EFiled: Nov 18 2016 05:10PM EST
Transaction ID 59857863
Case No. 12111-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE NATIONAL COLLEGIATE STUDENT LOAN MASTER TRUST, et al, Plaintiffs, v. PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY D/B/A AMERICAN EDUCATIONAL SERVICES, Defendant.	:	C.A. No. 12111-VCS

PLAINTIFFS' BRIEF IN OPPOSITION TO THE MOTION BY NON-PARTY GSS DATA SERVICES, INC. FOR LEAVE TO FILE AN *AMICUS* BRIEF

GRANT & EISENHOFER P.A.
Stuart M. Grant (#2526)
James J. Sabella (#5124)
Michael T. Manuel (#6055)
123 Justison Street
Wilmington, DE 19801
302-622-7000

Attorneys for Plaintiffs

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

INTRODUCTION

Plaintiffs[1] respectfully submit this brief in opposition to the motion by non-party GSS Data Services, Inc. ("GSSDS") for leave to file a brief as *amicus curiae* in opposition to Plaintiffs' motion for a preliminary injunction directing PHEAA to comply with: (1) §§7.01 and 7.04 of the MSA, which require PHEAA to allow the Trusts to conduct audits of PHEAA, and (2) §4.09 of the MSA, which requires PHEAA to participate in an operations meeting with the Trusts.

GSSDS's brief[2] -- which was filed without leave having been granted – bears no relationship to what an *amicus* brief is supposed to be. First, GSSDS's legal arguments are largely duplicative of the arguments presented by PHEAA and do not provide any insights that might assist the Court. Second, instead of presenting objective analysis of the issues, GSSDS offers a partisan brief advancing PHEAA's interest (as well as GSSDS's own interests). Third, GSSDS's brief would not assist the Court because its arguments are irrelevant to the issues the Court needs to decide. Whether or not GSSDS is in active concert with PHEAA is not an issue to be decided at this juncture. Rule 65(d) specifically states

---

[1] In this brief, terms not defined are used as defined in Plaintiffs' Opening Brief in support of their motion for a preliminary injunction or in the documents governing the Trusts (the "Governing Documents"). Unless otherwise noted, emphasis in quoted material has been supplied.

[2] Opposition of Non-Party GSS Data Services, Inc. to Plaintiffs' Motion for Preliminary Injunction, dated Nov. 7, 2016 ("GSSDS Br.").

that an injunction may provide that it covers persons in "active concert or participation" with the defendant. The Proposed Order submitted by Plaintiffs does not name GSSDS as someone in active concert with PHEAA. It merely tracks the language of the statute and provides that it applies to persons "in active concert with PHEAA." If, after the injunction is issued and served, GSSDS acts in concert with PHEAA to violate the injunction, at that point the Court would need to address GSSDS's conduct.

GSSDS's motion for leave to file a brief as *amicus curiae* should be denied.

ARGUMENT

LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* SHOULD BE DENIED BECAUSE GSSDS'S BRIEF IS NOT A PROPER *AMICUS* BRIEF

A. LEAVE SHOULD BE DENIED BECAUSE GSSDS'S LEGAL ARGUMENTS ARE REPETITIVE OF THE ARGUMENTS IN PHEAA'S BRIEF

"[T]he role of the *amicus curiae* is limited to assisting the court … through the presentation of *non-duplicative* authoritative arguments." *Turnbull v. Delaware Administration for Regional Transit*, 644 A.2d 1322, 1323 (Del. 1994). Courts generally deny leave to file *amicus* briefs where the arguments presented therein "merely repeat the arguments already submitted" by the parties. *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 83 (D.N.J. 1993); *see United States v. Hunter*, 1998 WL 372552, at *1 (D. Vt. June 10, 1998); *United States v. El-Gabrowny*, 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994). As Judge

Posner stated in *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997), *amicus* briefs that "duplicate the arguments made in the litigants' briefs" are "an abuse" and "should not be allowed" because in effect they "merely extend[]the length of the litigant's brief."

Here, the only legal argument that GSSDS makes – that a mandatory injunction should issue only after trial or on the basis of undisputed facts – is the exact same argument that PHEAA makes in its opposing brief. *Compare* GSSDS Br. at 2-4 *with* PHEAA Br. at 27-28. Leave to file an *amicus* brief with arguments that merely repeat those in PHEAA's brief should be denied.

B. LEAVE SHOULD BE DENIED BECAUSE GSSDS DOES NOT PRESENT AN OBJECTIVE ANALYSIS THAT WOULD BE HELPFUL TO THE COURT BUT RATHER A PARTISAN SUBMISSION ADVANCING PHEAA'S AND GSSDS'S INTERESTS

An independent basis for denying leave is that GSSDS's brief is a partisan, self-interested submission masquerading as an *amicus* brief.

An *amicus* brief is supposed to "provide an 'objective, dispassionate, neutral discussion of the issues.'" *Liberty Lincoln Mercury*, 149 F.R.D. at 82 (quoting *United States v. Gotti*, 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991)); *see SEC v. Bear Stearns & Co., Inc.*, 2003 WL 22000340, at *6 (S.D.N.Y. Aug. 25, 2003) ("conferring amicus status on such partisan interests is inappropriate"); *Abu-Jamal v. Price*, 1996 U.S. Dist. LEXIS 8597, at *5 (W.D. Pa. Feb. 23, 1996) ("'When the party seeking to appear as *amicus curiae* is perceived to be an interested party or to

be an advocate of one of the parties to the litigation, leave to appear *amicus curiae* should be denied'") (quoting *Liberty Lincoln Mercury*, 149 F.R.D. at 82); *L.I. Soundkeeper Fund, Inc. v. N.Y. Athletic Club,* 1995 WL 358777, at *1 (S.D.N.Y. June 14, 1995) ("Denial of leave to appear as *amicus* in a situation such as this, in which the applicant appears to have its own particular interests in the outcome of the litigation, is far from unprecedented.").

GSSDS purports to "take[] no position, either for or against, the requested audit or the operations meeting." GSSDS Br. at 5. That is as it should be. GSSDS is not a party to the MSA and has no right to be heard as to whether PHEAA should be ordered to comply with its contractual obligations to the Trusts to allow an audit or an operations meeting.

Contrary to GSSDS's purported position of neutrality, however, GSSDS's brief is submitted in opposition to the Trusts' motion. GSSDS argues flatly: "Plaintiffs Have Not and Cannot Satisfy the Heightened Burden Required for a Mandatory Injunction." GSSDS Br. at 2. Any fair reading of GSSDS's brief leads inescapably to the conclusion that GSSDS "appears to be a friend of the [defendant], not a friend of the Court." *Goldberg v. City of Phila.*, 1994 WL 369875, at *1 (E.D. Pa. July 14, 1994). This justifies denial of leave to appear as *amicus curiae*. *Id.*

Moreover, GSSDS does not attempt to hide that it is submitting its brief to further its own personal interest in not being deemed a party acting in concert with PHEAA. While protecting one's own interests might provide the basis for a motion for leave to intervene,[3] it is not a proper basis for an *amicus* submission. *Abu-Jamal*, 1996 U.S. Dist. LEXIS 8597, at *5; *L.I. Soundkeeper Fund*, 1995 WL 358777, at *1; *Liberty Lincoln Mercury*, 149 F.R.D. at 82.

C. LEAVE SHOULD BE DENIED BECAUSE GSSDS'S BRIEF WOULD NOT ASSIST THE COURT

An amicus brief should be allowed only if it will "assist[] the court." *Turnbull*, 644 A.2d at 1324; *La. Mun. Police Employees' Ret. Sys. v. Hershey Co.*, 2013 Del. Ch. LEXIS 121, at *3 (Del Ch. Apr. 16, 2013). Courts recognize that leave to file *amicus* briefs should be denied when those briefs present arguments that are not relevant or helpful to the court. *L.I. Soundkeeper Fund*, 1995 WL 358777, at *1; *United States v. Ahmed*, 788 F. Supp. 196, 198 n.1 (S.D.N.Y. 1992).

GSSDS's brief argues at length that it has acted properly and that its conduct in connection with the refusal to pay BPA's invoices for audit work was not done in active concert with PHEAA. But this is not an issue teed up by the pending motion for a preliminary injunction. The Court is not being asked to rule on those

[3] The Trusts reserve their right to oppose any such intervention motion, particularly at the eleventh hour. GSSDS admits that it has made a deliberate choice not to move to intervene. *See* Motion for Leave to File Opposition as Amicus Curiae, dated Nov. 7, 2016, ¶¶6, 8.

matters. Rule 65(d) provides that an injunction may apply to anyone in active concert or participation with the defendant. The injunction does not need to specify who such persons may or may not be. The Proposed Order submitted by Plaintiffs provides "that those in active concert with PHEAA are enjoined from interfering with Plaintiffs' efforts to enforce these provisions of the MSA." The Proposed Order does not specifically identify GSSDS as an entity that is in active concert with PHEAA.[4]

After the injunction is issued and served, if the Trusts believe that GSSDS (or anyone else) has violated the injunction after receiving notice thereof, that would be the time to decide those issues. GSSDS's presentation is not helpful to the Court in deciding whether to issue the injunction.

CONCLUSION

Because GSSDS's brief fails to satisfy any of the requirements for a proper *amicus* filing, leave to appear as *amicus curiae* should be denied.

[4] The reference in the conclusion of the Trusts' Opening Brief to GSSDS and US Bank was not intended to argue that they are persons who the Court should hold are in active concert or participation with PHEAA, only that if they are served with the injunction and then do so act, then they would be in violation of the injunction.

Dated: November 18, 2016

Respectfully submitted,

GRANT & EISENHOFER P.A.

By /s/ James J. Sabella
Stuart M. Grant (#2526)
James J. Sabella (#5124)
Michael T. Manuel (#6055)
123 Justison Street
Wilmington, DE 19801
302-622-7000

Attorneys for Plaintiffs

EFiled: Nov 18 2016 05:10PM EST
Transaction ID 59857863
Case No. 12111-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE NATIONAL COLLEGIATE STUDENT LOAN MASTER TRUST, et al, Plaintiffs, v. PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY D/B/A AMERICAN EDUCATIONAL SERVICES, Defendant.	:	C.A. No. 12111-VCS

CERTIFICATE OF COMPLIANCE WITH
TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Ct. Ch. R. 171(d)(4) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2010.

2. This brief complies with the type-volume limitation of Ct. Ch. R. 171(f)(1) because it contains 1,472 words, counted by Microsoft Word 2010.

Dated: November 18, 2016

Respectfully submitted,

GRANT & EISENHOFER P.A.

By */s/ James J. Sabella*
James J. Sabella (#5124)
123 Justison Street
Wilmington, DE 19801
302-622-7000
Attorney for Plaintiffs

EFiled: Nov 18 2016 05:10PM EST
Transaction ID 59857863
Case No. 12111-VCS

CERTIFICATE OF SERVICE

I, James J. Sabella, hereby certify that on November 18, 2016, I caused a true and correct copy of **Plaintiffs' Brief in Opposition to the Motion by Non-Party GSS Data Services, Inc. for Leave to File an *Amicus* Brief, and Certificate of Compliance with Typeface Requirement and Type-Volume Limitation** to be served via File & Serve*Xpress* upon the following counsel of record:

Stacey A. Scrivani, Esq.
Stevens & Lee, P.C.
919 N. Market Street, Suite 1300
Wilmington, DE 19801

Rebecca L. Butcher, Esq.
Landis Rath & Cobb LLP
919 Market St., Ste. 1800
Wilmington, DE 19801

John W. Shaw, Esq.
Jeffrey T. Castellano
Shaw Keller LLP
300 Delaware Ave., Ste. 1120
Wilmington, DE 19801

/s/ James J. Sabella
James J. Sabella (#5124)

Grant & Eisenhofer P.A.

123 Justison Street Wilmington, DE 19801 Tel: 302-622-7000 Fax: 302-622-7100

485 Lexington Avenue
New York, NY 10017
Tel: 646-722-8500
Fax: 646-722-8501

30 N. LaSalle Street, Suite 2350
Chicago, IL 60602
Tel: 312-214-0000
Fax: 312-214-0001

WRITER'S DIRECT DIAL NUMBER

646-722-8520
jsabella@gelaw.com

November 18, 2016

VIA FILE & SERVE*XPRESS* AND OVERNIGHT MAIL

The Honorable Joseph R. Slights III
Vice Chancellor
Delaware Court of Chancery
Kent County Courthouse
38 The Green
Dover, Delaware 19901

Re: ***The National Collegiate Student Loan Master Trust, et al. v. Pennsylvania Higher Education Assistance Agency d/b/a American Educational Services*, C.A. No. 12111- VCS**

Dear Vice Chancellor Slights:

Enclosed for Your Honor's consideration are two copies of Plaintiffs' Brief in Opposition to the Motion by Non-Party GSS Data Services, Inc. for Leave to file an *Amicus* Brief which was filed with the Court today.

Oral argument on the Motion has not yet been set. We are available at the Court's convenience should Your Honor have any questions about this matter.

Respectfully submitted,

/s/ James J. Sabella

James J. Sabella (DE Bar #5124)

cc: Stacey A. Scrivani (*via File & ServeXpress*)
Rebecca L. Butcher (*via File & ServeXpress*)
John W. Shaw (*via File & ServeXpress*)
Jeffrey T. Castellano (*via File & ServeXpress*)

EFiled: Nov 18 2016 04:47PM EST
Transaction ID 59840697
Case No. 12111-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE NATIONAL COLLEGIATE STUDENT LOAN MASTER TRUST, et al, Plaintiffs, v. PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY D/B/A AMERICAN EDUCATIONAL SERVICES, Defendant.	:	C.A. No. 12111-VCS

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION DIRECTING DEFENDANT TO COMPLY WITH §§ 7.01 AND 7.04 OF SERVICING AGREEMENT REGARDING AUDITS AND TO COMPLY WITH § 4.09 OF THE SERVICING AGREEMENT REGARDING OPERATIONS MEETINGS

GRANT & EISENHOFER P.A.
Stuart M. Grant (#2526)
James J. Sabella (#5124)
Michael T. Manuel (#6055)
123 Justison Street
Wilmington, DE 19801
302-622-7000

Attorneys for Plaintiffs

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

INTRODUCTION

Plaintiffs[1] respectfully submit this reply brief in support of their motion for a preliminary injunction directing PHEAA to comply with: (1) §§7.01 and 7.04 of the MSA, which require PHEAA to allow the Trusts to conduct audits of PHEAA, and (2) §4.09 of the MSA, which requires PHEAA to participate in an operations meeting with the Trusts.

PHEAA does not seriously contend, nor could it, that the Trusts are not entitled to conduct audits of PHEAA under MSA §§7.01 and 7.04 and to require PHEAA to participate in an operations meeting with the Trusts under MSA §4.09. Those are absolute contractual rights granted to the Trusts under the MSA. Instead, PHEAA continues to insist that the audits be conditioned on execution of an unreasonable and confusing NDA that is a recipe for future claims by PHEAA for breach thereof, and that PHEAA gets to choose by whom the Trusts would be represented at the operations meeting. As shown in Plaintiffs' Opening Brief and below, there is no merit to PHEAA's positions.

In addition, PHEAA continues to assert a threshold issue that overhangs all of the relief sought on this motion, to wit, that the Owners cannot give directions

[1] In this brief, terms not defined are used as defined in Plaintiffs' Opening Brief ("Pl. Br.") or in the documents governing the Trusts (the "Governing Documents"). Unless otherwise noted, emphasis in quoted material has been supplied.

because, according to PHEAA, their ownership runs afoul of §304(c) of the Trust Agreements. As demonstrated below, the documentary evidence establishes conclusively that PHEAA's argument is meritless.

PHEAA claims that a mandatory injunction cannot issue because there are genuine issues of material fact. But the issues it refers to are neither genuine nor material. The material facts on this motion are all established by documentary evidence which PHEAA does not and cannot challenge.

I. THE DOCUMENTARY EVIDENCE ESTABLISHES THAT NC OWNERS AND PATHMARK OWN THE BENEFICIAL INTEREST IN THE TRUSTS AND THUS ARE ENTITLED TO DIRECT THE OWNER TRUSTEE REGARDING THE AUDITS AND OPERATIONS MEETING

The threshold issue that the Court needs to address on this motion is whether NC Owners and Pathmark properly hold the beneficial interest in the Trusts such that they can instruct the Owner Trustee to request an audit and operations meeting and further instruct the Owner Trustee as to who should represent the Trusts in those matters. As PHEAA's brief puts it, squarely before the Court is the following question: "Whether NC Owners and Pathmark Associates are beneficial interest holders of the Trusts and may direct the Owner Trustee to engage third parties to conduct an audit of PHEAA or engage in an operations meeting."[2] This

[2] Defendant's Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, dated Oct. 31, 2016 ("PHEAA Br.") at 19-20.

is a critically important issue because, as PHEAA asserts, it "go[es] directly to whether VCG has the authority to direct Wilmington Trust to give certain direction and take certain action purportedly in the name of the Trusts, including bringing this lawsuit in the first place."[3]

PHEAA's challenge to the Owners' status is based on §3.04(c) of the Trust Agreements, which provide that a transfer of beneficial interests in the Trusts is not valid if it results in 100% of the beneficial ownership of the Trusts being held by one person or entity, or a group of affiliated persons or entities.[4] PHEAA's position is the Owners have violated this provision, so that they have no authority to direct the Trusts.

The Trusts have filed an affidavit by Donald Uderitz, the CEO of VCG Securities LLC ("VCG"),[5] correcting a prior affidavit that he had filed[6] and

---

[3] *Id*. at 23.

[4] "Affiliate" is defined in §1.01 of the Trust Agreements as follows:

> "Affiliate" means with respect to any specified Person, any other Person controlling or controlled by or under common control with such specified Person. For the purposes of this definition, "control" when used with respect to any specified Person means the power to direct the management and policies of such Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise; and the terms "controlling" and "controlled" have meanings correlative to the foregoing.

[5] *See* Second Supplemental Affidavit of Donald Uderitz, dated Sept. 9, 2016, a copy of which is Exh. 34 to the Affidavit of Donald Uderitz, dated Oct. 5, 2016 ("Uderitz Aff.") filed in support of the instant motion.

demonstrating that there has been no violation of §3.04(c). But PHEAA complains that this later Uderitz affidavit "did not attach any documents" to support it.[7] In response, the Trusts are providing herewith the documentary evidence that establishes beyond peradventure that §3.04(c) has not been violated.

As of March 31, 2009, The First Marblehead Corporation ("FMC") was the sole legal and beneficial owner of NC Residuals Owners Trust.[8] As of March 31, 2009, NC Residuals Owners Trust owned 100% of the beneficial interest of NC Owners LLC ("NC Owners").[9] NC Owners was the owner or beneficial owner of a majority of the beneficial interest in each of the Trusts.[10] The remaining beneficial interest in each of the Trusts was owned by The Education Resources Institute, Inc. ("TERI").[11] Thus, prior to the current ownership group becoming involved, ownership was split between FMC and TERI.

On March 31, 2009, FMC transferred its interest in NC Residuals Owners Trust to VCG Owners Trust.[12] TERI transferred its interests in the Trusts to SL

---

[6] PHEAA Br. Exh. J.

[7] PHEAA Br. at 22.

[8] *See* Exh. 1 to the Reply Affidavit of Donald Uderitz, sworn to Nov. 14, 2016 ("Uderitz Reply Aff.").

[9] *See* Uderitz Reply Aff. Exh. 1 at 1.

[10] *See* Uderitz Aff. Exh. 2 Sch. A; Uderitz Reply Aff. Exh. 1 at 1.

[11] *See* Uderitz Aff. Exh. 2 Sch. A.

[12] *See* Uderitz Reply Aff. Exh. 1 at 1.

Resid Holdings LLC ("SL Resid"), an affiliate of Citigroup Global Markets Inc. ("Citigroup"). Thus, after these transactions, ownership was split between VCG affiliates and Citigroup affiliates. PHEAA does not contend that VCG or Mr. Uderitz are affiliates of Citigroup or its affiliates. Thus, there is not, nor could there be, any contention that these transfers violated §3.04(c).

On March 10, 2016, NC Owners assigned a 0.0001% interest in each of the Trusts to Pathmark Associates, LLC ("Pathmark").[13] Later in the day on March 10, 2016, SL Resid transferred its beneficial interests in the Trusts to NC Owners.[14] As a result of these transfers, NC Owners and Pathmark owned (and now own) 99.9999% and 0.0001%, respectively, of each of the Trusts. The Owner Trust proceeded to process these transfers and reissue the Trust Certificates to reflect these ownership percentages.

PHEAA contends that VCG and/or Mr. Uderitz own Pathmark, and that, since VCG is an indirect owner of NC Owners, therefore §3.04(c) has been violated. The facts are, however, that Pathmark is, and has been since before the transfer from Citigroup, unaffiliated with VCG and Mr. Uderitz.[15]

---

[13] Uderitz Reply Aff. Exh. 2.

[14] Uderitz Reply Aff. Exh. 3.

[15] We recognize that Mr. Uderitz had previously submitted an affidavit with an erroneous statement concerning his relationship to Pathmark. It was to correct this statement that the Second Supplemental Affidavit of Donald Uderitz was later

(Cont'd)

On August 15, 2008, Pathmark was formed as a Delaware limited liability company.[16] The initial members of Pathmark were Mr. Uderitz and Robert Fasulo, holding respective interests of 99.99% and 0.01%.[17] On January 1, 2011, Robert Fasulo transferred his 0.01% interest in Pathmark to Mr. Uderitz's wife.[18]

On January 1, 2016, which was before Citigroup transferred its interest in the Trusts to NC Owners, Mr. and Mrs. Uderitz sold their interests in Pathmark to CECE and Co. Ltd., LLC ("CECE"), a Delaware limited liability company.[19] Neither VCG nor NC Owners nor NC Owners Residuals Trust nor Mr. and Mrs. Uderitz own any interest in CECE.[20]

While Mr. Uderitz was granted by Pathmark a Revocable Limited Power of Attorney in order to sign documents and take other actions incident to Pathmark's ownership interest,[21] as a matter of law that does not constitute control over Pathmark so as to make VCG and Pathmark "affiliates" within the meaning of

---

filed. The documentary evidence demonstrates that the statement in the earlier affidavit was incorrect and that the statements in the Second Supplemental Affidavit of Donald Uderitz are correct.

[16] *See* Uderitz Reply Aff. Exh. 4.

[17] *See* Uderitz Reply Aff. Exh. 5, Sch. A.

[18] *See* Uderitz Reply Aff. Exh. 6.

[19] *See* Uderitz Reply Aff. Exh. 7.

[20] Uderitz Aff. Exh. 34 ¶ 6; Affidavit of Alberto N. Moris, sworn to Nov. 14, 2016.

[21] *See* Uderitz Reply Aff. Exh. 8.

Trust Agreement §1.01. "A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal." *Villanueva v. Brown*, 103 F.3d 1128, 1136 (3d Cir. 1997) (internal quotation marks omitted). "The exercise of control by the principal over the conduct of an agent is the essence of an agency relationship." *Globemaster Midwest, Inc. v. United States*, 67 Cust. Ct. 539 (Cust. Ct. 1971).

The notion that the agent controls the principal was explicitly rejected in *EEOC v. RJB Props. Inc.*, 857 F. Supp. 2d 727, 784 n.34 (N.D. Ill. 2012), where the court stated: "The fact that RJB empowered Shumpert to act on its behalf does not mean that Shumpert 'controlled' RJB. Were it otherwise, every agent would 'control' its principal: lawyers would control their clients, managers would control their employers, etc. This clearly is not the law." Thus, the revocable power of attorney granted by CECE to Mr. Uderitz does not give Mr. Uderitz control over Pathmark and does not make VCG, NC Owners, or NC Residuals Owners Trust affiliates of Pathmark.

Therefore, there has been no violation of §3.04(c) and the Owners' status as owners entitled to direct the affairs of the Trusts is beyond dispute.

II. PHEAA IS REQUIRED TO ALLOW THE AUDITS

PHEAA does not and cannot deny that the Trusts are entitled to audits under MSA §§7.01 and 7.04. PHEAA persists, however, in its position that it will allow the audits only if VCG and BPA sign the NDAs that PHEAA has proposed.

The Trusts rejected that NDA because it is ambiguous, circular, overly restrictive, and seems designed merely provide the predicate for future claims by PHEAA against VCG and BPA. PHEAA's NDA provides that information can be used by VCG and BPA only "to perform the requirements necessary to perform the audits." As set forth in Plaintiffs' Opening Brief, this would appear to prevent use of the information gleaned from the audits in any meaningful way.[22]

PHEAA asserts that "[u]pon receipt of the 2016 NDAs, Plaintiffs, VCG, and BPA did not engage in any discussion about their contents, instead choosing not to proceed with the audit."[23] This is simply false. The day after receiving the new proposed NDAs, Plaintiffs' counsel wrote to PHEAA's counsel stating:

> We do not see that this new NDA is necessary. PHEAA already has the protection of the NDA signed last year by VCG and BPA, as well as the protections of Section 11 of the MSA.
>
> Furthermore, both on its face, and in comparison to the NDA that PHEAA employed last year, the new NDA is excessive and overreaching. Your proposed NDA precludes use of Confidential Information learned during the audits "for any purpose other than to

[22] *See* Pl. Br. at 28-29.

[23] PHEAA Br. at 10.

> perform the requirements necessary to perform the audits." I am not sure what this rather circular statement is supposed to mean, but it would seem to preclude using the information in responding to inquiries from regulators such as the CFPB, or with Vice Chancellor Slights, or to enforce adherence to the terms of the MSA, or in other ways. In providing the Trusts the right to conduct audits, I do not think the MSA intended that audits be conducted just for the sake of conducting audits. Further, precluding providing information to regulators would seem inconsistent with the provision in Section 7.01 providing that regulators may participate in the audit. For these and other reasons, the proposed NDA is unacceptable. Indeed, it is so unreasonable that it appears to be an effort to derail the audits altogether.
>
> We are prepared to move forward with the audits under the NDA signed last year and MSA Section 11. Are you? Or is this new NDA a precondition to the audits proceeding next week?

Uderitz Aff. Exh. 23. In light of this letter, PHEAA's representation to the Court that Plaintiffs "did not engage in any discussion about [the] contents" of the NDAs is inexplicable.

PHEAA's assertion that its proposed NDA "did not limit the *Trusts*' use of any confidential information obtained through the audits," but only limited use by VCG and BPA,[24] rings hollow, because it ignores the way in which the activities of the Trusts are directed. As discussed in Plaintiffs' Opening Brief,[25] the Trusts take action through Issuer Orders issued by Wilmington Trust as Owner Trustee. The Owner Trustee, in turn, acts at the direction of the Owners. Trust Agreement

[24] PHEAA Br. at 11 (emphasis in original).

[25] Pl. Br. at 3-4

§2.03(b)(i). VCG is the authorized representative of the Owners. Hence, the only way the Trusts can use information from the audits is for VCG to direct the Owner Trustee to issue an Issuer Order on behalf of the Trusts. If VCG cannot use the information, the Trusts cannot use the information.

The Court should not be misled by PHEAA's assertions that the NDA it has proposed is needed because the NDA signed in connection with the Emergency Audit allegedly was violated. If anything, PHEAA's argument illustrates why the confusing and circular NDA it has proposed is inappropriate. PHEAA's argument that the prior NDA was violated by Odyssey is entirely bogus. PHEAA does not claim that any information from the audits was disclosed to anyone not entitled to it. Instead, PHEAA asserts that Odyssey used the information "for the benefit of Odyssey, not the Trusts,"[26] but PHEAA provides zero proof of such assertion. PHEAA argues that the results of the audit were used to justify the Trusts' appointment of Odyssey as a servicer, but that was a use of the information *by the Trusts for the benefit of the Trusts*. The Trusts hired Odyssey; Odyssey did not hire itself. And the hiring of Odyssey was for the benefit of the Trusts, in order to

[26] PHEAA Br. at 13.

try to remedy the disastrous consequences to the Trusts of PHEAA's abysmal performance of its servicing obligations.[27]

PHEAA's twisting of the facts relating to the Emergency Audit in order to assert in PHEAA's Pennsylvania case claims against the Owners, BPA and Odyssey that the NDA from the Emergency Audit was violated illustrates the game that PHEAA likely is playing with respect to its proposed NDA for the audits under MSA §§7.01 and 7.04. The language PHEAA has proposed – that the information can be used only "to perform the requirements necessary to perform the audits" – is so confusing and circular that it leads inescapably to the conclusion that PHEAA is proposing such language in order to lay the foundation for another claim that the language was violated. It is totally inappropriate to condition a contractual right to an audit on execution of an NDA that virtually guarantees another lawsuit alleging the NDA was violated.

---

[27] PHEAA's reliance on a statement in the BPA audit report that the audit was conducted on behalf of Odyssey, PHEAA Br. at 13, is misplaced. Such erroneous comment by BPA does not change the facts that audit results were used for the benefit of the Trusts. Moreover, the BPA engagement letter makes clear that BPA was hired by the Trusts, not Odyssey. *See* Uderitz Aff. Exh. 37 ("thank you for the confidence in our services to the Trusts"; "the Trusts are interested in having a third party perform a review of the Servicer's processes…"; "We appreciate the opportunity to be of assistance to the Trusts"; "BPA … will provide to the Trusts the Services described in the Exhibit A"; "BPA will prepare a findings and recommendations report for the Trusts"). Odyssey is nowhere mentioned in the engagement letter.

III. PHEAA IS REQUIRED TO PARTICIPATE IN AN OPERATIONS MEETING WITH THE TRUSTS

A. THE TRUSTS, NOT PHEAA, GET TO DESIGNATE WHO REPRESENTS THE TRUSTS AT AN OPERATIONS MEETING

PHEAA's argument that the Trusts cannot designate who will represent them at an operations meeting stems from PHEAA meritless assertion that the Trusts' are "brain-dead" entities.[28] The facts and the law give the lie to this silly assertion.

Under 12 *Del*. *C*. §3806(a), a "beneficial owner" "shall be entitled to direct the trustees or other persons in the management of the statutory trust."[29] Section 2.03(b)(i) of the Trust Agreements provides that "the Owner Trustee or other agents selected in accordance with this Agreement will act on behalf of the Trust *subject to direction by the Owners*…."

The Trust Agreements then provide that the Owner Trustee has all of the "rights, powers and duties set forth herein and in the Statutory Trust Statute." Trust Agreement §2.04; *see id*. §8.01. Under §2.03(a)(ii) of the Trust Agreements, the Trusts have the power "to provide for the administration of the Trust and the servicing of the Student Loans." The Trusts further have the power "[t]o engage in those activities and to enter into such agreements that are necessary, suitable or

[28] PHEAA Br. at 16.

[29] Tellingly, while the Trusts' Opening Brief discussed this statute and its implications for this case (Pl. Br. at 3-4), PHEAA's brief fails even to mention it.

convenient to accomplish the foregoing or are incidental thereto or connected therewith." §2.03(a)(iii). They also have the power "[t]o engage in such other activities as may be required in connection with conservation of Trust Property…." §2.03(a)(iv).

Thus, the statute and the Trust Agreements clearly establish that the Trusts have the power to provide for the administration of the Trusts and the servicing of the Loans, and to enter into agreements to accomplish those tasks. And they also clearly establish that the Trusts do so at the direction of the beneficial owners. This is the antithesis of being "brain-dead."[30]

With the underlying predicate of PHEAA's argument thus demolished, there is nothing left of its argument that the Trusts cannot designate who will represent them at an operations meeting. There is simply no basis for PHEAA's assertion that the Trusts cannot designate who constitutes their "operational staff" for

[30] Wide of the mark is PHEAA's argument the Owner Trustee cannot designate who represents the Trusts because the Owner Trustee has no obligation to manage the Trust property. PHEAA Br. at 17. The provision essentially provides that the Owner Trustee incurs no liability for not taking an active role in managing the Trusts' affairs. It does not alter the chain of command, whereby the Owners direct the Owner Trustee to enter into contracts and otherwise take actions on behalf of the Trusts. If, as PHEAA argues, the "Owner Trustee cannot authorize third parties, such as VCG, to take action" concerning the Trust property, PHEAA Br. at 17, then the Owner Trustee was not allowed to sign the Indenture, the Administration Agreement, the Custodial Agreement, the Special Servicing Agreement and all of the other agreements that the Owner Trustee signed on behalf of the Trusts. PHEAA's argument collapses under its own weight.

purposes of an operations meeting. The Trusts have the right, at the direction of the Owners, to enter into agreements to provide for the administration of the Trusts and the servicing of the Loans. While they have engaged GSSDS to act as Administrator and PHEAA to act as Servicer, that does not divest the Trusts of their right under the statute and the Trust Agreements to engage in those activities. The Trusts have hired VCG to represent them at the operations meeting. Applicable here is the Court's statement to PHEAA's counsel at the hearing on July 11 regarding the appointment of VCG to participate in the audit: "You might not like who it is, but that's – the contract doesn't give you a say in that."[31]

Lastly, the absurdity of PHEAA's position that only the Administrator can represent the Trusts at an operations meeting is underscored by the Administrator's purported *amicus* brief, where the Administrator argues that the Court should not grant a preliminary injunction requiring an operations meeting.[32] The Administrator can hardly represent the Trusts' interests at an operations meeting that the Administrator is trying to prevent.

---

[31] Uderitz Aff. Exh. 8 at 82-83.

[32] Opposition of Non-Party GSS Data Services, Inc. to Plaintiffs' Motion for Preliminary Injunction, dated Nov. 7, 2016.

B. DISCUSSING AMENDMENTS TO THE SERVICING GUIDELINES AND PROGRAM MANUAL ARE APPROPRIATE SUBJECTS FOR AN OPERATIONS MEETING

PHEAA's assertion that an operations meeting cannot involve discussions of amendments to the MSA is no basis for PHEAA to refuse to engage in an operations meeting.

First, as set forth in the Trusts' Opening Brief, an operations meeting is sought to discuss numerous aspects of PHEAA's deficient servicing, not just amendments. PHEAA's argument about amendments provides no basis for refusing to discuss the other items set forth in MSA §4.09.

Second, the Trusts' Opening Brief made clear that the amendments that the Trusts wish to discuss are principally amendments to the Servicing Guidelines and Program Manual, and such amendments would relate, *inter alia*, to forbearance requests from borrowers.[33] Section 4.09 of the MSA, the section that provides for operations meetings, explicitly provides that amendments to the Servicing Guidelines and Program Manual to deal with such matters may be discussed at the operations meeting. In relevant part, §4.09 provides as follows:

> As part of the series of operational meetings, the Servicer and FMC shall create and maintain a procedures manual for all aspects of Servicing which shall comply fully with the terms of this Agreement, including without limitation the Service Level Agreement, the Servicing Guidelines, the terms and conditions of the Credit

[33] Pl. Br. at 15; *see id*. at 7, 20.

> Agreements, and all applicable federal and state laws ("Program Manual"). …. System changes that are needed as a consequence of any provision of the Program Manual will be completed within a timely manner and in accordance with a schedule adopted by the parties at an Operations Meeting.
>
> The parties shall review the Program Manual annually for revisions and updates. The parties anticipate that the Program Manual may include, without limitation, the following information:
>
> * * * *
>
> (e) Forbearance procedures and forms;

Third, PHEAA's position is contrary to the position it previously took when the parties were trying to negotiate having an operations meeting. In its April 26, 2016 letter in which PHEAA asked for evidence of Mr. Uderitz's authority to participate in the §4.09 operations meeting, PHEAA stated that it looks forward to discussing "necessary revisions to the Servicing Agreement and the Servicing Guidelines."[34]

Lastly, one has to ask: Why is PHEAA so reluctant to discuss with the Trusts amendments to the Servicing Guidelines and Program Manual? What is the harm in engaging in such discussions? PHEAA's brief is silent on this point.

[34] Uderitz Aff. Exh. 27 at 2.

IV. THE TRUSTS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF THE RELIEF REQUESTED

A. EXCEPTION REQUESTS

In order to deal appropriately with exception requests, the Governing Documents need to be amended to clearly specify who is supposed to handle them. This is one of the reasons why an operations meeting is needed, in order to discuss the amendments required so the exception requests can be addressed. PHEAA has acknowledged that the documents need to be amended in order to deal with exception requests. Just recently, PHEAA proposed an amendment to deal with "ambiguities in the Servicing Guidelines."[35] The amendment proposed by PHEAA, which took the form of a letter on the Administrator's letterhead, would have clarified a November 5, 2008 "Read and Agreed Letter" dealing with exception requests and would have provided that all "requests for exceptions to the Servicing Guidelines … should be directed to the Special Servicer or its designated subcontractors for determination or resolution."[36] Thus, an operations meeting is

---

[35] Uderitz Reply Aff. Exh. 9.

[36] The draft was completely inappropriate, since it did not provide for the consent of the Trusts or the Owner Trustee. On October 1, 2015, the Trusts directed the Administrator not to give "any direction to PHEAA and to take no further action with regards to the servicing of defaulted and delinquent loans without the express written consent of the Owner Trustee, on behalf of the Trusts." Uderitz Aff. Exh. 7 at 2. Since the Administration Agreement provides that the Administrator "shall not … take any action that the Issuer directs the Administrator not to take on its *(Cont'd)*

needed in order, *inter alia*, to get the documents amended so that exception requests can be addressed.

B. BORROWER LAWSUITS

Regarding lawsuits by borrowers, PHEAA's responds by quibbling with the four cases cited in Plaintiffs' Opening Brief. That is no answer. As Plaintiffs discussed in their Opening Brief, lawyers are soliciting clients to sue based on the position that the Trusts cannot prove ownership of the underlying loans.[37] The Trusts have already lost numerous cases and motions based on that theory. For example, this year, the Ohio Court of Appeals overturned a judgment in favor of the Trusts because the Trusts

> neglected to include documentation to prove that it is entitled to demand judgment on the note. Although the record contains reference to the pool agreement and an uncontested affidavit that [defendant borrower] is in default, NCSLT did not include specific documentation to directly link the pool of debts assigned to NCSLT from [the originating bank] to the debt [that the defendant has] incurred and had defaulted upon.

Nat'l Collegiate Student Loan Trust 2005-1 v. Owusu, 2016 WL 363550, at *2 (Ohio Ct. App., Butler Co., Jan. 25, 2016).

Three years earlier, a Louisiana court made a nearly-identical ruling, reversing, based on the Trusts' document deficiencies, a lower court's grant of

---

behalf," Uderitz Aff. Exh. 4 §1(d)(ii), the Administrator cannot authorize the amendments that PHEAA has proposed.

[37] Pl. Br. at 34.

summary judgment in favor of the Trusts. *Nat'l Collegiate Student Loan Trust 2003-1 v. Thomas*, 129 So. 3d 1231 (La. App. 2d Cir. 2013). Again, the court found that "[t]he Pooling Agreement offer[ed] no description of the loans being assigned by [the originating bank] …. As a result, genuine issues of material fact exist as to whether … plaintiff is the rightful holder of that loan." *Id*. at 1234-35.

The Trusts need an audit and operations meeting to determine precisely what records PHEAA has regarding ownership and custody of the loans, and what, if anything, PHEAA is doing to obtain the documents it does not have.[38] Without such information, they will be unable effectively to direct the defense or settlement of this type of lawsuit.

C. THE CFPB INVESTIGATION

PHEAA claims it cannot see any connection between the CFPB investigation and PHEAA.[39] The connection is plain. First, the CFPB is complaining the borrower requests for exceptions are not being addressed. As discussed above, the documents need to be amended to clarify who should handle such requests, and that would be one subject for the operations meeting. Second, the CFPB complains that the Trusts have brought lawsuits without having the

---

[38] Pursuant to the Custodial Agreement among PHEAA, the Trusts and the Indenture Trustee, PHEAA is the Custodian for each deal. Uderitz Reply Aff. Exh. 10.

[39] PHEAA Br. at 37.

requisite documents showing ownership and custody of the loans. As discussed above, the Trusts need an audit and operations meeting to determine what records PHEAA has regarding ownership and custody of the loans, and what PHEAA is doing to obtain the documents it does not have. Armed with this information, the Trusts would be in a far better position to deal with the CFPB's concerns.

D. GOODWILL

PHEAA cannot argue with a straight face that the failure to address borrower requests for exceptions, judicial decisions criticizing the Trusts for bringing lawsuits against borrowers without sufficient documentation, and criticism by the CFPB would not impact goodwill. Instead, PHEAA argues that these injuries don't matter because the Trusts are "passive entities without ongoing business ventures."[40] That is not accurate. The Trusts need to have borrowers continue to pay off their loans, and they also need to explore selling loans where collections are less than the servicing fees the Trusts pay.[41] But as news of the servicing issues and the Trusts' inability to produce the documents needed to foreclose on loans spreads, the likelihood of more defaults rises.[42] Moreover, with

---

[40] PHEAA Br. at 37.

[41] The hiring of Odyssey as a servicer (*see* PHEAA Br. at 13) was largely driven by the need to have a servicer empowered to sell unprofitable loans. *See* Uderitz Reply Aff. Exh. 11.

[42] *See* Pl. Br. at 33-34.

the documentation and servicing issues hanging over their heads, the Trusts' ability to sell loans is compromised.

V. THE BALANCE OF THE EQUITIES STRONGLY FAVORS THE TRUSTS

Nothing said in PHEAA's brief shows any equities pointing in its favor. It is undisputed that it agreed in the MSA to allow audits and an operations meeting. How is PHEAA harmed by allowing its contractually-obligated audit and meeting to proceed? PHEAA argues that it did not agree to allow VCG to participate,[43] but as the documents make clear and as the Court already has observed, PHEAA has no voice as to whom the Trusts choose to hire or designate as its agents. How does the fact that the Trusts appointed VCG create any equity in favor of PHEAA?

Nor is there any merit to PHEAA's purported concern that VCG and BPA would not be required to keep the information obtained confidential.[44] VCG and BPA were willing to operate under a reasonable NDA. But the NDA proposed by PHEAA, with its confusing and circular restrictions, would have precluded VCG from giving directions to the Owner Trustee to take actions on behalf of the Trusts and was clearly a ploy to set up another lawsuit by PHEAA against VCG and BPA. Such conduct by PHEAA hardly creates any equity in its favor.

---

[43] PHEAA Br. at 38.

[44] *Id*.

VI. THE MATERIAL FACTS ARE UNDISPUTED

While PHEAA argues that an injunction should not issue because some facts are disputed, it cannot argue that there is any genuine dispute as to the critical, material facts: PHEAA does not argue there is any dispute that the Trusts are entitled to audits under MSA §§7.01 and 7.04 or that the Trusts are entitled to an operations meeting under MSA §4.09. These are the material facts, and there is no dispute as to them. In *C&J Energy Servs., Inc. v. City of Miami Gen. Empls.' & Sanitation Empls.' Ret. Trust*, 107 A.3d 1049 (Del. 2014), the Court denied a mandatory injunction because it found a genuine dispute as to the basic facts as to whether the defendants had done anything wrong. That is hardly the case here.

PHEAA argues there is a dispute as to whether the Owners are the beneficial interest holders of the Trusts.[45] The documentary evidence submitted herewith and discussed above establishes their ownership interest and eliminates any reasonable dispute on this topic.

The only other alleged factual disputes asserted by PHEAA relate to the injuries suffered by the Trusts in the absence of injunctive relief.[46] As shown above, however, the fact of injury is clear. While there may be issues as to

[45] PHEAA Br. at 19-20.

[46] PHEAA Br. at 20.

quantifying the injuries, that only serves to underscore why injunctive relief, and not a later damages claim, is needed.

VII. US BANK'S SUBMISSION IS IMPROPER AND IRRELEVANT

US Bank, as Indenture Trustee and Special Servicer, has filed a letter taking no position as to the ownership issue or as to whether an audit or operations meeting should be ordered.[47] The essence of the letter is an argument that US Bank has not acted in concert with PHEAA to prevent the audits or operations meeting.

US Bank has no right to make a submission on this motion, and it has not requested leave to do so. The US Bank Letter states that it is appearing "as an interested non-party" but cites no authority for such appearance. US Bank chose not to move for leave to intervene.

Rule 65(d) specifically provides that an injunction can enjoin "persons in active concert or participation" with the defendant. In accordance with that provision, the Proposed Order submitted by Plaintiffs provides "that those in active concert with PHEAA are enjoined from interfering with Plaintiffs' efforts to enforce these provisions of the MSA." The Proposed Order does not mention US Bank as an entity that is in active concert with PHEAA.

---

[47] Letter from Jeffrey T. Castellano to the Court, dated Nov. 7, 2016 (the "US Bank Letter").

The US Bank Letter argues that US Bank has not acted in concert with PHEAA to thwart the audits and operations meeting. But since the Proposed Order does not name US Bank as an entity in active concert or participation with PHEAA, the Court is not being asked to rule on that and this is not an issue to be decided at this time.[48] After the injunction is issued and served, if the Trusts believe that US Bank (or anyone else) has violated the injunction after receiving notice thereof, that would be the time to decide those issues.[49]

CONCLUSION

It is respectfully submitted that a preliminary injunction should be issued directing PHEAA to allow the audits under §§7.01 and 7.04 to proceed and directing PHEAA to convene an operations meeting under MSA § 4.09 with the Trusts' designated agent, VCG.

---

[48] The references in the Trusts' Opening Brief to US Bank was not intended to argue that the Court should hold at this juncture that US Bank is in active concert or participation with PHEAA. The reference to US Bank as someone to whom the injunction would apply was intended to mean that if they are served with the injunction and then do so act, they would be in violation of the injunction, like anyone else who acts in concert with PHEAA to violate the injunction.

[49] As noted above, the Administrator has moved for leave to appear as *amicus curiae* and has filed a purported *amicus* brief. The Trusts are filing a separate opposition to that motion, which demonstrates that such motion should be denied.

Dated: November 18, 2016

Respectfully submitted,

GRANT & EISENHOFER P.A.

By /s/ James J. Sabella
Stuart M. Grant (#2526)
James J. Sabella (#5124)
Michael T. Manuel (#6055)
123 Justison Street
Wilmington, DE 19801
302-622-7000

Attorneys for Plaintiffs