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.

RESPONDENT'S BRIEF OF RESPONDENT/APPELLANT

Michael C. Griffin (SC Bar No. 72868)
G. Benjamin Milam (SC Bar 80311)
Jonathan E. Schulz (SC Bar No. 79850)
BRADLEY ARANT BOULT CUMMINGS LLP
214 North Tryon Street, Suite 3700
Charlotte, North Carolina 28202
Telephone: (704) 388-6000
mgriffin@bradley.com
bmilam@bradley.com
jschulz@bradley.com

Mary R. Powers
BROCK & SCOTT, PLLC
3800 Fernandina Rd., Suite 110
Columbia, South Carolina 29210
Telephone: (803) 454-3540
Mary.Powers@brockandscott.com

Attorneys for Respondent/Appellant

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STATEMENT OF THE ISSUE ON APPEAL

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

[3] Bailey and Owens concur with this characterization. (*See* Appellant's Initial Brief of Appellants/Respondents at p. 6 (explaining that the 2013 Action was about "the execution of the subject note and the mortgage and the circumstances surrounding that"); *id.* at pp. 6–7 (explaining that the 2013 Action was about the allegation "that NovaStar did not ascertain Owens' preference as to legal counsel and allowed the loan to be closed without attorney supervision, and, as a result, that the balloon aspect of the note was kept hidden from Owens when she signed the signature page of the note document")).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF THE ARGUMENT

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

With regard to Sections 29-3-310 and -320, this Court has previously determined that "the legislative intent in enacting these statutes was to provide an incentive for the mortgagee, *once it no longer has a monetary interest in the mortgage loan*, to promptly record the extinguishment of the lien." *Kinard*, 319 S.C. at 412, 461 S.E.2d at 835 (emphasis added). Until the time the trial court concluded – albeit erroneously – that Bailey and Owens somehow satisfied the Note and Mortgage (despite being in default), Deutsche Bank continued to "ha[ve] a monetary interest in the mortgage loan." *Id.*[11] Accordingly, the trial court did not "craft[ ] an exception" or otherwise deviate from the statutes. (Appellants/Respondents' Initial Appellants' Brief at p. 12). Rather, the trial court fully complied with and followed the statutes in declining Bailey and Owens' request for money damages.[12]

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

This 30th day of October 2018.

Michael C. Griffin (SC Bar No. 72868)
G. Benjamin Milam (SC Bar No. 80311)
Jonathan E. Schulz (SC Bar No. 79850)
BRADLEY ARANT BOULT CUMMINGS LLP
214 North Tryon Street, Suite 3700
Charlotte, North Carolina 28202
Telephone (704) 388-6000
Facsimile: (704) 332-8858
mgriffin@bradley.com
bmilam@bradley.com
jschulz@bradley.com

Mary R. Powers
Brock & Scott, PLLC
3800 Fernandina Rd., Suite 110
Columbia, South Carolina 29210

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

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-32-03570

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

Respondent/Appellant,

v.

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

Defendants,

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

Appellants/Respondents.

RULE 211(b) CERTIFICATE OF COMPLIANCE

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

This the 30th day of October, 2018.

Jonathan Schulz (SC Bar No. 79850)