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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 III

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2018-000436
Circuit Court Case No. 2016-CP-32-03572

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

Respondent/Appellant,

v.

Patricia Owens a/k/a Patrica 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.

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the trial court erred in finding foreclosure to be a compulsory counterclaim in a prior action under SCRCP 13(a), and subsequently granted summary judgment to Bailey and Owens, where the prior action focused primarily on the loan closing, and where foreclosure would not have affected Bailey and Owens' ability, in the prior action, to pursue, enforce, and obtain damages from claims they asserted relating to the loan closing?

2. Whether the trial court erred in rigidly and mechanically applying the doctrine of res judicata to preclude Deutsche Bank's foreclosure claim where doing so conflicts with state and federal policy; where Deutsche Bank – at the time of filing its answer in the prior action – was in communication with the borrower about loss mitigation options to avoid foreclosure, consistent with state and federal policy guidance; and where Bailey and Owens, in any event, did not even forecast to Deutsche Bank they were seeking a particular remedy that foreclosure might affect?

3. Whether the trial court, even upon finding foreclosure to be compulsory counterclaim in the prior action and applying res judicata, nevertheless erred in finding Deutsche Bank liable under S.C. Code Ann. § 29-3-310 for failure to record a mortgage satisfaction upon demand, where Deutsche Bank's obligations under that statute are conditioned on receipt of full payment or satisfaction of the mortgage, and where Bailey and Owens never made full payment and never satisfied the mortgage?

4. Whether the trial court erred in denying Deutsche Bank's motion for summary judgment with regard to Bailey and Owens' counterclaim under the Attorney Preference Statute where the alleged violation occurred approximately eighteen (18) years ago, making the claim time-barred, and where Deutsche Bank, in any event, fully complied with the statute by providing Owens with an attorney preference form?

STATEMENT OF THE CASE

A. Deutsche Bank's Foreclosure Action and Bailey and Owens' Affirmative Defenses and Counterclaims.

On or about June 15, 1998, Appellant/Respondent Patricia Owens, a/k/a Patricia Ann Owens ("Owens") executed a Fixed Rate Note ("Note") in favor of NovaStar Mortgage, Inc. ("NovaStar") in the amount of $60,400. (R. p. 80, ¶ 11, lines 1–4). The Note was secured by a mortgage ("Mortgage") on the property located at 111 Andrew Court, Gaston, SC 29053 (the "Property"). (R. p. 80, ¶ 12, line 1–p. 81, ¶ 12, line 5). The Mortgage was recorded on July 2, 1998 in Mortgage Book 4743 at page 0330, in the Lexington County Registry. (R. p. 81, ¶ 13, lines 1–2).

NovaStar subsequently assigned the Mortgage to Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1. (R. p. 81, ¶ 14, lines 1–2). This assignment was recorded on October 12, 2011 in Mortgage Book 15105 at page 248, in the Lexington County Registry. (R. p. 81, ¶ 14, lines 2–3). Thereafter, the Mortgage was further assigned to Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Home Equity Loan Asset-Backed Certificates, Series 2007-1 ("Deutsche Bank"). (R. p. 81, ¶ 14, lines 3–5). This assignment was recorded on May 15, 2012 in Mortgage Book 15513 at page 296, in the Lexington County Registry. (R. p. 81, ¶ 14, lines 5–6).

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

2016. (R. pp. 78–84).[1] The Complaint alleges, in relevant part, that the loan was in default and due on July 1, 2013, and that Deutsche Bank, as the holder of the Note and Mortgage, was declaring the entire balance of the principal and interest due and payable at once. (R. p. 82, ¶ 22, line 1–p. 83, ¶ 22, line 2). On November 29, 2016, the trial court entered an Order of Reference, referring the matter to The Honorable James O. Spence, Master in Equity for Lexington County. (R. pp. 51–52).

On or around December 9, 2016, Bailey and Owens filed a document styled Amended Answer and Counterclaim ("Answer and Counterclaims"). (R. pp. 104–115). Owens and Bailey alleged three separate counterclaims in the Answer and Counterclaims: (1) A declaratory judgment that Deutsche Bank holds no mortgage on the Property; (2) Failure to record a satisfaction of the mortgage within three months of receiving a demand, pursuant to S.C. Code Ann. § 29-3-310; and (3) Violation of S.C. Code Ann § 37-10-102 (the "Attorney Preference Statute"), for an alleged failure to give Owens an opportunity to select an attorney to represent her at the closing of the Mortgage. (R. p. 109, ¶ 58–p. 110, ¶ 70). Owens and Bailey also asserted several affirmative defenses, including res judicata and/or collateral estoppel, laches, unclean hands, waiver, and setoff/credit. (R. p. 107, ¶ 30–p. 109, ¶ 57). The defenses of res judicata, waiver, and laches, as well as two of Bailey and Owens' counterclaims, all flow from Bailey and Owens' claim that Deutsche Bank should have, but did not, assert foreclosure as a counterclaim in a prior lawsuit

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[1] Deutsche Bank named Bailey as a defendant in the foreclosure action because Bailey claims an interest in the Property by virtue of a deed from Owens purporting to convey to Bailey an interest in the Property. (R. p. 83, ¶ 23). Deutsche Bank named the SCDMV as a defendant in the foreclosure action because Deutsche Bank sought reformation of the Mortgage to encumber a manufactured home on the Property, the SCDMV is responsible for issuing Certificates of Title for manufactured homes in the State of South Carolina, and Deutsche Bank sought a court order requiring the SCDMV to issue a new certificate of title pertaining to the manufactured home to the successful bidder at the eventual foreclosure sale, free and clear of all liens. (R. p. 78, ¶ 4; p. 79, ¶¶ 6–9; p. 84, ¶ F).

brought by Bailey and Owens against Deutsche Bank and other defendants in 2013 (hereinafter the "2013 Action").

B. Bailey and Owens' Prior Lawsuit against Deutsche Bank and Other Defendants in 2013.

Back on June 27, 2013 – four days before the Note was due to mature – Bailey and Owens filed a lawsuit against Deutsche Bank, Deutsche Bank's predecessor in interest NovaStar, and six other defendants in Lexington County, alleging four causes of action. (R. pp. 380–396). Only two of the four claims asserted in the 2013 Action were asserted against Deutsche Bank: (1) violation of the Attorney Preference Statute, and (2) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann. § 39-5-10, *et seq.*, premised on the alleged violation of the Attorney Preference Statute. (R. p. 384, ¶ 33–p. 385, ¶ 44). Bailey and Owens alleged in that complaint that "[n]o attorney supervised the closing of the loan subject to this case," and that "[t]he loan subject of this action was unconscionable and was induced by unconscionable conduct." (R. p. 384, ¶¶ 35–36). Bailey and Owens' allegations against Deutsche Bank in the 2013 Action related to the closing of the mortgage. (R. p. 384, ¶ 33–p. 385, ¶ 44). The main question in the 2013 Action, as it related to Deutsche Bank, was whether Deutsche Bank's predecessor in interest – NovaStar – complied with the South Carolina Consumer Protection Code when conducting the closing by ensuring that Owens had an opportunity to select an attorney of her choosing.

In terms of relief sought against Deutsche Bank, the complaint in the 2013 Action sought "all relief available under S.C. Code Ann. § 37-10-105." (R. p. 384, ¶ 37; p. 387, ¶ e). The complaint made no express request to rescind the mortgage, nor did that complaint ask the Court to declare the mortgage void.

Shortly before filing its answer in the 2013 Action, Deutsche Bank's loan servicer, on August 23, 2013, sent Owens a letter informing her of loss mitigation options to avoid foreclosure,

including options for a loan modification under the Home Affordable Modification Program, a proprietary modification, a short sale, and a deed-in-lieu of foreclosure. (R. p. 242, ¶ 16; pp. 262–263). Approximately one month later, Deutsche Bank answered the complaint filed in the 2013 Action and asserted a handful of affirmative defenses, but it did not assert any counterclaims. (R. pp. 397–406). After a trial, a jury found in favor of Deutsche Bank on September 15, 2015. (R. pp. 370–371).[2]

C. The Parties' Dispositive Motions and the Court's Summary Judgment Order in the Present Underlying Action.

Returning to the present underlying proceedings, Deutsche Bank, on or around February 10, 2017, filed a motion to dismiss Bailey and Owens' counterclaims, which the trial court denied on May 30, 2017. (R. pp. 53–68). Following a period of discovery, the parties filed cross motions for partial summary judgment.

Deutsche Bank moved for summary judgment on all three of Bailey and Owens' counterclaims, renewing the arguments it asserted in its prior motion to dismiss. (R. p. 2, lines 17–18). As to the declaratory judgment counterclaim, Deutsche Bank argued that foreclosure was not a compulsory counterclaim in the 2013 Action. (R. p. 167, ¶ 9–p. 168, ¶ 13). Relatedly, Deutsche Bank sought summary judgment on Bailey and Owens' § 29-3-310 counterclaim, arguing it was not required to record a satisfaction of the mortgage because it had not received full payment or satisfaction of the underlying debt. (R. p. 168, ¶ 14). And finally, Deutsche Bank moved for summary judgment on Bailey and Owens' counterclaim under the Attorney Preference Statute because the claim was barred by the applicable statute of limitations, because NovaStar

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[2] According to the verdict form from the 2013 Action, the jury found in favor of Deutsche Bank on Bailey and Owens' claims for violation of the SCUTPA (which was asserted against Deutsche Bank) and for conversion (which was not asserted against Deutsche Bank). At least with respect to Bailey and Owens' claim against Deutsche Bank for violation of the Attorney Preference Statute, the jury apparently issued no ruling. (R. pp. 370–371).

(and not Deutsche Bank) originated the loan, and because Deutsche satisfied its obligations under the Attorney Preference Statute by providing Owens a form titled "South Carolina Notice of Rights Concerning the Selection of an Attorney and Insurance Agent." (R. pp. 168–169, ¶ 15). Bailey and Owens moved for summary judgment on Deutsche Bank's claim for foreclosure, on their counterclaim for a declaratory judgment, and on their counterclaim premised on § 29-3-310 for failure to record a satisfaction of the mortgage following a demand. (R. p. 2, lines 18–21).

Following a hearing attended by the parties on September 19, 2017, the Court entered its order on the parties' motions for summary judgment on November 28, 2017. (R. pp. 1–41). Determining that Deutsche Bank's foreclosure claim was a compulsory counterclaim in the 2013 Action and was now barred by the doctrine of res judicata, the trial court granted summary judgment to Bailey and Owens on Deutsche Bank's foreclosure claim and on Bailey and Owens' related declaratory judgment counterclaim. (R. pp. 23, 27, 36). In light of this determination, the trial court dismissed Bailey and Owen's counterclaim under the Attorney Preference Statute, noting that "relief would come into play only if Deutsche Bank were to prevail on its foreclosure claim" and that "[s]ince the foreclosure claim is barred by res judicata," the Attorney Preference Statute counterclaim "cannot survive." (R. p. 35, lines 18–22).

With regard to Bailey and Owens' § 29-3-310 counterclaim relating to Deutsche Bank's refusal to record a satisfaction of the mortgage within three months of such a request, the trial court denied Deutsche Bank's motion and granted, in part, Bailey and Owens' motion. (R. pp. 36–37). The trial court concluded that the mortgage was deemed satisfied, but that Deutsche Bank's three-month period of time within which to record a satisfaction pursuant to § 29-3-310 did not begin to run until the date of the trial court's summary judgment order. (R. pp. 36–37). Calculating a three-

month period of time, the trial court ordered Deutsche Bank to record a satisfaction of the Mortgage on or before February 23, 2018. (R. p. 37).

D. Bailey and Owens' Motion to Alter or Amend, and Deutsche Bank's Motion to Stay.

Following the Summary Judgment Order, Bailey and Owens filed a motion asking the trial court to alter or amend its judgment, and Deutsche Bank subsequently filed a motion to stay a portion of the judgment. (R. p. 42). Specifically, in their motion to alter or amend, Bailey and Owens asked the trial court to rule that Deutsche Bank's three-month period of time within which to record a satisfaction of mortgage ran from the time of its demand (as opposed to running from issuance of the Summary Judgment Order), that the time period had therefore expired, and that they were entitled to money damages. (R. p. 46). In its motion to stay, Deutsche Bank sought an additional three-month period of time to record a satisfaction of mortgage (beyond that provided for in the Summary Judgment Order) to fully and fairly evaluate its options for an appeal. (R. p. 48).[3]

The trial court denied Bailey and Owens' motion to alter or amend, and it granted Deutsche Bank's motion to stay. (R. p. 49). As a result, Deutsche Bank's time for compliance was extended for an additional time period through and including May 10, 2018. (R. p. 49).

E. The Parties' Notices of Appeal and Subsequent Motions During the Appeal.

On or around March 8, 2018, Bailey and Owens filed a notice of appeal to this Court, indicating they are appealing both the Summary Judgment Order and the Order on Motion to Alter or Amend and Motion to Stay. (R. pp. 364–366). On or around March 13, 2018, Deutsche Bank

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[3] Because Bailey and Owens' motion to alter or amend extended the deadline for both parties to file a notice of appeal, Deutsche Bank would have had to record a satisfaction of mortgage prior to its deadline to file a notice of appeal, thereby enabling Bailey and Owens to appeal without the risk of a cross-appeal from Deutsche Bank, whose appellate claims relating to foreclosure would then be moot. (R. p. 48).

filed a notice of appeal with this Court, indicating that it is appealing from the Summary Judgment Order. (R. pp. 367–369).

Because the trial court's order requiring Deutsche Bank to record a satisfaction of mortgage on or before May 10, 2018 is injunctive in nature, it is not automatically stayed by the parties' instant cross-appeal. Therefore, Deutsche Bank, on or around March 26, 2018, filed a Motion for Writ of Supersedeas with the trial court, asking the trial court to stay – for pendency of the parties' appeal – the order requiring Deutsche Bank to record a satisfaction of mortgage. Following a telephonic status conference with the trial court on April 12, 2018, the parties participated in a hearing before the trial court on April 30, 2018. The trial court stayed Deutsche Bank's requirement to record a mortgage satisfaction pending issuance of a more formal order on the Motion for Writ of Supersedeas. (R. p. 69). On May 9, 2018, the trial court issued a formal Order on Motion for Writ of Supersedeas, in which the trial court granted Deutsche Bank's motion and stayed Deutsche Bank's requirement to record a mortgage satisfaction pending the outcome of this appeal, subject to the requirement that Deutsche Bank – by May 29, 2018 – enter into an escrow arrangement (or similar arrangement) and hold a fully executed mortgage satisfaction in escrow during the appeal. (R. pp. 71–75). As of the date of this filing, Deutsche Bank's deadline to comply with the terms of the escrow requirements has not yet passed.

SUMMARY OF THE ARGUMENT

The trial court granted Bailey and Owens' motion for summary judgment and denied Deutsche Bank's motion for summary judgment based on its legal conclusion that foreclosure was a compulsory counterclaim in a prior lawsuit brought by Bailey and Owens against Deutsche Bank and other defendants. The trial court erred in reaching this conclusion and in subsequently ruling on the parties' cross motions for summary judgment consistent with this erroneous legal conclusion. Under applicable South Carolina law in the context of mortgage lending, a counterclaim is compulsory where it would serve as a defense to, or otherwise affect the enforceability of, an underlying claim. Bailey and Owens' claims against Deutsche Bank in the prior lawsuit are primarily limited to violation of South Carolina's Attorney Preference Statute, S.C. Code Ann. § 37-10-102, and violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, premised on the alleged violation of the Attorney Preference Statute. A foreclosure counterclaim – even if successfully pursued and enforced – would not prevent a borrower or mortgagor from pursuing, enforcing, and seeking damages flowing from violation of these statutes. Therefore, foreclosure was not a compulsory counterclaim in the prior lawsuit, meaning that the trial court erred in reaching that conclusion and erred in ruling on the parties' cross motions for summary judgment consistent with that erroneous legal determination.

Even if the trial court were correct that foreclosure was a compulsory counterclaim in the prior lawsuit, the trial court erred in applying res judicata to preclude Deutsche Bank's foreclosure action and in subsequently ruling on summary judgment consistent with that decision. Res judicata should not be applied in a rigid and mechanical manner. Where, as here, concerns of equity, justice, and policy override the aims of res judicata, the Court should not apply the doctrine of res judicata.

Even if this Court determines the trial court was correct in applying res judicata, the trial court nevertheless erred in finding Deutsche Bank liable under S.C. Code Ann. § § 29-3-310. The obligation of a mortgagee to record a mortgage satisfaction under that statute is contingent on receipt of full payment or satisfaction of the mortgage. Deutsche Bank never received full payment and never received satisfaction.

ARGUMENT

I. The Trial Court Erred in Concluding that Foreclosure was a Compulsory Counterclaim in the 2013 Action.

All of the decisions made by the trial court in its Summary Judgment Order – and therefore all of the claims at issue in this appeal – hinge on a legal determination of whether Deutsche Bank was required to assert foreclosure as a counterclaim in the 2013 Action. Only by first addressing this preliminary legal issue can the Court properly construe and evaluate the trial court's Summary Judgment Order at issue in this appeal. For the reasons set forth below – both individually and collectively – the trial court erred in deeming foreclosure a compulsory counterclaim in the 2013 Action and subsequently applying the doctrine of res judicata.[4]

A. Under South Carolina law, a Counterclaim is Compulsory in the Mortgage Lending Context if it Affects the Ability to Pursue, or Otherwise Serves as a Defense to, an Underlying Claim.

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

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

South Carolina courts have not addressed whether a claim for foreclosure is a compulsory counterclaim in a lawsuit initiated by a borrower or mortgagor against a lender or mortgagee. The closest South Carolina courts have come to addressing this issue is limited to the inverse context where a mortgagee initiates a foreclosure action and a court evaluates whether the borrower's defenses constitute compulsory counterclaims. *See, e.g.*, *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 778 S.E.2d 106 (2015); *DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989); *S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 800 S.E.2d 488 (Ct. App. 2017). These cases present uniquely different factual scenarios and, therefore, are not determinative of the instant appeal. *See Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct. App. 2002) ("Whether a counterclaim is logically related to the initial claim depends upon the facts of each case."). Nevertheless, the decisions in *BADD*, *DAV Corp.*, and *Salon Proz* – by focusing on whether a successfully asserted counterclaim constitutes a defense to a plaintiff's causes of action – support Deutsche Bank's position that foreclosure was not a compulsory counterclaim in the 2013 Action.

For instance, in *DAV Corp.*, a lender commenced an action to foreclose on a note and mortgage given to a joint venture, and one of the parties comprising the joint venture ("DAV") asserted six counterclaims against the lender, including breach of a subsequent oral contract to provide additional funding and breach of a subsequent oral contract to purchase DAV's interest in the joint venture. *See* 298 S.C. at 516–17, 381 S.E.2d at 904. Because DAV demanded a jury trial on its counterclaims, the Supreme Court of South Carolina was forced to determine whether DAV's counterclaims were compulsory. *See id.* at 517, S.E.2d at 904.[5] As to the breach of funding counterclaim, the Supreme Court found it to be compulsory because "if performed," the oral

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

agreement "*would have avoided* default on the note by the joint venture." *Id.* at 518, 381 S.E.2d at 905 (emphasis added). As to the breach of purchase counterclaim, however, the Supreme Court deemed it merely permissive because if performed, the oral agreement would "not [have] affect[ed] the enforceability of the note." *Id.*

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

Where a counterclaim is not a defense to an underlying foreclosure claim, the Supreme Court has found it to be merely permissive. In *BADD*, a bank brought a foreclosure action against a mortgagor and a guarantor, and the guarantor asserted counterclaims for civil conspiracy and breach of contract, both based on an alleged conspiracy with a third party. 414 S.C. at 291–92, 778 S.E.2d at 107. The Supreme Court of South Carolina found these counterclaims to be merely permissive because "the allegations, if true, would not render the guarantees unenforceable." *Id.* at 296, 778 S.E.2d at 109; *see id.* 296, 778 S.E.2d at 110 ("does not affect the execution or enforceability of the guaranty agreements").

DAV Corp., *Salon Proz*, and *BADD* make clear that – in the mortgage lending context – a counterclaim has a logical relationship to an underlying claim, and is therefore compulsory, if it would operate as a defense to the underlying claim. Where the counterclaim would not affect the

viability of the underlying claim, it is not compulsory.[6] Had Deutsche Bank asserted foreclosure as a counterclaim in the 2013 Action, it would not have affected Bailey and Owens' right or ability to find Deutsche Bank liable for violation of the Attorney Preference Statute or the SCUTPA. Stated differently, the loan closing is not the same transaction or occurrence as the subsequent default. Accordingly, foreclosure was not a compulsory counterclaim in the 2013 Action.[7]

Despite the strong persuasive support the above cases provide to Deutsche Bank's position, they are, as noted, not determinative in light of the inverse context in which the cases present themselves relative to the instant matter. Where, as here, no South Carolina case is directly on point, this Court should look to federal court decisions interpreting Rule 13. *See Twillman, Ltd.*, 351 S.C. at 62, 566 S.E.2d at 865 (noting that "South Carolina's Rule 13(a) is the same as the federal rule on counterclaims" and concluding "Accordingly, we may rely on federal law to

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[6] Rather than focus on any common usage and meaning of the phrase "logical relationship," this Court should instead construe that standard by looking to the construction given to the phrase by other South Carolina courts – e.g., *DAV Corp.*, *Salon Proz*, and *BADD* – in the mortgage lending context. *Cf. Gammons v. Domestic Loans of Winston-Salem, Inc.*, 423 F. Supp. 819, 821 (M.D.N.C. 1979) (finding lender's action on debt not a compulsory counterclaim in Truth in Lending Act action brought by borrower; explaining "While there appears to exist a logical relationship between the two claims, a precise examination undertaken in light of the different facts and law relevant to the separate claims reveals that the relationship is more illusory than real."); *Ball v. Conn. Bank & Trust Co.*, 404 F. Supp. 1, 4 (D. Conn. 1975) (explaining in same context, "wooden application of the common transaction label does not yield real judicial economy; any perceived logical nexus is conceptual, abstract, a formal characterization rather than a recognition of concrete advantage to be achieved through single forum adjudication of all the parties' opposing claims").

[7] Consistent with the principles laid out in *DAV Corp.*, *Salon Proz*, and *BADD*, a panel of this Court has already concluded that a foreclosure action is not logically related to a claim under the Attorney Preference Statute, albeit in an unpublished opinion. *See Wells Fargo Bank, NA v. Smith*, Op. Nos. 2012-UP-690, 2009-125666, 2012 WL 10987189 (S.C. Ct. App. filed June 13, 2012). In that case, a lender filed an action for foreclosure, a borrower asserted a counterclaim for violation of the Attorney Preference Statute, and this Court affirmed a lower court's decision to strike the borrower's request for a jury trial based on the counterclaim, explaining: "We conclude Smith's counterclaim is permissive because a violation of the Attorney Preference statute would not affect the enforceability of the Note and Mortgage." *Id.* at *5.

interpret our Rule 13"); *cf. Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987) (looking to federal case law to interpret state rule tracking language of corresponding federal rule).

The United States Court of Appeals for the Fourth Circuit has concluded that an action to collect on a debt is not "logically related" – and thus not a compulsory counterclaim – in a borrower's action alleging that the lender failed to make certain disclosures in violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq. See Whigham v. Beneficial Finance Co. of Fayetteville, Inc.*, 599 F.2d 1322, 1323–24 (4th Cir. 1979); *see also Maddox v. Ky. Fin. Co., Inc.*, 736 F.2d 380, 383 (6th Cir. 1984) (same); *Valencia v. Anderson Bros. Ford*, 617 F.2d 1278, 1290–92 (7th Cir. 1980), *rev'd on other ground by* 452 U.S. 205 (1981) (same).[8] These cases rely on a number of different supporting factors in finding TILA claims insufficiently related to foreclosure actions under the comparable Federal Rule of Civil Procedure 13.

First, "the lender's counterclaim raises issues of fact and law significantly different from those presented by the borrower's claim." *Whigham*, 599 F.2d at 1323–24 (explaining the only question in the borrower's suit is compliance with a statute, whereas the lender's claim requires

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

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

B. Because Deutsche Bank's Foreclosure Claim Would Not Have Affected Bailey and Owens' Right to Enforce their Claims Relating to the Loan Closing in the 2013 Action, the Trial Court's Conclusion that Foreclosure was a Compulsory Counterclaim in the 2013 Action was Erroneous.

Here, even if Deutsche Bank had successfully asserted foreclosure as a counterclaim in the 2013 Action, Bailey and Owens could nevertheless have successfully pursued their claims relating to the closing of the mortgage. Stated differently, the fact finder in the 2013 Action could have found Deutsche Bank liable for violation of the Attorney Preference Statute and the SCUTPA, while also, simultaneously, issuing an order of foreclosure in favor of Deutsche Bank. Those two results are not mutually exclusive. Mortgagors need not be up to date on their loan payments in order to maintain a viable claim premised on a loan closing occurring well prior to any default. Accordingly, Deutsche Bank's foreclosure claim would not have "affect[ed]" the "enforceability" of Bailey and Owens' claims in the 2013 Action, *Salon Proz*, 420 S.C. at 97, 800 S.E.2d at 492, nor would Deutsche Bank – if successful on its foreclosure claim – "have avoided" liability under the Attorney Preference Statute, *DAV Corp.*, 298 S.C. at 518, 381 S.E.2d at 905, meaning foreclosure was not a compulsory counterclaim in the 2013 Action under South Carolina's logical relationship test.

The reasoning of the above federal cases – addressing this issue in the context of TILA claims – applies equally well to whether Deutsche Bank's foreclosure counterclaim is logically related to Bailey and Owens' claims under the Attorney Preference Statute and the SCUTPA. With regard to different issues of fact and law, Bailey and Owens' *statutory* claims required them to establish that Deutsche Bank's predecessor in interest failed to properly inform Owens of her right to an attorney at the loan closing, *see* S.C. Code Ann. § 37-10-102, and therefore committed unfair trade practices in or affecting commerce, *see* S.C. Code Ann. § 39-5-10, *et seq.* Deutsche Bank's *contract* counterclaim, on the other hand, would have required it to show (1) existence of a debt secured by a mortgage and (2) that the debt was in default. *See Bank of Am., N.A. v. Draper*, 405 S.C. 214, 221, 746 S.E.2d 478, 481 (Ct. App. 2013). With regard to different evidence, Bailey and Owens – in the 2013 Action – presented evidence about the loan closing in 1998, and Deutsche Bank, in defense, presented evidence of a form provided to Owens informing her of her right to counsel.[9] To establish its foreclosure claim, on the other hand, Deutsche Bank would have presented evidence of the Note and Mortgage as well as Bailey and Owens' defaults thereunder in or around 2013 (approximately fifteen (15) years after the events underlying Bailey and Owens' statutory claims asserted in the 2013 Action). In other words, "[t]he sole connection between [Bailey and Owens' claims in the 2013 Action] and [Deutsche Bank's] debt counterclaim is the initial execution of the loan document," which is insufficient to establish the claims as logically related under Rule 13(a). *Valencia*, 617 F.2d at 1291. Accordingly, Deutsche Bank's foreclosure claim is not logically related to the statutory claims Bailey and Owens asserted in the 2013 Action, meaning it was not a compulsory counterclaim in the 2013 Action.

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[9] The specific form Deutsche Bank presented as evidence in defense of the Bailey and Owens' claims was a South Carolina Notice of Rights Concerning the Selection of an Attorney and Insurance Agent. (R. p. 240, ¶ 8; p. 244).

C. The Attenuated Connection Bailey and Owens Attempt to Draw Between Foreclosure and One Possible Remedy, to be Awarded or Not in a Trial Court's Discretion in Any Event, Which was Not Even Pled in their Complaint, is Insufficient to Satisfy Rule 13(a)'s Logical Relationship Test.

In an attempt to connect their statutory claims to Deutsche Bank's foreclosure action, Bailey and Owens have previously drawn a tenuous and speculative connection between (a) vague language used in the complaint in the 2013 Action, (b) the likelihood that their claim under the Attorney Preference Statute – even if proven – would constitute unconscionable conduct, (c) one remedy the trial court could, in its discretion, impose amongst various others upon finding unconscionable conduct, and (d) the effect that specific damage remedy might have on Deutsche Bank's entitlement to enforce the loan. Because the path from (a) to (d) is attenuated and very much unlike that found in *DAV Corp.* and *Salon Proz*, the Court should find it insufficient to satisfy Rule 13(a)'s logical relationship test.

Specifically, rather than expressly seeking, in their complaint in the 2013 Action, an order providing that the loan would not be enforced, Bailey and Owens generally sought "all available relief under S.C. Code Ann. § 37-10-105" (R. p. 384, ¶ 37, line 3; *see also* R. p. 387, ¶ e (seeking "all relief available under S.C. Code Ann. § 37-10-105(C)")).[10] As provided for in this statute, the customary measure of damages for violation of the Attorney Preference Statutes is monetary: actual damages plus "an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars." S.C. Code Ann. § 37-10-105(A). If a court determines the loan transaction was "induced by unconscionable conduct," it ***may*** award

[10] By virtue of the pleadings in the instant underlying case, Bailey and Owens clearly know how to request that a court deem their loan unenforceable, making their failure to do so in the 2013 Action all the more glaring. (R. p. 110, ¶ 60, 62 (alleging "entitl[ment] to declaratory judgment in their favor" that the "mortgage on the subject property . . . is unenforceable")).

one of seven different categories of damages.[11] And only one of these seven categories of damages involves refusal to enforce the loan agreement. *See* S.C. Code Ann. § 37-10-105(C)(1). In other words, ***if*** a trial court determined that a party's violation of the Attorney Preference Statute meant that the underlying transaction was induced by unconscionable conduct, and ***if*** the trial court decided to exercise its discretion to impose damages, and ***if*** the trial court elected one of seven different types of remedies to impose (to the exclusion of all others), then a foreclosure action brought by Deutsche Bank as a counterclaim would affect the *remedy*. However, the foreclosure claim – even assuming a trial court made each of every one of the above decisions – would not affect a trial court's ability to find Deutsche Bank liable for violation of the Attorney Preference, it would not prevent the trial court from finding the loan transaction to be induced by unconscionable conduct, and it would not prevent the trial court from awarding damages and imposing other remedies. In other words, even in the perfect set of circumstances from Bailey and Owens' standpoint, they could still pursue, enforce, and be awarded damages for violation of the Attorney Preference Statute, despite a successful foreclosure counterclaim

Because the alleged "connection" Bailey and Owens have crafted is far more attenuated than that found in *DAV Corp.* and *Salon Proz*, it is insufficient to establish the requisite logical relationship under Rule 13(a). In those cases, oral promises to modify loan terms would necessarily undermine and negate a foreclosure action. Here, by contrast, a foreclosure

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

counterclaim would, by no means, negate or undermine Bailey and Owens' claim under the Attorney Preference Statute. At most, it would affect one possible remedy option, subject to a trial court's discretion in any event, and contingent on a finding of unconscionability. A general reference in a complaint to a statute containing one damage remedy that might be affected by foreclosure is insufficient to satisfy SCRCP 13(a)'s logical relationship test, as interpreted by the courts. In other words, because the "sole connection between a[n] [Attorney Preference] claim and a debt counterclaim is the initial execution of the loan document," *Valencia*, 617 F.2d at 1291, any connection Bailey and Owens might try to manufacture between the claims, no matter how creative, "is more illusory than real," *Gammons*, 423 F. Supp. at 821.

II. Even if Deutsche Bank's Foreclosure Claim were a Compulsory Counterclaim under Rule 13(a), the Trial Court Erred in Applying the Doctrine of Res Judicata.

Where concerns of equity, justice, and public policy override the policy aims of res judicata, courts should not apply res judicata, and the trial court erred in granting Bailey and Owens' motion for summary judgment, and denying Deutsche Bank's motion for partial summary judgment, on that basis. *Cf. Carrigg v. Cannon*, 347 S.C. 75, 81–82, 552 S.E.2d 767, 770–71 (Ct. App. 2001) (noting "application of the doctrine [of collateral estoppel] may be precluded where unfairness or injustice results, or public policy requires it," and concluding "the circuit court erred in ruling [defendant] was collaterally estopped" and granting summary judgment). Here, the facts show that Deutsche Bank was actively attempting to engage Bailey and Owens in loss mitigation alternatives at the time they assert it was required to foreclose. Therefore, even if Deutsche Bank's foreclosure claim were a compulsory counterclaim in the 2013 Action – which it was not – the trial court nevertheless erred in applying the doctrine of res judicata in the instant matter on summary judgment.

The doctrine of res judicata "exist[s] to reduce litigation and conserve the resources of the court and litigants." *Nelson v. QHG of S.C. Inc.*, 354 S.C. 290, 314, 580 S.E.2d 171, 184 (Ct. App. 2003) (internal quotation marks omitted), *aff'd in part, rev'd in part on other grounds*, 362 S.C. 421, 608 S.E.2d 855 (2005). Because this doctrine "is grounded upon concepts of fairness, it *should not* be rigidly or mechanically applied." *State v. Bacote*, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998) (emphasis added). For instance, application of res judicata should be precluded "where unfairness or injustice results, or public policy requires it." *Nelson*, 354 S.C. at 314, 580 S.E.2d at 184. Importantly, South Carolina courts do not have discretion in whether to consider these competing concerns. *See id.* (application of res judicata "*will not* be applied where it will contravene other important public policies" (emphasis added); *Johns v. Johns*, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992) ("courts *must* weigh the competing public policies" (emphasis added)). In the appropriate case, "[t]he public policy underlying res judicata may have to yield to the other public policies." *Johns*, 309 S.C. at 203, 420 S.E.2d at 859.

Because application of res judicata in the circumstances of this case is unjust, inequitable, and in violation of both state and federal public policies for myriad reasons, this is an appropriate case where the policy aims of res judicata should be overridden, meaning the trial court erred in granting summary judgment based on its application of res judicata.

First and foremost, from a public policy standpoint, affirmance of the trial court's decision would turn the mortgage lending industry on its head, causing lenders and loan servicers to sue first and ask questions later.[12] In a 2011 Administrative Order, the Supreme Court of South

[12] *See generally Marais v. JPMorgan Chase Bank, N.A.*, 676 F. App'x 509, 514 (6th Cir. 2017) ("If foreclosure is a compulsory counterclaim in response to claims brought by borrowers under federal consumer-protection statutes, as Plaintiff contends, then every act of a consumer to vindicate her rights under those laws could come with the risk of losing her home in the process.").

Carolina set forth – as the policy in the state of South Carolina – that loss mitigation efforts are in the best interests of all parties, mortgagors and mortgagees alike. *See* Administrative Order of the Supreme Court of South Carolina, Re: Mortgage Foreclosure Actions, No. 2011-05-02-01 (May 2, 2011). Affirming the trial court order would require mortgage lenders and mortgage servicers – in contravention of promulgated policy of South Carolina – to file counterclaims for foreclosure in response to each and every lawsuit brought by a borrower alleging unconscionable conduct and seeking relief under S.C. Code Ann. § 37-10-105. A borrower would not even need to ask a Court to refuse to enforce a loan as a remedy, much less even intend to seek and obtain that relief; instead, merely seeking "damages under § 37-10-105" would be sufficient to trigger a lender's obligation to assert foreclosure as a counterclaim or forever waive the right to assert the claim.[13] Rather than focus on loss mitigation efforts, contemplate loan modification possibilities, and work with the borrower, mortgage lenders and mortgage servicers will instead proceed directly to court to file a foreclosure counterclaim as soon as possible to avoid the technical default and deprivation of rights imposed on Deutsche Bank in this case. This turn of events would undoubtedly exacerbate the problem of increased "unresolved foreclosure actions" and the "resulting burden on the resources

[13] Indeed, as noted, Bailey and Owens did not ask the Court, in their complaint in the 2013 Action, to refuse to enforce the Mortgage and Note. Instead, they merely sought "all available relief under S.C. Code Ann. § 37-10-105." (R. p. 384, ¶ 37).

of the Court," which the Supreme Court lamented in its May 2, 2011 Administrative Order.[14] Indeed, by possessing a note and mortgage, a lender has the ability to pursue several remedies upon default, including but not limited to foreclosure. If, by filing a preemptive lawsuit, a borrower can force a lender to file a foreclosure counterclaim (or forever lose that right), a lender is effectively deprived of its right to pursue remedies alternative to foreclosure.

Complicating matters further, federal regulations promulgated by the Consumer Financial Protection Bureau pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301, *et seq.*, not only impose obligations inconsistent with the filing of a foreclosure counterclaim but would also presently prohibit the very action the trial court concluded Deutsche Bank should have taken – but did not take – in the 2013 Action. Under 12 C.F.R. § 1024.41(f), "[a] servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless . . . [a] borrower's mortgage loan obligation is more than 120 days delinquent."[15] Here, Bailey and Owens' loan did not go into default until after it matured on July 1, 2013, four days after they filed the 2013 Action. Deutsche Bank filed its answer in the

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

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

2013 Action approximately 88 days from the default, i.e. before the passage of 120 days. (R. p. 107, ¶ 33). If these regulations were applicable at that time,[16] Deutsche Bank could not satisfy its apparent obligations under state law (to file a compulsory counterclaim for foreclosure under SCRCP 13(a)) while simultaneously complying with federal law (by waiting 120 days after default to initiate foreclosure under 12 C.F.R. § 1024.41(f)). *Cf.* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696-01, at *10698 (Feb. 14, 2013) (codified at 12 C.F.R. § 1024.41) (explaining purpose behind promulgation of 120-day delay under 12 C.F.R. § 1024.41(f) as "restrict[ing] 'dual tracking' where a servicer is simultaneously evaluating a consumer for loan modifications or other alternatives at the same time that it prepares to foreclose on the property"). If the trial court's ruling is affirmed, litigants will be unable to comply with both state and federal law, an outcome this Court should endeavor to avoid. *See generally Priester v. Cromer*, 401 S.C. 38, 43–44, 736 S.E.2d 249, 252 (2012) (noting that "federal regulations have no less pre-emptive effect than federal statutes" and stating "[t]he preemption doctrine . . . provides that any state law that conflicts with federal law is without effect" (internal quotation marks omitted)).

Even under enforceable federal regulations existing at the time of the 2013 Action, Deutsche Bank was required – within 36 days after a borrower's default – to "inform the borrower about the availability of loss mitigation options." 12 C.F.R. 1024.39(a). Deutsche Bank attempted to comply with this and other obligations by reaching out to Owens to discuss loss mitigation

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

options to avoid foreclosure. (R. p. 242, ¶ 16; pp. 262–263). The trial court's interpretation of SCRCP 13(a) under the facts of this case – requiring Deutsche Bank to file a foreclosure claim – is inconsistent with Deutsche Bank's requirements to take steps to avoid foreclosure. Perhaps more importantly, it is inconsistent with the clear policy directives of both state and federal guidance favoring loss mitigation options to avoid foreclosure.

Apart from these various policy reasons, the trial court also erred in applying res judicata because doing so, under the facts of this case, was unjust and inequitable. Under South Carolina equitable principles, "[e]quity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice." *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 256, 715 S.E.2d 348, 356 (Ct. App. 2011) (internal quotation marks omitted). Furthermore, "equity looks to substance rather than to form" and will "dispens[e] with pure formalities which would otherwise defeat equity." *Wilkie v. Phila. Life Ins. Co.*, 187 S.C. 382, 197 S.E. 375, 378 (1938).

Here, while Deutsche Bank was complying with state and federal policy in attempting to assist Bailey and Owens in avoiding foreclosure (R. p. 242, ¶ 16; pp. 262–263), Deutsche Bank answered a complaint in the 2013 Action that was limited to the consummation of the loan (in which Deutsche Bank was not even involved) that did not even expressly forecast to Deutsche Bank an intent on the part of Bailey and Owens to seek non-enforcement of the loan as a remedy for their claim under the Attorney Preference Statute. It is true that Bailey and Owens sought "all available relief under S.C. Code Ann. § 37-10-105" (R. p. 384, ¶ 37) and even "all relief available under S.C. Code Ann. § 37-10-105(C)" (R. p. 387, ¶ e). However, that complaint did not expressly seek non-enforcement of the loan. Moreover, the loan was not even in default at the time Bailey and Owens filed the complaint in the 2013 Action and no one had brought an action against them

on the debt, making it unreasonable for Deutsche Bank to even understand Bailey and Owens to be seeking non-enforcement of the loan, if they were in fact seek such a remedy at all. While attempting to assist Bailey and Owens in avoiding foreclosure, Deutsche Bank should not be penalized for failing to read between the lines of the complaint in the 2013 Action to divine the full scope of damages Bailey and Owens could possibly be awarded.

For these reasons, the trial court erred in applying the doctrine of res judicata in a rigid and mechanical way to bar Deutsche Bank's foreclosure action in the underlying matter.

III. Because the Trial Court Erred in Granting Summary Judgment to Bailey and Owens Premised on an Erroneous Interpretation of Rule 13(a) and Subsequent Application of Res Judicata, this Court Should Reverse the Trial Court's Ruling with Respect to Bailey and Owens' Motion for Summary Judgment.

The trial court ruled in favor of Bailey and Owens on their motion for summary judgment with respect to Deutsche Bank's foreclosure claim and with respect to Bailey and Owens' counterclaim for a declaratory judgment. (R. p. 36). The trial court also granted Bailey and Owens' motion as to liability on their counterclaim for failure to record a mortgage satisfaction under S.C. Code Ann. § 29-3-310. Without question, the trial court reached these decisions based solely and exclusively on its erroneous determination that foreclosure was a compulsory counterclaim the 2013 Action, and the trial court's subsequent decision to apply res judicata. (R. p. 23, lines 7–9 ("As the foreclosure claim was an unraised, compulsory counterclaim in the [2013] action, it is now barred by res judicata."); R. p. 27, lines 18–21 (explaining that because "Deutsche Bank's rights in the note . . . have been discharged . . . Bailey and Owens are entitled to prevail on their claim for a declaratory judgment"); R. p. 33, lines 21–23 ("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.")). Because the trial court erred by concluding that Deutsche Bank was required to assert foreclosure as a counterclaim in the

2013 Action (and in subsequently applying res judicata), this Court should reverse the trial court's ruling on Bailey and Owens' motion for summary judgement.

Even if this Court were to conclude that foreclosure was a compulsory counterclaim in the 2013 Action, it should nevertheless still reverse the trial court's summary judgment ruling with respect to § 29-3-310. Under that statute, a "mortgagee who has received *full payment* or *satisfaction* or to whom *legal tender has been made* of his debts, damages, costs, and charges secured by mortgage or real estate" is required to record a mortgage satisfaction within 3 months of demand. S.C. Code Ann. § 29-3-310 (emphasis added). Section 29-3-320 likewise imposes liability for failure to enter satisfaction after "having received such payment, satisfaction or tender." S.C. Code Ann. § 29-3-310 (emphasis added). The South Carolina Supreme Court has clarified that "full payment" is needed to trigger application of § 29-3-320. *Dykeman v. Wells Fargo Home Mortg., Inc.*, 381 S.C. 333, 340, 673 S.E.2d 804, 807 (2009). "Sections 29-3-310 and 320 are penal statutes" and "[p]enal statutes must be strictly construed." *Id.* at 337, 673 S.E.2d at 806. Under no set of circumstances – regardless of the application of res judicata – has Deutsche received full payment, satisfaction, or legal tender. For this additional reason, the Court should reverse the trial court and, instead, grant summary judgment to Deutsche Bank on Bailey and Owens' counterclaim pursuant to § 29-3-310.

IV. Because the Trial Court Erred in Finding Foreclosure to be a Compulsory Counterclaim in the 2013 Action, this Court Should Reverse the Trial Court and Grant Deutsche Bank's Motion for Partial Summary Judgment.

The Court should also reverse the trial court's ruling denying Deutsche Bank's motion for summary judgment and, instead, grant summary judgment to Deutsche on all of Bailey and Owens' counterclaims, including (1) declaratory judgment, (2) violation of S.C. Code Ann. § 29-3-310, and (3) violation of the Attorney Preference Statute. With regard to the first two counterclaims – declaratory judgment and § 29-3-310 – the trial court denied Deutsche Bank's motion for summary

solely based on its erroneous determination that foreclosure was a compulsory counterclaim in the 2013 Action. (R. pp. 27, 33). Because the trial court erred in reaching this conclusion, Deutsche Bank is entitled to summary judgment on Bailey and Owens' first two counterclaims. In other words, because Deutsche Bank is entitled to proceed with foreclosure, there is no genuine issue of material fact that the Note and Mortgage remain valid, enforceable, and presently unsatisfied.

As to the Attorney Preference Statute counterclaim, the trial court – upon deciding that foreclosure was barred by res judicata – simply concluded "the claim for violation of the attorney preference statute cannot survive the end of the foreclosure claim" and dismissed the claim for that reason alone, effectively deeming it moot. (R. p. 35, lines 12–13).[17] If this Court determines that foreclosure was not a compulsory counterclaim in the 2013 Action and that Deutsche Bank may proceed with foreclosure in this matter, the Attorney Preference Statute claim will be "un-mooted" and will require a ruling. In the event this Court agrees with Deutsche Bank on the compulsory counterclaim issue, this Court should also vacate the trial court's ruling on this issue and instead grant summary judgment to Deutsche Bank because the Attorney Preference Statute counterclaim is time-barred, and because there is no genuine issue of material fact that Deutsche Bank fully complied with the statute.

The Attorney Preference Statute clearly sets forth a three-year statute of limitations running from the date the alleged violation occurred. *See* S.C. Code Ann. § 37-10-105. The date of the alleged violation is in or around 1998. (R. pp. 381–382, ¶ 13). Bailey and Owens' assertion of a

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[17] The trial court in the 2013 Action orally ruled in favor of Deutsche Bank on Bailey and Owens' Attorney Preference Statute claim but did not reduce that ruling to a written order, despite the submission of a written proposed order by counsel for Deutsche Bank. It is solely for this reason that Deutsche Bank did not seek to dismiss this claim in the present action pursuant to the doctrine of collateral estoppel. Nevertheless, it should be emphasized that Bailey and Owens have already asserted this claim, lost, and are now seeking a second bite of the apple.

claim under this statute approximately eighteen years after the alleged violation is time-barred.[18] To the extent Bailey and Owens contend – as in the 2013 Action – that their counterclaim under the Attorney Preference Statute seeks damages under S.C. Code Ann. § 37-10-105(C) relating to unconscionable conduct, that claim is foreclosed by an additional statute of limitations. Bailey and Owens asserted that claim, if at all, in connection with the instant action on or around December 2016. (R. pp. 104–115). However, Bailey and Owens admit the Note matured on July 1, 2013. (R. p. 106, ¶ 22). And the statute precludes a party from bringing a claim under § 37-10-105(C) "after the original scheduled maturity date of the debt." S.C. Code Ann. § 37-10-105(C).

Even if the Attorney Preference Statute claim were not time barred, which it is, the Court should nevertheless grant summary judgment to Deutsche Bank on this counterclaim. As the trial court in the 2013 Action already accepted, Deutsche Bank fully complied with the Attorney Preference Statute by providing Owens with a "South Carolina Notice of Rights Concerning the Selection of an Attorney and Insurance Agent" form one month prior to the June 15, 1998 loan closing and having Owens sign it. (*Compare* S.C. Code Ann. § 37-10-102(a)(1) (permitting creditor to comply with 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 administrator"), *with* R. p. 240, ¶ 8; p. 244). Therefore, Deutsche Bank is entitled to summary judgment on this claim.

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[18] The Attorney Preference Statute does permit a claim beyond the three-year time limitation "as a matter of defense by recoupment or set-off." S.C. Code Ann. § 37-10-105. Bailey and Owens' have asserted an affirmative defense for "Setoff/Credit", and Deutsche Bank did not move for summary judgment on this affirmative defense. Therefore, that particular affirmative defense is not before the Court.

CONCLUSION

For these reasons, this Court should reverse the trial court's order with respect to Bailey and Owens' motion for summary judgment regarding (a) Deutsche Bank's foreclosure claim, (b) Bailey and Owens' declaratory judgment counterclaim, and (c) Bailey and Owens' § 29-3-310 counterclaim. This Court should also reverse the trial court's order with respect to Deutsche Bank's motion for summary judgment regarding Bailey and Owens' three counterclaims, including (a) declaratory judgment, (b) violation of § 29-3-310, and (c) violation of the Attorney Preference Statute.

In the alternative to reversing the trial court's orders, this Court should conclude that foreclosure was not a compulsory counterclaim in the 2013 Action and remand this matter to the trial court for further proceedings consistent with that determination.

This 30th day of October, 2018.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2018-000436
Circuit Court Case No. 2016-CP-32-03572

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

Respondent/Appellant,

v.

Patricia Owens a/k/a Patrica 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.

RULE 211(b) CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **APPELLANT'S BRIEF OF RESPONDENT/APPELLANT** complies with SCACR 211(b) because it is identical to Respondent/Appellant's previously filed Appellant's Initial Brief except for references to the record and correction of typographical errors and misspellings.

This the 30th day of October, 2018.

Jonathan Schulz (SC Bar No. 79850)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2018-000436
Circuit Court Case No. 2016-CP-32-03572

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

Respondent/Appellant,

v.

Patricia Owens a/k/a Patrica 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.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT'S BRIEF OF RESPONDENT/APPELLANT** was sent via first-class U.S. Mail, postage prepaid, and addressed as follows:

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This the 30th day of October, 2018.

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APPELLANTS/RESPONDENTS' FINAL RESPONDENTS' BRIEF

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STATEMENT OF ISSUES

I. **Did the master-in-equity commit reversible error in granting summary judgment against Respondent/Appellant on its mortgage foreclosure claim where undisputed facts showed the claim arose from the same set of facts as an earlier action and could have affected the enforceability of a claim by Appellants/Respondents against Respondent/Appellant in the earlier case?**

II. **Did the master-in-equity commit reversible error in determining that res judicata had extinguished Respondent/Appellant's mortgage where Respondent/Appellant had failed to assert a compulsory counterclaim to foreclose the mortgage in an earlier case after the mortgage debt had matured?**

III. **Did the master-in-equity commit reversible error in granting summary judgment on liability in Appellants/Respondents' favor on their claim for failure to record a mortgage satisfaction document where there was no dispute that more than three months had passed since a proper request for such recording had been made and the mortgage had been satisfied by operation of law?**

STATEMENT OF THE CASE

Respondent/Appellant 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") filed this lawsuit on October 19, 2016, against Appellants/Respondents Patricia Owens a/k/a Patricia Ann Owens ("Owens") and Tammy M. Bailey ("Bailey"), seeking foreclosure of a mortgage of property at 111 Andrew Court, Gaston, South Carolina, and seeking reformation of that mortgage. (R. pp. 76-98.) 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. (R. pp. 99-115.) Their amended answer and counterclaim admitted 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." (R. pp. 82, 106.) Bailey and Owens' amended pleading asserted the defenses of res judicata, collateral estoppel, laches, unclean hands, waiver, and setoff or credit. (R. pp. 107-09.) Bailey and Owens also asserted counterclaims for a declaratory judgment that Deutsche Bank holds no mortgage on the subject property or, in the alternative, that the mortgage is unenforceable, for liability under S.C. Code Ann. § 29-3-320 for failure to record satisfaction of the mortgage after due request, and for violation of S.C. Code Ann. § 37-10-102 (usually referred to as the attorney preference statute.) (R. pp. 109-10.) The case was referred to the Honorable James O. Spence, as Master-in-Equity for Lexington County. (R. pp. 51-52.)

Deutsche Bank moved for summary judgment in its favor as to each of Bailey and Owens' counterclaims. (R. pp. 165-69.) Bailey and Owens 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. (R. pp. 124-25.)

The master denied Deutsche Bank's motion for summary judgment and granted Bailey and Owens' motion, ruling that, under the undisputed facts, Deutsche Bank's foreclosure claim was a compulsory counterclaim in the previously concluded case of Tammy M. Bailey, et al. v. Novastar Mortgage, Inc., et al., Case No. 2013-CP-32-02210, in which Deutsche Bank was a defendant, because, if Bailey and Owens had prevailed in that case, that could have resulted in a judgment that the note and mortgage were unenforceable under S.C. Code Ann. § 37-10-105(C). (R. pp. 23, 27.) The master ruled that the res judicata effect of the end of the Bailey v. Novastar case precluded the foreclosure claim and satisfied the mortgage by operation of law. (R. pp. 23, 27, 33-34, 36-37.) The master also granted summary judgment in Bailey and Owens' favor as to liability under S.C. Code Ann. § 29-3-320 for Deutsche Bank's failure to record a satisfaction document within three months of a duly made request for the same under S.C. Code Ann. § 29-3-310.[1] (R. pp. 36-37.)

The note and mortgage involved in this case were dated June 15, 1998, and were given by Owens, who was then the owner of the subject property, to NovaStar Mortgage, Inc. (R. pp. 80-81, 246-53.) The note document contained a balloon provision under which, even if all the monthly payments under the note were made

[1] The master, however, provided Deutsche Bank a mechanism under which it could escape monetary liability under S.C. Code Ann. § 29-3-320 by recording a mortgage satisfaction document within a time frame set by the master. (R. pp. 36-37.) That is the subject of Bailey and Owens' appeal.

timely and made in their required amounts, a substantial principal balance came due on July 1, 2013, the note's maturity date. (R. p. 246.) The mortgage was recorded on July 2, 1998, 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. (R. p. 81.)

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

The note matured on July 1, 2013, and Deutsche Bank's complaint alleged 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." (R. pp. 4, 82.)

Bailey and Owens' amended answer and counterclaim alleged 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.

(R. pp. 106-07.)

Those documents were attached to the amended answer and counterclaim. (R. pp. 112-14.) Deutsche Bank admitted the sending and receipt of these letters. (R. pp. 127-37.) The letter from Bailey was sent to Deutsche Bank on August 23, 2016, and was a request that Deutsche Bank enter satisfaction of the subject mortgage. (R. p.

112.) The letter enclosed a $40.00 check to Deutsche Bank to cover any recording and processing fees associated with getting the satisfaction document recorded. (R. p. 112.) The letter stated that the subject note matured on July 1, 2013. (R. p. 112.) It went on to state 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. (R. p. 112.)

The letter from Deutsche Bank's attorney that was attached to the amended answer and counterclaim acknowledged receipt of Bailey's letter and noted Deutsche Bank's refusal to record the satisfaction. (R. p. 114.) 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. (R. pp. 104-15, 136.)

The parties agreed, 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 in favor of Deutsche Bank and the other defendants in that case. (R. p. 6, p. 185 ln. 9-23, pp. 370-525.)

The Bailey v. Novastar case was filed on June 27, 2013. (R. pp. 377-96.) 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. (R. pp. 7, 380-96.) Among the claims asserted in Bailey v. Novastar was a claim that sounded under S.C. Code Ann. § 37-10-105(C) 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) coupled with unconscionable loan terms or inducement of the mortgage loan by unconscionable conduct. (R. pp. 380-84.) Bailey and Owens' contention concerning the claims was that NovaStar did not ascertain Owens' preference as to legal counsel and allowed the loan to be closed 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. (R. pp. 381-84.)

Among the relief provided for in S.C. Code Ann. § 37-10-105(C) is 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." S.C. Code Ann. § 37-10-105(C). The prayer in the Bailey v. Novastar complaint stated that Bailey and Owens sought, *inter alia*, "all relief available under S.C. Code Ann. § 37-10-105(C)[.]" (R. p. 387.)

Deutsche Bank served its answer in the Bailey v. Novastar case on September 26, 2013. (R. pp. 6, 397-406.) In a filing made in Bailey v. Novastar, Deutsche Bank stated that Bailey and Owens' claims in that case "ar[ose] out of a purported mortgage refinancing loan transaction involving a balloon note in 1998 by Plaintiff Owens" and "relate solely to [that] closing[.]" (R. pp. 409, 411, 418.) At no time did Deutsche Bank assert a counterclaim 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. (R. pp. 8, 246, 397-406.)

Bailey v. Novastar was tried to a jury and resulted in a verdict for Deutsche Bank and the other defendants on September 15, 2015. (R. pp. 370-71.) Bailey and Owens' motion for a new trial in that case was denied by order filed June 24, 2016. (R. p. 374.) No appeal was taken in that case.

In the instant case that is subject of this appeal, the master held a hearing on the parties' motions for summary judgment. (R. pp. 173-217.) Bailey and Owens argued that Deutsche Bank's foreclosure claim had been a compulsory counterclaim that was required to be brought in the Bailey v. Novastar action and was thus barred by res judicata, that the mortgage was now satisfied by operation of law, and that Deutsche Bank was liable under S.C. Code Ann. § 29-3-320 for its failure to record a satisfaction document after due request. (R. pp. 173-217.) Deutsche Bank argued that none of that was correct. (R. pp. 173-217.) The court requested the submission of proposed orders, which counsel for the parties submitted. (R. p. 212 ln. 2 through p. 217 ln. 12, pp. 307-63.)

On November 28, 2017, the master-in-equity filed an order that analyzed the res judicata effect of Deutsche Bank's failure to raise foreclosure as a compulsory counterclaim in the Bailey v. Novastar action. (R. pp. 1-41.) The master ruled as follows:

> 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.
>
> . . .
>
> 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.
>
> . . .
>
> 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.

(R. pp. 27, 33-34.)

The master granted summary judgment for Bailey and Owens on Deutsche Bank's foreclosure claim and on their declaratory judgment claim that the mortgage does not encumber the property and also granted summary judgment for Bailey and Owens under S.C. Code Ann. § 29-3-320. (R. pp. 36-37.)

Deutsche Bank did not make any motion under Rule 59, SCRCP, with regard to the court's order. Bailey and Owens made a timely motion to alter or amend the relief the court ordered under S.C. Code Ann. § 29-3-320, noting that the language of the statue provides that the mortgagee shall pay the monetary relief the statute provides and does not offer any exceptions. (R. pp. 170-72.) After a hearing, the court denied that motion by order filed February 12, 2018. (R. pp. 42-50.)

These cross-appeals followed. (R. pp. 364-69.)

STATEMENT OF FACTS

This is a strange case. The factual scenario presented by this case is not likely to repeat itself in other cases in the future. Most mortgage customers do not sue the holders of their mortgages at all. When they do, they usually do not file the complaint three days before the maturity date of the note, so that the note has matured by the time the mortgagee answers the complaint. Most mortgage customers who do bring suit against their mortgagees do not raise claims under which the court can "refuse to enforce the agreement, or a term, or part of the agreement or transaction[.]" S.C. Code Ann. § 37-10-105(C). Most mortgagee defendants in suits brought by their customers press their rights and do not fail to assert claims that they have against their customers. Most suits by mortgage customers against mortgagees do not end with a trial. Most litigants do not sue one another multiple times about matters arising from the same transaction.

Further, here, federal regulations that, had they been in effect, might have changed the outcome of the decision went into effect after the materially operative events occurred. 12 CFR §§ 1024.39, 1024.41; 78 FR 10696, 10708, 10842, 10855 (Feb. 14, 2013). The likelihood of another case occurring that presents issues substantially similar to this one is slim, to say the least.

Not wanting to look like a bank trying to take someone's house away, Deutsche Bank made a strategic decision not to assert foreclosure as a counterclaim in the Bailey v. Novastar action. (R. p. 109.) In the short term, it worked: the jury in that case found for Deutsche Bank. (R. pp. 370-71.) That strategic decision had negative ramifications

for Deutsche Bank down the road, however, in this case. All of Deutsche Bank's arguments in this case are aimed at its objective of avoiding the negative consequences of its choice not to plead foreclosure as a counterclaim in Bailey v. Novastar. Deutsche Bank made its bed but does not want to lie in it.

STANDARD OF REVIEW

Where summary judgment is granted as the result of the determination of questions of law, this court's review of those determinations is *de novo*, as it always is for questions of law. Bennet v. Carter, 421 S.C. 374, 380, 807 S.E.2d 197, 200 (2017); Wachovia Bank, Natl. Assn. v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014); Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010). To the extent the review of a grant of summary judgment depends upon questions of law, rather than questions of fact, the standard under which "[a]ll ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party" does not apply, since the review is of a matter of law, not fact. Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004).

Questions of law, not fact, are what are at issue in this appeal. Deutsche Bank appears to agree. (Final Appellant's Brief of Respondent/Appellant p. 11 n. 4.)

ARGUMENT

I. Res judicata and the compulsory/permissive counterclaim distinction under South Carolina law.

Deutsche Bank contends that its foreclosure claim was not a compulsory counterclaim in the Bailey v. Novastar action and, thus, that the master-in-equity erred when he ruled that the foreclosure claim was barred by res judicata. The master

disagreed. (R. p. 23.) Deutsche Bank is wrong, and the master was right. An examination of South Carolina law on res judicata and the compulsory/permissive counterclaim distinction bears this out.

a. Res judicata.

Res judicata "bars a second suit where there is (1) identity of parties; (2) identity of subject matter; and (3) adjudication of the issue in the first suit." Judy v. Judy, 393 S.C. 160, 173, 712 S.E.2d 408, 412 (2011). 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 (emphasis added, quoting Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)).

The principle of res judicata has roots in the doctrine of bar and merger, from which it is no longer distinct in South Carolina. 7 S.C. Jur. Estoppel and Waiver § 29 (1991). It appears to have arisen from

> 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 v. Goldsmith, 205 S.C. 215, 31 S.E.2d 317, 319 (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 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).

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)).

Res judicata applies to 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).

b. Compulsory and permissive counterclaims.

"A pleading *shall* state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Rule 13(a), SCRCP (emphasis added). 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(b), SCRCP (emphasis added). Such claims are usually referred to as permissive counterclaims.

Our Supreme Court has developed a test to 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 foreclosure action with counterclaims, the Supreme Court adopted the "logical relationship" test for determining whether a counterclaim is compulsory. The Court 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[.]" Id. 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.

In the DAV case, the plaintiff's claim was for foreclosure of a mortgage, and the Court's described of DAV's counterclaims as 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 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 (Ct. App. 2017), this court 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.

DAV Corp., BADD, and Salon Proz may be boiled down to this: 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. BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97. If success on a counterclaim could affect the enforceability of the plaintiff's claim, it is compulsory. BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97.

c. Compulsory counterclaims that were not raised in a previous case that ended in a judgment are barred by res judicata.

> Failure 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), this court held res judicata barred a claim that arose from the same transaction or occurrence and could have been asserted as a counterclaim in a previous case. 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, observing 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), the Supreme Court stated 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."

This is because of the plain language of Rule 13(a), SCRCP. "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). The language of Rule 13(a) mandates 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[.]" This court has observed that 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. In Beach Company, this court stated:

> The South Carolina Reporter's Note following Rule 13 states: "[c]ounterclaims arising out of the same

> transaction or occurrence that is the subject of the action are 'compulsory' under Rule 13(a) and are barred by res judicata or estoppel by judgment if not asserted."

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

Rule 13(a) serves a bedrock principle of res judicata: that "it is in the interest of the state that there should be an end to litigation." Watson, 31 S.E.2d at 319. Parties cannot avoid that simply by "changing their relative positions of plaintiff and defendant" in a second case. Herbert Broom, Legal Maxims 259 (6th Am. ed., Philadelphia 1868) (originally published 1845). The question is not from which side of the "v." claims are asserted; it is, rather, whether the claims have a logical relationship to one another. DAV Corp., 298 S.C. at 518.

II. Deutsche Bank's foreclosure claim was compulsory in Bailey v. Novastar and is, thus, barred by res judicata.

The master ruled that Deutsche Bank's foreclosure claim was a compulsory counterclaim in the Bailey v. Novastar case. The master was right. At the time it served its answer in that case, Deutsche Bank had the same foreclosure claim, based on the same default (maturity of the note), against the same two people, Bailey and Owens, who were suing it about the execution of the same note and mortgage and who were seeking relief that could have rendered the note and mortgage unenforceable. (R. pp. 377-407.) 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.

In Bailey v. Novastar, Bailey and Owens sued Deutsche Bank seeking relief under S.C. Code Ann. § 37-10-105(C), which provides significant remedies where the

attorney preference statute has been violated and the mortgage loan was unconscionable or was induced by unconscionable conduct.

In pertinent part, the attorney preference statute provides:

> Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose -
>
> (a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 27-31-10 et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.
>
> The creditor may comply with this section by:
>
> (1) 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 administrator; or
>
> (2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. If a creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is in compliance with this section.

S.C. Code Ann. § 37-10-102.

The remedies for a violation of the attorney preference statute are as follows:

> A) If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred

dollars. No debtor may bring a class action for a violation of this chapter. No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, except as set forth in subsection (C). The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any pending actions. This subsection 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.

(B) No creditor may be held liable in an action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

(C) *If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct, the court may*, in an action other than a class action:

(1) *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*;

(2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;

(3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or

(4) award:

(a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;

> (b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and
>
> (c) attorney's fees and costs.
>
> An action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt.
>
> (D) In an action in which it is found that a creditor has violated this chapter, the court shall award to the debtor the costs of the action and to his attorneys their reasonable fees. In determining attorneys' fees, the amount of the recovery on behalf of the debtor is not controlling.

S.C. Code Ann. § 37-10-105 (emphasis added.)

Deutsche Bank contends that a counterclaim for foreclosure, if it had been brought by Deutsche Bank in the Bailey v. Novastar case, would not have *necessarily* barred the enforcement of Bailey and Owens' rights under S.C. Code Ann. § 37-10-105(C) and thus argues that foreclosure was not a compulsory counterclaim. Deutsche Bank also argues that proof of its foreclosure claim involves elements distinct from those that were necessary for success on Bailey and Owens' claim seeking relief under S.C. Code Ann. § 37-10-105(C). 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 necessarily *would* 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 this court's 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 could have established 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, as does the fact that, had Deutsche Bank pled foreclosure as a counterclaim and succeeded, its success on that claim would have affected Bailey and Owens' claim under S.C. Code Ann. § 37-10-105(C), as it would have meant that they could not achieve relief under S.C. Code Ann. § 37-10-105(C)(1).

Deutsche Bank's foreclosure claim was both arose out of the same transaction or occurrence as the Bailey v. Novastar case and could have affected the relief available to Bailey and Owens on their S.C. Code Ann. § 37-10-105(C) claim in that case. In a mortgage foreclosure case, the subject documents are the note and mortgage, the execution of which must be proven for the foreclosure plaintiff to win.[2] U.S. Bank,

[2] Not only does Deutsche Bank's argument to the contrary not make sense, it also does not appear to be preserved for review. To be preserved for appellate review, an argument must have been both raised to and ruled upon by the trial court. E.g., Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998).

684 S.E.2d at 205; Paramount Fund, Inc. v. Cusaac, 282 S.C. 497, 499, 319 S.E.2d 354, 355 (Ct. App. 1984) ("[i]n an action to foreclose a mortgage on real property, the mortgagee has the burden of proving a disputed mortgage by the preponderance of the evidence"). 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. (R. pp. 409, 411, 412, 415, 418.) Further, success by Bailey and Owens on their S.C. Code Ann. § 37-10-105(C) claim 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. Success on the foreclosure claim and relief for Bailey and Owens under S.C. Code Ann. § 37-10-105(C)(1) would have been totally inconsistent – in fact, impossible. The foreclosure counterclaim Deutsche Bank did not plead in Bailey v. Novastar was compulsory in at least *two* ways: 1) it arose from and required proof of the execution of the note and mortgage, the circumstances surrounding which were at the heart of Bailey and Owens' claims, see BADD, 414 S.C. at 295, 296, and 2) it could have affected the enforceability of Bailey and Owens' claim under S.C. Code Ann. § 37-10-150(C). See Salon Proz, 420 S.C. at 97. Either one of these things, alone, would have made it a compulsory counterclaim. See BADD, 414 S.C. at 295, 296; Salon Proz, 420 S.C. at 97.

Deutsche Bank's position is inconsistent with DAV Corp., BADD, and Salon Proz. 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). 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 reported decision of any South Carolina appellate court, has held that, to be compulsory, a counterclaim must necessarily and always bar the plaintiff's claim if successful. Neither is there any South Carolina decision that holds that there must be mirroring elements among the claims for a counterclaim to be compulsory.

There are also cases beyond the DAV Corp.-BADD-Salon Proz trinity that reveal 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. This court 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 or limited to a claim that would of necessity preclude success on the opposing claim, Jaynes and Hucks could not have been decided in the way that they were. Hucks, 305 S.C. at 298; Jaynes, 303 S.C. at 435-36, 438 & n. 1.

Deutsche Bank has had to look outside this state for cases to support its argument because South Carolina case law is squarely against it. BADD, 414 S.C. at 295, 296; Hucks, 305 S.C. at 298; DAV Corp., 298 S.C. at 517-19; Salon Proz, 420 S.C. at 97; Jaynes, 303 S.C. at 435-36, 438 & n. 1.

Deutsche Bank makes much mention of the fact that the prayer in Bailey and Owens's complaint in Bailey v. Novastar did not specifically state that it sought for the court to render the note and mortgage unenforceable and, instead, prayed that Bailey and Owens sought "all relief available under S.C. Code Ann. § 37-10-105(C)[.]" (R.

p. 387.) Adjudging the note and mortgage to be unenforceable *is* relief available under S.C. Code Ann. § 37-10-105(C). Moreover, Rule 54(c), SCRCP, provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Accord Battery Homeowners Assn. v. Lincoln Financial Resources, 309 S.C. 247, 422 S.E.2d 93 (1992); Perry v. Smalls, 308 S.C. 259, 417 S.E.2d 611 (Ct. App. 1992); Sossamon v. Peeler, 291 S.C. 256, 353 S.E.2d 152 (Ct. App. 1987); Jones v Bennett, 348 S.C. 96, 348 S.E.2d 365 (Ct. App. 1986). Since Bailey v. Novastar had a claim that sounded under S.C. Code Ann. § 37-10-105(C), the complaint put in issue that a judgment declaring the note and mortgage to be unenforceable might be rendered.

"General rules governing the conclusiveness of judgments and decrees ordinarily apply" to mortgage foreclosures, 59A C.J.S. Mortgages § 1051 (2009). There is no case law in South Carolina indicating an exception for mortgage foreclosure claims in the res judicata context. As discussed in the master's order (R. pp. 21-22), our Supreme Court has applied res judicata to affect a mortgagee's foreclosure claim at least as far back as 1930. Columbia Natl. Bank of Columbia v. Arthur, 151 S.E. 274, 275, 276 (S.C. 1930). There is not, and never has been, a res judicata exception for mortgage foreclosure claims. See id.; 59A C.J.S. Mortgages § 1051.

III. Public policy does not require deviation here from settled law on res judicata.

Citing cases discussing res judicata and public policy, Deutsche Bank contends the trial judge erred by applying well-settled principles of res judicata to this case. He did not. What Deutsche Bank really seeks is for this court, the Court of Appeals, to create a foreclosure exception to the compulsory counterclaim rule, in violation of the

plain language of Rule 13(a), SCRCP, and existing precedent. The master-in-equity did not do that, and there is no good reason for this court to do so.

a. Courts are reluctant to change law for public policy reasons.

Courts are reluctant to change existing law for public policy reasons, and our Supreme Court is no different, as some of its recent decisions show.

> We exercise restraint when undertaking the amorphous inquiry of what constitutes public policy. As the United States Supreme Court has recognized, "public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, *only with the utmost circumspection.* " Patton v. United States, 281 U.S. 276, 306, 50 S.Ct. 253, 74 L.Fd. 854 (1930), *abrogated by* Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) (emphasis added). This comports with our understanding that "[t]he primary source of the declaration of the public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration." Citizens' Bank v. Heyward, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925).

Taghivand v. Rite Aid Corp., 411 S.C. 240, 244, 768 S.E.2d 385, 387 (2015).

> This Court has repeatedly declined to create or expand public policies which the General Assembly could have adopted had it chosen to do so, and we decline to deviate from that practice now. Moreover, this Court has emphasized its preference for exercising restraint when undertaking the amorphous inquiry of what constitutes public policy based upon our understanding that the General Assembly is the principal source of public policy declarations.

Donze v. Gen. Motors, LLC, 420 S.C. 8, 800 S.E.2d 479, 487 (2017) (internal citations and quotation marks omitted).

"Determinations of public policy . . . are chiefly within the province of the legislature, whose authority on these matters we must respect." Fullbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 802 S.E.2d 794, 797 (2017). The legislature has not passed a statute varying the law in this context, nor has the Supreme Court enacted a rule change under S.C. Const. Art. V, § 4A.

Here, what Deutsche Bank is trying to get this court to do is to create an exception to a rule of civil procedure – and a rule of civil procedure is the functional equivalent, under S.C. Const. Art. V, § 4A, of a statute. Cf. Beach Co., 351 S.C. at 61 (rules of civil procedure construed like statutes). Deutsche Bank is trying to get this court to carve out a "foreclosure exception" to Rule 13(a), SCRCP. Not only would that contravene the principle of circumspect use of public policy shown by the cases cited above, there is no reason to create such an exception to serve public policy aims – and there is good reason not to do so.

b. The Administrative Order and Rule 13(a), SCRCP, are not in conflict.

Deutsche Bank is correct that there is 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"), which provides for a procedural mechanism within mortgage foreclosure actions designed to foster their resolution through various foreclosure intervention methods. It is also indicated by the adoption of federal regulations such as 12 CFR §§ 1024.39 and 1024.41, which took effect after the operative events in this case but, among other

things, now require mortgage servicers to wait a specified period of time after sending a defaulting mortgage customer information about ways to resolve that default before they refer out the matter for the bringing of a foreclosure action.

As the master found, though, "the public interest in foreclosure intervention and the public interest in finality of litigation served by res judicata are not necessarily in conflict." (R. p. 23.) The master observed that "[b]y 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." (R. pp. 23-24.)

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

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

As the master found, there is no 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. (R. pp. 25-26.) Since Deutsche Bank could have asserted its foreclosure claim in Bailey v. Novastar *and* served the public policy of foreclosure intervention, Deutsche Bank's proffered "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.

c. The paper tigers of Deutsche Bank's public policy arguments.

Deutsche Bank works hard to try to portray affirming Judge Spence's decision as the opening of a Pandora's box of problems. Examination of these arguments shows them to be paper tigers.

Unlike what Deutsche Bank intimates, Judge Spence did not make his decision on the basis that there is a categorical rule saying that mortgagees must always bring

foreclosure counterclaims or be barred by res judicata if they are sued by their borrowers. Bailey and Owens are not asking this court to approve such a categorical rule, nor would the court be doing so in affirming Judge Spence's order in this case. Decisions about res judicata are always case-specific, not categorical, since no two cases, or sets of two cases, will ever be alike. Indeed, the master observed two variables not present in this case that probably would have had a significant effect on the outcome if they had been present.

The first concerns 12 CFR §§ 1024.39 and 1024.41. These regulations were not in effect at the time of this case's operative events.[3] Among other things, these regulations now require a mortgage servicer to wait a specified period of time after sending a defaulting mortgage customer information about ways to resolve that default before the servicer refers out the matter for the bringing of a foreclosure action. 12 CFR §§ 1024.39; 1024.41. Had these rules been in effect at the time that Deutsche Bank answered, it might have had a very good argument that its foreclosure claim had not yet arisen at that point, since the required time period under these regulations had not elapsed. There is no inherent conflict between Judge Spence's decision and these regulations.

Second, the master observed that his decision did not address how it might have been different if the subject note had not matured at the time that Deutsche Bank served its answer. (R. p. 36.) It may well have been very different. If the default under the note and mortgage had simply been in making monthly payments, Deutsche Bank

[3] As shown by the Federal Register at 78 FR 10696, 10708, 10842, 10855 (Feb. 14, 2013), and as Deutsche Bank agrees, the rules under these 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.

might have forgone its claim as to all defaults *before* the time it answered and did not assert its counterclaim, but, when the next month's payment deadline came and went, a new default would have occurred, and the claim arising from *that* default would be unaffected by the operation of Rule 13(a). Here, however, the underlying note had *matured*, and maturation of the note without payment of the balance was the ultimate and final default under the note and mortgage. (R. p. 27.)

What Deutsche Bank in fact protests is not a sweeping categorical ruling by the master, but a correct, thorough application of established legal principles to an odd set of facts that is unlikely to repeat. The specters Deutsche Bank sees do not exist. Applying these established legal principles does not prevent anyone from engaging in foreclosure intervention efforts at all.

d. Accepting Deutsche Bank's argument would create the possibility of inconsistent, conflicting outcomes.

Deutsche Bank's argument, however, sets the stage for inconsistency. To demonstrate it, all one must do is to take the argument to its logical conclusion. If Bailey and Owens' claim under S.C. Code Ann. § 37-10-105(C) and Deutsche Bank's foreclosure claim did not bear a compulsory relation to one another, as Deutsche Bank argues they do not, then it would have been possible for Bailey and Owens to prevail in Bailey v. Novastar, obtain a judgment declaring the note and mortgage to be unenforceable, and yet still be exposed to Deutsche Bank possibly prevailing on a claim to foreclose that note and mortgage in a later action. That is absurd. Rule 13(a) was designed to prevent "'the scandal and absurdity' of a circuity of action[.]" Broom, supra at 259.

IV. The master did not err in concluding that the mortgage was satisfied by operation of law.

Res judicata arises from the doctrine of bar and merger, which has been subsumed within the modern concept. 7 S.C. Jur. Estoppel and Waiver § 29. 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." James D. McGuire, "The Election of Remedies," 9 Rocky Mtn. Law Rev. 271, 272 (1936-37).

Accordingly, the master looked to historic definitions to discern the effect of res judicata on the mortgage involved in this case. 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 this context, as the master found, the words *bar*, *extinguish*, and *discharge* have significant overlap in definition and express a common historical concept. (R. p. 26.)

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.

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

59 C.J.S. Mortgages § 564 (2009).

The master correctly observed that what rights extinguished by res judicata always depends upon case-specific factors. (R. p. 27.) Here, the note subject of the mortgage had matured and the balloon payment was unpaid at the time of Deutsche Bank's answer in the earlier action. Nonpayment at maturity is the ultimate and final default under a note and mortgage. Where a claim arising from that default is barred, that discharges Deutsche Bank's rights in the note and mortgage, as it neither has nor can have any other grounds on which to enforce the mortgage. The master was not out in left field here; authorities agree. "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). "A mortgage is different from other instruments in that, in order for it to be a valid instrument, there must be a debt or obligation of the mortgagor for which it is given as security. If there is no debt, then there is no valid mortgage." Blackwell v. Blackwell, 289 S.C. 470, 472, 346 S.E.2d 731, 732 (Ct. App. 1986) (internal citation omitted); accord Borg Warner Acceptance Corp. v. Darby, 296 S.C. 275, 278, 372 S.E.2d. 99, 101 (Ct. App. 1988) ("a security interest cannot exist without an obligation"). 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.

Deutsche Bank's mortgage no longer exists, and the master was right to find it does not encumber the subject property.

V. The master did not err in concluding that Bailey and Owens are entitled to summary judgment on liability under S.C. Code Ann. § 29-3-320.

Except with regard to whether the mortgage was satisfied, there was never any dispute that the elements of a claim under S.C. Code Ann. §§ 29-3-310 and -320 were met in this case. Accordingly, the master had to analyze whether *satisfaction* as contemplated by these statutes had occurred.

The master concluded that *payment* and *satisfaction* under these statutes do not mean the same thing. (R. pp. 28-31.) He engaged in a searching and thorough discussion in his order concerning the meaning of *satisfaction* under these statutes, and Bailey and Owens hereby incorporate here by reference the master's order from page 28 through the last full paragraph on page 34.

Payment and satisfaction are not synonymous. *Pay* and *satisfy* do not mean exactly the same thing. While payment is a kind of satisfaction, satisfaction is not limited to payment. Payment will almost certainly constitute satisfaction under any circumstances, but, unlike what Deutsche Bank argues, satisfaction may be accomplished in ways other than by payment. Payment is just the most common form of satisfaction, not the only one. Satisfaction necessarily embraces discharge that occurs for reasons other than payment.

Indeed, the language of S.C. Code Ann. §§ 29-3-310 and -320 reveals that satisfaction by means other than payment was expressly contemplated by the General Assembly when drafting these 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. Otherwise, the use of *satisfaction* in addition to *payment* would have been superfluous, surplus language, and "[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." In re: Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). "Our courts are constrained to avoid a statutory construction that would have the effect of reading a provision out of a statute." Protection & Advocacy for People with Disabilities, Inc. v. Buscemi, 417 S.C. 267, 274, 789 S.E.2d 756, 760 (Ct. App. 2016).

As discussed above, *bar*, *discharge*, and *extinguish* express facets of a common concept. An examination of the root of the word *satisfy* reveals that it expresses the same concept. 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.

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.

Deutsche Bank argues that Dykeman v. Wells Fargo Home Mortg., Inc., 381 S.C. 333, 340, 673 S.E.2d 804, 807 (2009), defined *satisfaction* under S.C. Code Ann. §§ 29-3-310 and -320 as payment. Deutsche Bank appears to be referring to the following passage:

> We hold that section 29-3-310 requires the following elements be established by the mortgagor to trigger the substantial penalty and related relief in section 29-3-320: (1) that he has made full payment of his "debts," including any applicable "damages, costs, and charges"; (2) that he has made a "request by certified mail or other form of delivery" that the mortgage be satisfied of record; (3) that he has made a "tender of fees of office for entering satisfaction"; and (4) that the mortgagee has failed to "enter satisfaction in the proper office on the mortgage" within three months of the request.

Dykeman, 381 S.C. at 340 (footnote omitted).

As the master noted and as is discussed above in this brief, the debt subject of the mortgage no longer exists. To pay it, Bailey and Owens did not need to pay any money. There is no inconsistency between Dykeman and the master's decision in this case.

The reading of the statute that includes discharge by operation of law within the meaning of *satisfaction* is also consistent with "the legislative intent in enacting these statutes[, which] 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) (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 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) (emphasis added).

The master did not err by granting summary judgment on liability to Bailey and Owens under S.C. Code Ann. § 29-3-320.

VI. Wells Fargo v. Smith's precedential value was eliminated by the Supreme Court.

Deutsche Bank cites Wells Fargo Bank, N.A. v. Smith, 398 S.C. 487, 493-99, 730 S.E.2d 328, 331-35 (Ct. App. 2012), in support of its argument. The Supreme Court of South Carolina stripped that opinion of its precedential effect by order issued June 11, 2014, stating as follows:

> Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion Wells Fargo Bank, N.A. v. Smith, 398 S.C. 487, 730 S.E.2d 328 (Ct. App. 2012). While we deny the petition, we direct the Court of Appeals to depublish its opinion and assign the matter an unpublished opinion number. The above opinion shall no longer have any precedential effect.

Wells Fargo Bank, N.A. v. Smith, S.C. Sup. Ct. Order dated June 11, 2014.

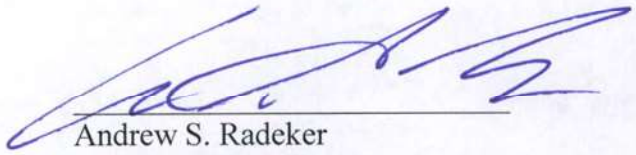
VII. Deutsche Bank cannot obtain reversal of the denial of its summary judgment motion.

Deutsche Bank seeks for this court to reverse the master's denial of its summary judgment motion and grant it summary judgment in this appeal. It is well settled that the denial of summary judgment is not appealable at all. Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 580 S.E.2d 440 (2003).

CONCLUSION

This court should affirm the master's well-reasoned rulings. The only reversal this court should order is that of the master's decision to vary Baily and Owens' statutorily mandated relief under S.C. Code Ann. § 29-3-320, as sought in their appeal.

Respectfully submitted,



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November 26, 2018

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
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

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Deutsche Bank National Trust Company, as Trustee
for NovaStar Mortgage Funding Trust, Series 2007-1
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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.

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ARGUMENT

I. Deutsche Bank's Un-Asserted Foreclosure Counterclaim was not Compulsory in the 2013 Action.

A. By Relying on Out-of-Context Cases, Bailey and Owens Attempt to Erroneously Expand this Court's Compulsory Counterclaim Jurisprudence in the Mortgage Lending Context.

Relying on out-of-context cases involving ownership of a country road and a trustee's fiduciary duties (*see* Appellant/Respondents' Initial Respondents' Brief (hereinafter "Respondent Brief") at 24–25), Bailey and Owens erroneously contend that Deutsche Bank's foreclosure counterclaim was compulsory solely because of limited overlapping facts with Bailey and Owens' Attorney Preference claim. (*See id.* at 24 (noting that foreclosure counterclaim "arose from and required proof of the execution of the note and mortgage")). That overly broad contention completely ignores South Carolina case law in the relevant context – *i.e., the mortgage context* – in which the logical relationship determination is made by asking whether a successful counterclaim *would affect* a plaintiff's right to enforce his or her claim. *See Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 330 n.7, 755 S.E.2d 437, 442 n.7 (2014) ("[T]he 'logical relationship' determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage."); *cf. Hough v. Ag S. Farm Credit ACA*, 2018 WL 1430960, at *2 (D.S.C. March 22, 2018) (applying South Carolina law and concluding, "In the foreclosure context, this determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage." (internal quotation marks omitted)).

Indeed, the three South Carolina cases on which both parties rely support Deutsche Bank's position and show Bailey and Owens' arguments to be overly broad because each case turns on whether a counterclaim would affect the enforceability of a leading claim (not whether there is merely some overlap in the facts). *See, e.g.*, *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 298,

296, 778 S.E.2d 106, 109 (2015) ("the allegations, if true, would not render the guarantees unenforceable"); *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 905 (1989) (deeming as permissive a counterclaim that "do[es] not affect the enforceability of the note"); *S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 97, 800 S.E.2d 488, 492 (Ct. App. 2017) ("Were this allegation true, it could affect the loan's enforceability.").

B. Because the Connection Between Deutsche Bank's Foreclosure Counterclaim and Bailey and Owens' Claims is Far More Attenuated that that Found in *BADD, DAV Corp.*, and *Salon Proz*, Those Cases Support Deutsche Bank's Position.

Upon dispensing with Bailey and Owens's above, overly broad description of the compulsory counterclaim rule in the mortgage context, the Court must then answer and resolve the relevant question before it: What does it mean for a counterclaim to affect the enforceability of a leading claim? *BADD*, *DAV Corp.*, and *Salon Proz* shed light on the answer to that question and require a connection far less attenuated than that relied on by Bailey and Owens.

In *DAV Corp.*, the counterclaims deemed compulsory alleged that a bank's "right to bring suit on the note w[as] modified by its oral agreement." 298 S.C. at 518, 381 S.E.2d at 905. If those counterclaims were successful, the bank would not have been able to prevail on its action for foreclosure. *See id.* ("would have avoided default on the note"). In other words, the *DAV Corp.* trial court could not find the guarantor *liable* in the foreclosure action if the counterclaims were successful.

Similarly, in *Salon Proz*, the counterclaim deemed compulsory alleged that the bank "promise[d] to modify or otherwise restructure loans, including . . . the loan subject of this case." 420 S.C. at 97, 800 S.E.2d at 492. If that counterclaim were successful, the bank would not have been able to prevail on its action for foreclosure. In other words, the *Salon Proz* trial court could not find the mortgagor *liable* in the foreclosure action if the counterclaim were successful.

Where a counterclaim – even if successful – would not prevent a court from making a liability determination in the plaintiff's favor, South Carolina courts in the mortgage lending context find counterclaims to be permissive. That is the lesson from *BADD*, in which a guarantor's counterclaims, even if successful, would not prevent a trial court from finding the guarantor liable in the plaintiff's foreclosure action. *See* 414 S.C. at 296, 778 S.E.2d at 109 ("the allegations, if true, would not render the guarantees unenforceable").

In the present case, Deutsche Bank's un-asserted foreclosure counterclaim in the 2013 Action is similar to the counterclaims in *BADD* and dissimilar to the counterclaims in *DAV Corp.* and *Salon Proz*. A successful foreclosure counterclaim in the 2013 Action would not have prevented a trial court from finding Deutsche Bank *liable* to Bailey and Owens on their claim under the Attorney Preference Statute. Indeed, Bailey and Owens do not even make that argument. Instead, Bailey and Owens' Rule 13(a) argument attempts to draws a very attenuated, multi-step connection between the un-asserted counterclaim and a potential *remedy*. The trial court erred in accepting Bailey and Owens' argument in this respect.[1]

C. Because – as Even Bailey and Owens Implicitly Admit – this Case Presents a Fact Pattern of First Impression in South Carolina, this Court Should Consider Persuasive Federal Authority.

By relying primarily on *BADD*, *DAV Corp.*, and *Salon Proz* – cases presenting the inverse context where a mortgagee initiates a foreclosure action – Bailey and Owens implicitly acknowledge that South Carolina courts have not addressed whether, and under what circumstances, a foreclosure counterclaim is compulsory in an action brought by a borrower. In

[1] Deutsche Bank is fully aware that this Court's *Wells Fargo v. Smith* decision is no longer binding authority on this Court. (*Cf.* Respondent Brief at 39–40). Indeed, that is why Deutsche Bank cited the case in the manner it did, and included the reference in a footnote only. (Appellant's Initial Brief of Respondent/Appellant at 14 n.7). Deutsche Bank nevertheless believed this Court would appreciate being directed to a case involving a procedural backdrop and legal issues remarkably similar to those in the present matter.

that situation, it is appropriate for this Court to look to federal case law for guidance. *See Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 62, 566 S.E.2d 863, 865 (Ct. App. 2017) (noting that "South Carolina's Rule 13(a) is the same as the federal rule on counterclaims" and concluding, "Accordingly, we may rely on federal law to interpret our Rule 13"); *cf. Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987) (looking to federal case law to interpret state rule tracking language of corresponding federal law). Deutsche Bank is not advising this Court to consider federal case law because South Carolina case law "is squarely against it." (Respondent Brief at 26). To the contrary, Deutsche Bank directs this Court to additional, persuasive authority because the question of "[w]hether a counterclaim is logically related to the initial claim depends on the facts of each case," *Twillman, Ltd.*, 351 S.C. at 61, 566 S.E.2d at 865, and because – as Bailey and Owens apparently agree – "[t]his is a strange case" (Respondent Brief at 10) presenting unique issues on which this Court has not previously ruled.

Federal courts' extensive treatment of the issue before this Court – in the very comparable context of leading claims brought under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* – should be highly instructive insofar as it provides this Court with a multi-factor roadmap to use in evaluating whether foreclosure was a compulsory counterclaim in the 2013 Action. These factors include whether "the lender's counterclaim raises issues of fact and law significantly different from those presented by the borrower's claim," *Whigham v. Beneficial Finance Co. of Fayetteville, Inc.*, 599 F.2d 1322, 1323–24 (4th Cir. 1979), and whether "different evidence is needed to support each claim," *Maddox v. Ky. Fin. Co., Inc.*, 736 F.2d 380, 383 (6th Cir. 1984).

Contrary to Bailey and Owens' efforts to argue to the contrary (*see* Respondent Brief at 23), their claim under the Attorney Preference Statute and Deutsche Bank's un-asserted foreclosure counterclaim raise different issues of fact and law, and require different evidence.

Bailey and Owens are left to argue, simply, that both claims relate to "the note and mortgage." (Respondent Brief at 23). Federal courts, addressing a comparable circumstance under a comparable Rule 13(a), specifically find that to be an insufficient connection. *See Valencia v. Anderson Bros. Ford*, 617 F.2d 1278, 1291 (7th Cir. 1980), *rev'd on other grounds by* 452 U.S. 205 (1981) ("The sole connection between a TILA claim and a debt counterclaim is the initial execution of the loan document."); *Whigham*, 599 F.2d at 1324 ("The borrower's . . . claim involves the same loan, but it does not arise from the obligations created by the contractual transactions."). The reasoning of these and myriad other federal decisions referenced in Deutsche Bank's Appellant's Initial Brief should guide this Court's decision-making. In the least, these thorough federal decisions should not simply be ignored, as Bailey and Owens seem to suggest via their failure to acknowledge them.

D. Bailey and Owens' Failure to Even Seek Non-Enforcement of the Note and Mortgage in their Complaint, Coupled with Their New Argument that Pleading Said Relief was Not Even Required, is a Telling and Exacerbating Factor.

Bailey and Owens know how to request in a pleading that a court deem their loan to be unenforceable. (R. p. 110, ¶¶ 60, 62). They chose not to make that request in their complaint in the 2013 Action, likely because the loan was not even in default at that time and no one had brought an action against them on the debt. As a result, Bailey and Owens failed to provide Deutsche Bank with notice of the remedies they were actually seeking, which had the effect of depriving Deutsche Bank from making an informed decision about whether foreclosure was a compulsory counterclaim.

Bailey and Owens now seem to no longer rely on their previous arguments premised on the notion that a broad-brush, catch-all prayer for relief placed each and every possible outcome – no matter how attenuated, and contingent, in any event, on multiple discretionary trial court decisions – at issue in the 2013 Action. Instead, Bailey and Owens move the goalposts, contending

now that they were not even required to reference § 37-10-105(C) because their claim "sounded under" that statute, and because, under SCRCP 54, a party is entitled to all relief to which he or she is entitled. (Respondent Brief at p. 26). Deutsche Bank does not dispute the plain language of Rule 54(c). However, the issue of whether a party is entitled to relief on the one hand, and the issue of whether a defendant receives notice of the relief sought sufficient to enable it to calculate the scope of compulsory counterclaims on the other hand, are two separate issues. It is elementary that a party cannot know whether a counterclaim is logically related to an opposing party's claim unless and until he is informed of the full scope of the opposing party's claim.

II. Even if Deutsche Bank's Un-Asserted Foreclosure Counterclaim Were Compulsory under Rule 13(a), the Trial Court Erred in Rigidly Applying the Doctrine of Res Judicata.

A. The Court is Required to Account for Concerns of Equity, Justice, and Policy in Evaluating Application of the Res Judicata Doctrine.

Citing to extensive case law and applicable equitable principles, Deutsche Bank explained in its Appellant's Initial Brief that South Carolina courts should not rigidly and mechanically apply the doctrine of res judicata and are, instead, *required* to consider extenuating circumstances where application of the doctrine would be inequitable, unjust, or in violation of public policy. (Appellant's Initial Brief of Respondent/Appellant at pp. 20-26). Bailey and Owens, in response, make no attempt to address, or even respond to, this case law and related legal principles. Instead, Bailey and Owens argue the Court should not change the law for public policy reasons – which is not Deutsche Bank's argument – and they erroneously accuse Deutsche Bank of seeking a "foreclosure exception" – which it is not. (Respondent Brief at pp. 27-28). Indeed, by citing to, and relying on, *valid South Carolina case law*, Deutsche Bank could not possibly be seeking an exception to that case law.

To be certain, if this Court considers countervailing circumstances sounding in equity, justice, and public policy, it will be following the law, not attempting to change it. *See Nelson v. QHG of S.C. Inc.*, 354 S.C. 290, 314, 580 S.E.2d 171, 184 (Ct. App. 2003) (application of res judicata should be precluded "where unfairness or injustice results, or public policy requires it"); *id.* (application of res judicata "*will not* be applied where it will contravene other important public policies" (emphasis added); *Johns v. Johns*, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992) ("courts *must* weigh the competing public policies" (emphasis added)).

This case involves myriad facts and circumstances that make rigid application of the res judicata doctrine inequitable, unjust, and against public policy. Relevant factors include, but are not limited to:

- Bailey and Owens filed frivolous claims – only four days before the Note was due to Mature – in the 2013 Action.
- The main question in the 2013 Action was whether Deutsche Bank's predecessor in interest complied with the South Carolina Consumer Protection Code at the closing; it had nothing to do with subsequent payments and defaults.
- Bailey and Owens admit the Note matured on July 1, 2013. (R. p. 106, ¶ 22).
- Bailey and Owens did not convey to Deutsche Bank in their complaint in the 2013 Action that they were seeking non-enforcement of the Note; instead they vaguely and broadly sought "all relief available under S.C. Code Ann. § 37-10-105(C)" (R. p. 387, ¶ e), and now argue that Deutsche Bank should have just read their mind and figured it out.
- Upon maturity of the Note, Deutsche Bank's immediate response was not to foreclose. Instead, Deutsche Bank reached out to Owens to work with her, offering various loan modification options to avoid foreclosure. (R. p. 242, ¶ 16; pp. 262–263).
- Deutsche Bank obtained a complete defense verdict in the 2013 Action.
- Bailey and Owens acknowledge their Note matured and has not been paid, yet they seek a free house.

If Bailey and Owens wanted to put Deutsche Bank on notice that they were seeking non-enforcement of the Note in the 2013 Action, they could have done so. They did not because they

were not seeking that relief. Their after-the-fact, "gotcha" arguments should not be rewarded. Defendants – like Deutsche Bank in the 2013 Action – who are forced into litigation should not be obligated to read between the lines of a vague pleading to divine the full scope of damages that a claimant could possibly be awarded. That is asking too much. Because this is indeed "a strange case" (Respondent Brief at p. 10), for all of the reasons set forth above, application of res judicata in the circumstances of this case was inappropriate.

B. South Carolina's Equitable Principles Support a Finding that the Trial Court Erred in Applying Res Judicata.

Consistent with the reasons set forth above for not applying res judicata are South Carolina's long-held principles of equity. "Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice." *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 256, 715 S.E.2d 348, 356 (Ct. App. 2011) (internal quotation marks omitted). Similarly, "equity looks to substance rather than to form" and will "dispens[e] with pure formalities which would otherwise defeat equity." *Wilkie v. Phila. Life Ins. Co.*, 187 S.C. 382, 197 S.E. 375, 378 (1938). These equitable principles all favor Deutsche Bank. It is likely for that reason that Bailey and Owens do not even mention or attempt to address them in their Respondent Brief.

C. Bailey and Owens' Advocacy for "Dual Tracking" Contravenes State and Federal Policy.

Bailey and Owens, like the trial court below, suggest that Deutsche Bank should have engaged in what is known as "dual tracking." (Respondent Brief at pp. 29–30). Generally speaking, dual-tracking is the process whereby a servicer communicates with a borrower about loan modification options while also, *at the very same time*, suing the borrower for foreclosure. It is with good reason that the Consumer Financial Protection Bureau promulgated regulations designed to disincentive this procedure, which sends mixed messages to – and would likely

confuse – a borrower. The mere fact that 12 C.F.R. § 1024.41(f) was not promulgated until January 10, 2014 is not outcome determinative, for two reasons:

First, despite Bailey and Owens' arguments to the contrary (Respondent Brief at pp. 29–30), if this Court construes SCRCP 13(a) in the manner that Bailey and Owens advocate, it is true that litigants going forward cannot simultaneously comply with 12 C.F.R. § 1024.41(f) and Rule 13(a). Stated differently, a litigant – in many circumstances[2] – will be unable to file an answer and foreclosure counterclaim within ***30 days*** of being served with a complaint, *see* SCRCP 12, 13(a), and also wait ***120 days*** after a default before asserting a foreclosure claim.

Second, even apart from the above federal regulation, the dual tracking that Bailey and Owens advocate for, coupled with their preferred interpretation of Rule 13(a), does in fact contravene South Carolina policy directives. It is true that the Supreme Court's Administrative Order on Mortgage Foreclosure Actions does not "require delay in asserting a foreclosure." (Respondent Brief at p. 29 (emphasis omitted)). However, the Order does not seek to encourage the filing of foreclosure actions either. To the contrary, the Order laments the fact that "the number of foreclosure actions filed in this State have continued to increase." Administrative Order of the Supreme Court of South Carolina, Re: Mortgage Foreclosure Actions, No. 2011-05-02-01 (May 2, 2011). Bailey and Owens' preferred and very expansive construction of Rule 13(a) would force lenders and servicer to do just that, *i.e.* file more foreclosure actions, and more often.

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[2] Bailey and Owens' claim that "[m]ost mortgage customers do not sue the holders of their mortgages . . . three days before the maturity date of the note" (Respondent Brief at p. 10) is irrelevant and erroneous. The practice is all too common. And even if the conflict between 12 C.F.R. § 1024.41(f) and Bailey and Owens' interpretation of Rule 13(a) creates impossible procedural hurdles for only a few litigants, that is a few too many. In the alternative, where – as here – a unique case presents itself, the policies underlying the doctrine of res judicata "may have to yield" to other concerns. *Johns*, 309 S.C. at 203, 420 S.E.2d at 859.

This likelihood is not a mere "paper tiger," (Respondent Brief at 31–33); it is reality. And affirmance of the trial court's decision will, in fact, result in a "categorical rule" (Respondent Brief at p. 31) as follows: In response to each and every lawsuit brought by a borrower in default alleging unconscionable conduct and seeking relief under S.C. Code Ann. § 37-10-105, a lender or servicer will be forced to file a foreclosure counterclaim. In turn, the lender or servicer will be deprived of its rights to pursue, in lieu of foreclosure, alternative remedies. And the expectation of a forthcoming foreclosure claim will no doubt have a chilling effect on a borrower's decision to seek to enforce his or her rights.

To the extent this case presents such an "odd set of facts that is unlikely to repeat," (Respondent Brief at 31–32), this case is not the right vehicle to effect, albeit by implication, such a broad-reaching categorical rule.[3]

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[3] Bailey and Owens' final argument with respect to the compulsory counterclaim issue contends that Deutsche Bank's argument has the potential to result in conflicting outcomes. (Respondent Brief at p. 33). They maintain "it would have been possible for Bailey and Owens to prevail in [the 2013 Action], obtain a judgment declaring the note and mortgage to be unenforceable, and yet still be exposed to Deutsche Bank possibly prevailing on a claim to foreclose that note and mortgage in a later action." (*Id.*) If, hypothetically, the note and mortgage were deemed unenforceable in a prior action, Deutsche Bank would not bring a subsequent foreclosure action, much less prevail in any such action. There is no conflict here, not even a possible conflict.

III. Because the Trial Court Erred by Deeming Deutsche Bank's Un-Asserted Foreclosure Counterclaim to be Compulsory and in Applying the Doctrine of Res Judicata, its Rulings Premised on those Errors Should be Reversed.

The trial court's rulings on Bailey and Owens' summary judgment motion were all premised on its erroneous interpretation of the compulsory counterclaim rule and its subsequent application of the doctrine of res judicata. (R. p. 23, lines 7–9 ("As the foreclosure claim was an unraised, compulsory counterclaim in the [2013] action, it is now barred by res judicata."); R. p. 27, lines 18–21 (explaining that because "Deutsche Bank's rights in the note . . . have been discharged . . . Bailey and Owens are entitled to prevail on their claim for a declaratory judgment"); R. p. 33, lines 21–23 ("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.")). Because the trial court erred by concluding that Deutsche Bank was required to assert foreclosure as a counterclaim in the 2013 Action (and in subsequently applying res judicata), this Court should reverse the trial court's ruling on Bailey and Owens' motion for summary judgement.[4]

IV. Even if Res Judicata Were Properly Applied to Bar Deutsche Bank's Foreclosure Claim, Which it Was Not, the Trial Court Still Erred in Concluding that Resolution of the 2013 Action Constituted "Satisfaction" under Section 29-3-310.

Finally, even if this Court concludes that foreclosure was a compulsory counterclaim in the 2013 Action, and even if the Court decides the trial court did not err in rigidly and mechanically

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[4] Even if the trial court's denial of Deutsche Bank's cross-motion for summary judgment – concerning Bailey and Owens' three counterclaims – is not appealable, a finding in Deutsche Bank's favor would necessarily require this Court to vacate the Summary Judgment Order below. Moreover, a finding that Deutsche Bank's un-asserted foreclosure counterclaim was not compulsory in the 2013 Action will be determinative of, and render moot, Bailey and Owens' counterclaims for declaratory judgment and for failure to enter satisfaction pursuant to S.C. Code S.C. Code Ann. §§ 29-3-310 and -320. Thus, Bailey and Owens' argument that this Court cannot reverse the denial of a summary judgment motion (*see* Respondent Brief at 40) is largely one of form over substance.

applying res judicata in the face of extensive countervailing circumstances, the trial court would still be in error by finding Deutsche Bank liable under S.C. Code Ann. § 29-3-310.

Under that statute, a "mortgagee who has received full payment or satisfaction or to whom legal tender has been made of his debts, damages, costs, and charges secured by mortgage or real estate" is required to record a mortgage satisfaction within 3 months of demand. S.C. Code Ann. § 29-3-310. Section 29-3-320 likewise imposes liability for failure to enter satisfaction after "having received such payment, satisfaction or tender." S.C. Code Ann. § 29-3-320. There is no real dispute that Bailey and Owens have failed to make "full payment" of the Note.[5] And there is no dispute or contention that Bailey and Owens provided some "legal tender" of their "debts" – they did not.

Accordingly, as it relates to Sections 29-3-310 and -320, the only question before this Court – and the only issue that was before the trial court – is whether Deutsche Bank "received . . . satisfaction." S.C. Code Ann. §§ 29-3-310 & -320.[6] Bailey and Owens contend that resolution of the 2013 Action constituted "satisfaction" under these statutes. (Respondent Brief at 33–39). What they are really arguing is that by virtue of successfully defending against Bailey and Owens' claims in the 2013 Action and obtaining a complete defense verdict, Deutsche Bank somehow

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[5] This candid admission should foreclose Bailey and Owens' creative argumentation about satisfaction "by operation of law" (R. p. 33, lines 22), because the Supreme Court of South Carolina has previously concluded, in clear and certain terms, that "payment of the mortgage" is a requirement "[f]or liability to attach under [S.C. Code Ann. §§ 29-3-310 & -320]." *Dykeman v. Wells Fargo Home Mortg., Inc.*, 381 S.C. 333, 339, 673 S.E.2d 804, 807 (2009); *see id.* at 340, 673 S.E.2d at 807 ("We hold that section 29-3-310 requires the following elements be established by the mortgagor to trigger the substantial penalty and related relief in section 29-3-320: (1) that he has made full payment of his 'debts,' including any applicable 'damages, costs, and charges' . . . .").

[6] Lest there be any doubt, the word "received" necessarily modifies both "payment" and "satisfaction" in both statutes. A contrary reading, whereby "received" modifies "payment" but not "satisfaction," makes the statutes incomprehensible.

"received . . . satisfaction" of the Note and Mortgage. Stated differently, Bailey and Owens contend that by virtue of bringing, and subsequently losing, a lawsuit, they "satisf[ied]" the Note and Mortgage. The trial court erred in reaching this conclusion.

The word "satisfaction" in this context "is generally defined as 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." *Bowers v. Dep't of Transp.*, 360 S.C. 149, 155, 600 S.E.2d 543, 546 (Ct. App. 2004) (internal quotation marks omitted). Acceptance of substitute performance as a discharge of an original obligation is typically formalized in an agreement or "an accord whereby one of the parties agrees to accept as satisfaction . . . some performance or undertaking different from that which he considers himself entitled." *Id.* (internal quotation marks omitted).[7] The statutes at issue here, by and through their use of the word "received," contemplate an affirmative performance by a debtor (or third party) and a subsequent acceptance by the creditor. *See* S.C. Code Ann. § 29-3-310 (referring to creditor "who has received . . . satisfaction"); *id.* § 29-3-320 (conditioning obligation on creditor "having received such . . . satisfaction"). Deutsche Bank must therefore have "received" – and presumably accepted, as a discharge of Bailey and Owens' obligations under the Note and Mortgage – some affirmative, substitute performance in lieu of payment in full.[8]

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[7] Deutsche Bank does not dispute that the words "payment" and "satisfaction" have different meanings in § 29-3-310 (Respondent Brief at 36), or that a party can discharge – and therefore satisfy—a debt in ways different than simply paying the debt according to its terms (*see id.*). Deutsche Bank does, however, dispute the notion that a debtor can satisfy a debt in a manner to which a creditor does not agree.

[8] Bailey and Owens' arguments about the meaning of the words "bar" and "merger" (Respondent Brief at 33) – words which do not appear in the relevant statutes – do not assist the Court in understanding how Deutsche Bank "received" anything, much less how Deutsche Bank received "full payment," "satisfaction," or "legal tender."

Forcing Deutsche Bank to defend a lawsuit hardly qualifies as the provision of substitute performance. Deutsche Bank "received" nothing. And by successfully defending against Bailey and Owens' claims in the 2013 Action, which proved to be without merit in any event, Deutsche Bank certainly did not agree to accept any substitute performance as "satisfaction" in full.

A long-standing principle of statutory construction is that "[i]t is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning." *Davenport v. City of Rock Hill*, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993). Bailey and Owens make no effort to explain, much less acknowledge, how the word "received" fits into their expansive and strained interpretation of Sections 29-3-310 and -320. Because Bailey and Owens' satisfaction-by-operation-of-law argument does not fit within the plain language of the statute, it was clearly not within the contemplation of the drafters of these statutes. *Cf. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005) ("The cardinal rule of statutory interpretation is to ascertain the intent of the legislature.").

Finally, to the extent the legislative intent behind the meaning of the word "satisfaction" is unclear, that uncertainty should be resolved in favor of Deutsche Bank, the party against whom a penalty would otherwise be imposed. "Sections 29-3-310 and 320 are penal statutes." *Dykeman*, 381 S.C. at 337, 673 S.E.2d at 806. "Penal statutes must be strictly construed." *Id.* Strict construction in this context means penal statues "must be applied in a manner which results in fairness and justice to the parties." *Kinard v. Fleet Real Estate Funding Corp.*, 319 S.C. 408, 412, 461 S.E.2d 833, 835 (Ct. App. 1995). This interpretive gloss should be even more pronounced where, as here, imposition of a penalty would result in a complete windfall for Bailey and Owens.

See id. ("penal statutes must be strictly construed, *especially when the penalty may result in a windfall to a plaintiff*" (emphasis added)).[9]

A finding that Bailey and Owens somehow "satisf[ied]" their obligations under the Mortgage and Note – despite the fact that they did not pay the Note when it became due and did nothing but file a preemptive lawsuit and lose – would be the textbook definition of a windfall this Court should avoid. The "[un]fairness" and "[in]justice" of that result is even more unmistakable once the Court takes into account (a) the failure of Bailey and Owens to make any express request to rescind the Mortgage in the 2013 Action (thereby forcing Deutsche Bank to guess Bailey and Owens' purported intentions in evaluating the issue of compulsory counterclaims), coupled with (b) the fact that Deutsche Bank was working with Bailey and Owens to evaluate loss mitigation options to avoid foreclosure at the time it answered the complaint in the 2013 Action.

Deutsche Bank does not dispute Bailey and Owens' citation of *Kinard* (*see* Respondent Brief at 39) for the proposition that "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." 319 S.C. at 412, 461 S.E.2d at 835 (emphasis added). Until the time the trial court concluded – albeit erroneously – that Bailey and Owens somehow satisfied the Note and Mortgage (despite being in default), Deutsche Bank continued to "ha[ve] a monetary interest in the mortgage loan." *Id.* Accordingly, even if the Court finds in favor of Bailey and Owens with regard to the trial court's interpretation of Rule 13(a) or its

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[9] Bailey and Owens have had numerous opportunities to address this argument concerning the penal nature of these statutes. Their decision to not even acknowledge the argument – especially when they spend so much time unpacking and explaining the meaning of various other words in the statute – is telling.

application of res judicata, it can – and should – find that the trial court erred in granting summary judgment to Bailey and Owens on their claim premised on S.C. Code Ann. § 29-3-310.

CONCLUSION

For the foregoing reasons, Deutsche Bank respectfully requests that the Court reverse the trial court's order with respect to Bailey and Owens' motion for summary judgment regarding (a) Deutsche Bank's foreclosure claim, (b) Bailey and Owens' declaratory judgment counterclaim, and (c) Bailey and Owens' § 29-3-310 counterclaim. In the alternative to reversing the trial court's orders, this Court should conclude that foreclosure was not a compulsory counterclaim in the 2013 Action or find that the trial court erred in applying res judicata and remand this matter to the trial court for further proceedings consistent with that determination.

This 30th day of October, 2018.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2018-000436
Circuit Court Case No. 2016-CP-32-03572

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

Respondent/Appellant,

v.

Patricia Owens a/k/a Patrica 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.

RULE 211(b) CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **APPELLANT'S REPLY BRIEF OF RESPONDENT/APPELLANT** complies with SCACR 211(b) because it is identical to Respondent/Appellant's previously filed Appellant's Initial Reply Brief except for references to the record and correction of typographical errors and misspellings.

This the 30th day of October, 2018.

Jonathan Schulz (SC Bar No. 79850)

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Defendants,

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

Appellants/Respondents.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT'S REPLY BRIEF OF RESPONDENT/APPELLANT** was sent via first-class U.S. Mail, postage prepaid, and addressed as follows:

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This the 30th day of October, 2018.

Jonathan E. Schulz (SC Bar No. 79850)

THE STATE OF SOUTH CAROLINA
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APPELLANTS/RESPONDENTS' FINAL APPELLANTS' BRIEF

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STATEMENT OF ISSUES

I. **Where the lower court ruled that Respondent/Appellant mortgagee violated S.C. Code Ann. § 29-3-320, which mandates monetary relief for its violation, did the lower court err in allowing Respondent/Appellant an opportunity to escape monetary liability for violating the statute?**

STATEMENT OF THE CASE

Respondent/Appellant 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") filed this lawsuit on October 19, 2016, against Appellants/Respondents Patricia Owens a/k/a Patricia Ann Owens ("Owens") and Tammy M. Bailey ("Bailey"), seeking foreclosure of a mortgage of property at 111 Andrew Court, Gaston, South Carolina, and seeking reformation of that mortgage. (R. pp. 76-98.) 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. (R. pp. 99-115.) Their amended answer and counterclaim admitted 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." (R. pp. 82, 106.) Bailey and Owens' amended pleading asserted the defenses of res judicata, collateral estoppel, laches, unclean hands, waiver, and setoff or credit. (R. pp. 107-09.) Bailey and Owens also asserted counterclaims for a declaratory judgment that Deutsche Bank holds no mortgage on the subject property or, in the alternative, that the mortgage is unenforceable, for liability under S.C. Code Ann. § 29-3-320 for failure to record satisfaction of the mortgage after due request, and for violation of S.C. Code Ann. § 37-10-102 (usually referred to as the attorney preference statute.) (R. pp. 110-11.) The case was referred to the Honorable James O. Spence, as Master-in-Equity for Lexington County. (R. pp. 51-52.)

Deutsche Bank moved for summary judgment in its favor as to each of Bailey and Owens' counterclaims. (R. pp. 165-69.) Bailey and Owens 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. (R. pp. 124-26.)

The master denied Deutsche Bank's motion for summary judgment and granted Bailey and Owens' motion, ruling that, under the undisputed facts, Deutsche Bank's foreclosure claim was a compulsory counterclaim in the previously concluded case of Tammy M. Bailey, et al. v. Novastar Mortgage, Inc., et al., Case No. 2013-CP-32-02210, in which Deutsche Bank was a defendant, because, if Bailey and Owens had prevailed in that case, that could have resulted in a judgment that the note and mortgage were unenforceable under S.C. Code Ann. § 37-10-105(C). (R. pp. 23, 27.) The master ruled that the res judicata effect of the end of the Bailey v. Novastar case precluded the foreclosure claim and satisfied the mortgage by operation of law. (R. pp. 23, 27, 33-34, 36-37.) The lower court, however, provided Deutsche Bank a mechanism under which it could escape monetary liability under S.C. Code Ann. § 29-3-320 by recording a mortgage satisfaction document within a time frame set by the master. (R. pp. 36-37.)

The note and mortgage involved in this case were dated June 15, 1998, and were given by Owens, who was then the owner of the subject property, to NovaStar Mortgage, Inc. (R. pp. 80-81, 246-53.) The note document contained a balloon provision under which, even if all the monthly payments under the note were made timely and made in their required amounts, a substantial principal balance came due on July 1, 2013, the note's maturity date. (R. p. 246.) The mortgage was recorded on July

2, 1998, 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. (R. p. 81.)

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

The note matured on July 1, 2013, and Deutsche Bank's complaint alleged 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." (R. pp. 4, 82.)

Bailey and Owens' amended answer and counterclaim alleged 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.

(R. pp. 106-07.)

Those documents were attached to the amended answer and counterclaim. (R. pp. 112-14.) Deutsche Bank admitted the sending and receipt of these letters. (R. pp. 127-31, 136.) The letter from Bailey was sent to Deutsche Bank on August 23, 2016, and was a request that Deutsche Bank enter satisfaction of the subject mortgage. (R. p. 112.) The letter enclosed a $40.00 check to Deutsche Bank to cover any recording and processing fees associated with getting the satisfaction document recorded. (R. p.

112.) The letter stated that the subject note matured on July 1, 2013. (R. p. 112.) It went on to state 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. (R. p. 112.)

The letter from Deutsche Bank's attorney that was attached to the amended answer and counterclaim acknowledged receipt of Bailey's letter and noted Deutsche Bank's refusal to record the satisfaction. (R. p. 114.) 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. (R. pp. 104-15, 136.)

The parties agreed, 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 in favor of Deutsche Bank and the other defendants in that case. (R. p. 6, p. 185 ln. 9-23, pp. 370-525.)

The Bailey v. Novastar case was filed on June 27, 2013. (R. pp. 377-96.) 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. (R. pp. 7, 380-96.) Among the claims asserted in Bailey v. Novastar was a claim that sounded under S.C. Code Ann. § 37-10-105(C) 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) coupled with unconscionable loan terms or inducement of the mortgage loan by unconscionable conduct. (R. pp. 380-84.) Bailey and Owens' contention concerning the claims was that NovaStar did not ascertain Owens' preference as to legal counsel and allowed the loan to be closed 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. (R. pp. 381-84.)

Among the relief provided for in S.C. Code Ann. § 37-10-105(C) is 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." S.C. Code Ann. § 37-10-105(C). The prayer in the Bailey v. Novastar complaint stated that Bailey and Owens sought, *inter alia*, "all relief available under S.C. Code Ann. § 37-10-105(C)[.]" (R. p. 387.)

Deutsche Bank served its answer in the Bailey v. Novastar case on September 26, 2013. (R. pp. 6, 397-406.) In a filing made in Bailey v. Novastar, Deutsche Bank stated that Bailey and Owens; claims in that case "ar[ose] out of a purported mortgage refinancing loan transaction involving a balloon note in 1998 by Plaintiff Owens" and "relate solely to [that] closing[.]" (R. pp. 409, 411, 418.) At no time did Deutsche Bank assert a counterclaim 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. (R. pp. 8, 397-406.)

Bailey v. Novastar was tried to a jury and resulted in a verdict for Deutsche Bank and the other defendants on September 15, 2015. (R. pp. 370-71.) Bailey and

Owens' motion for a new trial in that case was denied by order filed June 24, 2016. (R. p. 374.) No appeal was taken in that case.

In the instant case that is subject of this appeal, the master held a hearing on the parties' motions for summary judgment. (R. pp. 173-217.) Bailey and Owens argued that Deutsche Bank's foreclosure claim had been a compulsory counterclaim that was required to be brought in the Bailey v. Novastar action and was thus barred by res judicata, that the mortgage was now satisfied by operation of law, and that Deutsche Bank was liable under S.C. Code Ann. § 29-3-320 for its failure to record a satisfaction document after due request. (R. pp. 173-217.) Deutsche Bank argued that none of that was correct. (R. pp. 173-217.) The court requested the submission of proposed orders, which counsel for the parties submitted. (R. p. 212 ln. 2 through p. 217 ln. 12, pp. 307-63.)

Neither of the proposed orders that were submitted touched upon the idea of whether Deutsche Bank should be given an opportunity to avoid liability under S.C. Code Ann. § 29-3-320 even if its failure to record a satisfaction document violated the statute, nor did either attorney advance an argument in that vein at the hearing on the motions for summary judgment. (R. pp. 173-217, 307-63.) Instead, Bailey and Owens argued that Deutsche Bank had violated that statute and that they were entitled to the relief available under it, and Deutsche Bank argued that it had not violated the statute. (R. pp. 173-217, 307-63.)

During a telephone status conference after the parties had submitted their proposed orders, the court directed that another proposed order be prepared ruling, *inter alia*, that Deutsche Bank be given a certain amount of time to record a satisfaction

document in order to avoid liability under S.C. Code Ann. § 29-3-320. (R. p. 223 ln. 19 through p. 224 ln. 2, pp. 303-04.) Until then, neither party had ever raised that to the court as a possibility.

On November 28, 2017, the master-in-equity filed an order that analyzed the res judicata effect of Deutsche Bank's failure to raise foreclosure as a compulsory counterclaim in the Bailey v. Novastar action. (R. pp. 1-41.) The master ruled as follows:

> 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.
>
> . . .
>
> 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.
>
> . . .
>
> 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.

(R. pp. 27, 33-34.)

The master granted summary judgment for Bailey and Owens on Deutsche Bank's foreclosure claim and on their declaratory judgment claim that the mortgage does not encumber the property. (R. p. 36.) Rather than ruling that a hearing would be set to determine the amount of monetary relief to which Bailey and Owens were entitled under S.C. Code Ann. § 29-3-320, however, the master ruled as follows:

> Summary judgment in Bailey and Owens' favor is granted as to as Deutsche Bank's liability on Bailey and Owens' claim under S.C. Code Ann. § 29-3-320, as follows:
>
> i. The subject mortgage is satisfied;
>
> ii. Deutsche Bank is hereby enjoined to execute, in proper recordable form, a document showing the satisfaction of the subject mortgage and to deliver the same to the Register of Deeds for Lexington County for recording, with any fees required by that office, on or before February 23, 2018 (the satisfaction document must be received by the register of deeds by that date);
>
> iii. If Deutsche Bank does so, Bailey and Owens shall not be entitled to further relief under S.C. Code Ann. § 29-3-320; [and]
>
> iv. In the event that Deutsche Bank does not do so by that date, Deutsche Bank is liable to Bailey and Owens for the monetary relief to which they are entitled under S.C. Code Ann. § 29-3-320, and the court shall then hold a hearing to determine the amount of that relief[.]

(R. p. 37.)

Deutsche Bank did not make any motion under Rule 59, SCRCP, with regard to the court's order. Bailey and Owens made a timely motion to alter or amend the relief the court ordered under S.C. Code Ann. § 29-3-320, noting that the language of

the statue provides that the mortgagee shall pay the monetary relief the statute provides and does not offer any exceptions. (R. pp. 170-72.) After a hearing, the court denied that motion by order filed February 12, 2018. (R. pp. 42-50.)

This appeal followed, and Deutsche Bank served a notice of cross-appeal. (R. pp. 364-69.)

STANDARD OF REVIEW

This court reviews all questions of law *de novo*. Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010) ("appellate court may decide questions of law with no particular deference to the trial court"). "Statutory interpretation is a question of law subject to de novo review." Transportation Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010). "The determination of legislative intent is a matter of law." City of Myrtle Beach v. Juel P. Corp., 344 S.C. 43, 543 S.E.2d 538, 540 (2001).

ARGUMENT

I. Having concluded that the conditions of S.C. Code Ann. § 29-3-320 that triggered Deutsche Bank's liability were met, the lower court was required to apply the statute, and it erred by allowing Deutsche Bank an opportunity to avoid its mandatory monetary liability under the statute.

The master ruled that Deutsche Bank had violated S.C Code Ann. § 29-3-320 and was liable to Bailey and Owens under that statute, yet he also crafted an exception under which Deutsche Bank could avoid its monetary liability under S.C. Code Ann. § 29-3-320. (R. pp. 33-35, 36-37.) This was reversible error.

The text of S.C. Code Ann. §§ 29-3-310 and -320 reads as follows:

> 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.

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).

"When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). When a court interprets a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Id. at 499. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. If a statute's language is plain, unambiguous, and conveys a clear meaning[,] the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100, 105 (2003) (internal citation and quotation marks omitted).

The language of S.C. Code Ann. §§ 29-3-310 and -320 provides that, when the circumstances making a mortgagee liable under those statutes for failure to record a mortgage satisfaction document after due demand are met, the mortgagee that failed to record the satisfaction is liable for the monetary relief set out in S.C. Code Ann. § 29-3-320. (R. p. 170, p. 223 ln. 15-19, p. 226 ln. 10-21, p. 235 ln. 6-9, pp. 305-06.) No exception to that principle is given in any South Carolina statute or case law. (R. p. 170, p. 223 ln. 15-19, p. 226 ln. 10-21, p. 235 ln. 6-9, pp. 305-06.)

Here, it is undisputed that Deutsche Bank received the request to record a satisfaction document after the final conclusion of Bailey v. Novastar, it is undisputed that a check to cover the recording and processing fees for such a document was provided with the request, and it is undisputed that Deutsche Bank let more than three

months go by without recording a satisfaction document. Once the master determined that the res judicata effect of the end of Bailey v. Novastar operated to satisfy the mortgage, he had decided that all of the events that trigger liability under S.C. Code Ann. § 29-3-320 had occurred.

Comments by the master at the hearing on the motion to alter or amend relief and in his order indicate that he deviated from applying the plain terms of S.C. Code Ann. § 29-3-320 to Deutsche Bank because he thought that the point at which satisfaction had occurred was unclear or because he thought the mortgage was not satisfied until he declared it to be satisfied in his order that granted Bailey and Owens' summary judgment motion. (R. pp. 47-48, p. 224 ln. 16 through p. 225 ln. 12, p. 229 ln. 5 through p. 231 ln. 6, p. 237 ln. 4-6.)

In truth, there is no lack of clarity about when the mortgage was satisfied by operation of law. "Under the doctrine of res judicata, a final judgment on the merits in a prior action will bar the parties in a second action as to matters litigated and matters which might have been litigated." Jaynes v. County of Fairfield, 303 S.C. 434, 438, 401 S.E.2d 183, 185 (Ct. App. 1991). When final judgment was rendered in the Bailey v. Novastar case, that judgment took on its preclusive, res judicata effect, and that is what satisfied the mortgage. See id. (R. p. 225 ln. 25 through p. 226 ln. 3, p. 231 ln. 14-17, p. 233 ln. 13-16, p. 233 ln. 25 through p. 234 ln. 3, pp. 304-05.)

The master's order in this case did not satisfy the mortgage. (R. p. 225 ln. 25 through p. 226 ln. 3, p. 231 ln. 14-17, p. 233 ln. 13-16, p. 233 ln. 25 through p. 234 ln. 3, pp. 304-05.) The judgment ending the Bailey v. Novastar case is what satisfied the mortgage. (R. p. 225 ln. 25 through p. 226 ln. 3, p. 231 ln. 14-17, p. 233 ln. 13-16, p.

233 ln. 25 through p. 234 ln. 3, pp. 304-05.) The master's ruling about that res judicata effect simply reflected the reality created by the final judgment in the Bailey v. Novastar case. (R. p. 224 ln. 3 through p. 226 ln. 3, p. 231 ln. 14-17, p. 233 ln. 25 through p. 234 ln. 3, pp. 304-05.)

This is a concept the law recognizes well. It is the occurrence of the event at issue – here, the end the Bailey v. Novastar case in a final judgment – that changes the landscape of rights and liabilities. As counsel argued, and as the master agreed, in a negligence case, it is not as though a person becomes negligent only when a judicial proceeding determines him or her to be so; rather, the judicial proceeding determines whether the person was negligent in the past. (R. p. 224 ln. 3 through p. 225 ln. 24.) Another analogy is to an equitable lien, which attaches to property when the conduct of the parties creates the existence of the lien, not when a court later *declares* that the conduct of the parties has created the lien. First Fed. Savings & Loan Assn. of Charleston v. Bailey, 316 S.C. 350, 356, 450 S.E.2d 77, 81 (Ct. App. 1994).

Further, the master's concern about time frames may spring from a conflation of two different temporal points: 1) the moment at which something occurs that is an event of satisfaction of a mortgage and 2) the expiration of the three-month period under S.C. Code Ann. § 29-3-310 in which a satisfaction document must be recorded. (R. p. 48, p. 229 ln. 5 through p. 231 ln. 6, p. 237 ln. 4-6.) The latter time frame begins to run from the mortgagee's receipt of a request under S.C. Code Ann. § 29-3-310. (R. p. 234 ln. 25 through p. 235 ln. 3.)

The lower court here seemed concerned that whether the subject mortgage was satisfied was not something that was clear to Deutsche Bank at the time that the demand

for a satisfaction to be recorded was made. (R. pp. 34-35, 46, 171, p. 229 ln. 5 through p. 231 ln. 6, p. 237 ln. 4-6.) The master perceived that this remained unclear to Deutsche Bank until the court's decision that the mortgage was satisfied as a matter of law by operation of res judicata. (R. pp. 34-35, 46, 171, p. 229 ln. 5 through p. 231 ln. 6, p. 237 ln. 4-6.)

Under S.C. Code Ann. § 29-3-320, however, any such lack of clarity or a mortgagee's confusion about satisfaction or good faith belief that a mortgage was not satisfied does not relieve the mortgagee from liability under the statute when the conditions for liability are met, as they are here. (R. p. 171, p. 226 ln. 10-21, p. 234 ln. 5-19, p. 234 ln. 25 through p. 235 ln. 15.) When the conditions are met, proper demand is made, and more than three months passes from the demand without the recording of a satisfaction document, liability attaches under S.C. Code Ann. § 29-3-320. (R. p. 171, p. 226 ln. 10-21, p. 234 ln. 5-19, p. 234 ln. 25 through p. 235 ln. 15.) Good faith arguments, even about unsettled law, are not a defense and do not provide an exception. (R. p. 171, p. 226 ln. 10-21, p. 234 ln. 5-19, p. 234 ln. 25 through p. 235 ln. 15.)

A look at the Supreme Court of South Carolina's decision in Regions Bank v. Strawn, 413 S.C. 206, 776 S.E.2d 72 (2015), bears this out. (R. p. 171, p. 226 ln. 10-21, p. 234 ln. 5-19, p. 234 ln. 25 through p. 235 ln. 15.) In that case, the mortgagee had a good faith belief in the validity of arguments about whether the conditions of S.C. Code Ann. §§ 29-3-310 and -320 were met with respect to an open-ended line of credit mortgage. Regions Bank, 413 S.C. at 209-12. The questions presented by that case – whether the payoff of debt under an open-ended mortgage, which could theoretically secure future advances of funds, could constitute a satisfaction under S.C. Code Ann.

§§ 29-3-310 and -320 – had never been squarely answered before under South Carolina law. Regions Bank, 413 S.C. at 209-12. Neither the trial court, the Court of Appeals, nor the Supreme Court gave the mortgagee an "out," however. Id. at 209, 212. The conditions of the statute were met, and that meant liability for the monetary relief provided under S.C. Code Ann. § 29-3-320, because that is what the statute says. Regions Bank, 413 S.C. at 209-12.

"Courts must take a statute as it is drafted and give effect to the legislative intent as expressed in its language." Goldston v. State Farm Mut. Auto. Ins. Co., 358 S.C. 157, 177, 594 S.E.2d 511 (Ct. App. 2004). A court's "duty is to apply the statute according to its own terms." Shelley Const. Co., Inc. v. Sea Garden Homes, Inc., 287 S.C. 24, 29, 336 S.E.2d 488, 491 (Ct. App. 1985). Courts "are not at liberty, under the guise of construction, to alter the plain language of the statute by adding words which the Legislature saw fit not to include." Id. at 28.

The master's order in this case determined that the judgment ending the Bailey v. Novastar case is what satisfied the mortgage. (R. pp. 27, 33-34.) The master had determined that "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." (R. pp. 33-34.) Deutsche Bank brought no motion under Rule 59, SCRCP, with regard to that determination. (R. p. 234 ln. 4-5, p. 304.) On Bailey and Owens' motion to later or amend the relief ordered, the court was bound by its previous determination and could not alter it. See C&S Natl. Bank v. Easton, 310 S.C. 458, 427 S.E.2d 640, 641 (1993).

The rest is a matter of applying the unambiguous language of the statute: "shall forfeit[.]" S.C. Code Ann. § 29-3-320. "Ordinarily, the use of the word 'shall' in a statute means that the action referred to is mandatory." S.C. Dept. of Hwys. & Pub. Transp. v. Dickinson, 288 S.C. 189, 191, 341 S.E.2d 134 (1986). So it is here, as the plain words of S.C. Code Ann. § 29-3-320 state. "To impute an exception would require us to read language into the statute that is not there." First Citizens Bank & Trust Co., Inc. v. Blue Ox, LLC, 422 S.C. 461, 812, S.E.2d 418, 423 (Ct. App. 2018). If a mortgage has been satisfied, more than three months have passed since the mortgagee has received the request contemplated by S.C. Code Ann. § 29-3-310, and the mortgagee has not recorded the satisfaction, the mortgagee "*shall* forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the mortgage, or twenty-five thousand dollars, whichever is less, plus actual damages, costs, and attorney's fees in the discretion of the court, to be recovered by action in any court of competent jurisdiction within the State." S.C. Code Ann. § 29-3-320 (emphasis added). The amount of attorney's fees recoverable may be within the court's discretion, but whether the mortgagee is liable for these items of monetary relief is not.

Bailey and Owens were entitled to the monetary relief provided under S.C. Code Ann. § 29-3-320, and the lower court was obligated to order it. Here, Deutsche Bank let its time under S.C. Code Ann. § 29-3-320 run out long before the court issued its decision. Deutsche Bank gambled on the question of whether the court would determine that the mortgage was satisfied through res judicata. It lost the gamble. The

language of S.C. Code Ann. § 29-3-320 is "shall forfeit," not "shall forfeit . . . unless . . . ."

CONCLUSION

This court should reverse the master on this point and remand for a hearing to determine the amount of the monetary relief to which Bailey and Owens are entitled under S.C. Code Ann. § 29-3-320. The master's detailed and thoroughly analyzed order should remain the same in its other respects.

Respectfully submitted,

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November 26, 2018

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
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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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.

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STATEMENT OF THE ISSUE ON APPEAL

1. Whether the trial court correctly declined to award money damages under S.C. Code Ann. § 29-3-320 following Deutsche Bank's refusal to record a mortgage satisfaction upon demand where the borrowers admit they did not pay the Note in full and were in default at the time of the demand, and where no court had concluded the borrowers satisfied the note and mortgage at the time of their demand.

STATEMENT OF THE CASE

A. Deutsche Bank's Foreclosure Action and Bailey and Owens' Affirmative Defenses and Counterclaims.

On or about June 15, 1998, Appellant/Respondent Patricia Owens, a/k/a Patricia Ann Owens ("Owens") executed a Fixed Rate Note ("Note") in favor of NovaStar Mortgage, Inc. ("NovaStar") in the amount of $60,400. (R. p. 3, ¶ 11, lines 1–4). The Note was secured by a mortgage ("Mortgage") on the property located at 111 Andrew Court, Gaston, SC 29053 (the "Property"). (R. p. 80, ¶ 12, lines 1–p. 81, ¶ 12, line 5). The Mortgage was recorded on July 2, 1998 in Mortgage Book 4743 at page 0330, in the Lexington County Registry. (R. p. 81, ¶ 13, lines 1–2).

NovaStar subsequently assigned the Mortgage to Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1. (R. p. 81, ¶ 14, lines 1–2). This assignment was recorded on October 12, 2011 in Mortgage Book 15105 at page 248, in the Lexington County Registry. (R. p. 81, ¶ 14, lines 2–3). Thereafter, the Mortgage was further assigned to Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Home Equity Loan Asset-Backed Certificates, Series 2007-1 ("Deutsche Bank"). (R. p. 81, ¶ 14, lines 3–5). This assignment was recorded on May 15, 2012 in Mortgage Book 15513 at page 296, in the Lexington County Registry. (R. p. 81, ¶ 14, lines 5–6).

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

2016. (R. pp. 78–84).[1] The Complaint alleges, in relevant part, that the loan was in default and due on July 1, 2013, and that Deutsche Bank, as the holder of the Note and Mortgage, was declaring the entire balance of the principal and interest due and payable at once. (R. p. 82, ¶ 22, line 1–p. 83, ¶ 22, line 2). On November 29, 2016, the trial court entered an Order of Reference, referring the matter to The Honorable James O. Spence, Master in Equity for Lexington County. (R. pp. 51–52).

On or around December 9, 2016, Bailey and Owens filed a document styled Amended Answer and Counterclaim ("Answer and Counterclaims"). (R. pp. 104–115). Despite admitting they did not pay the sums due under the Note at or subsequent to maturity (*see* Appellant's Initial Brief of Appellants/Respondents at p. 2), Bailey and Owens nevertheless alleged three separate counterclaims in the Answer and Counterclaims: (1) A declaratory judgment that Deutsche Bank holds no mortgage on the Property; (2) Failure to record a satisfaction of the Mortgage within three months of receiving a demand, pursuant to S.C. Code Ann. § 29-3-310; and (3) Violation of S.C. Code Ann. § 37-10-102 (the "Attorney Preference Statute"), for an alleged failure to give Owens an opportunity to select an attorney to represent her at the closing of the Mortgage. (R. p. 109, ¶ 58–p. 110, ¶ 70). Bailey and Owens also asserted several affirmative defenses, including res judicata and/or collateral estoppel, laches, unclean hands, waiver, and setoff/credit. (R. p. 107, ¶ 30–p. 109, ¶ 57). The defenses of res judicata, waiver, and laches, as well as two of Bailey and

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[1] Deutsche Bank named Bailey as a defendant in the foreclosure action because Bailey claims an interest in the Property by virtue of a deed from Owens purporting to convey to Bailey an interest in the Property. (R. p. 83, ¶ 23). Deutsche Bank named the SCDMV as a defendant in the foreclosure action because Deutsche Bank sought reformation of the Mortgage to encumber a manufactured home on the Property, the SCDMV is responsible for issuing Certificates of Title for manufactured homes in the State of South Carolina, and Deutsche Bank sought a court order requiring the SCDMV to issue a new certificate of title pertaining to the manufactured home to the successful bidder at the eventual foreclosure sale, free and clear of all liens. (R. p. 78, ¶ 4; p. 79, ¶¶ 6–9; p. 84, ¶ F).

Owens' counterclaims, all flow from Bailey and Owens' claim that Deutsche Bank should have, but did not, assert foreclosure as a counterclaim in a prior lawsuit brought by Bailey and Owens against Deutsche Bank and other defendants in 2013 (hereinafter the "2013 Action").[2]

B. Bailey and Owens' Prior Lawsuit against Deutsche Bank and Other Defendants in 2013 and Their Subsequent Correspondence Three Years After the Fact.

Back on June 27, 2013 – *four days before the Note was due to mature* – Bailey and Owens filed a lawsuit against Deutsche Bank, Deutsche Bank's predecessor in interest NovaStar, and six other defendants in Lexington County, alleging four causes of action. (R. pp. 380–396). Only two of the four claims asserted in the 2013 Action were asserted against Deutsche Bank: (1) violation of the Attorney Preference Statute, and (2) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann. § 39-5-10 *et seq.*, premised on the alleged violation of the Attorney Preference Statute. (R. p. 384, ¶ 33–p. 385, ¶ 44). Bailey and Owens alleged in that complaint that "[n]o attorney supervised the closing of the loan subject to this case," and that "[t]he loan subject of this action was unconscionable and was induced by unconscionable conduct." (R. p. 384, ¶¶ 35–36). Bailey and Owens' allegations against Deutsche Bank in the 2013 Action related to the closing of the mortgage. (R. p. 384, ¶ 33–p. 385, ¶ 44). The main question in the 2013 Action, as it related to Deutsche Bank, was whether Deutsche Bank's predecessor in interest – NovaStar – complied with the South Carolina Consumer Protection Code when conducting the closing by ensuring that Owens had an opportunity to select an attorney of her choosing.[3]

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[2] For reference, Bailey and Owens refer to the 2013 Action as "Bailey v. Novastar." (*See* Appellants/Respondents' Initial Appellants' Brief at p. 3).

[3] Bailey and Owens concur with this characterization. (*See* Appellant's Initial Brief of Appellants/Respondents at p. 6 (explaining that the 2013 Action was about "the execution of the subject note and the mortgage and the circumstances surrounding that"); *id.* at pp. 6–7 (explaining that the 2013 Action was about the allegation "that NovaStar did not ascertain Owens' preference as to legal counsel and allowed the loan to be closed 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")).

In terms of relief sought against Deutsche Bank, the complaint in the 2013 Action sought "all relief available under S.C. Code Ann. § 37-10-105." (R. p. 384, ¶ 37; p. 387, ¶ e). The complaint made no express request to rescind the Mortgage, nor did that complaint ask the Court to declare the Mortgage void.

Shortly before filing its answer in the 2013 Action, Deutsche Bank's loan servicer, on August 23, 2013, reached out to Owens via letter in an attempt to assist her in avoiding foreclosure (hereinafter the "Foreclosure Avoidance Letter"). (R. p. 242, ¶ 16; pp. 262–263). The Foreclosure Avoidance Letter began, in relevant part, by stating: "We want to assist you in bringing your loan current by presenting you with some alternative solutions to avoid foreclosure." (R. p. 262). Included amongst these alternative solutions were options for a loan modification under the Home Affordable Modification Program, a proprietary modification, a short sale, and a deed-in-lieu of foreclosure. (R. p. 262). The Foreclosure Avoidance Letter provided Owens with a telephone number to call and stated: "Please call us immediately . . . to discuss your resolution options." (R. p. 262).

Approximately one month after sending Owens the Foreclosure Avoidance Letter, Deutsche Bank answered the complaint filed in the 2013 Action and asserted a handful of affirmative defenses. (R. pp. 397–406). In part because it had just begun the process of assisting Owens in avoiding foreclosure, Deutsche Bank did not assert a counterclaim for foreclosure. (R.

pp. 397–406). Following a trial, a jury found in favor of Deutsche Bank on September 15, 2015 on all claims. (R. pp. 370–371).[4]

Approximately three years after the jury verdict in the 2013 Action, on or around August 23, 2016, Bailey sent Deutsche Bank a letter. Rather than respond to the offer of assistance set forth in the Foreclosure Avoidance Letter, this letter attached a forty dollar ($40.00) recording fee and demanded that Deutsche Bank record a satisfaction of the Mortgage (hereinafter referred to as the "Demand Letter"). (R. p. 112). Bailey contended in the Demand Letter that when the jury in the 2013 Action rendered judgment in Deutsche Bank's favor – with Deutsche Bank asserting no counterclaim for foreclosure – Deutsche Bank's ability to foreclose on the Mortgage was "lost forever." (R. p. 112). Specifically, the Demand Letter stated: "Your company's failure to bring any such claims means that they are now forever extinguished and gone, and the final judgment of the jury verdict has operated to satisfy the mortgage as a matter of law. Please record the satisfaction document." (R. p. 112). In other words, despite the fact that Deutsche Bank was attempting to work with Owens to avoid foreclosure, despite the fact that Bailey and Owens lost the 2013 Action wholesale, and despite the fact that Bailey and Owens admit they did not pay the Note upon its maturity, Bailey nevertheless contended in the Demand Letter the Mortgage was satisfied.

Immediately upon receipt of the Demand Letter, Deutsche Bank responded, returned the Forty dollar ($40.00) recording fee to Bailey, and stated as follows: "We disagree with your

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[4] According to the verdict form from the 2013 Action, the jury found in favor of Deutsche Bank on Bailey and Owens' claims for violation of the SCUTPA (which *was* asserted against Deutsche Bank) and for conversion (which *was not* asserted against Deutsche Bank). (R. pp. 370–371). The trial court in the 2013 Action ruled in favor of Deutsche Bank on Bailey and Owens' Attorney Preference Statute claim but did not reduce that ruling to a written order, despite the submission of a written proposed order by counsel for Deutsche Bank.

contention that the prior litigation extinguished Deutsche Bank's right to demand full payment of the note and to initiate foreclosure to recover its collateral. As a result, Deutsche Bank will not record a satisfaction as requested." (R. p. 114).

C. The Parties' Dispositive Motions and the Court's Summary Judgment Order in the Present Underlying Action.

Returning to the present underlying proceedings, the parties, following a period of discovery, filed cross motions for partial summary judgment. Deutsche Bank moved for summary judgment on all three of Bailey and Owens' counterclaims. (R. p. 2). In relevant part, Deutsche Bank argued that foreclosure was not a compulsory counterclaim in the 2013 Action and, therefore, it was not required to record a satisfaction of the Mortgage under § 29-3-310 because it had not received full payment or satisfaction of the underlying debt. (R. p. 167, ¶ 9–p. 168, ¶ 14). Bailey and Owens moved for summary judgment on Deutsche Bank's claim for foreclosure, on their counterclaim for a declaratory judgment, and on their counterclaim premised on § 29-3-310 for failure to record a satisfaction of the Mortgage following a demand. (R. p. 2).

After a hearing, the Court entered its order on the parties' motions for summary judgment on November 28, 2017. (R. pp. 1–41). Determining that Deutsche Bank's foreclosure claim was a compulsory counterclaim in the 2013 Action and was now barred by the doctrine of res judicata, the trial court granted summary judgment to Bailey and Owens on Deutsche Bank's foreclosure claim and on Bailey and Owens' related declaratory judgment counterclaim. (R. pp. 23, 27, 36). With regard to Bailey and Owens' § 29-3-310 counterclaim relating to Deutsche Bank's refusal to record a satisfaction of the Mortgage within three months of the Demand Letter, the trial court denied Deutsche Bank's motion and granted, in part, Bailey and Owens' motion. (R. pp. 36–37).

Contrary to Bailey and Owens' argument on appeal, the trial court did not conclude that Deutsche Bank violated § 29-3-320 by failing to record a satisfaction of the Mortgage within three

months of the Demand Letter. (*Cf.* Appellant's Initial Brief of Appellants/Respondents at pp. 1, 12). The trial court also did not "craft[ ] an exception" or implement a "mechanism" to enable Deutsche Bank to "escape monetary liability." (Appellant's Initial Brief of Appellants/Respondents at pp. 3, 12). Instead, the trial court concluded – for the first time in its Summary Judgment Order that the Mortgage was deemed satisfied as a matter of law by virtue of the jury verdict in the 2013 Action. (R. p. 33). The Mortgage was not satisfied prior to the trial court's summary judgment order because, according to the trial court, "[w]hether the mortgage had been satisfied remained an open [issue] until this court's determination that satisfaction had occurred." (R. p. 34, lines 15–17). Consistent with that conclusion, the trial court determined that Deutsche Bank's three-month period of time within which to record a satisfaction pursuant to § 29-3-310 did not begin to run until the date of the trial court's Summary Judgment Order. (R. pp. 36–37). Calculating a three-month period of time, the trial court ordered Deutsche Bank to record a satisfaction of the Mortgage on or before February 23, 2018. (R. p. 37). Because Deutsche Bank was not yet tardy in complying with that requirement, the trial court followed the statute and declined to award any monetary penalty pursuant to § 29-3-320. (R. pp. 34–35).

D. Bailey and Owens' Motion to Alter or Amend, and Deutsche Bank's Motion to Stay.

Following the Summary Judgment Order, Bailey and Owens filed a motion asking the trial court to alter or amend its judgment, and Deutsche Bank subsequently filed a motion to stay a portion of the judgment. (R. p. 42). Specifically, in their motion to alter or amend, Bailey and Owens asked the trial court to rule that Deutsche Bank's three-month period of time within which to record a satisfaction of the Mortgage ran from the time of its Demand Letter (as opposed to running from issuance of the Summary Judgment Order), that the time period had therefore expired, and that they were entitled to money damages. (R. p. 46). In its motion to stay, Deutsche Bank sought an additional three-month period of time to record a satisfaction of the Mortgage

(beyond that provided for in the Summary Judgment Order) to fully and fairly evaluate its options for an appeal. (R. p. 48).[5]

The trial court denied Bailey and Owens' motion to alter or amend, again "conclud[ing] that the question of whether Defendants' mortgage was satisfied remained [open] until the Court determined that the mortgage was legally unenforceable in its Summary Judgment Order." (R. p. 48). In the same order, the trial court granted Deutsche Bank's motion to stay and ordered that Deutsche Bank's time within which to record a satisfaction of the Mortgage was extended for an additional time period through and including May 10, 2018. (R. p. 49).

E. The Parties' Notices of Appeal and Subsequent Motions During the Appeal.

On or around March 8, 2018, Bailey and Owens filed a notice of appeal to this Court, indicating they are appealing both the Summary Judgment Order and the Order on Motion to Alter or Amend and Motion to Stay. (R. pp. 364–366). On or around March 13, 2018, Deutsche Bank filed a notice of appeal with this Court, indicating that it is appealing from the Summary Judgment Order. (R. pp. 367–369).

Because the trial court's order requiring Deutsche Bank to record a satisfaction of the Mortgage on or before May 10, 2018 is injunctive in nature, it is not automatically stayed by the parties' instant cross-appeal. Therefore, Deutsche Bank, on or around March 26, 2018, filed a Motion for Writ of Supersedeas with the trial court, asking the trial court to stay – for the pendency of the parties' appeal – the order requiring Deutsche Bank to record a satisfaction of the Mortgage. Following a hearing, the trial court, on May 9, 2018, issued a formal Order on Motion for Writ of

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[5] Because Bailey and Owens' motion to alter or amend extended the deadline for both parties to file a notice of appeal, Deutsche Bank would have had to record a satisfaction of the Mortgage prior to its deadline to file a notice of appeal, thereby enabling Bailey and Owens to appeal without the risk of a cross-appeal from Deutsche Bank, whose appellate claims relating to foreclosure would then be moot. (R. p. 48).

Supersedeas, in which the trial court granted Deutsche Bank's motion and stayed Deutsche Bank's requirement to record a mortgage satisfaction pending the outcome of this appeal, subject to the requirement that Deutsche Bank enter into an escrow arrangement (or similar arrangement) and hold a fully executed mortgage satisfaction in escrow during the appeal. (R. pp. 71–75). To date, Deutsche Bank has fully complied with the terms of the Order on Motion for Writ of Supersedeas, meaning the requirement to record a satisfaction of the Mortgage is presently stayed pending the outcome of this appeal.

SUMMARY OF THE ARGUMENT

Bailey and Owens' lone argument on appeal is that the trial court should have, but did not, award monetary damages under S.C. Code Ann. § 29-3-320. This Court should not even reach that issue because the trial court erred in three preliminary decisions it made in its Summary Judgment Order, which errors preclude consideration of the issue of money damages. Specifically, the trial court erred in concluding that foreclosure was a compulsory counterclaim in the 2013 Action; it erred in subsequently applying the doctrine of res judicata; and it erred in concluding that Deutsche Bank's failure to assert a foreclosure counterclaim in the 2013 Action somehow satisfied Bailey and Owens' Note and Mortgage, which are in default and which Bailey and Owens admit they have not paid in full.

If this Court disagrees with Deutsche Bank and declines to reverse the Summary Judgment Order for any one of the three errors outlined above, this Court should, in the very least, affirm the portion of the Summary Judgment Order declining an award of money damages and affirm the Order on Motion to Alter or Amend and Motion to Stay. The issue of "satisfaction" under S.C. Code Ann. §§ 29-3-310 and -320 remained open until the trial court judicially determined – in the first instance – that Deutsche Bank was precluded from foreclosing on the Property. Until that time, Deutsche Bank clearly maintained an interest in the Note and Mortgage because Bailey and Owens admittedly did not pay the Note when it became due and were in default. Therefore, the trial court did not err in declining to award damages under Section 29-3-320.

ARGUMENT

I. This Court Should Not Even Address the Issue Raised by Bailey and Owens Concerning Money Damages Because the Trial Court Erred in Deciding Several Preliminary Issues, Which Precludes the Relief Bailey and Owens Seek on Appeal.

Before even reaching the issue of *when* the Mortgage was deemed satisfied for purposes of S.C. Code Ann. § 29-3-320, this Court must first make three preliminary determinations. First, the Court must determine that foreclosure was a compulsory counterclaim under SCRCP 13(a) in the 2013 Action. Second, the Court must determine that the doctrine of res judicata should be applied to bar Deutsche Bank's foreclosure action in the underlying matter. And third, the Court must determine that the result of the 2013 Action constituted a "satisfaction" of the Mortgage for purposes of S.C. Code Ann. § 29-3-310.

Because the trial court erred in deciding each one of these three preliminary issues in Bailey and Owens' favor, this Court should reverse the Summary Judgment Order. In doing so, this Court need not – and, indeed, should not – even address the issue raised by Bailey and Owens relating to money damages. *Cf. Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975) (per curiam) ("It is elementary that the courts of this State have no jurisdiction to issue advisory opinions."); *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 76 n.36, 558 S.E.2d 902, 911 n.36 (Ct. App. 2001) ("This court will not issue advisory opinions that have no practical effect on the outcome.").

A. The Trial Court Erred in Concluding that Foreclosure was a Compulsory Counterclaim in the 2013 Action.

As Deutsche Bank argued in its "Appellant's Initial Brief of Respondent/Appellant," foreclosure was not a compulsory counterclaim in the 2013 Action because it would not have affected Bailey and Owens' right or ability to find Deutsche Bank liable for violation of the Attorney Preference Statute or the SCUTPA. (*See generally* Appellant's Initial Brief of

Respondent/Appellant at pp. 11–20).[6] Stated differently, the fact finder in the 2013 Action could have found Deutsche Bank liable for violation of the Attorney Preference Statute and the SCUTPA while also, simultaneously, issuing an order of foreclosure in favor of Deutsche. Although decided in the inverse context where a mortgagee initiates a foreclosure action, the three South Carolina cases relied upon by Deutsche Bank in its "Appellant's Initial Brief of Respondent/Appellant" support this conclusion. (*See* Appellant's Initial Brief of Respondent/Appellant at pp. 12–14 (citing *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 778 S.E.2d 106 (2015); *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989); *S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 800 S.E.2d 488 (Ct. App. 2017))).

Insofar as *BADD*, *DAV Corp.*, and *Salon Proz* are not directly on point, this Court should look to federal law interpreting Federal Rule of Civil Procedure 13(a) for persuasive authority. *See Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 62, 566 S.E.2d 863, 865 (Ct. App. 2002) (noting "South Carolina's Rule 13(a) is the same as the federal rule on counterclaims" and concluding "[a]ccordingly, we may rely on federal law to interpret our Rule 13"); *cf. Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987) (looking to federal case law to interpret state rule tracking language of corresponding federal rule). As Deutsche Bank explained in its "Appellant's Initial Brief of Respondent/Appellant," federal courts around the country – including the United States Court of Appeals for the Fourth Circuit – have concluded that an action to collect on a debt is not "logically related" – and thus not a compulsory counterclaim – to the comparable context of a borrower's action alleging that the lender failed to make certain disclosures in violation of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (Appellant's Initial Brief of Respondent/Appellant

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[6] Deutsche Bank incorporates by reference the arguments made in its Appellant's Initial Brief of Respondent/Appellant filed with the Court in this matter on May 14, 2018. Those arguments are nevertheless summarized herein for the Court's assistance and reference.

at pp. 14–16). Indeed, even in the context of a claim brought pursuant to the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* – which concerns payments and collection – federal courts have found a foreclosure counterclaim to be merely permissive. *See Peterson v. United Accounts, Inc.*, 638 F.2d 1134, 1137 (8th Cir. 1981). Accordingly, federal law provides additional persuasive authority supporting the conclusion that foreclosure was not a compulsory counterclaim in the 2013 Action.

Simply put, the attorney preference disclosure issue at the center of the 2013 Action is not the same "transaction or occurrence" as the subsequent default. Accordingly, the trial court erred in concluding that foreclosure was a compulsory counterclaim in the 2013 Action. For that reason alone, the Court should reverse the portions of the underlying Summary Judgment Order that flow from that erroneous conclusion. In doing so, this Court should not reach the issue raised by Bailey and Owens on appeal.

B. Even if Deutsche Bank's Foreclosure Claim Were a Compulsory Counterclaim under Rule 13(a), the Trial Court Nevertheless Erred in Applying the Doctrine of Res Judicata.

Even if this Court concludes that foreclosure was a compulsory counterclaim in the 2013 Action pursuant to Rule 13(a), it should nevertheless reverse the Summary Judgment Order because the trial court erred in rigidly applying res judicata in the unique circumstances of this case where concerns of equity, justice, and public policy clearly override the policy aims of res judicata. (*See generally* Appellant's Initial Brief of Respondent/Appellant at pp. 20–26). Via its Foreclosure Avoidance Letter, Deutsche Bank was complying with state and federal requirements when it answered a complaint in the 2013 Action that was limited to the consummation of the loan. That complaint did not even expressly forecast to Deutsche Bank an intent on the part of Bailey and Owens to seek non-enforcement of the loan as a remedy for their claim under the Attorney Preference Statute. South Carolina principles of equity instruct that Deutsche Bank should not be

penalized for failing to read between the lines of a vaguely-pled complaint in the 2013 Action to divine the full scope of damages Bailey and Owens could possibly be awarded. (*See* Appellant's Initial Brief of Respondent/Appellant at pp. 25–26).

From a policy standpoint, affirmance of the Summary Judgment Order will force lenders and loan servicers – in the face of any suit alleging unconscionable conduct under S.C. Code Ann. § 37-10-105 – to sue first and ask questions later, or else risk forever losing the right to foreclose. By inevitably exacerbating the problem of increased "unresolved foreclosure actions" and "resulting burden[ ] on the resources of the Court," which the Supreme Court lamented in a 2011 Administrative Order, affirmance of the Summary Judgment Order would contravene the official policy of South Carolina that loss mitigation efforts (rather than lawsuits) are in the best interests of all parties. *See* Administrative Order of the Supreme Court of South Carolina, Re: Mortgage Foreclosure Actions, No. 2011-05-02-01 (May 2, 2011). Furthermore, affirmance of the Summary Judgment Order would place mortgage lenders and servicers in the impossible position of being unable to simultaneously comply with South Carolina law and federal regulations, which presently require a 120-day waiting period following default before initiating an action for foreclosure. *See* 12 C.F.R. § 1024.41(f)).

In deciding to apply the doctrine of res judicata to bar Deutsche Bank's foreclosure claim, the trial court expressed its belief that Deutsche Bank should have asserted foreclosure as a counterclaim while *simultaneously* reaching out to Owens to discuss loss mitigation options to avoid foreclosure. (R. p. 25). However, the entire purpose behind the 120-day waiting period set forth in 12 C.F.R. § 1024.41(f) is to avoid this type of "dual tracking." *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696-01, at *10698 (Feb. 14, 2013) (codified at 12 C.F.R. § 1024.41) (explaining desire to avoid "'dual

tracking' where a servicer is simultaneously evaluating a consumer for loan modifications or other alternatives at the same time that it prepares to foreclose on the property").[7] Indeed, any such "dual tracking" efforts undertaken by a loan servicer would undoubtedly be met by accusations that the loan servicer was engaged in deceptive "bait and switch" tactics.

For these reasons, even if the Court decides that foreclosure was a compulsory counterclaim in the 2013 Action, this Court should nevertheless reverse the Summary Judgment Order because the trial court erred in applying the doctrine of res judicata. In doing so, this Court need not address the issue raised by Bailey and Owens on appeal.

C. Even if Res Judicata Were Properly Applied to Bar Deutsche Bank's Foreclosure Claim, Which it Was Not, the Trial Court Erred in Concluding that Resolution of the 2013 Action Constituted "Satisfaction" under Section 29-3-310.

Finally, even if this Court concludes that foreclosure was a compulsory counterclaim in the 2013 Action, and even if the Court decides the trial court did not err in rigidly and mechanically applying res judicata in the face of extensive countervailing circumstances, the Court still does not need to address the issue of money damages raised by Bailey and Owens because the final judgment in the 2013 Action does not constitute receipt by Deutsche Bank of "satisfaction" under S.C. Code Ann. § 29-3-310.

Under Section 29-3-310, a "mortgagee who has received full payment or satisfaction or to whom legal tender has been made of his debts, damages, costs, and charges secured by mortgage or real estate" is required to record a mortgage satisfaction within 3 months of demand. S.C. Code

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

Ann. § 29-3-310. Section 29-3-320 likewise imposes liability for failure to enter satisfaction after "having received such payment, satisfaction or tender." S.C. Code Ann. § 29-3-320. Bailey and Owens admit they have not made "full payment" of the Note. (Appellant's Initial Brief of Appellants/Respondents at p. 2).[8] And there is no dispute or contention that Bailey and Owens provided some "legal tender" of their "debts" – they did not.

Accordingly, as it relates to Sections 29-3-310 and -320, the only question before this Court – and the only issue that was before the trial court – is whether Deutsche Bank "received . . . satisfaction." S.C. Code Ann. §§ 29-3-310 & -320.[9] Bailey and Owens contend that resolution of the 2013 Action constituted "satisfaction" under these statutes. What they are really arguing is that by virtue of successfully defending against Bailey and Owens' claims in the 2013 Action and obtaining a complete defense verdict, Deutsche Bank somehow "received . . . satisfaction" of the Note and Mortgage. Stated differently, Bailey and Owens contend that by virtue of bringing, and subsequently losing, a lawsuit, they "satisf[ied]" the Note and Mortgage. The trial court erred in reaching this conclusion.

The word "satisfaction" in this context "is generally defined as the discharge of an obligation by paying a party what is due to him or the performance of a substituted obligation in

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[8] This candid admission should foreclose Bailey and Owens' creative argumentation about satisfaction "by operation of law" (R. p. 33, line 22), because the Supreme Court of South Carolina has previously concluded, in clear and certain terms, that "payment of the mortgage" is a requirement "[f]or liability to attach under [S.C. Code Ann. §§ 29-3-310 & -320]." *Dykeman v. Wells Fargo Home Mortg., Inc.*, 381 S.C. 333, 339, 673 S.E.2d 804, 807 (2009); *see id.* at 340, 673 S.E.2d at 807 ("We hold that section 29-3-310 requires the following elements be established by the mortgagor to trigger the substantial penalty and related relief in section 29-3-320: (1) that he has made full payment of his 'debts,' including any applicable 'damages, costs, and charges' . . . .").

[9] Lest there be any doubt, the word "received" necessarily modifies both "payment" and "satisfaction" in both statutes. A contrary reading, whereby "received" modifies "payment" but not "satisfaction," makes the statutes incomprehensible.

return for the discharge of the original obligation." *Bowers v. Dep't of Transp.*, 360 S.C. 149, 155, 600 S.E.2d 543, 546 (Ct. App. 2004) (internal quotation marks omitted). Acceptance of substitute performance as a discharge of an original obligation is typically formalized in an agreement or "an accord whereby one of the parties agrees to accept as satisfaction . . . some performance or undertaking different from that which he considers himself entitled." *Id.* (internal quotation marks omitted). The statutes at issue here, by and through their use of the word "received," contemplate an affirmative performance by a debtor (or third party) and a subsequent acceptance by the creditor. *See* S.C. Code Ann. § 29-3-310 (referring to creditor "who has received . . . satisfaction"); *id.* § 29-3-320 (conditioning obligation on creditor "having received such . . . satisfaction"). Deutsche Bank must therefore have "received" – and presumably accepted, as a discharge of Bailey and Owens' obligations under the Note and Mortgage – some affirmative, substitute performance in lieu of payment in full.

Forcing Deutsche Bank to defend a lawsuit hardly qualifies as the provision of substitute performance. Deutsche Bank "received" nothing. And by successfully defending against Bailey and Owens' claims in the 2013 Action, which proved to be without merit in any event, Deutsche Bank certainly did not agree to accept any substitute performance as "satisfaction" in full.

Bailey and Owens speak at length about the rules of statutory construction. (Appellants/Respondents' Initial Appellants' Brief at pp. 13, 18, and 19). But they seemingly ignore the rule that "[i]t is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning." *Davenport v. City of Rock Hill*, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993). Apart from block quoting the relevant statutes in full, Bailey and Owens make no effort to explain, much less acknowledge, how the word "received" fits into their expansive and strained interpretation of Sections 29-3-310 and -320.

Because Bailey and Owens' satisfaction-by-operation-of-law argument does not fit within the plain language of the statute, it was clearly not within the contemplation of the drafters of these statutes. *Cf. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005) ("The cardinal rule of statutory interpretation is to ascertain the intent of the legislature.").

Finally, to the extent the legislative intent behind the meaning of the word "satisfaction" is unclear, that uncertainty should be resolved in favor of Deutsche Bank, the party against whom a penalty would otherwise be imposed. "Sections 39-2-310 and 320 are penal statutes." *Dykeman*, 381 S.C. at 337, 673 S.E.2d at 806. "Penal statutes must be strictly construed." *Id.* Strict construction in this context means penal statues "must be applied in a manner which results in fairness and justice to the parties." *Kinard v. Fleet Real Estate Funding Corp.*, 319 S.C. 408, 412, 461 S.E.2d 833, 835 (Ct. App. 1995). This interpretive gloss should be even more pronounced where, as here, imposition of a penalty would result in a complete windfall for Bailey and Owens. *See id.* ("penal statutes must be strictly construed, *especially when the penalty may result in a windfall to a plaintiff*" (emphasis added)). A finding that Bailey and Owens somehow "satisf[ied]" their obligations under the Mortgage and Note – despite the fact that they did not pay the Note when it became due and did nothing but file a preemptive lawsuit and lose – would be the textbook definition of a windfall this Court should avoid. The "[un]fairness" and "[in]justice" of that result is even more unmistakable once the Court takes into account (a) the failure of Bailey and Owens to make any express request to rescind the Mortgage in the 2013 Action (thereby forcing Deutsche Bank to guess Bailey and Owens' purported intentions in evaluating the issue of compulsory counterclaims), coupled with (b) the fact that Deutsche Bank was working with Bailey and Owens

to evaluate loss mitigation options to avoid foreclosure at the time it answered the complaint in the 2013 Action.

For this additional reason, the Court should reverse the trial court, grant summary judgment to Deutsche Bank on Bailey and Owens' counterclaim pursuant to § 29-3-310, and decline to address the issue of money damages raised by Bailey and Owens in their affirmative appeal.

II. Even if Resolution of the 2013 Action Constitutes "Satisfaction" under Section 29-3-310, Which it Does Not, the Trial Court Did Not Err in Refusing to Award Money Damages under Section 29-3-320 because the Issue of Satisfaction Remained Open Until it Was Judicially Determined.

As noted, the trial court erred in deeming foreclosure a compulsory counterclaim, it erred in applying res judicata, and it erred in construing Sections 29-3-310 and -320 to encompass satisfaction by operation of law. Having made those determinations, however, the trial court correctly found that the Mortgage was not satisfied unless and until the trial court decided to apply the doctrine of res judicata to bar Deutsche Bank from foreclosing on the Note and Mortgage. Having made that determination, the trial court was thereafter constrained to follow the relevant statutes and decline to award money damages to Bailey and Owens under § 29-3-320 until the passage of three months following this alleged satisfaction determination. Accordingly, even if this Court does not reverse the Summary Judgment Order for the myriad reasons outlined herein, this Court should, in the very least, affirm the portion of the Summary Judgment Order declining an award of money damages and affirm the Order on Motion to Alter or Amend and Motion to Stay.[10]

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[10] Deutsche Bank agrees with Bailey and Owens that this Court reviews the trial court's decisions at issue in this appeal de novo. *See Bennett v. Carter*, 421 S.C. 374, 380, 807 S.E.2d 197, 200 (2017); *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

With regard to Sections 29-3-310 and -320, this Court has previously determined that "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, 461 S.E.2d at 835 (emphasis added). Until the time the trial court concluded – albeit erroneously – that Bailey and Owens somehow satisfied the Note and Mortgage (despite being in default), Deutsche Bank continued to "ha[ve] a monetary interest in the mortgage loan." *Id.*[11] Accordingly, the trial court did not "craft[ ] an exception" or otherwise deviate from the statutes. (Appellants/Respondents' Initial Appellants' Brief at p. 12). Rather, the trial court fully complied with and followed the statutes in declining Bailey and Owens' request for money damages.[12]

The arguments Bailey and Owens make by analogy in support of their contention about *when* the alleged satisfaction occurred do not support their position. Bailey and Owens correctly note that a "judicial proceeding determines whether the person was negligent *in the past*." (Appellants/Respondents' Initial Appellants' Brief at p. 16 (emphasis added)). But, of course, a

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[11] Bailey and Owens are arguing that Deutsche Bank, upon receipt of the Demand Letter, should have, in hair-trigger fashion, recorded a satisfaction of the Mortgage based solely on Bailey's unsupportable and erroneous contentions set forth in the one-page Demand Letter, transmitted approximately *three years* after the jury verdict in the 2013 Action. Had Deutsche Bank done so, it would have forever precluded its ability to foreclose on the Note and Mortgage, regardless of whether the trial court below agreed with Deutsche Bank on the compulsory counterclaim issue, and regardless of whether the trial court below ultimately agreed with Deutsche Bank about the inappropriateness of applying the doctrine of res judicata in this circumstance. Bailey and Owens contend Deutsche Bank "gambled" by refusing to comply with the Demand Letter (Appellants/Respondents' Initial Appellants' Brief at p. 20), but Deutsche Bank would have gambled its foreclosure rights by complying as well.

[12] The fact that neither party asked the trial court to rule in the manner it did (*see* Appellants/Respondents' Initial Appellants' Brief at pp. 8–9), as well as Bailey and Owens' characterization of the trial court's thoughts and statements during the hearing on Bailey and Owens' motion to alter or amend (*see id.* at p. 14), is of no moment because, as noted, this Court reviews the trial court decisions at issue de novo.

person is not negligent under the law until a court of competent jurisdiction so determines. Similarly, Bailey and Owens' arguments about equitable liens (*see* Appellants/Respondents' Initial Appellants' Brief at p. 16), likewise favor Deutsche Bank. Indeed, the case on which Bailey and Owens rely provides that equitable liens are "not judicially recognized until a judgment is entered declaring its existence." *First Fed. Sav. & Loan Ass'n of Charleston v. Bailey*, 316 S.C. 350, 356, 450 S.E.2d 77, 81 (Ct. App. 1994).

The trial court followed this precedent from a general standpoint by explaining: "Whether the mortgage had been satisfied remained an open one until this court's determination that satisfaction had occurred." (R. p. 34, lines 15–17).[13] Unless and until the issue of "satisfaction" was judicially determined, Deutsche Bank had no obligation to comply with Bailey's Demand Letter. In other words, in the absence of a judicial determination that conditions precedent to relief under Sections 29-3-310 and -320 were satisfied, the Demand Letter did not trigger the three-month period within which Deutsche Bank had to record a satisfaction of the Mortgage.

Having concluded – in the first instance – that application of res judicata constituted "satisfaction" under S.C. Code Ann. §§ 29-3-310 & -320, the trial court should have not required Bailey and Owens to transmit another demand letter in compliance with the relevant statutes. Likewise, the trial court should not have required Deutsche Bank – in August 2016 – to respond to the Demand Letter in conformity with its Summary Judgment Order decided over a year later in November 2017. Rather than impose either of those two extreme requirements, the trial court reasonably concluded that its judicial determination about "satisfaction" triggered the three-month

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[13] Bailey and Owens misconstrue the Summary Judgment Order in contending the trial court found Deutsche Bank in violation of Section 29-3-320 and therefore otherwise subject to a monetary penalty, but it nevertheless decided not to impose a penalty. (*See* Appellants/Respondents' Initial Appellants' Brief at pp. 1, 12). The trial court made no such ruling.

window within which Deutsche Bank was required to record a satisfaction of the Mortgage. The trial court did not err in reaching that conclusion.

CONCLUSION

For the foregoing reasons, as well as those set forth in Deutsche Bank's Appellant's Initial Brief of Respondent/Appellant, this Court should reverse the trial court's order with respect to Bailey and Owens' motion for summary judgment regarding (a) Deutsche Bank's foreclosure claim, (b) Bailey and Owens' declaratory judgment counterclaim, and (c) Bailey and Owens' § 29-3-310 counterclaim. This Court should also reverse the trial court's order with respect to Deutsche Bank's motion for summary judgment regarding Bailey and Owens' three counterclaims, including (a) declaratory judgment, (b) violation of § 29-3-310, and (c) violation of the Attorney Preference Statute.

In the alternative to reversing the Summary Judgment Order in the manner described above, this Court should conclude that foreclosure was not a compulsory counterclaim in the 2013 Action and remand the matter to the trial court for further proceedings consistent with that determination.

In the very least, if this Court does not reverse the Summary Judgment Order for the reasons outlined herein, it should affirm the portion of the Summary Judgment Order relating to money damages and it should affirm the Order on Motion to Alter or Amend and Motion to Stay.

This 30th day of October 2018.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2018-000436
Circuit Court Case No. 2016-CP-32-03572

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

Respondent/Appellant,

v.

Patricia Owens a/k/a Patrica 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.

RULE 211(b) CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **RESPONDENT'S BRIEF OF RESPONDENT/APPELLANT** complies with SCACR 211(b) because it is identical to Respondent/Appellant's previously filed Respondent's Initial Brief except for references to the record and correction of typographical errors and misspellings.

This the 30th day of October, 2018.

Jonathan Schulz (SC Bar No. 79850)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Defendants,

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

Appellants/Respondents.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing **RESPONDENT'S BRIEF OF RESPONDENT/APPELLANT** was sent via first-class U.S. Mail, postage prepaid, and addressed as follows:

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Jonathan E. Schulz (SC Bar No. 79850)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

APPELLANTS/RESPONDENTS' FINAL REPLY BRIEF

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STATEMENT OF ISSUES

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ARGUMENT

I. Deutsche Bank is improperly trying to use its respondent's brief in Bailey and Owens' appeal as a supplement to its appellant's brief in its own appeal.

Respondent/Appellant (hereinafter "Deutsche Bank")'s respondent's brief in this cross-appeal "incorporates by reference the arguments made in its Appellant's Initial Brief[.]" (Final Respondent's Brief of Respondent/Appellant p. 13 n. 6.) Deutsche Bank then states that "[t]hose arguments are nevertheless summarized herein for the Court's assistance and reference." (Final Respondent's Brief of Respondent/Appellant p. 13 n. 6.)

Poppycock. Deutsche Bank's respondent's brief does not "summarize[]" the arguments in its appellant's brief; it presents completely new – and unpreserved – arguments in favor of its own appeal. Deutsche Bank's appellant's brief spends a mere two pages setting out its argument about why it thinks the master-in-equity erred in granting the Appellants/Respondents (hereinafter "Bailey and Owens") summary judgment on liability under S.C. Code Ann. § 29-3-320. (Final Appellant's Brief of Respondent/Appellant pp. 26-27.) In its respondent's brief, ostensibly a response to Bailey and Owens' appellant's brief, Deutsche Bank sets out almost four pages of argument about that and expressly advocates for reversal of a ruling subject of *its own* appeal. (Final Respondent's Brief of Respondent/Appellant pp. 16-20.) That Deutsche Bank is using its respondent's brief as a second appellant's brief could scarcely be more blatant. In what is supposed to be a brief about why the master did not err by varying Bailey and Owens' relief under S.C. Code Ann. § 29-3-320, Deutsche Bank comes right out and says that "[f]or this additional reason, the Court should reverse the trial

court, grant summary judgment to Deutsche Bank on Bailey and Owens' counterclaim pursuant to § 29-3-310[.]" (Final Respondent's Brief of Respondent/Appellant p. 20.)

All of an appellant's arguments in favor of reversal must be included in his initial appellant's brief. State v. Wakefield, 323 S.C. 189, 191, 473 S.E.2d 831, 832 (Ct. App. 1996); see Platt v. CSX Transp., Inc., 388 S.C. 441, 697 S.E.2d 575, 578 (2010) (argument not preserved where not fully asserted until reply brief before Court of Appeals). Accordingly, it is well settled that appellants are not allowed to use their reply briefs to make new arguments in support of reversal. Platt, 697 S.E.2d at 578; Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999); Wakefield, 323 S.C. at 191; Fields v. Melrose Ltd. Pshp., 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993). For the same reason, Deutsche Bank is not permitted to use its respondent's brief in this cross-appeal as a second appellant's brief to advance its new arguments for the reversal it seeks. See id.

Further, the argument it sets out in its respondent's brief in support the reversal it wants – chiefly, an argument about the meaning of the word *received* under S.C. Code Ann. §§ 29-3-310 and -320 – was not made in its appellant's brief nor ever once made in the proceedings below. (Final Appellant's Brief of Respondent/Appellant); (R. pp. 173-218, 165-69, 266-83, 345-63.) It is not preserved for review. To be preserved for appellate review, an argument must have been both raised to and ruled upon by the trial court. E.g., Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011); Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). Deutsche Bank never made its new argument until now. It was not included in its appellant's brief

because Deutsche Bank knows this argument is not preserved for review. (Final Appellant's Brief of Respondent/Appellant.)

Deutsche Bank is hoping it can slip this by the panel and have this court see this as an additional sustaining ground argument, even though that is not what it is. Deutsche Bank does not do much to hide that it is making an outright argument for reversal, stating that this court "should reverse the trial court" on this unpreserved argument. (Final Respondent's Brief of Respondent/Appellant p. 20.)

Deutsche Bank does not get to do that. It has its appeal, in which it has submitted an appellant's brief. It did not include these new arguments in that brief. It would not have been proper to include them in that brief anyway. Deutsche Bank has overstepped its bounds and used its respondent's brief for an improper purpose.

II. Bailey and Owens' invited response to Deutsche Bank's improper attempt to supplement its appellant's brief in its own appeal: Deutsche Bank's argument about the word *received* is easily dismantled.

When a party makes improper argument, the opposing party is permitted to make "an appropriate response" to them, even if the response would otherwise be impermissible. Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72 (2004); accord Bowman v. State, 809 S.E.2d 232, 243-44 (S.C. 2018) (same); Ellenburg v. State, 367 S.C. 66, 625 S.E.2d 224, 226 (2006) (same); Holston v. Jackson, 278 S.C. 137, 139, 292 S.E.2d 794, 795 (1982) (applying the principle). This is what is referred to as "opening the door" or the "invited response" or "invited reply" doctrine. Bowman, 809 S.E.2d at 243; Vaughn, 362 S.C. at 169.

The court should not consider the arguments in Deutsche Bank's respondent's brief that it makes in favor of reversal because they are unpreserved and were not

argued in Deutsche Bank's appellant's brief. If the court does end up considering them, however, Bailey and Owens, by way of an invited response, incorporate and point the court to their respondent's brief in Deutsche Bank's appeal and also offer a rejoinder to Deutsche Bank's argument about the word *received* under S.C. Code Ann. §§ 29-3-310 and -320.

Receive is defined as follows:

> **1** to take or get (something given, thrown, sent, etc.) **2** to experience, undergo [to *receive* acclaim] **3** to bear or hold **4** to react to in a specified way **5** to learn [to *receive* news] **6** to let enter **7** to greet (visitors, etc.)

Webster's New World Dictionary and Thesaurus 515 (New York 1996).

Nothing in S.C. Code Ann. §§ 29-3-310 or -320 indicates that satisfaction has to be received in any particular way. Nothing indicates that such reception has to be of a physical object. Nothing indicates that such reception has to be of money. Deutsche Bank *got* final judgment in Bailey v. Novastar – which is what the master determined was the event of satisfaction. (R. pp. 23, 27, 33.) Deutsche Bank *experienced* and *underwent* final judgment in Bailey v. Novastar. Deutsche Bank received final judgment in Bailey v. Novastar. Deutsche Bank might not have gotten a check, but it received satisfaction of its mortgage.

III. Deutsche Bank advances illogical argument about when satisfaction occurred.

Deutsche Bank contends that satisfaction of its mortgage did not happen when final judgment was rendered in Bailey v. Novastar but, instead, would have only happened once Judge Spence later *ruled* that the final judgment in Bailey v. Novastar had satisfied the mortgage by operation of law. Responding to Bailey and Owens'

negligence case analogy, Deutsche Bank contends that, "of course, a person is not negligent under the law until a court of competent jurisdiction so determines." (Final Respondent's Brief of Respondent/Appellant p. 21-22.)

Seriously? Is Deutsche Bank seriously contending that the defendant in a negligence wreck case was not negligent at the point that he failed to exercise due care, crossed the center line, and collided with the plaintiff? Is Deutsche Bank seriously contending that the moment of the occurrence of that defendant's negligence would be when the jury returns a verdict against him? That is not just illogical; it is downright ludicrous. If a person unlawfully breaks into a house, does he only become a burglar once he is found guilty of burglary? Does the burglary occur at the time of conviction?

Deutsche Bank's argument about when satisfaction occurred is just as illogical. The master's order in this case is not what satisfied the mortgage. The master's order simply determined that the effect of an earlier event – the rendering of final judgment in Bailey v. Novastar – was to satisfy the mortgage. (R. pp. 1-41.) That is the only logical way to read it. The event of satisfaction had happened before the other events that triggered liability under S.C. Code Ann. § 29-3-320, as S.C. Code Ann. §§ 29-3-310 and -320 require.

IV. Deutsche Bank's argument ignores the way the master actually ruled.

Deutsche Bank writes that "the trial court correctly found that the Mortgage was not satisfied unless and until the trial court decided to apply the doctrine of res judicata to bar Deutsche Bank from foreclosing on the Note and Mortgage." (Final Respondent's Brief of Respondent/Appellant p. 20.) That is not correct. That is not what the master found. The master found as follows:

> 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.

(R. pp. 33-34.)

Nor did the master change that determination when he ruled on Bailey and Owens' motion to reconsider his decision to vary the relief available under S.C. Code Ann. § 29-3-320. In his order ruling on that motion, the master stated the following:

> While the Court found that the mortgage *had been satisfied*, it noted that satisfaction had not occurred in the usual manner, and held that the question of whether the mortgage was satisfied remained open until the enforceability of the mortgage had been judicially determined.

(R. p. 46) (emphasis added).

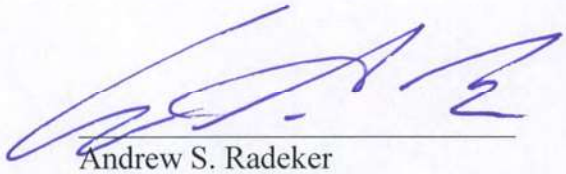
That is not a ruling that satisfaction did not occur until the master issued his order granting summary judgment to Bailey and Owens. The master noted that "the question of whether the mortgage was satisfied remained open" until that question was later decided; he did not rule that satisfaction did not occur until that question was decided. (R. p. 46.) In the example given in the section of this reply brief directly above, the question of whether the defendant driver's actions and omission constituted negligence remained open until the jury returned a verdict for the plaintiff, but that does not mean the negligence occurred when the verdict was read. The question of whether the burglary defendant's actions constituted burglary remained an open one until he

was convicted of burglary, but that does not mean that he did not commit burglary until the moment of his conviction.

CONCLUSION

Deutsche Bank offers no argument at all to the effect that the lower court had any authority to vary the statutory remedy under S.C. Code Ann. § 29-3-320. This court should reverse the master on this point and remand for a hearing be set to determine the amount of the monetary relief to which Bailey and Owens are entitled under S.C. Code Ann. § 29-3-320. The master's detailed and thoroughly analyzed order should remain the same in its other respects.

Respectfully submitted,



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November 26, 2018

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
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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PROOF OF SERVICE OF FINAL BRIEFS

I certify that I served the Appellants/Respondents' final briefs by depositing a copy of each of them, along with a bound copy of the record on appeal, on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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November 27, 2018

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434 S.C. 500
863 S.E.2d 829

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.
The ESTATE OF Patricia Ann Owens HOUCK; Tammy M. Bailey; South Carolina Department of Motor Vehicles, Defendants,

Of which the Estate of Patricia Ann Owens Houck and Tammy M. Bailey are the Appellants/Respondents.

Appellate Case No. 2018-000436
Opinion No. 5844

Court of Appeals of South Carolina.

Heard January 12, 2021
Filed August 11, 2021
Rehearing Denied October 6, 2021

Andrew Sims Radeker, of Harrison, Radeker & Smith, P.A., of Columbia, for Appellants/Respondents.

George Benjamin Milam and Jonathan Edward Schulz, both of Bradley Arant Boult Cummings, LLP, of Charlotte, North Carolina; Michael Casin Griffin, of Waxaw, North Carolina; and Mary R. Powers, of Brock & Scott, PLLC, of Columbia, all for Respondent/Appellant.

LOCKEMY, C.J.:

[434 S.C. 502]

In this foreclosure action, the Estate of Patricia Ann Owens Houck and Tammy M. Bailey (collectively, Mortgagors) appeal the master-in-equity's order granting their motion for partial summary judgment and finding Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1 (Deutsche Bank) liable for failing to record satisfaction of their mortgage pursuant to sections 29-3-310 to -320 of the South Carolina Code (2007).[1] Mortgagors solely argue the master erred in failing to order Deutsche Bank to pay a penalty under section 29-3-320. Deutsche Bank cross-appealed, arguing the master erred in granting Mortgagors' motion for partial summary judgment, finding its foreclosure claim was procedurally barred, and finding it was liable for failing to record satisfaction of the mortgage. In addition, Deutsche Bank argues the master erred by denying its motion for partial summary judgment

[863 S.E.2d 831]

as to Mortgagors' counterclaim for violation of section 37-10-102 of the South Carolina Code

[434 S.C. 503]

(2015) (the Attorney Preference Statute).[2] We reverse and remand.

FACTS/ PROCEDURAL HISTORY

In 1998, Houck signed a fixed-rate note (the Note) in favor of NovaStar Mortgage, Inc. (NovaStar), promising to pay $60,400 and 9.99% interest per annum in monthly installments. To secure the Note, Houck executed a mortgage (the Mortgage) on real property located at 111 Andrew Court in Gaston (the Property).[3] The Mortgage was later assigned to Deutsche Bank. The Note contained a balloon provision requiring Houck to pay the remaining balance due by the Note's maturity date of July 1, 2013.

On June 27, 2013—days before the Note matured—Mortgagors commenced an action (the 2013 Action) against NovaStar, Deutsche Bank, Ocwen Loan Servicing, LLC (the Loan Servicer), and others.[4] Mortgagors' claims against Deutsche Bank were premised upon violation of the Attorney Preference Statute. They claimed (1) that Deutsche Bank failed to comply with the attorney preference

provisions of section 37-10-102 with respect to the closing of the loan subject to this case, (2) that no attorney supervised the closing of the loan, and (3) that the loan was unconscionable and induced by unconscionable conduct. Mortgagors asserted that "[f]or each violation of [section] 37-10-102," they were "entitled to damages, attorney's fees, and penalties as provided in the South Carolina Consumer Protection Code, including all available relief under [section] 37-10-105." In addition, they asserted claims against Deutsche Bank for violation of the South Carolina Unfair Trade Practices Act (the SCUTPA). *See* S.C. Code Ann. §§ 39-5-10 to -730 (1985 & Supp. 2020). These claims were premised

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on the same alleged violation of the Attorney Preference Statute.

Mortgagors defaulted on the Note before Deutsche Bank filed its answer. In a letter dated August 23, 2013, the Loan Servicer advised Mortgagors of potential solutions to avoid foreclosure. Deutsche Bank answered the complaint on September 26, 2013, and asserted no counterclaims. The 2013 Action proceeded to trial September 15, 2015, and a jury found for the defendants. About a year later in August of 2016, Mortgagors sent a letter by certified mail to Deutsche Bank requesting that it record satisfaction of the Mortgage and included a $40 check to pay the fee for recording the satisfaction document. Deutsche Bank refused and returned the $40 check.

Deutsche Bank brought this action against Mortgagors in October 2016, seeking foreclosure of the Mortgage to satisfy the principal balance of $48,587.09 remaining on the Note. It alleged Mortgagors failed to make any payments on or after July 1, 2013. Mortgagors asserted defenses of res judicata, laches, unclean hands, waiver, and setoff. They admitted, however, that the "installments of principal and interest falling due from and after July 1, 2013[,] ha[d] not been paid although demand for payment thereof ha[d] been made." Mortgagors sought a declaratory judgment that Deutsche Bank held no mortgage on the Property or alternatively that any mortgage it held was unenforceable. They alleged that Deutsche Bank was liable for failing to enter satisfaction of the Mortgage within three months of Mortgagors' request pursuant to section 29-3-320 and that it violated the Attorney Preference Statute. Deutsche Bank filed a reply to the counterclaims in which it denied Mortgagors' allegations and alleged Mortgagors' claims under the Attorney Preference Statute were time-barred.

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The case was then referred to the master-in-equity, and both parties filed motions for partial summary judgment. Mortgagors sought summary judgment as to Deutsche Bank's claim for foreclosure, arguing it was procedurally barred by Rule 13(a), SCRCP, and res judicata. They also sought summary judgment as to their counterclaims for declaratory judgment and violation of section 29-3-320. Deutsche Bank sought

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summary judgment as to each of Mortgagors' counterclaims. The master granted Mortgagors' motion and denied Deutsche Bank's motion. He ruled the Mortgage was satisfied, instructed Deutsche Bank to record satisfaction pursuant to section 29-3-320 within three months of its order, and determined that if Deutsche Bank complied, Mortgagors would be entitled to no further relief under section 29-3-320.[5] Mortgagors filed a motion to alter or amend the master's order, which the master denied. This appeal followed.

STANDARD OF REVIEW

Upon review of an order granting summary judgment, our appellate courts "appl[y] the same standard [that] governs the trial court under Rule 56(c), SCRCP : summary judgment is proper when 'there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.' " *Osborne v. Adams* , 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001) (quoting *Baughman v. Am. Tel. & Tel. Co.* , 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991)). "We review questions of

law de novo." *Ziegler v. Dorchester County* , 426 S.C. 615, 619, 828 S.E.2d 218, 220 (2019).

LAW/ANALYSIS

I. Mortgagors' Motion for Partial Summary Judgment

Deutsche Bank argues the master erred by finding its foreclosure claim was a compulsory counterclaim in the 2013 Action and that res judicata precluded it from bringing this action. It asserts the foreclosure claim did not arise from the same transaction or occurrence that gave rise to Mortgagors' claims for violation of the Attorney Preference Statute and the SCUTPA and thus did not logically relate to their claims in the 2013 Action. Deutsche Bank contends that because section 37-10-105 provided several forms of relief, Mortgagors' general request for "all available relief" under section 37-10-105 instead of a specific request for nonenforcement of the agreement was insufficient to satisfy the logical relationship test. We agree.

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A. Compulsory Counterclaim

"If a compulsory counterclaim is not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action." *Beach Co. v. Twillman, Ltd.* , 351 S.C. 56, 62, 566 S.E.2d 863, 865 (Ct. App. 2002) ; *see also* Rule 13, SCRCP ("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* ...." (emphasis added)). "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *First-Citizens Bank & Tr. Co. of S.C. v. Hucks* , 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). "Claims that arise out of separate transactions or occurrences than the subject matter of the opposing party's claims are, instead, permissive." *Wachovia Bank, Nat'l Ass'n v. Blackburn* , 407 S.C. 321, 330-31, 755 S.E.2d 437, 442 (2014).

When deciding whether a claim is compulsory under Rule 13(a), SCRCP, South Carolina courts apply the "logical relationship test." *See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.* , 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989) (adopting the logical relationship test). In *Carolina First Bank v. BADD, L.L.C.* , our supreme court held a defendant's inclusion of a counterclaim for civil conspiracy in its answer to the bank's foreclosure complaint was permissive when it bore "no logical relationship to either the execution or the enforceability of the guaranty agreements."

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414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015). The court clarified that "the civil conspiracy claim presume[d] the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees unenforceable." *Id.* at 296, 778 S.E.2d at 109. In *South Carolina Community Bank v. Salon Proz, LLC* , this court found a claim was compulsory in a foreclosure action when, if the allegation were true, "it could affect the loan's enforceability." 420 S.C. 89, 97-98, 800 S.E.2d 488, 492 (Ct. App. 2017).

The Attorney Preference Statute requires mortgage lenders in residential real estate transactions to "ascertain prior to closing the preference of the borrower as to the legal counsel

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that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction." § 37-10-102(a). If the lender violates this provision, the borrower has a cause of action to recover actual damages and a right to recover a penalty from the lender "in an amount determined by the court" of no less than $1,500 and no more than $7,500. S.C. Code Ann. § 37-10-105(A) (2015). Additionally, subsection (C) provides,

> (C) If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108[6] at the time it was made, or was induced by unconscionable conduct, the court may ...:
>
> (1) 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;
>
> (2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;
>
> (3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or
>
> (4) award:
>
> (a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;
>
> (b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and
>
> (c) attorney's fees and costs.
>
> An action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt.

S.C. Code Ann. § 37-10-105(C) (2015).

Applying the logical relationship test, we find the foreclosure claim did not arise out of the same transaction or occurrence that was the subject matter of the 2013 Action.

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The occurrence that gave rise to Deutsche Bank's inclusion in Mortgagors' complaint in the 2013 Action was the execution of the loan documents and the closing of the Mortgage. The occurrence that gave rise to Deutsche Bank's foreclosure action was Mortgagors' default on the Note. We acknowledge *DAV Corp.* ; *BADD, L.L.C.* ; and *Salon Proz, LLC* all held that a claim is compulsory in a foreclosure action when, if the allegation were true, it could affect the enforceability of the loan.[7] However, this case differs from the foregoing cases because here the prior action was not a foreclosure action. Rather, Mortgagors' claims against Deutsche Bank in the 2013 Action were for violation of the Attorney Preference Statute and the SCUTPA. Thus, the question is whether a counterclaim for foreclosure in the 2013 Action would have affected Mortgagors' claims under the Attorney Preference Statute and the SCUTPA. Deutsche Bank's foreclosure claim was not a defense to Mortgagors' allegations in the 2013 Action, and had Deutsche Bank raised the foreclosure claim in the 2013 Action, it would not have affected Mortgagors' allegations pertaining to the violation of the Attorney Preference Statute. *See U.S. Bank Tr. Nat. Ass'n v. Bell* , 385 S.C. 364, 374-75, 684 S.E.2d 199, 205 (Ct. App. 2009) ("Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and

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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." (footnote omitted)). We therefore conclude that although Deutsche Bank could have asserted a counterclaim for foreclosure in the 2013 Action, such claim was permissive—not compulsory.

Further, although Mortgagors claimed they were not aware of the Note's balloon provision, they did not specifically request a determination that the Mortgage or the underlying obligation to repay the loan was unenforceable. Rather, they sought damages, attorney's fees, and in general terms, "penalties as provided in the South Carolina Consumer Protection Code, including all available relief" under section 37-10-105. Had the court in the 2013 Action determined that the balloon

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provision was unconscionable or induced by unconscionable conduct, it could have declared the entire agreement unenforceable, but such remedy was neither required nor specifically requested. *See* § 37-10-105(A), (C). The court could have instead refused to enforce only that particular term of the agreement or simply chosen to award monetary relief. *See id.*

For the foregoing reasons, we find Deutsche Bank's claim for foreclosure did not arise out of the same transaction or occurrence as the 2013 Action and was therefore not a compulsory counterclaim. Accordingly, we find the master erred by finding Deutsche Bank was precluded from bringing this foreclosure action, and we reverse the grant of summary judgment.

B. Res Judicata

Because we find Deutsche Bank's claim for foreclosure did not arise out of the same transaction or occurrence that was the subject of the 2013 Action, we find res judicata likewise did not bar Deutsche Bank from bringing this foreclosure action. *See Sub-Zero Freezer Co. v. R.J. Clarkson Co.* , 308 S.C. 188, 190, 417 S.E.2d 569, 571 (1992) ("Res judicata bars subsequent suit by the same parties on the same issues."); *id.* at 190-91, 417 S.E.2d at 571 ("[It] also bars subsequent suit by the same parties when the claims arise out of the same transaction or occurrence that is the subject of the prior suit between those parties."); *Riedman Corp. v. Greenville Steel Structures, Inc.* , 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992) (stating res judicata requires three elements: "(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit").

II. Remaining Issues

Mortgagors argue the master erred in failing to penalize Deutsche Bank for refusing to record satisfaction. Deutsche Bank argues the master erred in concluding the preclusive effect of the 2013 Action resulted in satisfaction of the Mortgage. Our reversal of the master's grant of summary judgment is dispositive of these issues; thus, we need not address them further. *See Futch v. McAllister Towing of Georgetown, Inc.* , 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding

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when the appellate court's disposition of a prior issue is dispositive, it need not address remaining issues).

Finally, as to Deutsch Bank's argument the master erred in denying its motion for summary judgment, we find this issue is not appealable. *See Olson v. Faculty House of Carolina, Inc.* , 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003) (holding "the denial of summary judgment is not appealable, even after final judgment"); *Coastal Fed. Credit Union v. Brown* , 417 S.C. 544, 553, 790 S.E.2d 417, 422 (Ct. App. 2016) (finding the denial of summary judgment was not appealable even when accompanied by an appealable grant of summary judgment).

CONCLUSION

For the foregoing reasons, we reverse the grant of summary judgment in favor of Mortgagors and remand to the master for further proceedings. We find the denial of Deutsche Bank's motion for summary judgment is not appealable.

REVERSED AND REMANDED.

KONDUROS and MCDONALD, JJ., concur.

Notes:

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[1] § 29-3-310 (stating that when a holder of record of a mortgage has received "full payment or satisfaction" or a legal tender has been made to him "of his debts, damages, costs, and charges secured by mortgage of real estate," it must enter satisfaction of the mortgage within three months after the mortgagor requests entry of satisfaction); § 29-3-320 (stating a holder who violates section 29-3-310 shall pay the aggrieved person "one-half of the amount of the debt secured by the mortgage, or [$25,000,] ... 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").

[2] *See* § 37-10-102(a) (requiring mortgage lenders to "ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction").

[3] In its foreclosure action, Deutsche Bank also sought to reform the Mortgage to include the mobile home located on the Property.

[4] According to Mortgagors' complaint, Bailey "became a debtor under the [N]ote through an assumption," but they alleged she "would not have done so if she had been aware of the balloon [provision]."

[5] The only cause of action effectively remaining after the master's grant of Mortgagors' partial motion for summary judgment was Mortgagors' counterclaim for violation of the Attorney Preference Statute.

[6] S.C. Code Ann. § 37-5-108 (2015) (listing factors for courts to consider when deciding whether an agreement or transaction is unconscionable or induced by unconscionable conduct).

[7] *See DAV Corp.* , 298 S.C. at 518, 381 S.E.2d at 905 ; *BADD, L.L.C.* , 414 S.C. at 296, 778 S.E.2d at 109 ; *Salon Proz, LLC* , 420 S.C. at 97-98, 800 S.E.2d at 492.

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM LEXINGTON COUNTY
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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,

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PETITION FOR REHEARING OR REHEARING *EN BANC*

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Appellants/Respondents (hereinafter "Bailey and Owens") hereby respectfully move and petition, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case and submits the memorandum below in support of the same. Appellants/Respondents, in an effort to keep this petition succinct, incorporates herein by reference their previously submitted briefs, making by reference those same arguments here.

This court's opinion merits a second look – if need be, by this court as a whole, *en banc*. See S.C. Code Ann. §§ 14-8-80 & -90. The master-in-equity was correct to rule that res judicata barred Respondent/Appellant (hereinafter "Deutsche Bank")'s foreclosure claim, as it was a compulsory counterclaim in the earlier action brought by Bailey and Owens.

I. The opinion finds the foreclosure claim was permissive in the 2013 action for reasons that contradict existing precedent.

If Deutsche Bank had counterclaimed for foreclosure in the 2013 action and won on the counterclaim, that would have most certainly affected the enforceability of Bailey and Owens' claim in that action for attorney preference violation coupled with unconscionability. Deutsche Bank's success on the foreclosure claim, which sought enforcement of the note and mortgage per their written terms, would have taken some available relief under the attorney preference claim off the table entirely. See S.C. Code Ann. § 37-10-105(C)(1-3). It would have been impossible in the 2013 action for a court both to enforce the note and mortgage as written (Deutsche Bank winning on the foreclosure claim) and award relief to Bailey and Owens under S.C. Code Ann. §

37-10-105(C)(1), (2), or (3), all of which provided for the non-enforcement or modified enforcement of the note and mortgage if Bailey and Owens had won on their claim.

This court's opinion found that "the foreclosure claim did not arise out of the same transaction or occurrence that was the subject matter of the 2013 Action." Accordingly, the court found that the foreclosure counterclaim Deutsche Bank had and could have brought at the time it answered in the 2013 action was permissive, rather than compulsory.

The opinion decides that the 2013 action and the instant foreclosure action arose out of different occurrences, respectively, the execution of the loan documents and mortgage closing and default under the note. That decision, however, runs contrary to precedent.

The opinion contravenes the precedent set in Carolina First Bank v. BADD, L.L.C., itself a foreclosure action, in which 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 such a debt collection 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 in BADD 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. Under that precedent, the transaction or occurrence giving rise to Deutsche Bank's foreclosure claim was (or at the very least included) the execution of the loan documents and mortgage closing – the very same transaction or occurrence this court determined gave rise to Bailey and

Owens' claims in the 2013 action. See id. When the precedent of BADD is applied to this case, Deutsche Bank's foreclosure claim can only be reckoned as having been a compulsory counterclaim in the 2013 action. See id.

The opinion in the instant also does not square with N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), a foreclosure action with counterclaims, in which the Supreme Court adopted the "logical relationship" test for determining whether a counterclaim is compulsory. The Court 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[.]" Id. 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.

In the DAV case, the plaintiff's claim was for foreclosure of a mortgage, and the Court's described of DAV's counterclaims as 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 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.

When the precedent of DAV Corp. is applied, it also gives a positive result for whether Deutsche Bank's foreclosure claim was compulsory in the 2013 action under the logical relationship test, as the unconscionable attorney preference violation claim in the 2013 action had *more* to do with the foreclosure claim than the claim in DAV Corp. had to do with the compulsory counterclaims there. Id. at 517-19. They arose out of the same relationship and more closely so than the DAV Corp. claims, and, as discussed above, they affect each other's enforceability at least as much, if not more than, the opposing claims in DAV Corp. did. Id. at 517-19.

As discussed in this court's opinion in the instant case, this court determined in S.C. Community Bank v. Salon Proz, LLC, 420 S.C. 89, 97, 800 S.E.2d 488, 492 (Ct. App. 2017), that a claim for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, was compulsory in a mortgage foreclosure action because it could affect the enforceability of the loan. Frankly, there is more mutual incompatibility of claims enforcement involved in this case between the 2013 action and Deutsche Bank's foreclosure claim than there was in Salon Proz, 420 S.C. at 97.

DAV Corp., BADD, and Salon Proz may be boiled down to this: 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. BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97. If success on a counterclaim could affect the enforceability of the plaintiff's claim, it is compulsory. BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97. Here, the relationship between the attorney preference with unconscionability claim in the 2013 action and Deutsche Bank's foreclosure claim had both.

In addition, this court's opinion is unduly focused on whether declaring the note and mortgage unenforceable was specifically prayed for in the complaint in the 2013 action. Never once has any case analyzing whether a counterclaim was compulsory or permissive taken that into account. Nor is there any reason to take it into account. For one thing, the content of the prayer in a contested case is usually unimportant to the relief available on a claim. "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Rule 54(c), SCRCP.

For another, at the heart of this case is whether Deutsche Bank's foreclosure claim is barred by res judicata, which "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). 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*" – even if they were

not pled at all, much less specifically prayed for. Id. at 414 (emphasis added, quoting Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)).

But, even if the specific content of the prayer in the 2013 action complaint were to matter to the analysis, Bailey and Owens specifically prayed for "all relief available under S.C. Code Ann. § 37-10-105(C)[.]" (R. p. 387.) That included the relief available under S.C. Code Ann. § 37-10-105(C)(1), (2), and (3), which provided for the non-enforcement or modified enforcement of the note and mortgage.

Not only has the opinion in this case contradicted precedent, it has turned a blind eye to what relief was actually sought in the 2013 action.

The court must have overlooked or misapprehended the law in reaching its conclusion in this case, and rehearing should be granted.

II. The opinion has effectively created a different compulsory/permissive analysis for foreclosure actions and other cases – essentially, a different law for banks.

This court's opinion states as follows:

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

The 2013 action was, indeed, not a foreclosure action. But Deutsche Bank's claim at issue is a foreclosure claim. First of all, there is no special law of res judicata and compulsory/permissive distinction that applies to foreclosure claims and not other claims.

Second, the compulsory counterclaim principle runs (as it must) with equal force in both directions, such that it applies equally to claims whether they are or could

asserted by a plaintiff or a defendant. It is the *relationship* between the claims that informs whether they are compulsory or permissive with regard to one another. DAV Corp., 298 S.C. at 518-19. The compulsory/permissive analysis and is, as it has to be, the same when a plaintiff asserts Claim A and a defendant has Claim B as a counterclaim as it when a plaintiff asserts Claim B and a defendant has Claim A as a counterclaim. The conclusion of whether the counterclaim is compulsory or permissive has to be the same, because the *relationship* between the claims is the same – either they have a logical relationship to one another or they do not. Id. The claimants' roles as plaintiff and defendant do not change the analysis if those roles are switched. See id. The court's opinion errs in treating in treating the analysis otherwise, indicating that this court must have overlooked or misapprehended the law in this regard.

This opinion has birthed a monstrous distinction, a compulsory/permissive analysis that is different for foreclosure actions than it is for other claims. Effectively, this creates the unsavory, unjust, and unfair result of a different law for banks. Our system depends upon the law being the same for everyone, and the opinion in this case chips away at this bedrock principle. This is wrong and should be undone.

III. This court should have reversed the denial of monetary relief under S.C. Code Ann. § 29-3-320.

As discussed in Bailey and Owens' briefs, the master erred by denying them relief under S.C. Code Ann. § 29-3-320, relief to which they were entitled under that statute. On rehearing, the court should reverse the master on that point alone and affirm his thorough and reasoned decision in all other respects.

IV. Rehearing *en banc* would be proper.

"A hearing or rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR.

Consideration by the full court appears necessary to secure or maintain the uniformity of this court's decisions, as well as to ensure adherence to Supreme Court precedent. Further, it is needed to ensure that the law remains the same for all who come before this state's courts.

WHEREFORE, Appellants/Respondents pray for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,

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August 26, 2021

The South Carolina Court of Appeals

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

v.

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

Of which the Estate of Patricia Ann Owens Houck and Tammy M. Bailey are the Appellants/Respondents.

Appellate Case No. 2018-000436

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

James E. Lockemy C.J.

J.

J.

Columbia, South Carolina

cc:
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The Honorable James O. Spence

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