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 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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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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