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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
The Honorable James O. Spence, Master in Equity

Supreme Court Appellate Case No. 2021-001292
Court of Appeals Appellate Case No. 2018-000436
Circuit Court Case No. 2016-CP-32-03572

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.

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

Petitioners.

BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF ISSUE ON APPEAL

1. Whether the Court of Appeals correctly concluded that foreclosure was not a compulsory counterclaim in a prior action alleging errors in loan origination, where foreclosure would not have affected Bailey and Owens' ability to pursue, enforce, and obtain damages on their claims.

STATEMENT OF THE CASE

A. Deutsche Bank's foreclosure action and Bailey and Owens' affirmative defenses and counterclaims.

On or about June 15, 1998, Appellant/Respondent Patricia Owens, a/k/a Patricia Ann Owens ("Owens") executed a Fixed Rate Note ("Note") in favor of NovaStar Mortgage, Inc. ("NovaStar") in the amount of $60,400. (R. p. 84, ¶ 11, lines 1–4).[1] The Note was secured by a mortgage ("Mortgage") on the property located at 111 Andrew Court, Gaston, SC 29053 (the "Property"). (R. p. 84, ¶ 12, lines 1–p. 85, ¶ 12, line 5). The Mortgage was recorded on July 2, 1998 in Mortgage Book 4743 at page 0330, in the Lexington County Registry. (R. p. 85, ¶ 13, lines 1–2).

NovaStar subsequently assigned the Mortgage to Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1. (R. p. 85, ¶ 14, lines 1–2). This assignment was recorded on October 12, 2011 in Mortgage Book 15105 at page 248, in the Lexington County Registry. (R. p. 85, ¶ 14, lines 2–3). Thereafter, the Mortgage was further 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 ("Deutsche Bank"). (R. p. 85, ¶ 14, lines 3–5). This assignment was recorded on May 15, 2012 in Mortgage Book 15513 at page 296, in the Lexington County Registry. (R. p. 85, ¶ 14, lines 5–6).

Deutsche Bank initiated this foreclosure action against Owens, Tammy B. Bailey ("Bailey"), and the South Carolina Department of Motor Vehicles ("SCDMV") on October 19,

[1] References herein to "R. p." pursuant to SCRAP 208(b), 211(b)(1), and 242(i) refer to the "App'x" pagination in the Appendix filed with the Court.

2016. (R. pp. 80–88).[2] The Complaint alleges, in relevant part, that the loan was in default and due on July 1, 2013, and that Deutsche Bank, as the holder of the Note and Mortgage, was declaring the entire balance of the principal and interest due and payable at once. (R. p. 86, ¶ 22, line 1–p. 87, ¶ 22, line 2). On November 29, 2016, the trial court entered an Order of Reference, referring the matter to The Honorable James O. Spence, Master in Equity for Lexington County. (R. pp. 55–56).

On or around December 9, 2016, Bailey and Owens filed a document styled Amended Answer and Counterclaim ("Answer and Counterclaims"). (R. pp. 108–119). Despite admitting they did not pay the sums due under the Note at or subsequent to maturity, Bailey and Owens nevertheless alleged three separate counterclaims in the Answer and Counterclaims: (1) A declaratory judgment that Deutsche Bank holds no mortgage on the Property; (2) Failure to record a satisfaction of the Mortgage within three months of receiving a demand, pursuant to S.C. Code Ann. § 29-3-310; and (3) Violation of S.C. Code Ann. § 37-10-102 (the "Attorney Preference Statute"), for an alleged failure to give Owens an opportunity to select an attorney to represent her at the closing of the Mortgage. (R. p. 113, ¶ 58–p. 114, ¶ 70). Bailey and Owens also asserted several affirmative defenses, including res judicata and/or collateral estoppel, laches, unclean hands, waiver, and setoff/credit. (R. p. 111, ¶ 30–p. 113, ¶ 57). The defenses of res judicata, waiver, and laches, as well as two of Bailey and Owens' counterclaims, all flow from Bailey and

[2] Deutsche Bank named Bailey as a defendant in the foreclosure action because Bailey claims an interest in the Property by virtue of a deed from Owens purporting to convey to Bailey an interest in the Property. (R. p. 87, ¶ 23). Deutsche Bank named the SCDMV as a defendant in the foreclosure action because Deutsche Bank sought reformation of the Mortgage to encumber a manufactured home on the Property, the SCDMV is responsible for issuing Certificates of Title for manufactured homes in the State of South Carolina, and Deutsche Bank sought a court order requiring the SCDMV 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. (R. p. 82, ¶ 4; p. 83, ¶¶ 6–9; p. 88, ¶ F).

Owens' claim that Deutsche Bank should have, but did not, assert foreclosure as a counterclaim in a prior lawsuit brought by Bailey and Owens against Deutsche Bank and other defendants in 2013 (hereinafter the "2013 Action").[3]

B. Bailey and Owens' prior lawsuit against Deutsche Bank and other defendants in 2013 and their subsequent correspondence.

Back on June 27, 2013—*four days before the Note was due to mature and before the loan was in default*—Bailey and Owens filed a lawsuit against Deutsche Bank, Deutsche Bank's predecessor in interest NovaStar, and six other defendants in Lexington County, alleging four causes of action. (R. pp. 388–404). Only two of the four claims asserted in the 2013 Action were asserted against Deutsche Bank: (1) violation of the Attorney Preference Statute, and (2) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann. § 39-5-10 *et seq.*, premised on the alleged violation of the Attorney Preference Statute. (R. p. 392, ¶ 33–p. 393, ¶ 44). Bailey and Owens alleged in that complaint that "[n]o attorney supervised the closing of the loan subject to this case," and that "[t]he loan subject of this action was unconscionable and was induced by unconscionable conduct." (R. p. 392, ¶¶ 35–36). Bailey and Owens' allegations against Deutsche Bank in the 2013 Action related to the closing of the mortgage. (R. p. 392, ¶ 33–p. 393, ¶ 44). The main question in the 2013 Action, as it related to Deutsche Bank, was whether Deutsche Bank's predecessor in interest – NovaStar – complied with the South Carolina Consumer Protection Code when conducting the closing by ensuring that Owens had an opportunity to select an attorney of her choosing.

In terms of relief sought against Deutsche Bank, the complaint in the 2013 Action sought "all relief available under S.C. Code Ann. § 37-10-105." (R. p. 392, ¶ 37; p. 395, ¶ e). The

[3] For reference, Bailey and Owens refer to the 2013 Action as "Bailey v. Novastar."

complaint made no request to rescind the Mortgage, nor did that complaint ask the Court to declare the Mortgage void.

Shortly before filing its answer in the 2013 Action, Deutsche Bank's loan servicer, on August 23, 2013, reached out to Owens via letter in an attempt to assist her with options to avoid foreclosure (hereinafter the "Foreclosure Avoidance Letter"). (R. p. 246, ¶ 16; pp. 266–267). The Foreclosure Avoidance Letter began, in relevant part, by stating: "We want to assist you in bringing your loan current by presenting you with some alternative solutions to avoid foreclosure." (R. p. 266). Included amongst these alternative solutions were options for a loan modification under the Home Affordable Modification Program, a proprietary modification, a short sale, and a deed-in-lieu of foreclosure. (R. p. 266). The Foreclosure Avoidance Letter provided Owens with a telephone number to call and stated: "Please call us immediately . . . to discuss your resolution options." (R. p. 266).

Approximately one month after sending Owens the Foreclosure Avoidance Letter, Deutsche Bank answered the complaint filed in the 2013 Action and asserted a handful of affirmative defenses. (R. pp. 405–414). In part because it had just begun the process of assisting Owens in avoiding foreclosure, Deutsche Bank did not assert a counterclaim for foreclosure. (R. pp. 405–414). Following a trial, a jury found in favor of Deutsche Bank on September 15, 2015 on all claims. (R. pp. 378–379).[4]

[4] According to the verdict form from the 2013 Action, the jury found in favor of Deutsche Bank on Bailey and Owens' claims for violation of the SCUTPA (which *was* asserted against Deutsche Bank) and for conversion (which *was not* asserted against Deutsche Bank). (R. pp. 378–379). The trial court in the 2013 Action ruled in favor of Deutsche Bank on Bailey and Owens' Attorney Preference Statute claim but did not reduce that ruling to a written order, despite the submission of a written proposed order by counsel for Deutsche Bank.

Approximately one year after the jury verdict in the 2013 Action, on or around August 23, 2016, Bailey sent Deutsche Bank a letter. This letter attached a forty dollar ($40.00) recording fee and demanded that Deutsche Bank record a satisfaction of the Mortgage (hereinafter referred to as the "Demand Letter"). (R. p. 116). Bailey contended in the Demand Letter that when the jury in the 2013 Action rendered judgment in Deutsche Bank's favor – with Deutsche Bank asserting no counterclaim for foreclosure – Deutsche Bank's ability to foreclose on the Mortgage was "lost forever." (R. p. 116). Specifically, the Demand Letter stated: "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." (R. p. 116). In other words, despite the fact that Deutsche Bank was attempting to work with Owens to avoid foreclosure, despite the fact that Bailey and Owens lost the 2013 Action wholesale, and despite the fact that Bailey and Owens admit they did not pay the Note upon its maturity, Bailey nevertheless contended in the Demand Letter that the Mortgage was satisfied.

Immediately upon receipt of the Demand Letter, Deutsche Bank responded, returned the Forty dollar ($40.00) recording fee to Bailey, and stated as follows: "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." (R. p. 118).

C. The parties' dispositive motions and the court's summary judgment order in the present underlying action.

Returning to the present underlying proceedings, the parties, following a period of discovery, filed cross motions for partial summary judgment. Deutsche Bank moved for summary judgment on all three of Bailey and Owens' counterclaims. (R. p. 6). In relevant part, Deutsche

Bank argued that foreclosure was not a compulsory counterclaim in the 2013 Action and, therefore, it was not required to record a satisfaction of the Mortgage under § 29-3-310 because it had not received full payment or satisfaction of the underlying debt. (R. p. 171, ¶ 9–p. 172, ¶ 14). Bailey and Owens moved for summary judgment on Deutsche Bank's claim for foreclosure, on their counterclaim for a declaratory judgment, and on their counterclaim premised on § 29-3-310 for failure to record a satisfaction of the Mortgage following a demand. (R. p. 6).

After a hearing, the Court entered its order on the parties' motions for summary judgment on November 28, 2017. (R. pp. 5–45). Determining that Deutsche Bank's foreclosure claim was a compulsory counterclaim in the 2013 Action and was now barred by the doctrine of res judicata, the trial court granted summary judgment to Bailey and Owens on Deutsche Bank's foreclosure claim and on Bailey and Owens' related declaratory judgment counterclaim. (R. pp. 27, 31, 40). With regard to Bailey and Owens' § 29-3-310 counterclaim relating to Deutsche Bank's refusal to record a satisfaction of the Mortgage within three months of the Demand Letter, the trial court denied Deutsche Bank's motion and granted, in part, Bailey and Owens' motion. (R. pp. 40–41).

The trial court did not conclude that Deutsche Bank violated § 29-3-320 by failing to record a satisfaction of the Mortgage within three months of the Demand Letter. Instead, the trial court concluded – for the first time in its Summary Judgment Order – that the Mortgage was deemed satisfied as a matter of law by virtue of the jury verdict in the 2013 Action. (R. p. 37). The Mortgage was not satisfied prior to the trial court's summary judgment order because, according to the trial court, "[w]hether the mortgage had been satisfied remained an open [issue] until this court's determination that satisfaction had occurred." (R. p. 38, lines 15–17). Consistent with that conclusion, the trial court determined that Deutsche Bank's three-month period of time within which to record a satisfaction pursuant to § 29-3-310 did not begin to run until the date of the trial

court's Summary Judgment Order. (R. pp. 40–41). Calculating a three-month period of time, the trial court ordered Deutsche Bank to record a satisfaction of the Mortgage on or before February 23, 2018. (R. p. 41). Because Deutsche Bank was not yet tardy in complying with that requirement, the trial court followed the statute and declined to award any monetary penalty pursuant to § 29-3-320. (R. pp. 38–39).

D. Bailey and Owens' motion to alter or amend, and Deutsche Bank's motion to stay.

Following the Summary Judgment Order, Bailey and Owens filed a motion asking the trial court to alter or amend its judgment, and Deutsche Bank subsequently filed a motion to stay a portion of the judgment. (R. p. 46). Specifically, in their motion to alter or amend, Bailey and Owens asked the trial court to rule that Deutsche Bank's three-month period of time within which to record a satisfaction of the Mortgage ran from the time of its Demand Letter (as opposed to running from issuance of the Summary Judgment Order), that the time period had therefore expired, and that they were entitled to money damages. (R. p. 50). In its motion to stay, Deutsche Bank sought an additional three-month period of time to record a satisfaction of the Mortgage (beyond that provided for in the Summary Judgment Order) to fully and fairly evaluate its options for an appeal. (R. p. 52).[5]

The trial court denied Bailey and Owens' motion to alter or amend, again "conclud[ing] that the question of whether Defendants' mortgage was satisfied remained [open] until the Court determined that the mortgage was legally unenforceable in its Summary Judgment Order." (R. p. 52). In the same order, the trial court granted Deutsche Bank's motion to stay and ordered that

[5] Because Bailey and Owens' motion to alter or amend extended the deadline for both parties to file a notice of appeal, Deutsche Bank would have had to record a satisfaction of the Mortgage prior to its deadline to file a notice of appeal, thereby enabling Bailey and Owens to appeal without the risk of a cross-appeal from Deutsche Bank, whose appellate claims relating to foreclosure would then be moot. (R. p. 52).

Deutsche Bank's time within which to record a satisfaction of the Mortgage was extended for an additional time period through and including May 10, 2018. (R. p. 53).

E. The parties' notices of appeal and subsequent motions during the appeal.

On or around March 8, 2018, Bailey and Owens filed a notice of appeal to the Court of Appeals, indicating they were appealing both the Summary Judgment Order and the Order on Motion to Alter or Amend and Motion to Stay. (R. pp. 372–374). On or around March 13, 2018, Deutsche Bank filed a notice of cross-appeal with the Court of Appeals, indicating that it was appealing from the Summary Judgment Order. (R. pp. 375–377).

Because the trial court's order requiring Deutsche Bank to record a satisfaction of the Mortgage on or before May 10, 2018 is injunctive in nature, it was not automatically stayed by the parties' cross-appeal. Therefore, Deutsche Bank, on or around March 26, 2018, filed a Motion for Writ of Supersedeas with the trial court, asking the trial court to stay – for the pendency of the parties' appeal – the order requiring Deutsche Bank to record a satisfaction of the Mortgage. Following a hearing, the trial court, on May 9, 2018, issued a formal Order on Motion for Writ of Supersedeas, in which the trial court granted Deutsche Bank's motion and stayed Deutsche Bank's requirement to record a mortgage satisfaction pending the outcome of this appeal, subject to the requirement that Deutsche Bank enter into an escrow arrangement (or similar arrangement) and hold a fully executed mortgage satisfaction in escrow during the appeal. (R. pp. 75–79). To date, Deutsche Bank has fully complied with the terms of the Order on Motion for Writ of Supersedeas, meaning the requirement to record a satisfaction of the Mortgage is presently stayed pending the outcome of this appeal.

F. The Order of the Court of Appeals.

After hearing oral argument, the Court of Appeals reversed the trial court's grant of summary judgment to Bailey and Owens on Deutsche Bank's foreclosure claim and on Bailey and

Owens' related declaratory judgment counterclaim. (R. pp. 713–718). The Court of Appeals first concluded that foreclosure was not a compulsory counterclaim in the 2013 Action because foreclosure was not a defense to Bailey and Owens' claims in the 2013 Action and would not have affected their allegations relating to the Attorney Preference Statute. (R. pp. 715–717). Upon finding that foreclosure was not a compulsory counterclaim in the 2013 Action, the Court of Appeals necessarily concluded that res judicata did not bar Deutsche Bank from bringing the underlying foreclosure action. (R. p. 717). Having reached that determination, the Court of Appeals declined to address the parties' competing arguments with respect to S.C. Code Ann. § 29-3-310 and any alleged requirement to record a satisfaction of the Mortgage. (R. p. 717).

Bailey and Owens subsequently filed a petition for rehearing or rehearing en banc (R. pp. 719–727), which the Court of Appeals denied (R. pp. 728–29). On November 5, 2021, Bailey and Owens filed a Petition for Writ of Certiorari to the Court of Appeals, asking this Court to review two aspects of the lower appellate court's decision. On November 23, 2022, this Court granted Bailey and Owens' Petition as to one of two issues raised, namely whether the Court of Appeals properly concluded that foreclosure was not a compulsory counterclaim in the 2013 Action and that res judicata did not, therefore, bar Deutsche Bank's foreclosure claim.

STANDARD OF REVIEW

This Court reviews the trial court's decision to grant summary judgment to Bailey and Owens de novo. *See Bennett v. Carter*, 421 S.C. 374, 380, 807 S.E.2d 197, 200 (2017) ("When the trial court grants summary judgment on a question of law, we review the ruling de novo."). Stated differently, this Court "may decide questions of law with no particular deference to the [master in equity's] findings." *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

ARGUMENT

This appeal asks the Court to construe the scope of compulsory counterclaims under SCRCP 13(a). Petitioners seek to obtain a windfall by arguing that their frivolous 2013 lawsuit—filed four days before maturity of their loan and before the loan was in default—now precludes foreclosure on a loan they admit to be in default. Because the foreclosure was not a compulsory counterclaim in the 2013 Action, the decision of the Court of Appeals should be affirmed.

I. The distinction between compulsory and permissive counterclaims under SCRCP 13(a).

Despite the complex procedural history of this case, the Court of Appeals' decision represents a routine application of SCRCP 13(a) and the distinction between permissive and compulsory counterclaims. Upon concluding that foreclosure was a permissive (but not compulsory) counterclaim in the 2013 Action, the Court of Appeals necessarily found that res judicata did not bar Deutsche Bank from bringing the underlying foreclosure action. The Court of Appeals' decision relies upon, and is consistent with, South Carolina case law on which both parties rely.

A. A counterclaim is compulsory if it affects the ability to pursue, or otherwise serves as a defense to, an underlying claim.

Under SCRCP 13(a), a counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." SCRCP 13(a). Counterclaims not arising out of the same transaction or occurrence of the leading claim(s) are merely permissive. *See* SCRCP 13(b). South Carolina applies the logical relationship test in determining whether a counterclaim is compulsory. *See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). Under this test, the logical relationship determination is made by asking whether the counterclaim would affect the plaintiff's right to enforce its claims. *See Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 330 n.7, 755 S.E.2d 437, 442 n.7 (2014).

("[T]he 'logical relationship' determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage.").[6]

In applying Rule 13 and distinguishing between compulsory and permissive counterclaims, the context matters because "[w]hether a counterclaim is logically related to the initial claim depends upon the facts of each case." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct. App. 2002). Prior to the instant case, South Carolina courts had not addressed whether, and in what circumstances, a claim for foreclosure could be a compulsory counterclaim in a lawsuit initiated by a borrower or mortgagor against a lender or mortgagee. Courts have, however, addressed the inverse scenario: whether a borrower' counterclaim filed in a foreclosure action is compulsory or permissive. *See, e.g.*, *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 778 S.E.2d 106 (2015); *DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989); *S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 800 S.E.2d 488 (Ct. App. 2017). These cases present uniquely different factual scenarios and, as *Twillman* seems to instruct, they alone are not determinative given "the facts of [this] case." 351 S.C. at 61, 566 S.E.2d at 865. Nevertheless, the decisions in *BADD*, *DAV Corp.*, and *Salon Proz* are instructive insofar as they concern mortgages and foreclosure, and—by focusing on whether a successfully asserted counterclaim constitutes a defense to a plaintiff's cause of action—they support Deutsche Bank's position that foreclosure was not a compulsory counterclaim in the 2013 Action.

In *DAV Corp.*, a lender commenced an action to foreclose on a note and mortgage given to a joint venture, and one of the parties comprising the joint venture ("DAV") asserted six counterclaims against the lender, including breach of a subsequent oral contract to provide additional funding and breach of a subsequent oral contract to purchase DAV's interest in the joint

[6] The Petitioners' Brief ignores this proposition from *Blackburn*.

venture. *See* 298 S.C. at 516–17, 381 S.E.2d at 904. Because DAV demanded a jury trial on its counterclaims, this Court was asked to determine whether DAV's counterclaims were compulsory. *See id.* at 517, S.E.2d at 904.[7] As to the breach of funding counterclaim, this Court found it to be compulsory because "if performed," the oral agreement "*would have avoided* default on the note by the joint venture." *Id.* at 518, 381 S.E.2d at 905 (emphasis added). As to the breach of purchase counterclaim, however, this Court deemed it merely permissive because, if performed, the oral agreement would "not [have] affect[ed] the enforceability of the note." *Id.*

Similarly, in *Salon Proz*, a bank filed a foreclosure action, the mortgagor asserted various counterclaims, and—following an order of reference to a master in equity—the mortgagor sought to transfer the matter back to the general docket, arguing it was entitled to a jury trial because its counterclaims were legal and compulsory. 420 S.C. at 92, 800 S.E.2d at 489–90. Finding that at least one of the counterclaims—a SCUTPA claim alleging a pattern of reneging on promises to modify the loans—was compulsory, the Court of Appeals explained: "Were this allegation true, it could affect the loan's enforceability." *Id.* at 97, 800 S.E.2d at 492.

Where a counterclaim is not a defense to an underlying foreclosure claim, this Court has found it to be merely permissive. In *BADD*, a bank brought a foreclosure action against a mortgagor and a guarantor, and the guarantor asserted counterclaims for civil conspiracy and breach of contract, both based on an alleged conspiracy with a third party. 414 S.C. at 291–92, 778 S.E.2d at 107. This Court found these counterclaims to be merely permissive because "the allegations, if true, would not render the guarantees unenforceable." *Id.* at 296, 778 S.E.2d at 109;

[7] "A party does not waive its right to a jury trial on a counterclaim asserted in an equity action if the counterclaim is legal and compulsory in nature." *See DAV Corp.*, 298 S.C. at 517, 381 S.E.2d at 905.

see id. 296, 778 S.E.2d at 110 ("does not affect the execution or enforceability of the guaranty agreements").

DAV Corp. and *Salon Proz*—consistent with *Blackburn*—make clear that a counterclaim has a logical relationship to an underlying claim, and is therefore compulsory, if it would operate as a defense to the underlying claim. *See DAV Corp.*, 298 S.C. at 519, 381 S.E.2d at 905 (deeming as permissive a counterclaim that "do[es] not affect the enforceability of the note," in context of leading claim for foreclosure); *Salon Proz*, 420 S.C. at 97, 800 S.E.2d at 492 (explaining in context of leading claim for foreclosure: "Were this allegation [in a counterclaim] true, it could affect the loan's enforceability."). Where the counterclaim would not affect the viability of the underlying claim, as in *BADD*, it is not compulsory. *See BADD*, 414 S.C. at 296, 778 S.E.2d at 109 (concluding in context of leading foreclosure claim: "the allegations [of a counterclaim], if true, would not render the guarantees unenforceable").

This construction of Rule 13(a) is consistent with its purpose of "prevent[ing] multiplicity of actions and . . . achiev[ing] resolution in a single lawsuit of all disputes arising out of common matters." *Twillman*, 351 S.C. at 62, 566 S.E.2d at 865 (internal quotation marks omitted). In other words, where there are real, non-abstract advantages to be gained by adding a counterclaim to an existing, leading claim and trying both claims in a single forum—such as where a counterclaim affects the enforceability of, or operates as a defense to, a plaintiff's claim—it makes sense to compel the filing of that counterclaim.

Here, there is minimal factual and legal overlap between a dispute over Novastar's compliance with the Attorney Preference Statute and the borrower's subsequent default under the Note over fifteen years later. Any perceived benefits to efficiency are *de minimis* at best and are

limited to discovery related to the primary loan documents, which is insufficient to satisfy SCRCP 15(a).

B. Mere overlapping facts are insufficient to satisfy the logical relationship test under SCRCP 13(a).

Bailey and Owens seem to agree with this framework. (Brief at 24 ("If success on a counterclaim could affect the enforceability of the plaintiff's claim, it is compulsory.")). But Petitioners then seek to broadly extend the scope of compulsory counterclaims to situations where there are merely overlapping facts between a counterclaim and the leading claims. (*Id.* at 23–24 (arguing that a counterclaim is also compulsory where it "arises out of the same set of facts as the plaintiff's claim")). This overly broad contention—seeking to extend compulsory counterclaims well beyond the notion of whether they "arise[ ] out of the [same] transaction or occurrence," SCRCP 13(a)—cannot be correct because it encompasses a broad swath of claims that have been found to be permissive under South Carolina law.

Petitioners purport to derive their overly expansive view of compulsory counterclaims from *BADD*, suggesting this Court "held that a counterclaim is compulsory in such a debt collection action if it arises out of the execution of the documents that form the basis of the plaintiff's claim." (Brief at 18). But, as explained above, that is not what this Court held in *BADD*. Rather, this Court in *BADD* found the civil conspiracy counterclaim to be permissive because it would "not render the guarantees unenforceable," *id.* at 296, 778 S.E.2d at 109, and it found the breach of contract counterclaim to be permissive because "it does not affect the execution or enforceability of the guaranty agreements," *id.* at 296, 778 S.E.2d at 110. *BADD* is, thus, fully consistent with the framework outlined above, which asks whether a counterclaim would operate as a defense to, or affect the enforceability of, a leading claim.

Bailey and Owens further attempt to support their overly broad construction of compulsory counterclaims by relying on cases in readily distinguishable contexts involving ownership of a country road, a trustee's fiduciary duties, and unfair business competition. (Brief at 21–23 (citing and discussing *First-Citizens Bank & Trust Co. of South Carolina v. Hucks*, 305 S.C. 296, 408 S.E.2d 222 (1991); *Encore Tech. Grp., LLC v. Trask*, 436 S.C. 289, 871 S.E.2d 608 (Ct. App. 2021); *Jaynes v. Fairfield*, 303 S.C. 434, 401 S.E.2d 183 (Ct. App. 1991)). But the context of these cases is important. *See Twillman*, 351 S.C. at 61, 566 S.E.2d at 865. In the mortgage foreclosure context, the logical relationship determination is made by asking whether a successful counterclaim would affect a plaintiff's right to enforce his or her claim. *See Blackburn*, 407 S.C. at 330 n.7, 755 S.E.2d at 442 n.7 ("[T]he 'logical relationship' determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage."); *cf. Hough v. Ag S. Farm Credit ACA*, 2018 WL 1430960, at *2 (D.S.C. March 22, 2018) (applying South Carolina law and concluding, "In the foreclosure context, this determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage." (internal quotation marks omitted)).

In any event, the out-of-context cases on which Petitioners rely support Deutsche Bank's interpretation of Rule 13(a). In *Trask*, a claim for unfair competition in a subsequent lawsuit was barred on res judicata grounds because the party seeking to assert it had *actually asserted it* as a defense in the earlier action. *See* 436 S.C. at 295, 871 S.E.2d at 612 ("Clean Touch used the same facts for an unclear hands defense in the first case."); *id.* at 310, 871 S.E.2d at 620 ("Finally (and in our view, *critically*), Clear Touch used the same factual basis—alleged unfair competition by Encore—as a defense to Encore's motion for restitution." (emphasis added)). In *Hucks*, a counterclaim alleging that a trustee breached its fiduciary duties would—if successful—affect the

enforceability of the trustee's declaratory judgment action, which presumably sought a declaration that the trustee complied with its obligations and duties as trustee (and thus did not breach them). *See* 305 S.C. at 298, 408 S.E.2d at 223. And in *Jaynes*, a landowner's claim of ownership of a road, asserted in a subsequent claim, would have been a defense to—or at least affected the enforceability of—a county's earlier claim of public ownership in the same road. *See* 303 S.C. at 438, 401 S.E. 2d at 185. Thus, the concept of whether a counterclaim affects the enforceability of, or serves as a defense to, a leading claim can be gleaned from, and is a through line in, *Trask*, *Hucks*, and *Jaynes*.[8]

But to the extent those cases deviate from the appropriate scope of compulsory counterclaims, the error in those cases—and the disconnect between Petitioners' arguments and more recent South Carolina law in the mortgage foreclosure context—appears to lie in the colloquial interpretation given to the phrase "logical relationship." (*See* Brief at 9 (appealing to "common-sense")). Contrary to Petitioners' suggestion, this Court should not focus on any common usage and meaning of the phrase "logical relationship."[9] Rather, this Court should follow the lead of the Court of Appeals and construe that standard by looking to the construction given to

[8] Bailey and Owens argue a straw man by contending that the counterclaims deemed compulsory in *Jaynes* and *Hucks* did not "mirror[ ]" those of the leading claims in those cases. (Brief at 22). Deutsche Bank is not arguing that "mirroring elements" between a counterclaim and a leading claim are a prerequisite to deeming a counterclaim compulsory.

[9] Indeed, even some counterclaims found to be permissive are "logically related" to leading claims using a common-sense, colloquial interpretation of the phrase "logically related." But for compulsory counterclaims to remain distinguishable from permissive ones, the phrase "logical relationship" cannot be construed and applied so broadly and carelessly.

it by other South Carolina courts—*e.g.*, *DAV Corp.*, *Salon Proz*, and *BADD*—in the mortgage lending context.[10]

The expansive framework advocated for by the Petitioners—whereby only some overlap in facts is sufficient—would render almost every counterclaim compulsory and would neuter the distinction between compulsory and permissive counterclaims. Specifically, as it relates to the 2013 Action, it would not be logical to conclude that a mortgage foreclosure action is a compulsory counterclaim where the borrower was not in default at the time the lawsuit was filed. *See infra* Section V.

II. Applying the appropriate framework, the Court of Appeals correctly concluded that foreclosure was not a compulsory counterclaim in the 2013 Action, meaning that res judicata did not bar Deutsche Bank's foreclosure claim below.

Applying the relevant cases discussed above, the Court of Appeals correctly considered the permissive-versus-compulsory nature of a prospective counterclaim in the 2013 Action by evaluating whether it would affect the leading claims asserted by the plaintiffs in the 2013 Action. Specifically, the Court of Appeals correctly framed the issue as follows: "[T]he question is whether a counterclaim for foreclosure in the 2013 Action would have affected Mortgagors' claims under the Attorney Preference Statute and the SCUTPA." (R. p. 716). This framework is fully consistent with this Court's prior decisions in *Blackburn*, *DAV Corp.*, and *BADD* discussed above (and is

[10] *Cf. Gammons v. Domestic Loans of Winston-Salem, Inc.*, 423 F. Supp. 819, 821 (M.D.N.C. 1979) (finding lender's action on debt not a compulsory counterclaim in Truth in Lending Act action brought by borrower; explaining, "While there appears to exist a logical relationship between the two claims, a precise examination undertaken in light of the different facts and law relevant to the separate claims reveals that the relationship is more illusory than real."); *Ball v. Conn. Bank & Trust Co.*, 404 F. Supp. 1, 4 (D. Conn. 1975) (explaining in same context, "wooden application of the common transaction label does not yield real judicial economy; any perceived logical nexus is conceptual, abstract, a formal characterization rather than a recognition of concrete advantage to be achieved through single forum adjudication of all the parties' opposing claims").

fully consistent with the Court of Appeals' reasoning in *Salon Proz*) by considering whether a counterclaim would affect the enforceability of a plaintiff's claim.

The Court of Appeals correctly answered that question in the negative:

> Deutsche Bank's foreclosure claim was not a defense to Mortgagors' allegations in the 2013 Action, and had Deutsche Bank raised the foreclosure claim in the 2013 Action, it would not have affected Mortgagors' allegations pertaining to the violation of the Attorney Preference Statute. We therefore conclude that although Deutsche Bank could have asserted a counterclaim for foreclosure in the 2013 Action, such claim was permissive—not compulsory.

(R. p. 716 (internal citation omitted)).

Stated differently, even if Deutsche Bank had successfully asserted foreclosure as a counterclaim in the 2013 Action, Bailey and Owens could nevertheless have successfully pursued their claims relating to the Attorney Preference Statute. A plaintiff in a foreclosure action has the burden to establish "the existence of the debt and the mortgagor's default on that debt." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 221, 746 S.E.2d 478, 481 (Ct. App. 2013). Neither element—the existence of the debt or the default in payments—would have negated the Petitioners' claim alleging that Novastar failed to obtain their preference for the closing attorney in the 1998 loan transaction. Stated differently, the fact finder in the 2013 Action could have found Deutsche Bank liable for violation of the Attorney Preference Statute and the SCUTPA, while also, simultaneously, issuing an order of foreclosure in favor of Deutsche Bank. Those two results are not mutually exclusive. Mortgagors need not be current on their loan payments in order to maintain a viable claim premised on a loan closing occurring well prior to any default. Conversely, Novastar's purported failure to ascertain the borrowers' preference for closing attorney would not

have defeated foreclosure.[11] Accordingly, Deutsche Bank's foreclosure claim would not have "affect[ed]" the "enforceability" of Bailey and Owens' claims in the 2013 Action, *Salon Proz*, 420 S.C. at 97, 800 S.E.2d at 492, nor would Deutsche Bank—if successful on a hypothetical counterclaim—"have avoided" liability under the Attorney Preference Statute, *DAV Corp.*, 298 S.C. at 518, 381 S.E.2d at 905. Foreclosure, therefore, was not a compulsory counterclaim in the 2013 Action under South Carolina's logical relationship test.

Upon correctly finding foreclosure to be a permissive—but not a compulsory—counterclaim in the 2013 Action, the Court of Appeals correctly concluded that res judicata did not bar Deutsche Bank's foreclosure claim in the underlying action, meaning summary judgment was inappropriately awarded to Petitioners.[12]

III. Federal courts' treatment of comparable consumer debt claims lends persuasive support to Deutsche Bank's position.

Despite the strong persuasive support the above cases like *DAV Corp.*, *Salon Proz*, and *BADD* provide to Deutsche Bank's position, they present themselves in the inverse context relative to the instant matter (*i.e.*, evaluating whether a mortgagor's counterclaims were compulsory, not whether a mortgagee's foreclosure claim is compulsory). To the extent no South Carolina case is directly on point, this Court should consider federal court decisions interpreting Rule 13. *See Twillman, Ltd.*, 351 S.C. at 62, 566 S.E.2d at 865 (noting that "South Carolina's Rule 13(a) is the

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[11] Even if Petitioners had proved that *no* attorney closed the loan (which they failed to do), this would not have been a defense to foreclosure for this 1998 loan. *See BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 624, 731 S.E.2d 547, 550 (2012).

[12] With the exception of circumstances allowing South Carolina courts to decline to apply res judicata where concerns of equity, justice, and public policy override the policy aims of res judicata, *see Carrigg v. Cannon*, 347 S.C. 75, 81–82, 552 S.E.2d 767, 770–71 (Ct. App. 2001), Deutsche Bank does not necessarily disagree with the generally accepted principle—outlined across three pages of Petitioners' Brief (*see* Brief at 12–14)—that res judicata bars claims that should have been asserted as compulsory counterclaims in prior actions. But because foreclosure was not a compulsory counterclaim in the 2013 Action, res judicata did not bar it in the underlying action.

same as the federal rule on counterclaims" and concluding, "[a]ccordingly, we may rely on federal law to interpret our Rule 13"); *cf. Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987) (looking to federal case law to interpret state rule tracking language of corresponding federal rule).

The United States Court of Appeals for the Fourth Circuit has concluded that an action to collect on a debt is not "logically related"—and thus not a compulsory counterclaim—to a borrower's action alleging that the lender failed to make certain disclosures in violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* *See Whigham v. Beneficial Finance Co. of Fayetteville, Inc.*, 599 F.2d 1322, 1323–24 (4th Cir. 1979); *see also Maddox v. Ky. Fin. Co., Inc.*, 736 F.2d 380, 383 (6th Cir. 1984) (same); *Valencia v. Anderson Bros. Ford*, 617 F.2d 1278, 1290–92 (7th Cir. 1980), *rev'd on other ground by* 452 U.S. 205 (1981) (same).[13] These cases rely on a number of different supporting factors in finding TILA claims insufficiently related to foreclosure actions under the comparable Federal Rule of Civil Procedure 13.

[13] Many other federal courts have reached this same conclusion in the context of a borrower's TILA claims, which are similar to the claims brought by Bailey and Owens under the South Carolina Consumer Protection Code relating to disclosures made—or not made—at the consummation of a consumer credit transaction. *See Rounds v. Cmty. Nat'l Bank in Monmouth*, 454 F. Supp. 883, 890 (S.D. Ill. 1978); *Meadows v. Charlie Wood, Inc.*, 448 F. Supp. 717, 721 (M.D. Ga. 1978); *Fetta v. Sears, Roebuck & Co., Inc.*, 77 F.R.D. 411, 414 (D.R.I. 1977); *Parr v. Thorp Credit, Inc.*, 73 F.R.D. 127, 129 (S.D. Iowa 1977); *Jones v. Goodyear Tire & Rubber Co.*, 73 F.R.D. 577, 579–80 (E.D. La. 1976); *Gammons v. Domestic Loans of Winston-Salem, Inc.*, 423 F. Supp. 819, 820–21 (M.D.N.C. 1976); *Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1122 (D. Hawai'i 1976); *Jones v. Sonny Gerber Auto Sales, Inc.*, 71 F.R.D. 695, 696 (D. Neb. 1976); *Zeltzer v. Carte Blanche Corp.*, 414 F. Supp. 1221, 1226 (W.D. Pa. 1976); *Ball v. Conn. Bank & Trust Co.*, 404 F. Supp. 1, 4 (D. Conn. 1975). Indeed, even in the context of a claim brought pursuant to the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*—which, relative to a claim under the Attorney Preference Statute, is arguably even more related to a foreclosure counterclaim insofar as it, like a foreclosure action, concerns payments and collection—federal courts have found a foreclosure counterclaim to be merely permissive. *See Peterson v. United Accounts, Inc.*, 638 F.2d 1134, 1137 (8th Cir. 1981).

First, "the lender's counterclaim raises issues of fact and law significantly different from those presented by the borrower's claim." *Whigham*, 599 F.2d at 1323–24 (explaining the only question in the borrower's suit is compliance with a statute, whereas the lender's claim requires the court to determine contractual rights of the parties); *see Maddox*, 736 F.2d at 383 (same). Second, "the evidence needed to support each claim differs." *Whigham*, 599 F.2d at 1324 (noting borrower must satisfy statutory obligations whereas lender "must verify the obligation and prove a default on loan payments"); *see Maddox*, 736 F.2d at 383 (same). And third, the claims are simply not logically related. *See Valencia*, 617 F.2d at 1291 ("The sole connection between a TILA claim and a debt counterclaim is the initial execution of the loan document."); *Whigham*, 599 F.2d at 1324 ("The borrower's . . . claim involves the same loan, but it does not arise from the obligations created by the contractual transactions.").

Petitioners' claim in the 2013 Action alleging violation of the Attorney Preference Statute bears a strong similarity to the TILA claims at issue in *Whigham* and other federal decisions. Because foreclosure is no more logically related to the attorney-preference claim than to other statutory consumer claims, these decisions lend further persuasive support to Deutsche Bank's position

IV. The Petitioners' remaining arguments to the contrary are unpersuasive and unavailing.

Bailey and Owens attempt to frame this appeal as a David-versus-Goliath dispute, casting Deutsche Bank as a "powerful, moneyed litigant[ ]" (Brief at 28) seeking a "pro-bank, anti-consumer special rule" (Brief at 30) that is not only "unjust" and "unfair" but also "unsavory" (Brief at 29). Once the Court peels back this exaggerated window dressing and Bailey and Owens's associated appeal to fairness—which Deutsche Bank believes cuts in its favor in any

event—it will reveal Petitioners' naked legal arguments to be incorrect, both individually and collectively.

A. Petitioners' prayer for relief in the 2013 Action did not request non-enforcement of the Note.

Bailey and Owens complain that the Court of Appeals was "unduly focused" on their prayer for relief in the 2013 Action. (Brief at 25). But Petitioners made arguments below premised on their prayer for relief and the relief to which they might be entitled. (*See, e.g.*, R. pp. 179 lines 16–24, 588, 599–600, 603–604, 606–607, 655).[14] Petitioners' emphasis and focus on their vague and broad request for "all relief available" to suggest they were seeking non-enforcement of the Note reveals the weakness in their position. At the time Petitioners filed suit in 2013, the Note was not even in default and no one had brought an action on the debt. Had Petitioners actually sought a declaration that the loan was unenforceable, they presumably would have directly requested this relief in their prayer. Nevertheless, Petitioners seek a rule that would place an undue burden on defendants to divine the intent of vague and poorly defined pleadings.

The Court of Appeals correctly declined to agree with Bailey and Owens' argument about the very attenuated connection between their prayer for relief in the 2013 Action, and a prospective foreclosure counterclaim. As the argument goes, Bailey and Owens contend that their request for "all relief available" under the Attorney Preference Statute (*see* R. p. 392, ¶ 37; R. p. 394, ¶ e) incorporated the possibility that a court might refuse to enforce the loan as a statutory remedy, thereby allegedly causing a foreclosure counterclaim to affect the enforceability of their claim. However, as the Court of Appeals noted, Bailey and Owens "did not specifically request a determination that the Mortgage or the underlying obligation to repay the loan was unenforceable."

[14] In granting summary judgment to Bailey and Owens on Deutsche Bank's foreclosure claim, the trial court likewise seemed to rely on what Bailey and Owens specifically pled in their prayer for relief. (*See* R. p. 21–22).

(R. p. 717). Non-enforcement of the loan is only one of seven remedies that a trial court can, in its discretion, impose and only upon finding unconscionability.[15] This alleged connection—between a counterclaim and the enforceability of the leading claim—is, therefore, far more attenuated than that found in controlling precedent.

The customary measure of damages for violation of the Attorney Preference Statute is monetary: actual damages plus "an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars." S.C. Code Ann. § 37-10-105(A). If a court determines the loan transaction was "induced by unconscionable conduct," it ***may*** award one of seven different categories of damages.[16] And only one of these seven categories of damages involves refusal to enforce the loan agreement. *See* S.C. Code Ann. § 37-10-105(C)(1). In other words, ***if*** a trial court determined that a party's violation of the Attorney Preference Statute meant that the underlying transaction was induced by unconscionable conduct, and ***if*** the trial court decided to exercise its discretion to impose damages, and ***if*** the trial court elected one of seven different types of remedies to impose (to the exclusion of all others), then a foreclosure action brought by Deutsche Bank as a counterclaim would affect the *remedy*.

However, the foreclosure claim—even assuming a trial court made each of every one of

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[15] It is doubtful that the remedies under S.C. Code 37-10-105(c) even apply to mortgage loans, as the statute references transactions found to be "unconscionable pursuant to Section 37-5-108," a statute addressing "consumer credit transactions," which do not include mortgages. *See* S.C. Code Ann. § 37-3-105.

[16] These categories of damages include (1) refuse to enforce the agreement, *see* S.C. Code Ann. § 37-10-105(C)(1); (2) refuse to enforce a term or part of the agreement, *see id.*; (3) refuse to enforce a particular transaction, *see id.*; (4) enforce only the portion of the agreement without the unconscionable term, *see id.* § 37-10-105(C)(2); (5) limit the application of the unconscionable term or part to avoid an unconscionable result, *see id.*; (6) rewrite or modify the agreement, *see id.* § 37-10-105(C)(3); or (7) award monetary damages of up to the loan finance charge, allow repayment of the unpaid balance of the loan without any finance charge, award up to twice the amount of excess loan finance charges paid to a creditor, and award attorneys' fees and costs, *see id.* § 37-10-10(C)(4).

the above discretionary decisions—would not affect a trial court's ability to find Deutsche Bank liable for violation of the Attorney Preference Statute, it would not prevent the trial court from finding the loan transaction to be induced by unconscionable conduct, and it would not prevent the trial court from awarding damages and imposing other remedies. In other words, even in the perfect set of circumstances from Bailey and Owens' standpoint, they could still pursue, enforce, and be awarded damages for violation of the Attorney Preference Statute, despite a successful foreclosure counterclaim.

The alleged "connection" Bailey and Owens have attempted to craft is substantively different from that found in *DAV Corp.* (and in the Court of Appeals' *Salon Proz* decision) where counterclaims premised on oral promises to modify loan terms would *necessarily* undermine and negate leading claims for foreclosure. *See DAV Corp.*, 298 S.C. at 518, 381 S.E.2d at 905 ("Clearly, there is a logical relationship between the enforceability of the note which is 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."); *Salon Proz*, 420 S.C. at 97, 800 S.E.2d at 492 (noting counterclaim alleging that lender "reneg[ed] upon promises to modify or otherwise restructure loans" (internal quotation marks omitted)). Here, by contrast, a foreclosure counterclaim would, by no means, negate or undermine Bailey and Owens' claim under the Attorney Preference Statute. At most, it would affect one possible remedy, subject to a trial court's discretion in any event, and contingent on a finding of unconscionability. No controlling precedent holds that a general and generic reference in a complaint to "all relief available" under a statute, which contains one damage remedy that might be affected by foreclosure, is sufficient to satisfy SCRCP 13(a)'s logical relationship test.

Bailey and Owens contend that "[n]ever once has any case analyzing whether a counterclaim was compulsory or permissive taken [a prayer for relief] into account." (Brief at 25). If true, this merely shows that Petitioners' arguments—which forced the Court of Appeals to consider the prayer for relief in the first place—may be creative but find no support in precedent.

B. The trial court's ability to conform judgments to the evidence under SCRCP 54(c) does not dictate the scope of compulsory counterclaims under SCRCP 13(a), and doing so would be plainly unreasonable and unworkable.

In the trial court, Bailey and Owens focused on the above argument that their broad-brush, catch-all prayer for relief placed each and every possible outcome—no matter how attenuated—at issue in the 2013 Action. Now, just as they did before the Court of Appeals, Bailey and Owens move the goalposts, contending that they were not even required to seek non-enforcement of the Note (and/or reference § 37-10-105(C)) because, under SCRCP 54(c), a party is entitled to all relief to which he or she is entitled. (Brief at 25–26). Deutsche Bank does not dispute the plain language of Rule 54(c).[17] However, the issue of whether a party is entitled to relief on the one hand, and the issue of whether a defendant receives notice of the relief sought sufficient to enable it to calculate the scope of compulsory counterclaims on the other hand, are two separate issues.

It is elementary that a party cannot know whether a counterclaim is logically related to an opposing party's claim unless and until he is informed of the full scope of the opposing party's claim. A finding that the scope of compulsory counterclaims is somehow coextensive with the unknowable and indeterminate relief a trial court might afford under SCRCP 54(c)—including

[17] For clarity, when Petitioners say "[t]he cases agree" (Brief at 25), they are merely citing cases that quote SCRCP 54(c). *See Battery Homeowners Ass'n v. Lincoln Fin. Resources, Inc.*, 309 S.C. 247, 251, 422 S.E.2d 93, 95–96 (1992); *Perry v. Smalls*, 308 S.C. 259, 264, 417 S.E.2d 611, 614 (Ct. App. 1992); *Sossamon v. Peeler*, 291 S.C. 256, 258, 353 S.E.2d 152, 154 (Ct. App. 1987); *Jones v. Bennett*, 290 S.C. 96, 97, 348 S.E.2d 365, 365 (Ct. App. 1986). None of these cases concerns or even discusses compulsory counterclaims, much less counterclaims in general.

relief a trial court might mete out via its broad inherent authority, apparently—would make it difficult (if not impossible) for litigants to ever know whether a prospective counterclaim was compulsory, and would lead to more of the "gotcha" arguments that underly this appeal.

C. The Court of Appeals' decision does not create a foreclosure exception to Rule 13(a).

Finally, Petitioners contend that the Court of Appeals' decision creates an alleged foreclosure exception to the permissive-versus-compulsory distinction under Rule 13. (*See* Brief at 26–29). Specifically, Petitioners take issue with the following statement from the Court of Appeals' opinion:

> We acknowledge *DAV Corp.*; *BADD, L.L.C.*; and *Salon Proz, LLC* all held that a claim is compulsory in a foreclosure action when, if the allegation were true, it could affect the enforceability of the loan. However, this case differs from the foregoing cases because here the prior action was not a foreclosure action.

(R. p. 716 (internal footnote omitted)). But everything about the foregoing statement is accurate. It is true that the leading claim in *DAV Corp.*, *BADD, L.L.C.*, and *Salon Proz was* a foreclosure claim. It is also true that the leading claim in the 2013 Action *was not* a foreclosure claim. Rather, Bailey and Owens brought claims against Deutsche Bank for violation of the Attorney Preference Statute and the SCUTPA. Given that "the prior action was not a foreclosure action," the Court of Appeals correctly considered "whether a counterclaim for foreclosure in the 2013 Action would have affected Mortgagors' claims under the Attorney Preference Statute and the SCUTPA." (R. p. 716). This is not a "double standard." (Brief at 10). Rather, it is a straightforward application of the cases on which both parties rely.[18]

[18] The issue of whether "Bailey and Owens' claim under S.C. Code Ann. § 37-10-105(C) would have been compulsory to Deutsche Bank's foreclosure claim if the latter had been brought first" (Brief at 29) is not before the Court. Deutsche Bank rejects the notion that the Court of Appeals "seem[ed] to contemplate" any such rule or holding.

Bailey and Owens' contention that the Court of Appeals should have instead considered whether their leading claims in the 2013 Action would have affected a prospective foreclosure action (*see* Brief at 27), is inconsistent with controlling precedent. By contending that "[t]he compulsory counterclaim principle runs . . . with equal force in both directions" (Brief at 27), Bailey and Owens are taking the position that the posture of a particular claim—be it a leading claim or a counterclaim—is irrelevant to the determination of whether a counterclaim is permissive or compulsory. But that contention does not comport with controlling precedent discussed in *supra* Section I(A), which concerns itself with whether a counterclaim would affect a leading claim, and not the other way around. In *DAV Corp.*, this Court did not ask whether the lender's foreclosure action was a defense to, or would affect the enforceability of the defendant's counterclaim for breach of an oral contract. *See* 298 S.C. at 518, 381 S.E.2d at 905. In *BADD*, this Court did not consider whether the bank's foreclosure claim was a defense to, or would affect the enforceability of the guarantor's counterclaims for civil conspiracy and breach of contract. *See* 414 S.C. at 296, 778 S.E.2d at 109–110. And in *Salon Proz*, the Court of Appeals did not evaluate whether the leading foreclosure claim was a defense to, or affected the enforceability of the mortgagor's SCUTPA counterclaim. *See* 420 S.C. at 97, 800 S.E.2d at 492. Bailey and Owens' position finds no support in these cases.

The Petitioners' contention also side-steps the context in which the permissive-versus-compulsory determination is made. At that stage in litigation, one or more leading claims have already been filed by a plaintiff. The question faced by a litigant (or a trial court) at that time is how the addition of a prospective counterclaim might affect the proceedings, or whether the addition of the prospective counterclaim would help "prevent multiplicity of actions." *Twillman*, 351 S.C. at 62, 566 S.E.2d at 865. The prospective counterclaim—and whether it is compulsory

or permissive—is necessarily oriented to and around the leading filed claim, which is being actively litigated, and which it considers joining in an existing lawsuit. Reorienting and reversing the evaluation—as Bailey and Owens ask this Court to do—by making the permissive-versus-compulsory determination by asking whether or how a filed leading claim might affect the viability of an unfiled prospective counterclaim is unworkable in practice and ignores the procedural posture in which these issues arise.

Bailey and Owens' erroneous argument appears to be predicated on their overly expansive view of the logical relationship test, which would have the effect of making almost every counterclaim a compulsory counterclaim based on mere overlapping facts.[19]

V. A finding in Bailey and Owens' favor would be inconsistent with South Carolina and federal policy directives and would have significant negative implications for borrowers, the mortgage industry, and the courts alike.

Reversing the Court of Appeals' decision would turn the mortgage lending industry on its head, causing lenders and loan servicers to sue first and ask questions later.[20] In a 2011 Administrative Order, the Supreme Court of South Carolina set forth—as the policy in the state of South Carolina—that loss mitigation efforts are in the best interests of all parties, mortgagors and mortgagees alike. *See* Administrative Order of the Supreme Court of South Carolina, Re:

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[19] Bailey and Owens' finally contend that Deutsche Bank's argument has the potential to result in conflicting outcomes. (Brief at p. 28). They maintain "it would have been possible for Bailey and Owens to prevail in [the 2013 Action], obtain a judgment declaring the note and mortgage to be unenforceable, and yet still be exposed to Deutsche Bank possibly prevailing on a claim to enforce and foreclose that same note and mortgage in a later action." (*Id.*) If, hypothetically, the Note and Mortgage were deemed unenforceable in a prior action, Deutsche Bank would not bring a subsequent foreclosure action, much less prevail in any such action. There is no conflict here, not even a possible conflict.

[20] *Cf. Marais v. JPMorgan Chase Bank, N.A.*, 676 F. App'x 509, 514 (6th Cir. 2017) ("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.").

Mortgage Foreclosure Actions, No. 2011-05-02-01 (May 2, 2011). Reversing the Court of Appeals would require mortgage lenders and mortgage servicers—in contravention of promulgated policy of South Carolina—to file counterclaims for foreclosure in response to each and every lawsuit brought by a borrower alleging unconscionable conduct and seeking relief under S.C. Code Ann. § 37-10-105. A borrower would not even need to ask a Court to refuse to enforce a loan as a remedy, much less even intend to seek and obtain that relief; instead, merely seeking "damages under § 37-10-105" would be sufficient to trigger a lender's obligation to assert foreclosure as a counterclaim or forever waive the right to assert the claim.[21] Rather than focus on loss mitigation efforts, contemplate loan modification possibilities, and work with the borrower, mortgage lenders and mortgage servicers will instead proceed directly to court to file a foreclosure counterclaim as soon as possible to avoid the technical default and deprivation of rights imposed on Deutsche Bank by the trial court here. This turn of events would undoubtedly exacerbate the problem of increased "unresolved foreclosure actions" and the "resulting burden on the resources

[21] To downplay these negative ramifications, the Petitioners have previously argued that the underlying procedural posture—whereby a mortgage customer sues the holder of their mortgage just days prior to the maturity date of the note—"is not likely to repeat itself in other cases in the future." (R. p. 591). On the contrary, preemptive suits by mortgagors in anticipation of foreclosure are a frequent tactic, including suits invoking the Attorney Preference Statute.

of the Court," which this Court lamented in its May 2, 2011 Administrative Order.[22] Indeed, by possessing a note and mortgage, a lender has the ability to pursue several remedies upon default, including but not limited to foreclosure. If, by filing a preemptive lawsuit, a borrower can force a lender to file a foreclosure counterclaim (or forever lose that right), a lender is effectively deprived of its right to pursue remedies alternative to foreclosure.[23]

Complicating matters further, federal regulations promulgated by the Consumer Financial Protection Bureau pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301, *et seq.*, not only impose obligations inconsistent with the filing of a foreclosure counterclaim but would also presently prohibit the very action the trial court concluded Deutsche

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[22] On the other hand, imposing an obligation on lenders and mortgage servicers to file a foreclosure counterclaim in these instances may have a chilling effect on a borrower's decision to seek to enforce his or her rights in the first instance, which is also at odds with South Carolina policy. *See Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) ("We find that the intention of the Legislature in crafting section 37-10-102 was to protect borrowers by requiring in the credit application 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 relating to the closing of the transaction . . . ."); *see generally Marais*, 676 F. App'x at 514 ("Although a party with the right to foreclose is permitted to do so at its discretion, making such claims compulsory would likely force many consumers to wager their homes in exchange for the opportunity to enforce their statutory rights.").

[23] Bailey and Owens have previously argued that the 2011 Order does not require delay in asserting a foreclosure claim, suggesting that lenders and mortgage servicers should file a foreclosure action at the same time that they serve a mortgagor with a notice of right to foreclosure intervention and begin the foreclosure intervention process with the borrower. (*See, e.g.*, R. pp. 610–611). It is true that the 2011 Order does not require delay in asserting a foreclosure action. However, the 2011 Order does not seek to encourage the filing of foreclosure actions either. To the contrary, the Order laments the fact that "the number of foreclosure actions filed in this State have continued to increase." Administrative Order of the Supreme Court of South Carolina, Re: Mortgage Foreclosure Actions, No. 2011-05-02-01 (May 2, 2011). Bailey and Owens' preferred and very expansive construction of Rule 13(a) would force lenders and servicers to do just that, *i.e.*, file more foreclosure actions, and more often. Such "dual tracking" will exacerbate the burdens on the Court. Moreover, it is with good reason that the Consumer Financial Protection Bureau promulgated regulations to disincentive dual tracking because it sends mixed messages to—and would likely confuse—a borrower.

Bank should have taken—but did not take—in the 2013 Action. Under 12 C.F.R. § 1024.41(f), "[a] servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless . . . [a] borrower's mortgage loan obligation is more than 120 days delinquent."[24] Here, Bailey and Owens' loan did not go into default until after it matured on July 1, 2013, four days after they filed the 2013 Action. Deutsche Bank filed its answer in the 2013 Action approximately 88 days from the default, *i.e.*, before the passage of 120 days. (R. p. 111, ¶ 33). If these regulations were applicable at that time,[25] Deutsche Bank could not satisfy its apparent obligations under state law (to file a compulsory counterclaim for foreclosure under SCRCP 13(a)) while simultaneously complying with federal law (by waiting 120 days after default to initiate foreclosure under 12 C.F.R. § 1024.41(f)). *Cf.* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696-01, at *10698 (Feb. 14, 2013) (codified at 12 C.F.R. § 1024.41) (explaining purpose behind promulgation of 120-day delay under 12 C.F.R. § 1024.41(f) as "restrict[ing] 'dual tracking' where a servicer is simultaneously evaluating a consumer for loan modifications or other alternatives at the same time that it prepares to foreclose on the property"). If the Court of Appeals' ruling is reversed, litigants will be unable to comply with both state and federal law, an outcome this Court should endeavor to avoid. *See generally Priester v. Cromer*, 401 S.C. 38, 43–44, 736 S.E.2d 249, 252 (2012)

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[24] Other pre-conditions in the regulations which are not applicable here include whether "foreclosure is based on a borrower's violation of a due-on-sale clause" and whether "[t]he servicer is joining the foreclosure action of a superior or subordinate lienholder." 12 C.F.R. § 1024.41(f)(1)(ii) & (iii).

[25] Although the relevant portion of 12 C.F.R. § 1024.41(f) requiring a lender to wait at least 120 days after default before initiating foreclosure was promulgated prior to the date of Deutsche Bank's September 26, 2013 answer in the 2013 Action, it did not go into effect until January 10, 2014. Deutsche Bank is, therefore, not arguing the trial court erred by not giving effect to this regulation. Instead, Deutsche Bank is arguing that if this Court reverses the Court of Appeals' interpretation of SCRCP 13(a), litigants going forward cannot simultaneously comply with SCRCP 13(a) and 12 C.F.R. § 1024.41(f).

(noting that "federal regulations have no less pre-emptive effect than federal statutes" and stating "[t]he preemption doctrine . . . provides that any state law that conflicts with federal law is without effect" (internal quotation marks omitted)).

Even under enforceable federal regulations existing at the time of the 2013 Action, Deutsche Bank was required—within 36 days after a borrower's default—to "inform the borrower about the availability of loss mitigation options." 12 C.F.R. § 1024.39(a). Deutsche Bank attempted to comply with this and other obligations by reaching out to Owens to discuss loss mitigation options to avoid foreclosure. (R. p. 246, ¶ 16; pp. 266–267). The trial court's interpretation of SCRCP 13(a) under the facts of this case—requiring Deutsche Bank to file a foreclosure claim—is inconsistent with Deutsche Bank's requirements to take steps to avoid foreclosure. Perhaps more importantly, it is inconsistent with the clear policy directives of both state and federal guidance favoring loss mitigation options to avoid foreclosure.

CONCLUSION

For the foregoing reasons, Deutsche Bank respectfully requests that this Court affirm the decision of the Court of Appeals.

This 8th day of February 2023.

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