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

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SC Court of Appeals

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

Respondent/Appellant,

v.

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.

APPELLANT'S BRIEF OF RESPONDENT/APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

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

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

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

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

Statement of the Case

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF THE ARGUMENT

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The trial court ruled in favor of Bailey and Owens on their motion for summary judgment with respect to Deutsche Bank's foreclosure claim and with respect to Bailey and Owens' counterclaim for a declaratory judgment. (R. p. 36). The trial court also granted Bailey and Owens' motion as to liability on their counterclaim for failure to record a mortgage satisfaction under S.C. Code Ann. § 29-3-310. Without question, the trial court reached these decisions based solely and exclusively on its erroneous determination that foreclosure was a compulsory counterclaim the 2013 Action, and the trial court's subsequent decision to apply res judicata. (R. p. 23, lines 7–9 ("As the foreclosure claim was an unraised, compulsory counterclaim in the [2013] action, it is now barred by res judicata."); R. p. 27, lines 18–21 (explaining that because "Deutsche Bank's rights in the note . . . have been discharged . . . Bailey and Owens are entitled to prevail on their claim for a declaratory judgment"); R. p. 33, lines 21–23 ("The court concludes that satisfaction, within the meaning of S.C. Code Ann. § 29-3-310 and -320, embraces the discharge of the mortgage by operation of law, which extinguishes the mortgage.")). Because the trial court erred by concluding that Deutsche Bank was required to assert foreclosure as a counterclaim in the

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

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

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

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

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

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

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

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

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

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

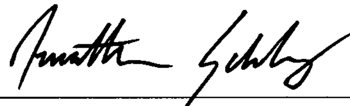
[18] The Attorney Preference Statute does permit a claim beyond the three-year time limitation "as a matter of defense by recoupment or set-off." S.C. Code Ann. § 37-10-105. Bailey and Owens' have asserted an affirmative defense for "Setoff/Credit", and Deutsche Bank did not move for summary judgment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

CONCLUSION

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

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

This 30th day of October, 2018.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED
OCT 31 2018
SC Court of Appeals

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

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

Respondent/Appellant,

v.

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

Defendants,

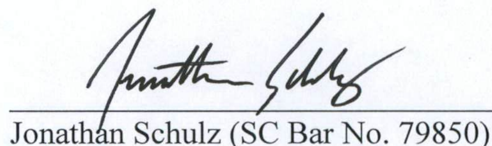
Of whom Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey are the

Appellants/Respondents.

RULE 211(b) CERTIFICATE OF COMPLIANCE

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

This the 30th day of October, 2018.



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