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

[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.

[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

[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
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