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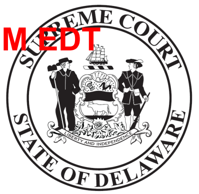

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RBC CAPITAL MARKETS, LLC, a Minnesota Limited Liability Company, Plaintiff Below/Appellant, 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 Corporation, Defendants Below/Appellees.	No. 343,2013 Court Below – Superior Court of the State of Delaware, in and for New Castle County C.A. No. N12C-02-015 FSS CCLD

REPLY BRIEF ON APPEAL OF APPELLANTS RBC CAPITAL MARKETS, LLC, THE DEPOSITORY TRUST COMPANY, AND CEDE & CO.

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Dated: October 1, 2013
1124710 / 36670

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PRELIMINARY STATEMENT

As they did before the Trial Court, Appellees mischaracterize RBC's Amended Complaint and ignore key allegations that make RBC's claim fundamentally different than that raised in its prior Chancery Action. Aware that the Chancery Court specifically held that RBC's claim was not for unpaid interest, Appellees desperately try to contort the Amended Complaint into an excessive fees claim, despite express allegations that RBC is owed interest regardless of whether the fees paid out of the Trust were authorized. Am. Compl. ¶ 73, A97.

At the pleading stage, Delaware law allows the court only to consider whether RBC has alleged a "conceivable" theory that Appellees failed to pay interest as the Indenture requires. The Amended Complaint has more than met this "minimal" threshold. Appellees seek to introduce competing evidence to dispute the Amended Complaint's allegations and draw unreasonable inferences from that evidence in their favor, contrary to Delaware's well-established pleading standard.

Appellees seek to "unmask" RBC's current claim as one for excessive fees by asking this Court to digest reams of detailed evidence outside of the Amended Complaint. RBC had never seen some of these documents—for example, the spreadsheets at B304-B308—before Appellees attached them to their reply brief in the Superior Court. That fact alone makes them inappropriate for any court to consider on a motion to dismiss. Moreover, much of the material RBC

used to calculate the amount of interest owed is *not* included in Appellees' submission, and Appellees' materials are incomplete and on their face appear unreliable. Yet, even if Appellees' appendices were identical to the documents and data RBC used to calculate the amount of interest owed—and they are not—they would not support dismissal of RBC's claim.

It is not the function of this Court—nor would it have been appropriate for the Trial Court on a motion to dismiss—to wade through voluminous documents and calculations to ascertain which of the parties' competing Net Loan Rate ("NLR") computations is correct. Appellees will have a full opportunity, once all evidence concerning the NLR calculation has been adduced in discovery, to present the merits of their case. For now, RBC has alleged, in conformity with Superior Court Rule 8, that it is owed interest *regardless* of whether the fees paid out of the Trust were authorized. Delaware law requires nothing more.

Finally, contrary to Appellees' mischaracterizations, the present claim for unpaid interest is not the "same" as RBC's prior action for excessive fees, and therefore cannot be barred by *res judicata*. Appellees' insistence that RBC "could have brought" its present claim (including its claim for Appellees' ongoing breach) as part of the Chancery Action is equally misguided, and is flatly contradicted by the Amended Complaint and the holding of the Chancery Court to the contrary.

ARGUMENT

I. THE TRIAL COURT MISAPPLIED A HEIGHTENED PLEADING STANDARD

Appellees, while paying lip service to Delaware's lenient pleading standard, nevertheless advocate that a heightened standard—one that investigates and assesses the underlying merits of the case at the pleading stage—should apply to RBC's Amended Complaint. The Trial Court should have applied Delaware's "minimal" or "low" pleading standard to RBC's claim. *Century Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011) ("The pleading standards governing the motion to dismiss stage of a proceeding in Delaware, however, are minimal."); *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005) ("the threshold for the showing a plaintiff must make to survive a motion to dismiss is low"). Had the Trial Court correctly applied the Delaware pleading standard to the Amended Complaint, the facts RBC alleged therein are more than sufficient to support a conceivable theory that RBC is entitled to relief.

A. Appellees Mischaracterize RBC's Claim and Ignore the Allegations in the Amended Complaint

RBC has made the well-pleaded allegations necessary to satisfy its burden at this stage of the litigation. The Amended Complaint clearly alleges the amount of interest due to RBC under the terms of the Indenture. Am. Compl. ¶¶ 31, 32, A84-A85. RBC alleges that, to arrive at this amount, it applied the

definition of the NLR as set out in the Indenture (including the definitions of all of the different variables used to calculate the NLR) to the available Trust data and provided detailed calculations showing that Appellees have not paid to RBC interest that is due and owing under the terms of the Indenture. *Id.* ¶¶ 25, 26, 28, 29, A82-A83. As such, RBC has satisfied Delaware's pleading standard.

Appellees' only answer to these plain, well-pleaded allegations is to ignore or misrepresent them. For example:

- Appellees argue that RBC has not calculated "the *precise* amount of interest" that it is owed. USEL IV Ans. Br. at 17-18 (emphasis added). This is entirely unnecessary under a correct application of the proper pleading standard, and it also is untrue. RBC calculated the amount of interest it was owed ***to the penny*** for the entire 2011 fiscal year. *See* Am. Compl. ¶ 31, A84-A85.

- Appellees argue that RBC's claim must be for excessive fees because no interest would be owed if fees were taken into account. USEL IV Ans. Br. at 17, 20, 21; BONY Ans. Br. at 28-32. However, RBC specifically alleged that "interest is owed to RBC . . . *regardless* of whether the outflows, *including fees*, were authorized." Am. Compl. ¶ 73, A97 (emphasis added).

- Appellees claim that RBC "did not make any allegations regarding, *inter alia*, the Special Allowance payments, consolidation loan rebate fees, Note Fees, Servicing Fees, and Administration Fees." BONY Ans. Br. at 29. This is not true. *See* Am. Compl. ¶ 28, A83 (alleging that RBC considered "Special Allowance Payments, consolidation loan rebate fees, Note Fees, Servicing Fees and Administration Fees" in calculating the NLR).

- USEL IV characterizes the Opening Brief as arguing that RBC need not allege "the amount of interest due under the Indenture and how that amount was calculated" or "how [RBC] determined that interest was due and owing under the Indenture," but ignores the fact that the Amended Complaint includes detailed allegations as to (i) the amount of interest due for 2011, (ii) how RBC calculated the amount of interest due, and (iii) how RBC

determined that interest was due. *See* USEL IV Ans. Br. at 15, 19; Am. Compl. ¶¶ 15, 24, 28, 29, A79, A82-A84.

- USEL IV argues that the Amended Complaint contains "conclusory allegations that the Trust has received a positive net cash flow, therefore interest must be due." USEL IV Ans. Br. at 15. In reality, RBC alleges *in detail* the actual expense and revenue data from Trust documents in determining that the Trust has had positive cash flow, and alleges the dollar amount of this cash flow for 2011. *See* Am. Compl. ¶¶ 24, 28, 29, A82-A84.

- BONY contends that RBC "intentionally withheld [its] calculation" of the interest due and made no allegations regarding "the different variables that go into the Net Loan Rate Formula." *See* BONY Ans. Br. at 7. But the Amended Complaint clearly explains RBC's calculation of the interest due, details the NLR formula's variables, and alleges that RBC used all these variables to calculate the amount of interest due. *See* Am. Compl. ¶¶ 26-31, A82-A84.

Appellees' mischaracterizations notwithstanding, RBC does exactly what is required to state a claim for unpaid interest under Section 6.09 of the Indenture. The Amended Complaint calculates the amount of interest due for fiscal year 2011 using the Indenture's exact formula. Nothing more is required.

B. Testing the Underlying Merits of RBC's Claim on Motion to Dismiss Is Improper Under Well-Established Delaware Law

Recognizing that accepting the allegations in the Amended Complaint as true would require reversal of the Trial Court's decision, Appellees seek to offer evidence rebutting those allegations. In Delaware, however, testing the factual evidence underlying the ultimate merits of a claim is wholly inappropriate at the pleading stage. *Malpiede v. Towson*, 780 A.2d 1075, 1082 (Del. 2001) (holding that because a motion to dismiss "must be decided without the benefit of a factual

record, [a court] may not resolve material factual disputes"). In fact, Delaware courts have found it preferable that a complaint *not* contain each and every evidentiary fact that will ultimately be needed to prove the claim to the fact-finder, because that is not the purpose of the pleading stage in a Delaware action. *Spanish Tiles, Ltd. v. Hensey*, 2005 WL 3981740, at *2 (Del. Super. Mar. 30, 2005) ("'if the complaint contained [evidentiary] facts it would no longer be a short and plain statement of the claim' as is required by Rule 8(a). . . . The plaintiff will not be required to plead evidentiary facts . . .") (citation omitted).

Nevertheless, the bulk of Appellees' Answering Briefs challenges both the "completeness" and the ultimate truth of the Amended Complaint's allegations regarding RBC's calculations of the interest it is owed based on the NLR. Appellees seek to shift the focus to whether the Amended Complaint's allegations are sufficient for RBC to win its claim at trial.

Appellees' foray into the methodology and results of RBC's NLR calculations is inappropriate at the pleading stage. Under well-established Delaware law, RBC at this stage need only make allegations outlining a "reasonably conceivable" theory that Appellees have not paid RBC the interest it is due. *Century Mortg. Co.*, 27 A.3d at 537 & n.13; *Cambium Ltd. v. Trilantic Capital Partners*, 36 A.3d 348 (Del. 2012). It was thus improper to weigh the merits of RBC's case on Appellees' motions to dismiss the Amended Complaint.

C. Consideration of Appellees' "Evidence" Is Inappropriate at the Motion to Dismiss Stage, And In Any Event, These Materials Do Not Contradict RBC's Allegations

Even if it *were* appropriate to delve into the merits of RBC's claim at this stage, Appellees' contentions regarding the calculations in the Amended Complaint rely on materials that cannot be properly considered on a motion to dismiss. Appellees improperly submit a competing and incomplete set of documents to argue that "RBC's allegations are contradicted by the alleged source documents upon which RBC claims it relied." *See* USEL IV Ans. Br. at 17; BONY Ans. Br. at 27-32. Significantly, this is ***not*** the same set of materials on which RBC relied. While some of the documents RBC relied on are included in the materials Appellees incorrectly claim are the Amended Complaint's "source documents," others are not. Further, RBC had never seen some of the spreadsheets before Appellees attached them to their Superior Court reply brief, and some of these documents appear to have been prepared recently for purposes of this litigation (*see* B304-B308 and following pages).

Even if these materials *were* the same set of source documents to which passing reference was made in the Amended Complaint, these data-heavy, complex spreadsheets are not the types of documents that would support dismissal of RBC's claim. Appellees cite Delaware case law purportedly standing for the proposition that a complaint may be dismissed where ***unambiguous*** language in

the documents upon which a claim is based contradicts the complaint's allegations. *See* USEL IV Ans. Br. at 17; BONY Ans. Br. at 27-32. Appellees' cases stand (at most) for the simple proposition that specific, unambiguous language *on the face of a contract itself* may preclude certain claims, but these cases are wholly distinguishable because here neither the Indenture nor any other document "unambiguously" refutes RBC's claim.[1] RBC spent weeks calculating the NLR from reams of data and spreadsheets. Appellees attach some of those spreadsheets, and some other documents, and then argue in conclusory fashion that these documents demonstrate that no interest is owed. The only thing these documents "unambiguously" show is that the calculation of interest owed under NLR formula is a complex task that draws on a variety of information and data sources.

Finally, even if Appellees' new evidence were appropriate to consider at this stage, the content of these documents does not refute RBC's calculations in any way. Nowhere do Appellees calculate each specific input into the NLR formula, and they offer just a few sentences concluding without support that the

[1] *Malpiede v. Towson*, 780 A.2d 1075 (Del. 2001) (stating the general proposition that Appellees cite, but *not* discussing how any documents "negate" any of the claims therein); *Transdigm Inc. v. Alcoa Global Fastners*, 2013 WL 2326881, at *10 (Del. Ch. May 29, 2013) (dismissing fraud claim under Rule 9(b)'s heightened pleading standard where that claim related to a time period clearly outside the "unambiguous" provision of the contract); *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 142-43 (Del. Ch. 2003) (dismissing misrepresentation claims for lack of justifiable reliance based on documents that the contract made clear could *not* be relied upon); *In re Wheelabrator Techs. Inc. S'holders Litig.*, 1992 WL 212595 (Del. Ch. Sept. 1, 1992) (plaintiffs' allegation that the purpose of a proxy disclosure was to persuade shareholders to approve merger was clearly refuted by express language in the proxy statement itself).

Trust's revenues and expenses equal the same amount. This is ironic given Appellees' (false) criticism of the Amended Complaint for not providing the "arithmetic" behind its interest calculations. *See* BONY Ans. Br. at 29.

In fact, some of Appellees' documents raise far more questions than they answer. For this reason, even if some of the documents Appellees attach to their Answering Briefs had been incorporated by reference into the Amended Complaint, dismissal based on the contents of these documents still would be improper. *See Krasner v. Moffett*, 826 A.2d 277, 285 (Del. 2003) (reversing trial court's dismissal of plaintiffs' claims where defendants relied on "portions of [a] joint proxy statement incorporated into the complaint," but the proxy statement left factual "questions . . . unanswered"). For example, the suspicious documents at Tab 14 of the Appendix to BONY's Answering Brief, entitled "*Possible* Net Loan Rate Calculation from Trustee Reports & Qtrly Reports," which allegedly "unambiguously" refute RBC's NLR calculation and claim for interest, provide only "*possible*" NLR calculations for 2011, not *actual* ones. *See* B304-B308 and following (unnumbered) pages. Given that USEL IV and BONY would have had to calculate the *actual* NLR for 2011, it is more than curious that they would attach spreadsheets purporting to show "possible" NLR calculations for 2011. That is, if the *actual* NLR for 2011 refuted RBC's claim, Appellees would have attached those *actual* calculations instead of hypothetical, "possible" ones.

In addition, these spreadsheets contain unexplained redactions that render them incomplete and impossible to fully analyze. Nevertheless, RBC has analyzed them to the extent possible, and has concluded that *even based on Appellees' own data and calculations*, RBC is still owed substantial interest. The "data" on which Appellees rely not only raise more questions, but they "unambiguously" show that RBC is entitled to unpaid interest.

Essentially, Appellees ask this Court to accept their conclusory allegations based on a competing set of cherry-picked and redacted "evidence," rather than accept RBC's more detailed allegations as to why interest is owed. This violates core principles of Delaware's notice pleading standard, including accepting a complaint's allegations as true, not resolving factual disputes on a motion to dismiss, not considering evidence outside the complaint, and drawing all reasonable inferences in the plaintiff's favor.

D. <u>The "No-Action" Clause Is Inapplicable to RBC's Claim</u>

Appellees' arguments that the "No-Action" clause bars RBC's claim depend completely on the Court accepting Appellees' competing evidence regarding the calculation of the NLR and interest due to RBC (which, as explained above, would be improper). Appellees argue that their competing evidence establishes that the shortfall in interest is due solely to RBC removing "excessive fees" from their calculations (USEL IV Ans. Br. at 19-21; BONY Ans. Br. at 32-

33), but this argument ignores the Amended Complaint's clear allegation (which must be taken as true on motion to dismiss) that interest is owed to RBC *regardless* of whether the Trust's fees are treated as excessive. *See* Am. Compl. ¶ 73, A97; *see also id.* ¶¶ 28-32, 35-38, 41-47, 52-55, A83-A90, A92-A93 (alleging in detail that RBC's claim is predicated solely on USEL IV's failure to pay interest due and owing to RBC, and is thus outside the scope of the "No-Action" clause). Indeed, given that the NLR calculation must always, by definition, take fees into account (because fees are a variable in the NLR formula), Appellees' position that the "No-Action" clause bars any suit in which the amount of fees is considered would seemingly preclude a noteholder from *ever* bringing an action for nonpayment of interest, a result which is prohibited by the Trust Indenture Act. *See* 15 U.S.C. § 77ppp(b) (the right of any noteholder to receive payment of interest "or to institute suit for the enforcement of any such payment . . . shall not be impaired or affected").

The Trial Court should have taken these allegations (which were well-pleaded, as explained above and in the Opening Brief) as true, and had it done so there is no doubt that the Amended Complaint alleges a conceivable theory that RBC's claim falls within Section 6.09's exception to the "No-Action" clause.

Appellees try to turn the motion to dismiss standard on its head by pointing out various ways in which they believe RBC's claim "could" actually fall

under Section 6.08 of the Indenture. *See* USEL IV Ans. Br. at 12, 14. USEL IV argues that an explanation of *how* RBC determined that interest was due under the Indenture is "vital to determine whether RBC has stated a claim under Section 6.09," or whether the claim falls under Section 6.08. *Id.* at 20. Not only does USEL IV ignore the fact that the Amended Complaint *did* explain how RBC determined that interest was due (Am. Compl. ¶¶ 26-33, A82-A85), but USEL IV also presents a false dichotomy. The inquiry at the pleading stage is not whether RBC's claim *could*, on some theory proffered by Appellees, fall under Section 6.08 of the Indenture. Rather, the proper inquiry is whether, taking the allegations in the Amended Complaint as true and drawing all reasonable inferences in RBC's favor, RBC has asserted a "conceivable" claim under Section 6.09. *Century Mortg. Co.*, 27 A.3d at 536 (on motion to dismiss, court must accept all well-pleaded allegations as true, accept even vague allegations as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in the plaintiff's favor, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances). RBC has done so, and thus the Trial Court's dismissal of the Amended Complaint should be reversed.

II. THE *RES JUDICATA* DOCTRINE DOES NOT BAR ANY PORTION OF RBC'S CLAIM

Contrary to Appellees' contentions, *res judicata* does not bar any portion of RBC's claim. This action is not the "same" as the Chancery Action

because it is based on fundamentally different operative facts. RBC could not have even *known* of the claim it asserts in the Amended Complaint at the time it brought the Chancery Action, because it was not until well after that time that RBC could have known that USEL IV was improperly refusing to pay interest due to RBC.

A. The Amended Complaint Does Not Allege the "Same" Claim RBC Stated Before the Chancery Court

Even though the Amended Complaint and the Chancery Complaint each allege different breaches of the Indenture, are based on fundamentally different operative facts, and seek to remedy different wrongs (*i.e.*, unpaid interest versus excessive fees), Appellees contend that the two actions are the "same" because they relate to the "same contract"—the Indenture. *See* USEL IV Ans. Br. at 23-24; BONY Ans. Br. at 15-16. But the fact that both claims relate to (different) breaches of the Indenture should not be dispositive here, given that the two actions arose from different types of violations and that the Indenture is the *one* contract that governs *all* relevant aspects of the Notes at issue. *Chambers Belt Co. v. Tandy Brands Accessories, Inc.*, 2012 WL 3104396, at *4 (Del. Super. July 31, 2012).[2]

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[2] USEL IV dismisses *Chambers Belt* as "wholly inapplicable," arguing that the subsequent court denied preclusive effect only to "factual determinations." USEL IV Ans. Br. at 24-25. However, the *Chambers Belt* court also limited the *res judicata* (that is, claim preclusion) effect of the prior action to the *legal* issues explicitly decided by the prior court, holding that "*[r]es judicata* . . . does not bar litigation of an issue that had not been decided in the previous action." *See* 2012 WL 3104396, at *3. Thus, *Chambers Belt* is applicable here because the issue of Appellees' nonpayment of interest was explicitly *not* decided in the Chancery Action.

RBC's present claim is not the "same" as the Chancery Action. The Chancery Action was, as the Chancery Court held, all about Appellees' payment of excessive fees out of the Trust, and was dismissed because RBC did not allege a claim for unpaid interest. *See* Chancery Opinion at 2, A58 ("RBC's claim therefore is not that [Appellees] breached the terms of the Indenture addressing the right of noteholders like RBC to timely interest payments calculated in accordance with the terms of the Indenture and Supplemental Indentures. Rather, RBC argues that [Appellees] breached the Indenture by causing the Trust to make fee payments in excess of the limits imposed by the Supplemental Indentures."). In contrast, the present action is narrowly focused on Appellees' failure to make interest payments, independent of any other type of breach of the Indenture. Thus the two claims are not (and cannot be) the "same" for the purposes of *res judicata*.

Furthermore, Appellees' argument that the Amended Complaint when "unmasked" is really about excessive fees depends entirely on this Court accepting their suspicious "evidence" (which is not properly before this Court and was not properly before the Trial Court) purporting to show that no interest is owed when accounting for an overpayment of fees. For the reasons stated above, consideration of this material is entirely improper, and it does not establish on its face or otherwise that the nonpayment of interest is due to excessive fees.

B. RBC Could Not Have Brought Its Claim at the Time of the Chancery Action

Appellees are incorrect that RBC's present claim is one that RBC "could have brought" when it filed the Chancery Action. *See* USEL IV Ans. Br. at 25-28; BONY Ans. Br. at 12-13. Appellees contend that "RBC could have known of (and actually did know) the facts underlying the Amended Complaint at the time the Chancery Action was filed" (USEL IV Ans. Br. at 34) and that RBC "had the relevant facts regarding nonpayment of interest well before dismissal of the Chancery Lawsuit" (BONY Ans. Br. at 23). This is untrue.

Appellees argue that because RBC believed the Trust was being charged excessive fees, and fees can impact the amount of interest paid, RBC could have brought a claim for unpaid interest. However, the Chancery Court *held exactly the opposite.* Specifically, the Chancery Court held that a claim for excessive fees was not enough to make out a claim for unpaid interest, and therefore dismissed the Complaint. Chancery Opinion at 12-13, A68-69 ("[t]he violations alleged by RBC did not affect the occurrence of interest payments, but rather directly injured the Trust itself"). Thus, in order to bring a claim, RBC needed information that would allow it to adequately allege a claim that interest was due regardless of Appellees' suspected fee-gouging. It did not have this information until well after the Chancery Action was commenced.

When RBC filed the Chancery Action, it could not have known that USEL IV was merely failing to pay interest owed under the Indenture. Appellees note that RBC in 2009-2010 believed that USEL IV was collecting excessive fees from the Trust. USEL IV Ans. Br. at 4-5, 28. But at that time, RBC was receiving interest. Until USEL IV had continued to pay ***zero interest*** for an extended period, RBC could not have known that the nonpayment of interest had nothing to do with excessive fees. And once on notice of a *possible* claim, RBC still needed to obtain data to confirm that interest was past due and the amount thereof, including requesting Trust information pursuant to the Indenture, which it can only do once a year. *See* Am. Compl. ¶ 24, A82; Indenture Section 7.14, A202-A203. Ironically, Appellees seek dismissal of the Amended Complaint for failing to allege the details of why interest is due and the "precise" amount of interest owed, and at the same time allege that RBC "could have brought" the same claim years ago when none of this detail was available to RBC. Indeed, at the time, Appellees had blocked RBC's access to information about the Trust's cash flows. *See* Am. Compl. ¶ 24, A82.

Finally, Appellees' arguments about what RBC knew or could have known cannot be resolved at this stage. At best, these arguments raise factual issues about RBC's subjective knowledge that would be inappropriate to resolve on a motion to dismiss. *Boerger v. Heiman*, 965 A.2d 671, 675 (Del. 2009)

(reversing lower court's dismissal of plaintiff's claim on summary judgment where there were questions of fact as to when plaintiff was on notice of his claim).

C. **The Chancery Opinion Was Not a Final Adjudication on the Merits**

Appellees wrongly insist that the Chancery Opinion was a final adjudication "on the merits"—even though that decision involved a motion to dismiss holding that RBC lacked *standing* to bring a claim for excessive payment of fees—on the basis that the Chancery Court's determination with respect to RBC's standing was made "with prejudice." USEL IV Ans. Br. at 28-33; BONY Ans. Br. at 17-22. But the Chancery Court was crystal clear that it was *only* deciding the issue of RBC's standing—not the merits. *See* Chancery Opinion at 4, A60 ("Because RBC has not pled that it has complied with any of the ***pre-conditions to suit*** set forth in the no-action clause, RBC's complaint must be dismissed.") (emphasis added). Because the Chancery Opinion only decided RBC's (lack of) standing to bring that claim, it was not a final adjudication "on the merits" for *res judicata* purposes. *Smith v. Guest*, 16 A.3d 920, 934 (Del. 2011).[3]

Even assuming *arguendo* that the Chancery Opinion was a final adjudication on the merits, the only "merits" it reached were those of RBC's

[3] Appellees contend that *Smith* is distinguishable because there "the res judicata effect of the prior decision was negated by a subsequently enacted statute." USEL IV Ans. Br. at 30-31; BONY Ans. Br. at 21 n.4. But this Court in *Smith* held that "even if the doctrine[] of res judicata . . . were otherwise available" it still would not bar the subsequent suit because the prior decision "was not a final judgment on the merits" and "held only that Guest did not have standing to bring her 2004 custody petition." *Smith*, 16 A.3d at 934-35.

excessive fees claim. *See* Chancery Opinion at 2, A58 ("*RBC's claim therefore is not that [Appellees] breached the terms of the Indenture addressing the right of noteholders like RBC to timely interest payments calculated in accordance with the terms of the Indenture and Supplemental Indentures*. Rather, RBC argues that [Appellees] breached the Indenture by causing the Trust to make fee payments in excess of the limits imposed by the Supplemental Indentures.") (emphasis added). That is, the Chancery Opinion held only that RBC cannot bring a claim for excessive fees under Section 6.09 of the Indenture. Thus, even if the Chancery Opinion was a decision "on the merits," it in no way precludes RBC's present claim for the nonpayment of interest.[4] *See* Opening Br. at 21-22.

D. Appellees' Ongoing Breaches Are Different Than Those That Could Have Been Alleged in the Chancery Action

Finally, Appellees' contention that *res judicata* bars the portions of RBC's claim relating to Appellees' ongoing breaches (from at least July 2011 to present) is incorrect. *See* USEL IV Ans. Br. at 33-34; BONY Ans. Br. at 22-25. Appellees' contention is built wholly on mischaracterizations: they argue that RBC's case citations are inapposite because RBC's present claim existed at the

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[4] BONY's assertion that the Chancery Opinion should have preclusive effect even though it was a standing decision because "RBC had a complete and fair opportunity to amend its Chancery Complaint to allege the claim asserted in the Amended Complaint" is based on a flawed premise. BONY Ans. Br. at 21-22. As explained above, RBC's present claim is fundamentally different from the claim it brought in the Chancery Court, and is *not* one that "could have been brought" in the Chancery Court. *See supra* Sections II.A, II.B. Further, the present claim could not have been brought in an amended complaint in Chancery Court because only the Superior Court had jurisdiction over the claims asserted in the Amended Complaint.

time of the Chancery Action and that RBC "could have known" at that time of the facts on which its present claim is based.

As explained above, and as the Chancery Court held, RBC did *not* allege a claim for nonpayment of interest in the Chancery Action, and could not have been on notice at the time that USEL IV was simply not paying accrued interest in violation of Indenture. *See supra* Sections II.A, II.B. Thus, just as in *Dover Historical Society, Inc. v. City of Dover Planning Commission*, 902 A.2d 1084 (Del. 2006), and *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185 (Del. 2009), the facts underlying RBC's present claim were not, and could not have been, known at the time of the Chancery Action. Appellees cite no authority for the proposition that *res judicata* can bar claims based on facts that could not have been known at the time of a prior action.

If Appellees were correct, they could simply refuse to pay interest to RBC ever again, and RBC would have no recourse because according to Appellees, RBC "could have brought" an earlier claim for nonpayment of interest in the Chancery Court. That obviously is not the law. *See Dover Historical Society*, 902 A.2d 1084; *LaPoint*, 970 A.2d 185. Thus, at the very least, *res judicata* cannot bar RBC's claims with respect to Appellees' breaches from July 2011 to present.

CONCLUSION

For all of the foregoing reasons, the Trial Court's order dismissing the Amended Complaint should be reversed.

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Dated: October 1, 2013
1124710/36670

CERTIFICATE OF SERVICE

Jennifer C. Wasson hereby certifies that, on the 1st day of October, 2013, she caused to be filed, via File and Serve*Xpress*, an electronic version of the within documents, and to be served, via File and Serve*Xpress*, upon the Delaware counsel of record identified below:

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