STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

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

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

Plaintiff,

vs.

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

Defendants.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

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

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

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

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

h. The amended answer and counterclaim further alleges:

Rule 13(a) of the South Carolina Rules of Civil Procedure says, "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

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

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

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

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

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

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

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

. . .

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

. . .

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

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

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

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

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

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

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

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

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

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

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

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

ISSUES

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

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

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

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

CONCLUSIONS OF LAW

SUMMARY JUDGMENT STANDARD

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

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

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

PUBLIC POLICY CONCERNS AT ISSUE

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 210.

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

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

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

RES JUDICATA

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

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

It is generally accepted across the country that

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

47 Am.Jur.2d Judgments § 504 (2006).

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 517.

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

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

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

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

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

Salon Proz, 420 S.C. at 97.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF RES JUDICATA HERE DOES NOT OFFEND PUBLIC POLICY

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

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

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

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

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

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

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

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

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

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

OPERATION AND EFFECT OF RES JUDICATA

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

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

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

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

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

59 C.J.S. Mortgages § 564 (2009).

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

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

S.C. CODE ANN. §§ 29-3-310 & -320

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Shumaker, supra at 824.

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

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

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

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

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

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

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

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

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

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

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

ATTORNEY PREFERENCE VIOLATION COUNTERCLAIM

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

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

MISCELLANEOUS OTHER MATTERS RAISED BY PARTIES

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

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

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

CONCLUSION

Accordingly, IT IS THEREFORE HEREBY ORDERED that:

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

i. The subject mortgage is satisfied;

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

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

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

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

And IT IS SO ORDERED.

Signature Page to Follow

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016-CP-

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

PLAINTIFF(S)

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

DEFENDANT(S)

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

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

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

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

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

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

For Clerk of Court Office Use Only

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

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

CLERK OF COURT

Court Reporter: Kimberly T. Power, Veritext Legal Solutions

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

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

Lexington Common Pleas

Case Caption: Deutsche Bank National Trust Company VS Patricia Owens

Case Number: 2016CP3203572

Type: Order/Other

AND IT IS SO ORDERED.

S/JUDGE JAMES O. SPENCE-3068