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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Supreme Court Appellate Case No. 2021-001292
Court of Appeals Appellate Case No. 2018-000436
Circuit Court Case No. 2016-CP-32-03572

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

Respondent,

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

Petitioners.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly concluded that foreclosure was not a compulsory counterclaim in a prior action where the prior action focused primarily on the loan closing, and where foreclosure would not have affected Bailey and Owens' ability, in the prior action, to pursue, enforce, and obtain damages from claims they asserted relating to the loan closing.

2. Whether the Court of Appeals correctly declined to address issues relating to S.C. Code Ann. § 29-3-310 and any alleged requirement to record a mortgage satisfaction where the Court of Appeals correctly reversed the summary judgment order below, which was dispositive of the issues relating to this statute.

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, 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 Owens' counterclaims, all flow from 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' 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.

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

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[2] For reference, Bailey and Owens refer to the 2013 Action as "Bailey v. Novastar."

complaint made no 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).[3]

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[3] 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.

Approximately three years after the jury verdict in the 2013 Action, on or around August 23, 2016, Bailey sent Deutsche Bank a 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 that 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 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).

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. 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).[4]

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

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[4] 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).

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 the Court of Appeals, indicating they were 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 cross-appeal with the Court of Appeals, indicating that it was 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 was not automatically stayed by the parties' 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 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.

F. The Court of Appeals Order.

After hearing oral argument, the Court of Appeals reversed the trial court's grant of summary judgment to Bailey and Owens on Deutsche Bank's foreclosure claim and on Bailey and

Owens' related declaratory judgment counterclaim. *See Deutsche Bank Trust Co. v. Houck* (hereinafter "*Ct. App. Op.*"), -- S.C. --, 863 S.E.2d 829 (2021). The Court of Appeals first concluded that foreclosure was not a compulsory counterclaim in the 2013 Action because foreclosure was not a defense to Bailey and Owens' claims in the 2013 Action and would not have affected their allegations relating to the Attorney Preference Statute. Upon finding that foreclosure was not a compulsory counterclaim in the 2013 Action, the Court of Appeals necessarily concluded that res judicata did not bar Deutsche Bank from bringing the underlying foreclosure action. Having reached that determination, the Court of Appeals declined to address the parties' competing arguments with respect to S.C. Code Ann. § 29-3-310 and any alleged requirement to record a satisfaction of the Mortgage.

Bailey and Owens subsequently filed a petition for rehearing or rehearing en banc, which the Court of Appeals denied. This petition for writ of certiorari followed.

STANDARD FOR WRIT OF CERTIORARI

"A writ of certiorari is not a matter of right." SCACR 242(b). Rather, it is subject to the Court's "judicial discretion" and limited to "special and important reasons." *Id.* A purported reason does not rise to the level of "special and important" and warrant the Court's exercise of discretion where it fails to match the "character of reasons" enumerated in SCACR 242(b), including: "novel questions or law"; the existence of a "dissent in the decision of the Court of Appeals"; a "conflict with a prior decision of the Supreme Court" and that of the Court of Appeals; the direct involvement of "substantial constitutional issues"; and a "conflict[ ] with a decision of the United States Supreme Court" and the inclusion of a federal question. SCACR 242(b)(1–5).

ARGUMENT

I. The Court of Appeals correctly concluded that res judicata did not bar Deutsche Bank's underlying foreclosure action.

Despite the complex procedural history of this case, the Court of Appeals' decision represents a routine application of SCRCP 13(a) and the distinction between permissive and compulsory counterclaims. Upon concluding that foreclosure was a permissive (but not compulsory) counterclaim in the 2013 Action, the Court of Appeals necessarily found that res judicata did not bar Deutsche Bank from bringing the underlying foreclosure action.

The Court of Appeals' decision relies upon, and is consistent with, South Carolina case law on which both parties rely. There are, therefore, no special or important circumstances warranting the exercise of this Court's discretion in this case. Bailey and Owens' contentions that the Court of Appeals' Order creates some type of foreclosure exception to Rule 13(a) – arguments they made in the Court of Appeals as well – are as exaggerated as they are erroneous.

A. The framework applied by the Court of Appeals for determining whether a counterclaim is permissive or compulsory is fully consistent with controlling precedent.

A counterclaim is compulsory under SCRCP 13(a) "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claims." SCRCP 13(a). South Carolina applies the logical relationship test in determining whether a counterclaim is compulsory. *See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). This Court has held that the logical relationship determination is made by asking whether the counterclaim would affect a plaintiff's right to enforce it's claims. *See Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 330 n.7, 755 S.E.2d 437, 442 n.7 (2014) ("[T]he 'logical relationship' determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage.").

Consistent with *Blackburn*, the three South Carolina cases on which both parties rely make the permissive-versus-compulsory determination by inquiring whether a *counterclaim* would affect the enforceability of *leading claims*. *See, e.g.*, *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 296, 778 S.E.2d 106, 109 (2015) (concluding in context of leading foreclosure claim: "the allegations [of a counterclaim], if true, would not render the guarantees unenforceable"); *DAV Corp.*, 298 S.C. at 519, 381 S.E.2d at 905 (deeming as permissive a counterclaim that "do[es] not affect the enforceability of the note," in context of leading claim for foreclosure); *S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 97, 800 S.E.2d 488, 492 (Ct. App. 2017) (explaining in context of leading claim for foreclosure: "Were this allegation [in a counterclaim] true, it could affect the loan's enforceability.").

Applying these cases, the Court of Appeals correctly evaluated the permissive-versus-compulsory nature of a prospective counterclaim in the 2013 Action by determining whether it would affect the leading claims asserted by the plaintiffs in the 2013 Action. Specifically, the Court of Appeals correctly framed the issue as follows: "[T]he question is whether a counterclaim for foreclosure in the 2013 Action would have affected Mortgagors' claims under the Attorney Preference Statute and the SCUTPA." *Ct. App. Op.*, 863 S.E.2d at 833. This framework is fully consistent with this Court's prior decisions in *Blackburn*, *DAV Corp.*, and *BADD* (and is fully consistent with the Court of Appeals' reasoning in *Salon Proz*).

Bailey and Owens seem to agree with this framework. (Petition at 12 ("If success on a counterclaim could affect the enforceability of the plaintiff's claim, it is compulsory.")). But Petitioners then seek to broadly extend the scope of compulsory counterclaims to situations where there are merely overlapping facts between a counterclaim and the leading claims. (*Id.* at 12 (arguing that a counterclaim is also compulsory where it "arises out of the same set of facts as the

plaintiff's claim")).[5] This overly broad contention completely ignores the above South Carolina case law in which the logical relationship determination is made by asking whether a successful counterclaim would affect the enforceability of a plaintiff's right to enforce his or her claim. Rather than focus on any common usage and meaning of the phrase "logical relationship," the Court of Appeals correctly looked to the construction given to the phrase by this Court. And in doing so, the Court of Appeals correctly declined to expand the scope of compulsory counterclaims in a manner that is inconsistent with controlling precedent. Indeed, the framework advocated for by the Petitioners – requiring only some overlap in facts – would render almost every counterclaim compulsory.

B. The Court of Appeals correctly concluded that foreclosure was not a compulsory counterclaim in the 2013 Action.

Applying the appropriate framework, the Court of Appeals correctly concluded that a counterclaim for foreclosure in the 2013 Action would not have affected Bailey and Owens' claims in the 2013 Action. Specifically, the Court of Appeals concluded that foreclosure was not a defense to Bailey and Owens' claims under the Attorney Preference Statute and the SCUTPA, and that it would not have affected Petitioners' allegations pertaining to violation of the Attorney Preference Statute. *See Ct. App. Op.*, 863 S.E.2d at 833.

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[5] Petitioners purport to derive this expansive view of compulsory counterclaims from *BADD*, suggesting that *BADD* "held that a counterclaim is compulsory in such a debt collection action if it arises out of the execution of the documents that form the basis of the plaintiff's claim." (Petition at 10). But that is not what this Court held in *BADD*. In that case, a bank brought a foreclosure action against a mortgagor and a guarantor, and the guarantor asserted counterclaims for civil conspiracy and breach of contract, both based on an alleged conspiracy with a third party. *See* 414 S.C. at 291–92, 778 S.E.2d at 107. This Court found the civil conspiracy counterclaim to be permissive because "the allegations, if true, would not render the guarantees unenforceable." *Id.* at 296, 778 S.E.2d at 109. Similarly, this Court found the breach of contract counterclaim to be permissive because "it does not affect the execution or enforceability of the guaranty agreements." *Id.* at 296, 778 S.E.2d at 110.

The Court of Appeals also correctly declined to agree with Bailey and Owens' argument about the very attenuated connection between their prayer for relief in the 2013 Action, and a prospective foreclosure counterclaim. As the argument goes, Bailey and Owens contend that their request for "all relief available" under the Attorney Preference Statute (*see* R. p. 384, ¶ 37; p. 387, ¶ e) incorporated the possibility that a court might refuse to enforce the loan as a statutory remedy, thereby causing a foreclosure counterclaim to allegedly affect the enforceability of their claim. However, non-enforcement of the loan is only one of seven remedies that a trial court can, in its discretion, impose and only upon finding unconscionable conduct. This alleged connection – between a counterclaim and the enforceability of the leading claim – is, therefore, far more attenuated than that found in controlling precedent.

The customary measure of damages for violation of the Attorney Preference Statute is monetary: actual damages plus "an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars." S.C. Code Ann. § 37-10-105(A). If a court determines the loan transaction was "induced by unconscionable conduct," it ***may*** award one of seven different categories of damages.[6] And only one of these seven categories of damages involves refusal to enforce the loan agreement. *See* S.C. Code Ann. § 37-10-105(C)(1). In other words, ***if*** a trial court determined that a party's violation of the Attorney Preference Statute meant that the underlying transaction was induced by unconscionable

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

conduct, and ***if*** the trial court decided to exercise its discretion to impose damages, and ***if*** the trial court elected one of seven different types of remedies to impose (to the exclusion of all others), then a foreclosure action brought by Deutsche Bank as a counterclaim would affect the *remedy*.

However, the foreclosure claim – even assuming a trial court made each of every one of the above decisions – would not affect a trial court's ability to find Deutsche Bank liable for violation of the Attorney Preference, it would not prevent the trial court from finding the loan transaction to be induced by unconscionable conduct, and it would not prevent the trial court from awarding damages and imposing other remedies. In other words, even in the perfect set of circumstances from Bailey and Owens' standpoint, they could still pursue, enforce, and be awarded damages for violation of the Attorney Preference Statute, despite a successful foreclosure counterclaim.

This alleged "connection" Bailey and Owens have attempted to craft is substantively dissimilar from that found in *DAV Corp.* (and in the Court of Appeals' *Salon Proz* decision) where counterclaims premised on oral promises to modify loan terms would *necessarily* undermine and negate leading claims for foreclosure. *See DAV Corp.*, 298 S.C. at 518, 381 S.E.2d at 905 ("Clearly, there is a logical relationship between the enforceability of the note which is the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture."); *Salon Proz*, 420 S.C. at 97, 800 S.E.2d at 492 (noting counterclaim alleging that lender "reneg[ed] upon promises to modify or otherwise restructure loans" (internal quotation marks omitted)). Here, by contrast, a foreclosure counterclaim would, by no means, negate or undermine Bailey and Owens' claim under the Attorney Preference Statute. At most, it would affect one possible remedy option, subject to a trial court's discretion in any event, and contingent on a finding of unconscionability. No controlling

precedent holds that a general and generic reference in a complaint to "all relief available" under a statute, which contains one damage remedy that might be affected by foreclosure, is sufficient to satisfy SCRCP 13(a)'s logical relationship test.[7]

C. The Court of Appeals' decision does not create a foreclosure exception to Rule 13(a).

Finally, Petitioners contend that the Court of Appeals' decision creates an alleged foreclosure exception to the permissive-versus-compulsory distinction under Rule 13. (*See* Petition at 14–15). However, Petitioners' use of exaggerated language does not make it so, and their arguments are a product of their misinformed understanding of controlling jurisprudence.

Specifically, Petitioners take issue with the following statement from the Court of Appeals' opinion:

> We acknowledge *DAV Corp.*; *BADD, L.L.C.*; and *Salon Proz, LLC* all held that a claim is compulsory in a foreclosure action when, if the allegation were true, it could affect the enforceability of the loan. However, this case differs from the foregoing cases because here the prior action was not a foreclosure action.

Ct. App. Op., 863 S.E.2d at 833 (internal footnote omitted). But, everything about the foregoing statement is accurate. It is true that the leading claim in *DAV Corp.*, *BADD, L.L.C.*, and *Salon Proz was* a foreclosure claim. It is also true that the leading claim in the 2013 Action *was not* a foreclosure claim. Rather, Bailey and Owens brought claims against Deutsche Bank for violation of the Attorney Preference Statute and the SCUTPA. Given that "the prior action was not a foreclosure action," the Court of Appeals correctly considered "whether a counterclaim for foreclosure in the 2013 Action would have affected Mortgagors' claims under the Attorney Preference Statute and the SCUTPA." *Ct. App. Op.*, 863 S.E.2d at 833. This is not a "double

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[7] Petitioners complain that the Court of Appeals was "unduly focused" on their prayer for relief in the 2013 Action (Petition at 12), but the Court of Appeals was forced to address this issue because it was – and continues to be – one of Petitioners leading arguments on appeal.

standard." (Petition at 7). Rather, it is a straightforward application of the cases on which both parties rely.

Bailey and Owens' contention that the Court of Appeals should have instead considered whether their leading claims in the 2013 Action would have affected a prospective foreclosure action (*see* Petition at 14), is inconsistent with controlling precedent. By contending that "[t]he compulsory counterclaim principle runs . . . with equal force in both directions" (Petition at 14), Bailey and Owens are taking the position that the posture of a particular claim – be it a leading claim or a counterclaim – is irrelevant to the determination of whether a counterclaim is permissive or compulsory. But that contention is inconsistent with controlling precedent discussed in *supra* Section I(A), which concerns itself with whether a counterclaim would affect a leading claim, and not the other way around. Bailey and Owens' erroneous argument appears to be predicated on their overly expansive view of the logical relationship test, which would have the effect of making almost every counterclaim a compulsory counterclaim based on mere overlapping facts. Indeed, if the Court of Appeals had done what Bailey and Owens insist it should have done – consider whether a *leading claim* would have affected the enforceability of a *prospective counterclaim* – it would have been without the support of controlling precedent and in error.

II. The Court of Appeals correctly declined to address the parties' competing arguments regarding S.C. Code Ann. § 29-3-310 and satisfaction of the Mortgage.

Having properly concluded that foreclosure was not a compulsory counterclaim in the 2013 Action, and having reversed summary judgment in favor of Bailey and Owens because res judicata did not bar Deutsche Bank's underlying foreclosure claim, the Court of Appeals correctly declined to address the parties' competing arguments regarding S.C. Code Ann. § 29-3-310 and satisfaction of the Mortgage. This decision was consistent with controlling precedent. *See Futch v. McAllister*

Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting that "appellate court need not address remaining issues when disposition of prior issue is dispositive").

CONCLUSION

For the foregoing reasons, Deutsche Bank respectfully requests that this Court deny the Petition for Writ of Certiorari.

This 3rd day of December 2021.

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