THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

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SC Court of Appeals

Appellate Case No. 2018-000436

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

v.

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

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

APPELLANTS/RESPONDENTS' FINAL RESPONDENTS' BRIEF

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STATEMENT OF ISSUES

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

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

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

STATEMENT OF THE CASE

Respondent/Appellant Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1 ("Deutsche Bank") filed this lawsuit on October 19, 2016, against Appellants/Respondents Patricia Owens a/k/a Patricia Ann Owens ("Owens") and Tammy M. Bailey ("Bailey"), seeking foreclosure of a mortgage of property at 111 Andrew Court, Gaston, South Carolina, and seeking reformation of that mortgage. (R. pp. 76-98.) Bailey and Owens answered and, later, served an amended answer and counterclaim within the time of do so as of right under Rule 15, SCRCP. (R. pp. 99-115.) Their amended answer and counterclaim admitted Deutsche Bank's allegation that "[t]he installments of principal and interest falling due from and after July 1, 2013 have not been paid although demand for payment thereof has been made." (R. pp. 82, 106.) Bailey and Owens' amended pleading asserted the defenses of res judicata, collateral estoppel, laches, unclean hands, waiver, and setoff or credit. (R. pp. 107-09.) Bailey and Owens also asserted counterclaims for a declaratory judgment that Deutsche Bank holds no mortgage on the subject property or, in the alternative, that the mortgage is unenforceable, for liability under S.C. Code Ann. § 29-3-320 for failure to record satisfaction of the mortgage after due request, and for violation of S.C. Code Ann. § 37-10-102 (usually referred to as the attorney preference statute.) (R. pp. 109-10.) The case was referred to the Honorable James O. Spence, as Master-in-Equity for Lexington County. (R. pp. 51-52.)

Deutsche Bank moved for summary judgment in its favor as to each of Bailey and Owens' counterclaims. (R. pp. 165-69.) Bailey and Owens moved for 1) summary

judgment in their favor as to Deutsche Bank's claim for foreclosure, 2) summary judgment in their favor as to their counterclaim seeking a declaratory judgment, and 3) summary judgment on liability in their favor as to their counterclaim under S.C. Code Ann. § 29-3-320 for failure to enter satisfaction of the mortgage. (R. pp. 124-25.)

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

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

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

timely and made in their required amounts, a substantial principal balance came due on July 1, 2013, the note's maturity date. (R. p. 246.) The mortgage was recorded on July 2, 1998, in the office of the Lexington County Register of Deeds, and assignments were recorded noting the transfer of the note and mortgage to Deutsche Bank. (R. p. 81.)

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

The note matured on July 1, 2013, and Deutsche Bank's complaint alleged that "[t]he installments of principal and interest falling due from and after July 1, 2013 have not been paid although demand for payment thereof has been made." (R. pp. 4, 82.)

Bailey and Owens' amended answer and counterclaim alleged the following:

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

(R. pp. 106-07.)

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

112.) The letter enclosed a $40.00 check to Deutsche Bank to cover any recording and processing fees associated with getting the satisfaction document recorded. (R. p. 112.) The letter stated that the subject note matured on July 1, 2013. (R. p. 112.) It went on to state that there was a previous lawsuit between the parties that "was directly about whether the note and mortgage were valid and enforceable[,]" that Deutsche Bank never asserted a counterclaim for foreclosure in that suit, and that the case was ended by a jury verdict against Bailey and Owens. (R. p. 112.)

The letter from Deutsche Bank's attorney that was attached to the amended answer and counterclaim acknowledged receipt of Bailey's letter and noted Deutsche Bank's refusal to record the satisfaction. (R. p. 114.) More than three months passed between Deutsche Bank's receipt of the letter request and the assertion of Bailey and Owens' counterclaims through their amended answer and counterclaim in this case. (R. pp. 104-15, 136.)

The parties agreed, and public records show, that the Bailey v. Novastar action occurred, that Deutsche Bank was a defendant in that case, and that the case was tried to a final judgment in favor of Deutsche Bank and the other defendants in that case. (R. p. 6, p. 185 ln. 9-23, pp. 370-525.)

The Bailey v. Novastar case was filed on June 27, 2013. (R. pp. 377-96.) In that case, Bailey and Owens asserted various claims against Deutsche Bank, most of which arose from the execution of the subject note and mortgage and the circumstances surrounding that. (R. pp. 7, 380-96.) Among the claims asserted in Bailey v. Novastar was a claim that sounded under S.C. Code Ann. § 37-10-105(C) against NovaStar and Deutsche Bank (as NovaStar's assignee) for violation of S.C. Code Ann. § 37-10-102

(commonly referred to as the attorney preference statute, under which a mortgage lender is required to ascertain a borrower's preference as to the legal counsel she desires to represent her in the mortgage loan closing) coupled with unconscionable loan terms or inducement of the mortgage loan by unconscionable conduct. (R. pp. 380-84.) Bailey and Owens' contention concerning the claims was that NovaStar did not ascertain Owens' preference as to legal counsel and allowed the loan to be closed without attorney supervision, and, as a result, that the balloon aspect of the note was kept hidden from Owens when she signed the signature page of the note document. (R. pp. 381-84.)

Among the relief provided for in S.C. Code Ann. § 37-10-105(C) is for a court to "refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made." S.C. Code Ann. § 37-10-105(C). The prayer in the Bailey v. Novastar complaint stated that Bailey and Owens sought, *inter alia*, "all relief available under S.C. Code Ann. § 37-10-105(C)[.]" (R. p. 387.)

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

fact that the subject note had matured at the time Deutsche Bank served its answer. (R. pp. 8, 246, 397-406.)

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

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

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

> Here, the note subject of the mortgage had matured at the time of Deutsche Bank's answer in the earlier action, and that is the ultimate and final default under the note and mortgage. The effect of the claim arising from that default being barred by res judicata is to discharge Deutsche Bank's rights in the note and mortgage, as it

> neither has nor can have any other right to enforce the mortgage.
>
> . . .
>
> Deutsche Bank's rights in the note debt owed or due as a result of the maturity of the note have been discharged. That is all of the debt. The note is gone, and the mortgage is gone with it. Accordingly, Bailey and Owens are entitled to prevail on their claim for a declaratory judgment that Deutsche Bank's mortgage does not encumber the subject property.
>
> . . .
>
> The court concludes that *satisfaction*, within the meaning of S.C. Code Ann. § 29-3-310 and -320, embraces the discharge of the mortgage by operation of law, which extinguishes the mortgage. That is what has happened here, as the undisputed facts show. Bailey and Owens are entitled to summary judgment in their favor as to Deutsche Bank's liability to them under S.C. Code Ann. § 29-3-320.

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

STANDARD OF REVIEW

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

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

ARGUMENT

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

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

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

a. Res judicata.

Res judicata "bars a second suit where there is (1) identity of parties; (2) identity of subject matter; and (3) adjudication of the issue in the first suit." Judy v. Judy, 393 S.C. 160, 173, 712 S.E.2d 408, 412 (2011). Res judicata bars the parties to the first case "from raising any issues which were adjudicated in the former suit *and any issues which might have been raised in the former suit.*" Id. at 414 (emphasis added, quoting Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)).

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

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

Watson v. Goldsmith, 205 S.C. 215, 31 S.E.2d 317, 319 (1944).

"The primary purposes of the doctrine . . . are to bring an end to litigation and prevent a defendant from being forced to defend the same action repeatedly." Garris v. Governing Bd. of S.C. Reinsurance Facility, 333 S.C. 432, 449, 511 S.E.2d 48 (1998); accord Nelson v. QHG of S.C., Inc., 362 S.C. 421, 427, 608 S.E.2d 855 (2005).

> Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, a

> litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.

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

A litigant's claim is barred even when he "is 'prepared in the second action (1) [t]o present evidence or *grounds or theories of the case* not presented in the first action or (2) [t]o seek remedies or forms of relief not demanded in the first action.'" S.C. Pub. Interest Foundation v. Greenville County, 401 S.C. 377, 386, 737 S.E.2d 502, 507 (Ct. App. 2013) (emphasis in original, quoting Restatement (Second) of Judgments § 25 (1982 & Supp. 2012)).

Res judicata applies to all rights and remedies "with respect to *all or part of the transaction, or series of connected transactions, out of which the action arose.*" Id. at 388 (emphasis in original; quoting Restatement (Second) of Judgments § 24).

b. Compulsory and permissive counterclaims.

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

Our Supreme Court has developed a test to determine what "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" and is, thus, a compulsory counterclaim. Rule 13(a), SCRCP. In N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), a foreclosure action with counterclaims, the Supreme Court adopted the "logical relationship" test for determining whether a counterclaim is compulsory. The Court held that most of DAV's counterclaims were compulsory because "there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note[.]" Id. The Court made clear the reason for doing so: of the four tests considered by the Court for whether a counterclaim is compulsory, the Court settled on the "logical relationship test," which is "by far the most widely accepted because of its flexibility." Id.

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

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

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

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

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

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

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

Id. at 517.

The Court held that all but the sixth counterclaim on this list was compulsory. Id. at 518. The logical relationship that each of those counterclaims had to the plaintiff's foreclosure claim was that each counterclaim arose out of the parties' relationship that was the subject of the foreclosure claim, dealt with the manner in which the loan was administered, or both. Id.

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

Only one reported case since BADD has discussed that decision in the context of whether a counterclaim is compulsory. In S.C. Community Bank v. Salon Proz, LLC, 420 S.C. 89, 97, 800 S.E.2d 488, 492 (Ct. App. 2017), this court determined a

claim for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, was compulsory, relying on BADD as authority.

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

Salon Proz, 420 S.C. at 97.

DAV Corp., BADD, and Salon Proz may be boiled down to this: there are at least two recognized ways a counterclaim may be compulsory. If a counterclaim arises out of the same set of facts as the plaintiff's claim, it is compulsory. BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97. If success on a counterclaim could affect the enforceability of the plaintiff's claim, it is compulsory. BADD, 414 S.C. at 295, 296; DAV Corp., 298 S.C. at 518-19; Salon Proz, 420 S.C. at 97.

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

> Failure to assert a compulsory counterclaim precludes a later assertion of that claim in a subsequent or independent action, but failure to assert a permissive counterclaim does not preclude its assertion in a subsequent action. . . . The Restatement [Second, Judgments § 22(2)(a)] similarly provides that a party may be precluded from subsequently maintaining an

> action on a counterclaim that was not interposed in a previous suit where the counterclaim must be interposed by a compulsory counterclaim statute or rule of court.

47 Am.Jur.2d Judgments § 504 (2006).

South Carolina law is consistent with these principles. In Jaynes v. County of Fairfield, 303 S.C. 434, 438 & n. 1, 401 S.E.2d 183, 185 & n. 1 (Ct. App. 1991), this court held res judicata barred a claim that arose from the same transaction or occurrence and could have been asserted as a counterclaim in a previous case. In Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188, 190-91, 417 S.E.2d 569, 571 (1992), the Supreme Court held the same, observing that "[t]he claims are now barred as arising out of the same transaction as the prior suit." In Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997), the Supreme Court stated that, "if a counterclaim is compulsory, but not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action."

This is because of the plain language of Rule 13(a), SCRCP. "Rules of procedure, like statutes, should be given their plain meaning." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 61, 566 S.E.2d 863 (Ct. App. 2002). The language of Rule 13(a) mandates that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim[.]" This court has observed that Rule 13(a)'s purpose is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." Beach Co., 351 S.C. at 62. In Beach Company, this court stated:

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

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

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

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

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

The master ruled that Deutsche Bank's foreclosure claim was a compulsory counterclaim in the Bailey v. Novastar case. The master was right. At the time it served its answer in that case, Deutsche Bank had the same foreclosure claim, based on the same default (maturity of the note), against the same two people, Bailey and Owens, who were suing it about the execution of the same note and mortgage and who were seeking relief that could have rendered the note and mortgage unenforceable. (R. pp. 377-407.) As the foreclosure claim was an unraised, compulsory counterclaim in the Bailey v. Novastar action, it is now barred by res judicata. Crestwood Golf Club, 328 S.C. at 217; Sub-Zero Freezer, 308 S.C. at 190-91; Beach Co., 351 S.C. at 62; Jaynes, 303 S.C. at 438 & n. 1.

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

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

In pertinent part, the attorney preference statute provides:

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

S.C. Code Ann. § 37-10-102.

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

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

dollars. No debtor may bring a class action for a violation of this chapter. No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, except as set forth in subsection (C). The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any pending actions. This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action.

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

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

(1) *refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made*;

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

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

(4) award:

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

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

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

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

Instructive in this regard is this court's summary of what must be shown in mortgage foreclosure actions:

> Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the

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

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

One of the remedies provided under S.C. Code Ann. § 37-10-105(C) is for a court to "refuse to enforce the agreement[.]" One of the outcomes within the scope of what Bailey and Owens pled in Bailey v. Novastar could have established a complete defense to a counterclaim for foreclosure: refusal to enforce the note and mortgage. See id. That Bailey and Owens could have received a judgment in the earlier case that would have constituted a complete defense to Deutsche Bank's foreclosure claim indicates that these claims have a compulsory relationship to one another, as does the fact that, had Deutsche Bank pled foreclosure as a counterclaim and succeeded, its success on that claim would have affected Bailey and Owens' claim under S.C. Code Ann. § 37-10-105(C), as it would have meant that they could not achieve relief under S.C. Code Ann. § 37-10-105(C)(1).

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

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

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

Deutsche Bank's position is inconsistent with DAV Corp., BADD, and Salon Proz. The Supreme Court in DAV Corp. found claims to be compulsory that had less to do with the execution of and enforceability of the subject note and mortgage than

Bailey and Owens' claims in the Bailey v. Novastar action did. 298 S.C. at 517-19. The Court in BADD used an analysis that reckons a counterclaim to be compulsory as "aris[ing] out of the underlying transaction or occurrence" where it either "affect[s] the execution *or* enforceability of the guaranty agreements." 414 S.C. at 296 (emphasis added). The decision in Salon Proz held a counterclaim was compulsory where "it *could* affect the loan's enforceability." 420 S.C. at 97 (emphasis added). None of these decisions, nor any reported decision of any South Carolina appellate court, has held that, to be compulsory, a counterclaim must necessarily and always bar the plaintiff's claim if successful. Neither is there any South Carolina decision that holds that there must be mirroring elements among the claims for a counterclaim to be compulsory.

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

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

defendants' claims had any mirroring elements; rather, the Court's analysis was as follows:

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

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

The purpose of the compulsory counterclaim rule is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." Beach Co., 351 S.C. at 62. If the scope of what is a compulsory counterclaim were instead limited to a counterclaim that mirrors one or more of the elements of the plaintiff's claim or limited to a claim that would of necessity preclude success on the opposing claim, Jaynes and Hucks could not have been decided in the way that they were. Hucks, 305 S.C. at 298; Jaynes, 303 S.C. at 435-36, 438 & n. 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Deutsche Bank is correct that there is a public policy that favors negotiated settlement of mortgage default disputes. This is shown in South Carolina by the Supreme Court's mortgage foreclosure action administrative order, In re: Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011) (South Carolina Supreme Court Administrative Order 2011-05-02-01) (hereinafter "the Administrative Order"), which provides for a procedural mechanism within mortgage foreclosure actions designed to foster their resolution through various foreclosure intervention methods. It is also indicated by the adoption of federal regulations such as 12 CFR §§ 1024.39 and 1024.41, which took effect after the operative events in this case but, among other

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

As the master found, though, "the public interest in foreclosure intervention and the public interest in finality of litigation served by res judicata are not necessarily in conflict." (R. p. 23.) The master observed that "[b]y complying with the Administrative Order at the same time as it asserted foreclosure as a counterclaim in the Bailey v. Novastar case, Deutsche Bank could have both served the interest of trying to avoid the property's foreclosure sale and held on to its foreclosure claim." (R. pp. 23-24.)

The Administrative Order does not require delay in *asserting* a foreclosure claim; rather, it requires the service on a mortgagor defendant of a notice of right to foreclosure intervention at the same time as the pleading asserting the foreclosure cause of action is served. In re: Mortgage Foreclosures, 396 S.C. at 212. The Administrative Order then provides that no "foreclosure hearing[,]" i.e., final hearing on the foreclosure cause of action, may be held until the mortgagee's attorney certifies to the court either that the mortgagor did not avail himself of foreclosure intervention or that the foreclosure intervention process did not result in resolution of the claim. Id. at 212-13. The process under the Administrative Order *uses* the pending foreclosure claim as a vehicle to facilitate negotiated resolution of mortgage loan defaults through foreclosure intervention. Id. It does not require a mortgagee to exhaust foreclosure intervention efforts *before* commencing its mortgage foreclosure claim. Id.

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

As the master found, there is no imperative to depart from established doctrine and create a new res judicata exception, never before recognized in South Carolina, where existing law under the Administrative Order provides a vehicle that would serve the aim of avoiding the loss of property to foreclosure without compromising the law of compulsory counterclaims. (R. pp. 25-26.) Since Deutsche Bank could have asserted its foreclosure claim in Bailey v. Novastar *and* served the public policy of foreclosure intervention, Deutsche Bank's proffered "policy considerations do not override the interest in bringing an end to litigation" and preventing multiplicity of actions, an end that is served by res judicata and Rule 13(a). Nelson, 362 S.C. at 427.

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

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

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

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

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

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

[3] As shown by the Federal Register at 78 FR 10696, 10708, 10842, 10855 (Feb. 14, 2013), and as Deutsche Bank agrees, the rules under these federal regulations that Deutsche Bank references did not go into effect until January 10, 2014 – nearly four months after September 26, 2013, which is when Deutsche Bank served its answer in the Bailey v. Novastar case.

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

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

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

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

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

Res judicata arises from the doctrine of bar and merger, which has been subsumed within the modern concept. 7 S.C. Jur. Estoppel and Waiver § 29. Historically, when applicable, the doctrine of bar and merger "per se destroyed the right of action and barred its prosecution absolutely[.]" Id. at n. 1. Bar and merger discharged a legal right absolutely, through "a discharge by judgment, . . . involving the doctrines of merger and res judicata." James D. McGuire, "The Election of Remedies," 9 Rocky Mtn. Law Rev. 271, 272 (1936-37).

Accordingly, the master looked to historic definitions to discern the effect of res judicata on the mortgage involved in this case. A law dictionary from 1912 gives one of the definitions of *bar* – and the only one applicable in this context – as "[a] perpetual destruction of the action of the plaintiff." Walter A. Shumaker & George Foster Longsdorf, The Cyclopedic Law Dictionary 87 (Chicago 1912). The same dictionary gives one of the definitions of *discharge*, under the subheading "Of Debt or Obligation[,]" as "[f]ull and final release from and termination of the obligation in whatever manner[.]" Id. at 284. It gives a definition of *extinguishment* as "[t]he destruction of a right or contract" and states that "[a]n extinguishment may be by matter of fact and by matter of law[,]" noting "[t]here are numerous cases where the claim is extinguished by operation of law." Id. at 350. In this context, as the master found, the words *bar*, *extinguish*, and *discharge* have significant overlap in definition and express a common historical concept. (R. p. 26.)

As a bar, res judicata discharges and extinguishes rights – which can include the mortgage rights of a mortgagee and the note rights of a note-owner. See Columbia Natl. Bank, 151 S.E. at 275; 59A C.J.S. Mortgages § 1051.

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

59 C.J.S. Mortgages § 564 (2009).

The master correctly observed that what rights extinguished by res judicata always depends upon case-specific factors. (R. p. 27.) Here, the note subject of the mortgage had matured and the balloon payment was unpaid at the time of Deutsche Bank's answer in the earlier action. Nonpayment at maturity is the ultimate and final default under a note and mortgage. Where a claim arising from that default is barred, that discharges Deutsche Bank's rights in the note and mortgage, as it neither has nor can have any other grounds on which to enforce the mortgage. The master was not out in left field here; authorities agree. "The rule that anything which operates to extinguish the debt necessarily operates to discharge the mortgage is generally regarded as prevailing." 55 Am.Jur.2d Mortgages § 360 (2009). "A mortgage is different from other instruments in that, in order for it to be a valid instrument, there must be a debt or obligation of the mortgagor for which it is given as security. If there is no debt, then there is no valid mortgage." Blackwell v. Blackwell, 289 S.C. 470, 472, 346 S.E.2d 731, 732 (Ct. App. 1986) (internal citation omitted); accord Borg Warner Acceptance Corp. v. Darby, 296 S.C. 275, 278, 372 S.E.2d. 99, 101 (Ct. App. 1988) ("a security interest cannot exist without an obligation"). Deutsche Bank's rights in the note debt

owed or due as a result of the maturity of the note have been discharged. That is all of the debt. The note is gone, and the mortgage is gone with it.

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

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

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

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

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

Indeed, the language of S.C. Code Ann. §§ 29-3-310 and -320 reveals that satisfaction by means other than payment was expressly contemplated by the General Assembly when drafting these statutes:

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

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

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

> satisfaction not to exceed twenty-five dollars to cover the cost of processing and recording the satisfaction or cancellation. If the mortgagor or his legal representative instructs the holder of record of the mortgage that the mortgagor will be responsible for filing the satisfaction, the holder of the mortgage shall mail or deliver the satisfied mortgage to the mortgagor or his legal representative with no satisfaction fee charged.

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

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

As discussed above, *bar*, *discharge*, and *extinguish* express facets of a common concept. An examination of the root of the word *satisfy* reveals that it expresses the same concept. Our modern English word *satisfy* comes from the Middle English *satisfien*, which in turn derives from the Vulgar Latin *satisficare*, from the Latin *satisfacere*, meaning "to do enough." http://www.dictionary.com/browse/satisfy?s=t.

As discussed above, viewed in its historical context, none of which appears to be contradicted by modern law, the effect of the bar of res judicata is to discharge, to extinguish the thing that might be sued upon. The barring effect of the judgment *does enough* to end the barred right or rights, thus satisfying them.

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

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

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

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

The reading of the statute that includes discharge by operation of law within the meaning of *satisfaction* is also consistent with "the legislative intent in enacting these statutes[, which] was to provide an incentive for the mortgagee, once it no longer has a monetary interest in the mortgage loan, to promptly record the *extinguishment* of the lien." Kinard v. Fleet Real Estate Funding Corp., 319 S.C. 408, 412, 461 S.E.2d 833, 835 (Ct. App. 1995) (emphasis added). "Once the mortgage has been satisfied and the mortgagor expresses this desire, it is incumbent upon the mortgagee 'to promptly record the *extinguishment* of the lien.'" Bostic v. Am. Home Mortgage Servicing, Inc.,

375 S.C. 143, 650 S.E.2d 479, 485 (Ct. App. 2007) (quoting Kinard, 319 S.C. at 412) (emphasis added).

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

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

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

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

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

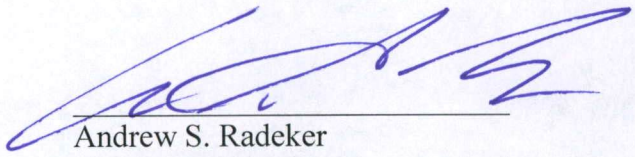
VII. Deutsche Bank cannot obtain reversal of the denial of its summary judgment motion.

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

CONCLUSION

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

Respectfully submitted,



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November 26, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

RECEIVED
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SC Court of Appeals

Appellate Case No. 2018-000436

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

v.

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

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

CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

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

Respectfully submitted,

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