PALMER, J., dissenting. I agree with the majority's conclusion that the misrepresentation claims and claims under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., of the plaintiff, Lighthouse Landings, Inc. (Lighthouse), are not barred by the doctrine of collateral estoppel because, contrary to the contention of the defendant, Connecticut Light and Power Company (power company), the factual issues underlying those claims were not decided by the trial court or this court in *Connecticut Light & Power Co.* v. *Lighthouse Landings, Inc.*, 279 Conn. 90, 900 A.2d 1242 (2006). I disagree, however, with the majority's conclusion that Lighthouse's claims are barred by the doctrine of res judicata.[1] Specifically, the majority concludes that Lighthouse is barred from litigating its claims in the present damages action because it "filed a counterclaim in the declaratory judgment action, in which it effectively became a plaintiff with respect to the claims brought therein," and because, under § 21 (1) of the Restatement (Second) of Judgments, " '[w]here the defendant interposes a counterclaim on which judgment is rendered in his favor, the rules of merger[2] are applicable to the claim stated in the counterclaim . . . .' " The majority's conclusion violates two bedrock principles of res judicata. First, a declaratory judgment action in which the parties seek solely to obtain declaratory relief does not bar a subsequent action for injunctive relief or damages arising out of the same transaction, even when the second action is predicated on the same claims and evidence adduced in the declaratory judgment action. 1 Restatement (Second), Judgments § 33 (1982). Second, when, as in the present case, the parties agree to a stay of one action pending the outcome of a second action, the judgment rendered in the second action has no preclusive effect on the action that has been stayed. Id., § 26. Indeed, it undoubtedly is because of these well settled principles that the power company never raised the doctrine of res judicata as a defense in this action.[3] Accordingly, I respectfully dissent.

I

It is well established that "[t]he courts of this state follow the Restatement (Second) [of] Judgments, in applying the doctrine of res judicata. See *Orselet* v. *DeMatteo*, 206 Conn. 542, 544–46, 539 A.2d 95 (1988); *Duhaime* v. *American Reserve Life Ins. Co.*, 200 Conn. 360, 363–65, 511 A.2d 333 (1986)." *A.J. Masi Electric Co.* v. *Marron & Sipe Building & Contracting Corp.*, 21 Conn. App. 565, 567–68, 574 A.2d 1323 (1990). "The doctrine of res judicata is one of rest and is enforced on the ground of public policy. *Brady* v. *Anderson*,

110 Conn. 432, 435, 148 A. 365 [1930]. To prevent a multiplicity of actions, equity will enjoin further litigation of a cause of action which has already been adjudicated. A final judgment on the merits is conclusive on the parties in an action and their privies as to the cause of action involved. If the same cause of action is again sued on, the judgment is conclusive with respect to any claims relating to the cause of action which were actually made or might have been made." *Corey* v. *Avco-Lycoming Division*, 163 Conn. 309, 316–17, 307 A.2d 155 (1972), cert. denied, 409 U.S. 1116, 93 S. Ct. 903, 34 L. Ed. 2d 699 (1973). There are exceptions to the doctrine of res judicata, however, that, like the doctrine itself, are grounded in public policy considerations. One such exception is the declaratory judgment exception, which is set forth at § 33 of the Restatement (Second) of Judgments. Section 33 provides: "A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared, and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action." 1 Restatement (Second), supra, § 33. Courts applying this section of the Restatement (Second) uniformly have interpreted it as limiting the preclusive effect of a declaratory judgment action solely to collateral estoppel—that is, to *issues* that were actually litigated and decided in the declaratory action and not to claims arising out of the same transaction, in particular, claims for injunctive relief and damages. See, e.g., *Duane Reade, Inc.* v. *St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 196 (2d Cir. 2010) ("[The declaratory judgment] exception [to res judicata] . . . limits the preclusive effect of the declaratory judgment to the subject matter of the declaratory relief sought . . . and permits the plaintiff or defendant to continue to pursue further declaratory or [injunctive] relief. . . . In other words, the preclusive effect of a declaratory judgment action applies only to the matters declared and to any issues actually litigated . . . and determined in the action." [Citations omitted; internal quotation marks omitted.]); *Harborside Refrigerated Services, Inc.* v. *Vogel*, 959 F.2d 368, 372 (2d Cir. 1992) (when plaintiff in prior action sought only declaratory relief, preclusive effect of declaratory judgment was limited to subject matter of declaratory relief sought such that "[t]he plaintiff or defendant may continue to pursue further declaratory or [injunctive] relief"); *Horn & Hardart Co.* v. *National Rail Passenger Corp.*, 843 F.2d 546, 549 (D.C. Cir.) ("[when] a party asks only for declaratory relief, courts have limited the preclusive effect to the matters declared, hence permitting a later action seeking [injunctive] relief based on the same cause of action"), cert. denied, 488 U.S. 849, 109 S. Ct. 129, 102 L. Ed. 2d 102 (1988); *Cimasi* v. *Fenton*, 838 F.2d 298, 299 (8th Cir. 1988) (res judicata attaches only to precise issue presented and decided in the prior declaratory

judgment action); *Mandarino* v. *Pollard*, 718 F.2d 845, 847 (7th Cir. 1983) ("[§ 33 of the Restatement (Second) of Judgments] provides that a declaratory judgment bars relitigation of issues actually decided but does not preclude a later action seeking [injunctive] relief based on the same cause of action").

The public policy considerations underlying the declaratory judgment exception to the general principle of res judicata were explained by the United States Court of Appeals for the Second Circuit in *Harborside Refrigerated Services*, *Inc.* v. *Vogel*, supra, 959 F.2d 368: "A common purpose behind both declaratory judgment availability and the doctrine of res judicata is litigation reduction and the conservation of judicial resources. Declaratory relief enables . . . courts to clarify the legal relationships of parties before they have been disturbed thereby tending [toward] avoidance of full-blown litigation. See *Travelers Insurance Co.* v. *Davis*, 490 F.2d 536, 543 (3d Cir. 1974). Similarly, res judicata operates to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. *Allen* v. *McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980); *Commissioner* v. *Sunnen*, 333 U.S. 591, 597, 68 S. Ct. 715, 92 L. Ed. 898 (1948). A requirement that parties to an action for declaratory relief bring all possible claims and counterclaims at that juncture or else be barred by res judicata, would undermine efficient adjudication and optimal use of judicial resources. Actions for declaratory relief would rapidly develop into full-scale legal contests, and the option of a preliminary suit limited to a declaration of the rights of the parties would evaporate. To permit res judicata to be applied in such a case beyond the precise issue before the court would subvert the very interests in judicial economy that the doctrine was designed to serve." (Internal quotation marks omitted.) *Harborside Refrigerated Services*, *Inc.* v. *Vogel*, supra, 373.

Thus, as one of the comments to § 33 of the Restatement (Second) of Judgments explains, "[a] plaintiff who wins a declaratory judgment may go on to seek further relief, even in an action on the same claim which prompted the action for a declaratory judgment. This further relief may include damages which had accrued at the time the declaratory relief was sought; it is irrelevant that the further relief could have been requested initially. . . . Nonmerger is justified by arguments based on the purpose of declaratory relief. A declaratory action is intended to provide a remedy that is simpler and less harsh than coercive relief, if it appears that a declaration might terminate the potential controversy. . . .

"A plaintiff who has lost a declaratory judgment action may also bring a subsequent action for other

relief, subject to the constraint of the determinations made in the declaratory action. The theory is the same: a declaratory action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced. *That approach is also applicable with respect to a counterclaim by a defendant . . . .*" (Citations omitted; emphasis added.) 1 Restatement (Second), supra, § 33, comment (c).

It is undisputed that, in the declaratory judgment action at issue, Lighthouse sought and obtained declaratory relief; it did not seek either injunctive relief or damages. Specifically, in its counterclaim, Lighthouse requested, inter alia, a judgment declaring that article six of the lease was void, and the court rendered judgment in accordance with that request. Consequently, Lighthouse's misrepresentation and CUTPA claims fall squarely within the exception to res judicata set forth in § 33 of the Restatement (Second) of Judgments.

Notwithstanding the rule limiting the preclusive effect of a declaratory judgment to issues that were actually decided in that action—as distinguished from causes of action or claims arising out of the same transaction, which are not subject to preclusion—the majority concludes that, because Lighthouse filed a counterclaim in the declaratory judgment action, it was required to bring all of its claims in that action. In support of this assertion, the majority relies on § 21 (1) of the Restatement (Second) of Judgments. That provision, however, applies only to counterclaims that are filed in an action seeking damages or injunctive relief. As I have explained, § 33 of the Restatement (Second) of Judgments governs actions in which the parties seek only *declaratory relief*. Furthermore, it is well established that a defendant in a declaratory judgment action may file a counterclaim for declaratory relief and that the same rules that apply to the plaintiff's declaratory request apply to the defendant's request, including the declaratory judgment exception to res judicata. See 1 W. Anderson, Actions for Declaratory Judgments (2d Ed. 1951) § 313, p. 724 (filing of counterclaim for declaratory relief and granting of declaratory relief on counterclaim "is . . . recognized as common practice" and is subject to same rules governing declaratory judgment actions generally). Accordingly, § 21 (1) of the Restatement (Second) of Judgments does not support the majority's conclusion that, by filing a counterclaim for declaratory relief in the declaratory judgment action, Lighthouse was required to bring all claims arising out of the same transaction.

The majority further asserts that merger should apply in this case because, in the declaratory judgment action, Lighthouse raised several special defenses to the power company's request for declaratory relief. Lighthouse raised those defenses, however, solely for the purpose

of defeating the power company's request for a judgment declaring that it properly had terminated the parties' lease. The majority cites no authority, and my research has revealed none, to support the proposition that the declaratory judgment exception to the doctrine of res judicata does not apply if a party relies on certain evidence or defenses in a declaratory judgment action and then relies on the same evidence or defenses in a subsequent action for damages or injunctive relief arising out of the same transaction. Indeed, it is precisely *because* parties are likely to rely on the same arguments and evidence in both actions that the declaratory judgment exception exists, that is, to provide an incentive for parties to pursue declaratory relief by ensuring that the preclusive effect of the declaratory judgment will be limited solely to the issues that were actually decided. As comment (c) to § 33 of the Restatement (Second) of Judgments makes clear, "the declaratory plaintiff . . . [is] permitted to make a partial presentation of his side of the controversy, in the hope of preventing a full-blown claim from arising, without thereby losing his chance to pursue or defend that claim at a later time."[4] 1 Restatement (Second), supra, § 33, comment (c). The majority's contrary conclusion is inconsistent with this rationale and also runs afoul of the oft-stated principle that, "[because] the application of [the] doctrine [of res judicata] has dramatic consequences for the party against whom it is applied, [this court] . . . 'should be careful that the effect of the doctrine does not work an injustice.' . . . Thus, '[t]he [doctrine] of [res judicata] . . . should be flexible and must give way when [its] mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies.' " (Citation omitted.) *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 602, 922 A.2d 1073 (2007). Indeed, the majority's conclusion that Lighthouse's misrepresentation and CUTPA claims are barred by res judicata ensures that, in the future, parties to declaratory judgment actions will be obliged to bring and litigate all other possible claims in those actions, thereby undermining the public policy favoring declaratory judgment actions. I therefore disagree with the majority that the claims that Lighthouse raised in the present action are not saved from the preclusive effect of res judicata.[5]

II

There is a second and, perhaps, even more fundamental reason why Lighthouse's claims are not barred by principles of res judicata. Section 26 of the Restatement (Second) of Judgments provides in relevant part: "When any of the following circumstances exists, the [doctrine of res judicata] does not apply to extinguish [a] claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

"(a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or

"(b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action . . . ." 1 Restatement (Second), supra, § 26.

The reason for this rule is self-evident. When parties agree to try claims arising out of the same transaction in separate proceedings, the public policy considerations behind the doctrine of res judicata, namely, repose and protecting defendants from vexatious or repetitive litigation,[6] no longer are implicated. In the present case, the power company, in its brief to this court, acknowledges that, "[s]hortly after Lighthouse filed its [civil] action [for damages, the power company] brought its [declaratory judgment] action seeking a declaration that it had properly exercised its right to terminate the lease, and that the lease was 'of no further force and effect.' [*Connecticut Light & Power Co.* v. *Lighthouse Landings, Inc.*], supra, 279 Conn. 96. Lighthouse filed an answer, six special defenses and a counterclaim [seeking a declaratory judgment in its favor]. . . .

"*Upon agreement of both parties*, the trial court . . . consolidated the actions, and stayed Lighthouse's [civil] action [for damages] pending resolution of [the power company's] declaratory judgment action. [Id.] The parties then tried the declaratory judgment action to the court." (Emphasis added.) Thus, this case presents a classic example of the exception for cases in which the parties agree to proceed with the declaratory judgment action while holding in abeyance, for trial or resolution at a later date, the claims raised in the damages action. Indeed, in light of the procedural history in this case, it is abundantly clear that the power company never invoked the doctrine of res judicata as a defense to Lighthouse's civil action for damages because it knew full well that such a defense would not lie in view of the parties' agreement to consolidate their respective claims *and to try the power company's claim first*. See, e.g., 1 Restatement (Second), supra, § 26, comment (a) ("A main purpose of [res judicata] is to protect the defendant from being harassed by repetitive actions based on the same claim. The rule is thus not applicable [when] the defendant consents, in express words or otherwise, to the splitting of the claim."). Indeed, to conclude otherwise would amount to a judicially sanctioned ambush of Lighthouse, in contravention of § 26 of the Restatement (Second) of Judgments. This is so because, under the circumstances of this case, it reasonably cannot be argued that Lighthouse had an opportunity to bring all of its claims in an earlier action *but failed to do so*. See, e.g., *Migra* v. *Warren City School District Board of Education*, 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984) ("[c]laim preclusion refers to the effect of a judgment in foreclosing litigation

of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier [action]"); *Dunham* v. *Dunham*, 221 Conn. 384, 391–92, 604 A.2d 347 (1992) ("[t]he doctrine of res judicata provides that a former judgment serves as an absolute bar to a subsequent action involving any claims relating to such cause of action which were actually made or which might have been made" [internal quotation marks omitted]). On the contrary, as the power company readily acknowledges, Lighthouse brought all of its claims in an earlier action, those claims subsequently were consolidated with the power company's declaratory judgment action, and the parties then agreed to try the declaratory judgment action first. As a consequence, the doctrine of res judicata has no applicability to the present case.[7] For this reason, and for the reasons set forth in part I of this opinion, I conclude that Lighthouse's misrepresentation and CUTPA claims are not barred by principles of res judicata. I therefore respectfully dissent.

[1] I note that "[t]he preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of 'res judicata.' . . . Res judicata is often analyzed further to consist of two preclusion concepts: 'issue preclusion' and 'claim preclusion.' Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. See [1 Restatement (Second), Judgments § 27 (1982)]. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier [action]. Claim preclusion therefore encompasses the law of merger and bar. See id., [§ 24, introductory note]." (Citations omitted.) *Migra* v. *Warren City School District Board of Education*, 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984). Because the majority opinion refers to claim preclusion as res judicata, all references in this dissent to res judicata are intended to refer specifically to the claim preclusion prong of that doctrine.

[2] "Connecticut's res judicata rules are derived from the theory of merger and the transactional test set out in the Restatement (Second) of Judgments. . . . Merger, or the extinguishing of the plaintiffs' original claims through the rendering of final judgment, has its roots in early case law. *Fisher, Brown & Co.* v. *Fielding*, 67 Conn. 91, 118–19, 34 A. 714 (1895) (*Hammersley, J.*, dissenting). 'When the plaintiff recovers a valid and final personal judgment, his original claim is extinguished and rights upon the judgment are substituted for it. The plaintiff's original claim is said to be "merged" in the judgment.' 1 Restatement (Second), [supra] § 18." (Citations omitted.) *Legassey* v. *Shulansky*, 28 Conn. App. 653, 656, 611 A.2d 930 (1992).

[3] As the majority explains, following oral argument in this case, this court requested that the parties file supplemental briefs on the applicability of the doctrine of res judicata even though the power company never raised res judicata as a defense to Lighthouse's civil action. The majority cites three opinions of the Appellate Court, namely, *Somers* v. *Chan*, 110 Conn. App. 511, 540 and n.20, 955 A.2d 667 (2008), *Honan* v. *Dimyan*, 63 Conn. App. 702, 706 and n.10, 778 A.2d 989, cert. denied, 258 Conn. 942, 786 A.2d 430 (2001), and *Legassey* v. *Shulansky*, 28 Conn. App. 653, 654, 611 A.2d 930 (1992), to support the proposition that courts occasionally have invoked the doctrine of res judicata, sua sponte, in order to promote the doctrine's underlying policy of judicial economy and repose. In each of those cases, however, the applicability of the doctrine was readily apparent. By contrast, as I explain hereinafter, it is quite clear that the doctrine is inapplicable to the present case on the basis of two separate exceptions to the doctrine contained in the Restatement (Second) of Judgments.

[4] Indeed, it is significant to note that, consistent with the public policy underlying declaratory judgment actions, that is, to terminate controversies without protracted litigation over equitable and monetary relief, it initially

appeared that the declaratory judgment rendered by the trial court in the present action would resolve the parties' dispute without any further litigation. In fact, the power company did not initially appeal from the court's judgment in the declaratory judgment action. See *Connecticut Light & Power Co.* v. *Lighthouse Landings, Inc.*, supra, 279 Conn. 98–100, 102–103. Only after the parties' relationship deteriorated further amidst allegations of a lockout and failure to pay rent did Lighthouse resurrect its damages action and the power company seek permission to file a late appeal from the judgment in the declaratory judgment action.

[5] The majority also asserts that "Lighthouse could have obtained the ruling that it now seeks by requesting an articulation from the trial court in the declaratory judgment action as to its other special defenses and by presenting those defenses to this court in [*Connecticut Light & Power Co.* v. *Lighthouse Landings, Inc.*, supra, 279 Conn. 90] as alternative grounds for affirmance." Under well established principles, however, Lighthouse, as the prevailing party, was under no obligation to seek an articulation. See, e.g., *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 738–39 n.25, 937 A.2d 656 (2007) ("in the absence of an articulation—which the appellant is responsible for obtaining—we presume that the trial court acted properly"); *Chase Manhattan Bank/City Trust* v. *AECO Elevator Co.*, 48 Conn. App. 605, 607, 710 A.2d 190 (1998) ("[t]he duty to provide [a reviewing] court with a record adequate for review rests with the appellant"); see also *Puris* v. *Puris*, 30 Conn. App. 443, 447 n.7, 620 A.2d 829 (1993) (describing appellee's filing of motion for articulation as "unusual but creative tactic"). Even more fundamentally, however, contrary to the reasoning of the majority, even if Lighthouse had filed such a motion, an articulation in the declaratory judgment action would not have afforded Lighthouse the relief that it seeks in its civil action, in which damages are sought for negligent and intentional misrepresentation and for violation of CUTPA. Because Lighthouse sought declaratory relief, rather than injunctive relief or damages, in the declaratory judgment action—specifically, a judgment declaring that the power company improperly had terminated the parties' lease—the articulation that the majority contemplates would have provided Lighthouse an answer *only* with respect to whether the trial court also agreed with it that the power company improperly had terminated the parties' lease for the reasons set forth in Lighthouse's other special defenses.

[6] See *Weiss* v. *Weiss*, 297 Conn. 446, 465, 998 A.2d 766 (2010) ("this court has identified the purposes of res judicata as promoting judicial economy, minimizing repetitive litigation, preventing inconsistent judgments and providing repose to parties").

[7] The majority asserts that the principle set forth in § 26 of the Restatement (Second) of Judgments, that is, when a party agrees to split claims arising out of a single transaction into separate proceedings, that party is barred from raising res judicata as a defense to the claims that are brought in the subsequent proceeding, is inapplicable because Lighthouse filed its answer, special defenses and counterclaim in the declaratory judgment action "more than six weeks after the court stayed the civil [damages] action," and because, according to the majority, "Lighthouse requested equitable and legal relief in the declaratory judgment action . . . ." As I explained, however, Lighthouse requested only one type of relief, that is, declaratory relief. The majority cites no authority—because there is none—to support its conclusion that the nature of the *defenses* and *arguments* in a declaratory judgment action, and not the relief sought, is determinative with respect to the issue of whether the action will have preclusive effect on a subsequent action arising out of the same transaction. More importantly, however, the majority cites no authority to support its contention that, because Lighthouse filed its answer and special defenses in the declaratory judgment action after the parties had agreed to consolidate the actions but to try the claims separately, the parties' agreement to split the claims by staying the action for damages is somehow vitiated *sub silentio*. Indeed, if, as the majority contends, Lighthouse violated the parties' agreement and, therefore, forfeited the protections of § 26 of the Restatement (Second) of Judgments merely by filing its responsive pleading in the declaratory judgment action, one would have expected the *power company* to have raised the applicability of res judicata as a defense to Lighthouse's civil action for damages, not this court, sua sponte, many years later. Finally, even though, contrary to the majority's contention, Lighthouse *never* sought injunctive relief or damages in the declaratory judgment action, for purposes of applying § 26 of the Restatement (Second) of Judgments, it makes no difference what precise claims Lighthouse raised in defense of the power company's declara-

tory judgment action. This is so because, under that section, principles of res judicata are inapplicable when, as in the present case, the parties have agreed to split their claims. In sum, the majority's use of the doctrine of res judicata to bar Lighthouse from pursuing the present action is unfair to Lighthouse, which could not possibly have anticipated that, after agreeing to a stay of its civil action for damages, this court effectively would void that agreement solely because Lighthouse, in accordance with that very agreement, had proceeded to litigate the declaratory judgment action first.