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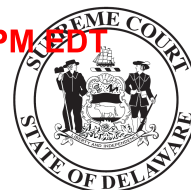

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RBC CAPITAL MARKETS, LLC, a Minnesota Limited Liability Company,	§	
	§	
Plaintiff Below/Appellant,	§	No. 343, 2013
	§	
and THE DEPOSITORY TRUST COMPANY and CEDE & CO.,	§	Court Below-Superior Court of the State of Delaware, in and for
Nominal Plaintiffs Below/ Appellants,	§	New Castle County C.A. No. N12C-02-015FSS CCLD
	§	
v.	§	
	§	
EDUCATION LOAN TRUST IV, a Delaware Statutory Trust; and U.S. EDUCATION LOAN TRUST IV, LLC, a Delaware Limited Liability Corporation,	§	**PUBLICLY REDACTED DOCUMENT FILED OCTOBER 1, 2013**
	§	
Defendants Below/Appellees.	§	

ANSWERING BRIEF ON APPEAL OF APPELLEE
<u>U.S. EDUCATION LOAN TRUST IV, LLC</u>

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Dated: September 16, 2013

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NATURE OF THE PROCEEDINGS

After receiving a dismissal with prejudice of its claims under the same provision of the same Indenture before the Court of Chancery, RBC Capital Markets, LLC ("RBC") filed a complaint with the Delaware Superior Court ("Superior Court") on February 1, 2012 ("Superior Complaint") initiating the underlying action for this appeal. The Superior Complaint contained claims for breach of contract and the implied covenant of good faith and fair dealing. Appellee U.S. Education Loan Trust IV, LLC ("USELT") and Appellee Education Loan Trust IV ("Trust"), defendants in both the Court of Chancery and Superior Court actions, each filed a motion to dismiss the Superior Complaint. At oral argument on these motions, the Superior Court identified deficiencies in RBC's Superior Complaint and permitted RBC to file an amended pleading.

On August 20, 2012, after substituting in the proper nominal plaintiffs, RBC filed an amended complaint stating a single claim for breach of contract against USELT and the Trust ("Amended Complaint"). USELT and the Trust each again moved to dismiss the Amended Complaint. On May 31, 2013, the Superior Court issued an opinion and order dismissing the Amended Complaint on the grounds that it was barred by *res judicata* and failed to state a claim pursuant to Superior Court Civil Rule 12(b)(6) ("Superior Opinion" attached as Exhibit A to Opening Brief on Appeal of Appellants ("Appeal Brief")).

SUMMARY OF ARGUMENTS

First, DENIED. The Superior Court did not improperly apply any principles of law in dismissing RBC's Amended Complaint. The Superior Court applied the appropriate standard on a motion to dismiss. Pursuant to the Indenture's no-action clause, RBC has very limited circumstances under which it can state a breach of the Indenture; RBC can only pursue a claim for interest or principal currently due and owing. While RBC's Amended Complaint is filled with conclusory allegations that RBC is owed unpaid interest, RBC is still obligated to support these conclusions with well-pleaded factual allegations. The facts asserted by RBC do not support a claim for unpaid interest under the Indenture's specific Net Loan Rate formula as required to prevent the application of the no-action clause.

Second, DENIED. The Superior Court correctly applied the doctrine of *res judicata* in dismissing RBC's Amended Complaint. The Chancery Opinion was a final adjudication on the merits of RBC's contractual obligation to assert a claim only under limited circumstances. The Amended Complaint asserted claims raised in the Chancery Complaint and all of RBC's claims could have and should have been raised in that forum. Further, the continuing breach concept does not revive RBC's claim as no new facts have been raised that support such a claim.

The Superior Opinion dismissing the Amended Complaint should be affirmed.

STATEMENT OF FACTS

A. The ARS and the Indenture

RBC is purportedly a beneficial owner of certain auction rate securities ("ARS") backed by education loans issued by USELT. *See* Am. Compl. ¶¶ 1, 8, 9, A74-75, 77-78. RBC was the broker-dealer and market agent for the ARS. *See* RBC's Verified Complaint in the Court of Chancery ("Chancery Complaint") ¶ 3, A46. The Trust owns the student loans that serve as collateral for the ARS, and whose performance influences the rate of interest for the ARS. *See* Am. Compl. ¶¶ 7, 9, A77-78. The ARS allegedly owned by RBC are governed by an Indenture of Trust dated March 1, 2006 ("Indenture"), a supplemental indenture dated March 1, 2006 ("First Supplemental Indenture"), and another supplemental indenture dated September 1, 2006 ("Second Supplemental Indenture" and, together with First Supplemental Indenture, "Supplemental Indentures") that set forth the beneficial owners' rights and obligations. *See id.* ¶¶ 9-10, A77-78. The Indenture documents are exhibits A, B and C to the Amended Complaint. *See id.*, A101-441.

The interest rate payable to holders of ARS was to be set in periodic Dutch auctions for which RBC acted as broker-dealer (*see id.* ¶ 11, A78), but "[b]eginning in February 2008, . . . , the auctions for ARS issued by [USELT] began to fail" and have continued to fail "to the present day." *Id.* ¶ 12, A78. In the event of a failed auction, the interest rate was to be the lesser of the Maximum Rate

or the Net Loan Rate. *See id.* ¶ 13, A78-79. As set forth in RBC's Appeal Brief, the interest rate applicable to RBC's claim is set by the Net Loan Rate, which is defined as follows:

> a per annum rate equal to (a) the sum of all interest payments and Special Allowance Payments made with respect to Financed FFELP Loans during the preceding calendar quarter, less (b) all consolidation loan rebate fees, Note Fees, Servicing Fees and Administration Fees during the preceding calendar quarter, divided by (c) the average daily principal balance of Financed FFELP Loans for the preceding calendar quarter.

Id. ¶ 15, A79 (quoting Supplemental Indentures, Schedule A, Section 1.01, A253, 374). There is no market mechanism to determine the Net Loan Rate. The Net Loan Rate is defined by the Indenture and determined by student loan performance (and the borrowers paying interest or not). The Net Loan Rate only sets the amount of interest currently due and owing for any quarter; any difference between the Net Loan Rate and the Maximum Rate is deferred and carried over for later payment when cash is available in the Collection Fund. *See* Indenture at § 4.06, A154.

B. RBC Brings Suit in the Court of Chancery, and its Case Is Dismissed with Prejudice

For years prior to the filing of the Chancery Action, RBC complained that USELT was miscalculating the interest due under the Indenture. On October 30, 2009, RBC (through its very same litigation counsel in the Chancery and Superior

proceedings) wrote to USELT and argued that the Net Loan Rate was incorrect because it was "significantly below prevailing market rates for similar types of investments." Exhibit 1 to USELT Reply Brief in Support of Motion to Dismiss Superior Complaint, B140-43. The letter threatened to sue USELT. On May 27, 2010, RBC reiterated that the terms of the Indenture had been breached by calculation errors resulting in an "artificially low [Net Loan Rate]." Exhibit 2 to USELT Reply Brief in Support of Motion to Dismiss Superior Complaint, B144-47. When RBC claimed it was owed additional interest pursuant to the Net Loan Rate, the issue was properly considered by the Trust (which is obliged to enforce certain rights of ARS owners under the Indenture), and which concluded that no additional interest was owed. Chancery Complaint ¶ 59, A51. RBC nonetheless initiated a lawsuit in the Court of Chancery on March 18, 2011 ("Chancery Action") by filing a complaint for breach of the Indenture, unjust enrichment and an accounting ("Chancery Complaint").

RBC's primary theory in the Chancery Action was that the Net Loan Rate was artificially depressed due to allegedly excessive Administrative Fees, which RBC alleged were paid out of the Trust in violation of caps on such fees set forth in the Supplemental Indentures. *See* Chancery Complaint ¶¶ 31-42, A45-47. In this regard, RBC alleged that "because the Operating Fees and Administrative Fees exceeded the specific limitations [in the Indenture], it resulted in an inaccurate Net

Loan Rate…" (*id.* ¶ 45, A48), and that "[t]he 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 Indenture." *Id.* ¶ 46, A48. In addition, RBC advanced a second theory, and alleged that "the calculation of the Net Loan Rate is incorrect for other reasons in addition to the payment of excessive fees[.]" *See id.* ¶ 47, A48. RBC further alleged, "[f]or example, the Net Loan Rate calculations for the ARS are significantly below prevailing market rates for similar types of investments." *Id.* RBC argued to the Chancellor that this "market rate" theory should permit it to avoid dismissal under the Indenture's no-action clause. *See* USELT's Reply Brief in Support of its Motion to Dismiss Superior Complaint 3-4, B122-23.

On December 6, 2011, the Court of Chancery dismissed RBC's claims pursuant to the no-action clause found at Section 6.08 in the Indenture. *See* Court of Chancery Memorandum Opinion dated Dec. 6, 2011 ("Chancery Opinion"), A68-73. The Court reasoned the "purposes of a no-action clause are to prevent individual holders of notes from bringing unworthy or unpopular actions (i.e., actions, which are not approved by the trustee or a majority of the noteholders) against the issuer or the trust…" *Id.* at 3, A59. It rejected RBC's "attempt[] to avoid the strictures of the no-action clause by seeking to conflate its actual claim of

breach – which is that Education Loan Trust violated the Indenture by causing the Trust to pay out excessive fees – with one of the harms supposedly caused by that breach – which is the interest rate paid on the auction rate notes was depressed…" *Id.* at 2, A58. That is, "[b]ecause the remedy sought by RBC is derivative of proving an independent wrong, rather than a direct violation of the provisions of the Indenture addressing when and what interest is due, RBC must follow the procedures mandated by the no-action clause." *Id.* at 13, A69. "If a predicate to recovery is proving a breach of legal obligations under a trust indenture other than those directly addressing the payment of principal and interest," the Court reasoned, "the proper course of action is to apply the requirements of the no-action clause to those claims." *Id.* at 16, A72

C. RBC Files the Superior Court Complaint, Which Similarly Faces Dismissal

RBC then filed the Superior Complaint, which similarly claimed interest should have been paid pursuant to the Net Loan Rate. The Superior Complaint focused on the theory previously articulated in the Chancery Complaint that based on the performance of other supposedly similar trusts with allegedly similar education loan portfolios, interest should have been paid to ARS holders. RBC's allegations failed to provide the names of these purportedly similar trusts, the terms of the indentures governing the unnamed trusts or any comparison with the

Indenture governing the ARS at issue in this matter. In the Superior Court, RBC carefully avoided mentioning "excessive fees," and instead indicated rather vaguely that "[t]here are serious questions as to what is being done with this money." Superior Complaint ¶ 34, B36. Although the Chancery Complaint was accompanied by a sworn verification by an RBC principal that the allegations were true and correct and although RBC clearly blamed allegedly "excessive fees" for the failure to pay interest, RBC's unsworn Superior Complaint became "agnostic" regarding why interest has not been paid. *See* RBC's Answering Brief In Opposition to Motion to Dismiss 13, B94 ("RBC is agnostic in this Action as to *why* Defendants have failed to pay interest…") (emphasis in original).

USELT and the Trust moved to dismiss the Superior Complaint on the grounds of (1) *res judicata*, (2) for failure to adequately plead a breach of the Indenture, and (3) because RBC is not a registered "holder" of ARS, and therefore lacks standing to bring suit under the Indenture. The Court held oral argument on the motions on June 20, 2012. Although RBC had repeatedly argued to the contrary, at argument RBC's counsel could not confirm its client was a registered "holder" of ARS, and the Court granted RBC leave to amend to attempt to address this deficiency. *See* Transcript of Oral Argument before Superior Court, June 20, 2012 ("Superior Transcript") 52-53, A729-30. The Court expressed doubt that RBC had brought a well-pleaded and appropriately narrow claim under Section

6.09 of the Indenture. In particular, it observed that RBC brought what seemed to be a "repackaged" Section 6.08 claim "under the guise of" Section 6.09 and that RBC was "still really suing over fees." Superior Transcript 48-49, 54-55, A725-26, A731-32. The Court stated its valid concerns – concerns that were not allayed by RBC's counsel – that RBC would seek discovery into alleged excessive fees or mismanagement (*i.e.*, the very claims the Court of Chancery dismissed under the "no-action clause") and then request relief on this basis. *Id.* at 59, 62-63, A736, A739-40.

The Superior Court correctly observed (and RBC's counsel appeared to agree) that, in the context of this Indenture, the Section 6.09 right to sue for unpaid interest is "very limited." *Id.* at 68, A745. The Court opined that RBC's Superior Complaint failed to state a viable Section 6.09 claim. *See id.* at 65, A742 (the Court stating "it seems that their allegations do not support the claim that there is interest that is being or has been withheld and that could be collected. … There are insufficient facts pleaded from which a court could find a cause of action under 6.09."). RBC was granted leave to amend, however, to attempt to demonstrate that, without taking into account any alleged "excessive fees," mismanagement or other breaches of the Indenture, "interest has been earned but not paid … as opposed to interest that should have been earned but the money that would have been returned to us in interest was used for other things." *Id.* at 70-71, A747-48.

D. RBC Files its Amended Complaint, Adding Conclusory Allegations that Interest is Due

RBC filed its Amended Complaint on August 20, 2012. In addition to substituting the proper party, the Amended Complaint contained new allegations regarding the alleged non-payment of interest. Of the three years of interest RBC alleges it was owed from May 2010 through 2012, RBC has provided only the claimed result of its (undisclosed and unsupported) calculations for one year, 2011. The Amended Complaint claims that "RBC has been able to collect information which makes clear the amount of interest that is owed but unpaid." *See* Amended Complaint, ¶ 24, A82. RBC alleged that $920,689 in interest was due to RBC for 2011 on the over $450 million in ARS allegedly owned. *Id.* ¶ 31, A84.

In determining the interest for 2011, RBC claimed it relied on "quarterly investor reports" and trustee statements from which it derived the cash flows into and out of the Trust. *Id.* ¶ 24, A82. RBC asserts that "[a]ccounting for all adjustments required by the Net Loan Rate (i.e., Special Allowance Payments, consolidation loan rebate fees, Note Fees, Servicing Fees and Administration Fees)," it obtained small positive "net receipt" numbers for each quarter of calendar year 2011. *See id.* ¶ 28, A83. The resulting "net receipts" were then "divided by the average daily principal balance of loans for the preceding quarter," which resulted in certain (similarly small) positive "Net Loan Rate" numbers for

each quarter of 2011 – amounting to less than a quarter of one percent. *Id.* ¶ 29, A83-84 (alleging a range of 0.18% to 0.24%).

RBC claims this largely undisclosed analysis resulted in a summary chart showing the interest owed for each series of RBC ARS from the second quarter of 2011 to the second quarter of 2012, which it claims amount to approximately $920,000 for that period. *See id.* ¶ 31, A84. With respect to other time periods covered by the Amended Complaint, RBC claims that, while it "lacks information to calculate the precise interest owed for 2010, the [unspecified] data it does have access to demonstrates there was no material changes to the cash flows of the Trust[.]" *Id.* ¶ 37, A87.

ARGUMENT

I. THE TRIAL COURT APPLIED THE APPROPRIATE PLEADING STANDARD IN DISMISSING RBC'S AMENDED COMPLAINT

A. Question Presented

Has RBC failed to plead a claim for breach of the Indenture by failing to assert well-pleaded factual allegations that would support a claim under Section 6.09 that interest was due and not paid under the Indenture's specific Net Loan Rate formula rather than a claim subject to the no-action clause set forth in Section 6.08? This question was preserved in USELT's Opening Brief in Support of its Motion to Dismiss the Amended Complaint 13, 15-18, 21, A537, A539-43, A545 and USELT's Reply Brief in Support of Its Motion to Dismiss the Amended Complaint 4-13, A661-70.

B. Standard and Scope of Review

The Supreme Court reviews a dismissal pursuant to Superior Court Rule 12(b)(6) *de novo*. In so reviewing, this Court will view "the complaint in the light most favorable to the non-moving party, accepting as true all well-pleaded allegations and drawing reasonable inferences that logically flow from them." *Price v. E.I. DuPont de Nemours*, 26 A.3d 162, 166 (Del. 2011). However this Court will not "accept conclusory allegations unsupported by specific facts or [] draw unreasonable inferences in favor of the non-moving party." *Id.* It is well-

established that "a claim may be dismissed if allegations in the complaint or in the exhibits incorporated in the complaint effectively negate the claim as a matter of law." *In re Gen. Motors (Hughes) Shareholder Litig.*, 897 A.2d 162, 169 (Del. 2006).

In determining whether RBC has failed to state a claim under the Indenture, this Court should consider not just the allegations of the Amended Complaint but also the documents referred to in the pleading. *See id.* When the documents are incorporated into and integral to a plaintiff's claims, then courts will consider them in ruling on a motion to dismiss. *In re Santa Fe Pac. Shareholder Litig.*, 669 A.2d 59, 69 (Del. 1995).

C. <u>Merits</u>

1. **RBC Has Failed to Advance a Well-Pleaded Claim Under Section 6.09 of the Indenture.**

As noted by the Superior Court in the Superior Opinion, "RBC either does not understand its cause of action or this court's jurisdiction." Superior Opinion 19. RBC's Appeal Brief merely reiterates the same misguided argument as set forth before the Superior Court below, and it remains just as unpersuasive as its re-packaged Amended Complaint. Appeal Brief 12-18.

While RBC spends several pages of argument trumpeting the lenient standard under which its one claim for breach of the Indenture should be assessed,

RBC fails to comprehend that the restrictions on its pleading arise not from the standard applied but from the terms of the Indenture by which it is bound. There is no dispute that the Superior Court used the correct standard in determining to dismiss RBC's claim. *See* Superior Opinion 17. RBC questions only how that standard was applied to its pleading. Appeal Brief 12. The Superior Court applied the standard correctly, RBC failed to provide well-pleaded factual allegations to show that interest was due and owing under the Indenture.

The Indenture, like many, restricts the claims that can be asserted by an ARS holder through a no-action clause that provides for a series of preconditions to suit by anyone other than the Trustee. Indenture § 6.08, A192. An ARS holder's direct claims against the Trust are limited to a claim for unpaid interest or principal. Indenture § 6.09, A192-93. Pursuant to the terms of the Indenture, interest is due and owing each quarter if the Net Loan Rate exceeds zero. The Net Loan Rate is determined by a formula that takes specific cash income items received minus cash expenses and divides by the outstanding balance of the loans in the Trust to determine the interest percentage applicable to the following quarter. Supplemental Indentures, Schedule A, Section 1.01, A253, 374. When cash expenses exceed cash income, the Net Loan Rate instead of being a negative number is rounded to zero.

RBC's path to a successful Section 6.09 claim lies in asserting that, pursuant

to the Net Loan Rate formula, the Trust's income exceeded its expenses (without any adjustments) resulting in a positive Net Loan Rate, not because that is the only way USELT and the Trust have notice of RBC's claim, but rather because it is the only claim that RBC can pursue without satisfying the preconditions to suit in Section 6.08.

a. RBC's Net Loan Rate Calculations Are Not Well Pleaded and Are Contradicted by the Documents on Which RBC Purports to Rely

RBC erroneously concludes in its Appeal Brief that the lenient pleading standard on a motion to dismiss relieves it from its obligation to allege the amount of interest due under the Indenture and how that amount was calculated – and without "adjustments" that doomed the Chancery Complaint. However, as two different courts have made abundantly clear, RBC needs to show that "there has been a 'default in the due and punctual payment' of interest on its [ARS] by pointing solely to the provisions of the Indenture and Supplemental Indentures addressing what and under what formula interest was to be paid," in order to state a claim under Section 6.09. Chancery Opinion 9, A65, Superior Opinion 9.

Instead of following these clear contractual guidelines for stating a Section 6.09 claim, RBC has chosen to litter its Amended Complaint with conclusory allegations that the Trust has received a positive cash flow, therefore interest must be due. Amended Complaint ¶¶ 34, 38, 46, 48, 56, 79, A86-87, A90-91, A93,

A98. None of these allegations are sufficient to state a claim that under the Net Loan Rate formula interest is currently due and owing. These allegations all simply assume that there has been a positive net cash flow, without pleading facts to support that conclusion.

The only allegations that directly address the Net Loan Rate formula and the calculation of interest similarly do not support a claim that interest is currently due and owing. Amended Complaint ¶¶ 28-32, A83-85. The trustee statements and rating agency reports on which RBC purported to rely (*id.* ¶ 24, A82) do not support the conclusions that RBC reached in the Amended Complaint.

(RBC made this claim in its briefing; RBC's Amended

Complaint did not allege the amount of its expense calculation). *See* USELT Reply Brief in Support of Motion to Dismiss Amended Complaint 10-13, A667-70.[1] This suggests that, as it attempted to litigate in the Court of Chancery, RBC has capped the Trust's actual expenses.

RBC has never addressed or challenged this analysis. RBC's only defense to its intentionally incomplete and demonstrably inaccurate claimed Net Loan Rate result is that this Court must assume it is true. But 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." *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 139 (Del. Ch. 2003). Based on the documents on which RBC purports to rely, RBC cannot show that the income items from the Net Loan Rate formula exceed the expense items and therefore, that the Net Loan Rate is positive.[2]

Additionally RBC's allegations in connection with the Net Loan Rate calculation are incomplete. RBC chose not to include *any information whatsoever* regarding the income or expense items used in its calculations. RBC's Amended

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[1] The trustee statements, rating agency reports and chart referenced in USELT's Reply Brief in Support of the Motion to Dismiss the Amended Complaint are attached to the Appendix to the Answering Brief on Appeal of Appellee Education Loan Trust IV at B88-304.

[2] The Superior Court concluded the Amended Complaint was deficient on its face, and accordingly it did not discuss the fact that RBC's allegations are contradicted by the alleged source documents upon which RBC claims it relied. This Court may, of course, affirm the result below based on this alternative argument, which was fairly raised below. *See Central Laborers' Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012).

Complaint fails to include *any* specific information for *any* time period regarding *any* of the multiple inputs used to determine whether the numerator in the Net Loan Rate formula is a positive or negative number. The only specific number RBC provides is its final results, *i.e.*, the small (but positive) "net receipts" ranging from about $870,000 to $1,200,000, which reflect the alleged conclusion of RBC's analysis but fail to permit any meaningful examination – or provide any support that RBC's claim should not be barred by the Indenture's broad no-action clause. Amended Complaint ¶ 28, A83. RBC also states in its Amended Complaint that "it has not calculated the precise amount of interest due" and it "cannot calculate the precise amount of interest owed," undermining its own argument that it has performed these calculations. Amended Complaint ¶¶ 25, 33, A82, A85.

The deficient allegations regarding the Net Loan Rate formula are the only allegations that could state a claim that interest is due and owing under the terms of the Indenture. The remaining allegations of the Amended Complaint simply do not address the contractual obligations of the parties under the Indenture. RBC's allegations regarding the performance of other trusts do not lead to a reasonable inference that the Trust's cash interest income exceeded its cash expenses for the time period at issue in the Amended Complaint. Amended Complaint ¶¶ 40-48, A88-91. Further, RBC's allegations regarding the fact that the Trust is collecting interest from half of the student loans in the Trust (aside from ignoring the obvious

implication that the same amount of student loans are not currently paying interest into the Trust) do not lead to the reasonable inference that the cash income collected exceeded the cash expenses of the Trust for that same period. Amended Complaint ¶¶ 51-56, A91-93. As the Superior Court correctly concluded in its Opinion, these facts may indicate that the Trust is underperforming, but they do not state a claim that interest is due under the Indenture. Superior Opinion 17-18.

RBC has not supported its conclusory allegation that interest is due and owing with well-pleaded factual allegations that would support such a conclusion.

b. How RBC Calculated the Net Loan Rate Numbers Set Forth in the Amended Complaint Determines Whether it Has Stated a Claim Under Section 6.09

RBC maintains in its Appeal Brief that it was not required to plead how it determined that interest was due and owing under the Indenture in order to state a claim for breach. Appeal Brief 16-18. However, this information is vital to determine whether RBC has stated a claim under Section 6.09 or whether the claim is based on adjustments for alleged overpaid fees or other misconduct that can only properly be raised after satisfying the preconditions to suit in Section 6.08. RBC's deliberately vague pleading and its cynical, strategic decision not to present the Court below with purported source documents it knew undermined its claims should not be allowed to negate the result compelled by the Indenture's no-action clause.

As set forth above, a Section 6.09 claim requires well-pleaded factual allegations that there is interest currently due and owing under the Net Loan Rate formula. The Amended Complaint nowhere demonstrates that RBC used the actual fees and expenses incurred, without any adjustments or other decisions regarding what fees to include.[3] RBC acknowledges that various types of expenses must be used in calculating the Net Loan Rate formula, but fails to provide any of the numbers it used in the Amended Complaint.

Instead of simply stating that it properly "subtracted" part (b) of the Net Loan Rate formula (*i.e.*, the sum of the specified expenses) from part (a) of the formula (*i.e.*, the sum of the specified income items), RBC's Amended Complaint curiously characterizes its work as *"[a]ccounting for all adjustments* required by the Net Loan Rate formula…" Amended Complaint ¶ 28, A83 (emphasis added). This suggests RBC adjusted certain of its hand-picked data in an (undisclosed) manner that it may contend is justified under the Indenture, such as, for example, capping Administrative Fees. As the numbers supplied by RBC in the briefing below do not agree with the trustee statements setting forth the expenses, the only reasonable inference is that RBC's Net Loan Rate calculations have adjusted the expenses actually incurred by the Trust. An impermissible reliance on overpaid

[3] Paragraph 73 alleges in a conclusory fashion 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." This does not reveal anything, however, about RBC's actual methodology in this case.

fees also is consistent with RBC's allegation that "[d]espite over $1 billion of collateral student loans paying interest into the Trust every month, *the Trust continues to collect that money but not properly apply those funds* to the make interest payments to ARS holders as interest as required by contract." *Id.* at ¶ 38, A87 (emphasis added). Thus, while RBC has cynically avoided alleging outright that its claim is based on payment of excessive fees, the Amended Complaint is consistent with RBC's prior reliance upon a showing that funds have been misapplied – *i.e.*, the paradigmatic Section 6.08 claim.

As the Court of Chancery recognized over two years ago, RBC is "attempting to avoid the strictures of the no-action clause by seeking to conflate its actual claim of breach – which is that Education Loan Trust violated the Indenture by causing the Trust to pay out excessive fees – with one of the harms supposedly caused by that breach – which is that the interest rate paid on the auction rate notes was depressed[.]" Chancery Opinion 2, A58. RBC's calculations of the Net Loan Rate thus depend on manipulations to expense items that, although RBC may erroneously believe are justified under other terms of the Indenture, it may not pursue due to the no-action clause. Therefore, the Superior Court correctly concluded that RBC has failed to state a claim pursuant to Section 6.09 of the Indenture. Superior Opinion 17-18.

II. RBC'S AMENDED COMPLAINT IS WHOLLY BARRED BY THE DOCTRINE OF RES JUDICATA

A. Question Presented

Is RBC's Amended Complaint barred by the doctrine of *res judicata* when it states the same claim, under the same provision of the Indenture against the same parties based on conditions that were or should have been known at the time of the Chancery Action? This question was preserved in USELT's Opening Brief in Support of its Motion to Dismiss the Amended Complaint 13, 19-23, A537, A543-47 and USELT's Reply Brief in Support of Its Motion to Dismiss the Amended Complaint 14-17, A671-74.

B. Standard and Scope of Review

The Supreme Court reviews determinations of the application of the doctrine of *res judicata*, *de novo*. *Smith v. Guest*, 16 A.3d 920, 933 (Del. 2011). *Res judicata* applies when: 1) the prior court had jurisdiction over the dispute; 2) the prior dispute involved the same parties; 3) the cause of action is the same as previously decided by the court; 4) the claimant party received an adverse decision in the prior suit; and, 5) the prior action has been finally adjudicated. *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191-92 (Del. 2009). It is beyond dispute that "[t]he procedural 'bar of *res judicata* extends to all issues which might have been raised and decided in the first suit as well as to all issues that actually

were decided.'" *LaPoint*, 970 A.2d at 191-92 (quoting *Cassidy v. Cassidy*, 689 A.2d 1182, 1185 (Del. 1997)); *see also* 47 *Am. Jur.* 2d Judgments § 476 ("Effect of splitting cause of action") (2012 Supp.) (reasoning "*res judicata* bars a second suit when the matter could have been decided in the first suit."). Contracts (such as the Indenture here) constitute a single transaction for *res judicata* purposes. *See, e.g.*, 47 *Am. Jur.* 2d Judgments § 477 (Actions on Contract) (2012 Supp.) (reasoning "a contract is typically considered to be a 'transaction' so that all claims arising from the breach of the contract must be brought in the original action, as well as all defenses. Claims and defenses not asserted in the original action are subject to the bar of claim preclusion."). If "[a] plaintiff splits his claim and saves a theory of recovery for another forum, he assumes the risk that he will not be able to present it in the other forum because the first adjudication will be *res judicata* to all subsequent litigation." *Maldonado v. Flynn*, 417 A.2d 378, 384 (Del. Ch. 1980).

In making its determination on the merits of this appeal, the Court can consider the pleadings and transcripts from the Chancery Action. *See Lagrone v. American Mortell Corp.,* 2008 Del. Super. LEXIS 321, at *13 (Del. Super. Ct. Sept. 4, 2008) ("[P]leadings and transcripts are part of the official court record and are subject to judicial notice. As such, they may properly be considered on a motion to dismiss.").

C. Merits

1. The Amended Complaint Raises the Same Claim as the Chancery Action for Purposes of *Res Judicata*

RBC argues that the facts raised in the Amended Complaint are "fundamentally different" from those raised in the Chancery Complaint and could not have been brought previously, and therefore the Chancery Opinion has no preclusive effect on the claim raised in the Amended Complaint. Appeal Brief 22.

A claim does not need to arise from the exact same facts to be deemed the "same claim" under the doctrine of *res judicata*; rather, *res judicata* will bar later claims if they "arise from the same transaction that formed the basis of the prior adjudication." *Maldonado*, 417 A.2dat 381 (citing *Ezzes v. Aackerman*, 234 A.2d 444 (Del. 1967)). In determining claim preclusion "a contract is considered to be a single transaction." *LaPoint*, 970 A.2d at 194.

RBC does not and cannot debate that the Amended Complaint raises a claim arising from precisely the same contract, the Indenture, as in the Chancery Complaint. In fact, RBC asserted the same exact provision of the Indenture as the basis for its claim in both complaints, though both courts determined that RBC failed to state a claim under Section 6.09. RBC addresses this fundamental principle that contract claims "arise from the same transaction" by citing the wholly inapplicable decision in *Chambers Belt Co. v. Tandy Brands Accessories,*

Inc., 2012 Del. Super. LEXIS 361 (Del. Super. Jul. 31, 2012).[4] In *Chambers Belt*, the plaintiff filed a breach of contract action in Superior Court. The defendant filed a complaint in the Court of Chancery seeking to have the claim raised in Superior Court referred to arbitration. *Id.* at *3. The Superior Court declined to give preclusive effect to *factual determinations* made in deciding the arbitrability of plaintiff's Superior Court claim when deciding that claim on the merits. *Id.* at *9-10. As the Superior Court's decision is based on claim preclusion and not fact preclusion, this case has no bearing on the Superior Opinion.

Admittedly, there is an exception to the general principle that claims arising from a single contract will not be considered as arising from a single transaction; if the new claims were triggered after the initial action was filed, then the new claims do not arise from the same transaction. *LaPoint*, 970 A.2d at 194.

The vast majority of RBC's allegations arose before the filing of the Chancery Action in 2011. As alleged in the Superior Complaint, the Net Loan Rate has remained at zero for the applicable interest periods since May 2010. Amended Complaint ¶¶ 1, 16, A74-75, A80. So for almost ten months preceding the filing of the Chancery Complaint the Net Loan Rate was zero. Further, while

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[4] RBC also cites *Grunstein v. Silva*, 2011 Del. Ch. LEXIS 12, at *26-27 (Del. Ch. Jan. 31, 2011), which held the individual plaintiff should not have been considered "in privity," for *res judicata* purposes, with an entity that previously sued, where the plaintiff was alleged to have a minority ownership interest in that entity. The *Grunstein* Court expressly recognized that it was "not confronted with" the circumstances here – *i.e.*, "a situation in which a plaintiff has filed a second action against defendants they previously sued regarding the same transaction." *Id.* at *24.

RBC cites to some recent reports from USELT (*id.* at ¶52, A92) and statements from Mr. Howard, president of USELT (*id.* at ¶¶59-64, A94-95), these allegations do not give rise to any new or different claims than those previously asserted. Outside of the Net Loan Rate calculations, the main thrust of the Amended Complaint is that in reviewing other trusts' interest rates and market conditions, RBC believes that Defendants have underpaid interest on the ARS. This same complaint and purported justification for a Section 6.09 claim was raised in the Chancery Complaint. Chancery Complaint ¶ 47, A48 ("RBC believes the calculation of the Net Loan Rate is incorrect for other reasons in addition to the payment of excessive fees. For example, the Net Loan Rate calculations for ARS are significantly below prevailing market rates for similar types of investments."). Further, the main allegation of the Chancery Complaint was that the payment of improper and excessive fees to USELT caused the underpayment of interest on the ARS (Chancery Complaint ¶¶ 44-46, A13), which is echoed in the Amended Complaint's allegation that USELT and the Trust are not properly applying funds to make interest payments. Amended Complaint ¶ 38, A87.

RBC does assert facts in the Amended Complaint related to the Net Loan Rate calculation that were not raised in the Chancery Complaint. However, these calculations only bolster USELT's argument that this claim could have and should have been made in the Court of Chancery. When the facts on which the plaintiff

relies were "known or capable of being known" as of the time of the prior action, the later action is barred. *Aveta, Inc. v. Bengoa*, 986 A.2d 166, 185 (Del. Ch. 2009). RBC in its own Amended Complaint states that it derived the Net Loan Rate calculation from trustee statements that it requested and received from the Trustee "pursuant to Section 7.14 of the Indenture of Trust" in January of 2012. Amended Complaint ¶ 24, A82. RBC could have requested the 2010 trustee statements in January 2011 before bringing the Chancery Action, but failed to do so. Those statements could have been used as evidence of purported overpaid fees or allegedly provided the basis for Net Loan Rate calculations, but RBC failed to investigate its own claims. RBC was asserting a claim for unpaid interest in the Chancery Action pursuant to Section 6.09 of the Indenture. At the time the Chancery Complaint was filed, the Trust had been paying zero interest for almost a year and RBC had been asserting that interest was underpaid since 2009. Exhibits 1 and 2 to USELT Reply Brief in Support of Motion to Dismiss Superior Complaint, B140-47. RBC should have requested the 2010 trustee statements, from which it alleges it is capable of deriving the Net Loan Rate, and asserted any causes of action arising therefrom in the Court of Chancery.

RBC's only argument that the claims in the Amended Complaint could not have been brought in the Chancery Action is that RBC could not realize that a breach had occurred until there had been an extended period of non-payment of

interest. Appeal Brief 28. Yet, RBC by its own Amended Complaint asserts that it has "deep experience in student loan-backed ARS . . . and monitors the market closely." Amended Complaint ¶40, A88. Additionally since 2009, RBC had complained about the fact that the Trust was paying below market rate interest. Exhibits 1 and 2 to USELT Reply Brief in Support of Motion to Dismiss Superior Complaint, B140-47. RBC's complaint in the Court of Chancery alleged that the Trust was wrongfully paying below market rate interest. Chancery Complaint ¶ 47, A48. RBC's initial Superior Complaint relied heavily on market conditions as the basis for its breach claim. Superior Complaint, B31-34. But RBC wants this Court to blindly accept its statement that it was only after a year of the Trust paying zero interest that it was on notice that interest was due under the Indenture. This inference is unreasonable and the Superior Court is not obliged to accept a statement, even a repeated one, that is contradicted by a party's own actions.

The Superior Opinion correctly held that RBC knew or could have known it was not receiving interest when it filed the Chancery Complaint, that RBC's Amended Complaint arises from the same transaction and therefore *res judicata* operates as a bar to RBC's claim. Superior Opinion 13-14.

2. The Chancery Opinion Was a Final Adjudication on the Merits

RBC further attempts to avoid the preclusive effect of the Chancery Opinion

by arguing that decision was not a final adjudication on the merits. Appeal Brief 29-33. In the Chancery Action, USELT moved to dismiss the Chancery Complaint under Rule 12(b)(6) with prejudice. *See* USELT Motion to Dismiss Chancery Complaint, B1. USELT's motion to dismiss the Chancery Action was granted without reservation. *See* Chancery Opinion 17, A73. As further evidence that the dismissal of the Chancery Action was with prejudice, Court of Chancery Rule 15(aaa) provides that when "a party fails to timely file an amended complaint or a motion to amend under this subsection (aaa) and the Court thereafter concludes that the complaint should be dismissed under Rule 12(b)(6) or 23.1 such dismissal shall be with prejudice." Chan. Ct. R. 15(aaa). Faced with a 12(b)(6) challenge to its complaint, RBC did not amend the Chancery Complaint and therefore the Chancery Action was dismissed with prejudice.

A dismissal of an action with prejudice under Rule 12(b)(6) acts as a final adjudication *on the merits* for barring a subsequent suit pursuant to the doctrine of *res judicata*. *See Savage v. Himes,* 2010 Del. Super. LEXIS 205, at *9 (Del. Super. Ct. May 18, 2010), *aff'd* 9 A.3d 476 (Del. 2010). Indeed, this is the definition of dismissal with prejudice: "removed from the court's docket in such a way that the plaintiff is foreclosed from filing suit again on the same claim or claims." BLACK'S LAW DICTIONARY, p.537 (9th ed. 2009). The dismissal of the Chancery Action was a final adjudication on the merits barring a subsequent suit.

RBC attempts to avoid the consequences of its prior unsuccessful suit by claiming a dismissal for lack of standing is not a "final adjudication on the merits" for *res judicata* purposes, and therefore the Opinion is not a final determination. This is unequivocally incorrect. A request for dismissal based on standing when the standing determination is intertwined with the merits of the controversy, such as where a standing determination is based on interpretation of a contract, is properly considered under Rule 12(b)(6). *See Appriva Shareholder Litig. Co., LLC v. EV3, Inc.,* 937 A.2d 1275 (Del. 2007) (holding that issues of standing related to the merits may be decided under Rule 12(b)(6)). USELT appropriately moved to dismiss the Chancery Action with prejudice under Rule 12(b)(6) due to the prohibitions against such suits contained in the Indenture's no-action clause, and dismissal was granted by the Court. USELT's Opening Brief in Support of its Motion to Dismiss the Chancery Complaint 1, B8. As RBC failed to amend its complaint, the Chancery dismissal was with prejudice pursuant to Chancery Rule 15(aaa). The Chancery Opinion was final for *res judicata* purposes.

RBC cites two cases in its Appeal Brief that offer no challenge to this analysis. RBC cites *Smith v. Guest,* 16 A.3d 920, 934 (Del. 2011) for the proposition that a dismissal on standing grounds will not operate as a bar for *res judicata* purposes; however, in *Smith* the *res judicata* effect of the prior decision was negated by a subsequently enacted statute. *See id.* at 933. Further, there is

nothing in the prior history of the *Smith* case indicating the dismissal of the prior custody case was with prejudice. *See C.M.G. v. L.M.S.*, 2009 Del. Fam. Ct. LEXIS 74, at *22 (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 Supreme Court decision, the custody order was vacated). The *Smith* decision offers no basis why the Court of Chancery's dismissal pursuant to Rule 12(b)(6) should not operate as a dismissal with prejudice barring a subsequent proceeding.

RBC's citation of *Ralph Paul, Inc. v. Betty Brooks, Inc.*, 1976 WL 7954 (Del. Ch. Jul. 22, 1976) is similarly misplaced and actually supports USELT's arguments. In that case, the Court of Chancery held that dismissal with prejudice for failure to prosecute, a procedural rule, operated as a final adjudication for the purposes of *res judicata*. *Id.* at *4. In so deciding, the *Ralph Paul* Court cited to the United States Supreme Court's reasoning on *res judicata*:

> Litigation is the means for vindicating rights, but it may also involve unwarranted friction and waste. The doctrine of *res judicata* reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. . . . And it has gone through if issues that were *or could have been dealt with* in an earlier litigation are raised anew between the same parties.

Id. at *5 (citing *Angel v. Bullington*, 330 U.S. 183, 192-93 (1947) (emphasis in original). In considering this doctrine, the *Ralph Paul* Court dismissed the second action "not because substantive issues have been determined but because plaintiffs

had a complete and fair opportunity and did nothing to secure their rights, while subjecting defendant to the difficulties and expense of preparing a defense." *Id.*

RBC then cites to Wright & Miller for the proposition that when a court is denied the power to decide a case on the merits, preclusion is inappropriate. RBC supports this argument with a citation to *Gulla v. N. Strabane Twp.*, 146 F.3d 168, 172-73 (3d Cir. 1998), in which the Pennsylvania Court of Common Pleas determined that the plaintiffs could not bring federal constitutional claims in a state court appeal of a township's approval of a subdivision plan, but the Third Circuit held that result did not preclude the plaintiffs from bringing their federal claims in federal court. This authority is inapposite. RBC's Chancery Complaint was not dismissed because the Court of Chancery did not have the authority to decide the claims raised therein; it was dismissed because the no-action clause prevents RBC from alleging a Section 6.09 claim unless it can plead sufficient facts permitting a reasonable inference that it has not "adjusted" the Trust's actual financial results.

RBC had a complete and fair opportunity to present its claims and, when faced with a motion to dismiss on Rule 12(b)(6) grounds, chose to stand on the Chancery Complaint, resulting in a dismissal with prejudice. The Court of Chancery was not precluded from considering the merits of RBC's claim by any jurisdictional bar. RBC could not bring the claims asserted because the Court of Chancery determined that RBC had not satisfied its contractual obligations to sue

on those claims; the Chancery dismissal was a determination on the merits.

While the Superior Court did not use the word "standing" in its Superior Opinion, it articulated the same reasoning as set forth above with regard to the operation of Rules 12(b)(6) and 15(aaa), which combine to result in a final adjudication for *res judicata* purposes. Superior Opinion at 15-16. RBC's legal argument with regard to dismissals based on "standing" is wholly inapplicable to the Amended Complaint, therefore the Superior Court's failure to mention it is not a ground for reversal of the Superior Opinion.

3. <u>RBC Cannot Resuscitate its Claims under the Theory of a Continuing Breach Without New Evidence</u>

RBC's final attempt to salvage the Amended Complaint from preclusion is an argument that because the same alleged breach of the Indenture is ongoing "at an absolute minimum, RBC is free to pursue its claim for interest earned since July 2011." Appeal Brief 34. However, the cases cited in support of this proposition are inapplicable to this matter. In *Dover Historical Society, Inc. v. City of Dover Planning Commission*, 902 A.2d 1084 (Del. 2006), after an initial fee petition was denied, the defendant took new action to destroy two historic buildings, which justified a second fee application on new grounds. *Id.* at 1092 (explaining "the second fee application rested entirely upon facts that did not arise until after the first application had been denied"). As detailed above, the facts on which RBC

principally relies existed at the time the Chancery Complaint was filed.

Similarly, in *LaPoint v. AmerisourceBergen*, 970 A.2d 185 (Del. 2009), this Court held that *res judicata* did not bar the second action for indemnification, reasoning that "*res judicata* does not operate to bar claims based on facts that *were not, and could not have been, known to the plaintiff in the second action at the time of the first action*." *Id.* at 193 (citing *Ambase Corp. v. City Investing Co. Liquidating Trust*, 326 F.3d 63, 73 (2d. Cir. 2003) (emphasis added).) RBC could have known of (and actually did know) the facts underlying the Amended Complaint at the time the Chancery Action was filed; in the absence of a new theory of breach based on facts it could not have known before, RBC cannot salvage any portion of this action.

The Superior Opinion correctly held that RBC's claim did exist at the time of the Chancery Complaint. Superior Opinion 18. The Superior Opinion concluded that, if the Defendants' engaged in alleged actionable misconduct different from that previously alleged, then RBC could bring a new suit, but the Amended Complaint did not so allege. Superior Opinion 19. Therefore, substantially the same continuing breach is not a basis to permit RBC another bite at the decimated apple or to reverse the Superior Court's deliberate, well-considered decision.

CONCLUSION

For all of the foregoing reasons, the Superior Court's decision dismissing RBC's Amended Complaint, its third attempt to package its claim in a manner that avoids the strictures of the no-action clause, should be affirmed.

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