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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.

APPENDIX

Volume II

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INDEX TO APPENDIX

VOLUME I

RECORD ON APPEAL

Volume I

Cover Page to Record on Appeal..... 1

Index to Record on Appeal.....2

Order on Motions for Summary Judgement…….....5

Order on Motion to Alter or Amend and Motion to Stay.....46

Order of Reference…… 55

Order Denying Motion to Dismiss Counterclaims.....57

Form 4 Order on Motion for Supersedeas.....73

Order on Motion for Writ of Supersedeas…….....75

Summons and Complaint, with Attachments.....80

Answer…….....103

Amended Answer and Counterclaim…….....108

Reply…….....120

Defendants' Motion for Partial Summary Judgment…….....128

Defendants' First Requests to Plaintiff to Admit.....131

Plaintiff's Responses and Objections to Requests to Admit.....137

Plaintiff's Responses and Objections to Interrogatories.....143

Plaintiff's Responses and Objections to Requests to Produce.....158

Plaintiff's Motion for Partial Summary Judgment…….……169

Defendants' Motion to Alter or Amend Relief Ordered…….……174

Transcript of Sept. 19, 2017, Hearing on Motions for Summary Judgment……....177

Transcript of Jan. 31, 2018, Hearing on Motions to Alter or Amend and to Stay ….223

Affidavit of Nichelle Jones…….243

Exhibit A – Blank Signed Attorney Preference Form……248

Exhibit B – Balloon Note……250

Exhibit C – Mortgage…….252

Exhibit D – Assignment and Assumption Agreement……258

Exhibit E – Mortgage Assignment Documents…….……..259

Exhibit F – Ocwen Payment History…….……264

Exhibit G – Letter from Ocwen……..……266

Plaintiff's Memorandum Regarding Summary Judgment Motions……....270

Defendants' Reply Memorandum Regarding Summary Judgment Motions…….288

Federal Register Excerpts…….……..291

Consent Order Between Ocwen and N.Y. Dept. of Fin. Servs…..……..296

Defendants' Reply Memorandum in Support of Motion to Alter or Amend……307

VOLUME II

RECORD ON APPEAL

Volume II

Cover Page to Record on Appeal..... 311

Index to Record on Appeal.....312

Defendants' Proposed Order on Motions for Summary Judgment……315

Plaintiff's Proposed Order on Motions for Summary Judgment…….353

Defendants' Notice of Appeal……372

Plaintiff's Notice of Appeal……375

Materials from Bailey v. Novastar……..378

Verdict Form……..……378

Order Denying Motion for New Trial……..……..…….382

Summons and Complaint, with Attachments…….385

Deutsche Bank's Answer and Affirmative Defenses…….405

Deutsche Banks's Motion for Summary Judgment……...416

Excerpts from Transcript of Trial…….……..…428

Certificate of Counsel…….……534

VOLUME III

Appellant's Brief of Respondent/Appellant……...535

Appellants/Respondents' Final Respondents' Brief……...575

Appellant's Reply Brief of Respondent/Appellant…….623

Appellants/Respondents' Final Appellants' Brief……..646

Respondent's Brief of Respondent/Appellant……669

Appellants/Respondents' Final Reply Brief……...……700

Opinion of Court of Appeals……...……..……...713

Petition for Rehearing or Rehearing En Banc…….719

Order Denying Petition for Rehearing ……..728

THE STATE OF SOUTH CAROLINA
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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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SC Court of Appeals

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/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 II

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INDEX
TO RECORD ON APPEAL

VOLUME I

Order on Motions for Summary Judgment.....1

Order on Motion to Alter or Amend Relief and on Motion to Stay.....42

Order of Reference.....51

Order Denying Motion to Dismiss Counterclaims.....53

Form 4 Order on Motion for Supersedeas.....69

Order on Motion for Writ of Supersedeas.....71

Summons and Complaint, with Attachments.....76

Answer.....99

Amended Answer and Counterclaim.....104

Reply.....116

Defendants' Motion for Partial Summary Judgment.....124

Defendants' First Requests to Plaintiff to Admit.....127

Plaintiff's Responses and Objections to Requests to Admit.....133

Plaintiff's Responses and Objections to Interrogatories.....139

Plaintiff's Responses and Objections to Requests to Produce.....154

Plaintiff's Motion for Partial Summary Judgment.....165

Defendants' Motion to Alter or Amend Relief Ordered.....170

Transcript of Sept. 19, 2017, Hearing on Motions for Summary Judgment.....173

Transcript of Jan. 31, 2018, Hearing on Motions to Alter or Amend and to Stay.....219

Affidavit of Nichelle Jones.....243

Exhibit A – Blank Signed Attorney Preference Form.....244

Exhibit B – Balloon Note.....246

Exhibit C – Mortgage.....248

Exhibit D – Assignment and Assumption Agreement.....254

Exhibit E – Mortgage Assignment Documents.....255

Exhibit F – Ocwen Payment History.....260

Exhibit G – Letter from Ocwen.....262

Plaintiff's Memorandum Regarding Summary Judgment Motions.....266

Defendants' Reply Memorandum Regarding Summary Judgment Motions.....284

Federal Register Excerpts.....287

Consent Order Between Ocwen and N.Y. Dept. of Fin. Servs.....292

Defendants' Reply Memorandum in Support of Motion to Alter or Amend.....303

VOLUME II

Defendants' Proposed Order on Motions for Summary Judgment.....307

Plaintiff's Proposed Order on Motions for Summary Judgment.....345

Defendants' Notice of Appeal.....364

Plaintiff's Notice of Appeal.....367

Materials from Bailey v. Novastar.....370

Verdict Form.....370

Order Denying Motion for New Trial.....374

Summons and Complaint, with Attachments.....377

Deutsche Bank's Answer and Affirmative Defenses.....397

Deutsche Bank's Motion for Summary Judgment.....408

Excerpts from Transcript of Trial.....425

Certificate of Counsel.....526

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.**	**ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

This matter comes before me upon motions of the Plaintiff (hereinafter, sometimes, "Deutsche Bank") and Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey (hereinafter, sometimes, "Bailey and Owens"), each seeking partial summary judgment in the above-captioned action. These motions were heard on September 19, 2017. At the hearing, the court requested proposed orders from counsel, and both counsel submitted ably drafted proposed orders. The court recognizes all arguments addressed in those proposed orders as having been made to the court.

This case presents issues concerning 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 *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.

Record on Appeal 307

SUMMARY OF CLAIMS AND UNDISPUTED MATERIAL FACTS 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 note document contains a balloon provision under which, even if all the monthly payments under the note are made timely and in their required amounts, a substantial principal balance comes due on July 1, 2013, the note's maturity date. 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. The note matured on July 1, 2013, and the complaint in this action 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 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 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 alleges as follows:

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.

Order Granting Motion to Dismiss

> 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 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. 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.

The Bailey v. Novastar action was tried to a final judgment at a jury trial. The jury did not find for Bailey and Owens; the verdict was for the defendants. 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 against NovaStar and Deutsche Bank (as NovaStar's assignee) for violation of S.C. Code Ann. § 37-10-102, commonly referred to as the attorney preference statute, under which a mortgage lender is required to 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

[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.

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 agreement or transaction that the court determines to have been unconscionable at the time it was made." Id. 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 the Bailey v. Novastar action, despite the fact that the subject note had matured at the time Deutsche Bank served its answer.

Deutsche Bank admits that Bailey sent, and that it received, the letter requesting the recording of 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. 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.

Deutsche Bank previously moved to dismiss Bailey and Owens' counterclaims. That motion was denied by order filed May 30, 2017.

Bailey and Owens have moved for 1) summary judgment in their favor as to Deutsche Bank's claim for foreclosure, 2) summary judgment in their favor as to their counterclaim seeking a declaratory judgment, and 3) summary judgment on liability in their favor as to their

counterclaim under S.C. Code Ann. § 29-3-320 for failure to enter satisfaction of the mortgage. Deutsche Bank has moved for summary judgment on Bailey and Owens' counterclaims.

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.

PUBLIC POLICY CONCERNS AT ISSUE

The court notes, consistently with the parties' arguments, that the issues presented by these motions bring up a number of 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 that *were* 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 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).

Record on Appeal 314

With regard to 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 that 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 the issuance of 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 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, among other things, 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).

RES JUDICATA

Much of the analysis of whether Bailey and Owens are entitled to summary judgment on the mortgage foreclosure claim in this case involves whether Deutsche Bank's claim for foreclosure was required 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

[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.

Record on Appeal 316

presence of third parties of whom the court cannot acquire jurisdiction." Rule 13(a), SCRCP. Such claims are usually referred to as 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 referred to as 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 is consistent with 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 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 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.

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, thus, 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 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 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 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

Record on Appeal 320

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). 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 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 of the remedies provided under S.C. Code Ann. § 37-10-105(C) is for a court to "refuse to enforce the agreement[.]" One of the outcomes 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 in the earlier case that would have constituted a complete defense to Deutsche Bank's foreclosure claim indicates that these claims have a compulsory relationship to one another.

Case law provides further support in this area 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 as follows:

> 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 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.

Record on Appeal 322

The Supreme 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. 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 that there must be mirroring elements among the claims for a counterclaim to be compulsory. What may be gleaned from the jurisprudence in this area is that 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 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 – the closing, as Deutsche Bank itself noted in that case. 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.

In the case of 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 the following 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 or 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 is aware of no case law in South Carolina indicating an exception for mortgage foreclosure claims in the res judicata context.

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

Record on Appeal 324

foreclosure action, with the Supreme Court holding that the foreclosure plaintiff could not foreclose against that defendant's interest and observing as follows:

> 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.

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 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,

Record on Appeal 326

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 indeed 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 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.
>
> 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

Record on Appeal 328

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 that there is a justiciable controversy between them about whether Deutsche Bank's mortgage continues to encumber the subject 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 of the definitions 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 of the definitions 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 the instant case, it is apparent that the words *bar*, *extinguish*, and *discharge* have significant overlap in definition and express a common historical concept.

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

Record on Appeal 330

> 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 subject 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. Deutsche Bank takes the position 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 that 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 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 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 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

Record on Appeal 334

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 in the instant case 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* at the time 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 not changed much 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.

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 to be consistent with what a statute closely related to S.C. Code Ann. § 29-3-310 and -320 indicate 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, 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

Record on Appeal 336

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 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.

The reading of 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.

ATTORNEY PREFERENCE VIOLATION COUNTERCLAIM

Both Deutsche Bank and Bailey and Owens argue that the undisputed fact of the blank attorney preference selection form means that 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 in this case.

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 that 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 in the event that Deutsche Bank were to prevail on its foreclosure claim. Since

Record on Appeal 338

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

While Deutsche Bank raised an interesting issue about 12 CFR §§ 1024.39 and 1024.41, that issue is not present in this case, 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 occurr while those regulations are in effect.

In an attempt to cast doubt on Deutsche Bank's ability to make use of some records attached to an affidavit submitted with its memorandum concerning these motions, Bailey and Owens put before the court 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 that consent order, 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." Deutsche Bank argued Bailey and Owens' presentation of this order was untimely under Rule 56, SCRCP, as it was not served two days before the summary judgment hearing. Since matters unrelated to those records, the affidavit they were presented with, or the consent order

offered by Bailey and Owens are dispositive of the issues subject of these motions, the court need not consider what effect that consent order might otherwise have had. Any issues of fact indicated by the Ocwen employee affidavit, Ocwen's records, or that order are not issues of *material* fact.

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

CONCLUSION

Accordingly, IT IS THEREFORE HEREBY ORDERED that:

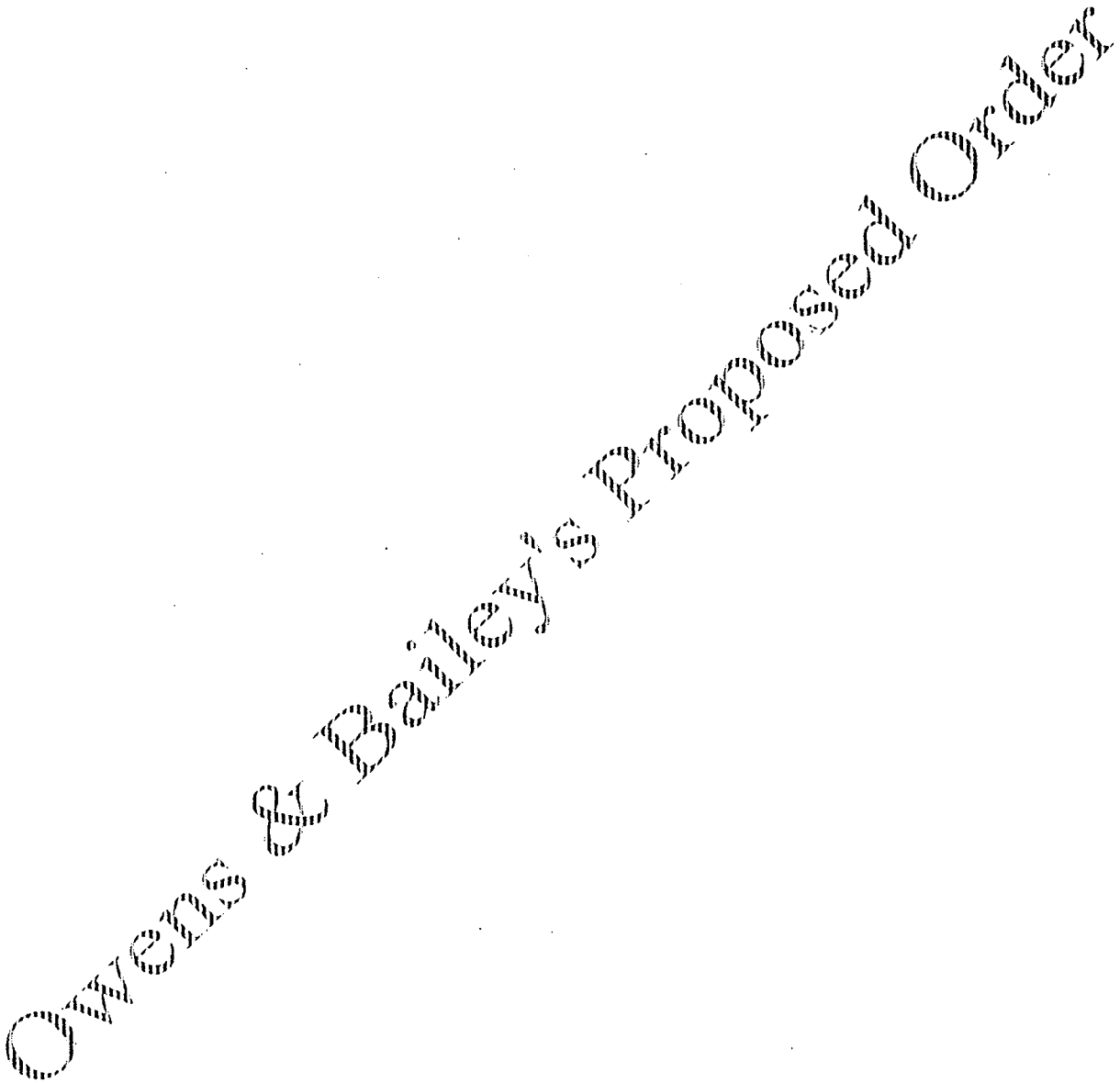
1) Deutsche Bank's motion for summary judgment on Bailey and Owens' counterclaims is denied;
2) Bailey and Owens' motion for partial summary judgment is granted, as follows:
    a. Summary judgment in Bailey and Owens' favor is granted as to Deutsche Bank's foreclosure claim;
    b. Summary judgment 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 subject 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;
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;
4) A trial will be held concerning the amount of monetary relief to which Bailey and Owens are entitled under S.C. Code Ann. § 29-3-320.

And IT IS SO ORDERED.

Record on Appeal 340

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

Lexington, South Carolina



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,

PLAINTIFF(S)

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

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.

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-**	**$ N/A – mortgage satisfiedof record**

	1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1	
		$
		$

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 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)

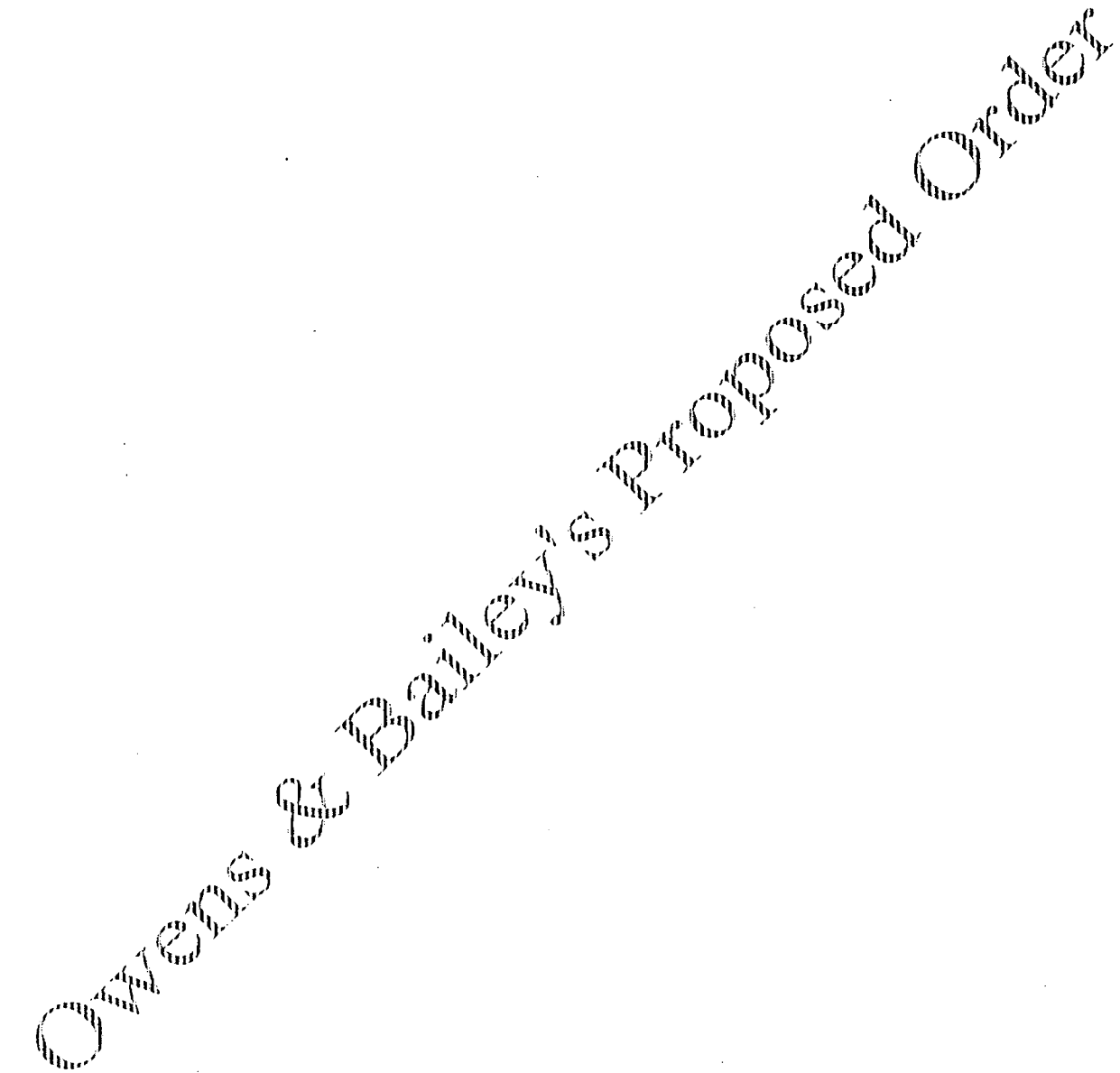
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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.


Alexander Bailey's proposed Order

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 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 Partial Summary Judgment as to the Counterclaims filed by Defendants, Patricia Owens a/k/a Patricia Ann Owens ("Owens") and Tammy M. Bailey ("Bailey") and Bailey and Owens' Motion for Partial Summary Judgment. The motions were heard September 19, 2017. G. Benjamin Milam, Esq. represented Deutsche Bank, and Andrew Radeker, Esq. represented Bailey and Owens at the hearing.

This action was commenced by Deutsche Bank on October 19, 2016, seeking foreclosure of a mortgage encumbering property at 111 Andrew Court, Gaston, SC 29053 (the "Property"). Bailey and Owens answered and raised several affirmative defenses, including res judicata, collateral estoppel, laches, unclean hands, waiver, and setoff or credit. They additionally raised counterclaims seeking a declaratory judgment that Deutsche Bank's mortgage cannot be enforced,

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seeking damages under S.C. Code Ann. § 29-3-320 for Deutsche Bank's failure to record a satisfaction of its mortgage, and for a setoff to any foreclosure judgment under S.C. Code § 37-10-102 (the "Attorney Preference Statute") based on the originating lender's alleged failure to ascertain the borrower's preference for closing attorney.

Bailey and Owens have moved for summary judgment in their favor as to (1) Deutsche Bank's foreclosure claim; (2) their first counterclaim for declaratory relief; and (3) their second counterclaim under S.C. Code § 29-3-320. Deutsche Bank moves for summary judgment in its favor as to each of Bailey and Owens' counterclaims.

Based on the following findings of fact and conclusions of law, the Court grants Deutsche Bank's Motion for Partial Summary Judgment and denies Bailey and Owens' Motion for Partial Summary Judgment.

FINDINGS OF FACT

1. This Court obtained jurisdiction of this matter pursuant to the November 29, 2016 Order of Reference.

2. Bailey & Owens are residents of South Carolina. All parties have or claim an interest in real property located in Lexington County, South Carolina. The Court has personal jurisdiction over the parties pursuant to S.C. Code §§ 36-2-802 and 36-2-803, and venue is proper in Lexington County.

3. The following events are undisputed and relevant to analysis:

   a. In 1998, Owens obtained a $60,400.00 mortgage loan ("Loan") from NovaStar Mortgage, Inc. ("NovaStar"), evidenced by a promissory note

dated June 15, 2016 ("Note") and secured by a mortgage ("Mortgage") encumbering the Property.

b. The Loan was subsequently assumed by Owens' daughter, Bailey, in 2001.

c. NovaStar assigned the Note and Mortgage to Deutsche Bank.

d. On June 27, 2013, Bailey and Owens filed suit against Deutsche Bank and other parties in a separate action under Case Number 2013-CP-32-2210 (the "2013 Action"). Bailey and Owens alleged that Owens was not given an opportunity to select an attorney to represent her in the 1998 closing of the Loan, that no attorney in fact supervised the closing of the Loan, and that the Loan was unconscionable because it included a balloon term. Although the 2013 Action alleged claims against various parties, the sole claims alleged against Deutsche Bank were for alleged violations of the Attorney Preference Statute and for alleged violations of the South Carolina Unfair Trade Practices Act. As part of the claim under the Attorney Preference Statute, Bailey and Owens alleged that "For each violation of [the Attorney Preference Statute], [Bailey and Owens] are entitled to damages, attorney's fees, and penalties as provided in the South Carolina Consumer Protection Code, including all available relief under S.C. Code Ann. § 37-10-105." Bailey and Owens' prayer for relief in the 2013 action seeks an award of actual and exemplary damages, costs, attorney's fees, statutory penalties, and "all relief available under S.C. Code Ann. § 37-10-105(C)."

e. The Note matured on July 1, 2013. At the time of maturity, the loan had an unpaid principal balance of $48,587.09. Bailey and Owens defaulted under

the terms of the Note and Mortgage by failing to pay the balance due on the note after maturity.

f. Deutsche Bank served its answer in the 2013 Action on September 26, 2017. Deutsche Bank did not serve any counterclaims on Bailey and Owens in the 2013 Action.

g. On September 16, 2015, following a jury trial, judgment was entered in the 2013 Action in favor of Deutsche Bank and its co-defendants.

h. 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 and enclosing a $40.00 check for recording and processing fees. Deutsche Bank declined to record a satisfaction, and more than three months has passed since the date of the demand.

4. There are a number of other relevant facts which Bailey and Owens contend are in dispute:

a. Deutsche Bank has submitted business records of its loan servicer, Ocwen Loan Servicing, LLC ("Ocwen") showing that on May 15, 1998, one month prior to the closing of the Loan, Defendant Owens signed a South Carolina Notice of Rights Concerning the Selection of an Attorney and Insurance Agent ("Attorney Preference Notice").

b. Deutsche Bank has also submitted business records from Ocwen showing that following Bailey and Owens' default under the terms of the Note, and thirty-four days prior to the service of Deutsche Bank's answer in the 2013 Action, Ocwen attempted to inform Bailey and Owens of alternative

solutions to avoid foreclosure. Specifically, Deutsche Bank asserts that on August 23, 2013, Ocwen sent Bailey and Owens a letter informing them of potential loss mitigation options ("Foreclosure Intervention Letter"), including potential options for a modification under the Home Affordable Modification Program ("HAMP"), a proprietary modification, short sale, and deed-in-lieu of foreclosure.

c. Bailey and Owens contend that Ocwen's business records are unreliable and should not be accepted as evidence of the foregoing facts.

5. The Court finds that there is no genuine dispute raised as to accuracy of the business records submitted by Deutsche Bank. Through the affidavit of an Ocwen representative, Deutsche Bank has established the foundation required for records of a regularly conducted business activity under Rule 803(6) of the South Carolina Rules of Evidence. Such records are generally accepted in the courts of this state as probative evidence of the facts recorded. Although Bailey and Owens broadly assert that Ocwen has made errors in the course of its recordkeeping, they have not attempted to show why the specific records before the Court are untrustworthy. Furthermore, Bailey and Owens have submitted no affidavits or other evidence asserting that they did not receive the August 23, 2013 letter informing them of alternatives to foreclosure, or that Owens did not sign the Attorney Preference Notice.

ISSUES

1. Was Deutsche Bank's foreclosure a compulsory counterclaim in the 2013 Action?

2. If Deutsche Bank's foreclosure was a compulsory counterclaim in the 2013 Action, is the foreclosure now barred by res judicata?

3. If Deutsche Bank's foreclosure is barred by res judicata, was Deutsche Bank required under S.C. Code § 29-3-310 to record a satisfaction of mortgage in response to Bailey and Owens' August 23, 2016 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

1. Deutsche Bank's foreclosure and Bailey and Owens' first counterclaim for a declaratory judgment are claims in equity.

An action for foreclosure is in equity. Carolina First Bank v. BADD, L.L.C., 414 S.C. 289, 293, 778 S.E.2d 106, 108 (2015).

A suit for a declaratory judgment is itself neither legal nor equitable, but is determined by the nature of the underlying issue. Felts v. Richland Cty., 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). Since Deutsche Bank's foreclosure is a matter in equity, Bailey and Owens' counterclaim seeking a declaration that the mortgage is unenforceable by virtue of res judicata is likewise an action in equity. Cf. Collier v. Green, 244 S.C. 367, 371, 137 S.E.2d 277, 280 (1964) (finding that questions raised by defenses and counterclaims directly affecting the validity of a lien were equitable in nature).

2. Bailey and Owens' second and third counterclaims are claims at law.

Bailey and Owens' counterclaims under S.C. Code § 29-3-210 and the Attorney Preference Statute are both statutory causes of action and require the interpretation of the relevant portions of the South Carolina Code. These matters are therefore claims at law. See State v. Burgess, 393 S.C. 396, 402, 712 S.E.2d 1, 4 (Ct. App. 2011) ("An action involving the interpretation of a statute is an action at law").

3. **Summary judgment standard.** 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). However, a party opposing a motion for summary judgment may not rest on the mere allegations or denials of his pleading, but, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. Coker v. Cummings, 381 S.C. 45, 54, 671 S.E.2d 383, 388 (Ct. App. 2008).

4. **Deutsche Bank's foreclosure claim was not compulsory in the 2013 action because it was not logically related to Bailey and Owens' statutory claims.**

A counterclaim is compulsory under SCRCP 13 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). Where a counterclaim is compulsory, the defendant is generally precluded by res judicata from raising the counterclaim in a subsequent suit. See Jaynes v. County of Fairfield, 303 S.C. 434, 438, 401 S.E.2d 183, 185 and n.1 (1991); Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997) ("The application of claim preclusion turns on whether a counterclaim is permissive or compulsory. . . . [I]f a

counterclaim is compulsory, but not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action.").

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 avoid the enforcement of the plaintiff's claim. For example, in DAV Corp., the court found that a foreclosure defendant's counterclaims alleging an oral agreement subsequent to the origination of the loan were compulsory because, if proven, they "would have avoided default on the note by the joint venture." 298 S.C. at 518-519, 381 S.E.2d at 905. Similarly, in South Carolina Community Bank v. Salon 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. BAIDD, L.L.C., the court found that a claim by a guarantor alleging that the foreclosing lender had conspired to induce default did not bear a logical relationship to the execution or enforceability of the guaranty agreements where "the allegations, if true, would not render the guarantees unenforceable," even though all claims arose out of the same loan transaction. 414 S.C. 289, 295-96, 778 S.E.2d 106, 109.

A majority of other jurisdictions have found that a foreclosure is not a compulsory counterclaim to a borrower's suit alleging a violation of statutory lending requirements. *See, e.g.*, Whigham v. Beneficial Finance Co., 599 F.2d 1322, 1323-24 (4th Cir. 1979) (finding that a lender's counterclaim to enforce loan debt was not "logically related" to a borrower's claim under the Truth in Lending Act); Marais v. JPMorgan Chase Bank, N.A. 676 F. App'x 509, 514

(6th Cir. 2017) (finding that there was insufficient overlap between a loan servicer's foreclosure claim and a borrower's claim under the Real Estate Settlement Procedures Act for the claims to be "logically related").

Bailey and Owens argue that S.C. Code 37-10-105(c) allows a court, among other things, to "refuse to enforce" an unconscionable agreement and that by requesting "all relief available under S.C. Code Ann. § 37-10-105(C)," the complaint in the 2013 Action thereby challenged the enforceability of the mortgage. Bailey and Owens argue that their claims in the 2013 action are therefore "logically related" to the foreclosure and that Rule 13 renders the foreclosure a compulsory counterclaim.

Deutsche Bank argues that the complaint in the 2013 Action sought only relief for alleged violations of statutory lending requirements, and that proof of the elements of its foreclosure claim would not have prevented the enforcement of Bailey and Owens' statutory claims in the 2013 Action. Thus, Deutsche Bank argues that its foreclosure action is not "logically related" to Bailey and Owens' claims in the 2013 action under DAV Corp. Deutsche Bank further argues that the parties to a mortgage have a right to pursue loss mitigation prior to exercising the remedy of foreclosure, and that Rule 13 cannot be interpreted to prevent such activities under the enabling act for the South Carolina Rules of Civil Procedure, which provides that the Rules "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.

The Court finds that Deutsche Bank's foreclosure requires proof of matters distinct from Bailey and Owens' statutory claims in the 2013 Action, and would not have affected the enforcement of those claims. 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; Bailey and Owens 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, they sought to show that the originating lender had violated statutory requirements connected with the closing of the loan. The enforcement of these consumer protection requirements would not have been impacted by proof of Bailey and Owens' default on the loan contract itself.

Accordingly, the present case stands in contrast to the circumstances under which the courts in DAV Corp. and Salon Proz found counterclaims to be compulsory, but instead mirrors the determination in Carolina First Bank v. BADD, L.L.C. that a counterclaim which "would not render the [plaintiff's claim] unenforceable" was not compulsory. The Court concludes that Deutsche Bank's foreclosure likewise was not compulsory in the 2013 Action, and Deutsche Bank is therefore entitled to summary judgment on Bailey and Owens' first counterclaim.

5. Even if the foreclosure were a compulsory counterclaim in the 2013 action, the foreclosure is not barred by res judicata due to the public policy favoring loss mitigation as an alternative to foreclosure.

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 "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).

Deutsche Bank argues that even if its foreclosure was a compulsory counterclaim in the 2013 Action, res judicata should not be applied under the facts of this case because, under the principles cited in *Nelson* and *Mr. T.*, such application would result in unfairness and injustice and would be contrary to public policy. In support, Deutsche Bank has cited federal regulations designed to prevent "dual tracking" and requiring loan servicers to temporarily delay foreclosure to allow for solicitation and processing of applications for a loan modification or other foreclosure relief. Deutsche Bank has also cited to S.C. Supreme Court Administrative Order 2011-05-02-01 as proof of a public policy favoring loss mitigation as an alternative to foreclosure. Deutsche Bank points out that its loan servicer sent a letter to Bailey and Owens shortly before it filed its answer, describing options for avoiding foreclosure. Deutsche Bank argues that forcing the lender to foreclose despite pending loss mitigation efforts would violate public policy favoring foreclosure intervention, and would also place borrowers seeking vindication of statutory rights at risk of inadvertently forcing the lender to foreclose.

Owens and Bailey argue that notwithstanding a public policy favoring foreclosure intervention, there is likewise a public policy, reflected in Rule 13, favoring the end of litigation and preventing a multiplicity of actions, and that these policy considerations are not overridden by public policy favoring loss mitigation. Owens and Bailey further argue that the foreclosure intervention procedure mandated by the 2011 Administrative Order, which requires the service of a foreclosure intervention notice contemporaneously with the foreclosure complaint, would

have been sufficient to permit the parties to engage in loss mitigation while allowing Deutsche Bank to file its foreclosure action.

The Court finds that the federal and state requirements cited by Deutsche Bank demonstrate a public policy favoring the use of loan modification and other loss mitigation options as an alternative to foreclosure. 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 likewise 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).

Contrary to Owens and Bailey's assertion, a ruling that the lender is not compelled to file a foreclosure counterclaim under these circumstances does not expose the borrower to a multiplicity of suits, as the borrower would not be subject to the peril of foreclosure in the earlier action absent a foreclosure counterclaim. See Garris v. Governing Bd. of S.C. Reinsurance

Facility, 333 S.C. 432, 449, 511 S.E.2d 48 (1998) (stating that the "primary purpose" of the res judicata doctrine is to "bring an end to litigation and prevent a defendant from being forced to defend the same action repeatedly"). The solution proposed by Owens and Bailey, that the lender be required to foreclose subject to the requirements of the 2011 Administrative Order, would paradoxically have the effect of encouraging litigation that may ultimately prove unnecessary.

The Court therefore finds that in the mortgage loan context, the application of Rule 13 does not require the lender to foreclose when it is actively seeking or facilitating the borrower's participation in a loss mitigation program. Here, public policy precludes the application of res judicata to Deutsche Bank's foreclosure claim. See Mr. T v. Ms. T, 378 S.C. at 138, 662 S.E.2d at 419.

6. Bailey and Owens are not entitled to relief under S.C. Code § 29-3-310 because they have not paid or satisfied the loan debt.

S.C. 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" to record a satisfaction of the mortgage within three months of a proper demand. S.C. Code § 29-3-320 provides that a mortgagee is liable for failure to enter a satisfaction after "having received such payment, satisfaction, or tender." This language has been virtually unchanged since 1817, when the predecessor to this statute was enacted. See Act of 1817, 6 Stat. 61.

The South Carolina Supreme Court has held that to trigger the relief available under Section 29-3-320, 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." Dykeman, 381 S.C. at 337, 339-40, 673 S.E.2d at 806-807. As the court stated in S.C. Dep't of Revenue v. Collins Entm't Corp., "The principle is well established that penal statutes are strictly construed, and one who seeks to recover a penalty for the failure on the part of the defendant to discharge some duty imposed by law, must bring his case clearly within the language and meaning of the statute awarding the penalty." 340 S.C. 77, 79, 530 S.E.2d 635, 636 (2000) (internal quotations omitted).

Section 29-3-310 does not define the term "satisfaction." 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 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).

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

Pomeroy's Equity Jurisprudence states that "Satisfaction 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.

The South Carolina Court of Appeals has stated that satisfaction is "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).

Bailey and Owens argue that application of the compulsory counterclaim rule and res judicata has achieved a discharge of the debt, and that this type of discharge is encompassed within the definition of "satisfaction." Bailey and Owens further argue that "satisfaction" cannot be synonymous with "payment" because the statute imposes an obligation on a mortgagee who has received "payment *or* satisfaction," and that the statute must be construed to avoid redundancy. See Matter of Decker, 322 S.C. 215, 219, 417 S.E.2d 462, 463 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.") (internal quotations omitted). Bailey and Owens argue that their construction is in keeping with a legislative intent 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). Finally, Bailey and Owens argue that a holding that the statute does not require satisfaction under these circumstances would leave a cloud on the mortgagor's title, and that there must be "no wrong without a remedy," citing Messervy v. Messervy, 82 S.C. 559, 64 S.E. 753, 754 (1909).

Deutsche Bank contends that because it is undisputed that the Bailey and Owens are in default of their payments on the loan debt, there has been no payment, satisfaction, or tender as required to impose a duty on Deutsche Bank to record a satisfaction. Deutsche Bank asserts that "satisfaction" necessarily requires either full payment of the debt or some substitute performance agreed by the parties. Deutsche Bank argues that because "satisfaction" encompasses the latter type of substitute performance, the legislature's use of the term is not rendered superfluous under its argument. Deutsche Bank contends that it does have a monetary interest in the mortgage, at least until there is a judicial determination to the contrary, and that there is no evidence of a legislative intent to require a mortgagee to satisfy its lien based solely on a borrower's un-adjudicated demand. Deutsche Bank further argues that its construction of the statute does not leave mortgagors without a remedy when a mortgage is unenforceable as a matter of law, because the mortgagor may file a quiet title action to remove any cloud on title. Finally, Deutsche Bank argues that S.C. Code §§ 29-3-310 and 29-3-320 are penal statutes, requiring strict construction, and that strict construction prohibits adoption of Bailey and Owens' interpretation as not clearly within the language and meaning of the statute.

The Court's determination that the foreclosure is not barred by res judicata precludes Deutsche Bank's liability under Section 29-3-320. Even if res judicata applied, however,

Deutsche Bank would still be entitled to summary judgment on this claim because Bailey and Owens have not made payment, satisfaction, or tender within the meaning of the statute.

The various authorities appear to be in agreement that "satisfaction" encompasses the performance of a substitute obligation in return for the discharge of the original obligation. Had Bailey and Owens reached an agreement with Deutsche Bank to provide payment in a different form, amount, or timetable than under the original note, for example, such payment might have constituted a "satisfaction" of the debt, even though not full performance under the original terms of the loan. The construction urged by Bailey and Owens is therefore unnecessary to avoid surplusage or superfluity.

Because Sections 29-3-310 and 29-3-320 are penal statutes, South Carolina law requires that they be strictly construed, and Bailey and Owens must bring their case clearly within the language and meaning of the statute awarding the penalty. Dykeman, 381 S.C. at 337, 339-40, 673 S.E.2d at 806-807; Collins Entm't Corp., 340 S.C. at 79, 530 S.E.2d at 636. Bailey and Owens, however, have identified no authorities supporting their view that the legislature intended to impose a penalty where, as here, the lender has been confronted with an unadjudicated claim that the mortgage is unenforceable. On the contrary, the Ecclesiastes Prod. Ministries decision and other cited authorities indicate that a "satisfaction" requires that discharge occur through some affirmative performance, either in accordance with the original obligation or by substitution. The South Carolina Supreme Court's determination that Sections 29-3-310 and 29-3-320 are penal statutes precludes this Court from adopting the expansive construction urged by Bailey and Owens.

Contrary to Bailey and Owens' assertion, this result does not leave mortgagors without a remedy to remove clouds on title when a mortgage has been found unenforceable, as such mortgagors may obtain relief by bringing a quiet title action under S.C. Code 15-67-10 *et seq.*

Because there is no genuine issue of material fact as to whether Deutsche Bank violated S.C. Code §§ 29-3-310 and 29-3-320, Deutsche Bank is entitled to summary judgment on Bailey and Owens' second counterclaim.

7. Bailey and Owens are not entitled to relief under the Attorney Preference Statute where the loan records show that Owens signed a notice clearly and prominently disclosing the information necessary to obtain her preference for legal counsel.

The Attorney Preference Statute requires "clear and prominent disclosure of the information necessary to obtain the borrower's preference as to the legal counsel employed to represent the debtor in all matters relating to the closing of the transaction . . . ." 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]."

Deutsche Bank has submitted the Attorney Preference Notice signed by Owens, which states in pertinent part, "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." The form provides a space for the designation of an attorney of the borrower's preference, which is left blank. Bailey and Owens have not identified any basis to conclude that the form or the manner in which notice was presented fails to meet the requirements of the Attorney Preference Statute. Accordingly, there is no genuine issue of

Record on Appeal 362

material fact and Deutsche Bank is entitled to summary judgment on Bailey and Owens' third counterclaim.

IT IS THEREFORE ORDERED AND ADJUDGED:

A. Deutsche Bank's Motion for Partial Summary Judgment as to Bailey and Owens' Counterclaims is GRANTED.

B. Bailey and Owens' Motion for Summary Judgment is DENIED.

C. The Court retains jurisdiction to adjudicate Deutsche Bank's foreclosure claim.

AND IT IS SO ORDERED.

Hon. James O. Spence
Master in Equity

_____, 2017
Lexington, South Carolina

Document 2017-CP-32-03825 Filed 08/25/2017 Entered 08/25/2017 09:26:36

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

RECEIVED
MAR 12 2018
SC Court of Appeals

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,

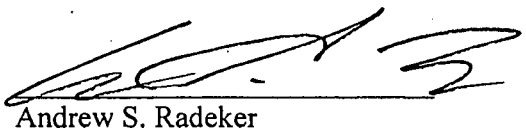
Of whom Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey are the.....Appellants.

NOTICE OF APPEAL

Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey (hereinafter "Bailey and Owens") appeal from the failure of the Lexington County Master-in-Equity to rule in his orders filed on November 28, 2017, and February 12, 2018 (copies of which are provided to the Court of Appeals with this notice) that Bailey and Owens are entitled to monetary relief under S.C. Code Ann. § 29-3-320. Bailey and Owens received written notice of the entry of these orders on the date each order was filed.

March 8, 2018

Respectfully submitted,



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Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

RECEIVED
MAR 12 2018
SC Court of Appeals

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.....Appellants.

PROOF OF SERVICE

I certify that I served the notice of appeal by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Michael C. Griffin, Esq.
G. Benjamin Milam, Esq.
Bradley Arant Boult Cummings LLP
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Charlotte, NC 28202

Mary R. Powers, Esq.
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March 8, 2018

Andrew S. Radeker

86171

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

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-Appellant,

v.

Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey,

Appellants-Respondents.

RECEIVED
MAR 14 2018
SC Court of Appeals

NOTICE OF APPEAL

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 appeals the order of the Honorable James O. Spence dated November 28, 2017. Respondent-Appellant received a notice of appeal from Appellants-Respondents on March 8, 2018.

March 13, 2018

G. Benjamin Milam
Bradley Arant Boult Cummings LLP
214 N. Tryon Street, Suite 3700
Charlotte, NC 28204
(704) 338-6049
Attorney for Respondent-Appellant

Other Counsel of Record:
Andrew S. Radeker
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Attorneys for Appellants/Respondents.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

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-Appellant,
v.	
Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey;	Appellants-Respondents.

RECEIVED
MAR 14 2018
SC Court of Appeals

PROOF OF SERVICE

I certify that I served the notice of cross-appeal by depositing a copy of it on the date shown below in the United States mail, postage prepaid, addressed as follows:

Andrew S. Radeker
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
Attorneys for Appellants/Respondents.

March 13, 2018

G. Benjamin Milam
Bradley Arant Boult Cummings LLP
214 N. Tryon Street, Suite 3700

SEP162015

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF LEXINGTON FILED	**CASE NO. 2013-CP-32-2210**

Tammy M. Bailey and Patricia Ann Owens,

Plaintiffs,

vs.

Novastar Mortgage, Inc.; 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; Ocwen Loan Servicing, LLC; Brian C. Reeve; and Brian Charles Reeve, LLC a/k/a Brian C. Reeve, P.A.;

Defendants.

2015 SEP 16 P 2:00

[illegible] A. CARRIGG
CLERK OF COURT
LEXINGTON SC

VERDICT FORM

As your verdict in this action, please read carefully and answer the questions set out below according to the instructions on this form as well as the instructions given to you by the Court in this matter:

As to Defendant, **Novastar Mortgage, Inc.**

1) Did you find by a preponderance of the evidence that Defendant Novastar Mortgage, Inc. violated the South Carolina Unfair Trade Practices Act?

ANSWER: YES _____ NO ✓

If your verdict is for the plaintiffs, please state the amount of ACTUAL damages: $_____
If your verdict is for the plaintiffs, please state the amount of PUNITIVE damages: $_____

As to Defendant, **Deutsche Bank.**

1) Did you find by a preponderance of the evidence that Defendant Deutsche Bank. violated the South Carolina Unfair Trade Practices Act?

ANSWER: YES _____ NO ✓

SEP162015

If your verdict is for the plaintiffs, please state the amount of ACTUAL damages: $_____
If your verdict is for the plaintiffs, please state the amount of PUNITIVE damages: $_____

2) Did you find by a preponderance of the evidence that Defendant Deutsche Bank. is liable for conversion

ANSWER: YES _____ NO ✓

If your verdict is for the plaintiffs, please state the amount of ACTUAL damages: $_____
If your verdict is for the plaintiffs, please state the amount of PUNITIVE damages: $_____

As to Defendant, **Ocwen Loan Servicing.**

1) Did you find by a preponderance of the evidence that Defendant Ocwen Loan Servicing violated the South Carolina Unfair Trade Practices Act?

ANSWER: YES _____ NO ✓

If your verdict is for the plaintiffs, please state the amount of ACTUAL damages: $_____
If your verdict is for the plaintiffs, please state the amount of PUNITIVE damages: $_____

2) Did you find by a preponderance of the evidence that Defendant Ocwen Loan Servicing is liable for conversion

ANSWER: YES _____ NO ✓

If your verdict is for the plaintiffs, please state the amount of ACTUAL damages: $_____
If your verdict is for the plaintiffs, please state the amount of PUNITIVE damages: $_____

Adina McWilson
Jury foreperson

Sept. 15, 2015
Date

SEP162015

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP3202210

FILED
2015 SEP 16 P 4:00
BETTY A. CARRIGG
CLERK OF COURT
LEXINGTON SC

PLAINTIFF(S)		DEFENDANT(S)	
Tammy M Bailey	Patricia Ann Owens	Novastar Mortgage Inc First Union National Bank NA Novastar Home Equity Loan B K Richardson Brian Charles Reeve LLC	Wells Fargo Bank NA Novastar Mortgage Funding Trust Ocwen Loan Servicing LLC Brian C Reeve

Submitted by: Attorney for: ☐ Plaintiff ☐ Defendant ☐ 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; (formal order to follow) ☐ 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.

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:

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 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.**

9/15/2015

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

SEP16201

Circuit Court Judge | Judge Code 2145 | Date 15 Sept 15

For Clerk of Court Office Use Only

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

Andrew Sims Radcker PO Box 50143 Columbia, SC 29250
S. Jahue Moore PO Box 5709 West Columbia, SC 29171

ATTORNEY(S) FOR THE PLAINTIFF(S)

Jeffrey L. Silver PO Box 11656 Columbia, SC 29211-1656
Michael Casin Griffin 100 N. Tryon St., Ste. 2690 Charlotte, NC 28202
Mark Steven Wierman 100 N. Tryon St., Suite 2690 Charlotte, NC 28202

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg

Court Reporter

Beth A. Carrigg - Clerk of Court

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.

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON Tammy M. Bailey and Patricia Ann, Owens, Plaintiffs, vs. Novastar Mortgage, Inc.; 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; Ocwen Loan Servicing, LLC; Brian C. Reeve; and Brian Charles Reeve, LLC a/k/a Brian C. Reeve, P.A., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH CIRCUIT CIVIL ACTION NO: 2013-CP-32-2210 **ORDER DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL AND OTHER POST-TRIAL RELIEF**

FILED
CLOCK IN ERROR

This matter is before the Court pursuant to Tammy M. Bailey and Patricia Ann Owens' Motion for a New Trial and Other Post Trial Relief pursuant to Rules 52 and 59 SCRCP. Specifically, Plaintiffs ask this Court for a new trial, or in the alternative, to Reconsider, Alter or Amend its prior rulings. The Court has reviewed the Plaintiff's Motion and finds that oral arguments would not assist in this matter and finds that any additional hearing would be redundant and unnecessary.

Therefore, it is **ORDERED** that Plaintiff's Motion for a New Trial and Other Post-Trial Relief is DENIED, and the prior ruling is reaffirmed in toto.

The Honorable R. Knox McMahon
Presiding Judge
Eleventh Judicial Circuit

FILED
CLERK OF COURT
LEXINGTON SC

Lexington, South Carolina
June 21, 2016

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP3202210

PLAINTIFF(S)		DEFENDANT(S)	
Tammy M Bailey	Patricia Ann Owens	Novastar Mortgage Inc First Union National Bank NA Novastar Home Equity Loan B K Richardson Brian Charles Reeve LLC	Wells Fargo Bank NA Novastar Mortgage Funding Trust Ocwen Loan Servicing LLC Brian C Reeve

Submitted by: Attorney for: ☐ Plaintiff ☐ Defendant ☐ 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; (formal order to follow) ☐ 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.

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:

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 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.**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

Circuit Court Judge	Judge Code	7/8/2016 Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on **July 8, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

Andrew Sims Radeker PO Box 50143 Columbia, SC 29250
S. Jahue Moore PO Box 5709 West Columbia, SC 29171

ATTORNEY(S) FOR THE PLAINTIFF(S)

Jana Bebergal Baker 15 East 26Th Street, Apt. 15C New York, NY 10010
S Sterling Laney III P O Box 999 Charleston, SC 29402
Brian C Reeve 104 Paces Brook Ave Apt 10434 Columbia, SC 29212-0701
Jeffrey L. Silver PO Box 11656 Columbia, SC 29211-1656
Carmen Harper Thomas PO Box 11070 Columbia, SC 29211
Benjamin Rush Smith III Meridian/17Th Floor 1320 Main Street Columbia, SC 29201
Michael Casin Griffin 100 N. Tryon St., Ste. 2690 Charlotte, NC 28202
Nicholas J. Voelker 5111 Addison Drive Charlotte, NC 28211
Mark Steven Wierman 100 N. Tryon St., Suite 2690 Charlotte, NC 28202

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/kpk

Court Reporter

Beth A. Carrigg - Clerk of Court

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.

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

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

FILED COPY

Tammy M. Bailey, et al.,) CIVIL ACTION COVERSHEET
Plaintiff(s))

2013-CP - 32-

vs.)

Novastar Mortgage, Inc., et al.,)
Defendant(s))

2013CP3202210

(Please Print)
Submitted By: Andrew S. Radeker
Address: P. O. Box 50143
Columbia, SC 29250

SC Bar #: 73743
Telephone #: (803) 779-2211
Fax #: (803) 779-6700
Other:
E-mail: drew@harrisonfirm.com

NOTE: The cover sheet 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 cover sheet must be served on the defendant(s) along with the Summons and Complaint.

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)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

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

Previous Notice of Intent Case # 20____-CP-____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ 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)

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)
- ☐ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Administrative Law Judge (980)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

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

Submitting Party Signature: _____ Date: June 27, 2013

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.

FOR MANDATED ADR COUNTIES ONLY
Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

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

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. (Medical malpractice mediation is mandatory statewide.)

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.**

COPY

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

CASE NO. 2013-CP-32-_____

Tammy M. Bailey and Patricia Ann Owens,

Plaintiffs,

vs.

Novastar Mortgage, Inc.; Wells Fargo Bank, N.A., as successor by merger to First Union National Bank, N.A.; 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; Ocwen Loan Servicing, LLC; Saxon Mortgage Services, Inc.; B. K. Richardson; Brian C. Reeve; and Brian Charles Reeve, LLC a/k/a Brian C. Reeve, P.A.;

Defendants.

SUMMONS
(JURY TRIAL DEMANDED)

2013CP3202210

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said Complaint upon the subscriber, at his office, P. O. Box 50143, Columbia, South Carolina 29250, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint in the time aforesaid, a judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,

Andrew S. Radeker
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
ATTORNEY FOR PLAINTIFFS

Columbia, South Carolina
June 27, 2013

COPY

FILED

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

CASE NO. 2013-CP-32-_____

Tammy M. Bailey and Patricia Ann Owens,

Plaintiffs,

vs.

Novastar Mortgage, Inc.; Wells Fargo Bank, N.A., as successor by merger to First Union National Bank, N.A.; 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; Ocwen Loan Servicing, LLC; Saxon Mortgage Services, Inc.; B. K. Richardson; Brian C. Reeve; and Brian Charles Reeve, LLC a/k/a Brian C. Reeve, P.A.;

Defendants.

COMPLAINT
(JURY TRIAL DEMANDED)

2013CP3202210

The Plaintiffs, complaining of the Defendants herein, allege:

1. This action concerns property located at 111 Andrew Court, Gaston, South Carolina, which is located in Lexington County, South Carolina.

2. The Plaintiffs are citizens and residents of the County of Lexington, State of South Carolina.

3. Defendant Novastar Mortgage, Inc. (hereinafter "Novastar") is a corporation. Upon information and belief, Novastar Mortgage, Inc. is still an existing corporation.

4. Defendant Wells Fargo Bank, N.A. is a business entity that operates across the nation, including in Lexington County, South Carolina, and is the successor by merger to First Union

National Bank. First Union National Bank is, upon information and belief, the last entity to which the note subject of this case was endorsed and the last to receive it via negotiation.

5. Defendant 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 that operates across the nation, including in Lexington County, South Carolina, and is the record owner of the mortgage subject of this case.

6. Defendant Ocwen Loan Servicing, LLC is a business entity that operates across the nation, including in Lexington County, South Carolina, and is the present purported servicer of the loan at issue.

7. Defendant Saxon Mortgage Services, Inc. is a business entity that operates across the nation, including in Lexington County, South Carolina, and is a former purported servicer of the loan at issue.

8. Defendant B. K. Richardson is, upon information and belief, a citizen and resident of the County of Lexington, State of South Carolina.

9. Defendant Brian C. Reeve is, upon information and belief, a citizen and resident of the County of Lexington, State of South Carolina.

10. Defendant Brian Charles Reeve, LLC is, upon information and belief, a South Carolina limited liability company with its principal place of business in the County of Lexington, State of South Carolina, and is the successor to Brian C. Reeve, P.A.

11. Jurisdiction of this action and of the defendants herein is proper in Lexington County, South Carolina.

12. Venue in this action is proper in Lexington County, South Carolina.

13. On or about June 15, 1998, Plaintiff Patricia Ann Owens (hereinafter "Patricia Ann") signed the second page of a two-page document that states on its first page that it is a balloon

note (hereinafter "the balloon note") to Novastar Mortgage, Inc. A copy of this document is attached as Exhibit A to this complaint.

14. This was in connection with a purported loan refinance through Defendant Novastar Mortgage, Inc.

15. A mortgage document (hereinafter "the mortgage") was signed by Patricia Ann on or about June 15, 1998, stating that it secures repayment of the balloon note.

16. The attorney who purportedly supervised the closing of this mortgage loan was Defendant Brian C. Reeve (hereinafter "Defendant Reeve"), operating through his law firm, Brian C. Reeve, P.A.

17. Defendant Reeve did not actually supervise the closing of the mortgage loan.

18. No licensed South Carolina attorney supervised the closing of the loan.

19. The mortgage loan was closed through the unauthorized practice of law, with Patricia Ann's execution of the balloon note and the mortgage supervised only by a layperson, Defendant B. K. Richardson.

20. Defendant Reeve was not present at the execution of the balloon note and the mortgage, yet he falsely signed as a witness and notary on the mortgage.

21. Patricia Ann did not know and did not believe that she had signed a balloon note.

22. Patricia Ann did not believe she was entering into a balloon note transaction.

23. Defendant Novastar Mortgage's employees, agents, and servants led Patricia Ann to believe that she was not entering into a balloon note transaction.

24. Patricia Ann was never given any opportunity to select an attorney to represent her in connection with the mortgage loan closing.

25. Defendant Reeve was chosen by Defendant Novastar Mortgage's employees, agents, and servants to get the mortgage loan closed.

26. If Patricia Ann had been represented by competent, unconflicted counsel who supervised the loan closing, she would not have signed the balloon note.

27. The balloon note and the mortgage loan closing transaction are and were unconscionable and were induced by unconscionable conduct, such conduct including, but necessarily being limited to, the following:

a. Unauthorized practice of law and the failure of an attorney to supervise the loan closing;

b. False witnessing of the mortgage;

c. Deprivation of Patricia Ann's right to counsel;

d. Taking advantage of Patricia Ann's position and lack of education about financial matters.

e. Misleading Patricia Ann as to the content and effect of the documents she was signing; and

f. The maturity and payment terms of the balloon note.

28. The mortgage was recorded July 2, 1998, in the office of the Lexington County Register of Deeds in Book 4743 at page 330.

29. A copy of the mortgage as recorded is attached as Exhibit B to this complaint.

30. Plaintiff Tammy M. Bailey (hereinafter "Tammy") is Patricia Ann's daughter and later became a debtor under the note through an assumption.

31. Tammy would not have done so if she had been aware of the balloon note.

32. Defendants Ocwen Loan Servicing and Saxon Mortgage Services have misappropriated money paid toward the loan at issue by Tammy and Patricia Ann, such misappropriation including, but not being limited to, the application of payments toward nonexistent or improper fees.

FOR A FIRST CAUSE OF ACTION

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

34. Defendant Novastar Mortgage did not comply with the attorney preference provisions of S.C. Code Ann. § 37-10-102 with respect to the closing of the loan subject of this action.

35. No attorney supervised the closing of the loan subject of this case.

36. The loan subject of this action was unconscionable and was induced by unconscionable conduct.

37. For each violation of S.C. Code Ann. § 37-10-102, Patricia Arn and Tammy are entitled to damages, attorney's fees, and penalties as provided in the South Carolina Consumer Protection Code, including all available relief under S.C. Code Ann. § 37-10-105.

38. This cause of action lies against Defendants Deutsche Bank and Wells Fargo, N.A.

FOR A SECOND CAUSE OF ACTION

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

40. Actions of the Defendants, including, but not necessarily limited to, those stated in this pleading, constitute violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, and were unfair and deceptive actions in trade or commerce.

41. The Defendants knew or should have known that the said actions were violations of the Unfair Trade Practices Act and were unfair and deceptive actions in trade or commerce.

42. These actions are capable of repetition, including, but not necessarily limited to, in that the Defendants' procedures and processes allow for and actually foster and encourage such behavior.

43. Patricia Ann and Tammy have suffered damages as a result of the Defendants' actions.

44. Patricia Ann and Tammy are entitled to recover from the Defendants actual damages, treble damages, reasonable attorney's fees, and costs.

FOR A THIRD CAUSE OF ACTION

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

46. In misapplying Patricia Ann and Tammy's payments Defendants Ocwen Loan Servicing and Saxon Mortgage Services converted money of Patricia Ann and Tammy to their own use.

47. This conversion was without Patricia Ann and Tammy's permission.

48. This conversion was wrongful.

49. This conversion was performed with conscious indifference to or reckless disregard of the rights of Patricia Ann and Tammy.

50. This conversion caused damages to Patricia Ann and Tammy.

51. These damages include, but are not necessarily limited to, the value of the Patricia Ann and Tammy's payments that were applied to incorrect charges to the loan and the accrual of interest to the loan that would not have accrued had the payments been properly applied.

52. Patricia Ann and Tammy are entitled to recover actual and punitive damages from these Defendants.

FOR A FOURTH CAUSE OF ACTION

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. Defendant Reeve undertook to be Patricia Ann's attorney at law with regard to the mortgage loan closing.

55. Defendant Reeve did so as an employee and principal of Brian C. Reeve, P.A.

56. Defendant Reeve owed Patricia Ann a duty to exercise reasonable care in representing her in the loan closing subject of this case.

57. That duty was imputed to Brian C. Reeve, P.A.

58. Upon information and belief, Defendant B. K. Richardson was an employee of Brian C. Reeve, P.A., at all times material hereto.

59. Defendant Brian Charles Reeve, LLC is responsible for the breach of that duty.

60. These defendants, and their agents, employees, and/or servants, were negligent, careless, reckless, and/or grossly negligent and acted in violation of their duties to Patricia Ann, including, but not necessarily limited to, as described above and as follows

a. Failing to advise Patricia Ann as to the nature and effect of the balloon note;

b. Conducting the loan closing without being an *independent* attorney as required by law;

c. Conducting the loan closing without the presence of a second witness and arranging for the false witnessing and notarization of the mortgage;

d. Failing to represent Patricia Ann competently;

e. Failing to advise Patricia Ann, including, but not limited to, with regard to the legal importance and content of the documents used in the closing;

f. Placing Defendant Novastar Mortgage in a position to unfairly and unlawfully take advantage of Patricia Ann;

a. Failing to use the degree of care that a reasonable and prudent real estate attorney would have used under the circumstances.

61. The conduct of these Defendants failed to meet the duty of care they owed to Patricia Ann. These Defendants did not exercise the competence and diligence normally exercised by lawyers in similar circumstances.

62. As a direct and proximate result of the negligence, carelessness, recklessness, and/or gross negligence of these Defendants, Patricia Ann and Tammy have suffered and will continue to suffer damages.

63. These Defendants are liable to Patricia Ann and Tammy for actual and punitive damages and the costs of this case.

64. Because of time constraints, an affidavit of an expert as to these matters could not be prepared.

WHEREFORE, the Plaintiffs pray:

a) For judgment against the Defendants awarding the Plaintiffs actual damages;

b) For judgment against the Defendants awarding the Plaintiffs punitive damages;

c) For judgment against the Defendants awarding the Plaintiffs treble damages;

d) For judgment against the Defendants awarding the Plaintiffs all available statutory penalties;

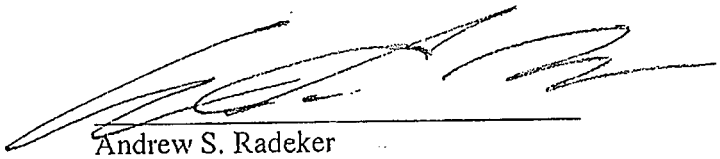
e) For judgment against the Defendants awarding the Plaintiffs all relief available under S.C. Code Ann. § 37-10-105(C);

f) For judgment against the Defendants awarding the Plaintiff reasonable attorney's fees;

g) For judgment against the Defendants awarding the Plaintiff the costs of this action; and

h) For such other and further relief as the Court may deem just and proper.

Respectfully submitted,



Andrew S. Radeker
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Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)

ATTORNEY FOR PLAINTIFFS

Columbia, South Carolina
June 27, 2013

LOAN #: 98-031782

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 3PL
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 certai

EXHIBIT 4

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.

Nancy Palazzo, Sr. Vice President

Pamela Cirinelli, Vice President

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 10:05A
Rec Fee: 12.00 St Fee: 0.00
Co Fee: 0.00 Pages: 6
LEX. CO. REGISTER OF DEEDS
DEBRA H. GUNTER

LOAN #: 98-031782

[Space Above This Line For Recording Data]

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

EXHIBIT B

which has the address of 111 ANDREW COURT, GASTON [Street, City],

South Carolina 29053 ("Property Address");
[Zip Code]

Initials:

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.

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

(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.

LOAN #: 98-031782

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
- ☐ Condominium Rider
- ☐ 1-4 Family Rider
- ☐ Graduated Payment Rider
- ☐ Planned Unit Development Rider
- ☐ Biweekly Payment Rider
- ☐ Balloon Rider
- ☐ Rate Improvement Rider
- ☐ Second Home Rider
- ☐ V.A. Rider
- ☐ Other(s) [specify]

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 ANN 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)

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

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-32-2210

TAMMY M. BAILEY and PATRICIA ANN OWENS

Plaintiffs,

v.

NOVASTAR MORTGAGE, INC., et. al.,

Defendants.

DEFENDANT DEUTSCHE BANK NATIONAL TRUST COMPANY'S ANSWER AND AFFIRMATIVE DEFENSES

COMES NOW defendant 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 ("Defendant"), by and through its counsel of record, and answers plaintiffs Tammy M. Bailey and Patricia Ann Owens' ("Plaintiffs") Complaint as follows:

1. Defendant admits the allegations of paragraph 1 upon information and belief.

2. Defendant is without sufficient information to admit or deny the allegations of paragraph 2 and therefore denies them and demands strict proof thereof.

3. Defendant is without sufficient information to admit or deny the allegations of paragraph 3 and therefore denies them and demands strict proof thereof.

4. Defendant is without sufficient information to admit or deny the allegations of paragraph 4 and therefore denies them and demands strict proof thereof.

5. Admitted.

6. Admitted.

7. Admitted.

8. Defendant is without sufficient information to admit or deny the allegations of paragraph 8 and therefore denies them and demands strict proof thereof.

9. Defendant is without sufficient information to admit or deny the allegations of paragraph 9 and therefore denies them and demands strict proof thereof.

10. Defendant is without sufficient information to admit or deny the allegations of paragraph 10 and therefore denies them and demands strict proof thereof.

11. Admitted.

12. Admitted.

13. Admitted.

14. Defendant is without sufficient information to admit or deny the allegations of paragraph 14 and therefore denies them and demands strict proof thereof.

15. Admitted.

16. Defendant is without sufficient information to admit or deny the allegations of paragraph 16 and therefore denies them and demands strict proof thereof.

17. Defendant is without sufficient information to admit or deny the allegations of paragraph 17 and therefore denies them and demands strict proof thereof.

18. Defendant is without sufficient information to admit or deny the allegations of paragraph 18 and therefore denies them and demands strict proof thereof.

19. Defendant is without sufficient information to admit or deny the allegations of paragraph 19 and therefore denies them and demands strict proof thereof.

20. Defendant is without sufficient information to admit or deny the allegations of paragraph 20 and therefore denies them and demands strict proof thereof.

21. Defendant is without sufficient information to admit or deny the allegations of paragraph 21 and therefore denies them and demands strict proof thereof.

22. Defendant is without sufficient information to admit or deny the allegations of paragraph 22 and therefore denies them and demands strict proof thereof.

23. Defendant is without sufficient information to admit or deny the allegations of paragraph 23 and therefore denies them and demands strict proof thereof.

24. Defendant is without sufficient information to admit or deny the allegations of paragraph 24 and therefore denies them and demands strict proof thereof.

25. Defendant is without sufficient information to admit or deny the allegations of paragraph 25 and therefore denies them and demands strict proof thereof.

26. Defendant is without sufficient information to admit or deny the allegations of paragraph 26 and therefore denies them and demands strict proof thereof.

27. Paragraph 27, including, but not limited to, any and all subparagraphs, calls for a legal conclusion to which no response is required. To the extent a response is required, Defendant denies the allegations and demands strict proof thereof.

28. Admitted.

29. Paragraph 29 refers to a written document, the terms of which speak for themselves. To the extent any allegations contained in paragraph 29 contradict the written terms of the document, Defendant denies those allegations and demands strict proof thereof.

30. Defendant is without sufficient information to admit or deny the allegations of paragraph 30 and therefore denies them and demands strict proof thereof.

31. Defendant is without sufficient information to admit or deny the allegations of paragraph 31 and therefore denies them and demands strict proof thereof.

32. Defendant denies the allegations of paragraph 32 and demands strict proof thereof.

FOR A FIRST CAUSE OF ACTION

33. Defendant incorporates the statements, reservations, and defenses asserted in paragraphs 1 through 32 as though fully set forth herein.

34. Defendant denies the allegations of paragraph 34 and demands strict proof thereof. Defendant states that on May 15, 1998 defendant Patricia A. Owen executed a form titled, "South Carolina Notice of Rights Concerning the Selection of an Attorney and Insurance Agent."

35. Defendant is without sufficient information to admit or deny the allegations of paragraph 35 and therefore denies them and demands strict proof thereof.

36. Defendant denies the allegations of paragraph 36 and demands strict proof thereof.

37. Defendant denies the allegations of paragraph 37 and demands strict proof thereof.

38. Paragraph 38 does not call for a response from Defendant. However, in the event paragraph 38 does call for a response, Defendant denies any and all allegations related thereto and demands strict proof thereof.

FOR A SECOND CAUSE OF ACTION

39. Defendant incorporates the statements, reservations, and defenses asserted in paragraphs 1 through 38 as though fully set forth herein.

40. Defendant denies the allegations of paragraph 40 and demands strict proof thereof.

41. Defendant denies the allegations of paragraph 41 and demands strict proof thereof.

42. Defendant denies the allegations of paragraph 42 and demands strict proof thereof.

43. Defendant denies the allegations of paragraph 43 and demands strict proof thereof.

44. Defendant denies the allegations of paragraph 44 and demands strict proof thereof.

FOR A THIRD CAUSE OF ACTION

45. Defendant incorporates the statements, reservations, and defenses asserted in paragraphs 1 through 44 as though fully set forth herein.

46. Defendant denies the allegations of paragraph 46 and demands strict proof thereof.

47. Defendant denies the allegations of paragraph 47 and demands strict proof thereof.

48. Defendant denies the allegations of paragraph 48 and demands strict proof thereof.

49. Defendant denies the allegations of paragraph 49 and demands strict proof thereof.

50. Defendant denies the allegations of paragraph 50 and demands strict proof thereof.

51. Defendant denies the allegations of paragraph 51 and demands strict proof thereof.

52. Defendant denies the allegations of paragraph 52 and demands strict proof thereof.

FOR A FOURTH CAUSE OF ACTION

53. Defendant incorporates the statements, reservations, and defenses asserted in paragraphs 1 through 52 as though fully set forth herein.

54. Defendant is without sufficient information to admit or deny the allegations of paragraph 54 and therefore denies them and demands strict proof thereof.

55. Defendant is without sufficient information to admit or deny the allegations of paragraph 55 and therefore denies them and demands strict proof thereof.

56. Paragraph 56 calls for a legal conclusion to which no response is required. To the extent a response is required, Defendant denies the allegations and demands strict proof thereof.

57. Paragraph 57 calls for a legal conclusion to which no response is required. To the extent a response is required, Defendant denies the allegations and demands strict proof thereof.

58. Defendant is without sufficient information to admit or deny the allegations of paragraph 58 and therefore denies them and demands strict proof thereof.

59. Paragraph 59 calls for a legal conclusion to which no response is required. To the extent a response is required, Defendant denies the allegations and demand strict proof thereof.

60. Paragraph 60, including, but not limited to, any and all subparagraphs, calls for a legal conclusion to which no response is required. To the extent a response is required, Defendant denies the allegations and demands strict proof thereof.

61. Paragraph 61 calls for a legal conclusion to which no response is required. To the extent a response is required, Defendant denies the allegations and demands strict proof thereof.

62. Defendant denies the allegations of paragraph 62 and demands strict proof thereof.

63. Defendant denies the allegations of paragraph 63 and demands strict proof thereof.

64. Paragraph 64 does not call for a response from Defendant. However, in the event paragraph 64 does call for a response, Defendant denies any and all allegations related thereto and demands strict proof thereof.

In response to the "WHEREFORE" paragraphs following paragraph 64 Defendant denies Plaintiffs are entitled to any of the relief sought therein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE
(General Denial of Allegations)

Defendant denies any and all of Plaintiffs' allegations and demands strict proof thereof.

SECOND AFFIRMATIVE DEFENSE
(Failure to State a Claim)

Plaintiffs' Complaint fails to state a claim against Defendant upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE
(Condition Precedent)

Plaintiffs' claims are barred for failure to satisfy a condition precedent.

FOURTH AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

Plaintiffs' claims are barred because Plaintiffs failed, neglected, and refused to mitigate the damages alleged and therefore are barred from recovery.

FIFTH AFFIRMATIVE DEFENSE
(No Right to Punitive Damages)

Plaintiffs failed to set forth a valid claim for punitive damages.

SIXTH AFFIRMATIVE DEFENSE
(Set-Off)

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

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' loan closed on June 15, 1998. (Compl. ¶ 15.) Accordingly, Plaintiff 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).

EIGHTH AFFIRMATIVE DEFENSE
(Statute of Limitations)

Certain of Plaintiffs' causes of action are barred by the applicable Statutes of Limitation.

NINTH AFFIRMATIVE DEFENSE
(Failures by Closing Agent Not Attributable to Defendant)

Any alleged failures by the closing agent cannot be attributed to Defendant.

TENTH AFFIRMATIVE DEFENSE
(Additional Defenses)

In addition to the defenses set forth herein, Defendant alleges presently that it has insufficient knowledge of information upon which to form a belief whether it may have additional, as yet unstated, affirmative defenses. Accordingly, Defendant reserves the right to assert additional defenses in the event discovery indicates additional defenses are appropriate.

WHEREFORE, Defendant prays that:

1. Plaintiffs' Complaint is dismissed with prejudice as to Defendant, and Plaintiffs have and recover nothing of it, including, but not limited to, any and all monetary damages and equitable relief;

2. The costs of this action be taxed against Plaintiffs;

3. Defendant recover all fees and costs incurred in defense of this action; and

4. Defendant be granted such other and further relief as the Court may deem just and proper.

This the 26th day of September 2013

BRADLEY ARANT BOULT CUMMINGS LLP

Nicholas J. Voelker (S.C. Bar No. 76446)
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Counsel for 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 , Ocwen Loan Servicing, LLC and Saxon Mortgage Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the above and foregoing DEFENDANT DEUTSCHE BANK NATIONAL TRUST COMPANY'S ANSWER AND AFFIRMATIVE DEFENSES on the following:

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by placing a copy of same in the United States Mail, first-class postage prepaid and addressed to his regular mailing address, on this 26th day of September 2013.

Nicholas J. Voelker (S.C. Bar No. 76446)

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.

FILING
BY DEUTSCHE BANK, ETC., IN
BAILEY V. NOVASTAR

FILED
2017 APR 17 AM 11:14
LISA GOWER
CLERK OF COURT
LEXINGTON, SC

I, Andrew S. Radeker, attorney for Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey, do hereby certify and say that attached hereto is a copy of a motion for summary judgment filed by Deutsche Bank, etc., in the case of Tammy M. Bailey, et al. v. Novastar Mortgage, Inc., et al., 2013-CP-32-02210. I added emphasis by underlining.

Respectfully submitted,

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ATTORNEY FOR DEFENDANTS
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Columbia, South Carolina
April 10, 2017

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

COUNTY OF LEXINGTON

CASE NO.: 2013-CP-32-2210

TAMMY M. BAILEY and PATRICIA ANN OWENS

Plaintiffs,

v.

NOVASTAR MORTGAGE, INC., WELLS FARGO BANK, N.A., SUCCESSOR BY MERGER TO FIRST UNION NATIONAL BANK, N.A., 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, OCWEN LOAN SERVICING, LLC, SAXON MORTGAGE SERVICES, INC., B.K. RICHARDSON, BRIAN C. REEVE, AND BRIAN CHARLES REEVE, LLC A/K/A BRIAN C. REEVE, P.A.

Defendants.

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 AND OCWEN LOAN SERVICING, LLC'S MOTION FOR SUMMARY JUDGMENT

COME NOW 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 ("Deutsche Bank as Trustee") and Ocwen Loan Servicing, LLC ("Ocwen" or collectively as "Defendants"), pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, and submits this Motion for Summary Judgment as to plaintiffs Tammy M. Bailey and Patricia Ann Owens' (collectively as "Plaintiffs") claims on grounds that there are no material issues of fact in dispute and the Defendants are entitled to judgment as a matter of law. In support of their Motion, Defendants show unto the Court as follows:

Record on Appeal 408

ORIGINAL

I. INTRODUCTION

Plaintiffs brought this action alleging claims for violation of S.C. Code Ann. § 37 10-102 (South Carolina Consumer Protection Code), violation of S.C. Code Ann. § 39-5-10 (South Carolina Unfair Trade Practices Act), and conversion. Plaintiffs' claims arise out of a purported mortgage refinancing loan transaction involving a balloon note in 1998 by Plaintiff Owens and a subsequent assumption of said mortgage loan by her daughter, Plaintiff Bailey, in 2001.

II. UNDISPUTED MATERIAL FACTS

1. On June 27, 2013, Plaintiffs filed their Complaint alleging a violation of S.C. Code Ann. § 37 10-102, violation of S.C. Code Ann. § 39-5-10, and conversion. (*See* Compl.).

2. The alleged violation of the South Carolina Consumer Protection Code relates to the origination of a mortgage refinancing transaction in 1998 and is asserted against Deutsche Bank as Trustee and defendant Wells Fargo Bank, N.A. (*Id.* ¶¶ 13, 33-38).

3. The alleged violation of S.C. Code Ann. § 39-5-10 fails to set forth specific allegations, but appears to concern the transaction related to a balloon note (the "Balloon Note") and mortgage (the "Mortgage") entered into by Plaintiff Patricia Ann Owen. (*Id.* ¶¶ 13-31, 40).

4. The alleged conversion relates to the alleged misapplication of payments related to the Balloon Note and Mortgage. (*Id.* ¶¶ 32, 46-52).

5. The Mortgage and the Balloon Note indicate that the originating lender is NovaStar Mortgage, Inc. (*See* Mortgage, attached as Exhibit A to Affidavit of Ocwen Loan Servicing, LLC in Support of its Motion to Vacate Default Judgment filed January 27, 2014 (hereinafter Feezer Aff.)

6. Defendant Ocwen began servicing this loan on April 2, 2012. (*See* Notice of Servicing Transfer dated March 14, 2012 attached as Exhibit F to Feezer Aff.)

ORIGINAL

III. STANDARD OF REVIEW

7. 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. *Baughman v. Am. Tel & Tel. Co.*, 306 S.C. 101, 114-15, 410 S.E. 2d 537, 545 (1991). The moving party may discharge the burden of demonstrating the absence of a genuine issue of material fact by pointing out the absence of evidence to support the nonmoving party's case. *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E. 2d 331, 333 (2002). Although the court "must view the facts and inferences therefrom in a light most favorable to the nonmoving party," in order to withstand a motion for summary judgment, the nonmoving party must establish specific facts showing that there is a genuine issue of material fact for trial. *Pinckney v. Salomon*, No. 2007-UP-023, 2007 WL 8324401, at *2 (S.C. Ct. App. Jan. 12, 2007) (quoting *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 S.E. 2d 495, 496 (S.C. Ct. App. 1994)); *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986).

8. As such, a party opposing a properly supported motion for summary judgment may not rest on the mere allegations or denials of her pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact. *Dickert v. Metro. Life Ins. Co.*, 306 S.C. 311, 313, 411 S.E. 2d 672, 673 (S.C. Ct. App. 1991), *rev'd in part on other grounds*, 311 S.C. 218, 428 S.E. 2d 700 (1993). The existence of a "mere scintilla of evidence in support of the nonmoving party's position is insufficient to overcome a motion for summary judgment." *Id.* at 313, 411 S.E. 2d at 673.

IV. ARGUMENT

Record on Appeal 410

ORIGINAL

A. **The Claim for Violation of the South Carolina Unfair Trade Practices Act (§ 39-5-10) Against Deutsche Bank as Trustee and Ocwen Must be Dismissed**

9. The claim for violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") is based on allegations that the loan was not closed and supervised by an attorney, the Mortgage was falsely witnessed at the closing, Plaintiff Owens was deprived of her right to counsel at the closing, and she did not understand that she was signing a balloon note. (Compl. ¶¶ 21, 22, 27, 31).

10. As an initial matter, none of the allegations involve the conduct of Deutsche Bank as Trustee or Ocwen, as neither party participated, or is alleged to have participated, in the closing of the loan. Accordingly, this claim fails as against Deutsche Bank as Trustee and Ocwen. *See Harris v. Option One Mortg. Corp.*, 261 F.R.D. 98, 107 (D.S.C. 2009) (holding that a servicer who did not have any part in creating an allegedly unconscionable loan was not liable for unfair trade practice act violation).

11. Second, the allegedly unfair and deceptive acts only affected the Plaintiffs. Although Plaintiffs assert in their complaint that the intentional actions affected the public interest and are capable of repetition, they provide no facts to support this conclusory allegation. (*See* Compl. ¶¶ 41-42.) Plaintiffs fail to identify either in the pleadings or deposition transcripts any evidence to satisfy this public interest requirement. Rather, Plaintiffs specifically limit their allegations of improper conduct to their particular loan closing. Therefore, Plaintiffs' SCUTPA claim fails as a matter of law. *See Woodson v. DLI Prop., LLC*, 406 S.C. 517, 530, 753 S.E. 2d 428, 435 (2014) ("Here, the transaction only affected Petitioners, DLI, and Respondents, and therefore, Respondents' actions or inactions are not actionable under the SCUTPA, and Petitioners failed to present any evidence to the contrary.").

ORIGINAL

12. Third, Plaintiffs' claim that Defendants engaged in the unauthorized practice of law cannot serve as the basis for a cause of action under the SCUTPA. *See Wells Fargo N.A. v. Watkins & Stefan Acres Prop. Owners Ass'n, Inc.*, No. 2013-UP-126, 2013 WL 8507826, at *1 (S.C. Ct. App. Mar. 27, 2013) (dismissing action for violation of South Carolina's Unfair Trade Practices Act based on the unauthorized practice of law because there is no private cause of action). No private right of action exists in South Carolina for the unauthorized practice of law. *Franklin v. Chavis*, 371 S.C. 527, 640 S.E. 2d 873, 877 (2007); *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 496, 560 S.E. 2d 612, 623 (2002). This claim is therefore impermissible as a matter of law.

13. Finally, Defendants have submitted evidence showing that the South Carolina Notice of Rights Concerning the Selection of an Attorney and Insurance Agent is dated May 15, 1998—one month prior to the purported loan closing on June 15, 1998—and contains the signature of Plaintiff Owens. (*See* Ex. D to Feezer Aff.). Defendants have submitted additional evidence showing that Plaintiff Owens signed the subject Balloon Note and that the HUD-1 Settlement Statement, signed by defendant Brian Reeve and Plaintiff Owen, provide that the closing occurred in the offices of Brian Reeve on June 15, 1998, and was supervised by Brian Reeve. (*See* Ex. C to Feezer Aff.). Plaintiff Owen admitted in her deposition that her signature appears on page two of the subject Balloon Note. (Owens Dep. 11:7-15, attached hereto as Ex. 1).

A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E. 2d 229, 230 (1981); *Evans v. State Farm Mut. Auto. Ins. Co.*, 269 S.C. 584, 587, 239 S.E. 2d 76, 77 (1977). A person who can read is bound to read an agreement before signing it. *Hood v. Life & Cas. Ins. of*

Record on Appeal 412

ORIGINAL

Tenn., 173 S.C. 139, 174 S.E. 76 (1934). In fact, a person signing a document is responsible for reading the document and making sure of its contents and owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it. *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986). "The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document." *Citizens & S. Nat'l Bank of South Carolina v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994). Plaintiff Owens may not argue that the Balloon Note was unfair and deceptive because she did not read the Balloon Note. Accordingly, Plaintiffs can point to no unfair or deceptive acts by Deutsche Bank as Trustee and Ocwen and this claim must be dismissed.

B. The Claim for Violation of the South Carolina Consumer Protection Code (§ 37-10-102) Against Deutsche Bank as Trustee Must be Dismissed

14. The alleged violation of the South Carolina Consumer Protection Code relates to the origination of the mortgage loan refinancing transaction on June 15, 1998 (Compl. ¶¶ 13-15, 33-38).

15. As an initial matter, Plaintiff Owens testified at her deposition, *in direct contrast to the allegations of her complaint*, that she did not take part in any loan refinancing transaction occurring in 1998.

Q: So in 1998, did you apply to refinance the loan for that?
A: No, I did not.

Q: So you did not attend a closing in 1998?
A: No.

Q: Ma'am, in your Complaint that you filed in court against my clients, you make allegations that you refinanced the loan in 1998. Are you now saying that that's not true?
A: I've never refinanced.
Q: So you did not refinance the loan with any lender in 1998?

ORIGINAL

A: No.

Q: I'm going to refer you to Paragraph 14 of your Complaint. It says: This was in connection with a purported loan refinanced through Defendant Novastar Mortgage, Inc. Is that not true?

A: I did not refinance.

Q: Did you close any loan in 1998?

A: No, no.

(Ex. 1 10:9-11, 11:4-6, 15:7-15, 16:8-14, 36:8-9).

16. As Plaintiff Owens now denies, under oath, the very allegations in her Complaint and, notwithstanding her denials, may not rest on the allegations of her Complaint, this cause of action must be dismissed. Plaintiff Owens may not testify that she did not take part in a loan transaction in 1998 and then claim that the lender, Novastar, did not comply with the attorney preference provisions of § 37-10-102 for a transaction that did not take place.

17. Additionally, Defendants have submitted evidence that the required closing attorney and insurance disclosures were made prior to the subject loan closing. (*See* Ex. D to Feezer Aff.). The South Carolina Notice of Rights Concerning the Selection of an Attorney and Insurance Agent is dated May 15, 1998—one month prior to the purported loan closing on June 15, 1998-- and contains the signature of Plaintiff Owens. Plaintiff Owens cannot rely on the allegations of her Complaint and any affidavit submitted in opposition this motion would clearly contradict her deposition testimony that no loan transaction occurred.

18. Furthermore, an action for a violation of § 37-10-102 must be brought within 3 years, unless the court finds as matter of law that the transaction was unconscionable or induced by unconscionable conduct. S.C. Code Ann. § 37-10-105. Here, the purported loan transaction occurred in 1998. In an attempt to avoid the expiration of the statute of limitations, Plaintiff

ORIGINAL

Owens bases her argument that the subject transaction was unconscionable on allegations that the loan was not supervised by an attorney, the mortgage was falsely witnessed, she was deprived of her right to counsel, and she did not understand that she was signing a balloon note. (Compl. ¶¶ 21, 22, 27).

19. As an initial matter, Plaintiffs allegations of unconscionability, even if established, fail to state a claim for recovery. *See Wells Fargo Bank, N.A. v. Smith*, 398 S.C. 487, 730 S.E.2d 328, 333 (2012) (holding "[t]he doctrine of unconscionability is used as shield, not a sword, and may not be used as the basis for affirmative recovery."). More importantly, Plaintiffs failed to show any evidence of a lack of meaningful choice, or one-sided contract provisions with terms so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Fanning v. Fritz's Pontiac- Cadillac- Buick, Inc.*, 322 S.C. 399, 472 S.E. 2d 242 (1996).

20. As argued above, the Defendants have submitted evidence that Plaintiff Owens signed the subject Balloon Note. In addition, the HUD-1 Settlement Statement, signed by Defendant Brian Reeve and Plaintiff Owens, states that the closing occurred in the offices of Brian Reeve on June 15, 1998, and was supervised by Brian Reeve. A person who signs a contract or other written document cannot avoid the effect of the document by claiming she did not read it. *Sims*, 276 S.C. at 643, 281 S.E.2d at 230. A person signing a document is responsible for reading the document and making sure of its contents. *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 39, 340 S.E. 2d 786, 789 (1986). In her deposition, Plaintiff Owens did admit to signing page 2 of the two-page subject Balloon Note, labeled "MULTISTATE BALLOON FIXED RATE NOTE".

> Q: Can you tell me why you signed anything in 1998 that says balloon note, or even the - if you just -

ORIGINAL

A: I wouldn't have.

Q: You wouldn't have?

A: No, no.

Q: So in 1998, then, someone handed you this second page of Exhibit 1 [Balloon Note] and you signed it?

A: I guess. That's my signature.

(Ex. 1 11:7-15).

Defendants have submitted evidence showing that the subject closing was conducted in accordance with applicable law. Plaintiff Owen must now come forth with evidence creating an issue of material fact as to whether the transaction was unconscionable. As she has already testified that she did not close any loan in 1998, any affidavit submitted in opposition to this motion raising a question of fact about the conduct of the closing would clearly contradict her sworn testimony. Accordingly, the applicable statute of limitations is three years and this claim must be dismissed.

C. **The Claim for Conversion Against Deutsche Bank as Trustee and Ocwen Must be Dismissed**

21. As a matter of law, Ocwen and Deutsche Bank as Trustee cannot be liable for converting the Plaintiffs' mortgage payments because the Plaintiffs had neither title to nor the right to possession of the funds at the time of the alleged conversion. To prevail in an action for conversion, a plaintiff must prove either title or right to possession of the property at the time of the alleged conversion. *Mackela v. Bentley*, 365 S.C. 44, 48, 614 S.E. 2d 648, 650 (Ct. App. 2005). Conversion cannot arise from the defendant's exercise of a legal right over the property. *Castell v. Stephenson Fin. Co.*, 244 S.C. 45, 51, 135 S.E. 2d 311, 313 (1964). There can be no conversion of money unless there is an obligation on the defendant to deliver a specific, identifiable fund to the plaintiff. *Richardson's Rests., Inc. v. The Nat'l Bank of S.C.*, 304 S.C. 289, 294, 403 S.E. 2d 669, 672 (Ct. App. 1991) (citations omitted) (emphasis added) (holding

ORIGINAL

that a bank cannot be liable for conversion of funds deposited into a payroll account because the deposits "became part of the Bank's general account against which [the depositor's] account received a credit"). However, there can be no conversion where there is a mere obligation to pay a debt. *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 220 S.E. 2d 116 (1975) (citing 18Am. Jur. .2d *Conversion* § 164 (1965)). Thus, where there is merely the relationship of debtor and creditor, an action based on conversion of the funds representing the debt is improper. *Owens*, 265 S.C. at 497, 220 S.E.2d at 119.

22. The terms of the Balloon Note and Mortgage also outline permissible fees. For example, the Mortgage states that payments accepted are applied to prepayment charges, taxes and insurance, interest, principal and any late charges under the note. (Ex. A ¶ 3 to Feezer Aff.) The Balloon Note provides that Plaintiffs must pay the Lender or whomever the Lender designates. (Ex. B ¶¶ 1, 3 to Feezer Aff.). The Balloon Note also allows for the assessment of late fees. (*Id.* ¶ 6). The Assignment and Assumption Agreement provides that Plaintiff Bailey is a maker or guarantor of the note and mortgage and that both Plaintiffs understood the title to the property is subject to the Mortgage and Balloon Note, assumed the indebtedness, and agreed to be bound to the Mortgage and Balloon Note. (Ex. E ¶¶ II, III to Feezer Aff.).

23. In this case, the terms of the Balloon Note and Mortgage require Plaintiffs to make mortgage payments to the lender or its agent for payment. (Ex. A ¶ 3 to Feezer Aff.; Ex. B ¶¶ 1, 3 to Feezer Aff.). According to the Notice of Servicing Transfer attached as Exhibit F to the Feezer Aff., Deutsche Bank as Trustee designated Ocwen as the agent for mortgage payment as of April 2, 2012. As a result, neither of the Plaintiffs had right nor title to the mortgage payments in the possession of Ocwen when it applied the payments to the Plaintiffs' mortgage account. Thus, this claim fails as a matter of law.

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V. CONCLUSION

Because there are no material issues of fact in dispute, Defendants Deutsche Bank as Trustee and Ocwen are entitled to summary judgment as a matter of law. Plaintiffs' allegations relate solely to a closing they now claim did not occur, and involve parties other than Deutsche Bank as Trustee and Ocwen. Furthermore, Plaintiffs have pointed to nothing supporting their allegation that the subject loan transaction was unconscionable. Accordingly, Defendants respectfully request an order granting summary judgment.

Respectfully submitted this 10th day of February, 2015.

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FILED
IN THE OFFICE OF THE CLERK OF SUPERIOR COURT

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing 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 and Ocwen Loan Servicing, LLC's Motion for Summary Judgment has been served on the following by directing same to their addresses through first-class, United States mail, postage pre-paid on this 6th day of February, 2015.

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FILED

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

COURT OF COMMON PLEAS
11TH JUDICIAL CIRCUIT
2013-CP-32-2210

TAMMY M. BAILEY and
PATRICIA ANN OWENS,

Plaintiffs,

vs.

NOVASTAR MORTGAGE, INC., 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, OCWEN LOAN SERVICING, LLC AND SAXON MORTGAGE SERVICES, INC.,

Defendants.

Condensed Transcript

DEPOSITION OF: PATRICIA ANN OWENS-HOUCK

DATE: December 29, 2014

TIME: 10:13 a.m.

LOCATION: Nelson, Mullins, Riley & Scarborough
1320 Main Street, 17th Floor
Meridian Building
Columbia, SC

TAKEN BY: Counsel for the Defendants

REPORTED BY: Susan M. Valsecchi, RPR, CRR
Certified Realtime Reporter

EXHIBIT 1

Job No. CS1981140

now, ma'am?
A. No, I'm not.
Q. All right. So you told me you received the loan in 1991 from NovaStar.
Was that to purchase a house, or to build a house?
A. To purchase the house.
Q. To purchase the house, okay.
So in 1998, did you apply to refinance the loan for that?
A. No, I did not.
Q. You did not, okay.
So can you tell me how your signature came to be placed on this note, if you did not apply to refinance?
A. The only thing I can tell you is I never saw this first page.
Q. Okay.
A. So whenever a bunch of documents are handed to you to sign and you're doing a closing -- I guess this might have been in there; but this balloon note, I have never seen.
Q. Okay. Now, ma'am, you just said when you were doing a closing. Are you referring to a closing of a loan?

A. At the beginning.
Q. At the beginning. In 1991?
A. Yeah.
Q. So you did not attend a closing in 1998?
A. No.
Q. No, okay. Can you tell me why you signed anything in 1998 that says balloon note, or even the -- if you just --
A. I wouldn't have.
Q. You wouldn't have?
A. No, no.
Q. So in 1998, then, someone handed you this second page of Exhibit 1 and you signed it?
A. I guess. That's my signature.
Q. Did they drive to your house to do this?
A. No.
Q. Did you go to an attorney's office?
A. Whenever it was closed -- in the beginning, not in 1998 -- but I don't -- I honestly don't know how to answer you about a balloon note, because I did not sign a balloon note --
Q. Okay.
A. -- at any time.

Q. Okay. Did you sign any documents relating to refinancing the loan you received in 1991?
A. No.
(Off-the-record discussion.)
(DEFENDANT'S EXHIBIT 2, Uniform Residential Loan Application, was marked for identification.)
BY MR. WIERMAN:
Q. Ma'am, I'm going to hand you what I'm marking as Defendant's Exhibit Number 2.
Please take a moment to review that.
MR. SILVER: I'm going to ask a question. The balloon note has Exhibit B on it; is that correct?
MR. WIERMAN: That's, I believe, from a motion. I marked it as Exhibit 1. It was Exhibit B on our motion to set aside the default.
MR. SILVER: I'm on board.
BY MR. WIERMAN:
Q. Ma'am, are you familiar with this Exhibit 2? On the top it's labeled Uniform Residential Loan Application.
A. Uh-uh.
Q. So you're not familiar with this

application, ma'am?
A. Uh-uh.
THE COURT REPORTER: You've got to say yes or no, okay?
THE WITNESS: Oh, sorry. No.
BY MR. WIERMAN:
Q. Okay, if you would look down at the bottom there's a signature at the very bottom under borrower's signature?
A. Uh-huh.
Q. And to me it says Patricia A. Owens and it's dated 5/15/98.
Is that your signature, ma'am?
A. It appears to be.
If you notice, whenever I write my name, I write on the line. This is well above the lines on both of these pages, on all three of the pages.
Q. Okay. So let's look at this Exhibit 2, which I'm going to call it the loan application.
It says here that the amount requested is -- on the top box -- $56,000 at 9.9 percent for 240 months and that the property address is 111 Andrew Court, Gaston, South Carolina.
Is that the residence you purchased in

1991, ma'am?
A. Yeah.
Q. All right. And it says here -- underneath the address it says: The purpose of this loan is refinance.
And to the right it says: Property will be the primary residence.
Does this jog your memory about refinancing a loan in 1998, ma'am?
A. No.
Q. Okay. So you don't recall applying for a loan application?
A. No. I put a large down payment on this house, and I only owed $17,000. There is no way I could have gone up to $56,000. No one ever paid me any money. No one. And I would not have refinanced my house for that amount of money.
Q. Okay. So you're saying this is not your signature on this loan application.
A. Well, it's the signature, but like I said, I sign on the lines and not above the lines.
Q. Is it possible you signed above the line on this one?
A. No.
Q. So do you believe it's not your

signature on this loan application?
A. I don't know how to keep answering you. I would have signed above the line -- I would not have signed above the line like this is. I would have signed on the line. Part of it is and the last part is not.
Q. Ma'am, in your Complaint that you filed in court against my clients, you make allegations that you refinanced the loan in 1998
Are you now saying that that's not true?
A. I've never refinanced.
Q. So you did not refinance the loan with any lender in 1998?
A. No.
Q. I'm going to refer to Paragraph 13 of your Complaint. This is the Complaint that your attorney filed in court, and it says: On or about June 15th, 1998, Plaintiff, Patricia Ann Owens, signed the second page of a two page document that states on the first page it's a balloon note to NovaStar Mortgage, Inc.
Are you saying that's not true, ma'am?
A. No, I wouldn't have signed a balloon note. If I had known it knowingly, I would not

have signed the balloon note.
Q. I understand, ma'am. I understand your contention that you didn't understand you were signing a balloon note, but this morning so far as you have told me you didn't refinance any loan in 1998.
A. No.
Q. Okay. I'm going to refer you to Paragraph 14 of your Complaint.
It says: This was in connection with a purported loan refinanced through Defendant NovaStar Mortgage, Inc.
Is that not true?
A. I did not refinance
Now, the only thing I know, is, when she took the loan, the assumption, that that's the only other transactions that was involved in this house, as far as I'm concerned.
I don't know where you're getting a refinance in 1998 from what I owed to $56,000. I don't understand.
Q. Okay, ma'am, we can put aside the amount of the refinance, but I'm first trying to get you to tell me whether there was any refinancing for any amount of money.

A. No.
Q. There was not, in 1998?
A. No.
Q. So Paragraph 14 of your Complaint that says, This was in connection with a purported loan refinance for Defendant NovaStar Mortgage Inc., that's not true; is that correct?
A. I'm getting a little bit confused here. I took the loan out in 1991 with NovaStar.
NovaStar is the only company I ever knew to do business with. I don't know anything about you or Saxon or whoever else is involved.
Q. I understand that, ma'am.
Right now I'm just asking if you contacted NovaStar in 1998 to refinance the loan --
A. No, no
Q. -- you originally retained in
A. No, no.
Q. You did not.
A. No.
MR. WIERMAN: Drew, do you want to take a break?
MR. RADEKER: Sure.
(A brief recess was held.)
BY MR. WIERMAN:

THE WITNESS: Oh, okay.
BY MR. WIERMAN:
Q. Okay. Ma'am, it's my contention that this -- I'm going to refer to this as a closing statement.
It shows that there was a mortgage held by Key Home Equity Services that was paid off.
We spoke briefly about Key Home Equity.
Do you have any recollection of dealing with Key Home Equity?
A. No, I don't.
Q. So if I told you that you applied for a refinance in 1998 and just over $49,000 went to First Home Mortgage -- I'm sorry, went to Key Home Equity Services -- to pay off the first mortgage -- that wouldn't mean anything to you?
A. No, that wouldn't.
Q. So do you know what your approximate loan balance was for the loan you took out in 1991? Do you remember what the original amount was?
A. The house was like $35,000. I put $15,000 down on it. I bought two acres of land with $6,000, but the house -- sorry, 35 -- 17 from 35 -- I mean 15 from 35 --
MR. RADEKER: 520,000.

THE WITNESS: Yes.
BY MR. WIERMAN:
Q. That would be $20,000.
A. Yes.
Q. All right. So you believe the loan you took out in 1991, you believe the original amount was $20,000?
A. Correct, yes, about that, somewhere around that.
Q. So, ma'am, if I told you that in 1998 there was a mortgage on your home and property for $49,011.89, what would your response be to that?
A. I don't know why.
Q. Ma'am, have you ever heard of Key Bank, USA?
A. Brian C. Reeve was supposed to be the attorney. If I did all of this, why isn't his signature on here?
Q. I can't answer any questions for you because I'm not allowed to testify.
A. Oh, I'm sorry.
Q. Okay. So you're looking at Page 2 of Exhibit 5; is that correct?
A. Yes.
Q. You see the settlement agent signature

is Brian C. Reeve.
Have you ever met Mr. Reeve?
A. No.
Q. If I told you Mr. Reeve was an attorney licensed in South Carolina that closed a loan for you in 1998, what would your response be to that?
A. He didn't.
Q. Did you close any loan in 1998?
A. No, no.
Q. Has Mr. Reeve ever sent any documents to you?
A. No.
Q. Have you ever corresponded or communicated in any way to Mr. Reeve?
A. No.
Q. Can you explain why Exhibit 5 is a document with both your signature and what appears to be Mr. Reeve's signature?
A. No.
(DEFENDANT'S EXHIBIT 6, Truth in Lending Disclosure Statement dated June 15, 1998, was marked for identification.)
BY MR. WIERMAN:
Q. I'm going to hand you what I'm now marking as Defendant's Exhibit 6.

If you would please take a few moments to review this document.
Ma'am, have you ever seen Exhibit Number 6 before?
A. I don't remember it.
Q. Exhibit Number 6 at the top is labeled Truth in Lending Disclosure Statement. It's dated June 15th, 1998.
The borrower is listed as Patricia Ann Owens and there's a signature at the bottom that appears to be Patricia Ann Owens.
Is that your signature at the bottom of Exhibit 6, ma'am.
A. It appears to be.
Q. Do you recall signing Exhibit Number 6?
A. No, I don't.
Q. Ma'am, do you remember the highest monthly mortgage payment you ever made for your loan that you took out in 1991 with Chemical Bank?
A. I believe the $256, or 66, whatever, was the initial. And I think, whenever I decided that I was going to have to move it, I think it was 502 that I had received that the payment had increased from that to 502.
Q. So you seem to recall making a payment

ORIGINAL

STATE OF SOUTH CAROLINA)
) IN THE FAMILY COURT
COUNTY OF LEXINGTON) 11th JUDICIAL CIRCUIT
)
TAMMY M. BAILEY and PATRICIA ANN OWENS) MOTION AND ORDER INFORMATION
Plaintiff,) FORM AND COVERSHEET
)
vs.)
NOVASTAR MORTGAGE, INC., ET AL.)
)
Defendant.) Docket No. 2013-CP-32-2210

Plaintiff's Attorney: , Bar No.	Defendant's Attorney: Michael C. Griffin, Bar No 72868
Address:	Address: 100 North Tryon Street, Suite 2690 Charlotte, North Carolina 28202
Phone: Fax	Phone: 704-338-6015 Fax 704-332-8858
E-mail: Other:	E-mail: mgriffin@babc.com Other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment
Estimated Time Needed: 30 Minutes Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff/☒ Defendant Date submitted 2/18, 2015

SECTION III: Motion Fee

☒ PAID AMOUNT: $ 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court: or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE Date: , 20
☐ Other:	Judge Signature:

CLERK'S VERIFICATION

Collected by: Date Filed: 2-23-15, 20
☑ MOTION FEE COLLECTED: $ 25.00
☐ CONTESTED - AMOUNT DUE: $

Custodial Parent (if applicable):

SCCA 233F (12/2009)

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.

EXCERPTS FROM TRANSCRIPT OF TRIAL IN BAILEY V. NOVASTAR

FILED
2017 APR 17 AM 11:45
LISA COUNTER
CLERK OF COURT
LEXINGTON, SC

I, Andrew S. Radeker, attorney for Defendants Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey, do hereby certify and say that attached hereto are excerpts from the transcript of the trial of the case of Tammy M. Bailey, et al. v. Novastar Mortgage, Inc., et al., 2013-CP-32-02210. I added emphasis by underlining.

Respectfully submitted,

Andrew S. Radeker
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ATTORNEY FOR DEFENDANTS
OWENS AND BAILEY

Columbia, South Carolina
April 10, 2017

State of South Carolina County of Lexington	In the Court Of Common Pleas Eleventh Judicial Circuit Case No.: 2013-CP-32-02210
Tammy M. Bailey and Patricia Ann Owens, Plaintiffs, vs. Novastar Mortgage, Inc,; Wells Fargo Bank, N.A., as successor by merger to First Union National Bank, N.A.; 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; Ocwen Loan Servicing, LLC; Saxon Mortgage Services, Inc.; B.K. Richardson; Brian C. Reeve and Brian Charles Reeve, LLC a/k/a Brian C. Reeve, P.A., Defendants.	Transcript of Record

September 8, 9, 10, and 15, 2015

Lexington, South Carolina

BEFORE:

The Honorable R. Knox McMahon, Judge, and Jury

APPEARANCES:

Andrew S. Radeker, Esquire
S. Jahue (Jake) Moore, Jr., Esquire
Attorneys for the Plaintiffs

Taylor A. Peace, Esquire
Jeffrey L. Silver, Esquire
Attorneys for the Defendant
Novastar Mortgage, Inc.

Michael C. Griffin, Esquire
Mark S. Wierman, Esquire
Attorneys for Defendants
Deutsche Bank National Trust Company and
Ocwen Loan Servicing, LLC.

Opening Statements

gentlemen. One further thing that I meant to mention. Mr. Moore will probably be stepping out about 4:30 today. He has another legal commitment and another commitment tomorrow morning and will not be joining us until probably sometime after lunch tomorrow. I didn't want you to think he was being disrespectful to the Court or to the jury in any manner.

All right. Well, we are ready to begin with the opening statements by the attorneys. Mr. Radeker.

MR. RADEKER: Thank you, Your Honor. May it please the Court.

THE COURT: You may address the jury. Yes, sir.

MR. RADEKER: Good afternoon. In South Carolina a mortgage lender is not allowed to close a mortgage loan unless that's done under the supervision of a licensed South Carolina attorney. In fact, in South Carolina a mortgage lender must determine who the borrower, its customer, wants to be the attorney to represent that borrower in all aspects of closing that transaction. Why? Because mortgage loans are a big deal. They're not easy to understand. Usually a big financial commitment and a long one. The paperwork can be confusing and the lawyer is there to make sure that the borrower understands the transaction. They go into it with their eyes wide open.

Now, if the lender doesn't do that, doesn't find out who the borrower would like to represent them in the closing and the borrower gets really hoodwinked badly, gets tricked, bamboozled into a really bad loan, well, the lender can be on the hook for that. And, of course, once the loan gets underway the mortgage company is not allowed to do anything with the payments other than properly apply them to the loan.

Now, let's talk about what the evidence will show in this case. This case is about a balloon note document. It's exhibit 5 in there. What is a balloon note? Well, it's not the good kind of balloon. It's not about a party. It's not about a celebration. A balloon note is a note, a loan that you pay during the term and when you get to the end of the term, you're not done paying it out. It doesn't pay out and it all comes due right at the end and a big payment that balloons up, hence the name balloon note.

Now, this case is about a balloon note document signed by Patricia Owens Houck who is here and it was a note to Novastar Mortgage, the attorneys sitting over there. Now, the evidence will show that Ms. Houck who was Ms. Owens at the time and you will see her name Patricia Ann Owens on various documents, she didn't know that that was what she was getting into because this

case is also kind of about a man named Brain Reeve. You won't see him here today. He died. But before he died he also chose not to contest this case.

Brian Reeve I would describe him maybe as a rogue attorney. He was a real estate closing attorney. You will see and hear evidence that he wasn't at the closing of this loan and that that was something that he routinely didn't do, actually be there when the documents were signed to do his job even though he was supposed to be the closing attorney.

Who are we suing? Novastar Mortgage for not following the rules. For not finding out who this lady would like to represent her. For letting this loan get closed with no lawyer there. For getting her get hoodwinked and bamboozled into a balloon note that's now popped up to come due.

Deutsche Bank. Deutsche Bank and their long name, I won't say the rest of it, as trustee for some series of mortgage backed security certificates, Deutsche Bank, well, the loan has been assigned to them now. But you see with the good on that, with the right to get that money, they take the bad, too. They take the problems associated with that loan. And Ocwen. Ocwen Loan Servicing. Ocwen is the servicer for Deutsche Bank. What's a mortgage servicer? A lot of you may know. You

may have mortgage loans already. But a mortgage servicer is kind of like what a property manager is to an apartment complex for a mortgage loan. They collect payments. They communicate with the borrower on the loan. They handle the day to day.

Now, what are we suing them for? Well, they can't account for all the payments that have been made on this loan. You will see that more payments were made than they can account for what they have done with. And they're doing that on behalf of Deutsche Bank. You're going to hear from Brian Boger who is sitting right back there. He's an attorney. We'll call him up here as an expert witness. And he does real estate closings and he does what I would say is the right way and he'll talk to you about how they're supposed to go down and about the telltale signs that you can see in the documents from this one about how this one didn't go down the way that it's supposed to go down.

You're going to see copies of the mortgage documents. There is the one that's recorded here, here at the county in the land records and it's got Brian Reeve's signature on it. But you will also see one that doesn't. And I think you're going to draw the conclusion from that that that means somebody made a copy of that document when it had been signed by then Ms. Owens and

the other witness, but not Mr. Reeve indicating that he wasn't there. Why would you make a copy of a document that three people were supposed to sign and if all three of them were there when only two of them signed it and hasn't got the third one?

You're also going to see this. On that mortgage document there are initials. There are initials on all the pages except for the signature page that has a signature on it. It's got Ms. Owens' initials on it. Now, on the balloon note document it doesn't have any initials on the first page and the first page is where it says, hey, balloon note. It's got a little warning up there. No initials on that. So you're going to see -- and it's almost laughable here -- an attorney selection form that's got her name signed on it. It says I choose the following person to represent me in this and it's blank. That's how shoddy this was. They didn't even care to fill it in later. So it's just blank. And it doesn't say I don't have a preference. There's a place to sign on that, but it's not signed there. It says I select this person and it's blank.

You're going to see the evidence that Novastar didn't do anything to find out who it is that Ms. Owens wanted to represent her in that closing. Not a thing. Didn't matter to them.

All right. She will testify, Ms. Owens now Ms. Houck, she never met Brian Reeve. You will see his picture. Showed it to her. Ever met this man? Never laid eyes on him in my life. Brian Reeve was fine to get a check for doing a closing but she never met him. He didn't do anything. That was okay with the people who were originating this loan. They got a loan to make. That's a salable commodity and they ended up selling it, transferring it to Deutsche Bank.

You're going to hear from Tammy Bailey. Now, Tammy Bailey, that's Pat as I call her, that's Pat's daughter. That's Tammy sitting right over here in blue. Tammy took over this loan from her mom because about as soon as her mom got into it it started to be a real nightmare for her. Hard to afford for her so she moved into the house and kind of took over that house and the loan associated with it. You will hear Tammy testify about how she actually arranged with Novastar who still had the loan at that time to assume this loan and nobody at Novastar ever mentioned a thing about any balloon payment, any balloon feature on this loan at all. In fact, they told her to go down to the county and pull the loan records and see what's there. And that mortgage document, it's got a box to check that says balloon rider. It's not checked. A balloon rider is an attachment that goes on the mortgage.

There's no balloon rider attached. Looking at that you can't tell this thing has got a balloon note associated with it. And she will tell you about how Ocwen can't account for all the payments that she's made on the loan.

It wasn't until 2013 after Tammy had spent some time researching this loan, she knew something was wrong that she actually got a copy of the note. That's the note involved in this case. And that's when she and her mom found out there is a balloon note on this. Oh, by the way, payment is coming due. It's about $50,000.00. These people don't have $50,000.00 to run down and pay this off. They're in a bad spot now.

Now, you're going to hear from the defense in this case. They're going to say, well, you know, Pat, she doesn't really remember what happened because it was so long ago. It was in 1998. She doesn't really know what happened at all. She doesn't remember getting any kind of loan or having any kind of closing. I'll tell you what, that right there is some evidence. There wasn't any closing for her to remember. There wasn't any meeting with some Brian Reeve, some lawyer to go over these loan documents with her. That's evidence that tends to show that we are correct about what we say.

You're going to see a lot of items of evidence and I bet you the defense will try to pick them apart and take

each one and want you to look at it in isolation. They want you to say, oh, well, that one thing, that doesn't prove that there was no attorney supervising this loan. That doesn't prove we didn't let this lady choose her closing attorney. That doesn't prove we misappropriated any money. But actually what you're going to need to do is to weigh all of the evidence together because what you're going to see is a lot of signs and they all point in one direction. All the signs point to Brian Reeve not being there. And what you are not going to see is any evidence or anything that will convince you that Brian Reeve was there. All they will be able to point to is, well, see, he signed this thing. He witnessed this.

But as you will hear there's lots of closings that he didn't attend. Just because he signed something doesn't mean he was actually there. You're going to have to weigh the evidence as the judge told you. The weight, if it tips slightly in the plaintiffs' favor, the verdict should be for the plaintiffs. But see, here's the thing. The scales are going to be like this (indicating) because there's not going to be any evidence over here on the defendants' side. All the evidence is going to be over here.

These people are probably going to say, well, these folks are trying to get a free house. You shouldn't feel

sorry for them. Feel sorry for us because the loan hasn't been fully repaid. Actually you're going to hear evidence and testimony about the payments that have been made on the loan. This loan has been paid back more, I mean, enough to fully repay the $60,400.00 that was loaned at 9.9 percent interest. Way more than $60,400.00 has been paid on this loan. So these people got their money. This is about whether they're gonna make some more money and maybe foreclose on this house. So this loan has been a nightmare for my clients from the beginning because people didn't do what they had to do by law to keep them from being in that position.

At the end of this trial we're gonna ask y'all to return a verdict. Verdict is just a phrase that means to speak the truth. I want you all to speak the truth about what happened and you're going to get a chance to make it right and we'll talk to you in closing about how it is that you do that. But I think as you go along in this trial you're gonna start to think about it yourselves.

Thank you.

THE COURT: Thank you, Mr. Radeker. Mr. Peace.

MR. PEACE: Good afternoon, ladies and gentlemen. And if you will allow me just one second to reintroduce myself. My name is Taylor Peace. I'm representing the defendant Novastar Mortgage in this matter.

You have just heard Mr. -- Well, Stephen King once wrote "Time is the thief of memory." And that at the end of the day, ladies and gentlemen, contrary to what Mr. Radeker would have you believe is the biggest problem with his clients' case. You see, the events that Patricia Owens complains of took place over 17 years ago. To be precise it took 17 years 2 months and 24 days. Put another way, that's 6,294 days. That is a long time ago. And as Mr. Radeker said, he would have you believe and Ms. Owens would have you believe that Novastar tricked Ms. Owens, hoodwinked her, bamboozled her into signing up for a loan that she could not pay; that they hired an attorney Brian Reeve; that he did not attend the closing of the loan; that he falsely witnessed the mortgage documents and overall he tricked her and he hoodwinked her through fraud, deceit and overall trickery. The problem with that, ladies and gentlemen, is this: Patricia Owens, and the evidence will show, Patricia Owens does not know. She does not remember.

In her deposition testimony which will be presented as evidence she says I do not know when asked does she remember refinancing. She says I do not remember. It also shows that she said I never refinanced. The evidence will also show this: That a month before the closing that she alleges never happened, she hired a

mortgage broker. Paid a man named Horace Bookman, hired him, signed a contract with him and paid him $2,000.00 to find a loan that was agreeable to her. A month later she attended the closing of the loan at the Law Offices of Brian Reeve and at that time she signed a multitude of documents. A balloon note which Mr. Radeker described to you, a mortgage, a truth in lending disclosure which sets forth the terms of the loan. Sets forth the repayment terms of the loan. She signed it. She also signed a HUD-1 settlement statement which summarized the financial, the finance of the transaction.

What do they show, ladies and gentlemen? That plaintiff Owens paid her mortgage broker $2,000.00 and most importantly paid attorney Brian Reeve $385.00. Not only that, she paid him for title insurance. All of the evidence that was - all of the documents that were signed that day and all of the evidence will show that attorney Brian Reeve was her lawyer. Was selected by her. The evidence will not show that he was selected by Novastar, by Deutsche Bank or any other person. In fact, the evidence will show that on June 8th, three days before the closing, Novastar sent Ms. Owens' mortgage broker, the man who she paid $2,000.00, a document that was to indicate where the loan closing documents were to be sent. The same ones that plaintiff Owens signed three

days later. They sent it to the mortgage broker and received it back. And what was indicated on that document? That the loan closing documents were to be sent to Brian Reeve.

Now, also she signed numerous other documents at the closing on top of the balloon note and mortgage, several of which were both witnessed and notarized by attorney Brian Reeve.

Now, the evidence will also show that plaintiff Owens has had numerous opportunities, numerous opportunities to stand up, to raise a red flag and say wait a minute. This loan was not closed in accordance with South Carolina law. The evidence will show also, ladies and gentlemen, that she did nothing. Nothing when she fell behind on her loan and a foreclosure action was filed against her. Subsequently dismissed. She did nothing when a second foreclosure action was filed against her. Subsequently dismissed. She did nothing when her daughter assumed the loan. She did nothing for 15 years. She did nothing when a foreclosure action was filed against Ms. Bailey. When Ms. Bailey was told by my client to go down to the courthouse, did she stand up and say my mother says attorney Brian Reeve wasn't there? She did nothing.

Not only that, ladies and gentlemen, the evidence

will show that the plaintiffs Patricia Owens and Tammy Bailey can show no evidence that my clients did anything wrong. They can show no evidence that they hoodwinked her; that they bamboozled her; that they tricked her. The only thing that they will be able to show is that they agreed to the terms of the loan that worked for them. That worked for them for 15 years. That they had no complaints about. The only issue is that they couldn't pay it. That is what this case is really about and at the end of the day the preponderance of evidence, those scales of justice, the evidence will not weigh in the plaintiffs' favor and we ask you to do the same thing and to find that the claims against Novastar should be dismissed.

Thank you.

THE COURT: Thank you, Mr. Peace. Mr. Griffin.

MR. GRIFFIN: Good afternoon, Your Honor. May it please the Court.

Good afternoon, ladies and gentlemen. Thank you for serving as jurors today. Your service is appreciated and thank you all for paying attention during voir dire.

My name is Mike Griffin and as I said this morning my colleague is Mark Wierman over there and we represent two of the defendants Ocwen Loan Servicing and Deutsche Bank National Trust Company as Trustee and I'll save you

the name of the name of the real estate trust, but I think it's important to understand what Deutsche Bank National Trust Company is and what they do and we'll go into that as the trial goes forward. Also this afternoon I have got Nicole Gostebski who was not here this morning when she was introduced, but she is here and will give testimony on behalf of Ocwen Loan Servicing.

So as I mentioned Deutsche Bank National Trust Company is one of my clients and what they do is they is serve as trustee for real estate investment trusts. What they do is mortgage loans or added to assets for the trust and Deutsche Bank manages it for the good of the shareholders. Part of these duties is they work with mortgage servicing companies. In this case they worked with several mortgage servicing companies, the final one being Ocwen. So the mortgage service company collects payments, they handle customer service issues, complaints. Deutsche Bank takes those payments and applies it to the investors. Now the important thing to remember is when Deutsche Bank National Trust Company is serving as a trustee, they don't lend money, they don't make loans. And, in fact, in this case you won't hear any testimony that Deutsche Bank originated a loan, lent somebody money or anything of those things.

Now, Ms. Bailey and now Ms. Houck, their note and

mortgage are now an asset that is part of this real estate trust which is why Deutsche Bank is a party to that. Ocwen is a loan servicing company. It doesn't make loans. It doesn't lend money. What it does as the servicer is it collects payments under the terms of the notes and the mortgages within this particular trust and it applies those payments in accordance with the terms of the note and mortgage signed by whoever the borrower is. The note and the mortgage will say this is how we apply the payments. This is where the payments go. This is how much is owed and this is when they're due. The other thing that loan servicers have is a responsibility to protect the collateral and the collateral in this case is the home. So things like paying real estate taxes that don't get paid so that the state or the county doesn't come in and seize the home, or making homeowners insurance payments in case there's no homeowners insurance on the collateral for damage to the house.

In April 2012 the evidence is going to show that Ocwen began servicing this loan that was Ms. Houck and Ms. Bailey's loan and that will come out in the testimony probably on both sides.

Now, this is where the attorney usually tells you, well, this is what the case is about. Well, from my clients I'm gonna tell you what the case is not about.

This is not about a bad act on the part of Deutsche Bank National Trust Company serving as trustee. You won't hear any evidence that Deutsche Bank was involved in the closing of the loan, they weren't involved in the agreement where Ms. Bailey took over payments for the loan, they had no interaction with Mr. Reeve. This case is not about some bad act on the part of Ocwen related to the closing of the loan, the application of the loan or that the point in time when Ms. Bailey took over the payments of the loan. You're not going to hear any testimony on either one of those points.

So this case is really about not taking responsibility for obligations. So let me provide some quick background. Ms. Houck agreed in June of 1998 when she signed a note and a mortgage, she borrowed money and part of it is I agree to pay this money back over time. At some point around 2001 the evidence and testimony will show that Ms. Bailey and Ms. Houck agreed to where Ms. Bailey would take over the loan payments for her. We effected and evidence will show that in July of 2013 the mortgage becomes due to be paid in full. It's on the face of the mortgage as to when you have to make that final payment. Instead of paying the amount due Ms. Houck and Ms. Bailey filed a complaint alleging that there were errors or failures at a loan closing of this

loan now owned by Deutsche Bank and that because of that the mortgage and note is invalid and that Deutsche Bank National Trust Company should pay Ms. Houck and Ms. Bailey some form of monetary damages.

They said they should be held liable for these errors. Well, the evidence and testimony will show that Deutsche Bank played no role in the origination, no role in the application, no role in the closing of the loan. In fact, there is no evidence or any testimony of any interaction between Ms. Houck and Deutsche Bank at all. The only interaction between Ms. Bailey and Deutsche Bank would be at the earliest 2011 when there was a foreclosure action filed against her and later dismissed.

Ms. Houck and Ms. Bailey also allege Ocwen didn't apply the payments they received properly. I think the evidence and testimony is going to show that Ocwen was not responsible for servicing this loan until April 2012 so they had from April 2012 until the maturity date of July of 2013. So they are going to allege or they have alleged in the complaint what we misapplied loan payments to the account, added fees that were not allowed, and that this is a deceptive trade practice in addition to what is called conversion.

You're going to hear testimony and evidence from Ms. Gostebski that Ocwen began servicing this account in

April of 2012 until the maturity date and that every payment made by Ms. Bailey to Ocwen was properly accounted for to the account in accordance with the terms of the note and the mortgage. Ms. Gostebski will present in the form of oral testimony and also accounting records of this account that they applied each payment properly; that any fees that were assessed were allowable under the terms of the note and the mortgage. For me this case it's going to be a simple matter of arithmetic. I encourage you to look closely at the accounting ledgers and the accounting records that Ms. Gostebski is going to go over and we're going to hopefully present into evidence today. Each and every payment will be backed by an accounting entry. Each and every fee and charge will be testified to and be backed up with an accounting entry.

So the plaintiffs claim that they have suffered some sort of actual compensatory and special monetary damages on what my clients did. They want punitive damages which usually are reserved to punish a bad act or for a reckless behavior. My expectation is the evidence will show no wrong doing on either part on either one of my clients Deutsche Bank National Trust Company as trustee or Ocwen Loan Servicing. I think what the evidence and testimony will show is that any of Ms. Houck's and Ms.

Bailey's alleged injuries were not due to any action by Ocwen or by Deutsche Bank as trustee and that any injury they suffered was due to their failure to pay the mortgage.

I think the testimony and evidence will show that Ocwen and Deutsche Bank National Trust Company acted properly in every aspect of their obligations. And I want to harken back to a statement that was made this morning. People didn't do what they had to do under the law. Deutsche Bank and Ocwen did everything they were required to do under the law. What didn't happen was people borrowed money and didn't pay it back according to the terms that they agreed to. So at the end of the trial today or the end of the trial this week I will come back and I'll ask you about the verdict and the verdict that I think or that I would like you to reach and I think that if you look at the evidence and testimony you will find that my clients didn't do anything wrong and they shouldn't be held liable.

Thank you.

THE COURT: Thank you. Thank you, Mr. Griffin. Mr. Radcker, you may call your first witness.

MR. RADEKER: Thank you, Your Honor. We call Brian Boger to the stand.

THE COURT: All right. Mr. Boger, if you would come

Argument by Mr. Peace - Counsel for Novastar

handed up to the Court, at the time it was made or was induced by unconscionable conduct, the Court may in an action other than a class action provide for remedies provided in subsection (c).

Now, because that statute provides the Court a, provides a statute that gives what is determined to be unconscionable at the time the agreement was made, we then have to go to 37-5-108. While I believe that there is -- In that case, 37-5-108 states with respect to a transaction that gives rise to or leads the debtor to believe will give rise to a consumer credit transaction if the Court finds as a matter of law the agreement or transaction to have been unconscionable at the time it was made or to have been induced by unconscionable conduct, the Court may refuse to enforce the agreement, or refuse to enforce the agreement or any portion of the agreement.

The important section in this case would be 37-5-1084(a). And that would be applying subsection 1. This section actual applies to Novastar because subsection 2 and subsection 3 I believe, it's Novastar's position relates to the collection of the actual debt. Because Ms. Owens' claims and Ms. Bailey's claims as to Novastar almost entirely relate to the origination of the loan, that is where it needs to look. We don't

trustee has done anything to violate the Consumer Protection Act.

THE COURT: I thought you weren't going forward on that, correct, Mr. Radeker, as to the bank? Did I not track that just now?

MR. RADEKER: Me? I think you have got them mixed up somehow. I'll be happy to respond as to why a cause of action applies against Deutsche Bank.

THE COURT: Go ahead, Mr. Griffin. I apologize.

MR. GRIFFIN: That's okay, Your Honor. Ocwen Loan Servicing is not a creditor. Deutsche Bank fits the definition of creditor but only as an assignee and the statute itself says just because your an assignee doesn't mean there's liability imputed and I think if you were to interpret the statute and the purpose of the statute is to protect consumers against people in a transaction.

The reason it would be unfair and almost violate due process, it would impose liability on a subsequent owner of a loan when the subsequent owner was not involved in the loan, wasn't involved in the closing. We wouldn't have been the company to ascertain or determine who Ms. Houck wanted to hire as her counsel. We wouldn't have been by the time Deutsche Bank comes into it which I think was 2007 as testified by Mr. Holtmann we can't then go back and say please fill out this attorney preference

form because it's already past the closing date. It would be impossible for us to comply with that. So to hold us liable for something that we had no involvement in, I think it can't be the intent of the statute to protect consumers.

THE COURT: All right. Thank you, Mr. Griffin. Mr. Radeker, as to the consumer protection code.

MR. RADEKER: Thank you, Your Honor. A lot to say. My opponents have just said a lot of things. Taking the last first as to, because this actually pretty simple, as to why it applies Deutsche Bank as well as to Novastar as the originating lender, creditor is that under South Carolina law assignee takes a mortgage subject to all the infirmities in and against the assignor so they take subject to the claims and defenses including this one. That's just the law. So if it lies against Novastar, it lies against Deutsche Bank.

They haven't pled a holder in due course defense which creates a narrow exception to that, but even if they had, there's no facts here that would tend to indicate that they have one. But they didn't plead it anywhere.

So okay. As to whether it's a claim that just, you know, I'll call it Ms. Owens because that's what she was named at the time, just Ms. Owens has or Ms. Owens and

Mr. Radeker

least a fact issue as to that and that's a 37-5-108 factor.

As to this notion that because these people were served with foreclosure actions they should have been on notice then that there was a balloon note here, I would say this: The other instance of unconscionable conduct here besides unauthorized practice of law which is inherently prejudicial not just to these people but to the public at large as noted by our Supreme Court is concealing the balloon nature of this transaction from this lady. And there certainly has been evidence adduced, a scintilla and more that that was going on here.

Is she in a position of being ignorant and unweary? Yes, she is. Brian Boger testified that even very sophisticated people, he said doctors, lawyers, judges without a closing attorney there to explain the documents don't understand the documents that are involved in a mortgage loan closing without a lawyer there to explain it to them, or if he didn't explain it to them, or if nobody showed her the first page of the balloon note, all of which is possible. Based on the evidence that's been presented here today she was in a position of being ignorant and unweary.

It's unconscionable conduct to conceal that balloon

note. These foreclosure actions that were brought, they don't say in the complaint that there's a balloon note involved here. They don't say that. And they're both dismissed. I mean, I kept wondering why it is that they're so keen to put this into evidence because it doesn't do anything to help their case. It's not like they can argue res judicata from it. There's no foreclosure judgment ever rendered. Both of them were dismissed. One of them says it was dismissed without ever even having been served on the defendants. So there is just nothing to come from that.

Your Honor, I point you, because there is no on point authority from our Court of Appeals to the Supreme Court besides the authority that says to provide a borrower with the attorney preference form at closing clearly violates the statute and that the Consumer Protection Code is to be liberally construed in favor of protecting consumers because there's no authority beyond that, I point the Court to persuasive authority from Judge Russo's order in the Nations versus Fowler case that I handed up at the pretrial conference and Judge Jay Jackson who is now a master in equity down in Orangeburg order from the First Citizens versus Livingston case both of which interpret 37-10-105(c) in accordance with our theory and that is that if no lawyer supervised the loan

closing and there's an attorney preference violation, that falls within this because that unauthorized practice of law, that is unconscionable conduct.

Looking at Mr. Holtmann's testimony, trying to see if there is anything else, he testified the interest calculations of the life of a loan are too complex for him to understand without aid. Up there on the stand he testified that he was an expert in mortgage loans.

So Brian Boger testified, couple that with Ms. Owens' testimony that she can't understand the form, and what Mr. Moore brought out on Mr. Holtmann's direct that the disclosure form is actually confusing especially without explanation by an attorney. Novastar simply abdicated its responsibility to comply with the attorney preference statute altogether as was its standard practice. It just never did anything about it. It certainly didn't do so here.

Brian Boger testified it's the lender's job to make sure that the loan closing is supervised by an attorney. That didn't happen here particularly when you view the evidence in the light most favorable to us as the Court is required to do at the directed verdict stage.

THE COURT: Thank you. I deny both motions as far as the Consumer Protection Code violation as to Novastar and the bank and grant it as to if you have a cause of

it depending on how the other --

MR. PEACE: Directed verdicts go.

THE COURT: -- motions go. Yes, sir. So we'll say 2:15. Thank you.

(Whereupon, the luncheon recess was taken.)

BAILIFF: All rise. Court is now in session.

THE COURT: All right. Thank you. Thank you very much. Please be seated. You have another motion, Mr. Peace?

MR. PEACE: Yes, Judge. I have a directed verdict motion. I would like to move for a directed verdict as to the other cause of action against Novastar, that being the Unfair Trade Practices Act claim.

THE COURT: I'll be glad to hear from you.

MR. PEACE: Thank you, Your Honor. Under the Unfair Trade Practices Act the act itself or the claim - or the statute creating the cause of action doesn't really provide any elements. However, the court has interpreted that statute over time to mean that the plaintiff has to prove an unfair or deceptive act that affects the public interest and that they have been damaged as a result. A lot of the case law has dealt with what it means to have a deceptive act that affects the public interest and the courts have determined that that can be done through repetition. And there's a couple ways that you can do

that. One is by showing, the plaintiff has to show that the same events happened in the past or that the policies and procedures of the defendant created potential for repetition that would continue without any kind of reprimand from the court and then also -- So those are the two ways that the court has determined.

In this case we don't believe that the plaintiffs have shown any evidence of any of the elements of the Unfair Trade Practices Act claim. In this case any Unfair Trade Practices Act violation, any unfair or deceitful act was undertaken by Brian Reeve again and not Novastar. There's been no testimony here that the plaintiffs had any communication with Ms. Bailey, or I'm sorry, Ms. Owens or really Ms. Bailey essentially out of privacy concerns to which Ms. Bailey testified. As to Ms. Owens, what Mr. Holtmann testified to as and what the financial services agreement show is that Ms. Owens had a representative. Had someone to represent her. Had someone through which Novastar could communicate with her that being her mortgage broker Horace Bookman.

She has said that nothing here has been unfair. Nothing here has been deceitful other than the alleged concealment of the first page of the balloon note. Again, that was something that Novastar sent to Brian Reeve and it was on Brian Reeve to have her execute the

documents appropriately. We received all those documents back. They were executed appropriately and we funded the loan.

Also, there's been no showing here that Novastar's policies or procedures or that these same events happened in the past as to Novastar. There has been testimony to show that Novastar relied on the broker to provide the attorneys or to provide the attorney preference, but those brokers represent the borrowers. They do not represent Novastar. So if there was any wrongdoing in this case or any other case because of those policies and procedures, that's on the broker. That's not on us.

Also, Novastar is no longer in business. Novastar is no longer in the business of issuing loans, so therefore there's not a potential for repetition that would create damages outside of the reprimand from the court.

Additionally, Ms. Owens admitted in her testimony here that they have done no investigation into the policies and procedures of Novastar. She has no knowledge. The only knowledge would come from Mr. Holtmann who again he testified that they're no longer in business. They can't do what the plaintiffs have alleged them to have done which again are actions undertaken by the broker not Novastar, an independent

Mr. Peace

statute of limitations is three years from the discovery of that act or of the alleged violation.

I'm going to refer back to an argument that I made previously. In this case the alleged act took place in 1998, the alleged unfair act. Now, Ms. Owens has a duty to read the documents, the documents that she closed or that she signed when she closed the loan and when she, you know, when she closed the loan and when she attended the closing of the loan. If there is any violation of the Unfair Trade Practices Act, it took place then. And that cause of action would have accrued when she knew or reasonably knew of the cause of action or was on notice to investigate what in the world was going on. In other words, she had a duty to say where is my attorney.

There's been no evidence here that she said that, but because she has a duty to read and understand what she's signing and essentially to stand up and go wait a minute, because she didn't do that until 2013, she's outside the statute of limitations of three years.

Now, again, even with the foreclosure actions with the assumption they were on notice or at least constructive notice we believe because the mortgage was filed a public record that there may have been something amiss about the closing which again was not undertaken by us but undertaken by Brian Reeve. So essentially the

statute of limitations, assuming all of that would have taken place or all of that, she should have discovered all of that, the statute of limitations would have run, I believe that's in 2005 earlier. This case was brought in 2013 three days before the balloon note was to mature. That's way outside the statute of limitations. For that reason we think that we are entitled to a directed verdict on top of the fact that there has been no showing here of a violation of any of the elements of an Unfair Trade Practices Act claim or at a minimum no showing of damage or any unfair deceitful act.

THE COURT: Thank you. Thank you, Mr. Peace. Mr. Griffin, anything you want to tell me?

MR. GRIFFIN: Yes, Your Honor. We would adopt the statute of limitations. For purposes of brevity I would like to adopt their argument on statute of limitations and on repetition. But even further again, Deutsche Bank as trustee is the successor to this mortgage. There's nothing in the law that says a successor is liable for a deceptive trade practice by its predecessor and it's not that we're a successor corporation or a mere continuation of Novastar, we have no connection with Novastar.

I have two cases. One from the Federal District Court in South Carolina, one from the bankruptcy court, if I can hand them up to Your Honor, that stand for the

MR. GRIFFIN: Yes, Your Honor. I understand that and it's based on Ms. Bailey's testimony that she never saw an inspection and I understand that.

THE COURT: And that doesn't mean, and at the same time I don't want to say just because she doesn't see it or didn't see somebody doesn't mean there wasn't anybody there. I'm a big proponent of that.

MR. GRIFFIN: But there's two aspects to it. One, Deutsche Bank is successor on the closing, and then Deutsche Bank using its servicing resident agent. As to Deutsche Bank and the closing, there is absolutely no testimony regarding an unfair trade practice or act by Deutsche Bank as relates to the closing.

THE COURT: What about that, Mr. Radeker? How do you connect that dot? How does the plaintiff connect that dot from the 1998 closing to the unfair trade practices, if there were any, at the closing?

MR. RADEKER: As against Deutsche Bank?

THE COURT: Yes, sir. As against the bank.

MR. RADEKER: As against Deutsche Bank the assignee, the one I wanted to speak to was this Harris versus Option One mortgage case. I haven't had time to read it. It just got handed to me. But based on what Mr. Griffin just described in it, they were talking about apples and oranges. He said that there wasn't any basis to hold the

current mortgage servicer liable for what happened at the closing. We're talking about Deutsche Bank being liable, not the servicer with regard to that. Deutsche Bank would take subject to the claims and defenses. There's not even a holder in due course defense pled. He was saying, well, this is pre UCC law that's quoted here. Well, pre UCC law is still in effect unless preempted by the UCC. The only thing in the UCC that would keep, you know, this claim from lying against Deutsche Bank would be a holder in due course defense which hasn't even been pled nor proven. So I would just say as a matter of law if the Unfair Trade Practices Act claim lies against Novastar, it lies against Deutsche Bank.

THE COURT: And he says no.

MR. RADEKER: I understand that, that he doesn't agree.

MR. GRIFFIN: Your Honor, take the UCC act, right? Think about what an unfair trade practice claim is supposed to do. It's supposed to defend consumers against bad acts by people in the market place. We haven't done anything. They can't allege we have done anything as it relates to the closing, yet they're gonna hold us liable for some deceptive trade practice act that we did not do.

I mean, UCC aside, I want to say, and don't quote me

you could argue that, Mr. Radeker, but I'm not going to charge that paragraph. I'll charge the first paragraph.

MR. RADEKER: Thank you, Your Honor.

MR. GRIFFIN: Your Honor, my only issue is the cases cited again go to, it creates the equitable effect of unclean hands in a foreclosure action subject to time. You can - if this was a loan that was closed after 2012 and I foreclose on you and it was unauthorized practice of law, either the lawyer didn't show up, it was closed by a paralegal or the bank closed it on its own, the borrower is allowed to raise that as an affirmative defense of unclean hands and I think that by charging it that way it turns into being an affirmative claim for monetary damages.

THE COURT: All right. Subject to your objection I'm going to charge 12 paragraph 1.

MR. SILVER: We hold the same objection, Your Honor.

THE COURT: Okay. Anything further?

MR. GRIFFIN: No. Thank you, Your Honor.

THE COURT: All right. Are we ready for the jury?

MR. RADEKER: I might ask for a brief restroom break, if we can. We were talking about charges during all this.

Closing arguments

MR. GRIFFIN: No, Your Honor.

THE COURT: All right. We will now begin our closing arguments. Mr. Radeker.

MR. RADEKER: Thank you, Your Honor.

Good morning. Thank you all for being here. I know it's been a long time. I don't think any of us thought it would take this long. But we're about to get to where we're talking about how to end this thing. In a few minutes y'all will go back to the jury room. When you get back there, you're gonna have three jobs. You're gonna have to answer the questions that the Judge gives you. You're gonna have to follow the law that the Judge gives you, but before you answer those questions, y'all are gonna have to explain to each other why you feel the way that you feel about the way those questions ought to be answered because your verdict has to come from you together. So let's talk about what the evidence showed in this case.

Now, the Judge talked to you about and we talked to you about in opening statement about the burden of proof. Remember the scales? If the scales tilt even ever so slightly in favor of the plaintiffs, your verdict is gonna be for the plaintiffs. To use a football analogy, we don't have to get a touchdown. We just have to make it across the 50 yard line. I think we're in the end

zone. Let's talk about why.

First of all, let's talk about the testimonial evidence. What the witnesses said. We called Brian Boger, expert in mortgage loan closings, qualified, no opposition to that. Done over 20,000 closings in his life and knows what he's talking about. He said it's the lender's job to make sure that the loan closing is supervised by an attorney and the law is that it's the lender's job to ascertain, to determine the borrower's preference as to the lawyer who is supposed to represent them in that transaction. It's supposed to be the borrower's choice. The lender has to give that borrower the choice to do that. He testified even sophisticated people can't understand the loan documents. Even the truth in lending form which is designed to be explanatory without the aid of a closing attorney who is there doing his job and explaining the documents to the borrower so they go into this transaction with their eyes wide open.

Now, we talked about the importance of a balloon note. If you have got a balloon note in a transaction, you kind of need to stop and say, whoa, this is important. You need to understand what this means. You need to understand at the end of this loan you wouldn't have paid it out. There's going to be a bunch of money, big payment that's gonna be due at that time. You still

want to do this? You adequately explain it to this borrower.

He talked about how in his expert opinion Brian Reeve the supposed closing attorney for this loan they say, well, he signed all these documents. But he wasn't there. They have talked about how in his opinion the balloon note was not adequately explained to then Pat Owens, now Pat Houck, Pat the plaintiff.

Now, these defendants, did you see an expert talk about them? Anybody to contradict Mr. Boger, what he said? No. Did you hear anybody say, well, I reviewed the documents and in my opinion I think he was there. I think it was adequately explained to them. No. You didn't hear any such thing because they didn't call anybody like that. Mr. Boger testified it would be highly unusual particularly in a balloon note transaction for initials to be placed on each page of the mortgage but not on the balloon note document that tells the borrower, hey, this is a balloon note in this transaction. But that's what we have got here. He said it certainly would not be normal for someone to make a copy of a mortgage on which the lawyer is a supposed witness at the time when the lawyer had not signed the document. He said that wouldn't be normal at all.

So we have also got Mr. Reeve's deposition. These

excerpts from his deposition will go back to the jury room with you. We couldn't call Mr. Reeve to the stand because he died. That's not the defendants' fault, and it's not our fault either, but he died so he couldn't be here. But we got his testimony from this other case. He will tell you that just because his signature is on some documents sure doesn't mean he was there.

Let's go over what he said. First, is this the loan you closed? Quote, "The loan you closed?" He said yes. Then it goes on and he starts to waver on that a little bit. Were you in attendance? I don't remember. And then he goes on a little more and he says some more stuff. The lady's name is McElveen in that case. Did you have any contact with Ms. McElveen? I'm not sure. So you don't know whether you ever met her or you didn't meet her? I'm not sure. If you had not attended the closing at the EquiCredit office, you wouldn't have met her on that occasion? Well -- Right? If I hadn't been there, I wouldn't have met her. She said she picked you as her attorney? Yes.

This is how he deals with transactions in which somebody did sign an attorney preference form to pick him and that didn't happen in this case.

Going on. They closed this loan and sent you checks? Looks like it. And then he says I'm not sure if

I was there or not. And then toward the end here's where he finally admits it. I never had any contact with her.

I said in opening to you this case is somewhat about a rouge attorney. That was Brian Reeve. He was just about getting it done for the bank. Who cares about the person who is supposed to be his client, helping them out. That's who they had closing this loan, Brian Reeve. This man who Pat Owens testified she never laid eyes on. Never seen him until she saw his picture in this obituary. Never met this fellow. There's a lot of things she couldn't remember and that's the truth. But she never met this fellow. She knows that.

All right. What else did she say? What else did Pat say? She said I never would have signed a balloon note. I knew what my economic circumstances were at the time. They were not good. I knew I was not gonna be in a position to pay off some balloon payment if it came due. There is no way that I would have done that. She's not a lawyer. Doesn't understand these documents. I think the defendants tried to intimate, well, you worked in property management for apartment complexes so you should have understood these closing documents. Well, Brian Boger testified that even real sophisticated people like lawyers and judges can't understand the documents without them being explained by a closing attorney who

knows what he's talking about.

So she testified she doesn't understand the truth in lending act form. That's no slight against her. Most people wouldn't understand the truth in lending act form. Most people wouldn't understand any of the documents. That's why there's a lawyer there to explain it to them. That's why our law requires that to protect the person who they know is going to be in the position of being to use some words that the Judge will tell you ignorant and unwary. Ignorant not as an insult. Ignorant just meaning what it says, not knowing and unwary means not with your guard up. Not able to protect yourself. That was the position she was in with no lawyer there to close this loan. She never met Brian Reeve and nothing that the defendants have presented in this case indicates anything else other than that. Nothing.

They say, well, he signed these documents. Well, we know just because he signed documents doesn't mean he was there. Just because he was the supposed closing attorney doesn't mean squat. That doesn't mean anything. You can't trust this guy.

She does remember when she bought that land in 1991 that closing was with a lawyer. That's a memorable event to her. She remembers that. So if there had been a closing with a lawyer, she would have remembered. Now,

the defense are gonna get up and say, well, she says she just doesn't remember anything. She doesn't remember anything about it. Well, you know what? That's because there wasn't a closing to remember. There was no meeting at a lawyer's office for her to remember. That's the logical explanation for that. Of course she doesn't remember. It didn't happen.

Tammy Bailey testified when she got involved with the loan or assumed it, took it over for her mom, had her sign this assumption document. Now, she might have thought I'm getting my mom out of this by taking it over. I'll tell you, that assumption agreement does not take Pat off the loan. It just adds Tammy onto it. That's all that it does. Novastar got another borrower to sue if things went wrong. And Novastar led her down the path, the path that she went down. She didn't know these people were lying to her. Never said anything to her about there being any kind of balloon feature associated with this loan at all. Never once.

And her testimony was that her mother told the Novastar people that they could give her the loan documents and show them to her, but they wouldn't do it and instead sent her to the county land records which they knew, because they had a copy of the mortgage, Mr. Holtmann testified all the stuff came back to them, that

there was a mortgage down there that doesn't tell you if you look at it that there's any kind of balloon payment associated with this loan at all.

In fact, there's a place for there to be a document attached to it called a balloon rider that says there's a balloon note on this. And there's a box to check that says balloon rider on that. That box is not checked. Nothing is attached. She thinks she's getting into a term loan 15 years that's going to pay out in 15 years because that's what the documents Novastar told her to look at said.

Now, she admits she fell behind several times on the payments. She did. So we are not saying that she didn't, but the fees that they charged kept her struggling to catch up. And she said she never would have assumed this loan if she had known there was a balloon note. Of course, she was going to help her mom out, but there's other ways she could have done that. She testified about that. She wouldn't have done it if these people over here had been forthright with her and had just told her the truth about what the nature of this loan was. She would have helped her out some other way.

And Novastar's interrogatory responses, y'all are probably wondering because of the legalese why wasn't it read back to you. All right. Let's talk about that.

Novastar says in its interrogatory responses that its actions were in accordance with its underwriting guidelines. This is the way we make all of our loans. This is the way we do all of them is just like this. What does that mean? It means just like Mr. Holtmann testified, they don't do anything to fulfill their obligations under the law to figure out who the borrower wants their lawyer to be. They don't do anything to do their job as Mr. Boger testified to make sure that a lawyer supervises the loan closing. They don't do anything to afford the borrower, their customer, the protections that they're obligated to afford to this person. They create a situation in which people can be taken advantage of just like this.

And Mr. Holtmann testified for Novastar. Do y'all remember that? Y'all remember him sitting up on the stand laughing nervously up there because he doesn't know what to say. He doesn't know anything about what actually happened here. They sent their lawyer down here to try and clean up their mess for them, but he didn't do too good of a job at it because he says they never even bothered to try to locate anybody who knew anything about the loan closing involved in this case. I wonder why that was. Would they be a little concerned about what that person might have to say? Never even tried to

locate them. They didn't do anything about complying with the attorney preference statute.

In their interrogatory responses they say here is how we say we complied with the statute. Somebody else who is not us gave this lady a form that she signed in which she doesn't identify who she is choosing as a closing attorney. That's how they say they complied with their obligations under the statute so they didn't. They made this loan to sell. They say, yeah, we made this loan, turn around and sell it. Had it for a while, made a little money off of it, turned around and sold it. So we got all our money back out of it and then some. Made a little profit. That's what motivates them is profit.

Now, you have Ms. Gostebski from Ocwen come up an testify and she testified also she doesn't know anything about servicing the loan. Never participated in it. She's just somebody they picked to come testify down here. She's a professional witness. Her job is to come and try to help Ocwen out of a jam at trial. That's her job. I think she testified that she testified in like 150 trials or depositions during like the past year, something like that. That's crazy. Like just this insane amount of times. Part of her job is to go and help them out of a jam.

She didn't do a very good job of that either because

she didn't have a whole lot to work with. She testified that these property inspection fees that you see on there aren't for any inspection. Just like Tammy said, nobody had been out to her house to inspect anything. That they're for somebody driving by and looking at it. That that's what that's for, somebody driving by and looking at it.

Let's look at the documentary evidence. Sorry we don't have a projector because we are in this courtroom. I'll hold this up. This here is the supposed attorney preference selection form. I got two little red asterisks on there to show you what's not there. And that's anything showing who it is that this lady picks to be her lawyer. This document is gonna go back there to the jury room with y'all. Nothing. They say, well, we find out who she wanted to be the closing attorney because the broker told us to send the documents to this guy. That's on some document that doesn't even use the word attorney on it. For all they knew Brian Reeve wasn't even a lawyer. Just send them to this guy. And there's no evidence, nothing in this record that has any tendency to indicate at all that Pat Owens gave that mortgage broker any permission to choose her lawyer for her. Instead here's this.

How did this happen? He said, ma'am, I just need

you to sign this. Sign all these things for me. So just sign this and we'll look into it. Here are these special closing instructions. And that said, well, hey, Brian Reeve, you know, Novastar says, hey, he didn't do anything on our behalf. Well, they give him all these instructions and they call him their closing agent where he signs at the bottom of the document. So he is working for them doing stuff for them.

In other words, what he's not doing is the stuff that he's supposed to be doing, that they're supposed to be doing, he's not doing it, and they're not doing anything to make sure that he is. They don't care. They have a loan to sell. That's what they want. They want a commodity to sell. That's what it's all about for them. Making something to sell on the market. Sell on Wall Street. That's what they testified. That's who has got this now, Deutsche Bank, big Wall Street company.

Do y'all remember any witnesses from Deutsche Bank? I don't. They didn't send anybody down here because they handled this the way that they handle their mortgage loans. The last thing in the world that they want to do is actually interact with the common people. So they just want to sit back and get their checks, and everything else who cares. They're just gonna sit back, get our checks. We'll let the servicer handle it. If

they screw it up, it's not our fault. No big deal. They don't even care enough to send somebody down here. They don't even care enough to send somebody down here to watch. There's nobody here from Deutsche Bank. These people don't rate for Deutsche Bank. Y'all don't rate for Deutsche Bank.

There's another document. Defendants put this in and this is the loan application document, the Uniform Residential Loan Application. Take a look at it when it goes back to the jury room with you. It's got a number on it. A number 240 under number of months. That's 20 years. This lady wasn't applying for a 15 year loan, a balloon note. That's not what this is. So did this help her to get this balloon note? Did it help her in any way? Her payments went up to $529.00 from $502.00 according to this document and $502.00 she testified she couldn't afford that. So it certainly didn't help her to do this. It helped Novastar. They've got something to sell, but didn't help Pat Owens in any way. That's okay with Novastar.

You sit here and think that they set out to hurt her? Maybe. But even if they didn't, they didn't care whether they did. All right. We've got a product. We made our product. Somebody gets hurt, that's all right.

Another thing that's gonna go back there with y'all

is plaintiffs' exhibit 4. It's a copy of the mortgage with two signatures not on it. That's Brian Reeve because he wasn't there. Why would somebody make a copy of a document with everybody there who is going to sign it before everybody had signed it? It doesn't make sense.

What they didn't find out in the shed is what Pat was not given a copy of, that's plaintiffs' exhibit 5, this balloon note document. Now, you noticed as we talked about throughout the trial there is not mark one on this front page unlike every other closing document you saw. There's not marked one on this front page to indicate that this lady ever saw this.

Mr. Moore pointed out with Mr. Holtmann something pretty interesting and that's that these numbers down here on these pages, they don't match. Now, Ocwen's witness, she testified, well, maybe it's just obscured because they were folding it over. But look at it when you go back there. The fold is in the same place on each of the pages. The fold doesn't obscure numbers on the second page. They're just not there at all. It would have been real easy for somebody who knew this lady wanted a 20 year loan and no balloon note to create two new documents, one for the loan she wanted and one for a different loan changing the loan numbers at the top. Or

maybe never show her the front page to begin with without an attorney there to say, hey, this is the note. No, look. You have got to see the whole document to do this. Without the protector there that the law says these people have got to make sure is there to protect her, there's nobody there to stop this thing from getting signed without her ever seeing this.

She wouldn't have entered into a balloon note, certainly shouldn't have entered into this transaction. She wouldn't have if these people had done what they were required to do to protect her.

Now, this is a page from that big like defendant Ocwen and Deutsche Bank exhibit 28 that will go back there, about a telephone book thick. Do you remember when their witness was testifying and she said, well, you know, Tammy could have called at any time. We would have been happy to talk to her trying to say that Tammy wasn't telling the truth about when she called in and they wouldn't talk to her. Here's the entry from July 23, 2013. Phone call in. Non authorized third party call. Talked with non authorized caller Tammy Bailey. Did not disclose account specific information to this caller. Tammy is the daughter of the borrower, but not authorized on the account. Informed her that we can take a verbal authorization from borrower but she refused. Did not.

Checked with supervisor and they said the same.

And then another phone call. Agent called in saying that Tammy Bailey is calling in and can you handle the call as there is no cert on her name nor any authorized letter sent to us. Before the agent could confirm the call, the caller had disconnected.

They wouldn't talk to her just like she said. Tried to slip one over on you with their witness' testimony, but they got caught by the documents.

All right. Let's talk a little bit about what they did with the payments, what Deutsche Bank and Ocwen did with the payments and fees that they charged. Ocwen's witness, she testified, well, hey, we just have somebody drive by and determine whether there's anything necessary to do to protect this property and if we determine there's not, we charge the borrower for that. What does the mortgage say? The mortgage says they can charge the borrower when the lender may do and pay for whatever is necessary, necessary to protect the value of the property and the lender's rights in the property. Rolling by in a car and determining that nothing is necessary to do is not doing something that is necessary to protect the value of the property.

Every one of those charges is improper. If y'all look at the payment history submitted, Ocwen's and before

that the previous servicer that Deutsche Bank had Saxon, there's one of those property inspection fee charges practically every month in there. Uhm, it's nuts when you go back there. They're all over the place. And you know what their notes say in that big phonebook thick defendant Ocwen/Deutsche Bank exhibit 28 says? Here's what they say. Always says this. It's the same every time in their entries. Property preservation note. Property found to be occupied as per the inspection results submitted on whatever date it was. Occupancy status is verified by visual. Exterior condition is fair and maintenance recommended is no and violations identified during inspection is no. They all say that. They never did anything necessary to protect the property.

If you go through these payment histories, you're gonna see some more interesting stuff about fees. You'll see a thing they call breach fees. Breach fees. I guess that's for breaching the note and mortgage. They don't say. It just says breach fee and there's a charge for it. Now, they only charge, and they've got those in there too for breaching the note and mortgage, a late charge. That's the only thing just for breaching it that they say they can charge for. That's for a breach, tag on $7.00 every time, breach fee, breach fee, practically

every month. Property inspection fee. Here's another ten bucks. 9.50. Another 10.50 when Ocwen takes it over.

And then we get to some pretty interesting ones. These are ones called corporate advance. I challenge y'all to go back and look through that mortgage and see where it says in there that they can charge for something called corporate advance. I don't know what in the world these people think that these things are, but they sure didn't tell us. We didn't see any evidence even of the invoices, checks or anything for property inspection fees. We don't even know if they really happened. They just have this big record about them. But they certainly let them do something called corporate advance. Those go from anything from 12 bucks to much, much higher amounts. 150 bucks. $1,480.00. They're all over the place.

Y'all remember that $425.00 property valuation expense that Ocwen charged as soon as they took over the loan? 425 bucks property valuation expense on that. Now, the other property inspection things they were just sending somebody to drive by. I guess for the $425.00 they had somebody drive by really slowly and maybe park on the side of the road and get out and actually look at the house for $425.00 and there's nothing in this mortgage document, in this note that allows them to

charge that. Not a thing.

Now, during the whole time that this loan has been in existence only a little over $11,000.00 has been paid down toward the principal out of over $125,000.00 in money paid toward it. We know that from Ocwen's payoff quote document where they say here is the principal that's left, $48,587.90. And the total amount due they say is $53,360.50. There are still $42.00 in property inspection fees that remain unpaid. They say it's got a per diem. A per diem is amount of interest that accrues per day on the loan. Per diem is $13.48 that's been accruing. $13.48 every day since they sent this. Every day.

So let's talk about some numbers here. One of those figures is what I will call profit. How much money it is that has been made off of the making of this loan. The loan is for $60,400.00. Now, taking the $1,241.85 that Ocwen said Tammy had in her calculations bad math, the only thing they took issue with in there, taking that out that means $124,620.96 has been paid on this loan, minus $60,400.00 the principal that was loaned, that leaves you with $64,220.96 is the profit that has been made off of this loan. This loan has been paid more than twice repaid. These people have made their money back and twice again.

All right. Now, how much is owed on this balloon payment today? The payoff quote gives us the figures for that. Again, I'm sorry I don't have a projector. I'll parade this in front of you to tell you what it says. I hope you can read my bad handwriting. So the balloon payment the total as of July 31, 2013, $53,360.50. We know from that document $13.48 per day in interest. How many days since then? Total it up. 776. Today is the 776th day. 776 times 13.48, that's $10,460.48. To pay this off today you need $63,820.98 to pay off this balloon note. It climbs up 13.48 every day.

Looking at the improper charges and total up the property inspection fees, the breach fees, and the corporate advances, some of them have explanations with them. The ones that were for attorney's fees and costs because I know this thing went to foreclosure a few times, I did not include those. I'll give them the benefit of the doubt on those. So back through July of 2010 going back three years before this case was brought because this case was brought the end of June 2013, that totals up to $5,649.50 in improper charges assessed on this loan. Charges that there's nothing in the note or mortgage that says you can charge for.

All right. How do we know that Ocwen and Deutsche Bank through Ocwen applied payments that Tammy made to

those charges? We do some math. We look at the payoff quote and it says there's $42.00 in these property inspection fees and $425.00 in the property valuation expense that needs to be paid in order to payoff this payoff quote. So at least arguably that money hadn't already been paid off through the payments that were made. Looking at how much money there was in charges from the time that Tammy reinstated that brought it current to the end of 2010 through when she reinstated in 2012 to Ocwen right after Ocwen took it over, those charges are not listed on that payoff quote. Something was done to eliminate them. They used Tammy's money to pay them off. It's that amount, that's the conversion amount, $5,164.50. That's how much of that money went to go pay those improper fees.

Now, their position wasn't, hey, we didn't charge fees or anything like that. It was just we're allowed to do it. But they're not allowed to do it. They're not allowed to do it by the terms of the documents they rely on. They're not allowed to do it.

All right. Let's talk about what lawyers call the causes of action, the kind of claims that I'm gonna go back. One, Unfair Trade Practices Act. What have you got to prove to prove that? First of all, you have got to prove an unfair or a deceptive act. We've got that.

With regard to the closing of the loan, Novastar ignored their required responsibilities to protect their borrower in two ways. Giving her the opportunity to choose her closing attorney they did nothing to comply with at all. And making sure that a lawyer was there to close the loan which they similarly did nothing to comply with at all and that was their process so that's our normal process. We closed this loan according to our underwriting guidelines. They didn't put anything in their underwriting guidelines to comply with that.

So all right. As to the improper charges, both Ocwen's witness and Mr. Holtmann, they testified, Mr. Holtmann considers himself to be expert in the mortgage industry. They testified that charging for charges like this for these supposed non existent property inspections, these drive bys that may not even occur, but even if they do aren't really allowed by the mortgage, but that's common. That's industry wide. They do that all the time. That's their process. So is it deceptive? Sure. It makes a borrower think, hey, I have actually got this charge. I'm supposed to pay for it. They're not thinking, hey, the mortgage company is charging me for something they're not allowed to charge me for, but it's sure unfair because they're not allowed to charge for that. It's systematic. It's repeated.

They do it to other people too so it impacts the public interest.

You will hear about that in what the Judge will tell you the law is on that because it's not like these are the only people this has been done. They do this to everybody. And it's not like these are the only people that this has been done to by Novastar because they systematically fell down. To use a big they abdicated. They gave up their responsibilities to do what they needed to do to protect their borrowers across the board with regard to every one of these loans that they made. So it proximately causes. That just means it causes. I mean, you can say if the world wasn't created, none of us would be here. But the world being created and you got in a car accident proximately is just the limited on it. It says causes in the way the law can recognize as the cause of something. And what is that? Cause of damages.

First of all, they loan out this money. They got this big balloon payment to payoff and no way to do it and Pat's still on the debt as well as Tammy even though that's not what they thought that they were doing. Do they have damages? Sure. What is owing debt? Starts here at zero. Now, we talk about damage. You lose something on the positive side going back this way. But that's damage too going from zero this way. You got

less, you're in a negative. You got more negative. So that's damage. That's damage right there.

Another one is conversion. What's conversion? Basically it's the civil equivalent of stealing is what it is. It's taking something you don't have any right to take. It's unauthorized exercise of ownership over something that belongs to somebody else and it can include money. Now, here Tammy parted with this money under the condition that it would be properly applied to this loan, but it wasn't. They took the money and converted it to their own needs without permission.

Also it can be a wrongful detention. Y'all remember them talking about suspense accounts? They put the money in it and just hold it. Nothing in that note or mortgage allows them to do that. It's holding. They don't apply it. What does it mean that they don't apply it? It means that interest accrues on the money that they're not applying to pay down the loan. It means the principal is that much higher because they won't apply the money to the loan. They do that all the time too.

All right. So where are we on our scale? From Deutsche Bank we haven't heard anything. From Ocwen not much of anything. From Novastar we don't even know the people who are around now. Here's all our evidence right here. Our scale is dragging on the floor on this. We

are well past does it tip slightly in our favor.

Here's the thing. These defendants, they just don't care about these people. If they get hurt, that's fine. Whatever. It's okay. Doesn't matter to us. We're making money and that's the only thing that matters to them.

Part of your verdict form is going to include a blank for punitive damages. Punitive damages are not like actual damages. Actual damages just compensate, just get you back to where you would be if they hadn't done the thing to you that they did that the law doesn't allow. But punitive damages are there to send a message. Y'all are here to send a message. Juror means oath person. That's what it means. Cool word. Y'all know you're law enforcement officers? You might not have a badge or a gun, but you are law enforcement officials here today. You are here to enforce the law and part of that is to send a message about how we view the conduct of these people. And let me tell you something. They only speak one language. The language of money. That's all they understand. They're pretty hard of hearing in anything but that language of money.

Tammy's been trying to tell them for years about these problems, about these improper fees. They didn't want to listen to her. They haven't listened to her yet.

They're not listening to her now. So if y'all want to tell these people something in the language of money the only language they understand, you're gonna need to say it really loudly because otherwise they're not going to hear you. Let's call this case what it is. It's predatory lending is what it is. These people have been victims of these defendants for far too long. It's time to turn the tables. Thank you.

THE COURT: Thank you, Mr. Radeker. Mr. Peace.

MR. PEACE: Thank you, Your Honor.

Good afternoon, ladies and gentlemen. My job is to tip those scales back a little bit today.

But first I want to thank you for agreeing to come back. You've heard a long week of testimony and your attention and focus has been much appreciated and hopefully by the end of the day we'll have you back to your regularly scheduled programs.

I wrote down two phrases while Mr. Radeker was talking and the first is this. Selective memory. That's what this case is really about. It's not only that, but it's also about hindsight because as you know, ladies and gentlemen, hindsight is 20/20. It's what makes you stop and go I shouldn't have done that or, oh, I wish I wouldn't have done that or, oh, I wish I would have asked this question.

Now, let's go back and look at the evidence for a second. Mr. Radeker spent a lot of time talking with you about the evidence. I would kind of like to do the same. Let's also talk about Brian Reeve. The plaintiffs want this case to be about Brian Reeve. They want it to be about his bad acts. The problem is those bad acts are that of Brian Reeve. In fact, Mr. Boger testified that the closing attorney. if the lender receives all the documents back completely executed, completely signed, completely witnessed and completely notarized, the lender is going to have no idea that the loan is closed improperly. That job would have lied with Ms. Houck and Mr. Reeve. They received nothing for 20 years or for 15 years.

You also heard Mr. Boger say that he closed over 20,000 loans. That he closed 95 percent of them with a mortgage company. I believe he even testified that a lot of times the lenders don't come. That only ten percent of the time the lender comes. How else is the lender supposed to know other than what the borrowers tell them? What the lawyers tell them. He also testified that loan closings are paper events. Paper being passed back and forth. Documents are being exchanged. He even stated that he leaves the room during closings sometimes. How is he to know what is signed outside of his presence

unless someone tells him? He also testified that he wasn't even there at this closing. He wasn't there on June 15th, 1998 and he even stated, ladies and gentlemen, that sometimes witness lines get missed. Sometimes notary signature blocks get missed. What does he do in that case? He signs them anyway. Why? Because he saw that person sign the document.

He even sends people home with loan packages that aren't completely signed or aren't completely witnessed or aren't completely notarized simply for that fact. But what does he do, he doesn't even call the people back in. And he also testified that this exactly what could have happened in this case. In fact, the documents that have been presented to you tend to show that that is the case. Why? You have only seen one document out of all the documents that I went over with Mr. Boger and all the documents I went over with Ms. Houck none of which she remembers signing, however, again selective memory. She only remembers three things. One, that she's never met Brian Reeve. Number two, that she remembers that she's never seen the balloon note. And number three, hindsight being 20/20 she would not have entered into the loan.

I bring that up because no other documents have been shown to you. No other documents have been shown that attorney Brian Reeve wasn't there. Now, you get all

these documents when you go back there. If you don't mind I would like to take a minute to go over them. I don't want to go over all of them because we would be here for another week.

If you remember, I went over the balloon note with Ms. Owens. If you look at the title of it, it's big, it's bold, it's out there. It says I am what I am. I'm a balloon note. Right underneath it is the warning language that Mr. Boger talked about. It says here, I'm explaining to you what I am. And the plaintiffs' make a big deal about the fact that Ms. Owens' signature is not there, nowhere on this document. Nowhere. I agree to that fact. But Mr. Boger also testified that it's not required. It doesn't have to be there. In fact, he's closed loans before where he doesn't have people sign those signatures where it's not required because it's not there. The only requirement is that on the second page is the signature. That's Ms. Owens' signature. She agreed to it. She signed it. She admitted that her signature was on there.

Not only that, ladies and gentlemen, the plaintiffs have also made a big deal about three little numbers missing on the bottom right hand corner on the second page. But what's also on the bottom of that second page? It says it's a multi state balloon note, page 2 of 2.

It's there on the document that Ms. Owens signed. Why didn't she say anything? Why didn't she ask the question what is a balloon note? Why didn't she ask that with her lawyer? Why didn't she ask that of her mortgage broker? What's also there, continuation of term 6C, the first part of which can be found on the first page. Why didn't she ask her lawyer, why didn't she ask anybody who performed the closing of the loan where is the first page? Where is the first page?

If you will notice, the loan numbers are the same. You will also notice that the first page says it's page 1 of 2 and it also states that it's a multi-state balloon note. Why didn't she say anything? She claims she doesn't remember, but the real reason or the unspoken reason is that it wouldn't help. It's not convenient. It wouldn't help her selective memory.

Now, we also talked about the mortgage and went over it. Her initials are on every single page which Mr. Boger testified to if those initial blocks are there, we have them sign. Also, this is the document that was filed on record. This is not the document that was given to Ms. Owens. We don't know why she was given an unsigned copy. All we know is that's the only document that was found out in the shed on her property about 15 years later. It's the only document. Where is the rest

of them? Why haven't they presented them to you? Wouldn't that help their case? Wouldn't it help their case to show you all these documents and say Brian Reeve wasn't there. Look at all these opportunities he had to sign.

Also you notice that the plaintiffs made a big deal about the fact that the balloon rider box is not checked. You heard Mr. Holtmann testify that it was not required on this loan. You heard Mr. Boger say that it's not required. That he doesn't know if it was required on this loan. Now we also went over the HUD-1 settlement statement. The HUD-1 settlement statement you will remember talked about where the closing took place, law offices of Brian Reeve. Look who signed on the bottom. Brian Reeve. Look who also signed. Patricia Ann Owens.

She also indicated that she signed this document, read the acknowledgment and agreed with its accuracy. And do you know what else it shows? That she received a loan in the amount of $60,000.00. That her first mortgage was paid off. That the mortgage broker that she hired got paid. That the lawyer who was hired to close the loan got paid by her. That a creditor was paid, and that she got paid. Let me say it again. She got paid $6,151.00. $6,151.00 went directly into her pocket. She doesn't remember it. Why? It's easy when you're

claiming that you don't know to say that you don't remember.

Now, I want to back up one second and talk about this mortgage broker for a second. Her and Mr. Holtmann testified that it's industry practice to have the mortgage broker, or for a lender to have no communication with the mortgage broker prior to the closing of the loan. And why is that? Because the mortgage broker can take the borrower somewhere else. Say you talked to my client. Sorry. I'm leaving. We're not closing the loan with you.

Ms. Owens also admitted to signing this financial services agreement. She agreed to pay him $2,000.00 and I want to read what the mortgage broker's services were to be. To provide information on available housing products. To provide information on our debt service and financing capabilities. Additional assistance in processing the loan application. In helping to meet the conditions of the loan commitment. For these what did she pay him? $2,000.00. She paid him $2,000.00 to help her do everything with regard to this loan. That's what this document says. She said, I, Patricia Ann Owens hire you Horace Bookman of Capital City Mortgage, Co., to help me do everything with regard to the loan. That's what it says. That's what it encompasses. She hired him to be

her agent. She hired him to be her fiduciary. To help her close. To help her obtain the loan that she got. It's as simple as that.

Also went over the truth in lending disclosure statement which she signed and agreed to reading it and receiving a copy of it. And what does it show? It shows 179 payments of $529.00. It also shows a balloon payment. It also shows one payment of $49,840.00. This document may be confusing, ladies and gentlemen. The federal government has made it confusing. But what does it show? What is the most prominent thing on this document? It's this. It's set apart by space. So to claim that anything was concealed from her is just disingenuous. That is what this document shows. She signed it. She acknowledged receiving a copy of it.

We also went over the compliance agreement with her which I find interesting because it was also notarized by who? Brian Reeve. My question would be where is the document that he didn't sign? Where is the copy of this document that he didn't sign? Oddly enough Patricia Ann Owens signed it. Now, I think this document is important to point out for this reason. It states essentially, and I'm paraphrasing, that Patricia Ann Owens agreed to report any irregularity, or agreed to assist the lender in fixing any clerical errors in regard to the closing of

the loan.

Her and Mr. Holtmann testified that they knew of no issues. That there were no issues to contact them about. Why? Because it was the responsibility of Mr. Reeve and Ms. Owens to report those issues to them. If she didn't stand up, if she didn't say, wait a minute, something is not right here, how are they to know? That is a responsibility of the borrower. She didn't stand up. She didn't do anything for 15 years. The only time she finally stood up, ladies and gentlemen, is when it was convenient. When her back was against the wall. When it was time for her to fulfill her promises.

We also went over the hardship letter with her and while it doesn't have attorney Brian Reeve's signature on it, I think it's important. You will have all these documents when you go back like Mr. Radeker said. But I think it's important for this reason. If you will remember Ms. Owens testified that's her signature and she agreed with me when I asked what does it say. It says that the loan would not cause any financial hardship to her. Well, was she not telling the truth then or was she not telling the truth now? She agreed to it. This is a representation. A representation that Novastar relied on along with the representations in her loan application that she indicated that she only had one loan. She said

that she was paying $502.00 a month. She never told us that she couldn't make it. She never told us that she couldn't make the $502.00 a month. How are we to know? We are relying on her mortgage broker. Novastar is relying on her to tell us what she can pay and what she can't.

Now, to that fact there's additional evidence, we went over this notice of right to cancel which she admitted her signature is on. Now, the notice of right to cancel as Mr. Boger testified gives the borrower three days to think about it. A cooling off period I believe he called it. A cooling off period. A time to sit and reflect and say, you know, I don't think I want this loan. And there's even a spot for her to sign saying that she wants to cancel. Why didn't she sign it? Why didn't she cancel it? Why did she wait 15 years to try and cancel this loan? Because finally her back was against the wall despite the numerous disclosures that were given to her.

Now, we also heard from Ms. Owens herself who again as Mr. Radeker stated she doesn't remember a lot. Doesn't remember a lot. But she testified that her signature was on each and every one of these documents. I went through every single one of them with her. Nothing. Nothing. She remembers nothing. The only

thing that she remembers is the fact that attorney Brian Reeve wasn't there. You also heard that she is a college educated woman with experience of at least two closings of loans signing these types of documents which Mr. Boger testified to were pretty much standard industry wide. Why didn't she stand up? Why didn't she say anything?

You also heard testimony from Ms. Bailey who also testified that she didn't know what happened. She has no idea what happened on June 15th, 1998. In fact, she testified that her parents bought this piece of property in 1991 and the next thing she knew her mother came to her and said I'm in trouble. That's seven years. In seven years she absolutely knew nothing of what was happening. Nothing of what was going on which is consistent with her testimony that she just assumed the balloon note without knowing what was going on. Lack of due diligence. Lack of due diligence.

Ms. Bailey assumed this loan without ever asking any questions. Without asking her mom. Mom, what's going on? Where are the loan documents? All she was told is Novastar. She called Novastar. What did Novastar tell her? Ma'am, I'm sorry. We can't answer your questions for privacy concerns. I certainly don't want my loan documents disclosed to the public. They have no way of identifying who Tammy Bailey is. All they have is what

she says on the phone. She's presented no evidence to say that her mother gave her any written authorization, gave Novastar any written authorization to talk to her. Just somebody calling on the phone. Hi. My name is Tammy Bailey. Can I have these loan documents? Well, ma'am the only thing we can do is tell you to go down to the county. What does she do when she went down to the county? Just decided, okay, I'll sign it. I'll sign it.

She never asked her mother where are the loan documents. Where are they, mom? I don't know where they are. I don't know what I'm getting into. I want to know what I'm getting into.

You also heard Mr. Holtmann when he testified that everything that Novastar received back was properly executed including the lock in broker demand document that they sent to Capital City Mortgage. Plaintiff Owens' mouth piece. Her spokesperson. Her fiduciary agent. They asked where the closing documents were to be sent. And what did they say? Directly to attorney Brian Reeve.

Now, Mr. Radeker made the claim that Novastar didn't even know or that the lock in broker doesn't even say that Brian Reeve is an attorney. Well, if that's the case, ladies and gentlemen, why are we here? Why are here? There's no unauthorized practice of law here.

There's nothing. In fact, the claim that attorney Brian Reeve is an actual attorney is the entire basis of their claim. You also heard evidence that that document was returned. That we obtained her preference.

Now, Mr. Radeker makes a whole lot about the document that was given to Capital City Mortgage. It's not even signed. It's not even initialed by Novastar. Well, ladies and gentlemen, that's only a half truth about what the law is. The borrower - or the creditor is only required to obtain the preference of the attorney prior to the closing of the loan. It's not required to issue any form. That's simply a manner in which it can be done.

Now, if you remember that lock in broker demand has a date of June 11, 1998. That's four days before the closing of the loan. It's not June 15th, 1998. It's not June 16th, 1998. It's not even June 27th, 2013, the date this lawsuit is filed. It's four days before the closing of the loan. You also heard testimony from Mr. Holtmann that it's industry standard, not necessarily with Novastar, not necessarily with Ocwen, and not necessarily with Deutsche Bank. It's industry standard that the borrower and the lender not have any direct contact prior to the closing of the loan for the reasons I have just stated because the brokers are able to then take the

borrowers somewhere else. The borrowers - or the brokers, the brokers are the ones that hold the power here, not the lenders. The brokers. The fiduciaries. The agents of the borrowers. If anything was done wrong here, it's the broker's fault. It's the attorney's fault. It's not Novastar's fault.

After all this evidence that you have heard and that you will see, what does this all mean? Well, I think it can be best summarized this way. On June 15th, 1998 plaintiff Owens made a promise. A promise to repay the loan that Novastar gave her in the amount of $60,400.00. What did this loan go to do? It paid off her mortgage. It paid the attorney she chose. It paid the mortgage broker she chose. It put money in her pocket and it paid for another creditor. It paid for another debt. Novastar provided all her disclosures. Novastar provided all the documentation. Provided all the representations, and told her what to pay.

What has she done for her part, ladies and gentlemen? She has broken her promise. That's what this case is about. She wants you the jury to say we sanction your breaking that promise. It's okay that you can't live up to your word. That's what this case is about.

Now, to do that she has alleged a violation of the Unfair Trade Practices Act and to be fair Mr. Radeker did

a very good job of explaining to you what the elements of that cause of action are. They have to show an unfair and deceptive act. They have to show an effect on the public interest, and you have to show damages. As to the unfair and deceptive act, ladies and gentlemen, there's been no evidence of that. Like I just said, Novastar provided all the documentation, provided all the representations, and told her what to pay. What more did she want us to do? We did everything that the law requires. We provided all the documentation to the attorney that she chose. If she took issue with what he did, if she takes issue with what the mortgage broker did, that is a claim for them. That is a claim against them. Those are people that she hired to help her. Those are not people hired by Novastar. Those are not employees of Novastar.

Now, as to the second element, you can show an effect on the public interest by capability and repetition and that can be done in two ways that Mr. Radeker told you about. First is that it happened in the past. And second, that the policies and procedures of the company created a potential for repetition that actually fostered and encouraged that unfair and deceptive act.

As to what happened in the past, ask yourselves in

the room during your deliberations what loans have we talked about? What past events have we talked about? My recollection is only one. This loan. This loan. This is the only loan we have talked about. This is the only issue that has come up. This is the only loan that we have talked about. All these other policies and procedures that are allegedly deceptive and unfair, that's Brian Reeve. That's the attorney that Ms. Owens paid. That's the person that Ms. Owens put her trust in. That's not Novastar. That's not the lender.

As to the policies and procedures, there's been no evidence that our policies and procedures fostered any unfair and deceptive act. What you have heard is that our underwriting - that Ms. Owens applied for a mortgage loan that failed underwriting guidelines. We provided her with a loan that was acceptable to her. The only time it became unacceptable is when it became due. Is when she was forced to pay when her back was against the wall. If there's any policies and procedures that are allegedly unfair and deceptive that foster and encourage unfair and deceptive acts, again that's on people that she hired. That's on her mortgage broker. That's on her lawyer. The lawyer that she hired. The only time that she was tricked, bamboozled or fooled is because of her actions and their actions, not because of anything

Novastar did.

Now, as to damages, I don't believe there's been any. Nobody has talked about them. The only time you have heard anything about damages is in this room today when Mr. Radeker talked about them. Mr. Boger never talked about them. Ms. Owens never talked about them. Ms. Bailey never talked about them. There's been not a single piece of evidence to go to damages other than what Mr. Radeker talked about at least as to Novastar. The only time that we have talked about it is today.

Now, what does all this mean? It means that at the end of the day that this is a case about buyer's remorse. It's a case of regret. Unfortunately regret is not a cause of action. Regret is not evidence of a cause of action. It is not an element of a cause of action. It's simply that, regret. And for that reason, ladies and gentlemen, these claims against my client for the violation of the Unfair Trade Practices Act should be dismissed. Thank you.

THE COURT: Thank you, Mr. Peace. Mr. Griffin.

MR. GRIFFIN: Good afternoon, Your Honor. May it please the Court.

THE COURT: Yes, sir.

MR. GRIFFIN: Good afternoon, ladies and gentlemen. I want to thank you for your service as the prior

attorneys did. It's been a long week and we do appreciate it.

As I said last week I represent Ocwen Loan Servicing and Deutsche National Trust Company as trustee in this case. And what I also said last week was what this case wasn't about. It's not about Ocwen Loan Servicing and what it did at the closing or Deutsche Bank National Trust Company as trustee and what it did at the closing, mainly because neither one of those companies were at the closing. If you think about it, most of the week was over what happened on May 15th, 1998, June 15th, 1998, and sometime in 2001. And if you recall the testimony, it was not until the third day before you heard Mr. Holtmann say this loan was sold to Deutsche Bank as part of the real estate trust in 2007 and it wasn't until probably the last witness where he talked about Ocwen coming on the scene in 2012. So all of the information, all of most of the documents, everything that was talked about this week was geared mainly at something where Deutsche Bank and Ocwen wasn't even there.

And then when we start to talk about what Ocwen did or did not do, or what Deutsche Bank did or did not do, for Deutsche Bank I think it's fairly easy. They owned this note as part of this trust that they own. But when asked by Mr. Boger did you see Deutsche Bank with any

involvement, he said no. When asked of Ms. Houck did you see any involvement with Deutsche Bank, she said she had no recollection of them, and the same with Ms. Bailey. Nobody had any interactions with Deutsche Bank. They were just the trustee that manages a real estate trust of which this one note is part of their portfolio.

Everybody has mentioned the scale of justice to you but I'm going to throw it out there as well. It has got to be tipped by the plaintiffs. They have the burden to prove by the greater weight of the evidence that Ocwen did something or that Deutsche Bank did something.

I want to start with Ocwen because there's at least some testimony about, and evidence, about something Ocwen did or did not do. One of the causes of action is conversion and I'll adopt Mr. Radeker's description of what conversion is. The civil version is stealing or theft. Part of that is that they have to prove by the greater weight of the evidence that Ocwen took something that Ms. Bailey or Ms. Houck had a right to. It's got to be identifiable. It can be money. In this case it is money. It's mortgage payments. But there's no evidence that Ocwen took money from Ms. Bailey and applied it to its own use. There's no evidence of a specific payment that was taken by Ocwen and used for a specific use. In fact, there's no evidence that Ocwen didn't have the

right to collect the money. That's the whole point of the mortgage and the note. There's an obligation to pay. Ocwen is Deutsche Bank's agent for servicing this loan and that's exactly what they did. They collected the payments and then they applied it.

As to payments, which payment was it? Ask yourself which was the payment that was taken by Ocwen? They paid these funds. Once they paid the money to Ocwen that was owed, they had no right or title to that money anymore. So it was then for Ocwen to then apply it to this account. The gist, really the claim is that they misapplied or they took it and put it in the wrong place and that that constitutes conversion. I don't think that -- That's not conversion. It certainly is not theft.

So let's talk about the actual payments and how they were applied. If you recall, there were handwritten notes prepared by Ms. Bailey. Defendant's exhibit 15. It looks like this on a ledger from the moment the loan started until the moment the loan matured and she wrote down all of those payments and she also mentioned that she created that looking at her checking account records, Western Union statements, everything she could. It was kind of amazing that over 15 years of payments all there so you had these handwritten notes, you've got her checking account statements and Western Union statements

and from that there was a summary document that some numbers were thrown out. The $21,000.00 was paid as of through 2013 and that the amount that was misapplied or was not applied was 4444.30.

So then on cross examination the first thing we did was look at those handwritten notes. If you recall, there was 2011, 2012, then 2013. So in 2011 there was a sub total, 2012 there was a sub total, and 2013 there was a sub total, and these three sub totals added up to the final number. She also said she made a mistake. Those are the receipts that she could find. I say this to her credit, she wanted to know where her money went, who it went, or to whom it went I guess would be the proper grammar, and how it was applied. So when she reviewed those checking account records that we looked at on cross examination, she agreed - actually the 2011 payments all went to Saxon Mortgage Services. That's what her checking account said on the three payments. That's what the Western Union statement said on the three payments, and that's what the Saxon accounting records also said, that none of that money went to Ocwen. It all went to Saxon and was recorded accurately.

One of the payments actually was written as 1535, $1,535.00. But if you recall, when we pulled the checking account statement we found one for $1,200.00 on

that date and one for $34.00 on that day. None of them said $1,535.00. Again I'm not being ugly and I'm not pointing out that there were errors. It was what the records showed. What her records established where these payments were made. They were paid to Saxon. They were not paid a Ocwen. In fact, it wasn't even the correct amount based on her checking account records and her Western Union receipts.

Ms. Gostebski actually got on the stand and showed in the Saxon payment history exactly where those loans were applied to Saxon. She also showed, we also had a letter, if you recall. She called it the hello/good-bye letter that's required under the Real Estate Settlement Procedures Act. What it is is a letter that says when your loan transfers from one servicer to another servicer, they have to give you notice saying your old servicer was Saxon, your new servicer is Ocwen. And in it there were two days. It said Saxon will only accept payments up to April 1st, 2012 and Ocwen will not begin accepting payments until April 2nd, 2012. The purpose of the letter is to let you know you still owe this money but don't pay Saxon, pay Ocwen. If you pay Saxon, they won't accept it. If you pay Ocwen before this date, they cannot accept it because they're not the agent for whoever owns the loan.

Then on redirect Mr. Radeker kind of revised the damages. He actually had the - if we had the overhead, I could show you. He got up there and was writing a few numbers down, crossing numbers out, kind of adding and subtracting what the amount was and changed the number to say that there was still this new error, this new damage total either 669.39 or 653.39. Now, that was also including this $34.00 payment that went to Saxon according to her business records and according to Saxon's records.

Well, to Ms. Bailey's credit she also said that the last payment she made on July 1st, 2013 was returned to her. Ms. Gostebski confirmed that it was returned and why it was returned. Because according to the terms of the note on July 1st, 2013 the final payment was due. Not a monthly payment, but the final payment, and if they don't receive the full payment, they're allowed to return it and that's what they did. So that 671.89 was returned to her.

Now, I just point this out to mean that there was no payment made to Ocwen that wasn't applied either under her calculations or under our calculations because if you recall, we put that written piece of paper up with Ms. Gostebski and went through each of the payments made to Ocwen which have only been 2012 and 2013. We checked

off every single payment based on our payment records and her handwritten notes. Again, you have the last payment that was returned to her 671.89 so there was no misapplied payment. There was no money that went to Ocwen that we didn't apply to the account.

As I said, it's really a matter of simple arithmetic and that's why I encourage you when you're deliberating to look through the payment histories that were provided. The plaintiff put up two payment histories. And ours what's called a phonebook, probably an accurate description of our payment history because it's almost 15, 16 months of every transaction, every phone call, every letter, every payment, every time we had to talk to a vendor, every time we had to do a property inspection, every time anything that went on that account is in that book. And I ask you to look at that and compare their 16, 17, and 18 with our payment records and compare it to the handwritten records to what the testimony was.

Like I said at the beginning of the week, it's a matter of arithmetic. Look closely at the accounting. Each and every payment testified to was backed up with an accounting entry. Each and every fee charged testified to is backed up with accounting. It conclusively proves through her own testimony that we have not misapplied any payments or not applied any payments or that she has any

damages from us misapplying a payment or not applying a payment.

Now, as to the fees there's been a lot of discussion about drive by fees, inspection fees and these various and sundry fees. Mr. Holtmann testified as the mortgage banking expert that it was common practice in the industry to assess fees under an account for certain things that the servicer is required to do. And if you remember during the first week I said one of the things we are required to do is to protect the collateral under paragraph 7 of the mortgage, pay any and all necessary to protect the value of the collateral.

One of the things about the value of the collateral is the condition of the home. Whether or not it's abandoned. Whether it's occupied. Whether or not it's destroyed. What's the condition of the yard and all these things both Mr. Holtmann and Ms. Gostebski testified we're allowed to do under the terms of the note and the mortgage and industry practices that say we go out every month to make sure you're still living in the home because if you're not living in the home, an unoccupied home can be a nuisance. An unoccupied home can be broken into. An unoccupied home goes into disrepair. We go out and we look at it. Is it still occupied? Do we need to cut the grass? Do we need to go

in because it's abandoned and put a lock on the door? Has a window been busted out? These are all things that they are allowed to do under that paragraph 7 to protect the value of the collateral.

The other thing I would like you to do is actually compare the payment account histories. Look, there's a column that shows where all these fees were assessed. If you go to the bottom, the column has been added up. None of the payment records show that Ms. Bailey's money was applied to any of these fees either inspection fees, the appraisal fees, any of the fees. If you look and you read through these payment histories and think about the testimony from Ms. Gostebski, everything was applied to principal, interest and escrow which was taxes and insurance. None of it went to any of these fees which is why they end up on the pay-off statement. The pay-off statement is the amount to pay off the loan at the end of the maturity of the loan or pay it off as of a date certain. You don't have to necessarily wait for a balloon payment. You can pay your loan off today.

All of those fees are on there because none of them were actually paid by Ms. Bailey and that's why they're owed at the end. So again there's been no evidence or testimony that shows right to a particular fund that Ocwen did not have the right to use the funds that were

given to it under the obligation to pay or that Ocwen did something illegal or wrong with it. Certainly not to the level of theft.

Now, there is also a claim for unfair trade and deceptive practices and again it's been explained about you have got to violate the statute and there's got to be damages. It's got to be deceptive and unfair. Sometimes they use the word offensive to public policy, immoral or unethical. So what was alleged? Now, it can't be related to the closing and the reason is neither Ocwen nor Deutsche Bank were there so there's no deceptive or oppressive action by Deutsche Bank or Ocwen related to the closing. Remember, 1998, 2001, 2007, 2012 and we're over here. We had nothing to do with this over here. No one has attributed any action to us as to the closing or the assumption that said, well, Ocwen should have done this or Ocwen didn't do that. Deutsche Bank should or should have not done something related to the closing or the assumption.

So it can't be the closing. So it's a misapplication of payments. Well, it can't be related to the payments because we showed every payment was applied properly. There was no payment that was misapplied. There was no proof that we did anything outside the terms of the note and the mortgage. If it's fees, then it's

which fees? Which fees are deceptive? Which fees are oppressive or illegal? It can't be late fees because the mortgage and the TILA say we can charge late fees after the 15th of the month. And as we went through every payment with Ms. Bailey and Ms. Gostebski, there were times that she paid late. No harm. No foul. She paid late. When you pay late, you pay a fee. When she paid on time, she wasn't assessed a late fee. That's just how it works.

Now, again back to fees. I hate to spend so much time on fees but that's really the heart of what is unfair and deceptive. Was there a fee that was unfair and deceptive? Well, according to the mortgage if you miss one or more of the payments on your mortgage, your mortgage is in default. If it's in default under paragraph 7 of the mortgage, we can do, I think the direct quote is do and pay for whatever is necessary to protect the value of the property and that any amounts that we pay to do these things are added to the debt. If you go into foreclosure, you can get attorney's fees, property title search fees and other charges for mailing related to the foreclosure.

I think this went into foreclosure four times over the 15 years. I don't mean that to say -- it's unfortunate but when that happens, we're allowed to do

certain things. Again when you compare these payment statements, see which fee was paid for. See where a payment was not applied to principal, interest, taxes and escrow.

So there's no evidence of damage because she hasn't paid those fees. She wasn't denied ability to have those fees applied to her account. There's no evidence of an unfair act. There's been no evidence of damages caused by Ocwen. There's been no evidence of damages caused by Deutsche Bank. There's been no evidence that Deutsche Bank did or did not do anything throughout the entire week you have been here.

And I just have one last point, this claim against Ocwen. As you consider the evidence, where was the proof, evidence or testimony pointing to a payment that we failed to apply? As to Deutsche Bank where was the evidence or testimony that said that Deutsche Bank did something wrong or that Deutsche Bank stole money? There's nothing there.

I do want to point out one additional document to you because I think this goes really to the heart of what happened at the closing. There was a discussion of the one big payment that they have to make. I would ask you to look at plaintiffs' exhibit 7, the truth in lending disclosure statement. I've highlighted it. Right in the

middle of it it says I'm going to get a loan where I pay 179 payments of $529.61, and then on July 1st, 2013 I'm going to make a payment of $49,840.28. This was signed by Ms. Houck. It says at the bottom of it I acknowledge receiving and reading a completed copy of this disclosure. I fail to see how what happened with this statement 12 years later can be used as a way to make my client pay money -- I just fail -- for something that's described as unfair or deceptive.

If you look at the payment histories that were produced on the last page, it doesn't talk about - it doesn't have any numbers on it. What it does have though is a description of the fees. So it says item, when charged and it describes it. So a late fee, assumption cost, subordination fees, satisfaction fee, property inspection fees, certified mail fees, broker's price opinion. All of these fees are explained as to why we, why Ocwen puts fees on the account. So how can this be deceptive or unfair when we explain the fee and show the fee on the account? How can there be a damage when none of these fees have actually been paid?

Now, just because no one is going to jail because it's a civil trial doesn't mean I don't think this is important. It is very important. It's also very serious because of what we are being accused of doing, of being

an unfair and deceptive company, of stealing. I'm not asking you that you let somebody off the hook or get away with something if they have done something wrong. If the evidence shows somebody did something wrong, what was it, the badge and - the police officer without the badge, you do have a duty here today to find out if something was done wrong and take according action. What I'm asking you to do is you don't punish Ocwen or Deutsche Bank for something it didn't do.

The Judge mentioned, he's going to give you this special verdict form where he's going to divide all the defendants out and there's a reason for doing that because you have to consider the evidence as to each claim and as to each party independently. What did Ocwen do that constitutes conversion? Civil theft. What identifiable fund did Ocwen steal that it did not have a right to? What did Ocwen do in applying the payments that was not in accordance with the mortgage or the note or the mortgage industry as described by Mr. Holtmann? How was Ms. Bailey damaged by what Ocwen did or didn't do? As to Deutsche Bank it's the same way. What did Deutsche Bank do that's an unfair trade practice that was deceptive that caused Ms. Bailey to incur some type of loss?

So what I ask you to do is go back, look through the

documents, consider the evidence and I think when you weigh it as to Ocwen and Deutsche Bank they have not made it past the 50 yard line. As to Deutsche Bank there's been no evidence that they did anything. As to Ocwen everything suggests that Ocwen did exactly what it was supposed to do when it was supposed to do it.

I thank you for your time.

THE COURT: Thank you. Thank you very much, Mr. Griffin. Mr. Radcker.

MR. RADEKER: Thank you, Your Honor.

All right. If Deutsche Bank doesn't do anything wrong, that's true. They hired somebody to do that. They hired Ocwen to do it. If Ocwen did it, Deutsche Bank did it. Ocwen is working on Deutsche Bank's behalf. Deutsche Bank is just a bunch of Wall Street bankers as Mr. Holtmann testified who sit up in their offices and let Ocwen run the show for them. But it's for them is the operative words. For them. So if Ocwen did it, Deutsche Bank did it. They let them charge improper fees, push people into default.

So they say, well, you know, what's - what's the money that we took? Okay. Tammy reinstated early in 2012 with Ocwen and paid some $7,900.00 and change to Ocwen. Out of that money looking at the documents it looks like $5,164.50 of that went to improper fees and we

excluded late fees. We excluded fees that the mortgage said you could charge from that calculation. $5,164.50 of it was to fees that were owed at that point. Those got paid off through the reinstatement, but they never should have been charged to begin with. They took the money and used it for something they were not allowed to use it for. That's the essence of conversion.

And it's certainly an unfair trade practice to routinely charge borrowers fees that the mortgage doesn't authorize. As I was listening to Mr. Griffin talk I thought of a phrase. Everybody's doing it. Mr. Holtmann testified, well, it's an industry wide practice. Everybody's doing it. It doesn't matter that everybody's doing it. It's still illegal. And, in fact, the fact that everybody's doing it in the mortgage banking world is all the more reason for y'all to send a message to these people about why it's not all right to do. You know, what the mortgage says you can do is not discover the condition of the property and charge the borrower for that. It's do what's necessary to protect it. All they ever said that they did was determine nothing was necessary to protect it, but they charge for it anyway for the property inspection fees. He certainly didn't tell you how it's necessary to protect the property to have somebody drive by and look at it. It's not.

Now, another thing, he made a big deal about Tammy's calculation errors. She got it wrong when Ocwen took over servicing the loan. We already gave that to them in our calculations. We said, all right. You are right about that. You know what difference that produces in the whole thing? It's like 1200 bucks is like the difference in the whole thing. There's still over $124,000.00 in payments that have been made on this loan and a lot more than that that's been taken for fees that are not allowed by the note and the mortgage. They're not allowed by the note and mortgage. That's the source of any right that they have got to take money and apply it to these fees, but that's what provides them to do what they did.

Now, the Judge will tell you that the assignee, that's the person to whom the mortgage is assigned, takes the mortgage subject to all the infirmaties in and against the assignor, the party that signs the note. The assignments are already in evidence that show Deutsche Bank got this from Novastar. That's some of the first exhibits that are in and we didn't talk about them a lot in trial because they just say what they say.

Now, when Mr. Griffin talked to you, he didn't take as much time as Mr. Peace did. Mr. Peace got up here to talk. I got a little mad when Mr. Peace was talking.

I'll tell you why. And he's got a job. His job and the other lawyers' job is to keep your verdict down. That's their job, keep it low. They would like for it to be nothing, but they at least want it to be small. That's their job, to keep your verdict down. That's what they're here to talk to you about. That's all they can talk to you about is trying to keep it low.

So all right. Let's talk about what Mr. Piece said. His accusations of selective memory. Look, there has been no evidence presented, testimony, documents, otherwise that anything happened in this case other than the way that we say that it did happen. Nobody got up here and testified Brian Reeve was there. Nobody said that. Nobody got up here and testified, yes, this balloon note document was adequately explained to this lady. Nobody testified to that. And this case is about Novastar because it's Novastar's failure to follow the law on what they are obligated by law to do, to afford protection to their borrower/customer that allowed this situation to happen. It is definitely about them. If they had simply done what they were supposed to do, it's unlikely that this would have ever occurred.

In fact, they didn't do anything with any of their loans because that was their process, their underwriting guidelines to make sure that they did what they were

supposed to do to protect their borrowers ever. You have to look at the whole picture here. You can't just look at each little item here. Like I said in the beginning there's lots of little items of evidence in this case, but they all add up. If I were to take one of these cups, it doesn't weigh much. If I take a hundred, it's gonna weigh some more. If I take a thousand, it's sure gonna weigh a lot at that point. The evidence that is here pushes us past the 50 yard line well beyond it into the end zone. The scales are like this (indicating) because what's missing is evidence from the other side to tip it back that way. It's just not there.

About the only thing that they can say on this is Brian Reeve's signatures appear on this document. This is a man we know we cannot trust. We know we can't trust him. He says in his deposition, yeah, I closed this loan. No. No. I never even met her. I wasn't there. We know that. This balloon note document on the first page he says, yeah, look at this. This tells her everything. There's no mark on it to indicate that she saw it, unlike everything else that they point out, to indicate that she ever saw the first page of that loan. We conceded that. Mr. Peace said, yeah. Sure. You're right about that. And there's no evidence that she agreed to this balloon note document.

In fact, the only evidence is that Pat never would have done this and did not know about the existence of this balloon note page until 2013. That's it. Nobody came in here and offered a different version of the truth than that because there isn't one. There's nobody to say that.

All right. Here is another thing about their selective memory comment. They say, oh, it's convenient for them to say this now. Let me ask y'all and answer for yourself. We're not allowed to have conversation. But do you think that either Pat or Tammy lied to y'all about anything? Do you? Ask yourself that when you go back there. Do you think that they lied to you? Because that's what Novastar is asking you to say that they did, is that they lied to you. Do you think that Pat lied to you when she was up on the stand crying? Was she lying to you?

Brian Reeve on the other hand, he's a proven liar. So to the extent Novastar asks you to trust him consider that. And Pat didn't get $6,100.00 and change. She testified if she did, she would remember it. If you were in her situation, you would have remembered it too. You're broke, struggling to make ends meet and get 6100 bucks, that's a pretty memorable event right there. So she didn't get the money out of the closing. Maybe

somebody did.

They said, well, Tammy assumed the loan without asking any questions. That's not even what the evidence shows. Actually the evidence showed that Tammy asked Novastar for the loan documents and Pat told them it was okay for them to tell her the loan terms and give her the loan documents and they didn't do it and sent her down to the county to look at documents that didn't tell her about the existence of the balloon note. That's evidence in this letter. That's evidence of deception is what that is.

All right. I mean, I don't think y'all are stupid. Does Novastar? I mean, they said something like, you know, like there's really no evidence here that Brian Reeve is a lawyer. Actually there is. There was Brian Boger's testimony, but he is and it's on some of their documents. But do they really even expect y'all to buy that?

The whole reason that Novastar never had any contact with their borrowers is because they can't be bothered to have contact with their borrowers and they don't really care about what happens to them. They're just making a product to sell. Contacting the borrowers kind of gets in their way. That's why they didn't do it consistently.

Mr. Peace can't just make evidence disappear by

saying that it doesn't exist. I'm not even going to go over every time during his argument that he said, well, there's no evidence of that. There's no evidence of that. There's no evidence of that. Actually there's evidence of every one of those things. Y'all remember it. He can't make it go away just by saying it's not there.

All right. Let's talk about this verdict form that y'all will get. That's how you're gonna have to answer the Judge's questions. All right. If you find that we have tipped the scales ever so lightly in our favor, if you think that's what the evidence shows you in this case, then on each one of the questions where it says find for the plaintiffs, check for the plaintiffs on that. That's how to do that. How to put it in balance. How to make the actual damages balance out, to compensate, that's what that's there for. $63,820.98 appears to take care of the balloon note. The Unfair Trade Practices Act claim against Novastar would put that in balance right there. That would take care of that balloon payment.

On the improper charges on the Unfair Trade Practices Act cause of action against Deutsche Bank and Ocwen $5,649.50. That would put it in balance. On the conversion, $5,164.50. That would put it in balance.

You know what really, really, really got to me about what Mr. Peace says is that Pat was supposed to stand up and say something when Novastar did not meet its obligations to put her in a position to be protected. I think y'all know how the scales go. Thank you.

THE COURT: Thank you. Thank you very much, Mr. Radeker.

Ladies and gentlemen of the jury, the clerk has informed me that your lunches are here. I think rather than -- We have been out here for a while now and my charge to you is probably going to take 40 minutes so I think what we'll do is we'll take our luncheon recess. Whenever you are through eating, you just knock on the jury room door and let the bailiff know and we'll reassemble. If it's 30 minutes, if it's 40 minutes or whatever time you need. Do not discuss the case during this luncheon recess. Thank you. Thank you very much. You may go to lunch.

(Whereupon, the jury entered the jury room for their luncheon recess at 1:00 p.m.)

THE COURT: Mr. Radeker, Mr. Peace, Mr. Griffin, have y'all had a chance to look at the proposed verdict form?

MR. RADEKER: Yes, we have, Judge.

MR. PEACE: Yes, Your Honor.

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

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.

CERTIFICATE OF COUNSEL

I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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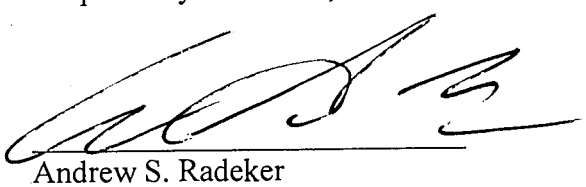
SC Court of Appeals

Respectfully submitted,



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October 10, 2018