

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

RBC CAPITAL MARKETS, LLC, )  
a Minnesota Limited Liability )  
Company, )

Plaintiff, )

and THE DEPOSITORY TRUST )  
COMPANY and CEDE & CO., )

Nominal Plaintiffs )

v. )

EDUCATION LOAN TRUST IV, )  
a Delaware Statutory Trust; and )  
U.S. EDUCATION LOAN TRUST )  
IV, LLC, a Delaware Limited )  
Liability Corporation, )

Defendants. )

C.A. No. N12C-02-015 MMJ CCLD

Submitted: November 18, 2015

Decided: February 17, 2016

Upon Plaintiff's Motion to Dismiss

**GRANTED**

Upon Defendants' Supplemental Objection  
to Plaintiff's Motion to Dismiss

Without Reimbursing Defendants' Fees

**DENIED**

**MEMORANDUM OPINION**

Matthew E. Fischer, Esq., Jennifer C. Wasson, Esq., Jesse L. Noa, Esq., Potter Anderson & Corroon LLP, Alan J. Stone, Esq. (Argued), Sean M. Murphy, Esq., Milbank, Tweed, Hadley & McCloy LLP, Attorneys for Plaintiffs

Daniel B. Rath, Esq., Rebecca L. Butcher, Esq. (Argued), K. Tyler O'Connell, Esq., Landis Rath & Cobb LLP, Attorneys for Defendants

**JOHNSTON, J.**

## **FACTUAL AND PROCEDURAL CONTEXT**

Plaintiff RBC Capital Markets (“RBC”) is a Minnesota limited liability company, with its principal place of business in New York. Defendant Education Loan Trust IV (“Trust”) is a Delaware statutory trust established pursuant to a Trust Agreement, dated March 1, 2006, among U.S. Education Loan Trust IV, LLC, Bank of New York, as trustee pursuant to an Eligible Lender Trust Agreement, and Bank of New York (Delaware), as Owner Trustee. Defendant U.S. Education Loan Trust IV, LLC (“Issuer”) is a Delaware Limited Liability Company, with its principal place of business in Miami, Florida.

RBC owned Auction Rate Securities (“ARS”) issued by the Issuer. The ARS were collateralized by student loans. Loan performance affected the rate of interest owed to holders of the ARS. The ARS were issued in accordance with the terms of the Indenture, amendments to the Indenture, and Supplemental Indentures.

The ARS have a variable interest rate that was set in periodic Dutch Auctions.<sup>1</sup> The Indenture and Supplemental Indentures provided that if an auction fails,<sup>2</sup> ARS holders, including RBC, are to be paid a rate of interest. The interest rate to be paid is the lesser of the Net Loan Rate (“NLR”)<sup>3</sup> and the Maximum

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<sup>1</sup> A Dutch Auction is a bidding process whereby current ARS holders or potential investors bid on an interest rate at which they would be willing to purchase the ARS for par value. This bidding process determines the interest rate to be paid.

<sup>2</sup> A Dutch Auction fails when there are not enough bids to purchase all ARS being sold at the auction.

<sup>3</sup> The Net Loan Rate is a per annum rate equal to (1) the sum of all interest payments and Special

Rate.<sup>4</sup> Although the Indenture contained a “no-action” clause, Section 6.09 carves out the following:

[T]he Holder of any Note shall have the right, which is absolute and unconditional, to receive payment of the principal of, premium, if any, and interest on such Note . . . and, upon the occurrence of an Event of Default with respect thereto, to institute suit for the enforcement of any such payment . . . .

RBC first brought a suit against Defendants in the Court of Chancery on March 18, 2011. RBC alleged that excessive fees were paid from the Trust in 2008 and 2009, thereby reducing the amount of interest that RBC should have been paid. In December 2011, the Court of Chancery dismissed RBC’s action. That Court found that RBC’s claim regarding excessive fees did not constitute an independent contractual breach of the Trust’s Indenture, and thus the no-action clause barred recovery.<sup>5</sup>

On August 20, 2012, RBC filed its Amended Complaint against Defendants in this Court, seeking to recover unpaid interest from the Issuer. RBC claimed that the Issuer was required to make periodic interest payments to RBC, but failed to make such payments beginning in May 2010. This Court dismissed RBC’s

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Allowance Payments made with respect to Financed FFELP Loans during the preceding calendar quarter, less (2) all consolidation loan rebate fees, Note Fees, Servicing Fees, and Administration Fees during the preceding calendar quarter, divided by (3) the average daily principal balance of the Financed FFELP Loans for the preceding calendar quarter.

<sup>4</sup> The Maximum Rate is the least of: (1) LIBOR plus 1.5% to 2.5%, depending on the rating assigned to the ARS by a Nationally Recognized Statistical Rating Organization; (2) the “CP Cap”—a formula set out in the Supplemental Indentures based on commercial paper rates; (3) 18%; and (4) the highest rate the issuer may legally pay.

<sup>5</sup> *RBC Capital Mkts., LLC v. Educ. Loan Trust IV*, 2011 WL 6152282, at \*4 (Del. Ch.).

Complaint for failure to state a claim upon which relief can be granted. This Court also found that the earlier judgment in the Chancery action barred RBC's Superior Court action by *res judicata*.

On March 5, 2014, the Delaware Supreme Court reversed the decision of the Superior Court. The Supreme Court held that "RBC's complaint satisfies Delaware's 'reasonable conceivability' pleading standard, that the claim is not barred by the Trust Indenture's no-action clause, and that on the current record it cannot be determined as a matter of law that RBC's Superior Court claim is precluded as *res judicata*."<sup>6</sup> The case was remanded to Superior Court.

RBC now seeks voluntary dismissal of the action with prejudice, pursuant to Superior Court Civil Rule 41(a)(2). RBC states that it has sold its entire position in the ARS at issue, and therefore will no longer be pursuing its breach of contract claim alleging the non-payment of interest on the ARS.

On July 13, 2015, the Issuer filed its Brief in Opposition to Plaintiff's Motion for an Unconditional Dismissal. Issuer contends that RBC made false representations in the Amended Complaint regarding the calculation of the NLR and engaged in a course of misconduct in litigating Defendants' motions. Issuer argues that this course of conduct increased the costs of litigation and, accordingly, fee-shifting is warranted pursuant to the "bad faith" exception to the American

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<sup>6</sup> *RBC Capital Mkts., LLC v. Educ. Loan Trust IV*, 87 A.3d 632, 635 (Del. 2014).

Rule.

On July 28, 2015, RBC filed its Reply Brief in Support of its Motion to Dismiss. RBC denies that it misrepresented any facts to the Court regarding the calculation of the unpaid interest and contends that it has maintained the same position throughout the case. RBC contends that it has not engaged in bad faith conduct during the pendency of this litigation and, therefore, each party should be responsible for its own fees.

On October 7, 2015, in response to footnote one of RBC's Reply Brief,<sup>7</sup> the Trust joined the Issuer's Opposition to RBC's Motion to Dismiss. On November 18, 2015, at oral argument on the Motion to Dismiss and responsive motions, RBC objected to the Trust's joinder with the Issuer as untimely.<sup>8</sup>

On October 23, 2015, with permission of the Court, the Issuer filed its Supplemental Objection to Plaintiff's Motion to Dismiss the Action Without Reimbursing Defendants' Fees. The Issuer contends that RBC's long-term goal was to liquidate the trust by making false accusations and arguments to the Court about the amount of interest owed to RBC by the Trust, thereby causing an Event of Default. The Issuer argues that RBC's conduct has harmed the Issuer, the Trust, and innocent non-party investors. The Issuer claims that as a result of this bad

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<sup>7</sup> RBC's Reply Brief in Support of its Motion to Dismiss, n.1 states: "Defendant Education Loan Trust IV . . . has not opposed RBC's voluntary dismissal, nor has it joined [the Issuer's] Opposition."

<sup>8</sup> The Court need not address the Trust's joinder as it does not affect the disposition of the case.

faith conduct, RBC should be ordered to pay all of Defendants' attorneys' fees, costs, and expenses incurred in defending this action.

On October 30, 2015, RBC filed its Supplemental Brief in Response to Defendants' Supplemental Objection to Plaintiff's Motion to Dismiss. RBC contends that its claim for unpaid interest was neither meritless nor frivolous, and RBC did not engage in bad faith conduct in pursuing its claim. RBC contends that its motivation for seeking dismissal of the action stems from a business decision to sell its entire position in the ARS on which the action is based. RBC argues that its decision was not improperly motivated and does not evidence bad faith.

### **STANDARD OF REVIEW**

#### ***Voluntary Dismissal***

Superior Court Civil Rule 41(a)(2)<sup>9</sup> provides in pertinent part that "an action shall not be dismissed at the plaintiff's instance save upon order of the Court and upon such terms and conditions as the Court deems proper." Therefore, a motion for voluntary dismissal under Rule 41(a)(2) "will not be granted as a matter of right, rather, it is directed to the sound discretion of the Court."<sup>10</sup> In exercising its discretion, the Court is obliged to act in such a way as to "secure substantial justice to both parties."<sup>11</sup> Generally, motions for voluntary dismissal are granted unless

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<sup>9</sup> All "Rules" referred to hereinafter will be the Superior Court Civil Rules.

<sup>10</sup> *AT&T Wireless Servs., Inc. v. Federal Ins. Co.*, 2005 WL 2155695, at \*3 (Del. Super.).

<sup>11</sup> *Lunn v. United Aircraft Corp.*, 26 F.R.D. 12, 13 (D. Del. 1960); *Draper v. Gardner Defined*

doing so would cause defendants to suffer “plain legal prejudice.”<sup>12</sup>

### ***Fee Shifting***

Delaware courts follow the American Rule, which provides that, in general, “courts in the United States do not award attorney’s fees to prevailing parties in litigation.”<sup>13</sup> However, there are exceptions to this rule, including an exception for bad faith.<sup>14</sup> The purpose of the bad faith exception is to “deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process.”<sup>15</sup> Delaware courts have awarded fees pursuant to the bad faith exception “where parties have unnecessarily prolonged or delayed litigation, falsified records, or knowingly asserted frivolous claims.”<sup>16</sup> The party seeking to shift fees bears the burden of producing “clear evidence” of bad faith conduct.<sup>17</sup>

## **ANALYSIS**

### ***Parties’ Contentions***

The Issuer contends that RBC’s Motion for Voluntary Dismissal should be subject to the condition that RBC pay the Issuer’s attorneys’ fees because RBC engaged in bad faith during the course of litigation. The Issuer argues that RBC’s goal in litigating this case was not to recover unpaid interest, but rather to take

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*Plan Trust*, 625 A.2d 859, 863 (Del. 1993).

<sup>12</sup> *Draper*, 625 A.2d at 863.

<sup>13</sup> *Kaung v. Cole Nat’l Corp.*, 884 A.2d 500, 506 (Del. 2005).

<sup>14</sup> *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542 (Del. 1998).

<sup>15</sup> *Kaung*, 884 A.2d at 506 (quoting *Schlank v. Williams*, 572 A.2d 101, 108 (D.C. 1990)).

<sup>16</sup> *Johnston*, 720 A.2d at 546.

<sup>17</sup> *Beck v. Atlantic Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005).



control of or force liquidation of the Trust by causing an Event of Default.

The Issuer contends that RBC misrepresented its ability to calculate the exact amount of interest due and owing to it under the NLR formula. RBC's original Complaint did not contain any NLR calculations or allegations that definitively determined whether any interest was due.

At oral argument on the Issuer's Motion to Dismiss, the Court granted RBC leave to amend the Complaint to show that interest was due and owing to RBC. RBC expressed doubts as to whether it would be able to account for all of the variables needed to calculate the NLR. On August 20, 2012, RBC filed the Amended Complaint, which included an exact calculation of the interest owed from the second quarter of 2011 through the second quarter of 2012.

The Issuer argues that RBC's characterization of the NLR calculation in the Amended Complaint as "exact," "precise," and accurate "to the penny" was false. The Issuer alleges that the NLR calculation is flawed because, among other things, the trustee statements reflecting the activity of loan servicer Great Lakes Higher Education Corporation do not show the interest received from borrowers. The Issuer argues that such information is a necessary NLR input, without which the NLR cannot be calculated. The Issuer alleges that RBC's failures to notify the Court that its calculations were estimates—and that RBC did not have all the information to make an exact calculation—evidence bad faith.

The Issuer's misrepresentation arguments center on alleged misrepresentation to this Court and to the Supreme Court. The Issuer states that RBC argued that its NLR calculation was exact in order to survive a motion to dismiss. However, RBC never disclosed the source documents from which it extracted the appropriate figures for the NLR calculation. The Issuer admits that it was not misled and knew from the beginning that the NLR calculation was inaccurate. Nevertheless, the Issuer argues that fee-shifting is still appropriate. Despite its knowledge of the incorrect NLR calculation, the Issuer contends that it had to unnecessarily litigate the case and expend money defending the claims against it.

### *Discussion*

Delaware Courts follow the American Rule for the payment of litigation fees and costs. However, certain exceptions apply, including an exception for bad faith conduct during the litigation. “Although there is no single, comprehensive definition of ‘bad faith’ that will justify a fee-shifting award, Delaware courts have previously awarded attorneys' fees where . . . ‘parties have unnecessarily prolonged or delayed litigation, falsified records or knowingly asserted frivolous claims.’”<sup>18</sup> Generally, the Court will not find that a litigant acted in bad faith for purposes of shifting attorneys' fees unless the litigant's conduct rose to the level of “glaring

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<sup>18</sup> *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005) (quoting *Johnston*, 720 A.2d at 546.).

egregiousness.”<sup>19</sup>

In *Johnston v. Arbitrium (Cayman Islands) Handels AG*, the Delaware Supreme Court held that fee-shifting under the bad faith exception was appropriate because defendants: (1) defended the action despite their knowledge that they had no valid defense; (2) delayed the litigation and asserted frivolous motions; (3) falsified evidence; and (4) changed their testimony to suit their needs.<sup>20</sup>

In *Kaung v. Cole National Corporation*, the Delaware Supreme Court affirmed the Court of Chancery’s decision to shift attorneys’ fees. The Court found that: (1) plaintiff’s motive for filing the action was improper; (2) plaintiff’s attorneys “made excessive and duplicative deposition requests while ignoring their own discovery obligations;” and (3) one of plaintiff’s key witnesses refused to answer questions in his deposition and this behavior was supported by plaintiff’s attorney.<sup>21</sup>

The Court finds that RBC’s conduct in the instant case does not rise to the level of bad faith and “glaring egregiousness” to justify fee-shifting. Although this Court originally dismissed RBC’s Amended Complaint, the Delaware Supreme Court found that the Amended Complaint stated a legally cognizable claim for interest owed, and met the pleading requirements.

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<sup>19</sup> *Id.* at 227.

<sup>20</sup> *Johnston*, 720 A.2d at 546.

<sup>21</sup> *Kaung*, 884 A.2d at 507.

The facts underlying the Issuer's current claims of bad faith also were presented to the Supreme Court. The Supreme Court found:

[T]he Amended Complaint specifically alleges that “interest is owed to RBC based on the actual cash flows into and out of the Trust regardless of whether the outflows, including fees, were authorized.” RBC’s counsel bound his client by representing to this Court that, in proving that claim, RBC would not challenge the propriety of any fees paid out of the Trust. Finally, Defendants cite no authority to support its contention that, to survive a motion to dismiss, a noteholder seeking to avoid a no-action clause must satisfy a heightened pleading standard requiring the noteholder to plead evidence establishing that its claim is not barred by the no-action clause.

RBC’s claim is not based on a challenge of management decisions. Rather, it is a straightforward claim to recover unpaid interest owed, for which RBC was not required affirmatively to plead compliance with the no-action clause.<sup>22</sup>

The Issuer argues that RBC represented that its calculations were exact and that the Supreme Court relied on that representation to advance past the motion to dismiss stage. Addressing the Issuer’s challenge to the accuracy of RBC’s NLR calculation and the source documents used to make such a calculation, the Supreme Court stated that at the motion to dismiss stage, it would not engage in a fact-finding expedition “merely to decide whether or not RBC’s allegations are contradicted.”<sup>23</sup>

The facts underlying the bad faith allegations were brought to the attention of the Supreme Court. The Issuer claims that some of the facts came to light

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<sup>22</sup> *RBC Capital Mkts., LLC*, 87 A.3d at 642.

<sup>23</sup> *Id.*

following the appeal. However, the Issuer admits that it at least suspected the basis of alleged bad faith from the beginning of the litigation

Nothing in the Supreme Court's opinion demonstrates that it relied on the accuracy of the NLR calculation. Rather, the Supreme Court analyzed RBC's Amended Complaint and found that it alleged sufficient facts to state a claim for relief. The Supreme Court declined to impose sanctions on RBC and declined to direct this Court, on remand, to consider the propriety of sanctions.

The Issuer's argument that RBC had an improper motive for bringing this lawsuit is unavailing. The Issuer alleges that RBC's motivation for bringing this lawsuit was to further its strategy to take control of or force liquidation of the Trust. Delaware courts are "empowered to shift fees under the bad faith exception to the American rule if a claim was asserted frivolously in the first instance."<sup>24</sup> Where a cause of action sets forth a viable claim, the Court will not disrupt the normal appropriation of fees.

RBC consistently has asserted that its claim against the Issuer is for unpaid interest. The Amended Complaint sets forth a valid cause of action and pleads facts that adequately allege a breach of the Indenture. So long as the Amended Complaint alleges a valid cause of action, which the plaintiff pursues in good faith, any secondary motives are irrelevant.

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<sup>24</sup> *Blue Hen Mech., Inc. v. Christian Bros. Risk Pooling Trust*, 117 A.3d 549, 558 (Del. 2015).

This case does not present a unique situation. The facts were hotly-contested. The litigation is in the context of other disputes among the parties. It is not unusual for a plaintiff to have more than one motive to initiate an action.

The Issuer has failed to present clear evidence that RBC acted in bad faith. While the Amended Complaint describes the NLR calculation as “precise” and accurate “to the penny,” RBC argues that it has always maintained that those statements described the careful work that RBC put into analyzing the information that it had at the time. RBC points to the fact that had the calculations in the Amended Complaint been the final dollar amount sought, there would have been no reason for RBC to seek discovery of additional data that affected the amount of interest due.

The Issuer has alleged that describing the NLR calculation in this manner was an intentional misrepresentation, but fails to assert facts that clearly and unequivocally support that conclusion. The difference between “estimated” calculations (allegedly undisclosed), and “exact” calculations (allegedly misrepresented) is not a sufficient basis for fee-shifting. The Issuer acknowledges that it was not misled. The Court finds that the Issuer has failed to demonstrate conduct by RBC that rises to the level of bad faith. Therefore, the Court declines to order RBC to pay the Issuer’s attorneys’ fees as a condition of dismissal.

## **CONCLUSION**

RBC seeks voluntary dismissal of the action with prejudice because it has sold its entire position in the ARS at issue, and therefore will no longer be pursuing its breach of contract claim alleging the non-payment of interest on the ARS. The Issuer contends that RBC engaged in bad faith throughout the litigation and asks the Court to condition the dismissal upon RBC's payment of reasonable costs, attorneys' fees, and expenses of the Issuer and the Trust. The Court finds that the Issuer has failed to present clear evidence that RBC acted in bad faith.

### **THEREFORE:**

Plaintiff RBC Capital Markets, LLC's Motion to Dismiss is hereby **GRANTED**. Issuer's Supplemental Objection to Plaintiff's Motion to Dismiss Action Without Reimbursing Defendants' Fees is hereby **DENIED**.

**IT IS SO ORDERED.**

/s/ Mary M. Johnston  
The Honorable Mary M. Johnston