IN THE SUPREME COURT OF THE STATE OF DELAWARE

RBC CAPITAL MARKETS, LLC, a Minnesota limited liability company, Plaintiff-Below/Appellant, and THE DEPOSITORY TRUST COMPANY and CEDE & CO., Nominal Plaintiffs-Below/ Appellants, v. EDUCATION LOAN TRUST IV, a Delaware statutory trust; and U.S. EDUCATION LOAN TRUST IV, LLC, a Delaware limited liability company, Defendants-Below/Appellees.	No. 343, 2013 Court Below – Superior Court of the State of Delaware in and for New Castle County

ANSWERING BRIEF ON APPEAL OF THE BANK OF NEW YORK MELLON, AS INDENTURE TRUSTEE FOR DEFENDANT-BELOW/APPELLEE EDUCATION LOAN TRUST IV

Dated: September 16, 2013

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NATURE OF THE PROCEEDINGS

Pursuant to an Indenture of Trust dated March 1, 2006 (the "Indenture"), The Bank of New York Mellon ("BNY Mellon" or the "Trustee") is the indenture trustee for Defendant/Appellee Education Loan Trust IV (the "Trust"). (Op. Br., Ex. A at 3). Plaintiff/Appellant RBC Capital Markets, LLC ("RBC") was the broker-dealer and market agent for the auction rate securities ("ARS") issued by Co-Defendant/Appellee U.S. Education Loan Trust IV, LLC ("USEL IV," together with the Trust, "Appellees") pursuant to the Indenture. (*Id.*).

On March 18, 2011, RBC filed a Verified Complaint (the "Chancery Complaint") in the Delaware Court of Chancery (the "Chancery Lawsuit") against the Trust and USEL IV. (A36). In the Chancery Complaint, RBC asserted claims for breach of contract, unjust enrichment, and an accounting to determine whether the Trust was properly administered. (Chancery Compl. ¶¶ 1, 60-73: A36, 51-53). RBC alleged that it was the holder of ARS and other securities backed by student loans (collectively, the "Notes"). (*Id.* ¶¶ 3, 7-9, 12-13, 15, 20-22: A37-40, 42). RBC further alleged that the Trustee, at the direction of USEL IV, paid certain operating and administration fees in excess of the limitations set forth in the Indenture. (*Id.* ¶¶ 30-42, 45-46: A45-48). As a result, RBC claims that the noteholders did not receive interest otherwise payable. (*Id.* ¶ 50: A49).

On April 22, 2011, Appellees each filed motions to dismiss the Chancery Lawsuit under Court of Chancery Rule 12(b)(6) (the "Chancery Motions to Dismiss"), and full briefing followed. (A30-35). Oral argument before Chancellor Strine was held on August 31, 2011. (A29). Supplemental submissions were filed on September 7 and 9, 2011. (A28-29).

In the Chancery Motions to Dismiss, Appellees argued, *inter alia*, that the Chancery Lawsuit should be dismissed pursuant to Rule 12(b)(6) because RBC failed to (and could not) allege compliance with the "no-action" clause in Section 6.08 of the Indenture. *See RBC Capital Markets, LLC v. Education Loan Trust IV*, 2011 WL 6152282, at *4 (Del. Ch. Dec. 6, 2011). RBC argued the "payment of interest and principal" exception in Section 6.09 of the Indenture governed because the Trust's payment of allegedly excessive operating and administration fees resulted in the non-payment of interest to noteholders. *Id.* at *2.

On December 6, 2011, the Court of Chancery granted the Chancery Motions to Dismiss. *Id.* at **2, 7. Pursuant to Rule 12(b)(6), the Court of Chancery dismissed the Chancery Lawsuit because (i) the no-action clause applied and (ii) RBC failed to allege compliance with the no-action clause's conditions for bringing suit. *Id.* at *2. Although the Court of Chancery recognized that Section 6.09 of the Indenture provided an exception to the no-action clause, the Court of

Chancery held that the exception was inapplicable to RBC's claims for breach of contract, unjust enrichment, and an accounting. *Id.* at **2, 5-6.

The Court of Chancery reasoned that RBC did not allege that the Trust failed to pay timely interest in accordance with the formula in the Indenture. *Id.* at *2. The Court of Chancery found that "RBC in fact admit[ted] that it received timely interest payments." *Id.* at *4. The Court of Chancery concluded that, "[w]hen a noteholder must premise its claim for payment of interest on proving a breach of provisions of the trust indenture not directly addressing the schedule or amount of interest payments due, it must comply with the no-action clause." *Id.* at *2.

The Court of Chancery recognized that RBC sought to "end run" the no-action clause by pleading reduced interest as its measure of damages for alleged breaches of the Indenture on account of allegedly excessive operating and administration fees paid out to USEL IV. *Id.* at **2, 5-6. The Court of Chancery recognized that allowing such an end run would contravene a main purpose of no-action clauses, which is to deter individual noteholders from causing expense and diminishing trust assets by bringing independent lawsuits for unmeritorious or unpopular claims. *Id.* The Court of Chancery also recognized that, if a noteholder like RBC could avoid a no-action clause by alleging a breach of an indenture that reduces or eliminates interest payments, the limited payment exception would swallow entirely the no-action clause. *Id.*

When faced with the Chancery Motions to Dismiss, RBC chose to file an answering brief in opposition to the Chancery Motions to Dismiss. RBC, however, did not seek to amend the Chancery Complaint. (A32). RBC also did not seek reconsideration of, or to appeal, dismissal of the Chancery Complaint. (A28). RBC did not offer (and the Court of Chancery did not find) any good cause for dismissing the Chancery Lawsuit without prejudice. (A73). Thus, the Chancery Lawsuit was dismissed with prejudice under Court of Chancery Rule 15(aaa).

Seeking a second bite at the apple, on February 1, 2012, RBC commenced another action (the "Complaint") against Appellees in the Delaware Superior Court (the "Superior Court"). In the Complaint, RBC asserted claims for breach of contract and breach of the implied covenant of good faith and fair dealing. (Compl. ¶¶ 53-60: B15-16). Both claims in the Complaint asserted the Trust's non-payment of interest, but both concern the payment of fees to USEL IV. (*Id.*).

Appellees filed separate Motions to Dismiss the Complaint on the grounds that (i) RBC's claims were barred by the *res judicata* doctrine and (ii) RBC failed to state a claim. (A17-26). The matter was fully briefed, and the Superior Court held oral argument on Appellees' motions. (A15).

During oral argument, the Superior Court explained that a Section 6.09 action "is supposed to be a collection action" in which a noteholder asserts that it was owed a particular amount of interest (*e.g.*, 1.5%) on a certain day (*e.g.*, April

1st) and did not receive that particular amount of interest on the due date. (A725, 732, 741-742). The Superior Court also stated that, within the Complaint, "there is nothing that says that there was interest earned that was not given to [RBC]." (A732). Nonetheless, the Superior Court permitted RBC to amend to plead that "interest has been earned but not paid ... as opposed to interest should have been earned but the money that would have been returned to [RBC] in interest was used for other things." (A747-48).

Taking yet another bite at the apple, on September 20, 2012, RBC, along with The Depository Trust Company ("DTC") and CEDE & CO ("Cede"), as Nominal Plaintiffs/Appellants,[1] filed an Amended Complaint.[2] (A74). The Amended Complaint sets forth a single breach of contract claim based on Appellees' alleged failure since May 2010 to pay any interest to RBC under the Indenture and Supplemental Indentures. (Am. Compl. ¶ 83: A99).

Recognizing that RBC sought to repackage its Chancery Lawsuit, the Superior Court dismissed the Amended Complaint (i) under the *res judicata* doctrine and (ii) for failure to state a claim. (Op. Br., Ex. A).

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[1] RBC, DTC, and Cede are collectively referred to below as "Appellants."

[2] DTC and Cede only "join[ed] in th[e] Amended Complaint as a nominal party." (Am. Compl. ¶ 3: A75-76). DTC and Cede are not appearing nominally on behalf of any other noteholder — they appear only on behalf of RBC. (*Id.* ¶ 6: A76-77).

SUMMARY OF THE ARGUMENTS

Appellants' arguments on appeal are denied on two grounds.

First, the *res judicata* doctrine required dismissal of the Amended Complaint. Appellants challenge only the Superior Court's application of the third and fifth elements of this doctrine. Regarding the third element (whether the "same claims" were or could have been asserted in the Chancery Lawsuit), the Amended Complaint alleged, *inter alia*, the same default for unpaid interest as the Chancery Lawsuit, relied upon the same contracts and interest payment exception to the no-action clause, asserted the same breach of contract claim, and sought similar relief. Regarding the fifth element (whether the dismissal of the Chancery Lawsuit was a final decree), Rule 15(aaa) provides that dismissal under Rule 12(b)(6) constitutes a dismissal ***with prejudice***, which is a final decree barring all claims that were or could have been asserted in the Chancery Lawsuit. The dismissal of the Chancery Lawsuit was not based on standing as Appellants erroneously contend. Dismissal was based on failure to state a claim under Rule 12(b)(6) (to which Rule 15(aaa) specifically refers). Even if dismissal were based on standing, an adjudication declining to reach ultimate issues still bars RBC's repeated filings because RBC had a complete and fair opportunity to secure its rights in the Chancery Lawsuit.

Second, the Superior Court properly dismissed the Amended Complaint under Rule 12(b)(6). Surrounded by much smoke and mirrors, Appellants allege in conclusory fashion that interest is payable to RBC under the Indenture. Appellants, however, make no meaningful allegations regarding the different variables that go into the Net Loan Rate formula showing that interest is owed. Worse yet, the documents upon which Appellants "directly" rely in the Amended Complaint demonstrate that no interest is owed. In an attempt to conceal RBC's repackaging of its Chancery Lawsuit, Appellants (i) intentionally withheld their calculation purportedly showing the interest allegedly due and (ii) failed to attach the documents on which they claim reliance. Those documents, however, contradict Appellants' assertions that any interest is due and unmask RBC's attempt to repackage its Chancery Lawsuit, which was dismissed with prejudice.

For either or both of the forgoing reasons, the Trustee respectfully requests that this Court affirm the Superior Court's dismissal of the Amended Complaint.

STATEMENT OF THE FACTS

I. THE PARTIES

The Trust (USEL IV) was the issuer of the Notes. (Am. Compl. ¶ 8: A77). BNY Mellon is the Trustee. (*Id.* ¶ 7: A77). DTC and Cede are the securities depository holder and legal owner of the Notes. (*Id.* ¶ 6: A76-77). RBC asserts that it is the beneficial owner of certain Notes issued by USEL IV. (*Id.*).

II. THE "NO-ACTION" CLAUSE AND "PAYMENT EXCEPTION"

The Section 6.08 no-action clause provides, in relevant part, as follows:

> [N]o Holder of any Note or Other Beneficiary shall have any right to institute any suit, action or proceeding in equity or at law for the enforcement of this Indenture or for the execution of any trust hereof or for the appointment of a receiver or any other remedy hereunder unless (a) an Event Default shall have occurred and be continuing, (b) the Acting Beneficiary Upon Default shall have made written request to the Trustee with respect thereto, (c) such Beneficiary or Beneficiaries shall have offered to the Trustee indemnity . . ., (d) the Trustee shall have thereafter failed to exercise the power hereinbefore granted or to institute such action, suit or proceeding in its own name and (e) no direction inconsistent with such written request shall have been given to the Trustee during such sixty (60)-day period by the Holders of not less than a majority in aggregate Principal Amount of the Notes then Outstanding or by any Other Beneficiary . . . .

(A192). The Section 6.09 payment exception to the no-action clause states:

> Notwithstanding any other provision in this Indenture, the Holder of any Note shall have the right, which is absolute and unconditional, to receive payment of the principal or, premium, if any, and interest on such Note in accordance with the terms thereof and hereof and, upon the occurrence of an Event of Default with respect thereto, to institute suit for the enforcement of any such payment, and such right shall not be impaired without the consent of such Holder.

(A192-193).

III. THE "NET LOAN RATE"

The Indenture and Supplemental Indentures provide the rate of interest payable on the Notes. (Am. Compl. ¶ 11: A78). In the event of a failed auction, the interest rate will be the lesser of the "Maximum Rate" or the "Net Loan Rate." (*Id.* ¶ 13: A78-79). The Net Loan Rate is the applicable rate at issue in this case. The Net Loan Rate is determined by taking the "sum of all interest payments and Special Allowance Payments," subtracting "all consolidation loan rebate fees, Note Fees, Servicing Fees and Administration Fees" and dividing that number by the "average daily principal balance" of student loans. (*Id.* ¶ 15: A79). It is undisputed that the ***Net Loan Rate can be a negative number*** under that formula. (A488-489). When the Net Loan Rate is negative, the interest rate is rounded to zero. (*Id.*).

IV. THE DEFICIENT AMENDED COMPLAINT

Appellants claim that USEL IV has not paid interest since May 2010 (Am. Compl. ¶¶ 1, 16, 21-22, 36: A74-75, 80-81, 87), and Appellants "believe" that interest should have been paid for periods since May 2010. (*Id.* ¶¶ 16, 36, 40: A80, 87, 88). Nowhere in the Amended Complaint did Appellants articulate how or why interest should have been paid under all the elements of the applicable

definition of the Net Loan Rate, and they do not dispute that zero percent interest is contemplated in the Net Loan Rate calculation.

Instead, Appellants alleged that they have "been able to collect information which makes clear the amount of interest that is owed but unpaid." (Am. Compl. ¶ 24: A82; *see also id.* ¶¶ 33, 37: A85, 87). Appellants provided charts that purport to establish the amount of interest that is owed, but these charts fail to reveal much of the ***necessary*** elements for determining the Net Loan Rate. (*Id.* ¶¶ 28-29: A83-84). Appellants failed to make any allegations regarding the following elements of the Net Loan Rate formula: (a) the "expenses" (*e.g.*, consolidation loan rebate fees, Notes fees, Servicing Fees and Administration Fees that are subtracted from the Net Receipts in a Net Loan Rate calculation); and (b) the "denominator" (*i.e.*, the average daily principal balance of Financed FFELP Loans for the preceding calendar quarter). Without those necessary inputs, Appellants' charts are meaningless as incomplete speculation. Appellants' incomplete data was designed to conceal the fact that RBC is repackaging its challenge to the allegedly excessive fees that the Court of Chancery dismissed with prejudice. Indeed, as demonstrated below, based on the very documents upon which Appellants rely, no interest is due to RBC absent a reduction in allegedly excessive fees.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY DISMISSED THE AMENDED COMPLAINT UNDER THE *RES JUDICATA* DOCTRINE

A. Question Presented

Did the Superior Court properly dismiss the Amended Complaint under the doctrine of *res judicata*? (A474-505, A627-652, A678-749).

B. Standard and Scope of Review

This Court reviews *de novo* a trial court's dismissal under the *res judicata* doctrine. *See Sutton v. Coons*, 2007 WL 4293073, at *2 (Del. Dec. 7, 2007).

C. Merits of the Argument

The doctrine of *res judicata* exists to prevent precisely the scenario presented here — RBC filed ***three complaints in two different courts*** — RBC had its ***days*** in court — and RBC complaints have been ***twice*** dismissed.

"The doctrine [of *res judicata*] permits a litigant to press his claims but once, and requires him to be bound by the determination of the forum he has chosen, so that he may have one day in court but not two." *Maldonado v. Flynn*, 417 A.2d 378, 381 (Del. Ch. 1980) (internal quotations and citation omitted). The doctrine exists, *inter alia*, to "promote the stability and finality of judicial decrees." *Id.*

There are five elements of *res judicata*.[3] Appellants take issue only with the third ("same claim or issue") and the fifth ("final decree") elements. (Op. Br. at 21). As the Superior Court correctly determined, those elements are satisfied.

1. The Chancery Lawsuit and the Amended Complaint Involve the Same Claim and Issues

The Superior Court correctly determined that the breach of contract claim in the Amended Complaint is the same (albeit artfully repackaged) breach of the contract claim asserted in the Chancery Lawsuit. (Op. Br., Ex. A at 13). Notwithstanding Appellants' (incorrect) argument that the Amended Complaint sets forth a different claim as to how Appellees' breached the contracts at issue here, the *res judicata* doctrine "extends to all claims which a party asserted, ***or could have asserted***, in a prior proceeding between the same parties." *See Sutton*, 2007 WL 4293073, at *2 (internal quotations omitted) (emphasis added).

As the Superior Court correctly held (Op. Br., Ex. A at 14), the breach of contract claim in the Amended Complaint could have been asserted in the Chancery Lawsuit. RBC filed the Chancery Lawsuit in March 2011. (A35). The briefing on the Chancery Motions to Dismiss was completed in July 2011 — over 15 months after RBC was on notice that interest payments ceased. (A30-31).

[3] The five elements are: "(1) the original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the [plaintiff] in the case at bar; and (5) the decree in the prior action was a final decree." *Sutton*, 2007 WL 4293073, at *2.

Based on RBC's own allegations as to the alleged "Event of Default" that triggered its Section 6.09 nonpayment of interest claim, RBC could have filed suit in March 2010, a week after the alleged interest was unpaid. (Am. Compl. ¶ 23: A81).

Also, *res judicata* is "based on the underlying transaction and not on the substantive legal theories or types of relief which are sought." *See Maldonado*, 417 A.2d at 381. For the *res judicata* bar to apply, "the underlying facts must have been known ***or capable of being known*** at the time of the first action." *Ezzes v. Ackerman*, 234 A.2d 444, 445-46 (Del. 1967).

RBC erroneously believes it can change the order of, and delete some of the words (relating to excessive fees) used in, its filings to overcome *res judicata's* bar. (Op. Br. at 22) (citing to a redline comparison of the complaints). The similarity, however, of the core allegations regarding unpaid interest in the Amended Complaint and Chancery Lawsuit is readily apparent:

Superior Court Amended Complaint	**Chancery Complaint**
"The amount of loans being repaid has increased, and over time, has resulted in an increase in cash coming into the Trust ... and therefore so should interest payments to RBC." (A95-96, ¶ 65).	"The impact of the unauthorized fees has resulted in an artificially low Net Loan Rate, which in turn has resulted in lower interest paid to RBC ... than was required under the Indenture and Supplemental Indentures." (A49, ¶ 48).
"There is no reasonable explanation why . . . USEL IV is consistently not paying interest to RBC." (A90-91, ¶ 48). "Some of these other holders have communicated to RBC personnel that	"Pursuant to this scheme, USEL IV devised a way to extract fees out of the Trust and pay less interest on ARS held by RBC." (A44, ¶ 27). "In addition to enriching USEL IV and

the non-payment of interest is improper and inconsistent with their analysis of the Trust." (A93, ¶ 57). "This withholding of interest due to RBC is improper, and represents a breach of the Indenture." (A97, ¶ 71).	its affiliates in the form of fees that were not earned under the Indenture, this also had the effect of causing artificially low interest payments to be made to RBC and other holders of the ARS." (A45, ¶ 29). "The impact of the unauthorized fees has resulted in an artificially low Net Loan Rate, which in turn has resulted in lower interest paid to RBC and other holders of ARS than was required under the Indenture and Supplemental Indentures." (A48, ¶ 46). "RBC requests an accounting in order to determine the full extent to which fees were unlawfully taken from the Trust, and how those fees and other factors contributed to an underpayment of interest owed to RBC and other Note holders." (A49, ¶ 48). "But for the conduct described herein, the periodic interest payments to RBC on the ARS would have been substantially higher." (A49, ¶ 50).
"To RBC's knowledge, no other comparable trust in the market other than USEL IV has paid no interest on every CUSIP issued by the trust for more than one auction period...." (A89, ¶ 43). "In summary, market history shows that a trust of this nature might have *one or* ***two*** of its securities pay zero interest for ***one or two*** auction periods, but there is nothing remotely close to USEL IV's	"[T]he Net Loan Rate calculations for the ARS are significantly below prevailing market rates for similar types of investments." (A48, ¶ 47).

nonpayment of interest...." (A89, ¶ 44).	

RBC also alleged the ***same*** default, relied upon the ***same*** interest payment exception to the no-action clause, asserted the ***same*** breach of contract claim, and sought the ***same*** relief in the Amended Complaint and the Chancery Lawsuit:

Superior Court Amended Complaint	**Chancery Complaint**
Event of Default	
A97-98, ¶¶ 74-75 (alleging Event of Default under Section 6.01 of the Indenture).	A50, ¶¶ 55, 57 (alleging Event of Default under Section 6.01 of the Indenture).
Reliance Upon Interest Rate Exception	
A98, ¶ 77 (relying upon Section 6.09 of Indenture).	A50-51, ¶ 58 (relying upon Section 6.09 of Indenture).
Breach of Contract Claim	
A99, Count I (breach of contract).	A52-53, Count III (breach of contract).
Payment of Interest Damages	
A99-100, Prayer for Relief, ¶ a. (requesting the Court to "order Defendants to ***pay to Plaintiff unpaid interest in an amount to be determined at trial*** (to exceed $1 million)....").	A54 , Prayer for Relief, ¶ c. (requesting a judgment from the Court of Chancery in favor of Plaintiff "ordering Defendants to ... ***pay unpaid interest to RBC***").

The same "transaction" underlies both the Chancery Lawsuit and the Amended Complaint because both involve performance under the same contracts (*i.e.*, the Indenture and Supplemental Indentures) and the same resulting harm (*i.e.*, a zero Net Loan Rate). *See Levinhar v. MDG Med., Inc.*, 2009 WL 4263211, at *10 (Del. Ch. Nov. 24, 2009) (explaining that "*res judicata* bars all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the actions arose.")

(internal quotations and citations omitted); *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 193 (Del. 2009) ("[A] contract is considered to be a single 'transaction' for the purpose of claim preclusion.").

At oral argument in the Superior Court, RBC stated that USEL IV's use of funds would have a negative impact on interest payments to noteholders. (June 20 Tr. at 46:21-47:15: A723-724) ("MR. STONE: ... [T]he interest that we are seeking in this case is ***highly dependent*** on what fees are taken out.") (emphasis added). Similarly, in the Chancery Lawsuit, RBC alleged that the Trustee, at the direction of USEL IV, paid certain fees in excess of the limitations set forth in the Indenture, which allegedly reduced interest payments to noteholders. (Chancery Compl. ¶¶ 30-42, 45-46, 50: A45-49). In fact, in the Chancery Lawsuit, RBC sought "an accounting to aid in a determination of unpaid interest due on securities issued by USEL IV in connection with the Trust." (*Id.* ¶ 1: A36-37; *see also id.* ¶¶ 60-64: A51-52). RBC even reiterated in the Chancery Lawsuit that the remedy sought was the payment of interest, stating that RBC's "proffered ***remedy*** is that they [USEL IV and the Trust] figure out how much interest is owed to us and ***we get our interest.***" (Sept. 9 Chancery Tr. at 36:11-13: B54) (emphasis added).

Notwithstanding the forgoing facts, Appellants argue at length that the Chancery Lawsuit only concerned allegedly improper fees and the Amended Complaint only concerned the nonpayment of interest. (Op. Br. at 21-28).

Appellants' attempt to cast the Amended Complaint in a different light from the Chancery Lawsuit is inaccurate. First, in the Chancery Lawsuit, RBC alleged that excessive fees "negatively affect[ed] an input to the formula in the Supplemental Indentures ... causing lower interest payments to be made to the noteholders than would have been the case had the Trust only paid the appropriate level of fees." *See RBC Capital Markets*, 2011 WL 6152282, at *1. Second, as discussed below, in the Amended Complaint, Appellants seek to recover interest that would be payable ***only*** if the allegedly excessive fees were excluded from the Net Loan Rate calculation. In sum, the Superior Court did not err in holding that "RBC has already had its day in court, and [the Superior Court] is not free to take a second look at the earlier judgment." (Op. Br., Ex. A at 2).

2. The Court of Chancery's Decision was a Final Decree

Appellees argued in the Chancery Lawsuit that the case should be dismissed because RBC failed to comply with the applicable no-action clause in Section 6.08 of the Indenture. (B75-79). RBC chose to stand on its pleading and filed an opposition to the Chancery Motions to Dismiss. (A32). Consequently, Rule 15(aaa) prohibits Appellants from asserting the same claim asserted (or that could have been asserted) in the Chancery Lawsuit. *See Chrin v. Ibrix, Inc.*, 2007 WL 1544209, at *4 (D.N.J. May 29, 2007) (applying Delaware law).

Pursuant to Rule 15(aaa), when faced with a Rule 12(b)(6) motion to dismiss, a plaintiff must choose to amend its complaint or answer the motion. *See* DEL. CT. CH. R. 15(aaa) *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *3 (Del. Ch. Oct. 19, 2006). "If the plaintiff chooses to stand on the complaint by answering the motion to dismiss and the Court dismisses the action, the dismissal is with prejudice, unless the plaintiff can show just cause or the Court's order of dismissal expressly permits the plaintiff to file an amended complaint and specifies a time for amending." Donald J. Wolfe, Jr. and Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 4.07[a][3] (2013).

Indeed, if a dismissal is to be without prejudice, this Court has held that the Court of Chancery should state "expressly" that the dismissal is without prejudice, "expressly authorize" the plaintiff to file an amended complaint, and provide a "date certain" for the plaintiff to do so. *See Braddock v. Zimmerman*, 906 A.2d 776, 784 (Del. 2006). RBC did not request, and the Court of Chancery did not include, any such language in its order. Thus, the dismissal was ***with prejudice***.

A dismissal with prejudice is a final judgment that operates as a *res judicata* bar to a subsequent lawsuit. *Id.*; *Savage v. Himes*, 2010 WL 2006573, at *1 (Del. Super. Ct. May 18, 2010); *Mohammed v. May Dep't Stores, Co.*, 273 F. Supp. 2d

531, 535 (D. Del. 2003). A Court of Chancery dismissal "with prejudice is a final judgment for *res judicata* purposes." *See Levinhar*, 2009 WL 4263211, at *7.

Largely ignoring Rule 15(aaa) as it did in the Court of Chancery, RBC tries to manufacture a distinction between a dismissal "with prejudice" and a final decree "on the merits." (Op. Br. at 31-32). RBC cites no authority for that proposition. If a dismissal "with prejudice" is not a decree on the merits, then it would be a dismissal "without prejudice." The relevant case law (federal and state) recognizes that a dismissal "with prejudice" is a final adjudication "on the merits." "[A] dismissal with prejudice is treated as a dismissal on the merits and is, therefore, a final judgment on the merits. Put differently, '[t]he term 'with prejudice,' expressed in a judgment of dismissal, has a well-recognized legal import; and it indicates an adjudication of the merits, operating as *res judicata*.'" *Smith v. CSK Auto, Inc.*, 132 P.3d 818, 820 (Alaska 2006) (internal footnotes omitted); *see also Nemaizer v. Baker*, 793 F.2d 58, 60 (2d Cir. 1986) ("A dismissal with prejudice has the effect of a final adjudication on the merits favorable to defendant and bars future suits brought by plaintiff upon the same cause of action."); *Nilssen v. Motorola, Inc.*, 203 F.3d 782, 785 (Fed. Cir. 2000) ("[T]he dismissal of a claim with prejudice operated as an adjudication of that claim on the merits"). Appellants' attempt to rewrite the stated basis of dismissal (from failure

to state a claim under Rule 12(b)(6) to lack of standing under Rule 12(b)(1)) and established case law fails as a matter of law.

Appellants rely upon *Ralph Paul, Inc. v. Brooks*, 1976 WL 7954 (Del. Ch. July 22, 1976) for the proposition that "a court's determination that a plaintiff lacks standing to bring an action is not a 'final judgment on the merits' that operates to bar a subsequent action under the doctrine of *res judicata*." (Op. Br. at 29). Appellants misplace reliance upon *Ralph Paul*. The Chancery Lawsuit was dismissed under Rule 12(b)(6) for failure to state a claim, not Rule 12(b)(1) for lack of standing. *See RBC Capital Markets*, 2011 WL 6152282, at *3 ("The Issuer and the Trust have each filed a motion to dismiss RBC's claims under Court of Chancery Rule 12(b)(6)."); *see also id.* at *7 ("[T]he Issuer's and the Trust's motions to dismiss are GRANTED"). Thus, *Ralph Paul* is inapplicable.

Appellants also cite *Smith v. Guest*, 16 A.3d 920 (Del. 2011) for the proposition that a dismissal of a previous lawsuit based upon standing does not constitute a "final judgment on the merits." (Op. Br. at 29-30). Appellants quote language from *Smith* quoting this Court's opinion in *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991). In *Stuart Kingston*, this Court held that "[t]he concept of 'standing,' in its procedural sense, refers to the right of a party to invoke the ***jurisdiction*** of a court to enforce a claim or redress a

grievance." *Id.* (emphasis added).[4] Accordingly, a motion for dismissal based upon a lack of standing is a Rule 12(b)(1) motion for lack of jurisdiction, not a Rule 12(b)(6) motion for failure to state a claim.

Noting the distinction applicable here, this Court held, in *Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275 (Del. 2007), "that where the issue of standing is related to the merits, a motion to dismiss is properly considered under Rule 12(b)(6) rather than 12(b)(1)." *Id.* at 1280. When a trial court dismisses the prior litigation on the basis of Rule 12(b)(6), the decision is a final resolution based on the merits. Here, the Chancery Motions to Dismiss were brought and decided under Rule 12(b)(6). *See RBC Capital Markets*, 2011 WL 6152282, at **3-4, 7. RBC did not appeal, or seek reconsideration of, the dismissal of the Chancery Lawsuit. Thus, the Chancery Lawsuit was dismissed by a final decree, thereby satisfying the fifth element of *res judicata*.

Even if *Ralph Paul* and Rule 12(b)(1) were relevant, "in a proper case, an adjudication declining to reach ultimate issues may still bar a second attempt to reach them again in this Court or in any other court." 1976 WL 7954, at *4. "A

[4] In *Smith*, the *res judicata* effect of the prior decision was negated by a subsequently enacted statute. 16 A.3d at 933. Nothing in the prior history of *Smith* indicates that the dismissal of the prior custody case at issue was with prejudice. *See, e.g., C.M.G. v. L.M.S.*, 2009 WL 5697870, at *3 (Del. Fam. Ct. Dec. 21, 2009) (addressing the *res judicata* effect of the prior custody case at issue in *Smith* and stating that on remand from the first Delaware Supreme Court decision, the custody order, was vacated).

later determination is foreclosed ... not because substantive issues have been determined but because ***the plaintiffs had a complete and fair opportunity and did nothing to secure their rights***, while subjecting the defendant to the difficulties and expense of preparing a defense." *Id.* at *5 (emphasis added).

In response to the Chancery Motions to Dismiss, RBC had a complete and fair opportunity to amend its Chancery Complaint to allege the claim asserted in the Amended Complaint. RBC had knowledge of its rights, but RBC did not take action to secure its rights. Instead, RBC stood on its Chancery Complaint, while subjecting Appellees to the difficulties and expense of preparing a defense.

3. The Purported Ongoing Breaches Could Have Been Raised in the Chancery Lawsuit

Attempting to save a portion of their claim from dismissal, Appellants argue that *res judicata* does not bar "those portions of RBC's claims for interest earned from March 2011." (Op. Br. at 33-34). As the Superior Court correctly held (Op. Br., Ex. A at 16), Delaware law provides that *res judicata* applies to every issue that RBC raised or could have raised in the Chancery Lawsuit.

Res judicata also bars a lawsuit for continuing harm alleged in a previous lawsuit. *See Sternberg v. O'Neil*, 1989 WL 137932, at *432 (Del. Ch. Oct. 26, 1989) (distinguishing "those allegations or claims based on *acts* (which are barred by *res judicata* if they arose, or were capable of being brought into court, before the December 1981 judgment date) and those injuries or damages that resulted, or

flowed, from particular acts (which results are barred by *res judicata* if the causative acts are similarly barred)."). The continuation of previously alleged facts is insufficient to overcome the *res judicata* bar. *See Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1092 (Del. 2006).

Here, Appellants allege nonpayment of interest due to the inclusion of excessive fees in the Net Loan Rate formula. That is a continuing harm for which RBC could have pursued declaratory or other relief in the Chancery Lawsuit to resolve the issue with respect to past, present, and future interest payments.

RBC's assertion that, at the time of the dismissal of the Chancery Lawsuit, it "lacked the necessary information and analysis to even realize that Appellees were wrongfully withholding interest due to RBC" (Op. Br. at 32), is belied by Appellants' other assertions. Specifically, RBC asserts that none of the other 27 student loan trusts "ever" reported 3 or more consecutive periods with 0% interest rates since January 2010, only 1 other trust had a single occurrence of a two-month consecutive 0% interest rate since 2009, and that from 2007 onward the Trust experienced an increase in active loan repayments. (*Id.* at 6). Based on RBC's own assertions, it had the relevant facts regarding nonpayment of interest well before dismissal of the Chancery Lawsuit.

Opposing dismissal of their claim for interest after March 2011, Appellants misplace reliance upon two cases. First, *Dover Historical Soc'y* simply held that

res judicata was inapplicable to an application that "rested ***entirely*** upon facts that did not arise until after the first application had been denied" and such facts "give rise to a ***quite different legal theory***." 902 A.2d at 1092. Here, Appellants rely upon facts going back to March 2010 when the Trust and Issuer ceased making interest payments. Those facts predate the filing and dismissal of the Chancery Lawsuit. Moreover, Appellants also assert the ***exact same*** legal theory (breach of contract) and seek the ***exact same*** remedy (payment of interest).

Second, Appellants rely upon this Court's holding in *LaPoint* that *res judicata* was inapplicable where "the first time that the [plaintiffs] pled their indemnification claim was *after* the Court of Chancery decided [defendant] breached the Merger Agreement and [defendant] wrongfully refused the demand for indemnification. The indemnification claim was not brought, then dropped, from an earlier action." 970 A.2d at 195 (emphasis in original). Conversely, in this case, RBC brought a prior breach of contract claim to recover unpaid interest due to allegedly excessive fees and then suffered a ***dismissal with prejudice***.

"Determining whether two claims arise from the same transaction requires pragmatic consideration, with the fact finder giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.* at 193 (internal

quotations omitted). The Superior Court correctly recognized that the Amended Complaint involved a continuation of many of the same facts, the same legal claim and theory, the same underlying contract, and the same motivation. Such claims constituted a convenient trial unit and litigating such claims together is consistent with reasonable expectations. Indeed, in the Chancery Lawsuit, ***RBC pled that the allegedly excessive fees were ongoing***. (Chancery Compl. ¶¶ 1, 60-73: A36-37, 51-53).

If RBC were correct, it could file a claim for interest due to alleged excessive administration fees in January, lose that litigation, refile another claim for interest due to alleged excessive administration fees in February, lose that litigation, and refile another claim for interest due to alleged excessive administration fees in March, lose that litigation, etc. Certainly, that cannot be the law. In sum, Appellants are either asserting claims that were, or could have been, asserted in the Chancery Lawsuit. The Superior Court correctly held that *res judicata* barred the breach of contract claim in the Amended Complaint.

II. THE SUPERIOR COURT PROPERLY DISMISSED THE AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM

A. Question Presented

Did the Superior Court properly dismiss the Amended Complaint where (i) the documents upon which Appellants rely contradict their deficient allegations and (ii) Appellants failed to allege compliance with the applicable no-action clause? (A474-505, A627-652, A678-749).

B. Standard and Scope of Review

This Court reviews *de novo* a trial court's decision on a motion to dismiss under Rule 12(b)(6) to "determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009).

The "governing pleading standard in Delaware to survive a motion to dismiss is ***reasonable*** 'conceivability.'" *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 537 (Del. 2011) (emphasis added). Conclusory allegations are insufficient, and the pleading of specific factual allegations making out a cause of action is required. *See Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011) ("We decline ... to accept conclusory allegations unsupported by specific facts ...."); *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010) ("We do not ... blindly accept conclusory allegations unsupported by specific facts ...."); *In re Gen. Motors (Hughes)*

S'holder Litig., 897 A.2d 162, 168 (Del. 2006) ("A trial court is not ... required to accept as true conclusory allegations without specific supporting factual allegations.") (internal citation omitted).[5]

RBC states that Appellees' "required extremely particularized allegations and 'source documents' ... so that they could test the truth of the Amended Complaint's allegations." (Op. Br. at 12). RBC ignores that Appellees sought the "source documents" because Appellees knew that RBC was manipulating data to allege that interest was due. RBC also ignores that a trial court can dismiss a complaint based on allegations in a complaint that are inconsistent with the "source documents" upon which a plaintiff relies. "[A] claim may be dismissed ***if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law*** ...." *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) (emphasis added); *see also In re Wheelabrator Techs, Inc. S'holders Litig.*, 1992 WL 212595, at *3 (Del. Ch. Sept. 1, 1992) ("[T]he Court is hardly bound to accept as true a demonstrable mischaracterization and the erroneous allegations that flow from it"). Where the allegations of a complaint

[5] In *Central Mortgage*, this Court held that, "until this Court decides otherwise ..., the governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'" 27 A.3d at 537. It makes sense to adopt the "plausibility" standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which is consistent generally with the Delaware approach. *See Winshall v. Viacom Int'l, Inc.*, 55 A.3d 629, 623 n.23 (Del. Ch. 2011) ("To this mind, if something is conceivable, it is plausible. If something is implausible, it is inconceivable."). In any event, the Amended Complaint fails to survive Delaware's pleading standard of "reasonable conceivability."

mischaracterize a document relied upon in the complaint, the document controls and a court should not blindly accept as true the allegations in the complaint. *See Transdigm Inc. v. Alcoa Global Fasteners, Inc.*, 2013 WL 2326881, at *4 (Del. Ch. May 29, 2013) ("[A] complaint may, despite allegations to the contrary, be dismissed ***where the unambiguous language of documents upon which the claims are based contradict the complaint's allegations***") (emphasis added)). Here, the Superior Court properly applied the legal standard.

C. Merits of the Argument

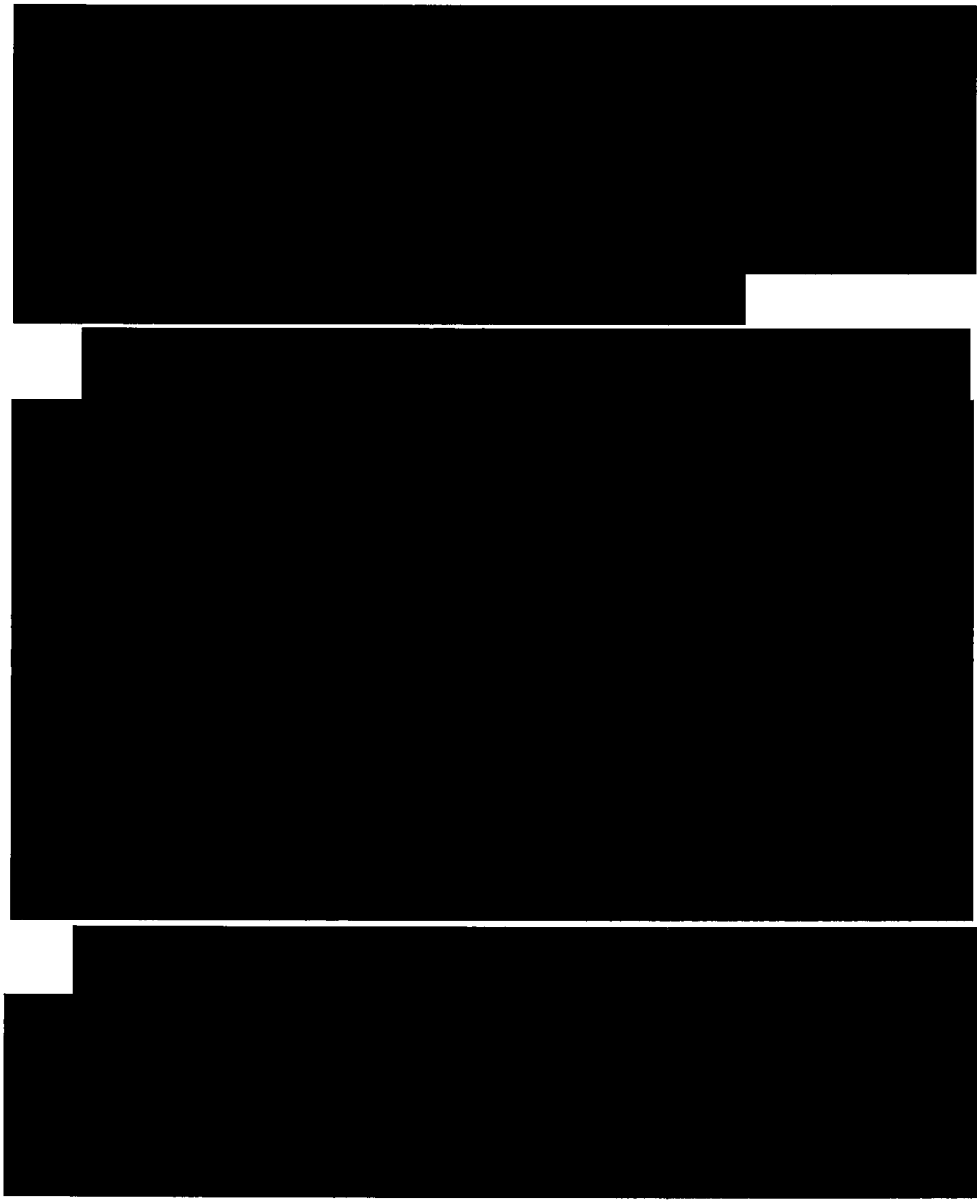
1. The Documents Relied Upon by Appellants In the Amended Complaint Belie their Allegation that Interest Was Due under the Net Loan Rate Formula

Appellants claim that the data supporting their claim that interest is payable was "taken directly from (1) trustee statements provided to RBC by the Trust ... in January 2012 pursuant to RBC's request under Section 7.14 of the Indenture; and (2) quarterly investor reports for 2011 prepared by the Issuer." (Op. Br. at 18) (citing Am. Compl. ¶ 24: A82); (*Id.*) ("RBC alleged precisely which documents provided the data"). To conceal the fact that their assertion interest was due under the Indenture was premised on the exclusion of allegedly excessive fees, Appellants did not attach copies of the trustee statements to the Amended Complaint. Appellees, however, attached copies of those documents in their submissions to the Superior Court. (A636). Like the Superior Court, this Court

should consider the trustee statements, which are integral to, and relied upon in, the Amended Complaint. *See General Motors*, 897 A.2d at 168-69.

Appellants cite two paragraphs in the Amended Complaint as alleging that interest is payable under the Net Loan Rate formula. (Op. Br. at 18) (citing Am. Compl. ¶¶ 28-29: A83-84). In the Amended Complaint, however, Appellants did not make any allegations regarding, *inter alia,* the Special Allowance payments, consolidation loan rebate fees, Note Fees, Servicing Fees, and Administration Fees during the preceding calendar quarter, all of which are used to calculate the Net Receipts. [redacted]

In an Answering Brief submitted to the Superior Court, Appellants acknowledge that the Trust received borrower interest payments totaling $50.45 million. (A567). The trustee statements (collectively, the "Trust Bank Statements") are the "source documents" upon which Appellants "directly" rely. [redacted]



[redacted] Thus, simple arithmetic based on the Trustee Bank Statements establishes that the Amended Complaint was simply another attempt (a covert one) to end run the no-action clause by ignoring fees that Appellants deem excessive.

Appellants argue that, although Appellees may dispute RBC's calculations and seek to review the evidence that forms the basis for the calculation, "RBC's allegations must be assumed to be true at this stage of the proceeding." (Op. Br. at 16). This Court, however, is not required to (and should not) blindly accept as true allegations that are inconsistent with the Trustee Bank Statements upon which Appellants admit the Amended Complaint is based. [redacted] The Trustee Bank Statements govern notwithstanding RBC's conflicting allegations. *See Malpiede*, 780 A.2d at 1083; *Wheelabrator Techs*, 1992 WL 212595, at *3; *Transdigm Inc.*, 2013 WL 2326881, at *4. Thus, it is not "reasonably conceivable" that RBC is owed any interest ***unless*** fees are excluded from the Note Loan Rate calculation as excessive — and any such breach based on excessive fees is barred by the no-action clause.

[redacted]

Appellants do not allege that the Trust failed to pay any interest that USEL IV determined was payable based on Net Loan Rate calculations or that other Trust beneficiaries received interest payments that were withheld from RBC. (Op. Br., Ex. A at 4) ("The [Net Loan Rate] formulas application is not disputed."). Appellants (again) allege a claim premised upon interest that is due only ***if*** the Indenture was breached by the payment of excessive fees. Thus, the interest payment exception in Section 6.09 of the Indenture is inapplicable. Appellants' claim was dismissed because it is governed by the no-action clause in Section 6.08 of the Indenture (not the Section 6.09 payment exception), and this Court should affirm dismissal of the Amended Complaint. *See RBC Capital Markets*, 2011 WL 6152282, at *1; *see also RJ Capital, S.A. v. Lexington Capital Funding III, Ltd.*, 2011 WL 3251554, at *7 (S.D.N.Y. July 28, 2011) (holding that a no-action clause barred suit alleging misapplication of an indenture's priority-of-payment provisions); *Bank of New York v. Battery Park City Auth.*, 675 N.Y.S.2d 860, 860 (N.Y. App. Div. 1998) ("[E]xpress authorization of actions for unpaid interest" did not apply because plaintiffs "were not seeking to recover past due interest as such, but rather the higher interest they could have expected to receive were it not for [an] allegedly wrongful redemption.").

Appellants argue their "claim is very simple, pay me the money that's due. It doesn't matter if there were monies that were diverted to fees." (June 20 Tr. at

50:2-5: A727). The fees do matter, and Appellants know it. They are a necessary part of the Net Loan Rate formula. Appellants concede that their claims for unpaid interest are "***highly dependent on what fees are taken out.***" (*Id.* at 46:21-47:15: A723-724). [redacted]

If Appellants can end run the no-action clause by changing their focus on a calendar year (from 2009 to 2011), the amount of fees excluded from the Net Loan Rate calculation [redacted] and the court in which they file their complaint (from the Court of Chancery to the Superior Court), then the no-action clause is meaningless. If avoiding the phrase "excessive fees" – while subtracting those fees from the Net Loan Rate calculation — makes the Amended Complaint different than the Chancery Lawsuit, then the no-action clause and the dismissal with prejudice of the Chancery Lawsuit are meaningless.[7]

[7] Appellants seek damages for breaches of the Indenture "by failing in each interest period since May 2010 to pay interest owed to RBC in connection with the terms of the indenture and Supplemental Indentures." (Am Compl. ¶ 83: A99). Appellants' allegations in the Amended Complaint generally concern only the second quarter of 2011 through the second quarter of 2012. With respect to prior periods, Appellants allege only that, "[w]hile RBC has not calculated the exact amount of interest due from May 2010 to the first quarter 2011, the amounts of interest owed would be similar for that prior period." (*Id.* ¶ 9: A77-78). This allegation is facially deficient. Thus, Appellants also fail to state a claim for interest allegedly payable for the period from May 2010 through the first quarter 2011 and from the third quarter of 2012 to present.

(Op. Br., Ex. A at 2) ("[T]he complaint's subtext undeniably is RBC's belief that Defendants chose to pay too much in fees.").

2. Appellants Failed to Allege Compliance with the Applicable "No-Action" Clause

Appellants must allege facts demonstrating their compliance with the no-action clause. *See Norte & Co. v. Manor Healthcare Corp.*, 1985 WL 44684, at *6 (Del. Ch. Nov. 21, 1985) ("[N]o-action provision has been held to require that plaintiffs, plead ... compliance with the requirements and performance of the conditions defined in the indenture as conditions precedent to the maintenance of [the] action.") (internal quotations and citation omitted); *see also Greene v. New York United Hotels, Inc.*, 260 N.Y.S. 405, 407 (N.Y. Sup. Ct. 1932), *sum. aff'd*, 261 N.Y. 698 (N.Y. 1933) ("[C]omplaint contains no allegations showing compliance with [the no-action] provisions of the trust agreement"); *Friedman v. Chesapeake & Ohio Railway Co.*, 261 F. Supp. 728, 730 (S.D.N.Y. 1966) (providing that, when a plaintiff invokes an indenture to validate its claim, the plaintiff must plead compliance with the indenture's no-action clause). RBC has failed to allege compliance with the Section 6.08 no-action clause, and this Court should affirm dismissal of the Amended Complaint. *See Bank of New York v. Battery Park City Auth.*, 251 A.D.2d 211 (N.Y. Sup. Ct. 1st Dep't 1998); *RBC Capital Markets*, 2011 WL 6152282, at *2.

CONCLUSION

For all of the foregoing reasons, this Court should affirm dismissal of the Amended Complaint.

Dated: September 16, 2013

Respectfully submitted,

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