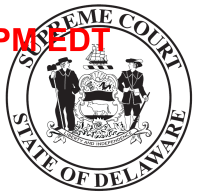
EFiled: May 11 2023 04:27PM EDT
Filing ID 69997981
Case Number 67,2023



IN THE SUPREME COURT OF THE STATE OF DELAWARE

PVP ASTON, LLC, *et al.*, Plaintiffs-below/Appellants, v. U.S. BANK NATIONAL ASSOCIATION, *et al.*, Defendants-below/Appellees.	No. 67, 2023 On appeal from the Superior Court of the State of Delaware, C.A. No. N22C-03-103 AML (CCLD)

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Dated: May 11, 2023

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NATURE OF THE PROCEEDINGS

Appellants ("Borrowers" or "Appellants") acquired multiple real properties from Rite-Aid pursuant to certain sale-lease back transactions (each, a "Property"). To do so, Borrowers entered into several commercial loans (each, a "Loan") with Defendants,[1] as separate lenders (each, a "Lender"). Each Loan was secured by a residual value insurance policy (each, a "RVI Policy") issued by insurer Financial Structures Limited ("FSL") solely for Lenders' benefit (with Borrowers expressly having no ownership interest or other rights with respect to the proceeds of those Policies). Each RVI Policy insured payment of the final "balloon" installment on the respective Loan in the event of default. Borrowers freely admit that they defaulted under the Loans (failing to make the final "balloon" payments thereunder) and that FSL thereafter made the requisite insurance payment (the "Insured Value") to each Lender (as the "Additional Named Insured" under the RVI Policy) pursuant to its respective claim (each, a "Claim").

However, through this litigation, Borrowers are effectively seeking judicial approval to walk away from their payment obligations under the Loans ***and*** keep the

---

[1] Defendants include: US Bank National Association ("U.S. Bank"), as trustee for Rite Aid Pass-Through Certificates, Series 1999-1, WF RR3-CMFUN, LLC ("WF RR3"), Sutherland Grantor Trust, Series V ("SGT"), Sutherland Commercial Mortgage Trust 2018-SBC7 ("SCMT"), and Wells Fargo Trust Company, N.A. ("Wells Fargo"), as trustee for the Legg Mason Mortgage Capital Corporation Lease-Back Commercial Mortgage Pass-Through Trust Series 1999-CTL-2.

Property they pledged to secure their empty promises to pay. The success of this brazen scheme by Borrowers (which the Superior Court saw through) hinges on Borrowers' meritless challenges to the assignments that Lenders made to FSL following FSL's payment of the Insured Value under the terms of the RVI Policies – assignments that Lenders were not only permitted but contractually obligated to make.

First, Borrowers mistakenly contend that Lenders were not permitted to assign the Loans to FSL because the only purported circumstance in which Lenders could assign the Loans to FSL is if FSL exercised the "Purchase Option" contained in Article V(d) of the RVI Policy. Not only are Lenders' rights under the Loans freely assignable at law, as well as under the Loan Documents (defined below) which specifically provide for assignment by Lenders, Section 8 of the Additional Named Insured Endorsement ("ANIE") ***requires*** Lenders to assign the Loans to FSL – stating that "[u]pon payment by [FSL] of the Insured Value pursuant hereto, [Lender] agrees to promptly assign to [FSL] (or its designee), without recourse, the Note, the Mortgage and all other documents relating to the Loan…." The obligation is clear and explicit.

Moreover, prior to the Superior Court's decision in this case, this exact assignment obligation under Section 8 was confirmed by two other courts: (a) a 2022 decision by a Michigan court ("Michigan Action") – interpreting the same policy, in

a case asserting similar claims, brought by one of the same Borrowers here – confirmed that "Section 8 of the Additional Named Insured Endorsement unambiguously provides for assignment of the Mortgage Instruments upon payment of a claim by the Insurer;" and (b) a 2022 decision by an Idaho court ("Idaho Action") confirmed that, upon payment of the Insured Value by FSL, the borrowers were required to convey title to the Properties to FSL pursuant to the terms of the Insured Covenants Agreements. Therefore, three courts – looking at the same issues presented here – have rejected Borrowers' flawed legal theories based on the plain language of the underlying contracts. Further, as found by the Superior Court in a nearly identical lawsuit filed by Borrowers against FSL (the "FSL Delaware Action"), Borrowers' claims are barred by collateral estoppel.

Second, Borrowers mistakenly contend that FSL's payment of the Insured Value paid off the Loans and therefore satisfied all of Borrowers' respective obligations under the Loans (allowing Borrowers to keep each Property free and clear of all debt). This position finds no support in the underlying contracts or the law. As stated by the court in the Michigan Action, when interpreting the contracts, "there is nothing stating the payment of a claim by the Insurer to the Lender discharges the Loan. Moreover, such a reading would render the assignment provisions meaningless . . . ." Given that the Loans are freely assignable, Borrowers' argument is nonsensical. In any event, whether Borrowers' obligations under the

Loans were discharged is an issue for Borrowers to address with FSL (or its assignees) as the current holder(s) of the Loans, not with Lenders that no longer have any interest therein.

Third, Borrowers argue that Lenders breached their obligations under the RVI Policies (even though Borrowers have no rights under those policies) by reaching an agreement to extend the three-day period for FSL to make payment. However, there is nothing in the RVI Policies that would prevent Lenders from doing so. Further, Borrowers have no standing to challenge waiver of the three-day payment requirement. Nonetheless, that is an issue for Borrowers to address with FSL (or its assignees), as Lenders no longer have any interest in the Loans.

Borrowers' theories of liability against Lenders are not supported by the Loan Documents, the RVI Policy, the law or common sense. This Court should join the unbroken line of authority that has rejected Borrowers' flawed legal theories and affirm the Superior Court's decision.

SUMMARY OF THE ARGUMENTS

1. **Denied.** The Superior Court did not commit reversible error and instead correctly determined that payment by FSL of the Insured Value to Lenders did not trigger any obligation on the part of Lenders to apply the Insured Value to the balance of the Loans. Lenders' only obligation, upon such payment, was to assign the Loan Documents to FSL, which they did. Given that assignment, any argument about whether Borrowers continue to owe amounts under the Loans is an issue between Borrowers and FSL, not Lenders.

2. **Denied.** The Superior Court did not commit reversible error and instead correctly interpreted the RVI Policies to require Lenders to assign the Loan Documents to FSL upon FSL's payment of the Insured Value pursuant to the Claims. Article V(a) of the RVI Policy requires FSL to pay the Insured Value to Lenders "in accordance with the terms hereof [the RVI Policy] and the Additional Named Insured Endorsement…." Section 8 of the ANIE is clear as to what happens after such payment – "[u]pon payment by [FSL] of the Insured Value pursuant hereto, the [Lender] agrees to assign to [FSL]…the…Loan Documents." Furthermore, in the event of conflict, the provisions of the ANIE control. Borrowers concede that FSL paid the Insured Value to Lenders, thereby triggering Lenders' obligation to assign the Loan Documents to FSL, which they did.

Borrowers' convoluted argument suggesting that the assignment of the Loan Documents is only permitted when FSL exercises the Purchase Option under Article V(d) is contrary to the express language of the RVI Policy. Moreover, Borrowers' argument is commercially and economically unreasonable as it would allow Borrowers to avoid the balloon payment on the Loans and nonetheless keep each Property free and clear of all liens unless FSL exercised the Purchase Option. Because Lenders complied with the express requirements of the RVI Policies, they did not breach any contract.

3. **Denied.** The Superior Court did not commit reversible error and instead correctly determined that Lenders did not breach the RVI Policies in connection with any Extension Agreements between Lenders and FSL or the payment of "Extension Fees" by FSL. It is undisputed that only Lenders, as the Additional Named Insureds, have any ownership interest in or rights to RVI Policies or the proceeds thereunder and that only Lenders can make claims under the RVI Policies. As the only party with an interest in the RVI Policies and their proceeds, Lenders are and were free to waive the three-day requirement for payment of the Insured Value by FSL (thereby granting an extension of time for FSL to pay the Claims). Borrowers have no right to complain about it. And, once again, the question of whether Extension Fees were

properly imposed on Borrowers is an issue between Borrowers and FSL (as assignees of Lenders), not Lenders (that no longer have any interest in the Loans.)

4. The Superior Court's decision should be affirmed for the independent reason that Borrowers' claims are barred by the doctrine of collateral estoppel. In the FSL Delaware Action, a nearly identical lawsuit filed by the same Borrowers against FSL, Borrowers asserted similar claims based on the same legal theories under the same RVI Policies. In that case, Judge LeGrow correctly held that all of Borrowers' claims were barred under the doctrine of collateral estoppel because of separate rulings in the Michigan Action and Idaho Action. The ruling in the FSL Delaware Action similarly bars Borrowers' claims against Lenders here.

STATEMENT OF THE FACTS[2]

A. The Loans

Borrowers are the individual borrowers under each of the Loans secured by each separate Property. (A30-32,¶¶ 6-10; A59). Following certain (unrelated) assignments, U.S. Bank (as trustee and not in its individual capacity), became the Lender under thirty of the Loans, Wells Fargo (as trustee and not in its individual capacity) became Lender under one of the Loans, WF RR3 became Lender under two of the Loans, SGT became Lender under one of the Loans, and SCMT became Lender under two of the Loans. (A29, ¶ 2; A32, ¶¶ 11-12, 14-15; A34, ¶20; A58). Each Loan was evidenced and secured by a loan, mortgage, and related documents (collectively, the "Loan Documents"). (A33, ¶ 19).

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2 Citations to documents contained in the Appellants' Appendix are cited herein as "A__". Citations to documents contained in the Appellees' Appendix are cited herein as "AA__."

B. The RVI Policies

As a condition to making the Loans, Lenders required residual value insurance to insure full payment of the final "balloon" installment on the Loan. (A34, ¶ 21). The residual value insurance, issued by non-party FSL, was documented by a RVI Policy, which is defined to include: the "Residual Value Insurance Policy, the Application and the Declarations, ***the Additional Named Insured Endorsement*** and any and all other endorsements hereto or thereto." (A34, ¶ 22; A79, Definition of "Policy") (emphasis added).

As the RVI Polices were issued expressly for the benefit of Lenders, only Lenders (as the Additional Named Insureds) could make a Claim thereunder. (A76-79, Art. I-II;A80-81, Art. V). The RVI Policies expressly state that "[i]n no event will the Insured have any ownership interest or other rights with respect to the proceeds of this Policy." (A426). The proceeds of each RVI Policy were payable ***only*** to the "Additional Named Insured," which in each case was the particular Lender. (A35, ¶ 29; A76, Art. I; A80-81, Art. V; A106-7, ¶ 2). In connection with each RVI Policy, FSL and each respective Borrower also executed an Insured Covenants Agreement ("ICA"). (A35, ¶ 28; A86-103).

Under Article V(a) of the RVI Policy, FSL agreed to "pay to the Additional Named Insured an amount equal to the Insured Value" of the RVI Policy ("Insured Value"), if: (i) a valid Notice of Claim has been given; (ii) the Additional Named

Insured shall not have received payment in full of all amounts owing under the Loan; and (iii) all of the terms and conditions of this Policy have been satisfied." (A80). Article V(a) further states that FSL has the obligation to make "payment to the Additional Named Insured in accordance with the terms hereof ***and the Additional Named Insured Endorsement***…." (*Id.*) (emphasis added). Section 8 of the ANIE then dictates Lenders' obligation upon payment of the Insured Value by FSL:

> Upon the payment by [FSL] of the Insured Value pursuant hereto, the [Lender] ***agrees to promptly assign to [FSL]*** (or its designee), without recourse, the Note, the Mortgage and all other documents relating to the Loan ('Loan Documents', including without limitation the rights of the [Lender] under any mortgage title insurance policies, to the extent assignable) . . . .

(A109-10, § 8). (emphasis added). Section 14 of the ANIE[3] further provides that, upon the payment under the RVI Policy, FSL is subrogated to the Lender's rights against the particular Borrower "up to the full amount of such payment." (A112-13, § 14). In other words, upon payment by FSL, FSL steps into the shoes of each respective Lender with no change in Borrowers' obligations as a result thereof.

In addition, Article V(d) of the RVI Policy provides FSL with an ***option, in lieu of Article V(a)***, to purchase the Loan, stating in relevant part:

> In the event that [FSL] is obligated in accordance with the terms and conditions of this Policy to make payment to the [Lender], on the Termination Date (and at any time thereafter) [FSL] shall have the

[3] The same provision is found in Section 17 of the ANIE attached to Defendant KeyBank National Association's Opening Brief in Support of its Motion to Dismiss Amended Complaint. (A205)

> option in its sole discretion, in lieu of complying with Article I and Article V of the Policy, to purchase the Loan from the [Lender] for a purchase price equal to all amounts payable under the Loan, but in no event greater than the Insured Value. [FSL] may exercise such option by giving written notice to the Insured and the [Lender] and making payment of the purchase price to the [Lender] within the time provided in Article V(c) hereof. If the Company exercises such option, the [Lender] will assign the Loan and all documents evidencing or securing the Loan to the Company, without recourse, in accordance with the provisions of Section 8 of the Additional Named Insured Endorsement.

(A81, Art. V(d)). Borrowers allege that FSL did not exercise the purchase option under Article V(d). (A43, ¶ 64).

Under the ICA, if a Borrower fails to pay a Loan in full and FSL pays a Claim, the Borrower is ***required*** to transfer the underlying Property to FSL immediately. (A88, § 4(a)). Specifically, Section 4(a) of the ICA states:

> In the event that FSL makes payment for a Claim under Articles I and V of the Policy, ***[Plaintiff] shall cause the deed to the Property to be immediately delivered to FSL***, without payment of additional consideration by FSL. [Plaintiff] hereby acknowledges that payment by FSL under the Policy is the equivalent of a purchase of the Property by FSL . . . .

(*Id.*) (emphasis added). This obligation is further provided in Recital 6 and Section 2(c) of the ICA and is wholly ignored by Borrowers. (A87, § 6; A88, § 2(c)).

C. Borrowers Defaulted On The Loans

Borrowers concede that they failed to make the balloon payments when due under the Loans and thereby defaulted. (A37, ¶¶ 36-37). Following such default, Lenders submitted their Claims to FSL under each RVI Policy. (A38, ¶ 44).

Pursuant to the terms of each RVI Policy, FSL paid each Lender the "Insured Value." Each Lender then assigned the Loan Documents to FSL as expressly required by Section 8 of the ANIE. (A37, ¶ 38; A109-10, § 8).

D. Borrowers' Amended Complaint And The Superior Court Decision

In their Amended Complaint, Borrowers asserted declaratory judgment and breach of contract claims against Lenders alleging breach of the underlying Loan Documents and RVI Policies. These claims are based on three flawed arguments: (i) that Lenders did not have the right to assign the Loan Documents to FSL and therefore should not have done so (A44-45, ¶ 72); (ii) that payment of the Insured Value by FSL to each Lender paid off or satisfied each Loan such that Borrowers are entitled to hold each Property free and clear of any and all debt, even though Borrowers defaulted on the Loans (A40, ¶ 51; A42-43 ¶ 62; A44, ¶ 68); and (iii) Lenders were not entitled to waive the three-day period for FSL to make payment (A43, ¶ 63).

Lenders filed motions to dismiss the Amended Complaint. After briefing and oral argument, the Superior Court (Judge LeGrow) granted the motions and dismissed the Amended Complaint with prejudice on January 24, 2023 (the "Superior Court Decision"). In doing so, the Superior Court held in part:

> The issue that ultimately is dispositive of the motions is one of contractual interpretation, namely whether the agreements underlying the loan and insurance policy only permitted the lenders to assign the loans if the insurer exercised the contractual "option" to purchase the

loans for less than the insured value. The plaintiffs' proffered interpretation is unreasonable and inconsistent with the contracts' plain language, including language describing the purchase option as being within the insurer's "sole discretion" and "in lieu of" paying the complete insured value. Since all the plaintiffs' claims are premised on this flawed interpretation, they must be dismissed.

***

This interpretation also is consistent with other provisions in the parties' agreement that state Plaintiffs have no ownership interest in the proceeds of the RVI Policy, and Defendants have an obligation to assign the Loans to FSL upon payment by FSL. ICA Section 4 states, "[i]n the event that FSL makes payment for a Claim under Articles I and V of the [RVI] Policy, the Owner [*i.e.*, Lender Defendants] shall cause the deed to the Property to be immediately delivered to FSL, without payment of additional consideration by FSL." RVI Policy Article V(a) states, "[i]n no event will the Insured [*i.e.*, Plaintiffs] have any ownership interest or other rights with respect to the proceeds of this [RVI] Policy."

***

It simply is not a reasonable reading of the RVI Policies or the Loan Documents to conclude that payment after three days was a payment that satisfied Plaintiffs' Loan obligations rather than payment under Article V(a). The question of whether the Extension Fees are obligations validly imposed on Plaintiffs is an issue to be resolved between Plaintiffs and FSL. It is not a claim against Defendants because Defendants no longer own the Loans.

***

In addition to being inconsistent with the contractual language, Plaintiffs' interpretation is commercially and economically unreasonable. Plaintiffs' reading of the relevant agreements would mean that for payment of each insurance premium, Plaintiffs absolved themselves of responsibility for the balloon payment. In other words, Plaintiffs would have no incentive to make their respective balloon payments, but nevertheless would obtain each Property free and clear of all obligations unless FSL exercised the Loan Purchase Option by paying

> less than the Insured Value. No commercially reasonable party would agree to that.
>
> Having concluded that Plaintiffs' interpretation is not reasonable, Plaintiffs' breach of contract claims require little further analysis. Because Defendants acted in accordance with the requirements of the RVI Policies, they did not breach the RVI Policies or the Loan Documents.

(*See* Exhibit to App. Br., January 24, 2023 Memorandum Opinion ("Superior Court Decision"), pp. 2, 21, 23, 24 (footnotes and citations omitted)).

E. Related Actions Deciding The Same Claims And Legal Theories

1. The Michigan Action

On August 9, 2021, one of the named plaintiffs here (AUSBP Ownerco 12, LLC)[4] filed an action against certain FSL designees in Michigan, styled *RA2 Troy, LLC v. FI 135 Troy, LLC and ICA Acquisition Troy, LLC*, State of Michigan, Circuit Court for the County of Oakland, Business Court, Case No. 21-189427-CB (the "Michigan Action"), asserting claims similar to those at issue here under the same RVI Policy. (AA119-45; AA65-100). On May 5, 2022, the Michigan court granted summary judgment in favor of the FSL designees and dismissed the case. (AA146-70).

In its decision, the Michigan court expressly rejected Borrowers' argument that Article V(a) of the RVI Policies stands for the proposition that the Insurer's

[4] Plaintiff AUSBP Ownerco 12, LLC was formerly known as RA2 Troy L.L.C. (A31-32, ¶ 10).

payment to the Lender will be used to pay off the loan, noting that "Article V(a) merely states that upon valid notice of a claim, the Insurer will pay the Insured Value to the Additional Named Insured (the Lender)." (AA159). The Michigan court summarized:

> [T]here is no language in either Article V of the Policy or in Section 8 of the Endorsement which states that an assignment does or does not evidence that the Loan has been paid in full. ***Stated another way, there is nothing stating the payment of a claim by the Insurer to the Lender discharges the Loan. Moreover, such a reading would render the assignment provisions meaningless*** . . . .

(AA161-62) (citations omitted) (emphasis added).

2. The Idaho Action

On July 12, 2022, the district court in Ada County, Idaho granted summary judgment to the plaintiff (an assignee of FSL's rights under the ICAs) in *TJV Associates LLC v. RA2 Boise-Overland LLC, et al.*, District Court of the Fourth Judicial District of the State of Idaho, in for the County of Ada, Case No. CV01-21-07907 – an action involving transactions very similar to the ones at issue in the present case (the "Idaho Action"). (AA171-206). In the Idaho Action, the borrowers under two loans, similar to those at issue here, failed to make their balloon payments, and the lenders made a claim to FSL under the applicable residual value policies. After paying the claims, FSL assigned its interests to the plaintiff, which sued borrowers after they refused to transfer title to the subject properties as required

under the ICAs. The borrowers asserted counterclaims against the plaintiff arguing in part that the ICAs were unenforceable.

In granting summary judgment to the plaintiff, the Idaho court held that the ICAs were enforceable and ordered specific performance requiring borrowers to transfer of title to the subject properties to each respective plaintiff as required under the ICAs. The court also dismissed the counterclaims of the defendant borrowers.

3. The FSL Delaware Action

On September 13, 2021, 34 of the 36 Borrowers in the present case filed the FSL Delaware Action, a separate action against FSL, styled *PVP Aston, LLC, et al. v. Financial Structures Ltd., et al.*, Case No. N21C-09-095 AML (Del. Super.), pursuant to which they asserted declaratory judgment and common law claims against FSL. Those plaintiffs alleged that FSL's payment of the Insured Value to the lenders paid off the Loans and thereby eliminated any right by FSL to enforce the Loans – the same allegations at issue here.

On March 31, 2023, the Superior Court (Judge LeGrow) granted FSL's motion to dismiss and dismissed the action with prejudice (the "FSL Decision"), in part, "because all Plaintiffs' claims are barred by the collateral estoppel doctrine" based on the decisions in the Michigan Action and Idaho Action. (AA225). In a thorough decision, the Superior Court analyzed each of the elements of collateral estoppel under Delaware law and properly concluded that "[t]he transactions and

agreements at issue here are the same transactions and agreements addressed in the Michigan and Idaho [A]ctions" and "the material issues in this action already have been decided in Michigan and Idaho." (AA230).

The Superior Court then noted that the Michigan court "rejected" Borrowers' theory that FSL's failure to exercise the Purchase Option (under the RVI Policy) extinguished Borrowers' Loans: "The Michigan Court held that 'Article V(a) merely states that upon valid notice of a claim, the Insurer will pay the Insured Value to the Additional Named Insured (the Lender). Further, Section 8 of the ANIE unambiguously provides for Assignment of the Mortgage Instruments upon payment of a claim by the Insurer.'" (AA231). The Superior Court went on to note that the Michigan court also "rejected the argument that the borrower there was not bound by the ANIE." (AA231).

> The Michigan Court held "the [ANIE] is considered part of the Policy under which the Plaintiff is named Insured. The Policy specifically defines the 'Policy' as 'this Residual Value Insurance Policy, the Application and the Declarations, the ANIE and any and all other endorsements thereto.' Moreover the fact that Plaintiff is not named in the [ANIE] has no effect on its application. The RVI Policy (including the [ANIE]) is for the benefit of the Lender (the Additional Named Insured), which is the only party that can make a claim under the Policy.

(AA231-32). In addition, the Superior Court recognized that the Michigan and Idaho courts also "rejected" Borrowers' claims that the ICAs were unenforceable. (AA233-34).

After noting that the Michigan and Idaho courts already rejected the same

claims and legal theories asserted by Borrowers in the FSL Delaware Action, the Superior Court applied the remaining elements of collateral estoppel, including that each of those plaintiffs "is in privity with the Michigan and Idaho Borrowers . . . . Courts routinely hold that entities under common control are in privity with each other for collateral estoppel purposes." (AA238; *see generally* AA235-43). Although factually and legally accurate, the FSL Decision is currently on appeal to this Court. (AA245-49).

ARGUMENT

I. The Superior Court Decision Should Be Affirmed Because Lenders Were Not Required To Apply The Proceeds From The RVI Policies To The Loan Balance

A. Question Presented

Whether this Court should affirm the Superior Court decision that Lenders were not required to apply the proceeds from the RVI Policies to the balance of the Loans? This argument was preserved for appeal. (A304; A312-14; A318-19; A325-26).

B. Scope of Review

This Court reviews a decision to grant a motion to dismiss under Rule 12(b)(6) *de novo* "to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *See Golden Rule Fin. Corp. v. S'holder Representative Servs. LLC*, 267 A.3d 382, 384 (Del. 2021) (citation omitted) (holding the lower court's dismissal of plaintiff's complaint was supported by the plain language of the parties' agreement).

On a motion to dismiss, the court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the non-moving party. *See Infomedia Grp., Inc. v. Orange Health Sols., Inc.*, 2020 WL 4384087, at *2 n.4 (Del. Super. July 31, 2020). The court must "ignore conclusory allegations that lack specific supporting factual allegations." *Id.* (quoting *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998)). A motion to dismiss may be granted if "it appears to a

reasonable certainty that under no state of facts which could be proved to support the claim asserted would [the] plaintiff be entitled to relief." *Cont'l Fin. Co., LLCV v. ICS Corp.*, 2020 WL 836608, at *2 (Del. Super. Feb. 20, 2020).[5]

C. Merits of Argument

Appellants contend that the Superior Court erred in concluding that Lenders had no obligation to apply the proceeds of the RVI Policies to the balance of the Loans pursuant to Section 6.05 of the Loan Agreement contained in the RA2 Loan Agreements and Paragraph 25 of the Mortgage and Security Agreement ("Mortgage") contained in the WEC Loan Documents. (App. Br. 19-22). Appellants are wrong for several reasons.

1. The Obligations Under The Loan Agreements Were Never Triggered

Upon FSL's payment to Lenders of the Insured Value, Lenders properly assigned the Loan Documents to FSL. As a general matter, Lenders were free to assign the Loan Documents to a third party, including FSL, at any time. In addition, as discussed above, the RVI Policies (including the ANIE) actually required Lenders to assign the Loan Documents to FSL.

[5] The Court may take judicial notice of court records for the purposes of deciding a Rule 12(b)(6) motion to dismiss. *See, e.g.*, *Hammer v. Howard*, 2021 WL 4935019, at *4 n.36 (Del. Super. Oct. 22, 2021) (taking judicial notice of materials in consideration of Rule 12(b)(6) motion).

Borrowers concede that FSL paid Lenders the Insured Value. This payment triggered Lenders' ***obligation*** to assign the Loan Documents to FSL, which Lenders promptly did thereby satisfying their only obligation. Therefore, as the Superior Court properly concluded, "Defendants' obligations under the RA2 Set of Loan Agreements Section 6.05 and the WEC Set of Loan Agreements Paragraph 25 were never triggered." (Superior Court Decision, p. 25). After Lenders assigned the Loan Documents to FSL (or its designees), they had no further obligations thereunder.

2. Any Claim by Appellants Related to Loan Satisfaction Would Be Against FSL, Not Lenders

Appellants' argument is that they do not owe any further balance under the Loans. Although this argument may give rise to a defense against an affirmative claim by FSL (or its designees or assignees) seeking to collect on the Loans, it does not give rise to an affirmative claim for breach of contract against Lenders (who no longer have any interest in the Loans). Even if the proceeds from the RVI Policy should have been applied to the balance of the Loans under Section 6.05 of the Loan Agreement and Paragraph 25 of the Mortgage (which it should not), that "is an issue to be resolved between Plaintiffs and FSL. It is not a claim against Defendants because Defendants no longer own the Loans." (Superior Court Decision, p. 23) (holding that any claim based on incurring default interest on the Loans is between Appellants and FSL, not Lenders).

3. Paragraph 25 of the Mortgage and Section 6.05 of the Loan Agreement Do Not Apply To Insurance Proceeds From FSL

The plain language of Paragraph 25 of the Mortgage and Section 6.05 of the Loan Agreement does not apply to payments by FSL of the Insured Value.[6]

a. Paragraph 25 Of The Mortgage Contained in the WEC Loan Documents Does Not Apply To Payments Of The Insured Value by FSL

On its face, Paragraph 25 of the Mortgage contained in the WEC Loan Documents is wholly inapplicable.[7] This Section (pertaining to *prepayment* of the Loans) provides:

> 25. ***Prepayment*** After Event of Default. If following the occurrence of any Event of Default, ***Borrower shall tender payment*** of an amount sufficient to satisfy the Debt at any time prior to a sale of the Mortgaged Property…such tender by Borrower shall be deemed to be a voluntary ***prepayment***…. If such tender occurs during the Lockout Period . . . Borrower shall, in addition to the outstanding principal balance of the Note, also pay to Lender a sum equal to (a) interest accrued and unpaid on the principal balance of the Note to the date of such tender, (b) interest which would have accrued on the principal balance of the Note at the Applicable Interest Rate (as such term is defined in the Note) from the date of such tender to the first day after the Lockout Period (as such term is defined in the Note), (c) a Prepayment Consideration…and (d) all other amounts due under the Note, this Indenture and Other Security Documents. If such tender occurs after the Lockout Period,

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[6] Lenders made this argument to the Superior Court, but the Court did not have to address it. (Superior Court Decision, p. 25 at n.111 ("Defendants separately argued that the plain language of Section 6.05 and Paragraph 25 did not apply to payments from FSL under the RVI Policies. Although there is persuasive force to Defendants' arguments, the Court need not address them here.")).

[7] As Borrowers point out, the WEC Loan Documents includes Loans for which Defendants SGT, SCMT, Wells Fargo and WF RR3 are Lenders. (A312, n.5).

> Borrower shall, in addition to the entire Debt, also pay to Lender a sum equal to the amounts set forth in clauses (a), (c) and (d) above.

(A538-39, ¶ 25) (emphasis added).

First, there is no language in this Section that provides that proceeds from the RVI Policies (the Insured Value) must be applied to the Loans (and thus satisfy same), as Appellants contend.[8] Second, this Section applies to payments tendered ***by Borrower***; and, it is undisputed that there has been no tender by Borrower. The only payment to Lenders was the payment of the Insured Value ***by FSL***. Both Section 3 of the Mortgage and Article V(a) of the RVI Policy specifically provide that Borrower has no interest or rights with respect to the RVI Policy or proceeds thereof (including payment by FSL of the Insured Value); thus, Borrowers have no right to have such proceeds applied to the Loans. Third, this Section applies only to "prepayments" under the Loan (not maturity/balloon payment) and outlines Borrower's obligation to pay certain amounts, including interest and prepayment consideration, if, after default and ***before maturity***, Borrower tenders a sum sufficient to satisfy the Debt. Here, the Loans had matured, and there was no "prepayment" to which this Section would apply. This Paragraph is inapplicable and provides no support for Appellants' arguments.

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[8] Under Del. Super. Ct. Civ. R. 12(b)(6), a complaint may be dismissed where the unambiguous language of the documents upon which the claims are based contradict the complaint's allegations. *See Ryan v. Buckeye Partners, L.P.*, 2022 WL 389827, at *5-6 (Del. Ch. Feb. 9, 2022).

b. Section 6.05 Of The Loan Agreement Contained In The RA2 Loan Documents Does Not Apply To Payments Of The Insured Value

Section 6.05 of the Loan Agreement contained in the RA2 Loan Documents requires that each Lender apply "all moneys received and amounts realized by it" or "all moneys then held or thereafter received by it" "(ii) to pay in full the aggregate unpaid principal amount of the Loan then Outstanding." (A313).[9] However, Borrowers gloss over the fact that Section 6.05 only applies to two categories of funds and the insurance proceeds from FSL do not qualify under either one.

(1) Insurance Proceeds Do Not Qualify Under The First Category Because The Prerequisites Are Not Met

The first type of funds that qualifies under Section 6.05 is comprised of "(a) all moneys received and amounts realized by" the Lender. (A495, § 6.05).[10] However, the text then qualifies "all moneys received and amounts realized by [Lender]" with the prerequisite phrase: "including any amounts realized by the Lender pursuant to the exercise of remedies pursuant to this [Loan] Agreement, the Mortgage, the Lease Assignment, Paragraph 19 of the Lease or any other Operative

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[9] As Plaintiffs point out, the RA2 Loan Documents only includes Loans for which Defendant U.S. Bank, as trustee, is the Lender. (A312, n.4).

[10] The definitions used in the RA2 Loan Agreement are attached as "Appendix A" to the Agreement (AA55-64).

Document." (*Id.*). Insurance proceeds under the RVI Policies, such as those received from FSL, do not satisfy this criterion.

First, insurance proceeds are received by the Lender pursuant to the RVI Policies and ANIE. Second, insurance proceeds are not realized "pursuant to the exercise of remedies pursuant to" the "[Loan] Agreement, the Mortgage, the Lease Assignment, [or] Paragraph 19 of the Lease." Nor are the RVI Policies realized by the exercise of remedies pursuant to "any other Operative Document." The Loan Agreement defines "Operative Document" as "the Lease, Lease Assignment, the Guaranty, the Secured Note, the Mortgage, the Subordination, Non-Disturbance and Attornment Agreement, the Consent Agreement and the Loan Agreement." (AA61). Notably, the RVI Policies (or any other document related to insurance policies) are not included in this definition.

But even if insurance proceeds were included, the proceeds were not received as a result of one of the two required events listed: "after either: (x) a Lease Event of Default shall have occurred and the Lease shall have been declared to be in default," or (y) "the principal of the Loan then Outstanding shall have been declared to be due and payable immediately pursuant to Section 7.01." (A495, § 6.05). First, there was no allegation that there was a Lease Event of Default, or that the Lender declared the Lease to be in default. Second, there was no allegation that the principal amounts of the Loans were accelerated. Rather, Borrowers simply allege that "[a]ll

the Loans matured during the period of economic upheaval brought on by the Covid-19 pandemic" (A37, ¶ 36) and thus Borrowers failed to make the final balloon payment thereby triggering the insurance payment. And, there is no allegation that the Lender exercised its right under Section 7.01 to "at anytime [after an Event of Default] at its option by written notice to [Borrower] declare the Loan to be due and payable."

(2) Insurance Proceeds Do Not Qualify Under The Second Category

The second type of moneys that qualify under Section 6.05 are comprised of "(b) all moneys then held or thereafter received by [the Lender] under this Agreement or under any other Operative Document as part of the Mortgaged Property." (A495, § 6.05). As noted above, insurance proceeds are received by the Lender under the RVI Policy and ANIE. The insurance proceeds are not received by the Lender "under this [Loan] Agreement" or "under any other Operative Document" because the RVI Policies and the ANIE are not listed in the definition of Operative Document. Therefore, insurance proceeds also do not satisfy this criterion, and Section 6.05 does not apply to pay off the Loans.

II. The Superior Court Correctly Determined That The Lenders Were Free To and Even Required to Assign the Loan Documents to FSL

A. Question Presented

Whether this Court should affirm the Superior Court decision that the plain, unambiguous language of the RVI Policies permitted and required Lenders to assign the Loan Documents to FSL after FSL paid the Insured Value under the RVI Policies? This argument was preserved for appeal. (A309-10; A314-18; A328-332).

B. Scope of Review

This Court reviews a decision to grant a motion to dismiss under Rule 12(b)(6) *de novo* "to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *See Golden Rule Fin. Corp.* 267 A.3d at 384 (citation omitted).

On a motion to dismiss, the court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the non-moving party. *See Infomedia Grp., Inc.,* 2020 WL 4384087, at *2 n.4 (citation omitted). The court must "ignore conclusory allegations that lack specific supporting factual allegations." *Id.* (quoting *Ramunno*, 705 A.2d at 1034). A motion to dismiss may be granted if "it appears to a reasonable certainty that under no state of facts which could be proved to support the claim asserted would [the] plaintiff be entitled to

relief." *Cont'l Fin. Co., LLCV*, 2020 WL 836608, at *2.[11]

C. Merits of Argument

Borrowers' entire theory of liability is based on the premise that Lenders had no right to assign the Loan Documents to FSL, but they are wrong. Absent some prohibition on assignment in the Loan Documents (which does not exist here), Lenders were free to assign the Loan Documents to a third party, including FSL, at any time.[12] Borrowers' premise that Lenders were obligated to refuse to make the assignment to FSL (despite their clear obligation to make the assignment) is simply baseless.

In addition to a general legal right to assign the Loan Documents, and the unambiguous provisions of the Loan Documents that specifically provide Lenders

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[11] The Court may take judicial notice of court records for the purposes of deciding a Rule 12(b)(6) motion to dismiss. *See, e.g.*, *Hammer*, 2021 WL 4935019, at *4 n.36.

[12] *Hawkins v. Daniel*, 2022 WL 997752, at *27 (Del. Ch. Apr. 4, 2022) ("By default under the common law, contract rights and other property rights are freely alienable."), *aff'd*, 878 F. App'x 891 (6th Cir. 2019); *Downeast Energy Corp. v. Frizzell*, 2011 WL 13092668, at *2 (N.H. July 6, 2011) (noting contract rights are generally assignable); *Davis v. Basalt Rock Co.*, 107 Cal. App. 2d 436, 444 (1951) ("Generally, unless by law or contract prohibited, contracts are assignable."); *RECP IV WG Land Inv'rs, LLC v. Capital One Bank (USA)*, 811 S.E.2d 817 ("It is well settled that contract rights and obligations are assignable unless restricted either by law or the parties themselves."); *Tidewater Fin. Co. v. Cowns*, 968 N.E.2d 59, 63 (Ohio Ct. App. 2011) citing *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121, 128 (Ohio Ct. App. 2006).

with the right to assign the Loan Documents,[13] the RVI Policies ***require*** Lenders to assign the Loan Documents in the circumstances presented here. Article V(a) of the RVI Policy requires FSL to pay the Insured Value to Lenders "in accordance with the terms hereof and the Additional Named Insured Endorsement." (A80, Art. V(a)). Section 8 of the ANIE ***requires*** Lenders to assign the Loan Documents upon payment of the Insured Value by FSL. As the Superior Court stated:

> Section 8 of the ANIE provides, in pertinent part, "***[u]pon payment by [FSL] of the Insured Value pursuant hereto***, the [Lender] agrees to promptly assign to [FSL]…the…Loan Documents." Section 8 of the ANIE is an express and mandatory provision that requires Defendants to assign the Loans to FSL upon payment of the Insured Value, which Plaintiffs concede occurred with respect to all the Loans.

(Superior Court Decision, p. 20) (quoting Section 8 of the ANIE) (emphasis in original). As the Superior Court correctly held, "the contractual language is clear that the assignments by Defendants to FSL were valid and in fact ***required under the RVI Policies***." (Superior Court Decision, p. 20) (emphasis added). Therefore, the clear and unambiguous language of the ANIE required Lenders to assign the Loan Documents after FSL paid the Insured Value.

Because the language of the ANIE is clear, Borrowers attempt to avoid it by repeatedly referring to the RVI Policy as the "Base Policy" to suggest that the ANIE

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[13] Section 52 of the Mortgage contained in the WEC Loan Documents provides that "Lender shall have the right to assign or transfer its rights under this Indenture without limitation."

is not part of the RVI Policy and thus somehow does not apply to them. (*See, e.g.*, App. Br. at 6) ("The Base Policy was a three-party contract among each applicable borrower, the lender and FSL. In addition to the Base Policy, there was an ANIE, a bi-lateral contract between only FSL and the lender (and not the borrower).") Borrowers are flatly wrong. Try as they might, however, Borrowers cannot avoid application of the ANIE – the very definition of "Policy" includes the "Residual Value Insurance Policy, the Application and the Declarations, ***the Additional Named Insured Endorsement*** and any and all other endorsements hereto or thereto." (A34, ¶ 22; A79, Definition of "Policy") (emphasis added). Further, the ICA specifically states that "FSL has issued [an RVI], which policy includes [an ANIE] relating to the Property…" All such documents are interpreted together as the parties' agreement. *See Columbus City School Dist. Bd. of Edn. v. Zaino*, 739 N.E.2d 783,787 (Ohio 2001); *Rivier Coll. v. St. Paul Fire & Marine Ins. Co.*, 187 A.2d 799, 802 (N.H. 1963); *In re Nat'l Collegiate Student Loan Trs. Litig.*, 251 A.3d 116, 153-43 (Del. Ch. 2020).

Appellants also attempt, once again, to rely on the same tired argument that Article V(d) of the RVI Policy (which provides the separate Purchase Option) is the ***only*** method by which FSL can receive an assignment of the Loan Documents.

(App. Br. at 26).[14] But this argument was expressly rejected by the Michigan court and the Superior Court:

> The Plaintiff argues that there could be no assignment under the Policy because under Article V(d) assignment only occurs where the Insurer exercises the option to purchase the Loan from the Additional Named Insured and the option was not exercised in this case. ***However, Section 8 of the Additional Named Insured Endorsement provides for assignment upon payment of the Insured Value. To the extent that Article V(d) of the Policy and Section 8 of the Additional Named Insured Endorsement conflict, the Endorsement controls***. After all, the Additional Named Insured Endorsement itself states that in the event of any conflict between the Policy and the Endorsement, the Endorsement governs . . . .

(AA159-60) ("The plain language of Article V of the RVI Policy and Section 8 of the ANIE permits only one reasonable interpretation: FSL was entitled to assignment of the Loans upon tendering payments under either Article V(a) or V(d).").

The Superior Court also correctly recognized that its conclusion that Section 8 of the ANIE required Lenders to assign the Loan Documents was "consistent with other provisions in the parties' agreement that state Borrowers have no ownership interest in the proceeds of the RVI Policy, and Defendants have an obligation to assign the Loans to FSL upon payment by FSL." (Superior Court Decision, p. 21).[15]

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[14] Appellants argue that "[i]f FSL were entitled to an assignment under both Article V(a) and Article V(d), Article V(d) is meaningless." (App. Br. at 26).

[15] "ICA Section 4 states, '[i]n the event that FSL makes payment for a Claim under Articles I and V of the [RVI] Policy, the Owner [*i.e.*, Lender Defendants] shall cause the deed to the property to be immediately delivered to FSL, without payment of additional consideration by FSL.' RVI Policy Article V(a) states, '[i]n no event

Appellants try in vain to avoid the application of Section 8 of the ANIE by arguing that only Article V(d) (the Purchase Option) mentions Section 8 of the ANIE while Article V(a) is silent and does not mention Section 8. (App. Br. at 28). This, however, is wholly misleading (and irrelevant). Although Section V(a) does not expressly reference "Section 8," it does expressly reference the Additional Named Insured Endorsement – "[FSL's] obligations hereunder are limited to making payment to the Additional Named Insured in accordance with the terms hereof ***and the Additional Named Insured Endorsement***…." (A80, Art. V(a)) (emphasis added). Furthermore, the Superior Court highlighted that an express reference to Section 8 would be unnecessary:

> Article V(a), however, does not need to expressly reference Section 8 because ***Article V(a) expressly refers to payment of the Insured Value, and Section 8 expressly applies to such payments***. A cross-reference would be redundant, so its absence is not significant. In contrast, Article V(d) refers to occasions when FSL pays less than the Insured Value. Article V(d) therefore cross-references Section 8 to confirm that assignment shall also occur if FSL exercises the Loan Purchase Option under that subsection.

(Superior Court Decision, p. 22) (emphasis added). Once FSL paid the Insured Value (which Appellants agree FSL did), Section 8 expressly applies (specifically stating its application "[u]pon payment by [FSL] of the Insured Value), and Lenders

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will the Insured [*i.e.*, Plaintiffs] have any ownership interest or other rights with respect to the proceeds of this [RVI] Policy.'" (Superior Court Decision, p. 21).

were required to assign the Loan Documents to FSL.

Appellants attempt to avoid this plain reading of the contract language by arguing that the "Superior Court erroneously concluded that the 'price' for an assignment to be delivered could be different under the Base Policy than the 'price' that might apply under Section 8 of the ANIE." (App. Br. at 26). As an initial matter, there is not a "price" that applies under Section 8 of the ANIE. The "price" that applies is the Insured Value under Article V(a) of the RVI Policy; Section 8 of the ANIE governs what happens ***after*** payment of the Insured Value. In addition, this argument is the proverbial red herring. Other than arguing that Article V(d) contains "surplusage," Appellants can point to no significance to whether or not the "price" is different under Article V(a) or Article V(d). It remains the case that FSL paid the Insured Value; and, therefore Section 8 of the ANIE – which requires Lenders to assign the Loan Documents "[u]pon payment by [FSL] of the Insured Value" – required Lenders to assign the Loan Documents to FSL.

Because this conclusion is unavoidable, Appellants further argue that, under Section 8 of the ANIE, Lenders "were required only to assign the Loan Documents evidencing whatever rights existed thereunder at the time of delivery of the assignment." (App. Br. at 30). Yet, that is exactly what Lenders did; they assigned the Loan Documents to FSL (as required by Section 8 of the ANIE). Any argument

about whether the Loans have a "zero balance" or not[16] after the assignment is an argument between Appellants and FSL (not Lenders) and does not give rise to a claim against Lenders who no longer have any interest therein.

Moreover, any argument that the Loans have a "zero balance" because FSL did not elect the Purchase Option is unreasonable. Nowhere do the RVI Policies state that FSL's payment of the Insured Value to Lenders results in the complete satisfaction and payoff of the Loans. This is not surprising. Under Borrowers' theory, by paying insurance premiums of $1.3 million at the beginning of the Loans (A35, ¶ 30), they would be permitted to default on nearly $30 million of balloon payments upon maturity but nonetheless take the Properties free and clear because of the residual value insurance on each Loan. (A30, ¶ 5; A44, ¶ 67 ("Pursuant to the provisions of the Policies, effective upon each claim payment by FSL, the payment was required to be applied to the satisfaction of the Loan, with the effect that the Loan Documents no longer evidenced a valid indebtedness"; A44, ¶ 68 ("[U]pon a claim payment without the exercise of the Loan Purchase Option,

[16] Appellants argue that "if [Section 8] does apply, any assignment delivered thereunder must reflect a Loan balance of zero." (App. Br. at 27). Appellants also contend that the "Superior Court concluded that, due to the ANIE, Defendants had a contractual obligation to make ***full balance*** assignments to FSL regardless of whether FSL exercised the Loan Purchase Option." (App. Br. at 27) (emphasis added). Nowhere did the Superior Court conclude that Lenders had to make "full balance" assignments of the Loans; the Superior Court simply concluded that Section 8 of the ANIE required Lenders to assign the Loans.

the underlying Loan was paid off and satisfied")).

The Superior Court recognized that "Plaintiffs' interpretation is commercially and economically unreasonable. Plaintiffs' reading of the relevant agreements would mean that for payment of each insurance premium, Plaintiffs absolved themselves of responsibility for the balloon payment" and could instead "obtain each Property free and clear of all obligations" after default. (Superior Court Decision, p. 24). This is especially nonsensical considering the Insured Value associated with almost every Property is hundreds of thousands of dollars, with several over one million dollars. (A59). The language of the RVI Policies does not support such an absurd result.[17]

As with Appellants' other theories, the Michigan court summarily rejected this one, holding, in part:

> [C]ontrary to the Plaintiff's argument, Article V(a) does not state that if a claim is made, the Insurer's payment to the Lender will be used to pay off the loan. Article V(a) merely states that upon valid notice of a claim, the Insurer will pay the Insured Value to the Additional Named Insured (the Lender). Further, Section 8 of the Additional Named Insured Endorsement unambiguously provides for assignment of the Mortgage Instruments upon payment of a claim by the Insurer. Thus, the consideration for the payment by the Insured of a claim made by the Additional Named Insured is not, as the Plaintiff argues, the payoff of the Loan but rather it is the assignment of the loan documents to the

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[17] *See, e.g.*, *Manti Holdings, LLC v. Authentix Acquisition Co.,* 261 A.3d 1199, 1208 (Del. 2021) ("An interpretation is unreasonable if it 'produces an absurd result'" or a result "'that no reasonable person would have accepted when entering the contract.'") (citation omitted).

> Insurer. [fn.32 The Plaintiff poses the question "[i]f the insurance proceeds were not applied to the loan balance, then what happened to them?" The answer is provided by Section 8 of the Additional Named Insured Endorsement.]
>
> ***
>
> The Plaintiff's construction [of the RVI Policies] is unsupported. First, the Plaintiff's construction is not supported by the language of the Policy and Endorsement. Again, Article V(a) merely states that the Insurer will pay a claim of the Additional Named Insured. Further, ***there is no language in either Article V of the Policy or in Section 8 of the Endorsement which states that an assignment does or does not evidence that the Loan has been paid in full. Stated another way, there is nothing stating the payment of a claim by the Insurer to the Lender discharges the Loan. Moreover, such a reading would render the assignment provisions meaningless . . . .***
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> Based upon the foregoing, the Court cannot declare that the Mortgage Instruments were retired by the payment of the claim by the Insurer or that the Defendants acquired no rights under the assignment of the Mortgage Instruments.

(AA159, AA161-62 (emphasis added) (citations omitted)). For these reasons, this Court should also reject Appellants' contention – to the extent relevant to the claims against Lenders – that payment under the RVI Policies somehow discharges the Loans.

III. The Superior Court Decision Should Be Affirmed Because Appellants Have No Standing To Contest Any Alleged Delayed Payment Of Insured Value

A. Question Presented

Whether this Court should affirm the Superior Court decision that the Borrowers have no standing to contest any alleged delayed payment of the Insured Value to Lenders? This argument was preserved for appeal (A307-8; A310; A319-20; A325-26).

B. Scope of Review

This Court reviews a decision to grant a motion to dismiss under Rule 12(b)(6) *de novo* "to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *See Golden Rule Fin. Corp.*, 267 A.3d at 384 (citation omitted).

On a motion to dismiss, the court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the non-moving party. *See Infomedia Grp., Inc.*, 2020 WL 4384087, at *2 n.4. The court must "ignore conclusory allegations that lack specific supporting factual allegations." *Id.* (quoting *Ramunno*, 705 A.2d at 1034). A motion to dismiss may be granted if "it appears to a reasonable certainty that under no state of facts which could be proved to support the claim asserted would [the] plaintiff be entitled to relief." *Cont'l Fin. Co., LLCV*,

2020 WL 836608, at *2.[18]

C. Merits of Argument

Appellants' final enumeration of error is that the Superior Court erred in failing to conclude that the purported agreement between Lenders and FSL to pay the Claims more than three days after notice of the Claims constituted a breach of the RVI Policies. Like the above, this argument has no merit.

The Superior Court properly concluded that any such "Extension Agreement" does not constitute a breach of the RVI Policy or otherwise give rise to an affirmative claim by Appellants. Pursuant to the RVI Policy, only Lenders as the Additional Named Insureds can make a claim under the RVI Policy. (A76, Art. I; A80, Art. III, Art. V(a); A106-7, § 2; A108, § 6). In addition, "[i]n no event will [Borrowers] have any ownership interest or other rights with respect to the proceeds of this Policy." (A80, Art. V(a)). Therefore, Borrowers cannot make a claim under the RVI Policy and have no ownership interest or rights with respect to the proceeds under the RVI Policy (and thus cannot recover the same for their benefit). As such, the Superior Court properly concluded that the timing obligation under the RVI Policy is owed to Lenders, not Borrowers, and that "Plaintiffs have no standing to challenge th[e] waiver" of the three-day payment requirement by Lenders. (Superior Court

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[18] The Court may take judicial notice of court records for the purposes of deciding a Rule 12(b)(6) motion to dismiss. *See, e.g.*, *Hammer*, 2021 WL 4935019, at *4 n.36.

Decision, p. 23).

Appellants attempt to save this flawed assertion by suggesting it is valid because "FSL treated the [purported extension] fees as default interest that accrued as a lien on the Properties." (App. Br. at 41). Even if true, the Superior Court again properly determined that "is an issue to be resolved between Plaintiffs and FSL. It is not a claim against Defendants because Defendants no longer own the Loans." (Superior Court Decision, p. 23). Borrowers have no standing to assert any claim related to any alleged delayed payment by FSL to Lenders.

IV. The Superior Court Decision Should Be Affirmed Because Borrowers' Claims Are Barred By Collateral Estoppel

A. Question Presented

Whether this Court should affirm the Superior Court decision on the separate, independent ground that Appellants' claims are barred under the doctrine of collateral estoppel? This argument was preserved for appeal. (A291-93).

B. Scope of Review

This Court reviews a decision to grant a motion to dismiss under Rule 12(b)(6) *de novo* "to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *See Golden Rule Fin. Corp.*, 267 A.3d at 384 (citation omitted).

C. Merits of Argument

In the FSL Delaware Action, 34 plaintiffs sued FSL and several FSL-related entities on the legal theory that the plaintiffs' loans were paid in full after FSL paid the lenders the Insured Value under each RVI Policy. In the FSL Decision, the Superior Court held that the claims were barred by collateral estoppel due to the rulings in the Michigan Action and the Idaho Action. (*See generally* AA207-44).

Importantly, ***all 34*** of the plaintiffs in the FSL Delaware Action are also plaintiffs in this case, with the only two additional plaintiffs being WEC 98D-4 LLC and WEC 98D-5 LLC. Nonetheless, all the claims brought in the instant action are barred by collateral estoppel for the same reasons as in the FSL Delaware Action,

e.g., that "[t]he relationship between Plaintiffs and the Borrower parties in Michigan and Idaho permits—and in fact requires—application of the collateral estoppel doctrine." (AA238).

Furthermore, given that 34 plaintiffs are identical, there can be no doubt that their claims are barred under the doctrine of collateral estoppel for the same reason their claims were barred against FSL. The issues previously decided in the Michigan Action and Idaho Action (and FSL Delaware Action) are identical to the claims against Lenders;[19] the Michigan Action and Idaho Action (and FSL Delaware Action) constitute final adjudications on the merits;[20] the plaintiffs are identical;[21] and Appellants had a full and fair opportunity to litigate the issues in the Michigan Action and Idaho Action (and FSL Delaware Action).[22] *Klauder v. Echo/RT Holdings, LLC* (*In re RayTrans Holdings, Inc.*), 573 B.R. 121, 130 (Bankr. D. Del. 2017) (citing *Betts v. Townsends, Inc.*, 765 A.2d 531, 535 (Del. 2000)).

As for the two additional Borrowers here that were ***not*** plaintiffs in the FSL Delaware Action – WEC 98D-4 LLC and WEC 98D-5 LLC, their claims are also barred in light of the two other actions that they filed and dismissed. These two

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[19] (AA229-35).

[20] (AA235-37).

[21] (AA238-43).

[22] (AA243-44).

Appellants and other related entities filed an action against FSL in federal court in Dallas, styled *WEC 98D-4 LLC v. Financial Structures Limited*, U.S. Dist. Ct. N.D. Tex., Case No. 3:20-cv-01399-C (the "Texas Lawsuit"). The Texas Lawsuit also concerned similar allegations and claims regarding the same RVI Policies and related documents. (AA101-17). By stipulation, the claims asserted by WEC 98D-4 LLC and WEC 98D-5 LLC were dismissed with prejudice. (AA118). This dismissal operates as an adjudication on the merits against Defendant WF RR3, the Lender in the cases involving WEC 98D-4 LLC and WEC 98D-4 LLC. *See West v. Ellis*, 2019 WL 4917902, at *3 (D. Del. Oct. 4, 2019) ("A plaintiff's stipulation to voluntarily dismiss a claim with prejudice precludes a plaintiff from bringing a subsequent action based on the same claim."). *Warren v. Mortg. Elec. Registration Sys.*, 616 F. App'x 735, 737 (5th Cir. 2015) ("Qualifying relationships [for privity for *res judicata*] include, but are not limited to, preceding and succeeding owners of property…and assignee and assignor.").[23]

For this reason, this Court should affirm the decision of the Superior Court on the separate and independent ground of collateral estoppel.[24]

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[23] These two Appellants should also be bound by the FSL Decision because they are in privity with the plaintiffs in the FSL Decision.

[24] As noted by the Superior Court, Lenders made additional, alternative arguments as bases to dismiss all the claims based upon (1) the doctrines of *res judicata* and collateral estoppel, (2) Borrowers' failure to plead damages and therefore lack of standing, and (3) Borrowers' impermissible group pleading.

CONCLUSION

Appellees respectfully request that the Court affirm the decision of the Superior Court.

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Although the Superior Court did not need to reach these grounds to dismiss this action, they provide additional bases to dismiss Borrowers' claims here.