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Case No. 12111-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE NATIONAL COLLEGIATE STUDENT LOAN MASTER TRUST, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2003-1, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-1, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-2, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-1, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-2, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-3, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-1, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-2, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-3, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-4, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-1, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-2, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3, THE NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-4, Plaintiffs, v. PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY D/B/A AMERICAN EDUCATIONAL SERVICES, Defendant.	:	C.A. No. 12111-VCS

PLAINTIFFS' OPENING BRIEF IN SUPPORT OF THEIR EMERGENCY MOTION FOR AN ORDER COMPELLING DEFENDANT TO FACILITATE THE CONTINUATION OF THE EMERGENCY AUDIT

Dated: May 2, 2016

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INTRODUCTION AND NATURE AND STAGE OF THE PROCEEDINGS[1]

Plaintiffs are fifteen (15) separate Delaware statutory trusts (the "Plaintiffs" or the "Trusts") which own student loans purchased from banks or other financial institutions. Pursuant to a series of "Governing Agreements," Defendant Pennsylvania Higher Education Assistance Agency ("PHEAA") is obligated to service those loans for the benefit of the Trusts by, *inter alia*, maintaining the loan documents, collecting payments, communicating directly with borrowers and taking other actions necessary to preserve the value of the loans. This case arises from PHEAA's systematic and repeated failures to service the student loans owned by the Trusts. As detailed in Plaintiffs' Verified Complaint (Dkt. No. 1), these failures – including the loss of the original loan documents necessary to collect on the delinquent loans – have already rendered as much as $5 billion in loans uncollectable. Further, PHEAA refuses to communicate with the Trusts' Owners, thereby preventing Plaintiffs from both determining the full scope of PHEAA's misconduct and staunching the bleeding.

Although PHEAA's list of misdeeds is long, the instant motion seeks two very narrow forms of relief on an expedited basis: (1) an Order directing PHEAA to permit the Trusts, through VCG Securities LLC ("Owner's Managing Agent"), to resume and complete the Accelerated and Emergency Audit referenced at ¶ 26

[1] Capitalized terms not defined herein shall have the same meaning set forth in the Verified Complaint.

of the Verified Complaint (the "Emergency Audit") – a contractually-mandated audit that PHEAA initially permitted but unilaterally shut down before completion; and (2) an Order directing PHEAA to recognize Owner's Managing Agent as a representative of the Trusts and to communicate to and with Owner's Managing Agent. As explained in more detail below, the Trusts are entitled to the relief sought herein, and PHEAA has no credible justification for thwarting the continuation of the Emergency Audit or refusing to recognize Owner's Managing Agent as a representative of the Trusts.

Thus far, PHEAA's sole excuse for refusing to communicate with the Owner's Managing Agent is its stated belief that the Managing Agent lacks the authority to speak for the Trusts and that only the Owner Trustee has that authority. That begs the question of why PHEAA routinely spoke with the Managing Agent on Trust affairs before the audit revealed PHEAA's misconduct. But it is a question that need not be answered. Wilmington Trust Company ("Wilmington Trust"), as the Owner Trustee for each of the Trusts, and in its capacity as Owner Trustee, specifically instructed PHEAA that it is "permitted to communicate directly with and to [Owner's Managing Agent] . . . concerning any and all matters applicable to the Trusts." Uderitz Aff., Exhibit A.[2] Nonetheless, as recently as

[2] The Affidavit of Donald Uderitz (the "Underitz Aff.") was filed contemporaneously herewith.

April 28, 2016, PHEAA has refused to communicate directly with Owner's Managing Agent.

Likewise, it is now clear that PHEAA will not permit the Trusts to complete the Emergency Audit. Because Plaintiffs have an unequivocal right to resume the audit of PHEAA's books and records under Article 7.10 of the Agreements, and because Plaintiffs need to complete the Emergency Audit to get their arms around the current status of PHEAA's "servicing" of Plaintiffs' student loan portfolio to determine the best path forward, they respectfully request the Court's assistance in enforcing this contractual right.

STATEMENT OF FACTS

Plaintiffs are each Delaware statutory trusts with Wilmington Trust as their Owner Trustee. Verified Complaint ¶ 3. PHEAA is a public corporation, which describes itself as a governmental instrumentality, organized under the laws of the Commonwealth of Pennsylvania. *Id*. at ¶ 4.

Plaintiffs and PHEAA are parties to the Governing Agreements, which include: (a) an Amended And Restated Private Student Loan Servicing Agreement Between Pennsylvania Higher Education Assistance-Agency And The First Marblehead Corporation ("FMC") dated as of September 28, 2006, as purportedly amended from time to time (collectively, with all purported amendments, the "Master Servicing Agreement" or "MSA"), to which Plaintiffs are the assignees of

the First Marblehead Corporation pursuant to a series of Servicer Consent Letters (the "Servicer Consent Letters") between FMC, Plaintiffs and Defendant; and (b) a series of Custodial Agreements entered into among Plaintiffs, U.S. Bank National Association, in its capacity as an indenture trustee, and PHEAA. *Id*. at ¶ 1.

Section 7 of the MSA requires PHEAA to allow for and participate in various audits at the request of the Trusts to assure compliance with the MSA. *Id*. at ¶ 21. In particular, under Section 7.10 of the MSA, in the event that Plaintiffs have the right to terminate under Section 14 of the MSA, "[Plaintiffs] shall have the right to perform or cause to be performed any audit, examination or inspection" described in the MSA "without any limitations or requirements as to notice, frequency, duration, business interruption, or other such limitation or requirement for the benefit of [PHEAA]." Plaintiffs' Emergency Audit right under Section 7 became especially relevant when Plaintiffs discovered that PHEAA was unable to collect on the loans due to its failure to maintain custody of loan documents. *See* Uderitz Aff. ¶ 2.

After PHEAA repeatedly failed to cooperate with the Trusts by providing requested information and defaulted on various reporting obligations, the Trusts invoked the Emergency Audit provision of the MSA. Verified Complaint at ¶ 26; Uderitz Aff. ¶¶ 14-15. PHEAA, however, did not fully cooperate and terminated

the on-site Emergency Audit after less than two days.[3] Verified Complaint at ¶ 27. The preliminary results of the Emergency Audit showed pervasive and material breaches of the servicing requirements of the Governing Agreements. *Id*. at ¶ 29; *see also id*. at ¶¶ 30-42. Among other breaches, the partial audit confirmed that PHEAA failed to: obtain and/or maintain custody of necessary loan documents and proof of transfer of the loans from the loan originator to the Trusts; provide secure and private access to electronic systems services student loans; and notify the Trusts of borrower and government complaints about improper servicing of student loans and take corrective action. Uderitz Aff. ¶ 2. After Plaintiffs confirmed that PHEAA did not possess the original student loans and assignments, Verified Complaint at ¶ 2, and were unable to secure a meeting with PHEAA, *id*. at ¶¶ 30-42, they commenced this action, hopeful that the specter of litigation would bring PHEAA to its senses.

It appeared briefly that the Trusts' hope would be realized, but Plaintiffs ultimately had no choice but to commence this action. Just days before PHEAA filed its partial Motion to Dismiss, PHEAA sent notice to Wilmington Trust that PHEAA wished to conduct a quarterly operational review meeting pursuant to Article 4.09 of the Agreements. Uderitz Aff. ¶ 22-23, Exhibit B. The Notice was

[3] Tellingly, PHEAA allowed – in recognition of Owner's Managing Agent's authority to act on behalf of Plainitffs – Owner's Managing Agent personnel to participate in the Emergency Audit. Uderitz Aff ¶ 19.

signed by Kenneth Shutter, PHEAA's Vice President of Client Relations and Enterprise Quality Assurance. *Id*. at Exhibit B. Wilmington Trust responded by email on April 19, 2016, advising PHEAA that it had forwarded the invitation to the Owners and that the Owners would respond directly. *Id*. at ¶ 23, Exhibit C.[4] On the same date, Don Uteritz responded to Mr. Shutter's email, accepted the invitation for a meeting, suggested that the operational teams meet on April 28 and 29, and proposed an agenda that included resumption of the audit. *Id*. at ¶ 25, Exhibit D. Mr. Uderitz specifically asked PHEAA to confirm the dates of the meeting. *Id*.

Having received no response from Mr. Shutter or anyone else at PHEAA, Mr. Uderitz sent a follow-up email to Mr. Shutter on April 21, one week before their proposed meeting date, asking him again to confirm the meeting. *Id*. at ¶ 26, Exhibit D. PHEAA did not reply to the April 21 email. *Id*. at ¶ 27. On April 26, 2016, PHEAA sent a letter to Wilmington Trust asking it, once again, to confirm Uderitz's authority to act for the Trusts. *Id*. at ¶ 28, Exhibit G. Uderitz immediately sent a reply email to PHEAA confirming his authority and attaching

[4] PHEAA had previously dealt with Don Uderitz and others at VGC directly, and in fact, had been specifically instructed by Wilmington Trust that it could do so. *See* Uderitz Aff at Exhibit A ("PHEAA is hereby permitted to communicate directly with and to [Owner's Managing Agent], the sole agent for NC Residuals Owners Trust, the sole member of the Owner, by whatever means designated by the Owner's, Member's Agent from time to time, concerning any and all matters applicable to the Trusts, the PHEAA Agreement or any other related document or agreement.").

prior correspondence on the issue. *Id*. at ¶ 29, Exhibit H. In parallel, on April 28, 2016, counsel for PHEAA confirmed to counsel for the Trusts that PHEAA was not willing to discuss resuming the Emergency Audit.

As more fully forth below, Plaintiffs respectfully submit that they are entitled to an order compelling PHEAA to recognize Owner's Managing Agent's authority to act on behalf of the Trusts and compelling PHEAA to facilitate the resumption and completion of the Emergency Audit.

ARGUMENT

I. LEGAL STANDARDS

"The Court of Chancery has broad discretion to fashion equitable relief." *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 961 A.2d 521, 525 (Del. 2008). Here, although Plaintiffs frame this motion as one for partial summary judgment, or alternatively a preliminary injunction, those frameworks are not to the exclusion of the exercise of this Court's equitable powers; indeed, "equity regards substance rather than form." *Monroe Park v. Metro. Life Ins. Co.*, 457 A.2d 734, 737 (Del. 1983).

Court of Chancery Rule 56(c) provides the standard of review for summary judgment motions. Under the Rule, "[a] motion for summary judgment will be granted where there exist no genuine issues of material fact and the moving party has demonstrated entitlement to judgment as a matter of law." *Lehman Bros.*

Holdings Inc. v. Spanish Broad Sys., Inc., 2014 WL 718430, at *6 (Del. Ch. Feb. 25, 2014).

"To obtain a preliminary injunction, the plaintiffs must demonstrate: (1) a reasonable probability of success on the merits; (2) that they will suffer irreparable injury without an injunction; and (3) that their harm without an injunction outweighs the harm to the defendants that will result from the injunction." *C&J Energy Servs., Inc. v. City of Miami Gen. Employees*, 107 A.3d 1049, 1066 (Del. 2014).

II. PLAINTIFFS ARE ENTITLED TO RELIEF

Plaintiffs face irreparable harm in the wake of PHEAA's has breach of the Agreements. Regardless of the procedural posture, Plaintiffs are entitled to an order compelling PHEAA to acknowledge the Trusts' Owners and allowing the Trusts to resume the Emergency Audit.

A. PHEAA Breached The Agreements.

"Under Delaware law, to establish a claim for breach of contract, a plaintiff must demonstrate three elements: 'first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff.'" *Aviva Life & Annuity Co. v. Am. Gen. Life Ins. Co.*, 2014 WL 1677798, at *13 n.112 (Del. Ch. Apr. 29, 2014)

(quoting *Univ. Enter. Group, L.P. v. Duncan Petroleum Corp.*, 2013 WL 3353743, at *17 (Del. Ch. July 1, 2013)).

The undisputed facts establish these three elements. First, the Governing Agreements constitute enforceable agreements under which PHEAA had contractual obligations to provide specified services as both servicer and custodian. *See generally* Verified Complaint. PHEAA cannot dispute this fact.

Second, as detailed in the Verified Complaint and Uderitz Affidavit, PHEAA has defaulted on numerous obligations. First, after conceding Plaintiffs' right to conduct the Emergency Audit, PHEAA abruptly terminated the audit when unfavorable facts began to be uncovered. Section 7.10 of the MSA provides Plaintiffs with a right to conduct an Emergency Audit "without any limitations or requirements as to notice, frequency, [or] duration . . . ." PHEAA breached the MSA the moment it refused to proceed with the Emergency Audit, and it has remained in breach to this day as a result of its continued failure to cooperate with Plaintiffs.

Moreover, the findings of the partial audit establish that PHEAA also violated, *inter alia*, (a) Section 4.04 of the MSA by not possessing assignments of student loans to the Trusts by the originating lender, Verified Complaint, ¶ 31; (b) Section 4.01 of the MSA (which incorporates by reference the Servicing Guidelines) by using an inadequate system for monitoring payments, loan

delinquencies and cure payments, *id*. *at ¶* 32; (c) Section 13 of the MSA by failing to notify borrowers that their student loans had been assigned to the Trusts, *id*. at ¶ 34; and (d) Section 4.04 of the MSA by transferring the student loans to third parties without prior approval of the Trusts despite representations that it had not done so, *id*. at ¶ 36. Additional material breaches of the MSA by PHEAA are set forth at length in the Verified Complaint. *See id*. ¶¶ 37-42.

Third, Plaintiffs have been, and continue to be, substantially damaged by PHEAA's conduct. Plaintiffs face irreparable harm. *See infra* Argument, § II.B. PHEAA's breach of the Emergency Audit provision prevents Plaintiffs from learning the full extent of the damages caused thus far, and from enforcing any of their rights under the Governing Agreements. Additionally, damages to Plaintiffs resulting from PHEAA's breach of any other provision of the Governing Agreement are closely tied to PHEAA's termination of the Emergency Audit. By denying Plaintiffs access to critical information regarding PHEAA's performance, PHEAA's underlying breaches are perpetuated, resulting in additional damages to Plaintiffs.

PHEAA's other material breaches of the MSA adversely affect the value and collectability of each student loan and the value of the Trusts. *Id*. at ¶ 43. Based on information obtained from the Emergency Audit that PHEAA prematurely terminated, Plaintiffs believe that between $1 billion and $5 billion in loan value

has been impaired as a result of PHEAA's inadequate servicing of the student loans. Uderitz Aff. ¶ 8. Moreover, by failing to maintain control of the persons and entities having access to its system, not obtaining the Trusts' approval before providing access to those persons and entities, and using its unsecure system to transfer student loans to third parties not approved by the Trusts, PHEAA has risked disclosure, if not improperly disclosed, the Trusts' confidential information. *See* Verified Complaint ¶¶ 47-48. Finally, if the improper collection methods associated with PHEAA's breaches are systemic, this will irreparably tarnish the Trusts' reputation in the marketplace.

Thus, Plaintiffs have established a *prima facie* breach of the Governing Agreements. However, even if PHEAA disputes it is in breach, Plaintiffs have at least made a sufficient showing to obtain preliminary relief, particularly with respect to the Emergency Audit. "The applicable standard on a motion for preliminary injunction falls well short of that which would be required to secure final relief following trial, since it explicitly requires only that the record establish a reasonable probability that this greater showing will ultimately be made." *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998) (quotations and citation omitted).

B. PHEAA's Breaches Are Subjecting Plaintiffs To Ongoing, Irreparable Harm Warranting Immediate Relief

The damages described above – primarily those caused by PHEAA's termination of the Emergency Audit, but also including the substantial impairment in the value and collectability of the loans that PHEAA is "servicing," the disclosure of confidential information, and the Trusts' loss of goodwill – constitute irreparable harm to the Plaintiffs and entitle them to preliminary injunctive relief.

To establish irreparable harm, "[a] party must plead facts suggesting that an award of money damages could not fully and adequately compensate the alleged harms. *Cty. of York Employees Ret. Plan v. Merrill Lynch & Co.*, 2008 WL 4824053, at *7 (Del. Ch. Oct. 28, 2008). Critically, Delaware courts will find irreparable harm when damages are difficult to calculate and other uncertainties, *such as collectability*, exist. *Id.* at *8; *see also Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132, 140-41 (3d Cir. 2000) ("[W]e note that Appellants suffered irreparable injury when the trust was depleted and payment was not readily forthcoming or available.").

As discussed above, Plaintiffs have suffered immediate damages due to PHEAA's termination of the Emergency Audit and its continued refusal to cooperate. The Emergency Audit right, which was triggered by PHEAA's default, was intended to give Plaintiffs an opportunity to collect information to protect their substantial investment. By disallowing Plaintiffs from exercising that right,

PHEAA is precluding Plaintiffs' ability to make any informed decision with regard to its investment. Therefore, irreparable harm exists. *See, e.g., In re Topps Co. S'holders Litig.*, 926 A.2d 58 (Del.Ch. 2007) ("The injunction that issues is warranted to ensure that the Topps stockholders are not irreparably injured by the loss of an opportunity to make an informed decision and to avail themselves of a higher-priced offer that they might find more attractive.").

Injunctive relief is also warranted at this juncture because of irreparable harm suffered by Plaintiffs as a result of PHEAA's other breaches. A review of current, publically-available financial statements published by PHEAA suggests that PHEAA does not have the financial ability to pay money damages for the losses in value its breaches have caused. Uderitz Aff. ¶ 9. Plaintiffs' findings of substantial loss in value of the student loans during the two-day Emergency Audit support this conclusion. *See id*. at ¶ 8. Given the magnitude of PHEAA's *ongoing* breaches and the collective effect of the same in impairing the value of billions of dollars in of student loans, an award of money damages at the conclusion of this litigation will be inadequate to compensate Plaintiffs. *See Equitable Trust Co. v. Gallagher*, 102 A.2d 538, 546 (1954) ("[T]he remedy of specific performance is designed to take care of situations where the assessment of money damages is impracticable or somehow fails to do justice.").

Notwithstanding the potential inadequacy of a money judgment, PHEAA's breaches have caused, and continue to cause, Plaintiffs irreparable harm for two additional reasons. First, as noted above, PHEAA's failure to maintain strict control of the persons and entities having access to its system has compromised the Trusts' confidential information. *See* Verified Complaint ¶ 47. It is well settled that "disclosure of . . . confidential information will, in appropriate cases, support a finding of irreparable harm." *Eastman Kodak Co. v. Cetus Corp.*, 1991 WL 255936, at *6 (Del. Ch. Dec. 3, 1991). Considering the sensitive nature of the confidential information at issue, a finding of irreparable harm is "appropriate" in this case. Such confidential information includes, but is not limited to, countless individuals' personal and financial information. While Plaintiffs are unaware of the full extent of improper disclosures, Plaintiffs confirmed during the Emergency Audit that PHEAA transferred student loans to third parties without prior approval of the Trusts in violation of Section 4.04 of the MSA. Certainly, these improper disclosures have the potential to expose Plaintiffs to liability for associated claims made by borrowers relating to unauthorized use of such information. Resuming the Emergency Audit is necessary here to evaluate the extent of confidential information disclosed to date, and determine any steps necessary to prevent additional improper disclosures going forward.

Second, the potential decline in Plaintiffs' goodwill in the marketplace due to PHEAA's breaches provides an independent basis for emergent relief. *See Horizon Pers. Commc'ns, Inc. v. Sprint Corp.*, 2006 WL 2337592, at *24 (Del. Ch. Aug. 4, 2006) ("The loss of control of reputation, loss of trade, and loss of goodwill constitute irreparable injury.") (internal quotations omitted). PHEAA's lack of compliance with the Servicing Guidelines by, *inter alia*, failing to send delinquency notifications to borrowers and co-borrowers has resulted in a decline in Plaintiffs' reputation for excellent customer service. *See, e.g.*, Verified Complaint ¶¶ 32, 36, and 41. Immediate intervention by this Court is respectfully requested to prevent PHEAA from subjecting Plaintiffs to further, irreversible reputational damage.

In view of the foregoing, Plaintiffs have established sufficient ongoing, irreparable harm to warrant partial summary judgment or preliminary equitable relief.[5]

[5] It bears noting here that completion of the Emergency Audit will help streamline and shape this litigation. Rather than shooting from the hip and seeking more complete preliminary or expedited relief, Plaintiffs first seek to use the "tools at hand" to better understand the extent and depths of PHEAA's breaches. Plaintiffs will then use this information to decide on a logical path forward (*e.g.*, replacing PHEAA as their loan servicer altogether, restructuring their relationship with PHEAA, seeking additional relief in the form of a preliminary injunction, and/or seeking the appointment of a custodian). In any event, completion of the Emergency Audit will only help pave the way for the efficient resolution of this matter.

C. The Balance of the Equities Favors Permitting The Trusts To Resume The Emergency Audit

"In order to be entitled to [specific performance], the party seeking specific performance of a contract must establish, by clear and convincing evidence, (1) that a valid and specifically enforceable contract exists between the parties [established above]; (2) that the party seeking specific performance was ready, willing, and able to perform under the terms of the contract [the Trusts have performed and continue to this day to perform under the Governing Agreements]; and (3) that the balance of the equities favors an order of specific performance." *Szambelak v. Tsipouras*, 2007 WL 4179315, at *4 (Del. Ch. Nov. 19, 2007) (citations omitted). Whether in the form of partial summary judgment and specific performance or preliminary equitable relief, the balance of equities and harms clearly favor granting Plaintiffs the requested relief.

As an initial matter, there is no harm to PHEAA in allowing the Trusts to resume and complete the Emergency Audit – absolutely none. If PHEAA wants its own appointed auditors to conduct a comparable audit in parallel, it is free to do so. Conversely, the Trusts will continue to suffer ongoing harm if they are unable to fully understand the current *status quo* and make decisions with a complete understanding (*e.g.*, whether move to a different servicer; reform their relationship with PHEAA, seek further injunctive relief and/or the appointment of a receiver, etc.).

Thus, a balancing of the equities heavily favors permitting the Trusts to resume the Emergency Audit. *Cf*. *Merrill Lynch*, 2008 WL 4824053 at *13 (ordering expedited discovery in the context of the plaintiff's request for emergent relief); *Rhone-Poulenc S.A*. *v*. *Morton-Norwich Products, Inc*, No. 6742, 1982 WL 8787, at *3 (Del. Ch. Apr. 1, 1982) (same); *Harmony Mill Ltd*. *P'ship v*. *Magness*, No. CIV. A. 7463, 1984 WL 21898, at *2 (Del. Ch. Feb. 14, 1984) (same).

D. The Owners of Trusts Must Direct the Emergency Audit

As indisputably demonstrated in the Uderitz Affidavit, the Emergency Audit was commenced by and conducted through the Owners and their Managing Agent. *See* Uderitz Aff. ¶¶ 9-11, Exhibit B. The Owners take a direct and active role in the management of the trusts pursuant to the respective Trust Agreements.

PHEAA has sought to evade its contractual obligation to cooperate in the Emergency Audit by pretending that some other entity speaks for the Trusts when in fact the Trusts (a) are the counterparty to the MSA; (b) own the student loans being serviced; and (c) have directed Wilmington Trust, the Owners' Trustee, to inform PHEAA to communicate as to all matters relating to the Trusts with VCG. Wilmington Trust issued that notice on August 28, 2015, and PHEAA received and acted upon it until PHEAA terminated the Emergency Audit in an effort to evade investigation. *See* Uderitz Aff. ¶¶ 9-10.

Only the Owners manage the Trusts. Uderitz Aff. ¶¶ 7-8. Wilmington Trust merely carries out the Owners' direction, such as notifying PHEAA whom to deal with on the Emergency Audit. Uderitz Aff. ¶ 9. Wilmington Trust has no authority to act for the Trusts or interact with third parties like PHEAA except as directed by the Owners. In fact, Wilmington Trust has a specific disclaimer in its correspondence about its limited authority. *See* Uteritz Aff at Exhibit A ("This letter is executed and delivered on behalf of the Issuer by Wilmington Trust Company, not in its individual capacity but solely as Owner Trustee of the Issuer, and the statements contained herein are those of the Issuer and not Wilmington Trust Company."). Neither Wilmington Trust nor any other entity has management rights as to the Trusts, and PHEAA's pretense otherwise is ultimately proof of the need for emergent action by way of the Emergency Audit.

CONCLUSION

The Trusts have an explicit and unequivocal right to resume and complete the Emergency Audit, PHEAA has no cognizable objection or defense and there is no reason to delay this relief. For the reasons stated herein, there are no genuine issues of material fact and Plaintiffs respectfully submit that they have demonstrated entitlement to an order permitting them to resume the Emergency Audit.

Dated: May 2, 2016

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