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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

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

Matthew E. Fischer (No. 3092)
Jennifer C. Wasson (No. 4933)
Janine L. Hochberg (No. 5188)
POTTER ANDERSON & CORROON LLP
1313 North Market Street – 6th Floor
Wilmington, DE 19801
Telephone: (302) 984-6000

Attorneys for Plaintiff Below/Appellant RBC Capital Markets, LLC and Nominal Plaintiffs Below/Appellants The Depository Trust Company and Cede & Co.

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NATURE OF THE PROCEEDINGS

RBC Capital Markets, LLC ("RBC") filed a complaint ("Complaint") in the Delaware Superior Court (the "Superior Court" or "Trial Court") to commence this action on February 1, 2012. Appellee U.S. Education Loan Trust IV, LLC ("USEL IV"), and Appellee Education Loan Trust IV (the "Trust," and collectively with USEL IV, "Appellees") each filed a motion to dismiss the Complaint. (The Trial Court held oral argument on those motions on June 20, 2012. At the conclusion of that oral argument, the Trial Court invited RBC to amend the Complaint to provide more detailed allegations regarding Appellees' failure to turn over interest payments owed to RBC.

On August 20, 2012, RBC, along with nominal plaintiffs The Depository Trust Company ("DTC") and Cede & Co. ("Cede," and collectively with RBC and DTC, "Appellants"), filed an Amended Complaint (the "Amended Complaint"), which stated a claim for breach of contract based on Appellees' failure to provide RBC with interest earned but not paid. USEL IV and the Trust each filed a motion to dismiss the Amended Complaint (collectively, the "Motions to Dismiss"). On May 31, 2013, the Trial Court issued an opinion and order dismissing the Amended Complaint, holding that RBC's claim was barred by *res judicata*, and alternatively, that the Amended Complaint failed to state a claim under Superior Court Civil Rule 12(b)(6) (attached hereto as Exhibit A).

SUMMARY OF ARGUMENTS

In dismissing RBC's Amended Complaint, the Trial Court applied improperly two important legal principles under Delaware law.

First, the Trial Court placed a far heavier burden on RBC under Superior Court Civil Rule 12(b)(6) than the proper standard under Delaware law allows. In short, the Trial Court would have required RBC essentially to prove its case at the motion to dismiss stage, whereas Delaware law requires only that a complaint make allegations that put the defendants on *notice* of the claim against them and assert a *conceivable* set of circumstances under which the plaintiff could recover.

Second, the Trial Court applied the doctrine of *res judicata* improperly and contrary to Delaware law when it held that this action is barred because of a previous action that (a) arose from a different set of operative facts, and (b) was not decided by a final adjudication on the *merits* of that action.

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

STATEMENT OF FACTS

A. This Action

Since at least 2007, RBC has been a beneficial owner of auction rate securities backed by student loans ("ARS") issued by USEL IV in connection with the Trust. (Amended Complaint ("Am. Compl.") ¶¶ 1, 17, A74, A80.) Currently, RBC holds $453 million of USEL IV-issued ARS and is the largest owner of ARS issued by the Trust. (*Id.* ¶¶ 17, 20, A80.) The ARS were issued pursuant to an Indenture of Trust, dated March 1, 2006, between USEL IV as issuer and The Bank of New York ("BONY") as Trustee, (*id.* ¶ 9, A77), and a number of amendments to the Indenture dated March 1, 2006, September 1, 2006, and October 1, 2007 (collectively, the "Indenture"). (*Id.* ¶ 10, A78.) The Indenture defines the rates of interest to be paid to holders of the ARS. (*Id.* ¶ 11, A78.) Under the terms of the Indenture, the interest rate to be paid on ARS was typically set in periodic auctions; these auctions were used to set the interest rate on the ARS until February 2008. (*Id.*)

Beginning in February 2008, auctions for USEL IV-issued ARS began to fail due to distress in the global credit markets, and those auction failures continue to the present day. (*Id.* ¶ 12, A78.) The Indenture defines the rate of interest to be paid to ARS holders such as RBC in the event of a failed auction—specifically, the lesser of the Net Loan Rate and the Maximum Rate. (*Id.* ¶ 13,

A78-A79.) The Maximum Rate is a per annum interest rate that is the lesser of (a) LIBOR plus 1.5% to 2.5%, depending on the ARS' rating; (b) a cap based on commercial paper rates; (c) 18%; and (d) the highest rate the issuer may legally pay. (*Id.* ¶ 14, A79.) The Net Loan Rate is a per annum rate that is directly tied to the cash flows of the underlying student loan collateral, specifically (a) the sum of all interest and Special Allowance payments (as defined in the Indenture) made during the preceding quarter, less (b) all Note, Servicing, Administration, and consolidation loan rebate fees paid during the preceding quarter, divided by (c) the average daily principal balance of the loans for the preceding quarter. (*Id.* ¶ 15, A79.)

In May 2010, in retaliation for complaints made by RBC, USEL IV abruptly and wrongfully stopped making interest payments to RBC on any of the ARS it holds, dropping the amount of interest paid on those ARS to 0%. (*Id.*) USEL IV was aware that RBC was and continues to be the largest shareholder of USEL IV-issued ARS and that the financial impact of halting interest payments would be borne more by RBC than by other ARS owners. (*Id.* ¶ 39, A88.) USEL IV has ignored repeated requests from RBC for information relating to the Trust, and even went so far as to block RBC's access to an investor website which USEL IV maintains and to which all other owners of the ARS have access. (*Id.* ¶ 24, A82.)

Despite USEL IV's attempts to cut off RBC's access to information, RBC has been able to collect data which makes clear the amount of unpaid interest that is owed to RBC. (*Id.*) RBC used this data to analyze the actual cash flows into and out of the Trust, which reflected that net cash has come into the Trust that should have been used to make interest payments to RBC. (*Id.* ¶ 34, A86.) Yet Appellees refused to distribute that cash to RBC in the form of periodic interest payments as required by the Indenture. (*Id.*)

The data RBC used in its analysis are derived from trustee statements that include details about cash flows into and out of the Trust, as well as quarterly investor reports prepared by USEL IV. (*Id.* ¶ 24, A82.) These sources provide detailed day-by-day data that enabled RBC to calculate the amount of interest owed to RBC for the period from May 1, 2011 to April 30, 2012. (*Id.* ¶ 25, A82.) Specifically, RBC used this data to calculate the Net Loan Rate applicable to RBC's ARS for each quarter in 2011. (*Id.* ¶¶ 26-29, A82-A84.) RBC also determined which of the Net Loan Rate and Maximum Rate applied during each period, and applied the lower of the two as the Indenture requires. (*Id.* ¶ 30, A84.) RBC's analysis showed that from May 1, 2011 to April 30, 2012, USEL IV should have paid RBC $920,689 in interest. (*Id.* ¶ 31, A84.)

In addition, RBC undertook an investigation of the ARS market as a whole, as well as trusts with similar underlying collateral to that of the Trust at

issue here. (*Id.* ¶¶ 40-56, A88-A93.) This investigation provided further evidence that USEL IV is improperly withholding interest payments:

- RBC analyzed 27 different student loan trusts with a total of 87 outstanding ARS having similar characteristics to the USEL IV-issued ARS and found that since January 2010, only 2 of the 27 have reported consecutive periods with 0% interest rates (and only for a few CUSIPS) while ***none*** of the trusts ever reported 3 or more consecutive periods with 0% interest rates. (*Id.* ¶¶ 41-42, A88-A89.) In stark contrast, USEL IV had paid 0% interest for 34 consecutive periods on ***all*** CUSIPS as of the filing of the Amended Complaint. (*Id.*)

- RBC analyzed on a year-by-year basis the interest rates USEL IV paid on the ARS it issued. (*Id.* ¶¶ 45-46, A89-A90.) In 2007 and 2008, the amount of interest paid by USEL IV roughly correlated with the rest of the market, but by 2010 and 2011, the interest rates USEL IV paid diverged dramatically from the interest rates paid by the rest of the market. (*Id.*)

- RBC's investigation revealed that a particular trust that (a) is owned and administered by the same company as USEL IV, (b) is governed by nearly identical Trust documentation, and (c) has similar underlying student loan collateral and a similar cost structure, has had only one occurrence of a two-month consecutive 0% interest rate since 2009. (*Id.* ¶¶ 49-50, A91.) Notably, RBC does *not* own ARS from this trust, which further underscores that USEL IV is retaliating against RBC.

- RBC analyzed the underlying student loans that collateralize USEL IV and found that from 2007 through 2011, USEL IV's student loan portfolio experienced a steady increase in the proportion of student loans being actively repaid by their borrowers. (*Id.* ¶¶ 51-56, A91-A93.) This should have had the effect of increasing the interest being paid to ARS holders. (*Id.* ¶ 53, A92.)

In sum, the Trust has money that it refuses to pay and which was owed to ARS holders in the form of periodic interest payments. (*Id.* ¶¶ 28-32, 79,

A83-A85, A98.) There are over $1 billion of collateral student loans paying interest into the Trust every month, and the Trust remains in possession of money that it refuses to disgorge. (*Id.* ¶¶ 38, 79, A87, A98.) Moreover, publicly available filings made by One William Street Capital Management L.P., a holder of Notes governed by the same Indenture that governs the Notes in this lawsuit, show that although the Trust possesses millions of dollars in funds, it wrongfully refuses to use those funds to provide earned interest to noteholders. (*Id.* ¶ 58, A93.)

USEL IV's improper withholding of interest payments due to RBC is a breach of the Indenture and of RBC's rights as a holder of ARS. (*Id.* ¶ 71, A97.) USEL IV's continued failure to pay interest to RBC when due, in direct violation of the Indenture's terms, constitutes an Event of Default under Section 6.01(a) of the Indenture, which provides:

> **Events of Default.** If any of the following events occur, it is hereby defined as and declared to be and to constitute an Event of Default, whatever the reason therefore and whether voluntary or involuntary or effected by operation of law: (a) default in the due and punctual payment of any interest on any Senior Note for five Business Days.

(*Id.* ¶¶ 74-75, A97-A98.) Under Section 6.09 of the Indenture, once an Event of Default has occurred, RBC has an "*absolute and unconditional*" right to initiate suit for the payment of interest. (*Id.* ¶¶ 75-76, A98.) Section 6.09 provides in full:

> **Unconditional Right of Noteholders To Enforce Payment.** 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 of, 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.

(*Id.* ¶ 77, A98.)

B. The Chancery Action

Prior to filing this action, RBC discovered that USEL IV had caused excessive fees to be paid out of the Trust in 2008 and 2009, in violation of the Indenture's express limits on such fees. On March 18, 2011, RBC filed a Verified Complaint (the "Chancery Complaint") in the Delaware Court of Chancery (the "Chancery Action") against USEL IV and the Trust on the grounds that USEL IV had breached the Indenture by paying excessive fees. The Court of Chancery issued an opinion granting a motion to dismiss the Chancery Action on December 6, 2011, holding that RBC lacked standing to bring the claims asserted therein. (the "Chancery Opinion") (A56-A73.)

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY APPLIED A HEIGHTENED PLEADING STANDARD IN DISMISSING RBC'S BREACH OF CONTRACT CLAIM

A. Question Presented

Has RBC sufficiently pled a breach of contract claim against Appellees where it has alleged detailed facts that support all elements of the claim and give Appellees notice of the claim, and where the claim is not barred by the Indenture's no-action clause? This question was preserved in RBC's Consolidated Answering Brief in Opposition to Defendants' Motions to Dismiss the Amended Complaint and at oral argument. *See, e.g.*, A561-A573, A727-A736, A744-A748.

B. Standard and Scope of Review

The Supreme Court reviews *de novo* a trial court's grant of a motion to dismiss under Superior Court Civil Rule 12(b)(6). *See Century Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011); *Haskins v. Kay*, 963 A.2d 138 (Del. 2008). In reviewing the Trial Court's dismissal of RBC's Amended Complaint, this Court must (1) accept all of RBC's well-pleaded factual allegations as true, (2) accept even vague allegations as well-pleaded if they give Appellees notice of the claim, (3) draw all reasonable inferences in favor of RBC, and (4) not affirm the Trial Court's dismissal unless RBC would not be entitled to recover under any reasonably conceivable set of circumstances. *Century Mortg. Co.*, 27 A.3d at 535.

The pleading standard governing the motion to dismiss stage of a proceeding in Delaware has been described by this Court as "minimal" or "low." *Id.* at 536; *see also 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"). Under Delaware law,[1] a complaint need not contain heightened fact pleadings of specifics, rather it "need only give general notice as to the nature of the claim asserted" to avoid dismissal. *Universal Capital Mgmt. v. Micco World, Inc.*, 2012 WL 1413598, at *2 (Del. Super. Feb. 1, 2012) (citation omitted). This Court has repeatedly made clear that "the governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability'" — a standard akin to determining whether the claim is *possibly* true.[2] *Century Mortg. Co.*, 27 A.3d at 537 & n.13; *Cambium Ltd. v. Trilantic Capital Partners*, 36 A.3d 348 (Del. 2012). "All that matters at the motion to dismiss stage," then, is that a plaintiff's well-pleaded complaint alleges a claim that, if proven, would "entitle [the plaintiff] to

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1 Although New York law applies to the substance of RBC's breach of contract claims because the Indenture contains a choice of law provision providing for the application of New York law, Delaware law applies to procedural issues such as the standard of review on a motion to dismiss. *See, e.g., Noddings Inv. Grp., Inc. v. Capstar Commc'ns., Inc.*, 1999 WL 182568, at *2 (Del. Ch. Mar. 24, 1999) (applying Delaware standard of review on motion to dismiss in dispute over contract governed by New York law).

2 As this Court has explained, Delaware's pleading standard imposes a lower burden than the federal standard, under which the standard to survive a motion to dismiss is "plausibility." *Century Mortg. Co.*, 27 A.3d at 537 n.13 ("Our governing 'conceivability' standard is more akin to 'possibility,' while the federal 'plausibility' standard falls somewhere beyond mere 'possibility' but short of 'probability.'").

relief under a reasonably conceivable set of circumstances." *Century Mortg. Co.*, 27 A.3d at 538. Thus, the "test for determining the sufficiency of a claim is a broad one," *Haskins*, 963 A.2d at 138; at the motion to dismiss stage, "it matters not which party's assertions are actually true." *Century Mortg. Co.*, 27 A.3d at 538. Indeed, a trial court may believe as a factual matter that it ultimately may be impossible for a plaintiff to prove its claims at a later stage of the proceeding, "but that is not the test to survive a motion to dismiss." *Id.* at 536.

C. Merits

1. RBC Pled Sufficient Factual Allegations in the Amended Complaint to Sustain Its Claim

The facts RBC alleged in the Amended Complaint were more than sufficient to meet the "low" threshold necessary to survive Appellees' motion to dismiss below. *See Doe v. Cahill*, 884 A.2d at 458; *see also Century Mortg. Co.*, 27 A.3d at 536. The Amended Complaint was well-pleaded because it clearly put Appellees on notice that RBC was pursuing a breach of contract claim based on unpaid interest under the terms of the Indenture. *See Century Mortg. Co.*, 27 A.3d at 535. Thus, the Trial Court was required to accept as true RBC's allegations even if they were "vague" (which they were not). *Id.*; *see also* Exhibit A at 2 ("RBC's complaint is vague as to why interest was not earned.").

As discussed below, the Trial Court misapplied the Delaware pleading standard with respect to RBC's breach of contract claim. Furthermore, Appellees'

arguments on their motions to dismiss below did not support the Trial Court's dismissal of RBC's Amended Complaint. At no point below did Appellees assert that they did not understand the nature of the claim against them. Rather, they suggested that dismissal was appropriate because they required extremely particularized allegations and "source documents" regarding the performance of the underlying collateral so that they could test the truth of the Amended Complaint's allegations. Yet like the Trial Court, Appellees incorrectly invoked a vastly higher pleading standard than exists under Delaware law. Thus, notwithstanding Appellees' protestations regarding the particularity of RBC's allegations, the Trial Court was required to accept RBC's allegations as true and to not dismiss the Amended Complaint unless it was not "conceivable" that RBC could recover under any set of circumstances. *Century Mortg. Co.*, 27 A.3d at 535.

a. RBC Was Not Required to Allege the *Exact* Amount of Interest Due Under the Indenture – Although It Did

The Trial Court erred in dismissing the Amended Complaint under Superior Court Civil Rule 12(b)(6) because RBC failed to allege "***exactly*** what interest was due and when." Exhibit A at 17 (emphasis added). The Trial Court misapplied Delaware's motion to dismiss standard and also impermissibly ignored the allegations in the Amended Complaint that set forth precisely – to the penny – how much interest was due and when it was due. The Trial Court also held that

"[i]t seem[s] . . . that no pleading specifically alleges there is interest that has been earned and not distributed as called for by the interest payment formula." *Id.* at 17-18.. This holding misapplied Delaware's notice pleading standard and also ignored allegations in the Amended Complaint that allege that exact information.

The Trial Court's formulation of the applicable pleading standard (and thus the dismissal of RBC's breach of contract claim) would hold RBC to a burden that is vastly higher than is provided for under Delaware law.

Under Delaware's pleading standard, as discussed above, RBC need not allege *exactly* how much interest is due, and when. *See Century Mortg. Co.*, 27 A.3d at 538 (reversing the trial court's dismissal because "[a]ll that matters at the motion to dismiss stage is that [plaintiff below's] well-pleaded Complaint [makes allegations that] if proven, would entitle [plaintiff below] to relief under a reasonably conceivable set of circumstances"). Nevertheless, and contrary to the Trial Court's holding that the Amended Complaint fails to allege that interest has been earned and not paid pursuant to the Indenture, the Amended Complaint alleges extensive specific facts regarding the amount of interest owed and the time period for which that interest is owed. (*See, e.g.*, Am. Compl. ¶¶ 28-32, 35-38, 41-47, 52-55, A83-A84, A86-A90, A92-A93.) For example:

- "RBC has determined that from the second quarter of 2011 through the second quarter of 2012, USEL IV should have paid RBC $920,689 in interest under the terms of the Indenture . . . . The following summary shows, by CUSIP number, the amount of interest USEL IV

should have paid to RBC for each of the past five business quarters." (Am. Compl. ¶ 31, A84-A85.)

- "The actual cash flows into and out of the Trust demonstrate that net cash has come into the Trust which in turn should have resulted in interest payments being made to ARS owners, but Defendants are refusing to distribute that cash to RBC in the form of periodic interest payments according to the schedule set out in the Indenture." (*Id.* ¶ 34, A86.)

- "Despite 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 make interest payments to ARS holders as interest as required by contract." (*Id.* ¶ 38, A87.)

- "USEL IV has received cash in the form of interest payments on the underlying student loan collateral, but has not properly applied that cash to make interest payments to ARS owners as required by the Indenture of Trust." (*Id.* ¶ 46, A90.)

- "Based on RBC's analysis, interest payments should have been made given that the Trust had net positive cash flows during 2011." (*Id.* ¶ 48, A91.)

- "Applying the Net Loan Rate and Maximum Rate formula to these cash flows shows that interest should have been paid. Given that substantial net cash flow is coming into the Trust each month, interest clearly is due and owing." (*Id.* ¶ 56, A93.)

- "The Trust has money which it refuses to disgorge and which was owed to ARS holders in the form of periodic interest payments." (*Id.* ¶ 79, A98.)

The Amended Complaint also walks through the terms of the Indenture and the application of the Net Loan Rate to allege specifically how RBC determined that it should have been paid over $920,000 in interest in 2011. For example, the Amended Complaint alleges that RBC calculated the Net Loan Rate

by examining documents showing "details about the flows of cash into and out of the Trust" (*id.* ¶ 24, A82), and then applied the applicable rate to each CUSIP that RBC owns (*id.* ¶ 30, A84).

In addition, the Amended Complaint provides precise allegations regarding the composition of loan collateral, the similarity of Trust documentation and interest calculations (sometimes nearly identical), and other material characteristics of the similar trusts analyzed by RBC that were making substantial interest payments, making these allegations sufficient to survive a motion to dismiss.[3] (*Id.* ¶¶ 41, 46-50, 58, A88, A90-A91, A93-A94.)

The Amended Complaint also alleges, based upon the actual cash flows of the Trust for 2011, that there were over $2 billion in student loans, of which over $1 billion were paying interest into the Trust every month. (*Id.* ¶¶ 38, 52-54, A87, A92.) The Trust took in over $50 million in interest payments on the underlying student loan collateral in 2011, and even after paying expenses and

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[3] The Trust's argument below that "third-parties' hearsay" and the parol evidence rule prohibit consideration of these allegations (Opening Brief of the Bank of New York Mellon, as Indenture Trustee for Defendant Education Loan Trust IV, in Support of its Motion to Dismiss the Amended Complaint, dated Oct. 12, 2012 ("Trust Br."), at 16, n.15, A494) was completely without merit. The Trust cited no legal authority suggesting that allegations containing "third-parties' hearsay" cannot be credited as true on a motion to dismiss, and the parol evidence rule is irrelevant because RBC did not introduce these analyses to suggest *how* to interpret the Indenture. (*See id.* (citing *Krieger v. Cornelius*, 697 N.Y.S.2d 766, 767 (App. Div. 1999) (standing only for proposition that where parties' intent was clear from terms of contract, court need not resort to extrinsic evidence to determine that intent); *Baisley Park Gardens Assoc. v. Brown*, 2003 WL 22519444, at *1 (N.Y. App. Div. Oct. 2, 2003) ("extrinsic and parol evidence is not admissible to create an ***ambiguity*** in a written agreement" (emphasis added)). Indeed, the Indenture's terms are clear—Appellees must periodically pay interest on ARS that RBC owns.

making adjustments, there was significant cash left over which should have been paid to RBC in the form of interest on the ARS it owns. (*Id.* ¶ 28, A83.)

In sum, the allegations RBC made in the Amended Complaint went above and beyond what was necessary to put Appellees on notice of the claim against them. The allegations in the Amended Complaint also set out a conceivable set of circumstance under which RBC would have been entitled to relief. Therefore, the allegations in the Amended Complaint are more than sufficient to survive a motion to dismiss under Delaware law.

b. RBC Was Not Required to Allege With Particularity *How* It Calculated the Amount of Interest Due – Although It Did

Below, Appellees argued at length that the Amended Complaint had to allege precise details regarding exactly how the Net Loan Rate was calculated, so that they could challenge the truth of the allegations in the Amended Complaint. For example, Appellees argued that without the underlying evidence and "source documents" that formed the basis for RBC's allegations, it was impossible for them to "test" RBC's allegations[4] and "*reach the merits* of a breach of contract

[4] Appellees apparently wanted to "test" RBC's calculations, arguing that "RBC could have made a math *error*." (Opening Brief in Support of Defendant U.S. Education Loan Trust IV, LLC's Motion to Dismiss the Amended Complaint, dated Oct. 12, 2012 ("USEL IV Br."), at 18, A542 (emphasis added).)

claim."[5] Again, Appellees argued the incorrect standard and ignored the plain allegations in the Amended Complaint.

Under Delaware's notice pleading standard, "a plaintiff is ***not*** required to plead ***any evidence*** in support of allegations in a complaint." *American Tower Corp. v. Unity Commc'ns, Inc.*, 2010 WL 1077850, at *1 (Del. Super. Mar. 8, 2010) (emphasis added) (holding that plaintiff need not "present evidence sufficient to support the factual allegations in its Complaint, but is merely required to place [Defendant] on notice of the cause of action asserted"); *see also Mason v. Redline Transp. Corp.*, 2009 WL 1231248, at *1 (Del. Super. Apr. 30, 2009) ("consideration of a motion to dismiss does not call for a review of underlying proof or evidence").

Notwithstanding that Appellees were not entitled to "test" the sufficiency of RBC's evidence at the motion to dismiss stage, the Amended Complaint includes detailed allegations as to how RBC calculated the amount of interest due. The Amended Complaint quotes the Indenture to explain that the Net Loan Rate is a per annum rate based on **(a)** the sum of all interest and Special Allowance payments made during the preceding quarter, less **(b)** all Note, Servicing, Administration, and consolidation loan rebate fees paid during the

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5 Trust Br. at 7, A485; USEL IV Br. at 1, 17, 18, A525, A541, A542 (emphasis added).

preceding quarter, divided by **(c)** the average daily principal balance of the loans for the preceding quarter. (Am. Compl. ¶ 15, A79.) Thus, the formula is **(a)** minus **(b)** divided by **(c)**. The Amended Complaint provides each of these inputs. (*Id.* ¶¶ 28-29, A83-A84.) Further, in contradiction to Appellees' argument below that "RBC does not adequately identify the sources of the data it used" (USEL IV Br. at 2, A526), RBC alleged precisely which documents provided the data it used to calculate the interest owed. The Amended Complaint alleges that the data were taken 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. (Am. Compl. ¶ 24, A82.)

In short, while Appellees may have disputed RBC's calculations below and sought to review all of the evidence that formed the basis for every calculation, RBC's allegations ***must be assumed to be true at this stage of the proceeding***.

2. The Indenture's "No-Action" Clause Does Not Bar RBC's Claim

The Trial Court held that "the Net Loan Rate equation undeniably involves management decisions, and a challenge to those decisions is a derivative claim subject to the Indenture's 'no-action clause.'" Exhibit A at 18. However, simply because "management decisions" may in some way have some mathematical effect on some of the inputs into the Net Loan Rate calculation, that

does not mean that RBC's claim for unpaid interest is barred by the no-action clause. This argument would strip investors of the right to pursue *any* claim for unpaid interest, as the Issuer and/or the Trust could always argue that management decisions *could* have impacted the interest payments in some way.

RBC's claim for unpaid interest falls under Section 6.09 of the Indenture, which grants RBC an "absolute and unconditional" right to bring suit for unpaid interest.[6] The Amended Complaint lays out with substantial factual detail RBC's claim that Appellees have failed to pay interest to RBC as required by the Indenture. (*See, e.g.*, Am. Compl. ¶¶ 28-32, 35-38, 41-47, 52-55, A83-A90, A92-A93.) These allegations, which as discussed above, the Trial Court should have taken as true, are therefore sufficient to survive the Indenture's no-action clause at the motion to dismiss stage.

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[6] A Section 6.09 claim is appropriate where a plaintiff seeks to recover interest payments determined pursuant to a variable interest rate formula such as the one at issue here. *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."). This provision safeguards *all* noteholders' "right to receive payment of . . . interest" and provides an "absolute and unconditional" right to sue for that interest, regardless of the method by which it is calculated. *UPIC & Co. v. Kinder-Care Learning Ctrs.*, 793 F. Supp. 448, 453-54 (S.D.N.Y. 1992). Indeed, because the interest payments at issue here are calculated pursuant to the Net Loan Rate formula, Section 6.09 would be wholly negated by such an interpretation, contrary to the cardinal canon of contract interpretation. *See Estate of Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (Delaware courts construe contracts to "give each provision and term effect" and will not "read a contract to render a provision or term 'meaningless or illusory.'").

II. THE TRIAL COURT ERRONEOUSLY HELD THAT THE DOCTRINE OF *RES JUDICATA* BARS RBC'S CLAIM

A. Question Presented

Is the doctrine of *res judicata* inapplicable where this action asserted different claims and arose from different operative facts than the Chancery Action, and where the Chancery Action was not decided on the merits? This question was preserved in RBC's Consolidated Answering Brief in Opposition to Defendants' Motions to Dismiss the Amended Complaint and at oral argument. *See, e.g.*, A574-A581, A736-A739.

B. Standard and Scope of Review

The Supreme Court reviews legal determinations of the court below, such as whether the doctrine of *res judicata* applies, *de novo*. *Smith v. Guest*, 16 A.3d 920, 933 (Del. 2011). A party asserting *res judicata* as a bar to a subsequent action must establish each of five elements: 1) the prior court had jurisdiction over the dispute; 2) the prior dispute involved the same parties; 3) the causes of action are the same in both cases; 4) the prior action was decided adversely to the plaintiff's contentions in the present case; and, 5) the prior action was finally adjudicated on the merits. *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191-92 (Del. 2009); *Smith*, 16 A.3d at 934-35. Claims are the "same" if they "arise from the same transaction" because they "'derive[d] from a common nucleus of operative fact[s],'" a determination that "requires pragmatic consideration" by the

fact-finder. *LaPoint*, 970 A.2d at 193; *Maldonado v. Flynn*, 417 A.2d 378, 381 (Del. Ch. 1980).

C. Merits

The Trial Court erred in holding that this action is barred by *res judicata*. Two of the above elements, each fatal to Appellees' attempt to invoke *res judicata*, are entirely lacking. First, this action is not "the same" as the Chancery Action because this action derives from different operative facts: it asserts a different cause of action, relies on new allegations, relates to a different time period, and seeks to remedy a different wrong (*i.e.*, unpaid interest rather than excessive fees) than the Chancery Action. Second, the Chancellor's determination that RBC did not have standing to bring its claims under Section 6.09 was not a "final adjudication on the merits," which provides an independent bar to the application of *res judicata*. Alternatively, even if *res judicata* could apply to a portion of RBC's claim, Appellees have continued to fail to pay interest to RBC since the completion of briefing on Appellees' motions to dismiss the Chancery Action, and thus *res judicata* cannot bar RBC from recovering for Appellees' ongoing breach of the Indenture.

1. The Claim Asserted and Issues Raised in the Instant Action Derive from Different Operative Facts Than Those in the Chancery Action

The doctrine of *res judicata* cannot bar the present action because RBC's claim is based on a fundamentally different set of operative facts than were the claims asserted in the Chancery Action. Furthermore, the claim that RBC now brings for non-payment of interest in accordance with the Indenture is not a claim that it "could have brought" in the Chancery Action.

This action is about Appellees' total failure to pay any interest due to RBC under the terms of the Indenture. Contrary to the Trial Court's holding, the "subtext" of the Amended Complaint is ***not*** "RBC's belief that Defendants chose to pay too much in fees," and the "heart" of this action does ***not*** relate to BONY's "judgment as to fees." *See* Exhibit A at 2. The Trial Court was also incorrect that "RBC does not allege that Defendants failed to make a payment when due, or that any payment fell short by a specific amount." *See* Exhibit A at 9. Rather, as the Amended Complaint makes clear, the issue in the present action is narrowly focused on Appellees' failure to make interest payments pursuant to the terms of the Indenture, specifically the Net Loan Rate. This action is in stark contrast to the Chancery Action, which truly was about the Appellees' payment of excessive fees out of the Trusts. Indeed, the two actions clearly arise from separate sets of operative facts, and a redline comparison between the two complaints shows that

the allegations are far from similar. *See* Plaintiff RBC Capital Market, LLC's Consolidated Answering Brief in Opposition to Defendants' Motions to Dismiss the Amended Complaint, Ex. C (A583-A626).

Given that the issue in the Chancery Action was not that Appellees improperly failed to make interest payments in accordance with the Indenture, the Chancery Action cannot have preclusive effect here. *See R&R Capital, LLC v. Merritt*, 2009 WL 2937101, at *4 (Del. Ch. Sept. 3, 2009) (claims alleged in prior complaint but not specifically encompassed by the prior court's ruling were not barred by *res judicata* because they had not been fully adjudicated on the merits).

a. The Chancery Action

The Chancery Action was based on allegations that, in 2008 and 2009, Appellees charged fees for administering the Trust that exceeded certain specified limits set forth in the Indenture. (Chancery Complaint ¶¶ 1, 27, 30, 31-42, 51, 61, 72, A36, A44-A47, A49, A51, A53.) RBC did not allege in the Chancery Complaint that the interest payments were not paid in accordance with the Net Loan Rate. The Court of Chancery *explicitly* held that RBC did "not allege that it did not receive interest payments on its auction rate notes on time, or that the interest rate formula applicable to the notes was not applied as written." (Chancery Opinion at 2, A58.) And the Court of Chancery repeatedly noted that it was *not* deciding whether Appellees had breached the Indenture provisions relating to the

payment of interest. (*Id.* at 12, A68) ("RBC does not allege a violation of any specific term of the [Indenture] that deals with the timing of interest payments or the amount of interest payments made . . . ").[7]

Appellees, in their briefing before the Court of Chancery, readily acknowledged that the Chancery Action was *not* about the failure to pay interest in accordance with the Net Loan Rate:

- "***[RBC] is not suing for alleged non-payment of interest*** owing exclusively to [RBC]; it is suing for alleged overpayments of certain Administration and Operating fees to USEL IV . . . . " (Rostocki Aff. Ex. G, Reply Brief in Support of Defendant U.S. Education Loan Trust IV, LLC's Motion to Dismiss the Verified Complaint at 1, A511 (emphasis added).)
- "***Plaintiff is not suing for non-payment of interest*** . . . ." (*Id.* at 2, A512 (emphasis added).)
- "***Plaintiff's claims against USEL IV cannot be for nonpayment of interest***, but must exclusively relate to alleged overcharges of fees payable to USEL IV pursuant to the Indenture." (*Id.* at 3, A513 (emphasis added).)

Even Appellees' own counsel, during oral argument before the Trial Court, admitted that the Chancery Action was *not* about Appellees' non-payment

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[7] The Court of Chancery also held that although RBC alleged that the excessive fees indirectly reduced the amount of interest paid to Noteholders, such an allegation was not the same as alleging that it did not receive timely interest payments pursuant to the Net Loan Rate formula. (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)).

of interest. (Oral Arg. Tr. at 6:1-5, A683 ("THE COURT: The core of the litigation in Chancery as far as it got, which wasn't very far, focused on exorbitant fees. Is that not a fair statement? MS. BUTCHER: That is a fair statement.").)

b. <u>This Action</u>

The Amended Complaint, on the other hand, alleges *exactly* what the Chancery Action was found not to have alleged—a claim solely for unpaid interest. The Amended Complaint is based on different facts (Appellees' deliberate, ongoing, and unjustifiable failure to pay interest due to RBC under the terms of the Indenture), relates to a different time period (May 2010 – present), alleges a different theory of breach based on different Indenture provisions (nonpayment of interest under Section 6.09), alleges a different harm (direct failure/refusal to pay interest earned under the Indenture), and requests a different type of relief (payment of interest due) than the Chancery Action. The Amended Complaint alleges that Appellees have for over two and a half years failed to pay any of the interest rightfully due to RBC, and does not in any way rely on independent breaches of the Indenture to show that interest payments were improperly reduced.

The Trial Court repeatedly (and incorrectly) characterized this action as one based on "mismanagement" of the Trusts and opined that "RBC cannot deny that the reason it is not receiving interest is the fees [paid out of the Trusts]." *See* Exhibit A at 13. Those statements, however, mischaracterize the allegations in

the Amended Complaint. In reality, the Amended Complaint (unlike the Chancery Complaint) does not allege any type of "mismanagement" of the Trusts; it focuses solely on the fact that Appellees failed to make interest payments to RBC in accordance with the requirements of the Indenture. Furthermore, RBC has taken no position as to ***why*** Appellees have failed to pay interest; in fact the Amended Complaint alleges that there is ***no*** valid reason for Appellees' failure to pay interest. As RBC's counsel stated during oral argument before the Trial Court, the reason behind Appellees' failure to comply with their obligations under the Indenture is irrelevant to this action and to the allegations in the Amended Complaint. (*See* Oral Argument Tr. at 50:2-5, A727 ("[O]ur claim is very simple, pay me the money that's due. It doesn't matter if there were monies that were diverted to fees.").)

Thus, the Trial Court's reasoning that the Chancery Action and this action arise from the same "transaction" is incorrect. *See* Exhibit A at 13-14. For all the reasons explained above, the two actions do *not* arise from the "same course of conduct." The Chancery Action arose from the Issuer's payment of excessive fees out of the Trusts in violation of limits the Supplemental Indentures set on fees, while this action arises out of Appellees' failure to pay any of the interest due to RBC under the terms of the Indenture governing the payment of interest. These are two separate "courses of conduct." Finally, the Trial Court's observation that

both claims ultimately relate to the same Indenture (Exhibit A at 13-14) is inapplicable here, given that the two actions are based on different sets of operative facts. *See, e.g., Chambers Belt Co. v. Tandy Brands Accessories, Inc.*, 2012 WL 3104396, at *4 (Del. Super. July 31, 2012) (holding that *res judicata* did not apply to a subsequent action based on the same contract provision at issue in a previous action, where the issues and claims in the two actions were different).

Given the fundamental difference between the two actions, this action does not present the "same" claims or issues as the Chancery Action under Delaware's transactional approach, and thus is not barred by *res judicata*. *See Grunstein v. Silva*, 2011 WL 378782, at *8 (Del. Ch. Jan. 31, 2011) (holding that plaintiff shareholder "ha[d] not impermissibly split his claims" because his claims in a subsequent action "differ[ed] dramatically, in terms of both theory and the relief sought" from the prior action brought by the entity he controlled).

The claim in this action is also not one that RBC "could have brought" in the Chancery Action. While it is true, as the Trial Court found, that interest payments to RBC had stopped almost a year before RBC filed the Chancery Action (*see* Exhibit A at 14), it was not until well after briefing had been completed on Appellees' motion to dismiss the Chancery Action that RBC was able to possess the data and analysis that allowed it to confirm that Appellees were wrongfully withholding interest payments in violation of the Indenture provisions

governing the payment of interest.[8] In fact, it was only after Appellees had failed to pay interest over a sustained period that RBC had even begun to realize that they were withholding interest without justification. (Am. Compl. ¶¶ 40, 41, 63, 67, A88-A89, A95-A96.) It was only after this sustained period of non-payment, which could not be explained by normal market conditions, that RBC was put on notice of the true nature of Appellees' wrongful conduct—that they were withholding interest payments that should have been made according to the terms of the Indenture. It was then that RBC undertook its lengthy and careful investigation into the lack of interest payments, and only after that diligence could RBC confirm (i) that Appellees were indeed misapplying the interest payment provisions of the Indenture and (ii) the exact amount of interest owed under the terms of the Indenture. Thus, the Trial Court's reasoning that this action is barred by *res judicata* because "RBC could have filed suit a week after the interest was due, but stopped, in 2010"[9] and "at no point in the Chancery litigation did RBC move to amend its complaint," is wholly unsupported. *See* Exhibit A at 14.

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[8] Appellant USEL IV asserted below that *res judicata* bars this claim because RBC "should have" requested information related to the Trust, but did not (*see* USEL IV Br. at 22, A546)—an argument that was particularly absurd given that RBC *repeatedly* requested information that would have allowed it to investigate such a claim, yet each time USEL IV and the Trustee unjustifiably ignored or refused RBC's requests. (Am. Compl. ¶¶ 24, 33, 70, A82, A85, A97.)

[9] The Trial Court pointed out that RBC bases its Section 6.09 claim on the Indenture provision designating "default in the due and punctual payment of any interest [. . .] for five Business Days" as one type of Event of Default under the Indenture. On this basis alone, the (continued . . .)

2. The Chancellor's Decision Was Not a Final Adjudication on the Merits

The Chancery Opinion was a not a "final adjudication on the merits" because it concerned only RBC's *standing* under the Indenture to bring an action based on the Issuer's payment of excessive fees. The Chancery Opinion did not reach the merits of RBC's case. Under Delaware law, a court's determination that a plaintiff lacks standing to bring an action is not a "final judgment on the merits" that bars a subsequent action under *res judicata*. *See Ralph Paul, Inc. v. Brooks*, 1976 WL 7954, at *4 (Del. Ch. July 22, 1976) (a "valid and final" judgment is one that "reaches and determines 'the real or substantial grounds of the action . . . as distinguished from matters of practice, procedure, jurisdiction or form'" (citation omitted)).[10] As this Court recently held, standing "is concerned only with the

(. . . continued)
Trial Court jumped to the conclusion that RBC "could have" filed the instant Action "a week" after interest payments stopped in 2010. *See* Exhibit A at 14. But this reasoning totally ignores the allegations in the Amended Complaint (which the Trial Court was not permitted to do on motion to dismiss) that, as noted above, RBC could not have been aware that Appellees were deliberately withholding interest in violation of the Indenture until well after it was denied interest for a lengthy period. (*See* Am. Compl. ¶¶ 34, 40, 41, 63, 67, A86, A88-A89, A95-A96.)

[10] *See also Faiveley Transp. USA, Inc. v. Wabtec Corp.*, 511 Fed. App'x 54, 55-56 (2d Cir. 2013) ("'[i]n ordinary circumstances a second action on the same claim is not precluded by dismissal of a first action for prematurity or failure to satisfy a precondition to suit.'" (*quoting* 18A Charles Alan Wright & Arthur R. Miller, Fed. Practice & Procedure § 4437 (2d ed. 2012)); *Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."); *Ruiz Rivera v. Holder*, 666 F. Supp. 2d 82, 91 (D. D.C. 2009) ("[T]he Court's previous decision . . . was a dismissal on standing grounds, not a final judgment on the merits, and as a result, it cannot be said that the plaintiff received or had a full and fair opportunity to litigate the issues alleged in this action." (internal quotations and citations omitted)).

question of *who* is entitled to mount a legal challenge and not with the merits of the subject matter of the controversy." *Smith*, 16 A.3d at 934. Applying that reasoning, this Court held that because the prior ruling in *Smith* did not reach the merits of the plaintiff's claim, the prior ruling "[was] not a 'final judgment on the merits' that bars [the plaintiff's] renewed [claim] under the doctrine of *res judicata*." *Id.* at 934-35 (citations omitted).

In the Chancery Action, the Court of Chancery did not rule on the merits of RBC's claims to recover unauthorized fees paid in connection with the administration of the Trust, and certainly did not rule on the merits of RBC's ability to recover unpaid interest. Rather, the Court of Chancery determined only that RBC did not have standing to assert its claims under Section 6.09 of the Indenture. (Chancery Opinion at 17, A73 ("I find that § 6.09 does not apply to RBC's claims, and RBC's claims are properly within the purview of § 6.08.").) The Court of Chancery also found that RBC's action was "derivative of a claim belonging to the Trust itself," and that the remedy sought was a "classic derivative action recovery." (*Id.* at 13, A69). Because RBC did not make a written demand on the Trustee pursuant to Section 6.08, the Court held that RBC lacked standing to bring its claims directly under Section 6.08 and declined to rule on the substance of RBC's claims. Indeed, the Trial Court itself acknowledged that "[a]t the ***outset***, the Chancellor held that RBC's claims were subject to the 'no-action clause' and,

because RBC failed to allege that section 6.08's ***preconditions*** were satisfied, the complaint was dismissed." Exhibit A at 6 (emphasis added).

And even assuming, for the sake of argument, that the Court of Chancery *had* to some extent made findings with respect to the merits of RBC's claims, such findings would still have ***no*** preclusive effect on the instant action, given that the Court of Chancery also decided that RBC lacked standing to bring its claims. *See* 18 Charles Alan Wright & Arthur R. Miller, Fed. Practice & Procedure § 4421 (2d ed. 2012) ("If a first decision is supported both by findings that deny the power of the court to decide the case on the merits and by findings that go to the merits, preclusion is inappropriate as to the findings on the merits."); *Gulla v. N. Strabane Twp.*, 146 F.3d 168, 172-173 (3d Cir. 1998) (Alito, J.) (holding that a prior court's ruling that plaintiff lacked standing was not a final adjudication on the merits, even where the prior court "commented upon the merits" of the case).

Ignoring this Court's precedent holding that decisions based on standing are ***not*** decisions "on the merits," the Trial Court accepted Appellees' argument that Court of Chancery Rule 15(aaa) controls the outcome of this case. In essence, the Trial Court held that the Chancery Opinion was a judgment "on the merits" because under Rule 15(aaa), it was dismissed with prejudice and was therefore "final," and "final" judgments are "'generally defined'" as

"'determin[ing] the merits of the controversy.'"[11] Exhibit A at 15-16. The Trial Court improperly conflated the concepts of an adjudication "with prejudice" and an adjudication "on the merits." RBC concedes that the Chancery Opinion was a final adjudication as to RBC's standing because RBC did not appeal that ruling or seek to amend the Chancery Court complaint. But that does not mean that the Chancery Opinion finally adjudicated the *merits* of the Chancery Action; rather it was a procedural ruling that never reached the merits of RBC's claims.

The Trial Court concluded that the Chancery Opinion "adversely decided every issue that RBC could and should have included in its Chancery proceeding," but supported that conclusion by citing just two sentences in the Chancery Opinion, the second of which tellingly states "[b]ecause 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." Exhibit A at 16 (citing *RBC Capital Mkts., LLC v. Educ. Loan Trust IV*, 2011 WL 6152282, at *7 (Del. Ch. Dec. 6, 2011) [Chancery Opinion at 73] (emphasis added)). Not only does that portion of the Chancery Opinion fail to support the Trial Court's reasoning, it

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[11] The Trial Court also reasoned that by virtue of RBC's "decision not to amend in the Chancery case . . . in effect RBC chose to split its claim." Exhibit A at 16. RBC of course made no such "choice," because as explained above, at the point in time that it could have amended the Chancery Complaint (prior to July 2011) RBC lacked the necessary information and analysis to even realize that Appellees were wrongfully withholding interest due to RBC. (*See* Am. Compl. ¶¶ 40, 41, 63, 67, A88-A89, A95-A96)

actually supports RBC's position that the Chancery Action was dismissed based on standing and not on the merits. Further, the Trial Court's rather circular reasoning that Rule 15(aaa) automatically makes the Chancery Opinion a final adjudication "on the merits" would render meaningless the effect of this Court's precedent, which holds that decisions based on standing are *not* judgments "on the merits."[12] As such, the Chancery Opinion was not a "final adjudication on the merits," rendering the doctrine of *res judicata* inapplicable.

3. Appellees' Breaches of the Indenture are Ongoing

Even if the claim RBC asserts in this action arose from the "same transaction" as the Chancery Action, this action still is not barred by *res judicata* because Appellees have continued to breach the Indenture following the filing (and dismissal) of the Chancery Action. "Contractual rights that are triggered and pursued *after* the initial action is filed" are not barred "because a prior judgment 'cannot be given the effect of extinguishing claims which did not even then exist.'" *LaPoint*, 970 A.2d at 194.

RBC clearly and in detail alleged that Appellees' breaches are ongoing. (Am. Compl. ¶¶ 16, 36, 46, 55, 67, 76, A80, A87, A90, A93, A96, A98.) This, of course, includes the period from March 2011, when the Chancery Action

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[12] Thus, whether Chancellor Strine's dismissal of the Chancery Action was "with prejudice" under Rule 15(aaa) is irrelevant because, as explained above, the Chancery Opinion went solely to the question of RBC's standing and thus was not a final adjudication on the merits.

was filed (or July 2011, when the briefing on the Appellees' motions to dismiss the Chancery Complaint was completed) forward. Thus, even if the claims in this action are based on the same transaction as those in the Chancery Action, *res judicata* still does not bar at least that portion of RBC's claims for interest earned from March 2011 (and certainly July 2011) forward. *See LaPoint*, 970 A.2d at 194-95 (claims on the same contract that arose *after* the prior action was filed were not part of the same transaction, and thus are not barred by *res judicata*); *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1092 (Del. 2006) (*res judicata* did not bar a subsequent action where conduct taking place *after* the prior action was filed supported "a claim for relief that was never adjudicated" in the prior action). Indeed, counsel for the Trust essentially conceded this point at oral argument before the Trial Court. (*See* Oral Argument Tr. at 30:13-15, A707 ("[W]e could make an argument about the interest that accrued after dismissal of the prior action. But at a minimum, everything that accrued prior to that could have been asserted in that prior action.").)

The Trial Court ignored RBC's allegation of an ongoing breach based on the faulty reasoning that the claim asserted in this action "exist[ed] when [RBC] chose to file in Chancery," which, as explained above, is unsupported and contrary to the Amended Complaint. *See* Exhibit A at 18. Thus, at an absolute minimum, RBC is free to pursue its claim for interest earned since July 2011.

CONCLUSION

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

POTTER ANDERSON & CORROON LLP

OF COUNSEL:

Alan J. Stone (No. 2677)
Sean M. Murphy
Patrick Marecki
MILBANK, TWEED, HADLEY & McCLOY LLP
1 Chase Manhattan Plaza
New York, NY 10005-1413
Telephone: (212) 530-5000

Attorneys for Plaintiff Below/Appellant RBC Capital Markets, LLC

-and-

Eric Heichel
EISEMAN LEVINE LEHRHAUPT & KAKOYIANNIS, P.C.
805 Third Avenue, 10th Floor
New York, NY 10022
Telephone: (212) 752-1000

Attorneys for Nominal Plaintiffs Below/Appellants The Depository Trust Company and Cede & Co.

By: */s/ Jennifer C. Wasson*
Matthew E. Fischer (No. 3092)
Jennifer C. Wasson (No. 4933)
Janine L. Hochberg (No. 5188)
Hercules Plaza – 6th Floor
1313 North Market Street
Wilmington, DE 19801
Telephone: (302) 984-6000

Attorneys for Plaintiff Below/Appellant RBC Capital Markets, LLC and Nominal Plaintiffs Below/Appellants The Depository Trust Company and Cede & Co.

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EXHIBIT A

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Case No. N12C-02-015 FSS CCLD

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RBC CAPITAL MARKETS, LLC, a Minnesota limited liability company,	)	
Plaintiff,	)	
and THE DEPOSITORY TRUST COMPANY and CEDE & CO.,	)	
Nominal Plaintiffs,	)	C.A. No.: 12C-02-015 FSS CCLD
v.	)	
EDUCATION LOAN TRUST IV, a Delaware statutory trust; and U.S. EDUCATION LOAN TRUST IV, LLC, a Delaware limited liability corporation,	)	
Defendants.	)	

Submitted: February 21, 2013
Decided: May 31, 2013

OPINION AND ORDER

***Upon Defendants' Motion to Dismiss* – GRANTED**

After losing its excessive fees and accounting case in the Court of Chancery, RBC repackaged its unsuccessful claim as one for breach of contract and filed it here. RBC now alleges that Defendants, issuer and trustee of auction rated securities, failed to pay interest under the indenture agreement. Defendants quickly

filed a motion to dismiss based on *res judicata* and failure to state a claim.

To summarize, RBC's core complaint in Chancery was that Defendant Trustee, at Issuer's direction, paid too much in fees, leaving little for RBC. RBC alleges here that similar investments with Defendants are earning interest, but not RBC's investments. Hence, RBC concludes it is similarly entitled to interest.

RBC's complaint is vague as to why interest was not earned. As discussed below, however, the complaint's subtext undeniably is RBC's belief that Defendants chose to pay too much in fees. Thus, Defendant Trustee's judgment as to fees is at this case's heart, as it was in the Chancery case. That is why the Chancery decision is now fatal to RBC's case here. RBC has already had its day in court, and this court is not free to take a second look at the earlier judgment. Not only that, the Court of Chancery was the proper court to consider RBC's claims.

I.

Chancellor Strine detailed the facts as pleaded, in December 2011.[1] Briefly recapping, in 2007, RBC became the beneficial owner of auction rated securities ("ARS" or "notes") issued by Defendant U.S. Education Loan Trust IV ("Issuer") and held by Education Loan Trust IV ("Trust"). RBC owns a 15% stake

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[1] *RBC Capital Markets, LLC v. Education Loan Trust IV*, 2011 WL 6152282, *1 (Del. Ch. Dec. 6, 2011).

in the ARS, which are long-term debt instruments secured by Federal Family Education Loan Program student and consolidation loans. Issuer owns the student loan collateral backing ARS; RBC was ARS's broker-dealer and market agent. ARS were issued pursuant to a March 2006 Indenture of Trust agreement between Defendants and The Bank of New York as Trustee.

The Indenture and two supplements ("Indenture") control the ARS. Governed by New York law, the Indenture details holders' rights and obligations, including determining the variable interest rate payable to ARS holders via a Dutch auction held every 28 days. If an auction failed, the interest rate was determined by the lesser of two fallback formulas found in the Indenture: the Maximum Rate or the Net Loan Rate. The alternate formulas for determining interest due are mathematically precise, not allowing any discretion.

In early 2008, the ARS auctions "began to fail due to distress in the global credit markets." RBC has since been unable to sell its ARS at auction. And, because the auction market failed, Issuer applied the lesser of the fallback interest formulas: the Net Loan Rate.

The Net Loan Rate is:

> 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.

Part (b) contains several independently defined terms:

> "Note Fees" are "fees, costs and expenses (including counsel fees and fees and expenses of agents [...]), of the Trustee, the Owner Trustee, any Eligible Lender Trustee, Paying Agent [...] and other consultants and professionals and Counsel for any such person incurred by or on behalf of the Issuer in carrying out and administering powers, duties, and functions, under [...] the Indenture."
>
> "Administration Fees" is defined as "a monthly fee in an amount set forth in the related Supplemental Indenture, which shall be released to the Master Servicer and the Administrator each month to cover expenses[, ...] including [...] fees payable to the Master Servicer in connection with carrying out and administering their respective powers, duties and functions [....]"

Obviously, the Indenture gives the Trustees discretion to determine Note Fees and Administration Fees' amounts. As mentioned, ultimately it is Defendants' exercise of their discretion over fees that is at issue here, as it also was in Chancery. The formulas application is not disputed.

II.

RBC's inability to sell its ARS eventually led to its March 18, 2011, verified complaint in the Court of Chancery. There, RBC asserted claims for an

accounting, breach of contract, and unjust enrichment. The claims centered on RBC's belief that at the Issuer's direction, the Trust paid excessive fees thereby effecting the Net Loan Rate formula's application, resulting in "artificially" low interest payments.

RBC, which was in an untenable position as an individual investor, attempted to bolstered its standing to sue the Trust and Issuer by alternatively invoking the Indenture's section 6.09's "absolute and unconditional right to receive payment" language.[2] RBC also alleged the Trust improperly calculated the Net Loan Rate. (RBC makes the same 6.09 claim here.)

The Trust and Issuer quickly moved to dismiss based on RBC's failure to state a claim. Specifically, they argued that RBC's fees claim was subject to the Indenture's section 6.08 "no-action" clause.[3] The "no-action" clause plainly is

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[2] **Unconditional Right to Noteholders to Enforce Payment.** 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 of, 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.

[3] **Limitation on Suits by Beneficiaries.** [...], no 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 any other remedy hereunder unless (a) an Event of Default shall have occurred and be continuing, (b) the Acting Beneficiaries Upon Default shall have made a written request to the Trustee with respect thereto, (c) such Beneficiary or Beneficiaries shall have offered to the Trustee indemnity, as provided in Section 7.01 hereof, (d) the Trustee shall have thereafter failed for a period of sixty (60) days after the receipt of the request and indemnification or refused to exercise the powers 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

intended to stifle litigation by dissatisfied individual investors, such as RBC. Further, the Trust argued that an accounting is a remedy awarded upon a successful claim and that unjust enrichment is inapplicable because the Indenture agreements controlled the notes.

After full briefing and argument, on December 6, 2011, Chancellor Strine issued an Opinion and Order granting dismissal. At the outset, the Chancellor held that RBC's claims were subject to the "no-action clause" and, because RBC failed to allege that section 6.08's preconditions were satisfied, the complaint was dismissed.[4] In the process, Chancellor Strine determined that RBC's claims

> depend[ed] on first proving that [the Trust and Issuer] breached the Indenture because the Trust paid out fees that were in excess of specific contractual limitations [....] [I]f a noteholder plaintiff must prove an independent contractual breach such as the one that RBC must prove here, in order to show that the interest payments made to it were lower than they should have been, the no-action clause applies[....][5]

Specifically, the Chancellor found that the excessive fees, if actually paid, injured all ARS holders, which meant it was a derivative claim subject to

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than a majority in aggregate Principal Amount of the Notes then Outstanding or by any Other beneficiary [....]"

[4] *RBC Capital Markets*, 2011 WL 6152282, at *2.

[5] *Id.* at *4.

section 6.08:

> Here, RBC alleges that the Issuer injured the Trust by causing the Trust to pay out excessive fees. As a result, RBC's claim that it received improperly low interest payments depends in the first instance on[,] and is derivative of[,] a claim belonging to the Trust[,] itself. The most obvious remedy for that breach would be a recovery against the Issuer for excessive fees, which would then be paid back into the Trust. That is a classic derivative action recovery [....] [6]

Therefore, because RBC's action was derivative, section 6.08's preconditions had to be satisfied to avoid the contractual prohibition on individual suits. The preconditions were not satisfied.[7]

The Chancellor also found:

> RBC ha[d] not alleged that the terms of the Indenture requiring periodic interest payments were directly breached, or that the interest rate formula for the auction rate notes was not applied as set forth in the Supplemental Indentures. In other words, [RBC] cannot show that there has been a 'default in the due and punctual payment' of interest on its notes by pointing solely to the provisions of the Indenture and the Supplemental Indentures addressing what[,] and under what formula[,] interest was to be paid.[8]

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[6] *Id.* at *5.

[7] *Id.* at *7.

[8] *Id.* at *4.

Chancellor Strine quoted former-Chancellor Allen, "no matter what legal theory a plaintiff advances, if the trustee is capable of satisfying its obligations, then any claim that can be enforced by the trustee on behalf of all bonds, **other than a claim for the recovery of past due interest** or [principal] is subject to the terms of a no-action clause [....]"[9] And, Chancellor Strine observed that, "RBC conceded [. . .] that if RBC's claims do not fall within the [section 6.09 exception], they are all barred by section 6.08."[10]

As to RBC's section 6.09 ("Unconditional Right to Noteholders to Enforce Payment") argument, the Chancellor held 6.09 "cannot reasonably be read to apply to RBC's claims."[11] The Chancellor further held:

> [s]ection 6.09 provides a limited exception to the Indenture's no-action clause that allows a noteholder to sue directly when that noteholder has not received a payment of principal or interest when due. RBC does not allege a violation of any specific term of the Indenture [...] that deals with the timing of interest payments or the amount of interest payments made, in the sense that [Trust and Issuer] failed to make an interest payment when due or tampered with or failed to apply the required interest rate formula.[12]

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[9] *Id.* at *5 (quoting *Feldbaum v. McCrory Corp.*, 1992 WL 119095, at *5 (Del. Ch. June 2, 1992)) (emphasis added).

[10] *Id.*

[11] *Id.*

[12] *Id.*

That holding covers RBC's 6.09 claim in this case.

As presented above and discussed next, RBC does not allege that Defendants failed to make a payment when due, or that any payment fell short by a specific amount, or that the Trust and Issuer did any of the other things mentioned by the Chancellor as amounting to a section 6.09 exception from section 6.08's bar. As presented above, RBC does not demand a sum certain here. It wants a trial to determine what fees were proper, and to derive from that finding RBC's contractual damages. And, to determine the proper fees, a jury would have to plumb the Issuer and Trustees' motives, business judgments and conduct.

III.

RBC did not take an appeal from the Court of Chancery dismissal. Instead, RBC filed its breach of contract suit here on February 1, 2012.[13] Claiming to be the "holder and beneficial owner of ARS" issued by Defendants, RBC alleged breach of contract and breach of the implied covenant of good faith and fair dealing for Defendants' failure to pay "interest, at an amount to be proven at trial, wrongfully withheld." As mentioned, RBC relies on the Indenture's "'absolute and unconditional' right to payment" clause, section 6.09. Basically, RBC reads the Chancery dismissal as creating an exploitable opening under section 6.09.

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[13] File & Serve Xpress Transaction ID ("Trans. ID") 42263025.

As they did in the Court of Chancery, Defendant filed motions to dismiss based on failure to state a claim and now, *res judicata*. Briefing ended on June 2, 2012, with oral argument on June 20, 2012.

RBC made several concessions at oral argument, including RBC's inability to claim it was a "Holder" as section 6.09 requires. The Indenture defines "Holder" as "the Person in whose name such note is registered in the Note Register." After the court recounted the complaint's deficiencies, the court deferred the motion to dismiss, allowing RBC 30 days to amend.

RBC filed its amended complaint on August 20, 2012. To finesse the fact that it was pursuing a claim it does not have standing to make, RBC added, as nominal plaintiffs, the registered holders of RBC's ARS, The Depository Trust Company and CEDE & Co. RBC also substantively amended its complaint to further detail that Issuer "ha[d] failed to pay interest on RBC's ARS holdings in each scheduled interest period" since May 2010. RBC's complaint essentially alleges that Defendants failed to pay interest or failed to properly administer the Net Loan Rate formula.

On October 12, 2012, Defendants moved to dismiss the amended complaint. Briefing on that ended January 18, 2013. After reviewing the record, the court notified the parties on February 21, 2013, that a second oral argument was not

necessary.[14] The parties mostly rehashed their earlier positions. Defendants argue RBC's claims are wholly barred by *res judicata*. Moreover, Defendants seek dismissal under Superior Court Civil Rule 12(b)(6), as RBC's amended complaint is "conclusory," "incomplete," and not sufficient to overcome the 12(b)(6) standard.

IV.

A. *Res Judicata*

A litigant may press claims and "be bound by the determination of the forum [...] chosen, so that he may have one day in court but not two."[15] The *res judicata* doctrine promotes finality and judicial economy while preventing vexatious litigation.[16] The *res judicata* bar operates when: "(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 appellants in the case at bar; and, (5) the decree in the prior action was a final decree."[17] If the five-part test is satisfied, a plaintiff's only hope is to "show that there was some impediment to the

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[14] Super. Ct. Civ. R. 78(c).

[15] *Maldonado v. Flynn*, 417 A.2d 378, 381 (Del. Ch. 1980).

[16] *LaPoint v. AmeriSource Bergen Corp.*, 970 A.2d 185, 191 (Del. 2009).

[17] *LaPoint*, 970 A.2d at 192.

presentation of the entire claim for relief in the prior forum."[18] Here, the parties agree that only the third and fifth *res judicata* elements are at issue.

1.

Res judicata "constitutes an absolute bar to a subsequent action on the same claim as to the parties and their privies on all theories which were litigated or which could have been litigated in the earlier proceeding."[19] Even if a litigant pursues a different theory in a later action, "when the second action is based on the same transaction as the first, the claim has been split and must be dismissed."[20] To bar a previously unasserted claim, "the underlying facts must have been known or capable of being known at the time of the first action."

In its attempt to avoid the third element's "same cause of action or issue," RBC relies on Chancellor Strine's explicit acknowledgment that,

> RBC did not allege that it did not receive interest payments on its auction rate notes on time, or that the interest rate formula applicable to the notes was not applied as written.

Hence, RBC now insists it "did not allege in the Chancery Court complaint that the interest payments were not paid," and that "it only knew the nonpayment of interest

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[18] *Wilson v. Brown*, 36 A.3d 351, 2012 WL 195393, at *4 (Del. Jan. 24, 2012) (TABLE).

[19] *Trans World Airlines, Inc. v. Hughes*, 317 A.2d 114, 118 (Del. Ch. 1974).

[20] *Wilson*, 2012 WL 195393, at *4.

was unlawful after an extended period with no interest payments." Finally, RBC argues that "much of the factual basis for the [Superior Court] claim relates to events that occurred after" the Court of Chancery filing.

Nevertheless, RBC's amended complaint repeatedly reflects RBC's central contention that Issuer mismanaged the trust. For instance, RBC alleges the interest payment's cessation is "retaliation" against RBC. RBC also alleges that "Defendants are holding or redirecting cash which lawfully should have been paid [as interest to RBC.]" Lastly, RBC claims "the Trust continues to collect [...] money but not properly apply those funds to make interest payments."

Clearly, RBC is basing its "interest" claim on the same mismanagement allegations upon which it sought an accounting in the Court of Chancery. RBC is not saying that under the formula for calculating interest there is money owing. RBC is, yet again, accusing Defendants of having acted in a way, whatever way that was, that left no interest money available under the formula. So not to be obvious, RBC has carefully avoided alleging, in so many words, that the zero interest payments were related to "excessive fees." But, RBC cannot deny that the reason it is not receiving interest is the fees.

Even if RBC were correct that its claim for interest is different from its fees complaint – though it is not – both claims arise from the indenture agreement and

Defendants' same course of conduct, which amounts to the same transaction. Moreover, when it sued in Chancery, RBC undeniably knew it was not receiving interest and Defendants were to blame. Otherwise, why did it file suit in the first place?

RBC filed its Chancery case in March 2011. As RBC admits, the interest payments had stopped almost a year before. As detailed above, the briefing on Defendants' motions to dismiss completed in July 2011 – over a year after RBC was on notice that the interest payments ceased. Now, as mentioned, RBC alleges that "it only knew the nonpayment of interest was unlawful after an extended period with no interest payments." Yet, it bases its "absolute and unconditional" right to interest on "default in the due and punctual payment of any interest [...] for five Business Days." Based on RBC's own allegation as to the "Event of Default" that triggered its 6.09 nonpayment of interest claim, RBC could have filed suit a week after the interest was due, but stopped, in 2010. Simply put, RBC's present claim that it did not know it was entitled to interest in 2011 is belied by its claims in the Chancery case.

Moreover, at no point in the Chancery litigation did RBC move to amend its complaint. As the Trust noted, RBC "chose to stand on its pleading." Because RBC failed to bring its interest claim in the Court of Chancery when the facts were known and it "could have been litigated," *res judicata*'s third element is satisfied.

2.

As to *res judicata*'s fifth element, RBC argues that Chancellor Strine dismissed its complaint based on standing, not on the case's merits. The Trust argues for Rule 15(aaa)'s application. Court of Chancery Rule 15(aaa) states:

> a party that wishes to respond to a motion to dismiss under Rule 12(b)(6) [...] by amending its pleading must file an amended complaint, or a motion to amend in conformity with this Rule, no later than the time such party's answering brief in response to either of the foregoing motions is due to be filed. In the even a party fails to timely file an amended complaint or motion to amend under this subsection and the Court thereafter concludes that the complaint should be dismissed under Rule 12(b)(6) [...] such dismissal shall be with prejudice [...] unless the Court, for good cause shown, shall find that dismissal with prejudice would not be just under all the circumstances.

Further, "[a] final judgment is generally defined as one that determines the merits of the controversy or defines the rights of the parties and leaves nothing for future determination or consideration."[21]

The Trust correctly describes RBC's situation:

> Plaintiff made certain choices in pursuing the Chancery lawsuit: Plaintiff alleged[,] but chose not to elaborate on[,] claims that other trusts were paying higher interest as a basis for its claim under section 6.09 of the Indenture; Plaintiff chose not to investigate and detail those claims despite Defendants' accurate challenges under Rule 12(b)(6) that the Chancery Complaint was barred by the

[21] *Braddock v. Zimmerman*, 906 A.2d 776, 780 (Del. 2006).

> Indenture's "no-action" clause; and Plaintiff chose not to amend the Chancery Complaint knowing that Court of Chancery Rule 15(aaa) would guarantee any dismissal of the Chancery Complaint with prejudice. In sum, when faced with a Rule 12(b)(6) motion to dismiss the Chancery Lawsuit, Plaintiff chose to stand on its pleading.

RBC's decision not to amend in the Chancery case is important because at that point, in effect, RBC chose to split its claim.

Court of Chancery Rule 15(aaa)'s clear makes Chancellor Strine's December 2011 decision as a final judgment. So, not only did the Chancellor's decision decide against RBC's standing, it adversely decided every issue that RBC could and should have included in its Chancery proceeding. That is reinforced by the opinion's final clause, clearly dismissing RBC's entire complaint:

> Thus, I find that § 6.09 does not apply to RBC's claims, and RBC's claims are properly within the purview of § 6.08. Because RBC has not pled that is has complied with any of the pre-conditions to suit set forth in the no-action clause, RBC's complaint must be dismissed.[22]

RBC cannot say here that there was a 6.09 claim that it did not pursue or that Chancellor Strine missed it. Chancellor Strine left "nothing for future determination or consideration." And, RBC did not take an appeal. So, *res judicata*'s fifth element, a final decree in the previous litigation, is also satisfied.

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[22] *RBC Capital Markets*, 2011 WL 6152282 at *7.

B.

Even if this case were not dismissed on *res judicata* grounds, it must be dismissed under Superior Court Civil Rule 12(b)(6)'s failure to state a claim. When determining a 12(b)(6) motion, the court must accept all well-plead allegations as true.[23] Dismissal will not be granted if the complaint gives general notice as to the nature of the claim asserted against the defendant.[24] A complaint will not be dismissed "unless it is clearly without merit, which may be either a matter of law or fact."[25] If there is a basis upon which the plaintiff may recover, the motion is denied.[26]

In its amended complaint, RBC alleges, several times, that "[Issuer] failed to pay interest [...] in each scheduled interest period," but fails to address exactly what interest was due and when. Further, RBC's amended complaint admits RBC "has not calculated the exact amount of interest due," and "RBC cannot calculate the precise amount of interest owed."

As the court stated during oral argument here, RBC made a clear argument that the ARS were underperforming, but was not alleging that "there's interest out there for [RBC] to collect." It seemed then, and it still does, that no

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[23] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

[24] *Id.*

[25] *Diamond State Tel. Co. v. Univ. of Delaware*, 269 A.2d 52, 58 (Del. 1970).

[26] *Spence*, 396 A.2d at 968.

pleading specifically alleges there is interest that has been earned and not distributed as called for by the interest payment formula. Even if true, RBC's charts and stats regarding "similar" funds distributing interest do not establish interest exists to which RBC is entitled.

Further, the Net Loan Rate equation undeniably involves management decisions, and a challenge to those decisions is a derivative claim subject to the Indenture's "no-action clause."[27] At oral argument, RBC's counsel had to concede that the Net Loan Rate "is a formula that is tied to a number of factors including management decisions and fees and other things, and it's not an indenture that has interest payments, 1 ½ percent per month or something like that."

C.

As a final fallback position, RBC argues that its case should not be dismissed because Defendants' failure to pay interest is a continuing breach. Citing *LaPoint*, RBC argues the "[c]ontractual rights that are triggered and pursued after the initial action is filed are not barred because a prior judgment cannot be given the effect of extinguishing claims which did not even then exist."[28] RBC argues such, even though the claim *did* exist when it chose to file in Chancery.

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[27] *RBC Capital Markets*, 2011 WL 6152282 at *5.

[28] Trans. ID 48259905, at 27 (quoting *LaPoint*, 970 A.2d at 194).

Of course, if the investments start earning interest and Defendants start refusing to pay, or withhold payments, or act in a manner over which this court has jurisdiction, then RBC may file a new lawsuit. Meanwhile, as the Court of Chancery and this court have explained at great length, RBC does not now have a 6.09 interest claim and, as the Court of Chancery explained before, RBC also does not have a 6.08 claim.

D.

In the final analysis, RBC either does not understand its cause of action or this court's jurisdiction. Paraphrasing Chancellor Strine, RBC is not alleging it has been denied lawful interest because of fraud, accounting error or Defendants' refusal to pay money actually due under the agreed formula for calculating interest payments to RBC. Not only that, RBC is a beneficiary of a trust with a "no action" clause. RBC's claim to interest is through the trust, and Defendants are the trust and its trustees. Despite how artfully RBC phrases it, RBC is challenging business decisions made by trustees that left no interest payments for this court to award as damages to RBC. Those decisions are matters for a court of equity, not this court of law.

V.

Because RBC's claim is barred by *res judicata* and failure to state a claim upon which this court can grant relief, Defendants' Motion to Dismiss RBC's

amended complaint is **GRANTED**, without costs.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Jennifer C. Wasson, Esquire
Janine L. Hochberg, Esquire
Daniel B. Rath, Esquire
Rebecca L. Butcher, Esquire
K. Tyler O'Connell, Esquire
Brian M. Rostocki, Esquire
Kurt F. Gwynne, Esquire

CERTIFICATE OF SERVICE

Jennifer C. Wasson hereby certifies that, on the 16th day of August, 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:

Kurt F. Gwynne
Brian M. Rostocki
John C. Cordrey
REED SMITH LLP
1201 Market Street
Suite 1500
Wilmington, DE 19801

Daniel B. Rath
Rebecca L. Butcher
LANDIS RATH & COBB LLP
919 Market Street, Suite 1800
Wilmington, DE 19801

/s/ Jennifer C. Wasson
Jennifer C. Wasson (No. 4933)