to do: Ben, you're plaintiff, right?

MR. MILAM: That's correct.

THE COURT: So plaintiff, historically in Lexington, gets the e-mail. So by Friday, I want you to do a global e-mail that says we're going to swap our proposed orders between attorneys on this date. We're then going to send our game film orders to you by this date. All right. So what I want y'all to do is I want y'all to swap orders first in Word and then write me a good objective proposed order. All right? Don't just send me -- for example, we're doing a thing on order writing in November in Lexington and the first thing I'm going to show -- if you go onto You Tube right now, there's a thing I typed it in that says Atlanta Falcons Super Bowl Highlight Reel, and you turn it on and they are sacking Brady and they're scoring. And if you watch it, you think who won the game, right?

That's kind of how the orders are.

So what I'm trying to do is get y'all to read each other's order and then send me like a game film. I'm arguing this, they're arguing this, court should find this because, like that.

Now, I'll note a couple of things because, as y'all know, there is always, always two lines of cases on every issue. Let's talk about public policy. Point over here is, oh, you can't do it judge. That's legislative. Right? Don't do it. That's a legislative thing. Right? And there's a line of cases that say that. Hands off, we can't do it.

There's also a line of cases that says the public policy as shown in the statute and in these cases is as follows. We're not making new public policy. We're interpreting existing stuff. All right.

So parse those cases because you just can't say don't do it because you're making public policy because, for example, in the -- what are the cases? Forum choices cases. An example in those, when you sai I signed the case, I signed the contract in South Carolina that says tried the case in Florida. One of the things you go through is, you

know, is Florida law close to our law or does it violate our public policy. That's one way to say no, still try in South Carolina even though you've got a contract clause that says do it here. That's a public policy thing we do. I mean, that's a court -- that is a court-generated thing that does public policy. So parse those cases. There are cases that say we can't do it and there are cases that say we can.

On one hand we're saying interpret broad, you know, create this public policy. On the other hand we're saying keep it narrow. All right. So talk about the breadth and the length because you can't say I want to create this huge, broad, wide public policy just for banks, and then say but I just want to interpret satisfaction for one definition out of four lines that's in Black's Law dictionary because this is all relating to public policy. It fundamentally is. I mean, it's fundamentally related to public policy and mortgage foreclosures.

So what I'm trying to say is, is try to be in consistent in your arguments. Don't say be broad, jump off, high dive on this issue, but be -- you know, stay in the shallow end in the kiddie pool on this one. Link it to where it's a logical

consistent ruling from your argument.

Does that kind of make sense?

MR. RADEKER: I will try to do that. I don't if I will succeed.

THE COURT: I understand.

MR. MILAM: I think that makes sense.

THE COURT: That's as best I got here.

MR. MILAM: I think us exchanging the orders will help with that a lot.

MR. RADEKER: And that's a really good idea. I might start suggesting that, really.

THE COURT: Well, I'd like to claim credit for it, but I was talking with a judge -- another judge and I said, you know, we don't have law clerks and we're getting these, sometimes, not the best orders. And it's requiring me to call, you know, or send Kim an e-mail saying will you please send me the 400-page transcript, condensed version, so I can go back and scroll through it because, you know, you're not citing pages, not doing stuff, and basically we're getting highlight reels. It's just bam, bam, bam, bam, bam, and nothing in the -- I don't remember the game like that. It happened a little differently. So he said, well, you know what

you ought to do? Make them swap first. And I went yeah.

You know, because it's on Word. You can pull them up, put them side by side. And if you want to make a real long order, just cut and paste or at least summarize, but at least have it where you've got the same -- you know, because it also puts us in the position of you argued 12 points, you only argued 8. And then if I sign an order that's got 8 or 12, one of you are going to have a problem on appeal because it can look like you didn't respond to an argument and you don't want that. I mean, you don't want to -- you don't want find out you have a problem up there because of something you didn't respond to adequately here.

Does that kind of make sense?

MR. RADEKER: (Counsel nods head.)

MR. MILAM: (Counsel nods head.)

THE COURT: So I think swapping ought to be a good thing.

MR. RADEKER: I agree.

THE COURT: Just do an e-mail and y'all do the time format. Just keep it reasonable. I mean, I realize everything is going on, but we want a time frame that y'all swap and then y'all look at

each others and then send me like the integrated or what I call the game film order.

MR. MILAM: And then I can copy Leslie on that e-mail just to keep apprized of it.

THE COURT: Yes. When you send that global e-mail out, you send it to me and to him. And then what I do is I print it and I put it on the file and then we put it in a calendar thing, a tickler kind of thing.

Can y'all think of anything else?

MR. RADEKER: No.

THE COURT: Okay. Thank you.

(The proceeding was adjourned at 11:57 a.m.)

CERTIFICATE OF REPORTER

I, Kimberly T. Power, Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed by official seal this 4th day of October, 2017, at Lexington, Lexington County, South Carolina.



Kimberly T. Power, Court Reporter
My Commission Expires: 4/24/2025

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	CASE NO.: 2016-CP-32-03572
Deutsche Bank National Trust Company, as Trustee for Novastar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1,	)	
Plaintiff,	)	
v.	)	
Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,	)	
Defendants.	)	

MASTER IN EQUITY MOTION HEARING

****

Wednesday, January 31, 2018

9:03 a.m. - 9:23 a.m.

The Motion Hearing Before the Master In Equity for Lexington County, The Honorable James O. Spence, was taken before Christine A. Cortright, a notary public in and for the State of South Carolina, commencing on Wednesday, January 31, 2018, at Lexington County Courthouse, 205 East Main Street, Lexington, South Carolina.

APPEARANCES

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Also Present:

Tammy Bailey

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EXHIBITS

(There were no exhibits marked to this hearing.)

STIPULATIONS

This hearing is being taken pursuant to the South Carolina Rules of Civil Procedure.

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THE COURT: All right. We're here on Deutsche v. Owens. It's 2016-CP-32-3572. We're here on two motions. We're here on plaintiff's motion to stay the order for summary judgment pending a ruling here. And we're here on defendant's motion to alter and amend. Plaintiff's counsel is Mr. Milam. Defendant's attorney is Mr. Radeker. I'm going to grant the motion to stay the order on summary judgment, the procedural one, to protect everybody's right to appeal.

I think this was -- unless y'all tell me differently, we had substantial discussion about this and this is what everybody I had understood had agreed to.

MR. RADEKER: I guess our position was, you know, that we would understand, you know, the need to stay the operation of the order. It's a -- I don't know how long this is necessarily going to take. We filed an affidavit of Ms. Bailey basically to note that the court can require like bond or security conditions for this.

THE COURT: Right.

MR. RADEKER: And maybe talk more about like what those conditions maybe ought to be rather than whether that motion is going to get granted. So at -- at -- anyway, that's our position on it. I don't want to jump ahead or anything, so.

THE COURT: Okay. Well, I'm going to grant the motion, so -- on that because I think -- I think that your motion should stay everything until there's a ruling on that.

MR. RADEKER: Okay.

THE COURT: So -- all right.

MR. MILAM: Thank you, Your Honor.

THE COURT: So just grant -- you draft an order on the motion and then send it around and y'all both take a look at it, and then send an email in that says we agree with the motion and we're going to e-file it, the one on the stay.

MR. MILAM: Okay. Okay. Certainly.

THE COURT: All right. Now, as to defendant's motion for reconsideration, I have read defendant's motion, I have read plaintiff's memo in opposition. I have read this morning plaintiff's reply to defendant's motion in opposition. So I have read everything. And it's your motion Mr. Radeker.

MOTION

BY MR. RADEKER:

MR. RADEKER: Thank you, Your Honor. Given that you have read everything, I will try to be brief in my presentation, and simply say I incorporate everything we've submitted in writing on this.

Here all of the conditions for the mortgagee's liability under Section 29-3-320 are met. The plaintiff seems to take the position that the mortgage wasn't satisfied until this court determined in this case that it was. Rather, what this court determined in this case was that the end of the Bailey v. Novastar case is what satisfied the mortgage.

The language in the statute is "shall forfeit." "Shall" is ordinarily mandatory. Is that -- that the plaintiff now shall forfeit to Defendants Bailey and Owens the certain sums enumerated in the statute. We're not trying to relitigate anything here. The issue of modifying the relief under 29-3-320 did not come up until after the parties had submitted their proposed orders in a telephone conference with Your Honor in which you indicated that that was how you intended to rule. And so we're not trying to just redo something we did

before. That issue didn't exist until the order came down.

I would compare this to a negligence case. There may questions in a negligence case of disputed liability about whether, say, the defendant in a car wreck was actually negligent. But we don't, simply because it's unknown how the case is going to come out, allow that defendant kind of an out to escape some of their liability for negligence simply because it was open question and hadn't yet been determined whether they were negligent.

Here, you know, yes, there may have been an open question and a debatable one about whether the effect of the previous case satisfied this mortgage, but --

THE COURT: All right. Let's -- let me --

MR. RADEKER: Yeah.

THE COURT: -- stop there on your -- on your analogy, on your negligence analogy.

MR. RADEKER: Uh-huh.

THE COURT: All right. Let's go back to that. Let's say we're here on a negligence case and we're arguing that there was a wreck -- it's 2018 -- in 2016, all right. And either the judge or the jury finds for the plaintiff that in 2016 they were

negligent and they enter a judgment. When did damages and interest start accruing from? Do you go all the way back to the -- to when the negligence was alleged to have occurred or do you do it from the date of the judgment?

MR. RADEKER: You stated damages and interest, and so I want to talk about those --

THE COURT: Well -- well -- well, you get your damages that you incurred, but when the judgment is entered, that's when it becomes a legal -- a legal finding and there is an award and interest starts accruing from that point based on the damages you've proven.

MR. RADEKER: Understood. That's when the judgment is entered.

THE COURT: Right.

MR. RADEKER: But the judgment declares that the negligence happened then.

THE COURT: Right.

MR. RADEKER: Not that now you're negligent --

THE COURT: Right.

MR. RADEKER: -- as of right now.

THE COURT: Right.

MR. RADEKER: So you were negligent back then.

THE COURT: Right.

MR. RADEKER: And that's what this court has done here

is then say I'm not satisfying the order, it says the effect of the end of the Bailey v. Novastar case was to satisfy the mortgage. I misspoke just a second ago.

THE COURT: Okay. Right.

MR. RADEKER: Is, you know -- and that's what's happened here.

I guess what I would say is this. Is that we're very satisfied with Your Honor's order in every respect except for this one tiny one. Is this statute says "shall forfeit" and it doesn't provide any exceptions. It doesn't provide an exception for, well, it was debatable whether a court was going to determine this to have been satisfied. It was debatable in the Regents Bank v. Strom case whether the court was going to determine that -- that -- that a request for satisfaction had been made. But that didn't save the litigant there, and it shouldn't save Deutsche Bank here. There is simply no exception to liability in the statute if the conditions are met as they are. Thank you.

THE COURT: All right. Thank you. Mr. Milam.

REPLY

BY MR. MILAM:

MR. MILAM: Yes, Your Honor. What the court has

always had to do is construe the intent of the legislature. And in this case, it's to construe the legislative intent on this novel issue of whether a mortgage can be satisfied by operation of law.

The statute in this case, as we've talked about at a previous hearing, goes back to 1817. The language has substantially unchanged since then. What can definitely be said is that in 1817 the legislature had no particular contemplation as to how the statute would -- would interact with Rule 13, the compulsory counterclaim rule, because the Rules of Civil Procedure didn't come into being until more than 150 years later.

Where the court is having to interpret the statute on an issue that the legislature did not think about, could not have thought about or considered, we submit that the court should apply the statute in the manner that's consistent with the -- the purpose behind the statute and, as the court of appeals has said, consistent with fairness and justice, because that is also relevant in determining what is the legislative intent as to when to apply this penal statute.

The supreme court and court of appeals have said that this particular statute, because it's a

penal statute, has to be strictly construed. What the court of appeals said in Kinard is that the legislative purpose behind the statute was to incentivize mortgagees to record a satisfaction once they no longer have an interest in the mortgage, once they no longer have a dog in the fight, they should not leave the mortgage just out there in the land records, they should go ahead and satisfy it.

It would be unfair to require the mortgagee to satisfy its mortgage when it doesn't know if the mortgage is going to be determined to be enforceable or unenforceable. Deutsche Bank has had an interest in the mortgage up to the point that the court decided the mortgage is unenforceable, it is going to be deemed satisfied as a matter of law. And as the court said in its summary judgment order, up until that point, the question of whether it was enforceable, the question of whether it was satisfied remained open.

Because the court has to construe the statute consistent with fairness and consistent with the intent of the legislature, in this case Deutsche Bank's obligation, the most proper construction of the statute is that that arose at the point the court determined that the mortgage is unenforceable

and was satisfied. And there has been no compelling reason given for the very broad interpretation that's argued by the defendants. And we ask that the ruling stand.

THE COURT: All right. Thank you. And I don't -- let me chat a bit because I under -- I understand both of your arguments and both of your -- your logic in it and -- but -- but here's where I have a problem with plaintiff's construction of this. All right. In all the cases that we've talked about with this statute, there's always been a payment. There's always been a payment or a payment tendered. The question was is if it was a payment with an equity loan. We paid off the equity loan; does it apply to that? There was always a payment. There was a tender. There was an offer of a tender. They -- a recognizable act that everybody recognized was a payoff event. If I write a check that says "payoff" and mail it, that's a recognizable legal event, an offer of a tender to pay off. Here -- and I may have left some off -- theoretically, we've got at least three vents that can be argued under your theory that liability should attach.

Let's go back to the first lawsuit, the very, very fist lawsuit. All right. When you pled the

action and there was no counterclaim pled, you could theoretically argue that from that point, 31 days later, or whenever it was when they had to plead or counterclaim and foreclose because it was mandatory, since they didn't, that could have been the date. Right? Or it could have been when the case was over, when there was a -- when the case was over. Or it could have been alleged when you filed the second suit and they did nothing after the first suit to appeal it. Or you could have argued when there was a judicial determination. So my problem is is not the statute but it's the satisfaction event. Because there was no satisfaction event until there was a judicial determination that the failure to plead was in effect a compulsory counterclaim. Because had I ruled it was not a compulsory counterclaim, would it have been satisfied? It wouldn't have been satisfied, right? It would not have been satisfied until -- unless y'all appealed and they said it was.

So the difference in the cases cited and the argument is is you're right about damages go back to here, but in all those cases we've had a tender, we've had a legally recognizable here's your money to pay it off. The equivalent to here's your money

to pay it off in this case was the judicial determination that this was a compulsory counterclaim. And that didn't happen till the ruling. Now, all the facts are back here, but until that ruling occurred, in my mind, that ruling is the equivalent of the check tendered.

Does that make sense to both of y'all? Now, I'm not asking you to agree with it, but that's -- that's what I was trying to say in the first hearing, and that's what I think now. Mr. Radeker?

MR. RADEKER: I understand what you're saying. I don't agree with it.

THE COURT: I understand.

MR. RADEKER: The event of satisfaction is the unappealed end of the Bailey v. Novastar case. That's when that happened. That's what this court determined in the November 28th order.

THE COURT: Why can't -- why can't -- why couldn't you theoretically on your -- on the theory you're arguing now, why could you not say it goes back even further than that? Why can you say that it doesn't even go back to when they didn't counterclaim?

MR. RADEKER: Well, their failure to counterclaim was key, but that's not what produced the res judicata effect. That case could have been dismissed without

prejudice. There's all kinds of things that could have happened.

THE COURT: I understand.

MR. RADEKER: Right. But it --

THE COURT: But when --

MR. RADEKER: -- wasn't. And it's when it ended --

THE COURT: Right. But --

MR. RADEKER: -- and that --

THE COURT: -- but your argument -- your argument was they didn't counterclaim and foreclose.

MR. RADEKER: Right.

THE COURT: That was a compulsory counterclaim.

MR. RADEKER: Right.

THE COURT: So 31 days after they failed to do that, arguably, is when your right -- when it all ended because they didn't do it, because three years later or two years later there was a judicial ruling that their failure to do that was not -- was -- was -- caused the mortgage to be satisfied because it was compulsory. Why couldn't you go back to when they -- the day after they should have counterclaimed?

MR. RADEKER: Well, because at that point that case isn't over. It's still going on. They could amend in a certain foreclosure as a counterclaim. The case could have been dismissed without prejudice, in

which case there would be no res judicata effect.

THE COURT: Right.

MR. RADEKER: And the fact that they didn't plead the counterclaim wouldn't matter. But that's not how it ended.

THE COURT: Right. But none of that happened.

MR. RADEKER: Right.

THE COURT: But none of that happened. So under the facts of the case as it came out, they didn't plead, the case was over. Why do you say you had to wait till it was over? Why couldn't you just say I get to go all the way back to when they didn't plead it?

MR. RADEKER: Because res judicata won't get created until there's a judgment ending the Bailey v. Novastar case.

THE COURT: Right. Till there's a legal determination.

MR. RADEKER: So --

THE COURT: Right?

MR. RADEKER: Right. And that happened.

THE COURT: Okay.

MR. RADEKER: And there is no question that that happened.

THE COURT: Right.

MR. RADEKER: That didn't happen on November 28th,

2017. That happened when Bailey v. Novastar ended. that's when that happened. That is when satisfaction occurred.

Also, I'd note this. We are not here on Deutsche Bank's motion to reconsider. This court has already ruled Bailey and Owens are entitled to summary judgment in their favor as to Deutsche Bank's liability to them under South Carolina Code 29-33-320.

THE COURT: Right. It all --

MR. RADEKER: So -- yeah.

THE COURT: Because --

MR. RADEKER: And what that statute says is that they shall forfeit these sums of money.

THE COURT: Right.

MR. RADEKER: And there is only one lawful thing that can come out of that, and that is to set a hearing to determine how much that's going to be.

THE COURT: I -- I agree.

MR. RADEKER: And --

THE COURT: But hold on. Because as I understand it, they have a certain amount of time to satisfy the mortgage. The question is is when we make the determination of money, right?

MR. RADEKER: Well, the time that they've got to

satisfy the mortgage runs under the statues from when the request is made. And it's three months from then. They didn't go record a satisfaction. They can't now say, "Well, but, you know, we didn't understand. It was a novel issue. We didn't know how it was going to work out." If the legislature wanted to create an exception for something like that, they could and would have written that into the statute. But they did not do that. It's like any case where you don't know how it's going to come out, you don't get to come in and argue, say, "Well, I shouldn't get the full brunt of being found against because I didn't know how I was going to come out at the beginning." That's not how it works.

It's not like we're here saying, arguing, that they were frivolous to take this position. All this stuff would totally matter at that point. But we're not saying that. We're saying, hey, as far as I know they totally had a good faith belief that they would win this case, but they haven't. And what we're entitled to is what we get if we win on this point, and we have won on it.

THE COURT: All right. Y'all haven't filed a Rule 59 but I -- I understand we have to determine where the

damages accrue from. That's the issue. Yes, sir.

MR. MILAM: And, Your Honor, what -- what we are here on is to determine when did the legislature intend to trigger Deutsche Bank's obligation. And the distinction that I would make is that this is a penal statute. It's intended to penalize the mortgagee for not doing what it's supposed to do. And we have never had a case in South Carolina, certainly not any appellate decision, on what it means for there to be a satisfaction.

THE COURT: I understand both of y'all. Both of y'all are arguing correctly case law on legislation. Legislation, statutory legislation, is always written backwards. It's written from a certain point in time based on all the facts right here and maybe, if we've got some reporter's comment from 1719, say, "And it would cover these situations." I don't think we've got any of that. So we have cases all the time because we have different fact patterns than the legislation was predicated upon. So that's what courts are for. Courts are -- courts are here to do that. You can't say that if they meant to do it they would -- they would have imagined every scenario, so you can't -- because that's just -- that's not realistic. You're -- you know, you're

both citing the correct case law and statutory stuff or statutory construction. I understand all that.

But I'm going to respectfully deny the motion because I think the -- the determination was when there was a judicial determination that that occurred. And so draft, Mr. Milam, draft the motion, draft an order on it, and then whatever y'all do, whether you appeal or not appeal, then file your cross-appeals. However you handle it, handle it. But I just think that that's the correct ruling, respectfully to all.

MR. RADEKER: Thank you.

MR. MILAM: Thank you, Your Honor.

(The hearing was concluded at 9:23 a.m.)

CERTIFICATE

Be it known that I, Christine A. Cortright, do hereby certify that the motion hearing before The Honorable James O. Spence, Master-in-Equity for Lexington County, South Carolina, was held at the aforementioned place and time; that the foregoing hearing was taken down by means of stenomask with backup; and that I was then and there a notary public in and for the State of South Carolina and that by virtue thereof, I was duly authorized to administer an oath.

I further certify that the foregoing transcript represents a true, accurate and complete transcript of said hearing. This transcript may contain quoted material; said material is transcribed as read or quoted by the speaker.

I further certify that I am neither employed by nor related to any of the parties in this matter nor their counsel; nor do I have any interest, financial or otherwise, in the outcome of this action.

Witness my hand and seal this 20th day of February, 2018.

Christine A. Cortright

Christine A. Cortright
Notary Public for South Carolina
My Commission Expires: 08/16/2026

ELECTRONICALLY FILED - 2017 Sep 14 11:41 AM - LEXINGTON - COMMON PLEAS - CASE#2016CP3203572

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
C/A No.: 2016-CP-32-03572

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2007-1,

Plaintiff,

vs.

PATRICIA OWENS A/K/A PATRICIA ANN OWENS; TAMMY M. BAILEY; SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES,

Defendants.

AFFIDAVIT IN SUPPORT OF DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2007-1'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The undersigned, being first duly sworn, deposes and says:

1. I am employed by Ocwen Financial Corporation, as a Senior Loan Analyst, and I am authorized to make the representations contained in this affidavit. I am of the age of the majority, and under no disability. The statements made in this affidavit are based on my personal knowledge.

2. For convenience, the following party or parties are referred herein as "Borrowers": Patricia Owens a/k/a Patricia Ann Owens and Tammy Bailey.

3. Ocwen Loan Servicing LLC ("Ocwen") currently services the loan at issue in this lawsuit (the "Loan").

4. I have reviewed the relevant books and records in the possession, custody or control of Ocwen relating to the matters set forth in this affidavit. The information in this Affidavit is taken from Ocwen's business records.

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5. The business records were made in the ordinary course of Ocwen's business, and it was the regular course of Ocwen's business to make such records. Said records relative to this matter were made at the time of the transactions, occurrences or events referred to therein or were made within a reasonable time thereafter, by, or from information transmitted by, persons with knowledge of such transactions, occurrences, or events.

6. To the extent that the business records were created by prior servicers, holders, investors, owners, lenders, and/or vendors, those business records have been integrated into Ocwen's business records, consistent with regular business practices and Ocwen's policies and procedures. The business records are kept and relied upon as a regular practice and in the ordinary course of business conducted by Ocwen.

7. Based upon my experience and in the performance of my job duties, I am familiar with the manner and procedure in which the documents referenced above are created and maintained.

8. Patricia Owens a/k/a Patricia Ann Owens ("Owens") signed a "South Carolina Notice of Rights Concerning the Selection of an Attorney and Insurance Agent" ("Attorney Preference Form") dated May 15, 1998. Attached as Exhibit A is a true and correct copy of the Attorney Preference Form.

9. Owens executed a Promissory Note dated June 15, 1998, in the amount of $60,400.00 in favor of NovaStar Mortgage, Inc. ("NovaStar.") Attached as Exhibit B is a true and correct copy of the Promissory Note.

10. Owens also executed a Mortgage dated June 15, 1998 encumbering the real property located at 111 Andrew Court, Gaston, South Carolina 29053, securing the payment obligations under the Promissory Note. Attached as Exhibit C is a true and correct copy of the

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Mortgage.

11. On February 7, 2001, Borrowers executed an Assignment and Assumption Agreement providing that Tammy Bailey would assume and pay the indebtedness evidenced by the Note and that her interest in the Property would be subject to the Mortgage. The Assignment and Assumption Agreement did not release liability as to Owens. Attached as Exhibit D is a true and correct copy of the Assignment and Assumption Agreement.

12. NovaStar endorsed the Note in favor of First Union National Bank ("First Union") and assigned the Note and Mortgage to First Union as reflected by the Assignment of Mortgage dated January 19, 1999 and recorded in the office of the Lexington County Register of Deeds in Deed Book 5196, Page 132. First Union subsequently assigned the Note and Mortgage back to NovaStar as reflected by the Assignment of Mortgage dated October 12, 2000 and recorded in the office of the Lexington County Register of Deeds in Deed Book 6020, Page 72. NovaStar assigned the Note and Mortgage to Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1, as reflected by the Assignment of Mortgage dated October 6, 2011 and recorded in the office of the Lexington County Register of Deeds in Deed Book 15105, Page 248. Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 assigned the Note and Mortgage to Deutsche Bank, as reflected in the Assignment of Mortgage dated May 1, 2012 and recorded in the Office of the Lexington County Register of Deeds in Deed Book 15513, Page 296. True and correct copies of the foregoing assignments are attached hereto as Composite Exhibit E.

13. The Promissory Note is currently in the possession of Deutsche Bank through its designated custodian.

14. The Promissory Note matured on July 1, 2013 with an unpaid principal balance of

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$48,587.09. Borrowers did not pay the sums due under the Promissory Note at or subsequent to maturity, and are in default due to nonpayment according to the terms and conditions of the aforesaid Promissory Note and Mortgage.

15. The account is presently due for the July 1, 2013 payment, together with interest from July 1, 2013, late fees, and other charges authorized by the Promissory Note and Mortgage. The outstanding principal balance is $48,587.09. There may be additional costs, expenses and credits charged to this account. A true and correct copy of the loan payment history is attached as Exhibit F.

16. Following Borrowers' default under the terms of the Note, the servicer attempted to inform the Borrowers of alternative solutions to avoid foreclosure. On or around August 23, 2013, Ocwen sent Borrowers a letter informing them of potential loss mitigation options, including potential options for a modification under the Home Affordable Modification Program ("HAMP"), a proprietary modification, short sale, and deed-in-lieu of foreclosure. A true and correct copy of the August 23, 2013 letter is attached as Exhibit G.

17. As of the date of this Affidavit, the efforts undertaken by the noteholder and/or servicer have not produced a mutually agreeable resolution to the delinquency.

FURTHER AFFIANT SAYETH NAUGHT.

[SIGNATURE ON FOLLOWING PAGE]

Dated: 9/7/17

Affiant Signature: _____

Print Name: Nichelle Jones

Title: Senior Loan Analyst
Ocwen Financial Corporation, Inc.

STATE OF FLORIDA
COUNTY OF ORANGE

The foregoing instrument was acknowledged and sworn before me this 7th day of September, 2017, by Nichelle Jones, as Senior Loan Analyst of Ocwen Financial Corporation, Inc., who is personally known to me or has produced FLDL J520632678110 as identification.

_____
NOTARY PUBLIC for State of Florida
My Commission Expires: 1/21/2021

MARCELA M. MANNING
NOTARY PUBLIC
STATE OF FLORIDA
Comm# GG035421
Expires 1/21/2021

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Capital City
Mortgage Co. Inc.
2000 Park Street Suite 102 Columbia, S.C. 29201

SOUTH CAROLINA NOTICE OF RIGHTS CONCERNING THE SELECTION OF AN ATTORNEY AND INSURANCE AGENT

DATE: 5/15/98

SELECTION OF ATTORNEY

I (We) have been informed by Capital City Mortgage Co., Inc., that I (We) have the right to select legal counsel to represent me (Us) in all matters of this transaction relating to the closing of this loan.

Name of Attorney _____ Telephone # _____

Address _____ City\State\Zip _____

Borrower Patricia A. Owens Co-Borrower _____

Having been informed of this right, and having no preference, I asked for assistance from Capital City Mortgage Co. Inc., and was referred a list of acceptable attorneys. From this list I select:

Name of Attorney _____ Telephone # _____

Address _____ City\State\Zip _____

Borrower _____ Co-Borrower _____

SELECTION OF INSURANCE AGENT

I (We) have been informed by Capital City Mortgage Co., Inc., that I (We) have the right to select an insurance agent to furnish required insurance on subject property. I select:

Insurance Agent _____ Telephone # _____

Address _____ City\State\Zip _____

Borrower Patricia A. Owens Co-Borrower _____

Having been informed of this right, and having no preference, I (we) asked for assistance from Capital City Mortgage Co. Inc., and was referred a list of qualified agents. From that list I select:

Insurance Agent _____ Telephone # _____

Address _____ City\State\Zip _____

Borrower _____ Co-Borrower _____

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Capital City
Mortgage Co. Inc.
2000 Park Street Suite 102 Columbia, S.C. 29201

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DATE: 5/15/98

SELECTION OF ATTORNEY

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Name of Attorney _____ Telephone # _____

Address _____ City\State\Zip _____

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Having been informed of this right, and having no preference, I asked for assistance from Capital City Mortgage Co. Inc., and was referred a list of acceptable attorneys. From this list I select:

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Address _____ City\State\Zip _____

Borrower _____ Co-Borrower _____

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Insurance Agent _____ Telephone # _____

Address _____ City\State\Zip _____

Borrower Patricia A. Owens Co-Borrower _____

Having been informed of this right, and having no preference, I (we) asked for assistance from Capital City Mortgage Co. Inc., and was referred a list of qualified agents. From that list I select:

Insurance Agent _____ Telephone # _____

Address _____ City\State\Zip _____

Borrower _____ Co-Borrower _____

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LOAN #: [redacted]

BALLOON NOTE
(FIXED RATE)

THIS LOAN IS PAYABLE IN FULL AT MATURITY. YOU MUST REPAY THE ENTIRE PRINCIPAL BALANCE OF THE LOAN AND UNPAID INTEREST THEN DUE. THE LENDER IS UNDER NO OBLIGATION TO REFINANCE THE LOAN AT THAT TIME. YOU WILL, THEREFORE, BE REQUIRED TO MAKE PAYMENT OUT OF OTHER ASSETS THAT YOU MAY OWN, OR YOU WILL HAVE TO FIND A LENDER, WHICH MAY BE THE LENDER YOU HAVE THIS LOAN WITH, WILLING TO LEND YOU THE MONEY. IF YOU REFINANCE THIS LOAN AT MATURITY, YOU MAY HAVE TO PAY SOME OR ALL OF THE CLOSING COSTS NORMALLY ASSOCIATED WITH A NEW LOAN EVEN IF YOU OBTAIN REFINANCING FROM THE SAME LENDER.

JUNE 15, 1998 | LAGUNA HILLS, [City] | CALIFORNIA [State]

111 ANDREW COURT, GASTON, SC 29053
[Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $60,400.00, (this amount is called "principal"), plus interest, to the order of the Lender. The Lender is NOVASTAR MORTGAGE, INC., A VIRGINIA CORPORATION.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of principal has been paid. I will pay interest at a yearly rate of 9.990%.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making payments every month.

I will make my monthly payments on the 1ST day of each month beginning on AUGUST, 1998. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. My monthly payments will be applied to interest before principal. If, on JULY 1, 2013, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at

23046 AVENIDA CARLOTA 3FL
LAGUNA HILLS, CA 92653

or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. $529.61.

4. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of principal at any time before they are due. A payment of principal only is known as a "prepayment." When I make a prepayment, I will tell the Note Holder in writing that I am doing so.

I may make a full prepayment or partial prepayments without paying any prepayment charge. The Note Holder will use all of my prepayments to reduce the amount of principal that I owe under this Note. If I make a partial prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

5. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (i) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (ii) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the principal I owe under this Note or by making a direct payment to me. If a refund reduces principal, the reduction will be treated as a partial prepayment.

6. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charges for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.000% of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain

EXHIBIT
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date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is delivered or mailed to me.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

7. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

9. WAIVERS

I and any other person who has obligations under this Note waive the rights of presentment and notice of dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

10. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

Transfer of the Property or a Beneficial Interest in Borrower. If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Instrument.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

Patricia Ann Owens

PATRICIA ANN OWENS

PAY TO THE ORDER OF FIRST UNION NATIONAL BANK AS TRUSTEE

WITHOUT RECOURSE
NOVASTAR MORTGAGE, INC.

Manny Palazzo, Sr. Vice President

Pamela Cirinelli, Vice President

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0030991 Bk: 4743 Pg: 0330

Owens, P
98-031782

When recorded mail to:
NOVASTAR MORTGAGE, INC.
COLLATERAL CONTROL
23046 AVENIDA CARLOTA 3FL
LAGUNA HILLS, CA 92653

FILED, RECORDED, INDEXED
07/02/1998 10:06A
Rec Fee: 12.00 St Fee: 0.00
Co Fee: 0.00 Pages: 6
LEX. CO. REGISTER OF DEEDS
DEBRA H. GUNTER

LOAN #: [redacted]

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MORTGAGE

THIS MORTGAGE ("Security Instrument") is given on JUNE 15, 1998. The mortgagor is PATRICIA ANN OWENS

("Borrower"). This Security Instrument is given to NOVASTAR MORTGAGE, INC., A VIRGINIA CORPORATION which is organized and existing under the laws of THE STATE OF VIRGINIA and whose address is 23046 AVENIDA CARLOTA 3FL, LAGUNA HILLS, CA 92653 ("Lender"). Borrower owes Lender the principal sum of SIXTY THOUSAND FOUR HUNDRED AND NO/100********** ********** Dollars (U.S. $60,400.00). This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if not paid earlier, due and payable on JULY 1, 2013. This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender and Lender's successors and assigns the following described property located in LEXINGTON County, South Carolina:

SEE LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF.

AP #: 10027-01-01

which has the address of 111 ANDREW COURT, GASTON [Street, City],

South Carolina 29053 ("Property Address");
[Zip Code]

Initials: PAO

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LOAN #: [redacted]

TO HAVE AND TO HOLD this property unto Lender and Lender's successors and assigns, forever, together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal and Interest; Prepayment and Late Charges. Borrower shall promptly pay when due the principal of and interest on the debt evidenced by the Note and any prepayment and late charges due under the Note.

2. Funds for Taxes and Insurance. Subject to applicable law or to a written waiver by Lender, Borrower shall pay to Lender on the day monthly payments are due under the Note, until the Note is paid in full, a sum ("Funds") for: (a) yearly taxes and assessments which may attain priority over this Security Instrument as a lien on the Property; (b) yearly leasehold payments or ground rents on the Property, if any; (c) yearly hazard or property insurance premiums; (d) yearly flood insurance premiums, if any; (e) yearly mortgage insurance premiums, if any; and (f) any sums payable by Borrower to Lender, in accordance with the provisions of paragraph 8, in lieu of the payment of mortgage insurance premiums. These items are called "Escrow Items." Lender may, at any time, collect and hold Funds in an amount not to exceed the maximum amount a lender for a federally related mortgage loan may require for Borrower's escrow account under the federal Real Estate Settlement Procedures Act of 1974 as amended from time to time, 12 U.S.C. Section 2601 *et seq.* ("RESPA"), unless another law that applies to the Funds sets a lesser amount. If so, Lender may, at any time, collect and hold Funds in an amount not to exceed the lesser amount. Lender may estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with applicable law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is such an institution) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items. Lender may not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and applicable law permits Lender to make such a charge. However, Lender may require Borrower to pay a one-time charge for an independent real estate tax reporting service used by Lender in connection with this loan, unless applicable law provides otherwise. Unless an agreement is made or applicable law requires interest to be paid, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender may agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds, showing credits and debits to the Funds and the purpose for which each debit to the Funds was made. The Funds are pledged as additional security for all sums secured by this Security Instrument.

If the Funds held by Lender exceed the amounts permitted to be held by applicable law, Lender shall account to Borrower for the excess Funds in accordance with the requirements of applicable law. If the amount of the Funds held by Lender at any time is not sufficient to pay the Escrow Items when due, Lender may so notify Borrower in writing, and, in such case Borrower shall pay to Lender the amount necessary to make up the deficiency. Borrower shall make up the deficiency in no more than twelve monthly payments, at Lender's sole discretion.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender. If, under paragraph 21, Lender shall acquire or sell the Property, Lender, prior to the acquisition or sale of the Property, shall apply any Funds held by Lender at the time of acquisition or sale as a credit against the sums secured by this Security Instrument.

3. Application of Payments. Unless applicable law provides otherwise, all payments received by Lender under paragraphs 1 and 2 shall be applied: first, to any prepayment charges due under the Note; second, to amounts payable under paragraph 2; third, to interest due; fourth, to principal due; and last, to any late charges due under the Note.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines and impositions attributable to the Property which may attain priority over this Security Instrument, and leasehold payments or ground rents, if any. Borrower shall pay these obligations in the manner provided in paragraph 2, or if not paid in that manner, Borrower shall pay them on time directly to the person owed payment. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this paragraph. If Borrower makes these payments directly, Borrower shall promptly furnish to Lender receipts evidencing the payments.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion operate to prevent the enforcement of the lien; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which may attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 10 days of the giving of notice.

5. Hazard or Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage" and any other hazards, including floods or flooding, for which Lender requires insurance. This insurance shall be maintained in the amounts and for the periods that Lender requires. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's approval which shall not be unreasonably withheld. If Borrower fails to maintain coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property in accordance with paragraph 7.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard mortgage clause. Lender shall have the right to hold the policies and renewals. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower.

Unless Lender and Borrower otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged, if the restoration or repair is economically feasible and Lender's security is not lessened. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower. If Borrower abandons the Property, or does not answer within 30 days a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may collect the insurance proceeds. Lender may use the proceeds to repair or restore the Property or to pay sums secured by this Security Instrument, whether or not then due. The 30-day period will begin when the notice is given.

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LOAN #: [redacted]

Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of the payments. If under paragraph 21 the Property is acquired by Lender, Borrower's right to any insurance policies and proceeds resulting from damage to the Property prior to the acquisition shall pass to Lender to the extent of the sums secured by this Security Instrument immediately prior to the acquisition.

6. Occupancy, Preservation, Maintenance and Protection of the Property; Borrower's Loan Application; Leaseholds. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within sixty days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate, or commit waste on the Property. Borrower shall be in default if any forfeiture action or proceeding, whether civil or criminal, is begun that in Lender's good faith judgment could result in forfeiture of the Property or otherwise materially impair the lien created by this Security Instrument or Lender's security interest. Borrower may cure such a default and reinstate, as provided in paragraph 18, by causing the action or proceeding to be dismissed with a ruling that, in Lender's good faith determination, precludes forfeiture of the Borrower's interest in the Property or other material impairment of the lien created by this Security Instrument or Lender's security interest. Borrower shall also be in default if Borrower, during the loan application process, gave materially false or inaccurate information or statements to Lender (or failed to provide Lender with any material information) in connection with the loan evidenced by the Note, including, but not limited to, representations concerning Borrower's occupancy of the Property as a principal residence. If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

7. Protection of Lender's Rights in the Property. If Borrower fails to perform the covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture or to enforce laws or regulations), then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include paying any sums secured by a lien which has priority over this Security Instrument, appearing in court, paying reasonable attorneys' fees and entering on the Property to make repairs. Although Lender may take action under this paragraph 7, Lender does not have to do so.

Any amounts disbursed by Lender under this paragraph 7 shall become additional debt of Borrower secured by this Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

8. Mortgage Insurance. If Lender required mortgage insurance as a condition of making the loan secured by this Security Instrument, Borrower shall pay the premiums required to maintain the mortgage insurance in effect. If, for any reason, the mortgage insurance coverage required by Lender lapses or ceases to be in effect, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the mortgage insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the mortgage insurance previously in effect, from an alternate mortgage insurer approved by Lender. If substantially equivalent mortgage insurance coverage is not available, Borrower shall pay to Lender each month a sum equal to one-twelfth of the yearly mortgage insurance premium being paid by Borrower when the insurance coverage lapsed or ceased to be in effect. Lender will accept, use and retain these payments as a loss reserve in lieu of mortgage insurance. Loss reserve payments may no longer be required, at the option of Lender, if mortgage insurance coverage (in the amount and for the period that Lender requires) provided by an insurer approved by Lender again becomes available and is obtained. Borrower shall pay the premiums required to maintain mortgage insurance in effect, or to provide a loss reserve, until the requirement for mortgage insurance ends in accordance with any written agreement between Borrower and Lender or applicable law.

9. Inspection. Lender or its agent may make reasonable entries upon and inspections of the Property. Lender shall give Borrower notice at the time of or prior to an inspection specifying reasonable cause for the inspection.

10. Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of any part of the Property, or for conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender.

In the event of a total taking of the Property, the proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower. In the event of a partial taking of the Property in which the fair market value of the Property immediately before the taking is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the taking, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the taking, divided by (b) the fair market value of the Property immediately before the taking. Any balance shall be paid to Borrower. In the event of a partial taking of the Property in which the fair market value of the Property immediately before the taking is less than the amount of the sums secured immediately before the taking, unless Borrower and Lender otherwise agree in writing or unless applicable law otherwise provides, the proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the condemnor offers to make an award or settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the proceeds, at its option, either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due.

Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of such payments.

11. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to any successor in interest of Borrower shall not operate to release the liability of the original Borrower or Borrower's successors in interest. Lender shall not be required to commence proceedings against any successor in interest or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or Borrower's successors in interest. Any forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

12. Successors and Assigns Bound; Joint and Several Liability; Co-signers. The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of paragraph 17. Borrower's covenants and agreements shall be joint and several. Any Borrower who co-signs this Security Instrument but does not execute the Note: (a) is co-signing this Security Instrument only to mortgage, grant and convey that Borrower's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and

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LOAN #: [redacted]

(c) agrees that Lender and any other Borrower may agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without that Borrower's consent.

13. Loan Charges. If the loan secured by this Security Instrument is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge under the Note.

14. Notices. Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any other address Lender designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph.

15. Governing Law; Severability. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Security Instrument or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision. To this end the provisions of this Security Instrument and the Note are declared to be severable.

16. Borrower's Copy. Borrower shall be given one conformed copy of the Note and of this Security Instrument.

17. Transfer of the Property or a Beneficial Interest in Borrower. If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Instrument.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

18. Borrower's Right to Reinstate. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earlier of: (a) 5 days (or such other period as applicable law may specify for reinstatement) before sale of the Property pursuant to any power of sale contained in this Security Instrument; or (b) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees; and (d) takes such action as Lender may reasonably require to assure that the lien of this Security Instrument, Lender's rights in the Property and Borrower's obligation to pay the sums secured by this Security Instrument shall continue unchanged. Upon reinstatement by Borrower, this Security Instrument and the obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under paragraph 17.

19. Sale of Note; Change of Loan Servicer. The Note or a partial interest in the Note (together with this Security Instrument) may be sold one or more times without prior notice to Borrower. A sale may result in a change in the entity (known as the "Loan Servicer") that collects monthly payments due under the Note and this Security Instrument. There also may be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change in accordance with paragraph 14 above and applicable law. The notice will state the name and address of the new Loan Servicer and the address to which payments should be made. The notice will also contain any other information required by applicable law.

20. Hazardous Substances. Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property that is in violation of any Environmental Law. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property.

Borrower shall promptly give Lender written notice of any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge. If Borrower learns, or is notified by any governmental or regulatory authority, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law.

As used in this paragraph 20, "Hazardous Substances" are those substances defined as toxic or hazardous substances by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials. As used in this paragraph 20, "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

21. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under paragraph 17 unless applicable law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender, at its option, may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 21, including, but not limited to, reasonable attorneys' fees and costs of title evidence, all of which shall be additional sums secured by this Security Instrument.

22. Release. Upon payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument without charge to Borrower. Borrower shall pay any recordation costs.

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LOAN #: [redacted]

23. **Waivers.** Borrower waives all rights of homestead exemption in the Property.

24. **Future Advances.** The lien of this Security Instrument shall secure the existing indebtedness under the Note and any future advances made under this Security Instrument up to one hundred fifty percent (150%) of the original principal amount of the Note plus interest thereon, attorneys' fees and court costs.

25. **Riders to this Security Instrument.** If one or more riders are executed by Borrower and recorded together with this Security Instrument, the covenants and agreements of each such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Security Instrument as if the rider(s) were a part of this Security Instrument.

[Check applicable box(es)]

- ☐ Adjustable Rate Rider
- ☐ Graduated Payment Rider
- ☐ Balloon Rider
- ☐ V.A. Rider
- ☐ Condominium Rider
- ☐ Planned Unit Development Rider
- ☐ Rate Improvement Rider
- ☐ Other(s) [specify]
- ☐ 1-4 Family Rider
- ☐ Biweekly Payment Rider
- ☐ Second Home Rider

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:

Patricia Ann Owens
PATRICIA [redacted] OWENS

STATE OF SOUTH CAROLINA, Lexington County ss:

Personally appeared before me witness

and made oath that he/she saw the within named Borrower sign, seal, and as act and deed, deliver the within written Mortgage; and that witness with notary witnessed the execution thereof.

Sworn before me this 15th day of June, 1998

My Commission Expires: 6-6-2006

Notary Public for South Carolina
Brian C. Reeve

(Seal)

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Schedule A

ALL THAT CERTAIN PIECE, PARCEL, OR LOT OF LAND, WITH THE IMPROVEMENTS THEREON, SITUATE, LOCATED, LYING, AND BEING IN THE COUNTY OF LEXINGTON, STATE OF SOUTH CAROLINA, THE SAME BEING SHOWN AND DESIGNATED AS LOT (1), JAMES MCLENDON SUBDIVIDION, PHASE III, UPON THAT CERTAIN PLAT DATED JULY 17,1989 PREPARED BY DONALD R. SPROLES, FOR JAMES G. MCLENDON, RERCORED IN THE RMC OFFICE FOR LEXINGTON COUNTY IN PLAT BOOK 233 AT PAGE 150.

DERIVATION: THIS BEING THE SAME PROPERTY CONVEYED TO PATRICIA ANN OWENS BY DEED OF JAMES G, MCLENDON AND CAROL S. MCLENDON DATED MAY 23, 1991 AND RECORDED MAY 23,1991 IN DEED BOOK RB-1840 AT PAGE 299.

PROPERTY ADDRESS:
111 ANDREW COURT
GASTON SC 29053

TMS# 10027-01-01

File No: R-16517

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ASSIGNMENT AND ASSUMPTION AGREEMENT

TO: NovaStar Mortgage, Inc.

I For value received the undersigned hereby transfer and assign to Tammy M. Bailey

PURCHASER

all of the interest of the undersigned in any refunds or credits which may at any time be available by reason of the provisions of the deed of trust described in the following described agreement or the contract of insurance thereof by the Federal Housing Administration.

Dated: 2/7/01

Patricia Ann Owens
MAKER - SELLER Patricia Ann Owens

193 Cassidy Rd Gaston SC 29053
NEW ADDRESS OF SELLER

MAKER - SELLER

TO: Nova Star Mortgage, Inc.

II The undersigned having heretofore assumed or being the maker(s) or guarantor(s) of the promissory note and deed of trust described in the following Assumption Agreement, Section III below in consideration of the execution and acceptance thereof, hereby jointly and severally agree that the liability of the undersigned on the said note shall not be affected thereby. The undersigned further jointly and severally waive presentation, demand of payment, protest and notice of non-payment of the said indebtedness and expressly consent to delay or change in the time of payment of principal or any instalment thereof or in the amount of one or more instalments or performance of any of the provisions of the deed of trust, to partial releases of the property covered by the said deed of trust, to the acceptance of additional security for said note, to the increase or reduction of the interest rate payable under said note; to the reduction of principal thereof, and to subsequent assumption agreements all without notice to the undersigned and without affecting the liability of the undersigned thereon.

Dated: 2-7-01

ORIGINAL MAKER

193 Cassidy Rd, Gaston SC 29053
NEW ADDRESS OF SELLER

ORIGINAL MAKER

Patricia Ann Owens
SELLER OR GUARANTOR

TO: Nova Star Mortgage, Inc.

III The undersigned having acquired title to that certain real property described in a ~~deed of trust~~ mortgage dated June 15, 1998 executed by Patricia Ann Owens which ~~deed of trust~~ mortgage was given to secure a promissory note of even date in the principal sum of $ 60,400.00 and having agreed as part of the purchase price of said property to assume and pay the indebtedness evidenced by said note (or as the same may be modified or extended) and to be bound by and to perform all of the covenants of the said deed of trust at the time and in the manner provided therein. The undersigned further agrees that the property described in said ~~deed of trust~~ mortgage shall be held as security for the payment of any and all obligations and liabilities, whatsoever, whether primary, secondary, direct, indirect, fixed or contingent, which are now due or may hereafter become due from the undersigned (or any of them or any successor in interest to the undersigned or any of them) whether created directly or acquired by assignment if the document evidencing any such other obligation or liability or any other writing signed by the undersigned (or any of them or any successor in interest to the undersigned or any of them) specifically provides that said obligation is secured by said deed of trust. Any married person who signs below as Purchaser hereby expressly agrees that his or her separate property shall be liable for any or all indebtedness which is or which may hereafter be secured by said deed of trust.

Patricia Ann Owens

Dated: 2-7-01

Tammy M Bailey
PURCHASER Tammy M Bailey

MAILING ADDRESS

PURCHASER

INSTRUCTIONS:

(a) The immediate sellers should sign Sections I and II.
(b) Guarantors if any, and original makers should then sign Section II, except that if the obligation is on an FHA or V.A. form of note and original makers are not readily available, their signatures need not be obtained, (FHA and V.A. note forms contain waivers and consent to extensions.) In all other cases signature of original maker should always be obtained (before obtaining signatures of purchasers) except that when makers have once signed this form, it is not necessary that they sign subsequent agreements.
(c) Purchasers should then sign Section III.

EXHIBIT tabbies D

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NMI: [redacted]
Ref# [redacted]

ASSIGNMENT OF MORTGAGE

FOR GOOD AND VALUABLE CONSIDERATION, the sufficiency of which is hereby acknowledged, the undersigned, NOVASTAR MORTGAGE, INC., a VA Corp., whose address is 23046 Ave., De La Carlota, 3rd Fl., Laguna Hills, Ca 92653 (assignor), by these presents does convey, grant, sell, assign, transfer and set over the described mortgage/deed of trust together with the certain note(s) described therein together with all interest secured thereby, all liens, and any rights due or to become due thereon to *FIRST UNION NATIONAL BANK, as indentured trustee pursuant to the Indenture dated as of August 1, 1998 , relating to the NovaStar Home Equity Loan Asset-Backed Bonds Series 1998-2 its successors or assigns, (assignee) *9639 Dr. Perry Rd. #124 Ijamsville MD 21754.
Said mortgage made by
PATRICIA ANN OWENS
to NOVASTAR MORTGAGE, INC., A VIRGINIA CORPORATION
and recorded in the Recorder or Registrar of Deeds of
LEXINGTON County, South Carolina in Book 4743
Page 330 and/or as Document #
dated 01/19/99
NOVASTAR MORTGAGE, INC.

FILED, RECORDED, INDEXED
04/12/1999 03:39:50PM
Rec Fee: 6.00 St Fee: 0.00
Co Fee: 0.00 Pages: 1
LEX. CO. REGISTER OF DEEDS
DEBRA H. GUNTER

By: _____
JORGE TUCUX
VICE PRESIDENT

TALIN GHEYVANDIAN witness#1 GENEVE MONTES witness#2

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
Before me, the undersigned Notary Public, personally appeared the undersigned witness who, being duly sworn, deposed and said that (s)he saw JORGE TUCUX the VICE PRESIDENT sign, seal and deliver the foregoing Assignment of Mortgage and that (s)he, together with the other witness witnessed the execution thereof.
SWORN to and subscribed before me this 19th day of January, 1999

TALIN GHEYVANDIAN witness#1

JIM BEASLEY Notary Public
My commission expires:02/26/1999
Prepared by:
M Hoy/NTC,420 N. Brand Bl.4th Fl. Glendale, CA 91203 (800)346-9152
when recorded return to:
Nationwide Title Clearing
420 N. Brand Blvd. 4th Fl
Glendale, CA 91203
NOVA1 JU 285JU

JIM BEASLEY
Comm. #1052337
NOTARY PUBLIC CALIFORNIA
LOS ANGELES COUNTY
Comm Expires Feb 26 1999

EXHIBIT
tabbies
E

OCWEN/OWENS-01-000060

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DERRY QUACKENBUSH STUART
[illegible]8978 FILED, RECORDED, INDEXED 002
10/19/2000 10:10:56:623
Rec Fee:$6.00 St Fee:$8.00
Co Fee:$8.00 Pages:1
Lexington County ROD Debra H. Gunter
MORTGAGE ASST Bk:Pg 6828:72

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

ASSIGNMENT OF MORTGAGE

KNOW ALL MEN BY THESE PRESENTS:

For value received, First Union National Bank, as indentured trustee pursuant to the Indenture dated as of August 1, 1998, relating to the NovaStar Home Equity Loan Asset-Backed Bonds Series 1998-2, hereby grants, conveys, assigns, and transfers to NovaStar Mortgage, Inc., its successors and assigns, whose address is 1900 West 47th Place, Suite 205, Westwood, Kansas 66205, that certain Mortgage, dated June 15, 1998, executed and delivered by Patricia Ann Owens to NovaStar Mortgage, Inc., and recorded on July 2, 1998, in Record Book 4743 at page 330, in the Office of the Register of Deeds for Lexington County, South Carolina, together with the note therein described or referred to, the money due and to become due thereon, with interest, and all right accrued or to accrue under said Mortgage.

Dated: October 12, 2000.

WITNESSES:

Debra S. Ousse
DEBRA S. OUSSE

Melissa L. Monroe
Melissa L. Monroe

FIRST UNION NATIONAL BANK, as indentured trustee pursuant to the Indenture dated as of August 1, 1998, relating to the NovaStar Home Equity Loan Asset-Backed Bonds Series 1998-2

By: _____

Its: RONALD L. FISHER
VICE PRESIDENT

STATE OF MARYLAND)
COUNTY OF Frederick)

PROBATE

PERSONALLY appeared before me the undersigned witness who made oath that s/he saw the within-named First Union National Bank, as indentured trustee pursuant to the Indenture dated as of August 1, 1998, relating to the NovaStar Home Equity Loan Asset-Backed Bonds Series 1998-2, by its duly appointed officer, sign, seal and, as its act and deed, deliver the within Assignment of Mortgage, and that s/he with the other witness whose signature appears above, witnessed he execution thereof.

Debra S. Ousse
WITNESS DEBRA S. OUSSE

SWORN to and subscribed before me this

12 day of October, 2000

Melissa L. Monroe (L.S.)
Notary Public for MARYLAND
My Commission Expires: 5-6-03

MELISSA L. MONROE NOTARY PUBLIC FREDERICK COUNTY MARYLAND

Melissa L. Monroe, Notary Public
Frederick County
State of Maryland
My Commission Expires May 6, 2003

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OIS # [redacted]

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2011-10-12 14:14:47:393
REC FEE: $6.00 ST FEE: $0.00
CO FEE: 10.00 Pages: 1
Lexington County R.O.D. Debra H. Gunter
MORTGAGE ASST Bk:Pg 15185:248

Recording requested by:
Weston Adams Law Firm
P.O. Box 291
Columbia, SC 29202
Phone: (803) 254-1675(recording info above this line)

Patricia Ann Owens (Tammy Bailey) Loan No. [redacted]
Property Address: 111 Andrew Court Gaston, South Carolina 29053

ASSIGNMENT OF MORTGAGE

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FOR VALUE RECEIVED, NovaStar Mortgage, Inc., hereby transfers, sets over, and assigns to:

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1
c/o Saxon Mortgage Services, Inc.
3701 Regent Blvd.
Irving, TX 75063

its successors and assigns, that certain mortgage and note thereby secured executed by Patricia Ann Owens to NovaStar Mortgage, Inc. in the original principal amount of $60,400.00 which mortgage is dated June 15, 1998 and was recorded on July 2, 1998 in Mortgage Book 4743 at page 330 in the Office of the RMC for Lexington County, South Carolina.

Witness our hands and seals this 6th day of October (month), 2011 (year).

WITNESSES:
Signed, sealed and delivered
In the presence of 2 witnesses:

(Signature: Witness #1 - *THIS WITNESS MUST CO-SIGN WITH NOTARY BELOW*)

(Signature: Witness #2)

NovaStar Mortgage, Inc.
by Saxon Mortgage Services, Inc., as its attorney-in-fact

BY: _____
(Signature:) Cooper D. Roden

STATE OF: TX
COUNTY OF: Dallas

Personally appeared before me the undersigned witness, who being duly sworn says that he/she saw NovaStar Mortgage, Inc.by Saxon Mortgage Services, Inc., as its attorney-in-fact , by its duly authorized officer or attorney in fact whose signature appears above, attest the same, and the said Corporation, by said Officer or Attorney in Fact, seal said Assignment of Mortgage, and as its act and deed, deliver the same, and he/she with the other witness named above witnessed the execution thereof.

Witness my hand and official seal, this 6 day of October (month), 2011 (year).

(Signature: Notary)
Notary Public for the State of TX
My Commission Expires: 4-8-2014

(Signature: Witness #1 - *SAME PERSON AS WITNESS #1 ABOVE*)

MELANIE L HARRIS
Notary Public, State of Texas
My Commission Expires
April 08, 2014

ELECTRONICALLY FILED - 2017 Sep 14 11:41 AM - LEXINGTON - COMMON PLEAS - CASE#2016CP3203572

ELECTRONICALLY FILED - 2017 Sep 14 11:41 AM - LEXINGTON - COMMON PLEAS - CASE#2016CP3203572

20120023389 FILED, RECORDED, INDEXED
2012-05-15 12:27:06:267
REC FEE: $7.00 ST FEE: $0.00
CO FEE: $0.00 Pages: 2
Lexington County R.O.D. Debra N. Gunter
MORTGAGE ASST Bk:Pg 15513:296

Prepared by: Nadine Alvarez
When Recorded Mail To:
OCWEN LOAN SERVICING, LLC
1661 Worthington Road, Suite 100
West Palm Beach, FL 33409
Phone Number: 561-682-8835
23711025171287
Attorney Code: 19295

ASSIGNMENT OF MORTGAGE
SOUTH CAROLINA

This **ASSIGNMENT OF DEED OF TRUST** from **DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1**, whose address is c/o Ocwen Loan Servicing, LLC. 1661 Worthington Road, Suite 100, West Palm Beach, FL 33409, ("Assignor) to **DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-1**, whose address is c/o Ocwen Loan Servicing, LLC. 1661 Worthington Road, Suite 100, West Palm Beach, FL 33409 ("Assignee").

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Assignor does by these presents hereby grant, bargain, sell, transfer and set over unto the Assignee, its successors, transferees and assigns forever, all of the right, title and interest of said Assignor in and to the following instrument describing land therein, duly recorded in the Office of the County Recorder of **LEXINGTON** County, State of **SOUTH CAROLINA**, as follows:

Mortgagor: PATRICIA ANN OWENS
Mortgagee: NOVASTAR MORTGAGE INC.
Document Date: JUNE 15, 1998
Amount: $ 60,400.00
Recording Date: JULY 02, 1998
Book/Volume/Docket/Liber: 4743
Page/Folio: 0330
Instrument no: 0030991
Property address: 111 ANDREW COURT, GASTON, SC
Property described as follows:

LEGAL DESCRIPTION:

ALL THAT CERTAIN PIECE, PARCEL, OR LOT OF LAND, WITH THE IMPROVEMENTS THEREON, SITUATE, LOCATED, LYING, AND BEING IN THE COUNTY OF LEXINGTON, STATE OF SOUTH CAROLINA, THE SAME BEING SHOWN AND DESIGNATED AS LOT (1), JAMES MCLENDON SUBDIVIDION, PHASE III, UPON THAT CERTAIN PLAT DATED JULY 17,1989 PREPARED BY DONALD R. SPROLES, FOR JAMES G. MCLENDON, RERCORED IN THE RMC OFFICE FOR LEXINGTON COUNTY IN PLAT BOOK 233 AT PAGE 150.

DERIVATION: THIS BEING THE SAME PROPERTY CONVEYED TO PATRICIA ANN OWENS BY DEED OF JAMES G, MCLENDON AND CAROL S. MCLENDON DATED MAY 23, 1991 AND RECORDED MAY 23,1991 IN DEED BOOK RB-1840 AT PAGE 299.

ELECTRONICALLY FILED - 2017 Sep 14 11:41 AM - LEXINGTON - COMMON PLEAS - CASE#2016CP3203572

This Assignment is made without recourse, representation or warranty.

DATED: MAY 01, 2012

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1
BY ITS ATTORNEY IN FACT
SAXON MORTGAGE SERVICES, INC

BY: _____

NAME: Leticia N. Arias
TITLE: Vice President

Signed, sealed and delivered in the presence of:

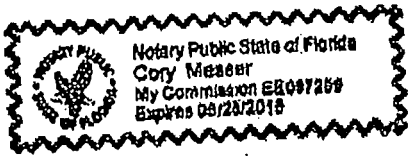
(1) _____
Naomi Smith

(2) _____
Vanessa Pino

STATE OF FLORIDA }
}SS.
COUNTY OF PALM BEACH }

The foregoing instrument was acknowledged before me this 1ST DAY OF MAY, 2012, by Leticia N. Arias; Vice President at SAXON MORTGAGE SERVICES, INC Attorney In Fact For **DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1**. He/She is personally known to me.

_____
Notary Public – Cory Messer



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OCWEN
RSK-PMRC

Payment Reconciliation History

LOAN#: [redacted] INVESTOR#: 3806 POOL#: 1 DATE PAYMENT DUE: 07/01/2013 INTEREST RATE: 9.99000 PRINCIPAL BAL: 48,387.09
BORR1: Patricia Ann Owens ESCROW BAL: -6,401.99
BORR2:
PROP: 111 Andrew Ct MAIL: 111 Andrew Ct
Gaston SC 29053-9280 Gaston SC 29053-9280

Check/ Ref. Number	Date Payment Due	Date Payment Received	Date Assessed/ Transaction Date	Description	Amount Applied/ Assessed	Principal Application	Interest Application	Escrow Application	Optional Products	Late Charges	Fees/ Other (See Description)	Suspense Application	Principal Balance	Escrow Balance	Suspense Balance
	06/01/2011			Beginning Balance	0.00	0.00	0.00	0.00	0.00	-264.80	-3,268.80	0.00	51,400.57	0.00	14.98
			02/21/2012	Loan Disbursement	-54,653.59	-51,400.57	0.00	0.00	0.00	0.00	0.00	14.98	51,400.57	0.00	14.98
		02/21/2012		Escrow Account Adjustment	-457.59	0.00	0.00	-457.59	0.00	0.00	0.00	0.00	51,400.57	-457.59	14.98
			04/12/2012	Property Valuation Expense	-425.00	0.00	0.00	0.00	0.00	0.00	-425.00	0.00	51,400.57	0.00	0.00
			04/23/2012	Property Inspection Fee	-10.50	0.00	0.00	0.00	0.00	0.00	-10.50	0.00	51,400.57	0.00	0.00
			05/16/2012	Property Inspection Fee	-10.50	0.00	0.00	0.00	0.00	0.00	-10.50	0.00	51,400.57	0.00	0.00
	05/01/2012	07/10/2012		Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	51,400.57	0.00	0.00
	06/01/2011	06/01/2012		Regular Multiple/Reinstatement	1,295.25	101.78	427.91	135.41	0.00	291.28	0.00	338.95	51,298.87	-322.18	353.93
	07/01/2011	06/01/2012		Regular Multiple/Reinstatement	665.02	102.35	427.06	135.41	0.00	0.00	0.00	0.00	51,196.32	-186.77	353.93
	08/01/2011	06/01/2012		Regular Multiple/Reinstatement	665.02	103.40	426.21	135.41	0.00	0.00	0.00	0.00	51,092.92	-51.36	353.93
	09/01/2011	06/01/2012		Regular Multiple/Reinstatement	665.02	104.26	425.35	135.41	0.00	0.00	0.00	0.00	50,988.66	84.05	353.93
	10/01/2011	06/01/2012		Regular Multiple/Reinstatement	665.02	105.13	424.48	135.41	0.00	0.00	0.00	0.00	50,883.53	219.46	353.93
	11/01/2011	06/01/2012		Regular Multiple/Reinstatement	665.02	106.00	423.61	135.41	0.00	0.00	0.00	0.00	50,777.53	354.87	353.93
	12/01/2011	06/01/2012		Regular Multiple/Reinstatement	665.02	106.89	422.72	135.41	0.00	0.00	0.00	0.00	50,670.64	490.28	353.93
	01/01/2012	06/01/2012		Regular Multiple/Reinstatement	665.02	107.78	421.82	135.41	0.00	0.00	0.00	0.00	50,562.86	625.69	353.93
	02/01/2012	06/01/2012		Regular Multiple/Reinstatement	665.02	108.67	420.94	135.41	0.00	0.00	0.00	0.00	50,454.19	761.10	353.93
	03/01/2012	06/01/2012		Regular Multiple/Reinstatement	665.02	109.58	420.03	135.41	0.00	0.00	0.00	0.00	50,344.61	896.51	353.93
	04/01/2012	06/01/2012		Regular Multiple/Reinstatement	665.02	109.58	420.03	135.41	0.00	0.00	0.00	0.00	50,234.19	1,032.11	353.93
	04/01/2012	06/01/2012		Regular Multiple/Reinstatement	665.21	110.49	419.12	135.60	0.00	0.00	0.00	0.00	50,123.70	1,167.71	353.93
			06/15/2012	Certified Mail Cost	-6.53	0.00	0.00	0.00	0.00	0.00	-6.53	0.00	50,123.70	1,161.18	353.93
	06/01/2012	07/31/2012		Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	50,123.70	1,134.70	353.93
			07/03/2012	Property Inspection Fee	-10.50	0.00	0.00	0.00	0.00	0.00	-10.50	0.00	50,123.70	1,124.20	353.93
9648927	05/01/2012	07/10/2012		Payment	688.00	111.41	418.20	135.60	0.00	0.00	42.79	30,122.71	1,127.71	0.00	396.72
	07/01/2012	07/31/2012		Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
			07/19/2012	Insurance Disbursement -Accri	-1,291.00	0.00	0.00	-1,291.00	0.00	0.00	0.00	0.00	50,122.71	-163.39	396.72
				Payment	602.42	112.34	417.27	135.60	0.00	0.00	0.00	-42.79	50,010.37	-41.69	353.93
9755621	06/01/2012	07/31/2012		Payment	665.21	113.27	416.34	135.60	0.00	0.00	0.00	0.00	49,897.10	67.91	353.93
9755621	07/01/2012	07/31/2012		Payment	-10.50	0.00	0.00	0.00	0.00	0.00	-10.50	0.00	49,897.10	67.91	353.93
			08/06/2012	Property Inspection Fee	-6.53	0.00	0.00	0.00	0.00	0.00	-6.53	0.00	49,897.10	67.91	353.93
			08/06/2012	Certified Mail Cost	-206.56	0.00	0.00	-206.56	0.00	0.00	0.00	0.00	49,897.10	-138.65	353.93
			08/07/2012	Insurance Disbursement -Accri	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	49,897.10	-138.65	353.93
		08/01/2012	08/24/2012	Late Charge Assessment	206.56	0.00	0.00	206.56	0.00	0.00	0.00	0.00	49,897.10	67.91	353.93
			09/05/2012	Insurance Credit	-6.53	0.00	0.00	0.00	0.00	0.00	-6.53	0.00	49,897.10	67.91	353.93
			09/12/2012	Certified Mail Cost	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	49,897.10	67.91	353.93
	09/01/2012	10/04/2012		Late Charge Assessment	1,000.00	114.22	415.39	135.60	0.00	0.00	0.00	334.79	49,782.88	183.51	708.72
1001570	08/01/2012	09/24/2012		Payment	-353.93	0.00	0.00	0.00	0.00	0.00	0.00	-353.93	49,782.88	183.51	354.79
		10/04/2012		Suspense Transfer	353.93	0.00	0.00	0.00	0.00	0.00	0.00	353.93	49,782.88	183.51	708.72
		10/04/2012		Suspense Transfer	0.00	115.17	414.44	135.60	0.00	0.00	0.00	-645.21	49,667.71	299.11	63.51
	08/01/2012	10/04/2012		Payment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	49,667.71	299.11	63.51
	10/01/2012	10/23/2012		Late Charge Assessment	-5.00	0.00	0.00	0.00	0.00	0.00	-5.00	0.00	49,667.71	299.11	63.51
			10/29/2012	Transaction History Fee	606.38	116.13	413.48	142.28	0.00	0.00	0.00	-43.51	49,551.58	441.39	0.00
1018242	10/01/2012	10/29/2012		Payment	671.89	117.09	412.52	142.28	0.00	0.00	0.00	0.00	49,434.49	583.67	0.00
1022227	11/01/2012	11/06/2012		Payment	-35.31	0.00	0.00	-35.31	0.00	0.00	0.00	0.00	49,434.49	548.36	0.00
			12/04/2012	Tax Disbursement-LEXINGTON COU	671.89	118.07	411.54	142.28	0.00	0.00	0.00	0.00	49,316.42	690.64	0.00
1036905	12/01/2012	12/06/2012		Payment	671.89	119.05	410.56	142.28	0.00	0.00	0.00	0.00	49,197.37	832.92	0.00
1052162	01/01/2013	01/09/2013		Payment	-30.00	0.00	0.00	0.00	0.00	0.00	-30.00	0.00	0.00	0.00	0.00
			01/25/2013	Loan Document Copy Fee - Multi	-30.00	0.00	0.00	0.00	0.00	0.00	-30.00	0.00	0.00	0.00	0.00
			01/25/2013	Loan Document Copy Fee - Multi	671.89	120.04	409.57	142.28	0.00	0.00	0.00	0.00	49,077.33	975.20	0.00
1067332	02/01/2013	02/01/2013		Payment	671.89	121.04	408.57	142.28	0.00	0.00	0.00	0.00	48,956.29	1,317.48	0.00
1083622	03/01/2013	03/01/2013		Payment	30.00	0.00	0.00	0.00	0.00	0.00	30.00	0.00	48,956.29	1,317.48	0.00
		03/13/2013		Loan Document Copy Fee - Multi	30.00	0.00	0.00	0.00	0.00	0.00	0.00	30.00	48,956.29	1,317.48	30.00
		03/13/2013		Suspense Payment	-30.00	0.00	0.00	0.00	0.00	0.00	0.00	-30.00	48,956.29	1,317.48	0.00
		03/15/2013		Suspense Transfer	671.89	122.05	407.56	142.28	0.00	0.00	0.00	0.00	48,834.24	1,259.76	0.00
1109026	04/01/2013	04/11/2013		Payment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	48,834.24	1,259.76	0.00
	05/01/2013	05/20/2013		Late Charge Assessment	671.89	123.06	406.55	142.28	0.00	0.00	0.00	0.00	48,711.18	1,402.04	0.00
1140146	05/01/2013	05/28/2013		Payment	671.89	124.08	405.53	142.28	0.00	0.00	0.00	0.00	48,587.09	1,544.32	0.00
1151090	06/01/2013	06/10/2013		Payment	671.89	0.00	0.00	0.00	0.00	0.00	0.00	671.89	48,587.09	1,544.32	671.89
		07/02/2013		Suspense Payment	671.89	0.00	0.00	0.00	0.00	0.00	0.00	0.00	48,587.09	86.32	671.89
			07/03/2013	Insurance Disbursement -Accri	-1,458.00	0.00	0.00	-1,458.00	0.00	0.00	0.00	0.00	48,587.09	86.32	0.00
			07/15/2013	Suspense Disbursement	-671.89	0.00	0.00	0.00	0.00	0.00	0.00	-671.89	48,587.09	86.32	0.00
	07/01/2013			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
	08/01/2013			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
			08/21/2013	Certified Mail Cost	-6.53	0.00	0.00	0.00	0.00	0.00	-6.53	0.00	0.00	0.00	0.00
			08/27/2013	Property Inspection Fee	-10.50	0.00	0.00	0.00	0.00	0.00	-10.50	0.00	0.00	0.00	0.00
	09/01/2013			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
			09/24/2013	Property Inspection Fee	-10.50	0.00	0.00	0.00	0.00	0.00	-10.50	0.00	0.00	0.00	0.00
	10/01/2013			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
			10/22/2013	Property Inspection Fee	-10.50	0.00	0.00	0.00	0.00	0.00	-10.50	0.00	0.00	0.00	0.00
	11/01/2013			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
			12/05/2013	Property Inspection Fee	-10.50	0.00	0.00	0.00	0.00	0.00	-10.50	0.00	0.00	0.00	0.00
			12/12/2013	Tax Disbursement-LEXINGTON COU	-40.09	0.00	0.00	-40.09	0.00	0.00	0.00	0.00	48,587.09	46.23	0.00
	12/01/2013			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
			12/23/2013	Property Inspection Fee	-10.50	0.00	0.00	0.00	0.00	0.00	-10.50	0.00	0.00	0.00	0.00
			01/10/2014	Property Inspection Fee	-10.50	0.00	0.00	0.00	0.00	0.00	-10.50	0.00	0.00	0.00	0.00
	01/01/2014			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
			02/04/2014	Property Inspection Fee	-10.50	0.00	0.00	0.00	0.00	0.00	-10.50	0.00	0.00	0.00	0.00
	02/01/2014			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
			03/01/2014	Property Inspection Fee	-10.50	0.00	0.00	0.00	0.00	0.00	-10.50	0.00	0.00	0.00	0.00
	03/01/2014			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00

EXHIBIT
tabbies 7

ELECTRONICALLY FILED - 2017 Sep 14 11:41 AM - LEXINGTON - COMMON PLEAS - CASE#2016CP3203572

LOAN#: [redacted]
BORR1: Patricia Ann Owens
BORR2:
PROP: 111 Andrew Ct
Gaston SC 29053-9280

INVESTOR#: 3804 POOL#: 1 DATE PAYMENT DUE: 07/01/2013 INTEREST RATE: 9.93000

MAIL: 111 Andrew Ct
Gaston SC 29053-9280

PRINCIPAL BAL: 48,587.09
ESCROW BAL: -4,401.99

Check/ Ref. Number	Date Payment Due	Date Payment Received	Date Assessed/ Transaction Date	Description	Amount Applied/ Assessed	Principal Application	Interest Application	Escrow Application	Optional Products	Late Charges	Fees/ Other (See Description)	Suspense Application	Principal Balance	Escrow Balance	Suspense Balance
			04/10/2014	Property Inspection Fee	-15.00	0.00	0.00	0.00	0.00	0.00	-15.00	0.00	0.00	0.00	0.00
	04/01/2014			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
			04/29/2014	Property Inspection Fee	-15.00	0.00	0.00	0.00	0.00	0.00	-15.00	0.00	0.00	0.00	0.00
	05/01/2014			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
	06/01/2014			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
			07/02/2014	Insurance Disbursement -Ameri	-1,438.00	0.00	0.00	-1,438.00	0.00	0.00	0.00	0.00	48,587.09	-1,411.77	0.00
	07/01/2014			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
	08/01/2014			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
	09/01/2014			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
	10/01/2014			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
	11/01/2014			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
			12/08/2014	Tax Disbursement-LEXINGTON COU	-41.45	0.00	0.00	-41.45	0.00	0.00	0.00	0.00	48,587.09	-1,453.42	0.00
	12/01/2014			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
	01/01/2015			Late Charge Assessment	-26.48	0.00	0.00	0.00	0.00	-26.48	0.00	0.00	0.00	0.00	0.00
			06/26/2015	Insurance Disbursement -Ameri	-1,458.68	0.00	0.00	-1,458.68	0.00	0.00	0.00	0.00	48,587.09	-2,911.42	0.00
		07/17/2015		Certified Mail Cost	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	48,587.09	-2,911.42	0.00
		07/17/2015		Prior Servicer Fees	3.50	0.00	0.00	0.00	0.00	0.00	3.50	0.00	48,587.09	-2,911.42	0.00
		02/29/2016		Investor Billable Exp Payment	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	48,587.09	-2,911.42	0.00
		02/29/2016		Investor Billable Exp Payment	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	48,587.09	-2,911.42	0.00
		04/25/2016		Investor Billable Exp Payment	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	48,587.09	-2,911.42	0.00
		06/29/2016		Investor Billable Exp Payment	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	48,587.09	-2,911.42	0.00
			07/14/2016	Insurance Disbursement -Ameri	-1,458.00	0.00	0.00	-1,458.00	0.00	0.00	0.00	0.00	48,587.09	-4,369.42	0.00
		07/28/2016		Investor Billable Exp Payment	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	48,587.09	-4,369.42	0.00
			08/11/2016	Property Inspection Fee	-13.25	0.00	0.00	0.00	0.00	0.00	-13.25	0.00	0.00	0.00	0.00
		08/26/2016		Investor Billable Exp Payment	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	48,587.09	-4,369.42	0.00
			09/08/2016	Property Inspection Fee	-13.25	0.00	0.00	0.00	0.00	0.00	-13.25	0.00	0.00	0.00	0.00
		09/29/2016		Investor Billable Exp Payment	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	48,587.09	-4,369.42	0.00
			10/06/2016	Property Inspection Fee	-13.25	0.00	0.00	0.00	0.00	0.00	-13.25	0.00	0.00	0.00	0.00
			10/18/2016	Statutory Mailings	-0.47	0.00	0.00	0.00	0.00	0.00	-0.47	0.00	0.00	0.00	0.00
			10/18/2016	FC Thru Title Searches	-660.00	0.00	0.00	0.00	0.00	0.00	-660.00	0.00	0.00	0.00	0.00
			10/20/2016	Title Report Fee	-250.00	0.00	0.00	0.00	0.00	0.00	-250.00	0.00	0.00	0.00	0.00
			10/25/2016	Filing Fee Complaint	-150.00	0.00	0.00	0.00	0.00	0.00	-150.00	0.00	0.00	0.00	0.00
			10/25/2016	Statutory Mailings	-7.97	0.00	0.00	0.00	0.00	0.00	-7.97	0.00	0.00	0.00	0.00
			10/25/2016	Service of Process	-280.00	0.00	0.00	0.00	0.00	0.00	-280.00	0.00	0.00	0.00	0.00
			10/25/2016	FC Thru Complaint	-440.00	0.00	0.00	0.00	0.00	0.00	-440.00	0.00	0.00	0.00	0.00
		10/28/2016		Investor Billable Exp Payment	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	48,587.09	-4,369.42	0.00
			11/07/2016	Statutory Mailings	-12.94	0.00	0.00	0.00	0.00	0.00	-12.94	0.00	0.00	0.00	0.00
			11/07/2016	Proceeding Subsequent	-75.00	0.00	0.00	0.00	0.00	0.00	-75.00	0.00	0.00	0.00	0.00
			11/09/2016	Property Inspection Fee	-13.25	0.00	0.00	0.00	0.00	0.00	-13.25	0.00	0.00	0.00	0.00
		11/30/2016		Investor Billable Exp Payment	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	48,587.09	-4,369.42	0.00
		12/01/2016		Investor Billable Exp Payment	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	48,587.09	-4,369.42	0.00
		12/01/2016		Investor Billable Exp Payment	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	48,587.09	-4,369.42	0.00
			12/05/2016	FC Thru Service Complete	-440.00	0.00	0.00	0.00	0.00	0.00	-440.00	0.00	0.00	0.00	0.00
			12/06/2016	Tax Disbursement-LEXINGTON COU	-32.57	0.00	0.00	-32.57	0.00	0.00	0.00	0.00	48,587.09	-4,401.99	0.00
			12/06/2016	Property Inspection Fee	-13.25	0.00	0.00	0.00	0.00	0.00	-13.25	0.00	0.00	0.00	0.00
			12/09/2016	Civil Litigation	-199.50	0.00	0.00	0.00	0.00	0.00	-199.50	0.00	0.00	0.00	0.00
				Ending Balance	0.00	0.00	0.00	0.00	0.00	-662.00	-6,488.35	0.00	0.00	0.00	0.00

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OCWEN

WWW.OCWEN.COM

August 23, 2013

05/01/12 00:00 3 0011194 20130823 IHK08104 EILETTER 2 OZ DOM IHK0810000* 155747 LT

PATRICIA ANN OWENS
111 ANDREW CT
GASTON SC 29053-9280

Loan Number: [redacted]
Property Address: 111 Andrew Ct, Gaston, SC 29053-0000

Dear Borrower(s):

Recently, Ocwen Loan Servicing, LLC ("Ocwen") sent you a Notice of Default due to your loan becoming past due. We want to assist you in bringing your loan current by presenting you with some alternative solutions to avoid foreclosure.

We specialize in tailoring resolutions to cure delinquent accounts prior to the initiation of foreclosure proceedings. While we cannot guarantee any of the options below, we will work with you to determine the options that are available based on your financial needs.

MODIFICATION - Ocwen offers both the Home Affordable Modification program, part of the initiative announced by President Obama, and its own modification program to help homeowners. In every case, Ocwen will first determine if you qualify for the Home Affordable Modification before suggesting an alternative. By modifying your loan, we can alter part of your mortgage debt by lowering your interest rate, loan balance, or term. This may lower your payment and bring your account current. In addition to these features, for those that qualify under the Home Affordable Modification program, you may also be eligible for a borrower incentive that can be used to pay down the total balance on your mortgage loan.

PRE-APPROVED SALE - By listing your property, you may receive a sale offer acceptable both to you and to Ocwen. The sale of your property could help you to avoid a foreclosure sale of your home.

DEED IN LIEU OF FORECLOSURE - If you do not intend on keeping the property, then depending on your current financial situation Ocwen may accept the deed to the property and extinguish the debt, even if the property is worth less than the loan balance. Title must be clear of any other liens.

Foreclosure is a legal action used to recover money from a customer when the customer does not pay his or her payments according to the terms of the mortgage agreement. A few of the related consequences are:

PROPERTY LOSS - You would no longer own the home and would be obligated to vacate the premises.

DAMAGED CREDIT RATING - A foreclosure on your credit record may significantly damage your credit rating and may impair your ability to obtain credit in the future.

Please call us immediately at (800) 746-2936 to discuss your resolution options. Any future payments that come due while we work with you on available options are still your responsibility so it is important that you contact us as soon as possible.

Additionally, the Credit Counseling Resource Center (CCRC), a program of the Homeownership Preservation Foundation, provides free credit counseling services. The experienced HUD-approved housing counselors working with the CCRC are independent of Ocwen and may be able to help you avoid a foreclosure. If you choose not to contact Ocwen directly, we urge you to contact the CCRC at 1-888-995-HOPE to obtain assistance in keeping your home.

EXHIBIT
6

EILETTER

This communication is from a debt collector attempting to collect a debt; any information obtained will be used for that purpose. However, if the debt is in active bankruptcy or has been discharged through bankruptcy, this communication is not intended as and does not constitute an attempt to collect a debt.

Please call us at (800) 746-2936 or visit our website www.ocwen.com where you can review your account, enter your financial information and provide a description of your current situation at your convenience.

OCWEN CONTACT INFORMATION HOURS: Monday - Friday 8:00 am to 9:00 pm, Saturday 8:00 am to 5:00 pm, and Sunday 9:00 am to 9:00 pm ET
PHONE NUMBER: (800) 746-2936

Important Notice for Customers in Colorado
Ocwen Loan Servicing, LLC maintains an office in Denver, Colorado that accepts in-person payments. For other account inquiries, please call us at (800) 746-2936 or visit our website www.ocwen.com.
Address: 1776 S. Jackson Street, #900
Denver, Colorado 80210
Telephone: (303) 327-8955

Sincerely,

Ocwen Loan Servicing, LLC

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This communication is from a debt collector attempting to collect a debt; any information obtained will be used for that purpose. However, if the debt is in active bankruptcy or has been discharged through bankruptcy, this communication is not intended as and does not constitute an attempt to collect a debt.

OCWEN/OWENS 01 004569

06/01/12 09.00 3. 0011394 20130823 IHKQ8104 EILETTER 2 OZ DOM IHKQ810000 155747 LT

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OCWEN

You may be able to make your payments more affordable.

Act now to get the help you need!

Dear Borrower,

There is help available if you are having difficulty making your mortgage loan payments. You may be eligible for the Home Affordable Modification Program, part of the initiative announced by President Obama to help homeowners.

As your mortgage loan servicer, we will work with you in an effort to make your mortgage payment affordable. You will not pay any fees to take advantage of this opportunity to modify your mortgage loan payment and keep your property. Now is the time to act. We are ready to help you.

Here's how it works: We will first determine if you are eligible based on your situation. To conduct this evaluation, we need you to submit an Initial Package consisting of a Request for Mortgage Assistance form (including all necessary certifications), an IRS Form 4506T-EZ or Form 4506-T, and documentary evidence of all income. You may obtain the Request for Mortgage Assistance form and the IRS Form 4506T-EZ or Form 4506-T form at www.ocwencustomers.com.

If you are eligible, we will look at your monthly income and housing costs, including any past due payments, and then determine an affordable mortgage payment.

At first, you will make new, affordable monthly payments on your mortgage loan during a trial period. If you make those payments successfully and fulfill all trial period conditions, we will permanently modify your mortgage loan.

The modification may involve some or all of the following changes to your mortgage loan: 1) Bringing your account current; 2) Reducing the interest rate on your loan; 3) Extending the term of the loan, and/or 4) delaying your repayment of a portion of the mortgage principal until the end of the loan term.

STEP 1 GATHER THE INFO WE NEED TO HELP YOU

To take advantage of this opportunity and the Home Affordable Modification Program, contact us as soon as possible. To help speed the process it will be helpful if you have the following information when you call:

- Loan number
- Monthly pre-tax income of each borrower
- Information about any financial hardship you are suffering

If you do not qualify for a loan modification under this program, or do not want to stay in your home or keep your rental property, we will work with you to explore other options available to help you keep your property or ease your transition to a new home, if applicable.

STEP 2 CONTACT US

We want to make modifying your mortgage loan as easy as possible. However, you must take the first step by contacting us at (800) 746-2936; Monday to Friday 8:00 am to 9:00 pm, Saturday 8:00 am to 5:00 pm, and Sunday 12:00 pm to 9:00 pm ET. You may also write to us at the address at the bottom of this letter. Be sure to include the information listed above.

Sincerely,

Ocwen Loan Servicing
1661 Worthington Road, Suite 100
West Palm Beach, FL 33409

[redacted]

OSL-308-01-08

This communication is from a debt collector attempting to collect a debt; any information obtained will be used for that purpose. If the debt is in active bankruptcy or has been discharged through bankruptcy, this communication is not intended as and does not constitute an attempt to collect a debt.

OCWEN/OWENS-01-0045861

NMLS # 1852

IMPORTANT NOTICE

FINANCIAL COUNSELING SERVICES

When you are experiencing a financial hardship, counseling may be a way to help you manage your finances. We urge you to contact HUD approved agencies to obtain assistance in keeping your home. This assistance is available at no charge. For specific guidance on this notice or information related to the Home Affordable Modification Program, ask the counselor for MHA HELP.

HUD Approved Housing Counseling: 1-800-569-4287 www.HUD.gov
HOPE Hotline Number: 1-888-995-4673

Beware of Foreclosure Rescue Scams. Help is free!

- There is never a fee to get assistance or information about the Making Home Affordable Program from your lender or a HUD-approved housing counselor.
  - For a HUD-approved counselor, visit http://www.hud.gov/offices/hsg/sfh/hcc/fc/
- Beware of any person or organization that asks you to pay a fee in exchange for housing counseling services or modification of a delinquent loan.

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
C/A No.: 2016-CP-32-03572

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2007-1 NOVASTAR HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 2007-1,

Plaintiff,

vs.

PATRICIA OWENS A/K/A PATRICIA ANN OWENS; TAMMY M. BAILEY; SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S COUNTER-MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff, Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Home Equity Loan Asset Backed Certificates, Series 2007-1 ("Deutsche Bank") serves its brief in opposition to Defendants, Patricia Owens a/k/a Patricia Ann Owens ("Owens") and Tammy Bailey's ("Bailey") (collectively, "Defendants") Motion for Summary Judgment, and in support of its Counter-Motion for Partial Summary Judgment as to Defendants' Counterclaims, and states as follows:

INTRODUCTION

This foreclosure action, and Defendants' counterclaims, come after the conclusion of a prior suit by Defendants against Deutsche Bank and other parties in June 2013 (the "2013 Action"), in which Defendants brought claims based on alleged statutory violations by the originating lender. The 2013 Action was ultimately tried by a Lexington County jury, which returned a complete verdict in favor of Deutsche Bank and its co-defendants in that suit. Defendants now argue that

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Deutsche Bank's foreclosure was required to be asserted as a counterclaim in the 2013 Action, and ask for a declaration that the mortgage is unenforceable under principles of *res judicata*. Although it is undisputed that the mortgage debt has not been paid, Defendants further claim that they are entitled to a satisfaction of their mortgage, and assert that Deutsche Bank is liable for failing to record a satisfaction within three months of a putative demand pursuant to S.C. Code § 29-3-320. Finally, Defendants attempt to renew their claim under S.C. Code 37-10-102 (the "Attorney Preference Statute") as a setoff to any foreclosure judgment.

Deutsche Bank's foreclosure action was not a compulsory counterclaim in the 2013 Action under SCRCP 13 because proof of the foreclosure claim would not have barred Defendants' claims in the prior suit, and the claims thus were not "logically related." Even if the claims were deemed logically related, Rule 13 should not be construed to make a foreclosure compulsory under the circumstances of this case. Deutsche Bank has submitted an affidavit showing that at the time Defendants assert it should have filed a counterclaim, it was pursuing efforts to inform Defendants of alternatives to foreclosure. This Court should decline Defendants' request to apply *res judicata* (1) to avoid unnecessary conflict with federal pre-foreclosure intervention requirements; (2) to avoid substantive limitation on the lender's remedies for default in violation of the enabling act for the Rules of Civil Procedure; and (3) because equity and public policy require this court to avoid a "rigid or mechanical" interpretation of *res judicata* that would force a lender to foreclose when it is pursuing bona fide loss mitigation efforts. For each of these reasons, Deutsche Bank is entitled to summary judgment on the Defendants' claim that the mortgage is unenforceable.

Defendants' claim for failure to enter a satisfaction under S.C. Code § 29-3-320 likewise fails because Defendants have not made full payment or satisfaction of the underlying debt. Finally, Defendants are not entitled to any setoff for alleged violations of the Attorney Preference

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Statute, because the evidence submitted in this case conclusively shows that that the originating lender complied with statutory requirements.

STATEMENT OF FACTS

The claims in this matter arise out of a $60,400.00 mortgage loan given by NovaStar Mortgage, Inc. ("NovaStar") to Owens in 1998 and subsequently assumed by Owens' daughter, Defendant Bailey, in 2001. The mortgage loan is evidenced by a promissory note dated June 15, 2016 ("Note") and secured by a mortgage ("Mortgage") encumbering Defendants' real property located at 111 Andrew Court, Gaston, SC 29053 (the "Property"). See Aff. of Nichelle Jones at ¶¶ 9-10, Exhibit 1. NovaStar assigned the Note and Mortgage to Deutsche Bank as reflected by the Assignments of Mortgage dated October 6, 2011 and May 1, 2012 and recorded in the office of the Richland County Register of Deeds in Deed Book 15105, Page 248 and Deed Book 15513, Page 296, respectively. See id. at ¶12, Exhibit 1.

On June 27, 2013, four days before the loan was due to mature, Defendants filed suit against Deutsche Bank and other parties in a separate action under Case Number 2013-CP-32-2210. Although Defendants alleged multiple claims against various parties in that suit, the only claims against Deutsche Bank were for alleged violations of S.C. Code 37-10-102 (the "Attorney Preference Statute") and the South Carolina Unfair Trade Practices Act. In support of these claims, Defendants alleged that the originating lender, NovaStar, did not comply with the provisions of the Attorney Preference Statute, that no attorney supervised the closing of the loan, and that the loan was unconscionable. See Complaint in 2013 Action, Exhibit 2. The Complaint sought damages and penalties, including "all relief available under S.C. Code Ann. § 37-10-105(C)," but did not seek rescission of the mortgage or ask the Court to declare the mortgage void.

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The Note matured on July 1, 2013. At the time of maturity, the loan had an unpaid principal balance of $48,587.09. Defendants defaulted under the terms of the Note and Mortgage by failing to pay the balance due on the note after maturity. See Aff. of Nichelle Jones at ¶14, Exhibit 1. Following Defendants' default under the terms of the Note, Deutsche Bank's loan servicer, Ocwen Loan Servicing, LLC ("Ocwen") attempted to inform the Defendants of alternative solutions to avoid foreclosure. On or around August 23, 2013, Deutsche Bank sent Defendants a letter informing them of potential loss mitigation options, including potential options for a modification under the Home Affordable Modification Program ("HAMP"), a proprietary modification, short sale, and deed-in-lieu of foreclosure. See id. at ¶16, Exhibit 1.

Deutsche Bank served its answer in the 2013 Action on September 26, 2017, less than 90 days from the date the loan went into default and only 34 days after the date of Ocwen's August 23, 2017 foreclosure intervention letter. The 2013 Action was resolved by a jury trial, resulting in a verdict in favor of Deutsche Bank and its co-defendants.

Deutsche Bank filed the Complaint in this action on October 19, 2016, seeking foreclosure of the Property under the terms of the Note and Mortgage. Defendants served their Amended Answer and Counterclaims on December 9, 2016.

STANDARD OF REVIEW

Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. S.C.R.C.P. 56(c); Baughman v. Am. Tel & Tel. Co., 306 S.C. 101, 114-15, 410 S.E. 2d 537, 545 (1991). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Quail Hill, LLC v. Cty. of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010).

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ARGUMENT

I. Deutsche Bank is entitled to summary judgment on Plaintiff's claim that foreclosure is barred by *res judicata*

A. Deutsche Bank's foreclosure would not have barred enforcement of Defendants claims, and therefore is not "logically related" to those claims under Rule 13

In their first counterclaim, Defendants contend that Deutsche Bank was required to file its foreclosure as a compulsory counterclaim in the 2013 Action. Because the successful prosecution of a foreclosure claim by Deutsche Bank, if proven, would not have barred the Defendants' claims under the Attorney Preference Statute and the South Carolina Unfair Trade Practices Act, the foreclosure was not "logically related" to these claims and therefore was not compulsory.

A counterclaim is compulsory only if it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Mortg. Elec. Sys., Inc. v. White, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (Ct. App. 2009) (citing SCRCP 13(a)). Claims that arise out of separate transactions or occurrences from the subject matter of the opposing party's claims are, instead, permissive. Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 330–31, 755 S.E.2d 437, 442 (2014). To be compulsory, there must be a "logical relationship" between the claim and counterclaim. N. Carolina Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989).

South Carolina courts have found that a defendant's counterclaim bears a "logical relationship" to the claim asserted in the complaint when the counterclaim, if proven, would bar the enforcement of the plaintiff's claim. For example, in DAV Corp., the court found that a foreclosure defendant's counterclaims based on an alleged oral agreement subsequent to the origination of the loan were compulsory because, if proven, they would avoid default on the note. 298 S.C. at 518-519, 381 S.E.2d at 905. Similarly, in South Carolina Community Bank v. Salon

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Proz, LLC, the court found that a borrower's counterclaim alleging that the plaintiff had reneged on a promise to modify or restructure the borrower's loan, if proven, would affect the enforceability of the loan. 420 S.C. 89, 97, 800 S.E.2d 488, 492. In contrast, in Carolina First Bank v. BADD, L.L.C., the court found that a claim by a guarantor alleging that the foreclosing lender had conspired to induce default was *not* compulsory where "the allegations, if true, would not render the guarantees unenforceable." 414 S.C. 289, 295-96, 778 S.E.2d 106, 109.

Although the South Carolina courts have not directly addressed the issue of whether a lender must bring an action on a debt as a compulsory counterclaim to a borrower's suit alleging a violation of statutory lending requirements, a majority of courts in other jurisdictions have found that a foreclosure is not compulsory under these circumstances.[1] In Whigham v. Beneficial Finance Co., the Fourth Circuit found that a lender's counterclaim to enforce loan debt was not "logically related" to a borrower's claim under the Truth in Lending Act ("TILA"), observing that the TILA claims "invoke a statutory penalty designed to enforce federal policy against inadequate disclosure by lenders," whereas the foreclosure counterclaim "alleges simply that the borrower has defaulted on a private loan contract governed by state law." 599 F.2d 1322, 1323-24 (4th Cir. 1979). In Bank of New York Mellon v. Keiran, the Minnesota Court of Appeals found that foreclosure was not a compulsory counterclaim in a borrower's TILA action because "The TILA action is based on facts surrounding the original mortgage transaction, while the foreclosure action is based on the Keirans' subsequent performance under the loan." No. A15-2068, 2016 WL 4421302, at *5 (Minn. Ct. App. Aug. 22, 2016). The Sixth Circuit similarly held in Marais v. JPMorgan Chase Bank, N.A. that there was insufficient overlap between a loan servicer's

[1] Because S.C.R.C.P. 13 mirrors the analogous federal rule, courts may look to federal decisions interpreting Rule 13 where there is no South Carolina decision on point. Beach Co. v. Twillman, 351 S.C. 56, 62, 566 S.E.2d 863, 865-66 (Ct. App. 2002) ("South Carolina's Rule 13(a) is the same as the federal rule on counterclaims. Accordingly, we may rely on federal law to interpret our Rule 13.").

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foreclosure claim and a borrower's claim under the Real Estate Settlement Procedures Act for the claims to be "logically related," since the former was a state law contract claim, while the latter required an interpretation of federal statutory law. 676 F. App'x 509, 514 (6th Cir. 2017). The Seventh Circuit has likewise noted the tenuous factual connection between a statutory claim arising out of origination and a subsequent foreclosure, finding that a rule making the foreclosure compulsory would "secure few, if any, of the advantages envisioned in Rule 13(a)." Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 1291 (7th Cir. 1980), rev'd on other grounds by 452 U.S. 205, 101 S. Ct. 2266, 68 L. Ed. 2d 783 (1981); Roban v. Marinosci Law Group, 34 F. Supp. 3d 1252 (S.D. Fla. 2014) (holding that a suit alleging violation of the fair debt collections practice act was not a compulsory counterclaim in a prior foreclosure action because a suit on the debt is not logically related to the action to enforce a federal policy regulating the practices for collecting the debt).

Because proof of Deutsche Bank's foreclosure does not constitute a defense to Defendants' statutory claims in the 2013 Action, the present case stands in contrast to the circumstances under which the courts in DAV Corp. and Salon Proz found counterclaims to be compulsory. Had Deutsche Bank brought a counterclaim for foreclosure in the 2013 Action, it would have been required to show (1) the existence of a debt secured by a mortgage and (2) that the debt was in default. Bank of Am., N.A. v. Draper, 405 S.C. 214, 221, 746 S.E.2d 478, 481 (Ct. App. 2013) (stating that a party seeking foreclosure "has the burden of establishing the existence of the debt and the mortgagor's default on that debt."). None of these points were in dispute in the 2013 action; Defendants did not allege that they did not sign the operative loan documents, nor did they assert that the loan debt was discharged before or after maturity. Instead, Defendants sought to show that the originating lender had violated statutory requirements connected with the closing of

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the loan. Deutsche Bank's proof of the elements of its foreclosure case thus would not have prevented the Defendants from enforcing their purported claims for statutory violations of the Attorney Preference Statute and the Unfair Trade Practices Act. As with the federal statutes at issue in Whigham, Defendants' statutory claims invoke a penalty designed to enforce lenders' compliance with state consumer protection requirements, and are not impacted by proof of Defendants' default on the loan contract itself.

Defendants have argued that the foreclosure is logically related to their claims in the 2013 Action because one statutory remedy (out of several) provided by S.C. Code § 37-10-105(C) is that the court may "refuse to enforce" an unconscionable credit agreement. Thus, Defendants argue, had they proven their allegation that the loan was unconscionable, a court could have found the mortgage to be unenforceable. Defendants did not ask for a determination of the loan's enforceability in their complaint, but they contend that this was encompassed in their prayer for "all relief available under S.C. Code Ann. § 37-10-105(C)." At the time Defendants filed their complaint, however, the loan had not yet matured, and no one had brought an action against them on the debt. Asking the Court to "refuse to enforce" a loan where no enforcement had been sought would have been meaningless. Had Defendants wanted the Court to make an affirmative declaration that the loan was void or unenforceable, they would undoubtedly have expressly requested it, as indeed they have done in the present action. Defendants' complaint in the 2013 action simply did not give reasonable notice of an intent to try the enforceability of the loan, and thus did not render the foreclosure compulsory.

Furthermore, Defendants' argument misconstrues the logical relationship test. As noted above, South Carolina courts have found that a counterclaim may be logically related to the complaint if it would bar enforcement of the plaintiff's claim. See, e.g., DAV Corp., 298 S.C. at

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518-519, 381 S.E.2d at 905. This formulation simply echoes the common law rule that a party "cannot split up his defenses, and present them by piecemeal in successive suits arising out of the same transaction." See Mitchell v. Federal Intermediate Credit Bank, 165 S.C. 457, 164 S.E. 136, 143 (1932) (quoting Bierer & Downer v. Fretz, 37 Kan. 27, 14 P. 558, 559 (1887). There is no precedent for the reverse proposition urged by Defendants: that a defendant is obliged to raise all counterclaims for which the plaintiff's allegations might constitute a defense. In other words, a claim of unconscionability may be compulsory in a foreclosure action because it is a defense to the enforceability of the note, and should thus be raised at the time of enforcement. Presenting evidence of default and acceleration of the debt, however, is no defense to a claim that the loan is unconscionable and violates consumer protection requirements. Nor does the same rationale apply, because allowing Deutsche Bank to proceed with a separate foreclosure does not, as in the former scenario, give it a second bite at the apple or force Defendants to retry their statutory claims. In the absence of precedent extending the compulsory counterclaim rule in the manner sought be Defendants, this Court should decline to do so.

Claims that arise out of separate transactions or occurrences than the subject matter of the opposing party's claims are, instead, permissive. Rule 13(a), S.C. R. Civ. P. There were two transactions at issue in the 2013 action. The first was the 1999 loan closing between Novastar and Patricia Owens, and the cause of action related to whether Novastar complied with the South Carolina Consumer Practices Act in conducting the closing. The second transaction was between Novastar and Tammy Bailey in 2002 when Owens' assigned and Bailey assumed the note and mortgage. Deutsche Bank was not part of either transaction and its obligation, if any, was limited to that of an assignee. See S.C. Code Ann. § 37-1-301(13). Presenting evidence of default and

acceleration of the debt simply would not have been relevant to Novastar's alleged omissions in the two transactions, and should not be deemed compulsory.

B. Rule 13 must be construed to avoid conflict with federal pre-foreclosure intervention requirements.

Even if Deutsche Bank's foreclosure were deemed "logically related" to the claims in the 2013 action, Rule 13 should not be interpreted to make foreclosure compulsory under the circumstances of this case to avoid unnecessary conflict with federal pre-foreclosure intervention requirements. Several regulations implemented under the Dodd Frank Act require loan servicers to implement steps to allow borrowers to take advantage of alternatives to foreclosure. 12 CFR § 1024.39 provides that a loan servicer "shall establish or make good faith efforts to establish live contact with a delinquent borrower not later than the 36th day of the borrower's delinquency and, promptly after establishing live contact, inform such borrower about the availability of loss mitigation options if appropriate." 12 CFR § 1024.41, which imposes requirements designed to avoid so-called "dual tracking," flatly prohibits a loan servicer from making the first notice or filing required for a foreclosure unless a borrower's mortgage loan obligation is more than 120 days delinquent.

In this case, Defendants' loan did not go into default until after it matured on July 1, 2013, four days *after* Defendants filed the 2013 action. Deutsche Bank filed its answer in the 2013 Action on September 26, 2013, less than 90 days from the default. If Rule 13 made the foreclosure a compulsory counterclaim, as suggested by Defendants, a loan servicer in Deutsche Bank's position would have to choose between violating Section 1024.41's prohibition on foreclosure referrals less than 120 days from delinquency (and attendant penalties and liabilities) and losing

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its right to repayment of the mortgage debt.[2] To avoid such a conflict, Rule 13 should be construed to avoid the application of *res judicata* when a servicer opts to pursue loss mitigation efforts prior to foreclosure.

C. Construction of Rule 13 to bar foreclosure under the circumstances of this case would limit parties' substantive rights in violation of the enabling act for the South Carolina Rules of Civil Procedure

The enabling act for the South Carolina Rules of Civil Procedure, 1985 S.C. Act No. 100 ("Enabling Act") states that a rule of procedure may not be "construed to affect the substantive legal rights of any party to any civil litigation in the courts of this State but shall affect only matters of practice and procedure." These words are not merely precatory, but a substantive limitation on the civil rules. See Anderson Mem'l Hosp. v. W. R. Grace & Co., No. CIV.A. 92-CP-25-270, 1994 WL 1744074, at *3 (S.C. Com. Pl. Aug. 8, 1994); Middleton v. SunStar Acceptance Corp., No. CIV.A. 98-CP-07-1131, 2000 WL 33385388, at *2 (S.C. Com. Pl. Jan. 13, 2000) (finding that under the Enabling Act, the interpretation of Rule 23 must yield to statutory constraints).

The South Carolina Supreme Court has long recognized that loan modification and alternatives to foreclosure may be beneficial to both borrowers and lenders. The foreclosure intervention requirements in S.C. Supreme Court Administrative Order 2011-05-02-01 (the "2011 Administrative Order") are in part intended "to insure that eligible homeowners and lender-services have been afforded the benefits of loan modification or other loss mitigation where possible." In the modern era, it is common for lenders and loan servicers to have robust loss mitigation programs. A rule forcing the lender to foreclose in response to a borrower's suit, perhaps contrary to the desire of both parties, would unfairly preclude both borrower and lender

[2] The cited portion of 12 CFR § 1024.41 was promulgated prior to the date of Deutsche Bank's September 26, 2013 answer, but did not take effect until January 10, 2014. See Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 FR 10696-01.

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from exercising substantive legal alternatives to foreclosure, such as modification of the loan, refinancing the loan at maturity, and other loss mitigation options. Thus, imposing a rule that requires lenders to foreclose in response to a borrower's suit would substantively limit the rights of both borrowers and lenders in violation of the Enabling Act.

Furthermore, S.C.R.C.P. 71 provides that actions to foreclose liens shall "ordinarily be referred to a master pursuant to Rule 53." There are several benefits to such referrals. Referral to a master-in-equity or special referee ensures that one judge will hear all matters in the case. A master typically sets a date certain for trial, which may be crucial for lenders with out-of-state witnesses. Finally, an experienced master-in-equity or special referee is typically well-versed in mortgages and related areas of law. If foreclosure were deemed a compulsory counterclaim to a borrower's suit under Rule 13, such a rule might encourage borrowers to preemptively file suit in an effort to control the forum of the litigation. This result would contravene the intent of Rule 71 that mortgage foreclosures should generally be tried by the master. It also interferes with a lender's choice of remedies to force a lender/creditor to maintain its claims in equity in the circuit court. There is no rule requiring that claims at equity and law be severed, it is discretionary. As a result, lenders/creditors may be forced to foreclose on mortgages within a jury trial. Such a result defeats the purpose of both Rules 71 and 13.

D. Construction of Rule 13 to bar foreclosure under the circumstances of this case would be grossly unjust and inequitable

The doctrine of *res judicata* exists to "reduce litigation and conserve the resources of the litigants and it is based on the notion that it is unfair to permit a party to relitigate an issue that has already been decided." Nelson v. QHG of S.C. Inc., 354 S.C. 290, 314, 580 S.E.2d 171, 184 (Ct. App. 2003), rev'd on other grounds by 362 S.C. 421, 608 S.E.2d 855 (2005) (quoting State v. Bacote, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998)). Since the doctrine is grounded upon

concepts of fairness, it must not be "rigidly or mechanically applied." Id. Thus, the application of *res judicata* a "may be precluded where unfairness or injustice results, or public policy requires it." Mr. T v. Ms. T, 378 S.C. 127, 138, 662 S.E.2d 413, 419 (Ct. App. 2008).

At both state and federal levels, public policy plainly favors facilitation of opportunities for pre-foreclosure intervention. The 2011 Administrative Order reflects the South Carolina Supreme Court's encouragement of loss mitigation as a means to relieve foreclosure dockets and encourage resolution of defaults through alternatives to litigation. In its promulgation of mortgage servicing rules, the Consumer Financial Protection Bureau has specifically stated that its goals include "assist[ing] consumers with . . . options that may be available for consumers having difficulty with their mortgage loan obligations." See Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 FR 10696-01. A rule making foreclosure compulsory in response to a borrower's claim that the lender violated consumer protection requirements would contravene this purpose, as well as the public policy supporting the consumer protection laws themselves. As the court recognized in Marais, "If foreclosure is a compulsory counterclaim in response to claims brought by borrowers under federal consumer-protection statutes, as Plaintiff contends, then every act of a consumer to vindicate her rights under those laws could come with the risk of losing her home in the process." 676 F. App'x 509, 514 (6th Cir. 2017).

In addition to public policy, equitable principles also dictate that a lender should not forfeit its right to foreclose when it participates in bona fide efforts for pre-foreclosure intervention. "Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice." Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 256, 715 S.E.2d 348, 356 (Ct. App. 2011). Furthermore, "[e]quity regards and treats that as done which in good conscience ought to be done," and, in giving legal effect to an equitable right, will "dispens[e] with

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pure formalities which would otherwise defeat the equity." Wilkie v. Philadelphia Life Ins. Co., 187 S.C. 382, 197 S.E. 375, 378 (1938).

Here, Deutsche Bank has established that its loan servicer sent correspondence to Defendants informing them of loss mitigation opportunities shortly before serving its answer in the 2013 Action. See Aff. of Nichelle Jones at ¶ 16, Exhibit 1. Deutsche Bank thus sought alternatives to the foreclosure of Defendants' property in good faith. Defendants, however, seek the extinguishment of Deutsche Bank's mortgage interest even though it is undisputed that the mortgage debt has not been paid, and despite the resolution of the 2013 Action in favor of the lender. Where the lender makes a bona fide effort to engage the borrower in loss mitigation efforts prior to moving forward with foreclosure, as here, both equity and public policy strongly disfavor application of *res judicata* on the basis of the lender's decision not to immediately foreclose. Thus, to the extent the Court finds that Deutsche Bank's foreclosure would otherwise be a compulsory counterclaim in the 2013 Action, the Court should nevertheless decline to engage in a "rigid or mechanical" application of the rule, but should permit the foreclosure to be tried on the merits.

II. Deutsche Bank is entitled to summary judgment as to Defendants' counterclaim for alleged violations of S.C. Code § 29-3-320, because it is undisputed that Defendants have not paid or satisfied the mortgage debt

In their Second Counterclaim, Defendants argue that Deutsche Bank is liable under S.C. Code § 29-3-320 for failure to enter a satisfaction of the mortgage within three months of a demand to do so from Defendants. This claim fails because Defendants do not allege that they have actually paid the mortgage debt, a fundamental requirement of this claim.

SC Code § 29-3-310 requires a mortgagee of record "who has received *full payment or satisfaction* or to whom a legal tender has been made of his debts, damages, costs, and charges" (emphasis added) to record a satisfaction of the mortgage within three months of a proper demand.

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Section 29-3-320 provides that a mortgagee is liable for failure to enter a satisfaction after "having received such *payment, satisfaction, or tender*" (emphasis added). The South Carolina Supreme Court has affirmed that to trigger the relief available under the statute, a mortgagor must show that "he has made full payment of his debts, including any applicable damages, costs and charges." Dykeman v. Wells Fargo Home Mortg., Inc., 381 S.C. 333, 340, 673 S.E.2d 804, 807 (2009) (internal quotations omitted). Sections 29-3-310 and 29-3-320 are penal statutes and "must be strictly construed." Id. at 337, 339-40, 673 S.E.2d at 806-807.

Defendants do not allege that they have paid the mortgage debt. Instead, Defendants merely have an unadjudicated claim that the mortgage is unenforceable. Defendants argue that because the statute refers to "payment, satisfaction, or tender," satisfaction must mean something different from payment, and assert (without supporting precedent) that the bar of *res judicata* would qualify as a "satisfaction" under the statute. Contrary to this assertion, South Carolina Court of Appeals has defined a satisfaction as "'[t]he discharge of an obligation by paying a party what is due to him' or '[t]he performance of a substituted obligation in return for the discharge of the original obligation.'" Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 496, 649 S.E.2d 494, 501 (Ct. App. 2007) (quoting Black's Law Dictionary 1342 (6th ed. 1990)); Bowers v. Dep't of Transp., 360 S.C. 149, 155, 600 S.E.2d 543, 546 (Ct. App. 2004). Thus, under the definition recognized in Ecclesiastes Production Ministries, a satisfaction can be made by full payment *or* by a substitute performance by the obligor, and it is unnecessary to look to Rule 13 to find meaning in the legislature's use of the phrase "payment, satisfaction, or tender."

Defendants have cited no cases that equate the bar of *res judicata* with a "satisfaction" of a promissory note or other obligation. Nor have Defendants demonstrated a legislative intent in Section 29-3-320 to impose a monetary penalty on a mortgagee that refuses to record a satisfaction

of mortgage in response to a borrower's bare, unadjudicated claim that the mortgage is unenforceable. Because Section 29-3-320 is penal in nature and must be strictly construed, the expansive interpretation urged by Defendants must fail.

Defendants allege neither that they have paid the debt secured by the Mortgage, nor that they have performed a "substituted obligation" in return for Deutsche Bank's discharge of the debt. See Ecclesiastes Prod. Ministries, 374 S.C. at 496, 649 S.E.2d at 501. Because Defendants have not alleged facts demonstrating that the Loan debt has been paid or otherwise satisfied, Deutsche Bank is entitled to summary judgment on this claim.

III. There is no genuine issue of material fact as to Defendants' claim for alleged violations of the Attorney Preference Statute.

Defendants have previously conceded that they may not seek affirmative relief against Deutsche Bank for their claim under the Attorney Preference Statute, due to the expiration of the statute of limitations. Nevertheless, Defendants claim a right of setoff to any foreclosure judgment. The facts established by Deutsche Bank, however, preclude any such setoff.

As shown by the Affidavit of Nichelle Jones, Owens signed a South Carolina Notice of Rights Concerning the Selection of an Attorney and Insurance Agent dated May 15, 1998, one month prior to the loan closing on June 15, 1998. See Affidavit of Nichelle Jones at ¶ 8, Exhibit 1. Pursuant to S.C. Code § 37-10-102, a creditor may comply with the provisions of the Attorney Preference Statute by "including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the [South Carolina Department of Consumer Affairs]." See also Davis v. NationsCredit Fin. Servs. Corp., 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (finding that the legislative intent of this language was to require "clear and prominent disclosure of the information necessary to ascertain the borrower's preference as to the legal counsel employed to represent the debtor in all matters

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relating to the closing of the transaction, and the borrower's preference as to the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage," and finding that a creditor substantially complied with the statute by providing the required information on a separate sheet from the credit application).

Defendants have not and cannot show that the form signed by Owens was not presented to Owens in a timely manner, or that the form was materially different from the form then distributed by the South Carolina Department of Consumer Affairs. Accordingly, Deutsche Bank should be granted summary judgment on this claim.

CONCLUSION

For the reasons stated above, Deutsche Bank respectfully requests that the Court deny Defendants' Motion for Summary Judgment, and grant Deutsche Bank's Motion for Partial Summary Judgment as to each of Defendants' counterclaims.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2017 I served the above and foregoing **Memorandum of Law** on the following via U.S. Mail addressed to the following:

Drew Radeker, Esq.
PO Box 50143
Columbia, SC 29250

Attorney for Plaintiff

This the 14th day of September, 2017.

/s/ G. Benjamin Milam
Of Counsel

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STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS CASE NO. 2016-CP-32-3572
Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1, **Plaintiff,** **vs.** **Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,** **Defendants.**	**DEFENDANTS OWENS AND BAILEY'S REPLY MEMORANDUM REGARDING MOTIONS FOR SUMMARY JUDGMENT**

The Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey (hereinafter "Bailey and Owens") hereby submit this memorandum in reply to the Plaintiff (hereinafter "Deutsche Bank")'s recent filings concerning the summary judgment motions pending in the above-captioned action.

THE ARGUMENT ABOUT FEDERAL REGULATIONS DOES NOT APPLY

While Deutsche Bank advances an interesting argument about 12 CFR §§ 1024.39 and 1024.41, it is not applicable to this case. As shown by the attached excerpts from the Federal Register at 78 FR 10696, 10708, 10842, 10855 (Feb. 14, 2013), the rules under the federal regulations that Deutsche Bank references did not go into effect until January 10, 2014 – nearly four months after September 26, 2013, which is when Deutsche Bank served its answer in the Bailey v. Novastar case. Deutsche Bank cannot prevail on a theory that Rule 13(a), SCRCP, did not apply to it as a result of a federal regulation that did not go into effect until the following year.

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Any argument based on "law" that was not the law at the time in question is purely academic and does not address the instant controversy.

OCWEN'S RECORDS ARE NOT TRUSTWORTHY

Attached to this memorandum is a consent order dated December 19, 2014, signed by Ocwen Loan Servicing, LLC (hereinafter "Ocwen"), which is Deutsche Bank's servicer for the mortgage loan at issue, and entered into with the New York State Department of Financial Services, in which Ocwen stipulated, among other things, that "Ocwen regularly gives borrowers incorrect or outdated information, sends borrowers backdated letters, unreliably tracks data for investors, and maintains inaccurate records" and that "Ocwen's core servicing functions rely on its inadequate systems."

In light of these admissions, Deutsche Bank has a hard row to hoe when it comes to grounding its factual contentions in Ocwen's records.

LAW FROM OTHER JURISDICTIONS IS IRRELEVANT

Deutsche Bank relies on law from other jurisdictions. Such law is irrelevant. As discussed in this court's order that denied Deutsche Bank's motion to dismiss in this case, there is controlling South Carolina precedent that demonstrates amply that Deutsche Bank's foreclosure claim was a compulsory counterclaim in the Bailey v. Novastar action, a case that could have resulted in a judgment that the subject note and mortgage were unenforceable.

CONCLUSION

As noted in Bailey and Owens' motion for partial summary judgment, they have incorporated into that motion their memorandum previously filed in opposition to Deutsche Bank's motion to dismiss their counterclaims and court's order denying that motion. Those filings and

what is above in this one show the correctness of Bailey and Owens' position. Their motion for partial summary judgment should be granted, and Deutsche Bank's should be denied.

Respectfully submitted,

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Part II

Bureau of Consumer Financial Protection

12 CFR Part 1024
Mortgage Servicing Rules Under the Real Estate Settlement Act (Regulation X); Final Rule

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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1024

[Docket No. CFPB–2012–0034]

RIN 3170–AA14

Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretations.

SUMMARY: The Bureau of Consumer Financial Protection is amending Regulation X, which implements the Real Estate Settlement Procedures Act of 1974, and implementing a commentary that sets forth an official interpretation to the regulation. The final rule implements provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act regarding mortgage loan servicing. Specifically, this final rule implements Dodd-Frank Act sections addressing servicers' obligations to correct errors asserted by mortgage loan borrowers; to provide certain information requested by such borrowers; and to provide protections to such borrowers in connection with force-placed insurance. Additionally, this final rule addresses servicers' obligations to establish reasonable policies and procedures to achieve certain delineated objectives; to provide information about mortgage loss mitigation options to delinquent borrowers; to establish policies and procedures for providing delinquent borrowers with continuity of contact with servicer personnel capable of performing certain functions; and to evaluate borrowers' applications for available loss mitigation options. Further, this final rule modifies and streamlines certain existing servicing-related provisions of Regulation X. For instance, this final rule revises provisions relating to mortgage servicers' obligation to provide disclosures to borrowers in connection with transfers of mortgage servicing, and mortgage servicers' obligation to manage escrow accounts, including restrictions on purchasing force-placed insurance for certain borrowers with escrow accounts and requirements to return amounts in an escrow account to a borrower upon payment in full of a mortgage loan. Concurrently with the issuance of this final rule, the Bureau is issuing a rule implementing amendments relating to mortgage servicing to the Truth in Lending Act in Regulation Z.

DATES: This final rule is effective on January 10, 2014.

FOR FURTHER INFORMATION CONTACT:
Regulation X (RESPA): Whitney Patross, Attorney; Jane Gao, Terry Randall or Michael Scherzer, Counsels; Lisa Cole or Mitchell E. Hochberg, Senior Counsels, Office of Regulations, at (202) 435–7700.
Regulation Z (TILA): Whitney Patross, Attorney; Marta Tanenhaus or Mitchell E. Hochberg, Senior Counsels, Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Summary of the Final Rule

The Bureau of Consumer Financial Protection (Bureau) is amending Regulation X, which implements the Real Estate Settlement Procedures Act of 1974, and implementing a commentary that sets forth an official interpretation to the regulation (the 2013 RESPA Servicing Final Rule). The final rule implements provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act regarding mortgage loan servicing.[1] Specifically, this final rule implements Dodd-Frank Act sections addressing servicers' obligations to correct errors asserted by mortgage loan borrowers; to provide certain information requested by such borrowers; and to provide protections to such borrowers in connection with force-placed insurance. Additionally, this final rule addresses servicers' obligations to establish reasonable policies and procedures to achieve certain delineated objectives; to provide information about mortgage loss mitigation options to delinquent borrowers; to establish policies and procedures for providing delinquent borrowers with continuity of contact with servicer personnel capable of performing certain functions; and to evaluate borrowers' applications for available loss mitigation options. Further, this final rule modifies and streamlines certain existing servicing-related provisions of Regulation X. For instance, this final rule revises provisions relating to mortgage servicers' obligation to provide disclosures to borrowers in connection with a transfer of mortgage servicing, and mortgage servicers' obligation to manage escrow accounts, including restrictions on purchasing force-placed insurance for certain borrowers with escrow accounts and requirements to return amounts in an escrow account to a borrower upon payment in full of a mortgage loan. Concurrently with the issuance of this final rule, the Bureau is issuing a rule implementing amendments relating to mortgage servicing to the Truth in Lending Act in Regulation Z (the 2013 TILA Servicing Final Rule).

On August 10, 2012, the Bureau issued proposed rules that would have amended Regulation X, which implements RESPA,[2] as well as Regulation Z, which implements TILA,[3] regarding mortgage servicing requirements.[4] The Proposed Servicing Rules proposed to implement the Dodd-Frank Act amendments to TILA and RESPA with respect to, among other things, periodic mortgage statements, disclosures for ARMs, prompt crediting of mortgage loan payments, requests for mortgage loan payoff statements, error resolution, information requests, and protections relating to force-placed insurance. In the 2012 RESPA Servicing Proposal, the Bureau also proposed to use its authority to adopt requirements relating to servicer policies and procedures, early intervention with delinquent borrowers, continuity of contact, and procedures for evaluating and responding to loss mitigation applications.[5] The proposals sought to address fundamental problems that underlie many consumer complaints and recent regulatory and enforcement actions, as set forth in more detail below.

The Bureau is finalizing the Proposed Servicing Rules with respect to nine

[1] Public Law 111–203, 124 Stat. 1376 (2010).

[2] *See* Press Release, U.S. Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Proposes Rules to Protect Mortgage Borrowers* (Aug. 10, 2012) available at *http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-rules-to-protect-mortgage-borrowers/.* The proposal was published in the Federal Register on September 17, 2012. 77 FR 57200 (Sept. 17 2012) (2012 RESPA Servicing Proposal).

[3] *See* Press Release, U.S. Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Proposes Rules to Protect Mortgage Borrowers* (August 10, 2012) available at *http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-rules-to-protect-mortgage-borrowers/.* This proposal was also published in the Federal Register on September 17, 2012. 77 FR 57318 (Sept. 17, 2012) (2012 TILA Servicing Proposal; and, together with the 2012 RESPA Servicing Proposal, the Proposed Servicing Rules).

[4] The 2013 RESPA Servicing Final Rule and the 2013 TILA Servicing Final Rule are referred to collectively as the Final Servicing Rules.

[5] For ease of discussion, this notice uses the term "discretionary rulemakings" to refer to a set of regulations implemented using the Bureau's authorities under section 6(j), 6(k)(1)(E), or 19(a) of RESPA to expand requirements beyond those explicit in RESPA. The "discretionary rulemakings" include requirements relating to servicer policies and procedures, early intervention with delinquent borrowers, continuity of contact, and procedures for evaluating and responding to loss mitigation applications, as set forth in §§ 1024.38–41.

a final rule implementing Dodd-Frank Act requirements concerning appraisals for higher-risk mortgages, pursuant to TILA section 129H as established by Dodd-Frank Act section 1471, 15 U.S.C. 1639h. This rule follows the agencies' August 2012 joint proposal (the 2012 Interagency Appraisals Proposal).[54] The agencies' joint final rule is referred to as the 2013 Interagency Appraisals Final Rule. As discussed in that final rule, the agencies plan to issue a supplemental proposal addressing potential additional exemptions to the appraisal requirements. In addition, following its August 2012 proposal (the 2012 ECOA Appraisals Proposal),[55] the Bureau is issuing a final rule to implement provisions of the Dodd-Frank Act requiring that creditors provide applicants with a free copy of written appraisals and valuations developed in connection with applications for loans secured by a first lien on a dwelling, pursuant to section 701(e) of the Equal Credit Opportunity Act (ECOA) as amended by Dodd-Frank Act section 1474, 15 U.S.C. 1691(e). The Bureau's final rule is referred to as the 2013 ECOA Appraisals Final Rule.

The Bureau is not at this time finalizing proposals concerning various disclosure requirements that were added by title XIV of the Dodd-Frank Act, integration of mortgage disclosures under TILA and RESPA, or a simpler, more inclusive definition of the finance charge for purposes of disclosures for closed-end mortgage transactions under Regulation Z. The Bureau expects to finalize these proposals and to consider whether to adjust regulatory thresholds under the Title XIV Rulemakings in connection with any change in the calculation of the finance charge later in 2013, after it has completed quantitative testing, and any additional qualitative testing deemed appropriate, of the forms that it proposed in July 2012 to combine TILA mortgage disclosures with the good faith estimate (RESPA GFE) and settlement statement (RESPA settlement statement) required under the Real Estate Settlement Procedures Act, pursuant to Dodd-Frank Act section 1032(f) and sections 4(a) of RESPA and 105(b) of TILA, as amended by Dodd-Frank Act sections 1098 and 1100A, respectively (the 2012 TILA–RESPA Proposal).[56] Accordingly, the Bureau already has issued a final rule delaying implementation of various affected title XIV disclosure provisions.[57]

Coordinated Implementation of Title XIV Rulemakings

As noted in all of its foregoing proposals, the Bureau regards each of the Title XIV Rulemakings as affecting aspects of the mortgage industry and its regulations. Accordingly, as noted in its proposals, the Bureau is coordinating carefully the Title XIV Rulemakings, particularly with respect to their effective dates. The Dodd-Frank Act requirements to be implemented by the Title XIV Rulemakings generally will take effect on January 21, 2013, unless final rules implementing those requirements are issued on or before that date and provide for a different effective date. *See* Dodd-Frank Act section 1400(c), 15 U.S.C. 1601 note. In addition, some of the Title XIV Rulemakings are required by the Dodd-Frank Act to take effect no later than one year after they are issued. *Id.*

The comments on the appropriate effective date for this final rule are discussed in detail below in part VI of this notice. In general, however, consumer advocates requested that the Bureau put the protections in the Title XIV Rulemakings into effect as soon as practicable. In contrast, the Bureau received some industry comments indicating that implementing so many new requirements at the same time would create a significant cumulative burden for creditors. In addition, many commenters also acknowledged the advantages of implementing multiple revisions to the regulations in a coordinated fashion.[58] Thus, a tension exists between coordinating the adoption of the Title XIV Rulemakings and facilitating industry's implementation of such a large set of new requirements. Some have suggested that the Bureau resolve this tension by adopting a sequenced implementation, while others have requested that the Bureau simply provide a longer implementation period for all of the final rules.

The Bureau recognizes that many of the new provisions will require creditors to make changes to automated systems and, further, that most administrators of large systems are reluctant to make too many changes to their systems at once. At the same time, however, the Bureau notes that the Dodd-Frank Act established virtually all of these changes to institutions' compliance responsibilities, and contemplated that they be implemented in a relatively short period of time. And, as already noted, the extent of interaction among many of the Title XIV Rulemakings necessitates that many of their provisions take effect together. Finally, notwithstanding commenters' expressed concerns for cumulative burden, the Bureau expects that creditors actually may realize some efficiencies from adapting their systems for compliance with multiple new, closely related requirements at once, especially if given sufficient overall time to do so.

Accordingly, the Bureau is requiring that, as a general matter, creditors and other affected persons begin complying with the final rules on January 10, 2014. As noted above, section 1400(c) of the Dodd-Frank Act requires that some provisions of the Title XIV Rulemakings take effect no later than one year after the Bureau issues them. Accordingly, the Bureau is establishing January 10, 2014, one year after issuance of the Bureau's 2013 ATR, Escrows, and HOEPA Final Rules (*i.e.*, the earliest of the title XIV Rulemakings), as the baseline effective date for most of the Title XIV Rulemakings. The Bureau believes that, on balance, this approach will facilitate the implementation of the rules' overlapping provisions, while also affording creditors sufficient time to implement the more complex or resource-intensive new requirements.

The Bureau has identified certain rulemakings or selected aspects thereof, however, that do not present significant implementation burdens for industry. Accordingly, the Bureau is setting earlier effective dates for those final rules or certain aspects thereof, as applicable. Those effective dates are set forth and explained in the Federal Register notices for those final rules.

IV. Legal Authority

The final rule was issued on January 17, 2013, in accordance with 12 CFR 1074.1. The Bureau is issuing this final rule pursuant to its authority under RESPA and the Dodd-Frank Act. Section 1061 of the Dodd-Frank Act transferred

Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Federal Housing Finance Agency.

[54] 77 FR 54722 (Sept. 5, 2012).

[55] 77 FR 50390 (Aug. 21, 2012).

[56] 77 FR 51116 (Aug. 23, 2012).

[57] 77 FR 70105 (Nov. 23, 2012).

[58] Of the several final rules being adopted under the Title XIV Rulemakings, six entail amendments to Regulation Z, with the only exceptions being the 2013 RESPA Servicing Final Rule (Regulation X) and the 2013 ECOA Appraisals Final Rule (Regulation B); the 2013 HOEPA Final Rule also amends Regulation X, in addition to Regulation Z. The six Regulation Z final rules involve numerous instances of intersecting provisions, either by cross-references to each other's provisions or by adopting parallel provisions. Thus, adopting some of those amendments without also adopting certain other, closely related provisions would create significant technical issues, *e.g.*, new provisions containing cross-references to other provisions that do not yet exist, which could undermine the ability of creditors and other parties subject to the rules to understand their obligations and implement appropriate systems changes in an integrated and efficient manner.

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the first sentence of this clause.[191] A few participants specifically commented that this sentence seemed out of place, because it was a definition rather than a statement specifically about their situation. The Bureau tested a hypothetical estimated 90–150 day timeframe for when foreclosure could occur. When asked when lenders could begin to pursue foreclosure, all participants referred to the 90 to 150 day timeframe in the clause, and understood that this time period would start from the due date of their missed payment. However, at least two participants mistakenly thought that the reference to this time period implied that the foreclosure process could not start sooner than 90 days after the missed payment, despite the fact that the clause states that the process "may begin earlier or later."[192] One participant felt strongly that if it was true that the foreclosure process could start in less than 90 days, then the reference to the "90 to 150 day" time period should be removed from the clause because it was misleading. For the reasons explained in the section-by-section analysis of § 1024.39(b)(2) above, the Bureau has omitted the clauses in proposed MS–4(D) that illustrated how a servicer could explain foreclosure and provide the estimated number of days in which the servicer may begin the foreclosure process, as would have been required under proposed § 1024.39(b)(2)(v).

Proposed clauses in Model MS–4(E) illustrated how the servicer may provide contact information for the State housing finance authority and housing counselors, as would have been required under proposed § 1024.39(b)(2)(vi). During consumer testing of proposed MS–4(E), all participants understood that the purpose of this message was to provide contact information for the Federal government agency identified in the clause.[193] Contact information for accessing housing counseling resources was also tested during previous rounds of testing of the ARM interest rate adjustment notice. The Bureau is adopting in the final rule the clauses substantially as proposed setting forth contact information for either the Bureau or HUD Web site to access a list of housing counselor or counseling organizations, as well as the HUD telephone number to access the list of HUD-approved counselors. The Bureau is renumbering MS–4(E) as MS–4(C). For the reasons discussed above in the section-by-section analysis of § 1024.39(b)(2), the Bureau is omitting contact information for State housing finance authorities.

VI. Effective Date

This final rule is effective on January 10, 2014. The Bureau believes that this approach is consistent with the timeframes established in section 1400(c) of the Dodd-Frank Act and, on balance, will facilitate the implementation of the Title XIV Rulemakings' overlapping provisions, while also affording covered persons sufficient time to implement the more complex or resource-intensive new requirements. Certain of the regulations set forth in the Final Servicing Rules are required under title XIV. Specifically, section 1420 of the Dodd-Frank Act, which requires the periodic statement, states that the Bureau "shall develop and prescribe a standard form for the disclosure required under this subsection, taking into account that the statements required may be transmitted in writing or electronically." 15 U.S.C. 1638(f)(2). Other regulations set forth in the Final Servicing Rules, while implementing amendments under title XIV of the Dodd-Frank Act, are *not* regulations required under title XIV. Pursuant to section 1400(c)(2) of the Dodd-Frank Act, the effective dates of these regulations need not be within one year of issuance.

The Bureau received approximately 60 comments from industry participants with respect to the appropriate effective date. As stated above, comments from consumer advocacy groups generally urged earlier effective dates. A number of industry trade associations, as well as a large bank and a small credit union indicated that the Bureau should provide a sufficient amount of time, but did not express an opinion regarding an appropriate timeframe. The majority of servicers, including large and small banks, non-bank servicers, and numerous credit unions, as well as their trade associations, indicated that the Bureau should establish an effective date of between 12 and 18 months after issuance.[194] Some large banks, a bank servicer, numerous trade associations, the Office of Advocacy of the U.S. Small Business Administration, and the GSEs stated that the Bureau should consider an implementation period of approximately 18–24 months for certain of the requirements. Further, three banks and numerous trade associations for banks and manufactured housing servicers stated that the Bureau should consider an effective date between 24 and 36 months after issuance. Each of the industry commenters generally stated that the requested time was necessary to effectively implement the regulations because of the complexity of the proposed rules, the impact on systems changes and staff training, and the cumulative impact of the proposed mortgage servicing rules when combined with other requirements imposed by the Dodd-Frank Act or proposed by the Bureau. These letters provide some basis to believe that implementing the regulations within 12 months is challenging for many firms. They do not establish, however, that implementation in 12 months is impracticable.

For the reasons already discussed above, the Bureau believes that an effective date of January 10, 2014 for this final rule and most provisions of the other title XIV final rules will ensure that consumers receive the protections in these rules as soon as reasonably practicable, taking into account the timeframes established by the Dodd-Frank Act, the need for a coordinated approach to facilitate implementation of the rules' overlapping provisions, and the need to afford covered persons sufficient time to implement the more complex or resource-intensive new requirements.

VII. Dodd-Frank Act Section 1022(b)(2) Analysis

A. Overview

In developing the final rule, the Bureau has considered potential benefits, costs, and impacts.[195] The 2012 RESPA Servicing Proposal set forth a preliminary analysis of these effects, and the Bureau requested and received comments on this topic. In addition, the Bureau has consulted, or offered to consult, with the prudential regulators, HUD, FHFA, the Federal Trade Commission, and the Federal Emergency Management Agency,

[191] "Foreclosure is a legal process a lender can use to take ownership of a property from a borrower who is behind on his or her mortgage payments."

[192] This specific question was not asked of all participants, so it is not possible to estimate exactly how many of the participants might have had this misconception.

[193] Macro tested a statement including HUD's housing counselor list and phone number because, at the time of testing, the Bureau did not have a web site containing this information.

[194] In addition, a force-placed insurer stated that it would be require between 6–12 months to implement regulations relating to force-placed insurance requirements.

[195] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas.

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does not specify specific steps required for reviewing service providers.[233] Regarding implementation, a servicer can take into account the size, nature, and scope of its operations. In particular, a servicer may take into account the volume and aggregate unpaid principal balance of mortgage loans serviced, the credit quality, including the default risk, of the mortgage loans serviced, and the servicer's history of consumer complaints.

This advantage to regulated entities of objectives-based standards may be offset by costs to the regulated entity in at least two ways. First, a regulated entity may incur costs to measure and evaluate whether the entity is, in fact, achieving the objective required by the regulation. Second, a regulated entity may incur costs resulting from over-compensation to achieve an objective when the achievement of such objective depends on factors outside the control of the regulated entity. The general servicing policies, procedures, and requirements mandate policies and procedures, which are under the control of the servicer. The policies and procedures need only be reasonably designed to achieve the objectives, which will tend to mitigate the risks to servicers of over-complying to achieve objectives when the failure to achieve such objectives is based on factors beyond the servicer's control.

Finally, § 1024.38 imposes a record retention requirement and a servicing file requirement. Servicers must retain records that document actions taken by servicers with respect to a borrower's mortgage loan until one year after the date a mortgage loan is discharged or servicing is transferred. The Bureau believes that currently servicers generally retain this information at least until the mortgage loan is discharged or servicing is transferred. Further, this requirement replaces a previous document retention requirement in § 1024.17(l) requiring servicers to retain documents relating to borrower escrow accounts for five years, notwithstanding whether a mortgage loan was discharged or servicing was transferred. Because documents and information relating to a servicing file are necessary for on-going servicer operations, the Bureau believes the cost of this provision to servicers comes from the additional year that they may need to retain documents not related to escrow charges after a mortgage loan is discharged or servicing is transferred. This retention expense is incremental to the expense associated with retaining the information before the mortgage loan is discharged or servicing is transferred. Further, certain costs may be reduced relative to the pre-statutory baseline of retaining documents relating to escrow accounts for five years. Accordingly, the Bureau believes any expense relating to the document retention requirement is likely small.

Finally, servicers are required to maintain certain documents and data in a manner that facilitates compiling them into a servicing file within five days. Servicers may need to develop faster access to some of this information than they currently have, and some may need to document the location and methods of access of this information in a more unified way than they currently do. However, servicers do not have to maintain all of the information on a single system.[234] Further, the Bureau is mitigating the cost of this provision by not requiring servicers to comply with it with respect to information created prior to January 10, 2014. Thus, servicers do not have to improve access to legacy information that may be missing or inaccessible.

4. Requirements Regarding Early Intervention

Section 1024.39 establishes early intervention requirements with respect to certain delinquent borrowers. Servicers are required to establish or make good faith efforts to establish live contact with a borrower not later than the 36th day of a borrower's delinquency and inform the borrower about the availability of loss mitigation options if appropriate. Section 1024.39 also requires servicers to provide a written notice to borrowers not later than the 45th day of the borrower's delinquency. Provisions of the rule prescribe the content of the written notice and provide model clauses. However, servicers can comply with the content requirement by sending borrowers a single mailing that contains separate notices that collectively provide all the model clauses. Servicers that qualify as small servicers pursuant to 12 CFR 1026.41(e) are exempt from the requirements of § 1024.39.

Potential benefits and costs to consumers. The provisions on early intervention with delinquent borrowers are intended to spur communication between servicers and borrowers that facilitates borrower's avoidance of foreclosure. The benefits of § 1024.39 to delinquent borrowers depend on whether servicers already meet the requirements of § 1024.39, servicers are successful in establishing live contact with borrowers under the live contact requirement, and information provided on loss mitigation options during the live contact or in the written notice helps borrowers manage their default and avoid foreclosure.

A number of early intervention standards exist and are issued by private mortgage investors, the GSEs, or government agencies offering guarantees or insurance for mortgage loans, such as FHA, the VA, or the Rural Housing Service. Servicers of FHA and VA loans are generally required to take action within the first 20 days of a delinquency, such as making telephone calls, and sending written delinquency notifications. Similarly, servicers of loans purchased by the GSEs are encouraged to contact borrowers within several days of a delinquency. Freddie Mac recommends that servicers begin initial call campaigns on the third day of delinquency, and Fannie Mae recommends that servicers take similar actions with respect to borrowers having a high risk of default. Regarding written notification, Federal agencies and the GSEs have established requirements and recommended practices with respect to written notifications that are similar to the Bureau's final rule under § 1024.39(b). However, the Bureau believes that some GSE servicers may not provide written notifications to certain lower-risk delinquent borrowers until the 65th day of delinquency.

Comprehensive data is generally unavailable on the extent to which servicers already reach out to delinquent borrowers; and for those that do, when and by what means they do, and what information they provide to borrowers. The discussion below therefore generally provides a qualitative analysis for borrowers not currently receiving such communications from their servicers. Given the ubiquity of some type of early intervention requirement on servicers, the benefit of the rule depends on the extent to which it is superior to existing requirements.

The requirement that servicers establish or make good faith efforts to establish live contact with borrowers may benefit the borrowers who are required to be contacted under the

[233] *See* for example OMB's Circular A–4. "Performance standards express requirements in terms of outcomes rather than specifying the means to those ends. They are generally superior to engineering or design standards because performance standards give the regulated parties the flexibility to achieve regulatory objectives in the most cost-effective way."

[234] The Bureau received numerous comments from industry describing the burden attributable to the proposed requirements for the servicing file. Many of such comments expressed that while servicers have the information for a serving file, they do not store such information grouped together. Such comments are discussed in part V with respect to § 1024.38(c)(2).

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NEW YORK STATE
DEPARTMENT OF FINANCIAL SERVICES

In the Matter of

OCWEN FINANCIAL CORPORATION,
OCWEN LOAN SERVICING, LLC

CONSENT ORDER PURSUANT TO NEW YORK BANKING LAW § 44

The New York State Department of Financial Services (the "Department") and Ocwen Financial Corporation, the parent company of Ocwen Loan Servicing, LLC (together, "Ocwen"), (collectively, the "Parties") stipulate that:

WHEREAS, Ocwen is the fourth largest mortgage loan servicer and the largest servicer of subprime loans in the United States, servicing an unpaid principal balance ("UPB") of approximately $430 billion. In New York alone, Ocwen services nearly 130,000 residential home loans with a total UPB of more than $30 billion.

WHEREAS, Ocwen is a New York State-licensed mortgage banker and mortgage loan servicer, pursuant to the New York Banking Law, and the Department is responsible for its supervision and regulation;

WHEREAS, in the last five years, Ocwen has acquired mortgage servicing rights ("MSRs") for hundreds of billions of dollars in UPB from several major servicers, including Litton Loan Servicing LP ("Litton"), Saxon Mortgage Services, Inc. ("Saxon"), and Homeward Residential Holdings, Inc. ("Homeward");

WHEREAS, in 2010 and 2011, the multistate examinations of Ocwen, Litton, and Homeward identified numerous and significant violations of New York State laws and regulations;

WHEREAS, on September 1, 2011, in connection with Ocwen's acquisition of Litton and amid concerns regarding Ocwen's rapid growth and capacity to properly acquire and service a significant portfolio of distressed home loans, Ocwen and the Department entered into an Agreement on Mortgage Servicing Practices (the "2011 Agreement"), which required Ocwen to adhere to certain servicing practices in the best interest of borrowers and investors;

WHEREAS, a June 2012 targeted examination of Ocwen revealed that Ocwen violated the 2011 Agreement;

WHEREAS, as a result of Ocwen's violation of the 2011 Agreement, Ocwen entered into a Consent Order with the Department on December 5, 2012, which required Ocwen to retain an independent compliance monitor (the "Compliance Monitor") for two years to conduct a comprehensive review of Ocwen's servicing operations;

WHEREAS, the Department and the Compliance Monitor identified numerous and significant additional violations of the 2011 Agreement, as well as New York State laws and regulations;

NOW, THEREFORE, to resolve this matter, the Parties agree to the following:

Facts

1. Ocwen has grown more than ten-fold in the last several years. Beginning in 2009, Ocwen significantly expanded its servicing operations through the acquisition of several major servicers of home loans, as well as the acquisition of MSRs for hundreds of billions of dollars in UPB. From the end of 2009 to the end of 2013,

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Ocwen's servicing portfolio grew from 351,595 residential loans with an aggregate UPB of $50 billion to 2,861,918 residential loans with an aggregate UPB of $464.7 billion.

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2. In 2010 and 2011, the Department participated in a multistate examination of Ocwen, as well as examinations of Litton and Homeward, the entities ultimately acquired by Ocwen. The examination of Ocwen identified, among other things, deficiencies in Ocwen's servicing platform and loss mitigation infrastructure, including (a) robo-signing, (b) inaccurate affidavits and failure to properly validate document execution processes, (c) missing documentation, (d) wrongful foreclosure, (e) failure to properly maintain books and records, and (f) initiation of foreclosure actions without proper legal standing.

3. The examinations of Litton and Homeward identified substantial deficiencies, weaknesses, and violations of laws and regulations relating to, among other things, foreclosure governance, implementation of modification programs, record keeping, required notifications, and the charging of unallowable fees.

4. The examination of Litton also revealed that, prior to Ocwen's acquisition of Litton, members of Litton's information technology staff falsified documents provided to the Department during the review of Litton's information technology infrastructure.

5. In connection with Ocwen's acquisition of Litton in 2011 and in light of the examination findings for both Ocwen and Litton, the Department sought to ensure that Ocwen had sufficient capacity to properly acquire and manage a significant portfolio of distressed loans, including the ability to effectively manage the increased volume and comply with requirements under the federal Home Affordable Modification Program, internal loss mitigation policies and procedures, and laws and regulations governing mortgage loan servicing and foreclosure activities.

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6. To that end, Ocwen and the Department entered into an Agreement on Mortgage Servicing Practices on September 1, 2011, which required Ocwen to: (a) establish and maintain sufficient capacity to properly acquire and manage its significant portfolio of distressed loans to ensure a smooth borrower transition; (b) engage in sound document execution and retention practices to ensure that mortgage files are accurate, complete, and reliable; and (c) implement a system of robust internal controls and oversight with respect to mortgage servicing practices performed by its staff and third party vendors to prevent improper foreclosures and maximize struggling borrowers' opportunities to keep their homes.

7. In June 2012, the Department conducted a targeted examination of Ocwen to assess its compliance with the 2011 Agreement and Part 419 of the Superintendent's Regulations, which governs business conduct rules for servicers. The examination identified gaps in the servicing records of certain loans that indicated repeated non-compliance by Ocwen, including: (a) failing to send borrowers a 90-day notice prior to commencing a foreclosure action as required under New York Real Property Actions and Proceedings Law ("RPAPL") § 1304, (b) commencing foreclosure actions on subprime loans without affirmatively alleging in the complaint that Ocwen had standing to bring the foreclosure action as required by RPAPL § 1302, and (c) commencing foreclosure actions without sufficient documentation of its standing to do so.

8. The targeted examination also identified instances that indicated widespread non-compliance with the 2011 Agreement including: (a) failing to provide borrowers with the direct contact information for their designated single point of contact, a customer care representative whose role is to understand each assigned borrower's circumstances and history to ensure that the borrower receives efficient and consistent customer care; (b) dual-tracking; (c) failing to conduct an independent review of loan modification denials; (d) failing to demonstrate adoption of policies and procedures to effectively track sanctioned third-party vendors, including local foreclosure counsel; (e) failing to demonstrate implementation of policies and procedures to verify borrower information on newly boarded accounts to accurately reflect the status and current balance of the borrower's account; and (f) failing to ensure that trial or permanent modifications granted to borrowers by a prior servicer are honored upon transfer to Ocwen.

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9. Consequently, on December 5, 2012, Ocwen entered into a Consent Order with the Department, which required Ocwen to retain an independent compliance monitor for two years. The Consent Order mandated that the Compliance Monitor, which would report directly to the Department, would "conduct a comprehensive review . . . of Ocwen's servicing operations, including its compliance program and operational policies and procedures." The review would, at a minimum, consider (a) the adequacy of Ocwen's staffing levels, (b) the robustness of Ocwen's established policies and procedures, (c) the fairness of servicing fees and foreclosure charges, (d) the accuracy of borrower account information, (e) Ocwen's compliance with federal and state law, (f) borrower complaints and recordings of customer service, and (g) Ocwen's compliance with the Agreement.

10. The Compliance Monitor began work in July 2013.

11. In the course of the Compliance Monitor's review, it identified numerous and significant violations of the 2011 Agreement, as well as New York State laws and regulations.

12. For example, a limited review by the Compliance Monitor of 478 New York loans that Ocwen had foreclosed upon revealed 1,358 violations of Ocwen's legal obligations, or about three violations per foreclosed loan. These violations included:

- failing to confirm that it had the right to foreclose before initiating foreclosure proceedings;
- failing to ensure that its statements to the court in foreclosure proceedings were correct;

- pursuing foreclosure even while modification applications were pending ("dual tracking");
- failing to maintain records confirming that it is not pursuing foreclosure of servicemembers on active duty; and
- failing to assign a designated customer care representative.

13. The Department and the Compliance Monitor also identified, among other things, (a) inadequate and ineffective information technology systems and personnel, and (b) widespread conflicts of interest with related parties.

Inadequate and Ineffective Information Technology Systems and Personnel

14. In the course of its review, the Compliance Monitor determined that Ocwen's information technology systems are a patchwork of legacy systems and systems inherited from acquired companies, many of which are incompatible. A frequent occurrence is that a fix to one system creates unintended consequences in other systems. As a result, Ocwen regularly gives borrowers incorrect or outdated information, sends borrowers backdated letters, unreliably tracks data for investors, and maintains inaccurate records. There are insufficient controls in place—either manual or automated—to catch all of these errors and resolve them.

15. For example, Ocwen's systems have been backdating letters for years. In many cases, borrowers received a letter denying a mortgage loan modification, and the letter was dated more than 30 days prior to the date that Ocwen mailed the letter. These borrowers were given 30 days from the date of the denial letter to appeal that denial, but those 30 days had already elapsed by the time they received the backdated letter. In other cases, Ocwen's systems show that borrowers facing foreclosure received letters with a date by which to cure their default and avoid foreclosure—and the cure date was months prior to receipt of the letter. Ocwen's processes failed to identify and remedy these errors.

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16. Moreover, Ocwen failed to fully investigate and appropriately address the backdating issue when an employee questioned the accuracy of Ocwen's letter dating processes and alerted the company's Vice President of Compliance. Ocwen ignored the issue for five months until the same employee raised it again. While Ocwen then began efforts to address the backdating issue, its investigation was incomplete and Ocwen has not fully resolved the issue to date, more than a year after its initial discovery.

17. Ocwen's core servicing functions rely on its inadequate systems. Specifically, Ocwen uses comment codes entered either manually or automatically to service its portfolio; each code initiates a process, such as sending a delinquency letter to a borrower, or referring a loan to foreclosure counsel. With Ocwen's rapid growth and acquisitions of other servicers, the number of Ocwen's comment codes has ballooned to more than 8,400 such codes. Often, due to insufficient integration following acquisitions of other servicers, there are duplicate codes that perform the same function. The result is an unnecessarily complex system of comment codes, including, for example, 50 different codes for the single function of assigning a struggling borrower a designated customer care representative.

18. Despite these issues, Ocwen continues to rely on those systems to service its portfolio of distressed loans. Ocwen's reliance on technology has led it to employ fewer trained personnel than its competitors. For example, Ocwen's Chief Financial Officer recently acknowledged, in reference to its offshore customer care personnel, that Ocwen is simply "training people to read the scripts and the dialogue engines with feeling." Ocwen's policy is to require customer support staff to follow the scripts closely, and Ocwen penalizes and has terminated customer support staff who fail to follow the scripts that appear on their computer screens. In some cases, this policy has frustrated struggling borrowers who have complex issues that exceed the bounds of a script and have issues speaking with representatives at Ocwen capable of addressing their concerns. Moreover, Ocwen's customer care representatives in many cases provide conflicting responses to a borrower's question. Representatives have also failed in many cases to record in Ocwen's servicing system the nature of the concerns that a borrower has expressed, leading to inaccurate records of the issues raised by the borrower.

19. Ocwen's inadequate infrastructure and ineffective personnel have resulted in Ocwen's failure to fulfill its legal obligations. Prior to the Department's and the Compliance Monitor's review, Ocwen did not take adequate steps to implement reforms that it was legally obligated to implement pursuant to the 2011 Agreement.

Widespread Conflicts of Interest with Related Parties

20. The Department's review of Ocwen's mortgage servicing practices also uncovered a number of conflicts of interest between Ocwen and four other public companies (the "related parties"),[1] all of which are chaired by Mr. Erbey, who is also the largest individual shareholder of each and the Executive Chairman of Ocwen. In addition to serving as chairman of the board for Ocwen and each related company, Mr. Erbey's holdings in these companies total more than $1 billion. Other Ocwen executives and directors also own significant investments in both Ocwen and the related parties. Yet, Ocwen does not have a written policy that explicitly requires potentially conflicted employees, officers, or directors to recuse themselves from involvement in transactions with the related companies.

[1] The related parties are, as of the date of this Consent Order, Altisource Portfolio Solutions, S.A. ("Altisource Portfolio"), Altisource Residential Corporation, Altisource Asset Management Corporation, and Home Loan Servicing Solutions Ltd., and any of their affiliates, predecessors and successors in interest, both past and present, and any of their officers, directors, partners, employees, consultants, representatives, and agents or other persons and entities acting under their control or on their behalf.

21. Despite Mr. Erbey's holdings in these companies, Mr. Erbey has not in fact recused himself from approvals of several transactions with the related parties. Mr. Erbey, who owns approximately 15% of Ocwen's stock, and nearly double that percentage of the stock of Altisource Portfolio, has participated in the approval of a number of transactions between the two companies or from which Altisource received some benefit, including the renewal of Ocwen's forced placed insurance program in early 2014.

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22. Ocwen's close business relationship with related companies is particularly evident in its relationship with Altisource Portfolio, which has dozens of subsidiaries that perform fee-based services for Ocwen. In one example, Altisource Portfolio subsidiary Hubzu, an online auction site, hosts nearly all Ocwen auctions. In certain circumstances, Hubzu has charged more for its services to Ocwen than to other customers—charges which are then passed on to borrowers and investors. Moreover, Ocwen engages Altisource Portfolio subsidiary REALHome Services and Solutions, Inc. as its default real estate agency for short sales and investor-owned properties, even though this agency principally employs out-of-state agents who do not perform the onsite work that local agents perform, at the same cost to borrowers and investors.

23. Conflicts of interest are evident at other levels of the Ocwen organization. For example, during its review, the Monitor discovered that Ocwen's Chief Risk Officer concurrently served as the Chief Risk Officer of Altisource Portfolio. The Chief Risk Officer reported directly to Mr. Erbey in both capacities. This individual seemed not to appreciate the potential conflicts of interest posed by this dual role, which was of particular concern given his role as Chief Risk Officer.

Settlement Provisions

Monetary Payment

24. Ocwen will pay the amount of $150 million as follows:

a. $100 million paid to the Department by December 31, 2014, as a civil monetary penalty pursuant to New York Banking Law § 44, to be used by the State of New York for housing, foreclosure relief, and community redevelopment programs supporting New York's housing recovery; and

b. $50 million deposited into an interest-bearing escrow account by December 31, 2014, to be paid as restitution to current and former Ocwen-serviced borrowers in New York, as follows:

i. $10,000 to each borrower whose home was foreclosed upon by Ocwen between January 1, 2009, and the date of this Consent Order; and

ii. The balance of the $50 million to be distributed equally among borrowers who had foreclosure actions filed against them by Ocwen between January 1, 2009, and the date of this Consent Order, but in which Ocwen did not complete such foreclosure.

25. Ocwen agrees that it will not claim, assert, or apply for a tax deduction or tax credit with regard to any U.S. federal, state, or local tax, directly or indirectly, for any portion of the amount paid pursuant to this Consent Order.

Borrower Assistance

26. For borrowers receiving payments pursuant to Paragraph 24(b)(ii), Ocwen will evaluate such borrowers for all applicable modifications and other foreclosure alternatives in light of their improved financial condition resulting from such payment.

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27. Beginning sixty (60) days after the date of execution of the Consent Order, and for a period of two years thereafter, Ocwen will provide upon request by a New York borrower that borrower's complete loan file, which includes all information from all systems, including comment codes, at no cost to the borrower, regardless of whether such borrower's loan is still serviced by Ocwen.

28. Beginning sixty (60) days after the date of execution of the Consent Order, Ocwen will provide every New York borrower who is denied a modification, short sale, or deed-in-lieu of foreclosure, a detailed explanation of the reasons for denial.

29. Beginning sixty (60) days after the date of execution of this Consent Order, for all New York borrowers who have been reported negatively by Ocwen to credit agencies since January 1, 2010, Ocwen will provide upon request at no cost a copy of such borrower's credit report (including credit scores) no more than once a year, regardless of whether such borrower's loan is still serviced by Ocwen. Ocwen will make sufficient staff available for borrowers to inquire about their credit reporting and will dedicate the resources necessary to investigate such inquiries and promptly correct any errors.

30. The Operations Monitor will oversee Ocwen's compliance with these borrower assistance provisions and will work with Ocwen to develop appropriate procedures for such compliance.

Operations Monitor

31. The Department will select in its sole discretion an independent on-site operations monitor (the "Operations Monitor") that will report directly to the Department.

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32. The Operations Monitor will review and assess the adequacy and effectiveness of Ocwen's operations. Such an assessment will include but is not limited to the following areas:

a. Information technology systems and personnel, including with respect to record keeping and borrower communications;

b. Number of personnel and the training and expertise of its personnel in all servicing operations;

c. Onboarding process for newly acquired mortgage servicing rights, including Ocwen's ability to onboard newly acquired MSRs without interruption to servicing newly acquired loans or its existing loan portfolio;

d. Controls in identifying and correcting errors made by Ocwen's personnel or systems;

e. Risk management functions;

f. Contracts or proposed contracts with third parties, including but not limited to related parties;

g. Fees charged by Ocwen to borrowers or mortgage investors; and

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h. The Ocwen borrower experience.

33. The Operations Monitor will identify the criteria for determining what constitutes a "related party" for purposes of compliance with this Consent Order.

34. The purview of the Operations Monitor will extend to all matters directly or indirectly affecting New York borrowers, including matters that affect borrowers in all states or in multiple states that include New York.

35. The Operations Monitor will identify needed corrective measures to address identified weaknesses and deficiencies in Ocwen's operations, make recommendations to Ocwen and to the Superintendent, and oversee implementation of reforms. The Operations Monitor will also develop benchmarks against which to assess Ocwen's progress in complying with recommended corrective measures.

36. The Operations Monitor will review and assess Ocwen's current committees of the Board of Directors. Ocwen Financial Corporation's Board of Directors (the "Board") will consult with the Operations Monitor concerning, among other things, the structure, composition, and reporting lines of such committees, and whether certain committees should be either disbanded or created.

37. The Board will consult with the Operations Monitor to determine which decisions should be committed to the specific oversight of the Board's independent directors, or a committee comprised of such independent directors, including, but not limited to:

a. Approval of transactions with related parties;

b. Approval of transactions to acquire mortgage servicing rights, sub-servicing rights, or otherwise to increase the number of loans serviced by Ocwen;

c. Approval of new relationships with third-party vendors;

d. Determinations as to whether Ocwen's servicing, compliance, and information technology functions are adequately staffed;

e. Determinations as to whether Ocwen's servicing, compliance, and information technology personnel are adequately trained;

f. Determinations as to whether Ocwen's information technology infrastructure and ongoing investment in information technology systems are adequate;

g. Determinations as to whether Ocwen is adequately addressing the issues identified by the Operations Monitor and the Compliance Monitor; and

h. Determinations as to whether Ocwen is treating borrowers fairly and is communicating with borrowers appropriately.

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38. The Board will consult with the Operations Monitor to determine whether any member of senior management should be terminated or whether additional officers should be retained to achieve the goals of complying with this Consent Order, and all applicable laws, regulations, and agreements, as well as creating a corporate culture of ethics, integrity, compliance, and responsiveness to borrowers.

39. Ocwen may acquire MSRs upon (a) meeting benchmarks developed by the Operations Monitor concerning the adequacy of Ocwen's onboarding process for newly acquired MSRs and its ability to adequately service both those newly acquired MSRs and its existing loan portfolio, and (b) the Department's approval, not to be unreasonably withheld. The Operations Monitor will act with reasonable expedition to develop such benchmarks in consultation with Ocwen. These benchmarks will address, at a minimum, the following:

a. The development and implementation of a satisfactory compliance plan;

b. The development and implementation of a plan to resolve record-keeping and borrower communication issues;

c. The reasonableness of fees and expenses charged to borrowers and mortgage investors, including those charged directly or indirectly by related parties;

d. The development and performance of a risk assessment to identify potential risks and deficiencies in the onboarding process; and

e. The development of a written onboarding plan that addresses potential risks and deficiencies, including testing and quality control review periodically during the onboarding process.

40. The Operations Monitor will semi-annually review and approve Ocwen's benchmark pricing and performance studies with respect to all fees or expenses charged to New York borrowers by any related party.

41. The Operations Monitor will oversee and ensure Ocwen's implementation and adherence to the terms of this Consent Order.

42. Within one hundred twenty (120) days of the date of the formal engagement of the Operations Monitor, the Operations Monitor will submit to the Parties a preliminary written report of findings, including, to the extent the Operations Monitor has had the opportunity to develop them, any proposed corrective measures and associated benchmarks (the "Operations Report"). The Operations Monitor will submit written monthly action progress reports ("Progress Reports") to the Parties. On a quarterly basis, starting ninety (90) days from the date of the first Operations Report, the Operations Monitor will issue an Operations Report covering the three-month period immediately preceding.

43. Ocwen agrees to cooperate fully with the Operations Monitor by, including but not limited to, providing the Operations Monitor access to all relevant personnel and records necessary on a real-time basis, including those at any overseas locations, and including information on business decisions pertinent to the work of the Operations Monitor currently pending or recently made by Ocwen management or its Board of Directors, to allow the Operations Monitor to fulfill its duties.

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44. Any dispute as to the scope of the Operations Monitor's authority will be resolved by the Department in the exercise of its sole discretion after appropriate consultation with Ocwen and/or the Operations Monitor.

45. Ocwen will pay all reasonable and necessary costs of the Operations Monitor.

46. The terms of the Operations Monitor will extend for a period of twenty-four (24) months from the date of formal engagement which shall be no later than May 1, 2015. The Department may, in its sole discretion, extend the engagement another twelve (12) months if the Department determines that Ocwen has not sufficiently achieved benchmarks identified by the Operations Monitor.

Compliance Monitor

47. The Compliance Monitor will remain engaged for at least three (3) months from the execution of this Consent Order. The Department may, in its sole discretion, extend the engagement of the Compliance Monitor for a period not to exceed an additional three (3) months.

48. Following completion of the Compliance Monitor's engagement, the Operations Monitor may call upon the Compliance Monitor to perform work that draws on the Compliance Monitor's institutional knowledge of Ocwen.

49. Prior to the Operations Monitor's engagement and for a short transitional period thereafter not to exceed forty-five (45) days, the Department may in its sole discretion direct the Compliance Monitor to fill any of the roles of the Operations Monitor described in this Consent Order.

Board of Directors

50. Ocwen Financial Corporation will expand its Board of Directors by two independent board members (the "Additional Directors") in consultation with the Compliance Monitor or the Operations Monitor.

51. The Additional Directors will not own equity in any related party.

52. Ocwen's Board will contain no more than two executive directors at any time.

Conflicts of Interest

53. With respect to mortgage loans serviced by Ocwen, Ocwen will conduct semi-annual benchmarking studies of pricing and performance standards with respect to all fees or expenses charged to New York borrowers or to investors on New York property by any related party, to determine whether the terms offered by the related party are commensurate with market rates or, if market rates are not available, are reasonably related to actual expenses incurred by the related party. Maximum rates for services that are established by government-sponsored enterprises or other investors may not be presumed to be the market rate and may not substitute for actual assessment of market rates.

54. Ocwen will not share any common officers or employees with any related party.

55. Ocwen will not share risk, internal audit, or vendor oversight functions with any related party.

56. Any Ocwen employee, officer, or director owning more than $200,000 equity ownership in any related party will be recused from negotiating, or voting to approve a transaction with the related party in which the employee, officer, or director has such equity ownership, or any transaction that indirectly benefits such related party if such transaction involves revenues or expense to Ocwen or a related party of $120,000 or more.

Management Changes

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57. Effective January 16, 2015, William Erbey will resign from his position as Executive Chairman of Ocwen, his position as Chairman of the Board of Directors of Altisource Portfolio, his position of Chairman of the Board of Directors of Altisource Residential Corporation, his position of Chairman of the Board of Directors of Altisource Asset Management Corporation, and his position of Chairman of the Board of Directors of Home Loan Servicing Solutions Ltd. Mr. Erbey will have no directorial, management, oversight, consulting, or any other role at Ocwen or any related party, or at any of Ocwen's or the related parties' affiliates or subsidiaries as of the date of his resignation. Effective at his resignation, Ocwen's Board members and management will not disclose to Mr. Erbey any non-public information about Ocwen that is not available to other shareholders. In the event that Ocwen discovers a violation of the terms of this Paragraph, Ocwen will notify the Department of the violation within three (3) business days of discovery.

No Indemnification

58. Neither Ocwen, nor any of its parents or affiliates will, collectively or individually, seek or accept, directly or indirectly, reimbursement or indemnification, including, but not limited to, payment made pursuant to any insurance policy, or from any of its parents or affiliates, with regard to any or all of the amounts payable pursuant to this Consent Order.

Breach of Consent Order

59. In the event that the Department believes Ocwen to be in material breach of this Consent Order ("Breach"), the Department will provide written notice to Ocwen, and Ocwen must, within ten (10) business days of receiving such notice, or on a later date if so determined in the Department's sole discretion, appear before the Department to demonstrate that no Breach has occurred or, to the extent pertinent, that the Breach has been cured.

60. The parties understand and agree that Ocwen's failure to make the required showing within the designated time period will be presumptive evidence of Ocwen's Breach. Upon a finding of Breach, the Department has all the remedies available to it under the New York Banking and Financial Services Laws and may use any evidence available to the Department in any ensuing hearings, notices, or orders.

Wavier of Rights

61. The parties understand and agree that no provision of this Consent Order is subject to review in any court or tribunal outside the Department.

Parties Bound by the Consent Order

62. This Consent Order is binding on the Department and Ocwen, as well as Ocwen's successors and assigns that are under the Department's supervisory authority. This Consent Order does not bind any federal or other state agency or any law enforcement authority.

63. Except as set forth in Paragraphs 64 and 65, no further action will be taken by the Department against Ocwen for the matters set forth in this Consent Order, provided that Ocwen complies with the terms of the Consent Order.

64. Nothing in this Consent Order shall excuse Ocwen from paying required restitution to any borrowers harmed by its improper or illegal conduct, including the backdating of letters to borrowers. To the extent a borrower entitled to restitution has received a cash payment pursuant to this Consent Order, Ocwen may offset such payment against the restitution owed to such borrower.

65. Notwithstanding any other provision in this Consent Order, the Department may undertake additional action against Ocwen for transactions or conduct that: (a) are not set forth in this Consent Order; (b) Ocwen did not disclose to the Compliance Monitor or the Department in connection with the Department's

investigation into these matters; and (c) that the Department and Compliance Monitor were not otherwise aware of in connection with the Department's investigation and the work of the Compliance Monitor.

Notices

66. All notices or communications regarding this Consent Order will be sent to:

For the Department:
Daniel Burstein
Executive Deputy Superintendent
Real Estate Finance Division
New York State Department of Financial Services
One State Street
New York, NY 10004

For Ocwen:
Timothy M. Hayes
Executive Vice President and General Counsel
Ocwen Financial Corporation
1661 Worthington Road #100
West Palm Beach, FL 33409

Miscellaneous

67. Each provision of this Consent Order will remain effective and enforceable until stayed, modified, suspended, or terminated by the Department.

68. No promise, assurance, representation, or understanding other than those contained in this Consent Order has been made to induce any party to agree to the provisions of the Consent Order.

IN WITNESS WHEREOF, the parties have caused this Consent Order to be signed this 19th day of December, 2014.

OCWEN FINANCIAL CORPORATION

By: /s/ Ronald Faris
RONALD FARIS
President and Chief Executive Officer

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES

By: /s/ Benjamin M. Lawsky
BENJAMIN M. LAWSKY
Superintendent of Financial Services

OCWEN LOAN SERVICING, LLC

By: /s/ Timothy M. Hayes
TIMOTHY M. HAYES
Executive Vice President

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STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS CASE NO. 2016-CP-32-3572
Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1, **Plaintiff,** **vs.** **Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles,** **Defendants.**	**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO ALTER OR AMEND RELIEF ORDERED UNDER S.C. CODE ANN. § 29-3-320**

The Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey (hereinafter "Bailey and Owens") hereby submit this memorandum in reply to the memorandum the Plaintiff (hereinafter "Deutsche Bank") has submitted opposing Bailey and Owens' motion in the above-captioned action for an order that alters or amends the relief granted to Bailey and Owens under S.C. Code Ann. § 29-3-320 in the court's order filed November 28, 2017. Bailey and Owens' reply to Deutsche Bank's memorandum can be summed up in a just a few points.

Bailey and Owens are not trying to "relitigate" anything. Until the court directed that a proposed order be prepared ruling, *inter alia*, that Deutsche Bank be given a certain amount of time to record a satisfaction document in order to avoid liability under S.C. Code Ann. § 29-3-320, neither party had ever raised that to the court as a possibility. That came up when the court gave that direction in a telephone status conference *after* the parties had submitted their proposed orders. Neither of the proposed orders that had been submitted touched upon the idea of whether Deutsche Bank should be given an opportunity to avoid liability under S.C. Code Ann. § 29-3-320 even if

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its failure to record a satisfaction document violated the statute. Instead, Bailey and Owens argued that Deutsche Bank had violated the statute and that they were entitled to the relief available under it, and Deutsche Bank argued that it had not violated the statute.

The following passage from a Court of Appeals opinion is illustrative:

> "When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." In re Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998). Mother contends that Father never requested the award to be retroactive. Accordingly, when the family court made the award retroactive in its order, Mother needed to raise the issue in a Rule 59(e) motion.

Bennett v. Rector, 389 S.C. 274, 697 S.E.2d 715, 720 (Ct. App. 2010).

With regard to the order's provision that Deutsche Bank has violated S.C. Code Ann. § 29-3-320 but also has a way to escape liability under the statute, Bailey and Owens "receive[d] an order that grants certain relief not previously contemplated or presented to the trial court." Timmerman, 331 S.C. at 460. The issue subject of this motion was not litigated before, not at all; rather, it came into being with the court's order.

The court has already ruled that the judgment at the end of the Bailey v. NovaStar case satisfied the mortgage. The court's November 28 order in this case did not satisfy the mortgage. As that order determined, the judgment ending the Bailey v. NovaStar case is what satisfied the mortgage. This court has already so ruled, and that ruling has not been challenged by Deutsche Bank.

The November 28 order states:

1) "Here, the note subject of the mortgage had matured at the time of Deutsche Bank's answer in the earlier action, and that is the ultimate and final default

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under the note and mortgage. The effect of the claim arising from that default being barred by res judicata is to discharge Deutsche Bank's rights in the note and mortgage, as it neither has nor can have any other right to enforce the mortgage." (Order Nov. 28, 2017 p. 27, emphasis added.)

2) "Deutsche Bank's rights in the note debt owed or due as a result of the maturity of the note have been discharged. That is all of the debt. The note is gone, and the mortgage is gone with it. Accordingly, Bailey and Owens are entitled to prevail on their claim for a declaratory judgment that Deutsche Bank's mortgage does not encumber the subject property." (Order Nov. 28, 2017 p. 27, emphasis added, paragraph break omitted.)

3) "The court concludes that *satisfaction*, within the meaning of S.C. Code Ann. § 29-3-310 and -320, embraces the discharge of the mortgage by operation of law, which extinguishes the mortgage. That is what has happened here, as the undisputed facts show. Bailey and Owens are entitled to summary judgment in their favor as to Deutsche Bank's liability to them under S.C. Code Ann. § 29-3-320." (Order Nov. 28, 2017 p. 33-34, emphasis added.)

Deutsche Bank incurred its liability when it did not record a satisfaction within three months of the request. If a mortgage has been satisfied, more than three months has passed since the mortgagee has received the request contemplated by S.C. Code Ann. § 29-3-310, and the mortgagee has not recorded the satisfaction, the mortgagee "*shall* forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the mortgage, or twenty-five thousand dollars, whichever is less, plus actual damages, costs, and attorney's fees in the discretion of the court, to be recovered by action in any court of competent

jurisdiction within the State." S.C. Code Ann. § 29-3-320 (emphasis added). The amount of attorney's fees recoverable may be within the court's discretion, but whether the mortgagee is liable for these items of monetary relief is not. "Ordinarily, the use of the word 'shall' in a statute means that the action referred to is mandatory." S.C. Dept. of Hwys. & Pub. Transp. v. Dickinson, 288 S.C. 189, 191, 341 S.E.2d 134 (1986).

Here, Deutsche Bank let its time under S.C. Code Ann. § 29-3-320 run out long before the court issued its decision. Deutsche Bank gambled on the question of whether the court would determine that the mortgage was satisfied through res judicata. It lost the gamble. The language of S.C. Code Ann. § 29-3-320 is "shall forfeit," not "shall forfeit . . . unless . . . ."

CONCLUSION

Bailey and Owens are entitled to monetary relief under S.C. Code Ann. § 29-3-320. The court should amend its order to so provide and should set a hearing to determine the amount of that relief.

Respectfully submitted,

/s/ Andrew S. Radeker
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Columbia, South Carolina
January 30, 2018

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