IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CENTRAL MORTGAGE COMPANY, Plaintiff, v. MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC, as successor-in-interest to MORGAN STANLEY MORTGAGE CAPITAL, INC., Defendant.	)	C.A. No. 5140-VCS

MEMORANDUM OPINION

Date Submitted: May 20, 2010
Date Decided: August 19, 2010

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STRINE, Vice Chancellor.

I. Introduction

This dispute involves Central Mortgage Company ("CMC"), which provides mortgage servicing to lenders, and Morgan Stanley Mortgage Capital Holdings LLC ("Morgan Stanley"), which contracted with CMC for those services. The dispute between CMC and Morgan Stanley arose as the mortgages that CMC agreed to service began to fall delinquent when the financial crisis took hold in 2007. As additional mortgages became delinquent, Fannie Mae and Freddie Mac (the "Agencies"), to whom Morgan Stanley had sold the mortgages after contracting with CMC for servicing, demanded that CMC repurchase the underperforming loans. CMC requested that Morgan Stanley take responsibility for the mortgages, which it allegedly failed to screen properly. Although Morgan Stanley initially repurchased or repaid CMC for approximately 50 of those delinquent loans, it has refused to repurchase any more. CMC therefore brought a complaint in this court, requesting damages and specific performance based on a number of theories sounding in contract and tort. In response, Morgan Stanley has moved to dismiss CMC's complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim.

CMC makes numerous arguments as to why Morgan Stanley should be required to make CMC whole for losses resulting from the Agencies' unilateral decisions to return loans to CMC. Many of these arguments, however, push to the periphery that which should take center-stage — the fully integrated written agreements between Morgan Stanley and CMC.

For the reasons discussed below, I dismiss the complaint in its entirety. I dismiss CMC's breach of contract claims because CMC has failed to provide contractually-required notice to Morgan Stanley of Morgan Stanley's alleged breaches of contract. But because CMC appears to have otherwise viable breach of contract claims, I dismiss those contract claims without prejudice to allow CMC to provide proper notice and replead those claims if it so chooses once the contractual remedy process has been pursued in good faith. CMC's remaining claims, however, are dismissed with prejudice. The complaint does not plead facts supporting a rational inference that Morgan Stanley has repudiated its agreements with CMC, and thus I dismiss CMC's repudiation claim. I dismiss CMC's claims for breach of the implied covenant of good faith and fair dealing, implied indemnity, and unjust enrichment because CMC's relationship with Morgan Stanley is governed by a binding written contract and those claims improperly seek to supplant that contract. I also dismiss CMC's claim for negligent misrepresentation because I find that Morgan Stanley did not owe any special duty to CMC that would, under New York law, allow CMC to hold it liable for a misrepresentation absent a showing of scienter (i.e., fraud). Finally, I dismiss CMC's rescission claim because CMC has not pled viable unilateral mistake, and promissory estoppel claims because the parties' written contract foreclosed any oral modifications and rendered unreasonable any reliance on oral statements.

II. Factual Background

These are the facts as drawn from the complaint and the documents it incorporates.

A. CMC Bids For Servicing Rights To Mortgages To Be Sold By Morgan Stanley

Morgan Stanley is in the business of purchasing loans from originators, pooling the loans, and selling the pool to investors as either securitized transactions or in bulk. In March 2005, Morgan Stanley offered for sale approximately $1 billion in mortgage servicing rights (the "Servicing Rights"), to be sold on a regular basis over the succeeding months and years, for both pooled loans that were to be sold to the Agencies, and to private investors.[1] Mortgage servicing entails, for example, sending bills to and collecting payments from the mortgagor, and remitting payments to the mortgagee.[2] The offering materials for these Servicing Rights described the loans to be sold to the Agencies as "Agency Alt A" loans, and the loans to be sold to private investors as "Private Label Alt A" loans.[3] The offering materials also explained that approximately 50% of the loans would have "limited" or "no" documentation, and stated that Morgan Stanley had "no obligation to tell [the servicer] when information herein may change and [made] no representation or warranty with respect to the accuracy or completeness of such information . . . ."[4]

Based upon these offering materials, CMC, which describes itself as a "highly regarded servicer of residential mortgage loans" and "one of the country's best mortgage

[1] Compl. ¶ 16.
[2] *Id*. ¶ 13.
[3] Compl. Ex. A.
[4] *Id*.

servicers," made a bid for certain of the Servicing Rights.[5] Morgan Stanley accepted CMC's bid in July 2005.[6]

B. Morgan Stanley And CMC Execute A Master Agreement

On July 25, 2005, after Morgan Stanley had accepted CMC's bid, CMC entered into a Flow Servicing Rights Purchase and Servicing Agreement with Morgan Stanley to service the pools of mortgage loans that Morgan Stanley had sold or would sell in the future to the Agencies and private investors.[7] That agreement was later amended on November 1, 2006, resulting in the First Amended and Restated Flow Servicing Rights Purchase and Servicing Agreement (the "Master Agreement").[8] The Master Agreement provides that the contract shall be governed by New York law,[9] and submits disputes exclusively to the Delaware courts' jurisdiction.[10]

The Master Agreement set forth the terms and conditions for a series of separate transactions that CMC and Morgan Stanley would undertake thereafter, and provided that the Agreement along with the documents for the individual transaction constituted the "entire agreement between the parties," and could be amended only "*in writing* signed by the party against whom such enforcement is sought."[11] Specifically, the Master Agreement did not obligate CMC to service any particular pool of loans, but gave CMC the right to purchase Servicing Rights on specific pools of loans based on the

[5] Compl. ¶ 17.
[6] *Id.* ¶ 18.
[7] *Id.*
[8] *Id.*
[9] Compl. Ex. B ("Master Agreement") § 14.06.
[10] *Id.*
[11] *Id.* § 14.03 (emphasis added).

characteristics of those loans.[12] The Master Agreement also included an acknowledgment by CMC "that certain of the Mortgage Loans have certain characteristics which increase the likelihood of defaults under the Mortgage Notes."[13] If CMC chose to exercise its right to purchase Servicing Rights with respect to Agency loans, the Master Agreement required CMC to "service the Mortgage Loans in strict compliance with the servicing provisions of the [Agency guidelines]."[14] The Master Agreement also required CMC to indemnify Morgan Stanley under certain circumstances, but did not contain any requirement that Morgan Stanley indemnify CMC.[15]

In addition, the Master Agreement contained representations, warranties, and covenants made by Morgan Stanley. In relevant part, Morgan Stanley represented that "[n]o Mortgage Loan is (a) covered by the Home Ownership and Equity Protection Act of 1994 or (b) a 'high cost,' 'threshold,' 'covered' or 'predatory' or similar loan under any other applicable state, federal or local law."[16] Also, Morgan Stanley represented that "[a]ny and all requirements of any federal, state or local law . . . have been complied with,"[17] and that the information in the mortgage loan schedules and accompanying data would be "true, complete and accurate in all material respects."[18] Likewise, Morgan Stanley represented that the servicing and collection practices that Morgan Stanley and

[12] Compl. ¶ 18.
[13] Master Agreement § 3.02.
[14] *Id.* § 3.01(a).
[15] *Id.* § 9.01.
[16] *Id.* § 10.07.
[17] *Id.* § 10.10.
[18] *Id.* § 10.08.

any prior servicer used were "in all material respects in compliance with . . . applicable laws and regulations, and have been in all material respects legal and proper."[19] This representation also provided that Morgan Stanley did not commit fraud with respect to the mortgage loans and, "to the best of its knowledge," neither did the borrower, lender, or any other party involved in the origination of the loan.[20]

Importantly, the Master Agreement also set forth the remedy available in the event of a breach of a representation or warranty which required, among other things, that the party discovering the breach give prompt written notice to the breaching party before pursuing any remedy:

> Upon discovery by either the Seller or the Servicer *of a breach* of any of the foregoing representations and warranties, *the party discovering such breach shall give prompt written notice to the other party*. Within 60 days of the earlier of either discovery by or notice to the Seller of any such breach of a representation or warrant which materially and adversely affects the ownership interest of the Servicer in the Servicing Rights related to any Mortgage Loan, the Seller shall use its best efforts to promptly cure such breach in all material respects and, if such breach cannot be cured, the Seller shall, at the Servicer's option, repurchase the Servicing Rights affected by such breach at the Purchase Price.[21]

C. CMC Purchases Servicing Rights To Several Pools Of Loans From Morgan Stanley Pursuant To The Master Agreement

CMC's first purchase of Servicing Rights occurred on March 16, 2006 when Morgan Stanley sold certain pooled loans to the Agencies.[22] CMC decided to make this first purchase after visiting Morgan Stanley's due diligence facilities in Boca Raton,

[19] *Id.* § 10.12.
[20] *Id.*
[21] *Id.* § 10.13 (emphasis added).
[22] Compl. ¶ 22.

Florida in February 2006 (the "Boca Raton Meeting"), where Morgan Stanley allegedly assured CMC that the due diligence process was undertaken in accordance with the Agencies' guidelines.[23]

During the Boca Raton Meeting, Morgan Stanley allegedly demonstrated to CMC its thorough review process of loans that Morgan Stanley bought and sold, and told CMC that each loan was screened at the Boca Raton facility.[24] In particular, Morgan Stanley made a presentation explaining that it had hired Clayton Holdings, a company "known in the industry for its performance of mortgage due diligence," to ensure that each loan file met the applicable underwriting criteria and to verify borrower data such as income, debt-to-income ratio, and credit score.[25] Morgan Stanley's Mike Francis allegedly told CMC that its contracts were "standard Freddie Mac" contracts, which CMC took to mean that "the loans sold or to be sold by Morgan Stanley to [the Agencies] were underwritten to [Agency] guidelines."[26]

CMC was allegedly concerned with Morgan Stanley's diligence process because the Agencies, unlike private investors who typically have more relaxed standards, only purchase loans that meet certain criteria set forth in the Agencies' underwriting guidelines.[27] The Agencies will not purchase loans from Morgan Stanley or other sellers unless they have reviewed and approved the underwriting criteria and the available information on the underlying loans. Therefore, before a transaction, the Agencies

[23] *Id*. ¶¶ 25-33.
[24] *Id*. ¶ 26.
[25] *Id*. ¶ 28.
[26] *Id*. ¶ 30.
[27] *Id*.

review and approve the seller's underwriting guidelines for the pool of loans offered for sale.

After making its initial purchase in March 2006, CMC went on to purchase Servicing Rights for pools of loans sold to the Agencies on: January 31, 2007 for $636 million in Freddie Mac loans and $247 million in Fannie Mae loans; March 2007 for $293 million; May 9, 2007 for $346.7 million; and August 2007 for $232 million.[28] Thus, CMC bought Servicing Rights for a total of six pools of loans that Morgan Stanley had sold to the Agencies.[29] For each of these transactions, CMC and Morgan Stanley executed transaction-specific documentation.[30] That documentation included a commitment letter,[31] a purchase agreement, a sale of servicing rights agreement,[32] and a "Form 981" or "Form 629" (collectively, Form 981 and Form 629 are referred to as the "Agency Transfer Agreements") that the parties were required to complete, sign, and file with the relevant Agency.[33] Form 981 is the document that parties submit to Freddie Mac when requesting a transfer of Servicing Rights, and Form 629 is the equivalent form for Fannie Mae.

The commitment letters and the sale of the servicing rights agreements incorporated by reference the terms of the Master Agreement.[34] The purchase and sale of servicing rights agreements expressly provided that they could only be amended in

[28] *Id*. ¶¶ 43, 44, 49, 57, 58.
[29] *Id*.
[30] *Id*. ¶ 35.
[31] Compl. Ex. E. at 1.
[32] *Id*. at 8.
[33] Compl. Ex. H.
[34] Compl. ¶ 35.

writing.[35] The Agency Transfer Agreements, which CMC and Morgan Stanley signed and gave to the appropriate Agency, provided that CMC as transferee of the Servicing Rights "acknowledge[d], covenant[ed] and warrant[ed] that it shall be responsible for all representations, covenants, and warranties concerning the eligibility of Mortgages for purchase by" the Agency as provided in the Agency's guidelines.[36] In addition, both CMC and Morgan Stanley warranted that Morgan Stanley would deliver and CMC would receive "all records, legal documentation, files and funds relevant to the transferred Mortgages," and that CMC would "examine[ ] such records and shall have determined whether such records are correct. [CMC] . . . assum[ed] full responsibility and liability for the correctness of such records."[37] CMC also promised to "perform[ ] whatever due diligence review of the Servicing rights to be transferred . . . that it deemed appropriate . . . ."[38]

D. Certain Loans Become Delinquent, And Morgan Stanley And CMC Agree To Amend The Master Agreement

In February and March 2007, CMC noticed that the loans it had purchased from Morgan Stanley had higher delinquencies at the point of the servicing transfer than they had at the time of the Servicing Rights purchase by CMC.[39] CMC raised these concerns during a conference call with key Morgan Stanley employees. During that phone call, Morgan Stanley allegedly admitted that it had inadvertently failed to include the loans at

[35] Compl. Ex. E.
[36] Compl. Ex. H.
[37] *Id*.
[38] *Id*.
[39] *Id*. ¶ 45.

issue in Morgan Stanley's automated dialing software which prompted borrowers to make monthly payments.[40] As a consolation for this oversight, Morgan Stanley's Mike Francis agreed to reduce the price of the Servicing Rights by 2% but, according to the complaint, the price CMC paid for the loans, even after the adjustment, reflected a premium of about 33% for the loans' Agency eligible status.[41] CMC alleges that the parties agreed that CMC would transfer the Servicing Rights for 1,600 badly performing loans back to Morgan Stanley, and be reimbursed for the price that CMC had paid for those Rights.[42] But CMC agreed that it would continue to subservice those loans on the condition that it be paid its normal servicing fee, in addition to being reimbursed for any out of pocket expenses.[43]

Morgan Stanley and CMC also agreed that Morgan Stanley would repurchase the Servicing Rights on any loan that went delinquent within the first 12 months. Accordingly, CMC and Morgan Stanley amended the Master Agreement, which was retroactively dated January 2007, to state as follows:

> With respect to any Mortgage Loan, in the event that any Monthly Payment becomes ninety (90) or more days delinquent within the first twelve (12) months after the applicable Sale Date, the Seller shall, at the Servicer's option, repurchase the Servicing Rights related to such Mortgage Loan at the applicable Repurchase Price.[44]

[40] *Id*.
[41] *Id*. ¶ 46.
[42] *Id*. ¶ 48.
[43] *Id*.
[44] Compl. ¶ 47, Ex. F.

The amendment also provided that it "appl[ied] to all of the Mortgage Loans purchased . . . *from and after* the date of th[e] Amendment."[45] Soon after, CMC decided to purchase more Servicing Rights for a $293 million portfolio of Morgan Stanley loans that were to be sold to Fannie Mae.[46]

E. The Parties Meet At CMC's Offices And Morgan Stanley Allegedly Promises To "Take Care" Of CMC

The loans for which CMC had Servicing Rights continued to deteriorate during the spring of 2007. To address this problem, representatives from CMC and Morgan Stanley met at CMC's offices in Little Rock, Arkansas on April 11, 2007 (the "Little Rock Meeting").[47] During that Meeting, Mike Francis of Morgan Stanley allegedly explained that the loans being serviced by CMC had not been screened at Morgan Stanley's Boca Raton due diligence facility, contrary to what CMC had believed before purchasing the Servicing Rights for those loans and were, thus, of a "lesser quality" than CMC had thought.[48] Francis allegedly promised that Morgan Stanley would "take care" of CMC, which CMC claims amounted to a promise to indemnify CMC for any adverse consequences it might face as a result of Morgan Stanley's failure to conduct due diligence.[49] Also, with regard to the 1,600 loans that Morgan Stanley had taken back but continued to pay CMC to subservice, CMC alleges that Francis orally agreed that Morgan Stanley would transfer the Servicing Rights to another servicer if CMC decided, at any

[45] Compl. Ex. F (emphasis added).
[46] Compl. ¶ 49
[47] *Id*. ¶ 50.
[48] *Id*. ¶¶ 52, 53.
[49] *Id*. ¶ 54.

point, that it no longer wished to subservice the loans.[50] Following the Little Rock Meeting, CMC purchased Servicing Rights for an additional $346.7 million of Freddie Mac loans, and another $232 million in Agency loans.[51] In connection with each, CMC again signed transaction-specific agreements that incorporated the terms of the amended Master Agreement and provided that they were fully integrated and could only be amended in writing.[52]

F. The Agencies Issue Repurchase And Make-Whole Demands, And Morgan Stanley Initially Indemnifies CMC

In early 2008, the Agencies began to send CMC repurchase or make-whole demands allegedly because many mortgages that Morgan Stanley had sold to the Agencies did not meet Agency guidelines.[53] CMC was obligated under the Agency Transfer Agreements to repurchase or pay the make-whole amounts for those loans. Initially, CMC would forward its repurchase or make-whole requests to Morgan Stanley, who upheld its supposed promise to "take care" of CMC by repurchasing loans from CMC on 47 occasions in 2008 and early 2009, or reimbursing CMC for make-whole payments.[54]

CMC also requested that Morgan Stanley fulfill its alleged oral agreement to transfer the servicing of the 1,600 loans CMC had agreed to subservice. Initially, Morgan Stanley refused but, in June 2008, Morgan Stanley transferred the servicing of

[50] *Id.* ¶ 56.
[51] *Id.* ¶¶ 57, 58.
[52] *Id.* ¶ 35; Compl. Ex. E.
[53] *Id.* ¶ 65.
[54] *Id.* ¶¶ 68, 69.

those 1,600 loans to Saxon Mortgage, leaving CMC with no obligations under those particular loans.[55]

G. Morgan Stanley Refuses To Repurchase Or Reimburse CMC For Additional Agency Loans

By the end of 2008, CMC claims that they continued to receive delinquent mortgages back from the Agencies allegedly because of loan data misrepresentations made by Morgan Stanley to the Agencies.[56] CMC's complaint, however, does not include any explanation as to what sort of misrepresentations had allegedly been made by Morgan Stanley. Further, CMC does not provide any examples of the misrepresentations Morgan Stanley allegedly made or even indicate what information it was receiving from the Agencies as to why the loans were being returned. Indeed, the complaint does not actually plead facts indicating that the Agencies, as to even one loan, attributed the return to any behavior of Morgan Stanley itself. And, under the Agency guidelines, the Agencies have very broad flexibility to return loans for a variety of reasons,[57] and this case suggests that they are doing so aggressively if loans fall delinquent. Notably, the complaint does suggest that CMC itself believes that not all of the Agency repurchase requests were meritorious; one of CMC's concerns is that Morgan Stanley is allegedly no longer cooperating with CMC's attempts to appeal the Agencies' decisions.[58]

In any event, CMC claims that as the alleged financial impact of the demands for repayment or repurchase from the Agencies grew, Morgan Stanley abruptly stopped

[55] *Id*. ¶ 72.
[56] *Id*. ¶ 65.
[57] *See e.g.*, Compl. Ex. R, T.
[58] Compl. ¶¶ 80-81.

repurchasing the delinquent loans from CMC, or reimbursing CMC for make-whole payments.[59] CMC allegedly gave Morgan Stanley notice that it had breached its agreements with CMC by failing to take back the loans CMC received back from the Agencies, but Morgan Stanley declined to cure.[60]

CMC alone therefore allegedly answered the Agencies' repurchase and make-whole demands on nearly fifty loans after March 2009.[61] At the time that CMC filed this suit, an additional 140 Agency repurchase or reimbursement demands were pending.[62]

H. CMC Brings This Action

CMC brought this suit against Morgan Stanley on December 14, 2009. CMC asserts a number of claims against Morgan Stanley, all of which are brought under New York law. First, CMC brings several claims based in contract law. CMC alleges that Morgan Stanley breached the representations and warranties made in the Master Agreement and the ancillary transaction-specific contracts (Counts I and II). As an alternative to its express breach of contract claims, CMC also claims that Morgan Stanley repudiated the Master Agreement (Count III), that Morgan Stanley breached the implied covenant of good faith and fair dealing in the Master Agreement and ancillary transaction-specific contracts (Count IV), that the Master Agreement must be rescinded because of CMC's mistaken belief that it was purchasing Servicing Rights to loans that met the Agencies' requirements and would therefore not be returned by the Agencies

[59] *Id.* ¶ 78.
[60] *Id.* ¶ 79.
[61] *Id.* ¶ 92.
[62] *Id.* ¶ 93.

(Count VI), and that Morgan Stanley has unjustly enriched itself by refusing to repurchase loans from the Agencies as CMC has demanded (Count X).

Second, in addition to those claims sounding in contract, CMC brings claims alleging that Morgan Stanley has an implied duty to indemnify CMC which requires it to reimburse CMC for loan repurchases and repayments (Count V), and that Morgan Stanley negligently misrepresented the characteristics of the loans it had sold to the Agencies (Count VII). Finally, CMC asserts claims for promissory estoppel on the basis that Morgan Stanley allegedly promised CMC that the loans were in accordance with Agency requirements, and that it would indemnify CMC for problems arising from the loans sold to the Agencies (Counts VIII and IX).

Morgan Stanley has moved to dismiss all of those claims under Court of Chancery Rule 12(b)(6). The issues arising from Morgan Stanley's motion are addressed in turn below.

III. Legal Analysis

A. Standard Of Review

A motion to dismiss under Rule 12(b)(6) will be denied "unless it can be determined with reasonable certainty that the plaintiff could not prevail on any set of facts reasonably inferable" from the pleadings.[63] Accordingly, the court must accept as true all well-pled facts and afford plaintiffs "the benefit of all reasonable inferences."[64]

[63] *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002) (citing *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996)).
[64] *In re Primedia Inc. Deriv. Litig.*, 910 A.2d 248, 256 (Del. Ch. 2006).

Nevertheless, a complaint "must plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief" sought.[65]

B. CMC's Contract-Based Claims Are Dismissed

1. CMC's Breach Of Contract Claims Are Dismissed Without Prejudice Because CMC Failed To Provide Notice As Required By The Master Agreement

In Count I, CMC alleges that Morgan Stanley breached the Master Agreement by selling CMC Servicing Rights for Agency loans that did not comply with Agency guidelines. And, in Count II, CMC alleges that Morgan Stanley breached certain representations and warranties in the Master Agreement: § 10.07, which states that no loan was a "high cost" loan; § 10.08, which states that all loan information was "true, complete and accurate in all material respects;" § 10.10, which states that all state, federal, and local law requirements were complied with; and § 10.12, which states that the servicing and collecting practices for the loans were compliant with "accepted servicing practices."[66]

Morgan Stanley raises several arguments as to why Counts I and II fail to state a claim. Notably, Morgan Stanley argues that CMC has failed to comply with § 10.13 of the Master Agreement, which outlines the steps that must be followed to remedy a party's breach of contract, by giving the breaching party prompt written notice of its breach and an opportunity to cure. Specifically, § 10.13 requires that: "[u]pon discovery by either the Seller or the Servicer of a breach of any of the foregoing representations and

[65] *DeSimone v. Barrows*, 924 A.2d 908, 929 (Del. Ch. 2007).
[66] Master Agreement §§ 10.07-.08, 10.10, 10.12.

warranties, the party discovering the breach *shall give prompt written notice* to the other party" followed by a 60 day cure period.[67]

Nowhere in the complaint does CMC allege that it provided Morgan Stanley with prompt written notice of Morgan Stanley's alleged breaches of the Master Agreement that are raised in Counts I and II. Rather, CMC makes a constructive notice argument that it gave Morgan Stanley notice of Morgan Stanley's alleged breaches when it passed along the Agencies' loan repurchase requests. CMC must resort to that argument because it is undisputed that CMC never gave Morgan Stanley an express indication explaining what provisions of the Master Agreement were breached before CMC filed its complaint. That is, the first time CMC gave written notice to Morgan Stanley was when it attached a chart to its complaint stating, on a loan-by-loan basis, which representations and warranties Morgan Stanley had allegedly breached.[68] That chart, however, does not explain the nature of the alleged breaches. It simply lists the contract sections that were, for some unspecified reason, supposedly violated.

CMC also claims that, for the first 47 of its repurchase or repayment requests, Morgan Stanley "cured" its breaches of the Master Agreement and, thus, under § 10.13 of that Agreement, it did not need to give notice to Morgan Stanley of its breach.[69] But, Morgan Stanley claims that it made the repurchases and make-whole payments "in the

[67] *Id*. § 10.13 (emphasis added).
[68] Compl. Ex. K.
[69] Compl. ¶ 71.

interest of preserving a good working relationship with CMC, not pursuant to any contractual obligation."[70]

There are two reasons why CMC failed to give notice under the contract. First, attaching an exhibit to the complaint is not contractually proper notice under the Master Agreement, which required *prompt* written notice that allowed Morgan Stanley an opportunity to cure. CMC's exhibit does not provide Morgan Stanley with an opportunity to cure, because it was provided after CMC had initiated suit against Morgan Stanley and because it does not spell out what the breaches actually entailed. Second, forwarding Agency loan files to Morgan Stanley after the Agencies returned the loans for non-compliance with Agency guidelines is not proper notice because CMC did not point out to Morgan Stanley where the representations and warranties in the Master Agreement had been violated. And, the fact that Morgan Stanley answered the first 47 repayment or repurchase requests does not eliminate CMC's contractual obligation to provide written notice. It should be noted that if the Agencies were returning loans to CMC for specific reasons then CMC should both include those reasons in any proper notice to Morgan Stanley, specifically relate them to Morgan Stanley's conduct and duties under the Master Agreement and transaction-specific agreements, and replead them should it choose to pursue these claims after following the proper notice procedure. But, it is neither sufficient notice nor a proper allegation of breach of the Agreement to rest on the mere fact that the Agencies returned the loans to CMC without pointing to a specific violation of the Agreement by Morgan Stanley that caused the Agencies to do so.

[70] Def.'s Op. Br. at 14.

In entering into the Master Agreement, CMC agreed to follow a specific procedure if it became aware that Morgan Stanley breached the Agreement. That requirement was for a reason. The Master Agreement required CMC to provide prompt written notice to Morgan Stanley, so that Morgan Stanley had an opportunity to cure any breach, as a condition precedent to CMC's right to seek rescission.[71] Without notice, Morgan Stanley was prejudiced because it did not have an opportunity to cure its alleged breaches, which it bargained for in entering into the Master Agreement, before CMC brought suit against it.[72] CMC cannot now attempt to bypass that provision by bringing a claim for breach of that same Agreement without first providing Morgan Stanley with written notice and an opportunity to cure.[73] Having failed to satisfy the notice requirement in § 10.13, CMC is unable to proceed with a claim for breach of the Master Agreement.[74]

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[71] *See ALJ Capital I, L.P. v. David J. Joseph Co.*, 841 N.Y.S.2d 217, at *5 (N.Y. Sup. 2007) (finding that a contractual provision required "prompt written notice" before a party could seek recovery against a breaching party, and, thus, that the plaintiff's failure to provide prompt written notice precluded the plaintiff from seeking repayment under the contract); *see also Argo Corp. v. Greater N.Y. Mut. Ins. Co.*, 827 N.E.2d 762, 764 (N.Y. 2005) (dismissing claims for breach of an insurance contract where the plaintiff had failed to provide prompt notice of its claim, as required under its contract of primary insurance).

[72] *See ALJ Capital*, 841 N.Y.S.2d 217, at *5 (finding that the defendant was prejudiced by the plaintiff's failure to give contractually-required notice, because the defendant was not provided with an opportunity to cure).

[73] *See Israel v. Chabra*, 537 F.3d 86, 95 (2d Cir. 2008) (holding that a plaintiff could not bring a claim for missed bonus payments because the plaintiff had failed to satisfy a notice requirement that was a condition precedent to the defendant's obligation to guaranty the missed payment); *Eastman Kodak Co. v. Bostic*, 1991 WL 243378, at *4 (S.D.N.Y. Nov. 14, 1991) (dismissing breach of contract claims where the plaintiff had failed to abide by a contract provision requiring certification before any obligation to pay arose, and stating that the plaintiff could not "now enforce a contract materially different from the one for which it bargained").

[74] *See Metropolitan Steel Indus. Inc. v. Perini Corp.*, 800 N.Y.S. 2d 350, at *16 (N.Y. Sup. 2004) (dismissing breach of warranty claims where the plaintiff had failed to allege that it complied with the specific contractual requirements to remedy a breach); *see also F. Garofalo Elec. Co. v. New York Univ.*, 705 N.Y.S.2d 327, 331 (N.Y. App. Div. 2000) (holding that a contract's notice and documentation requirements for extra work and delay damages were conditions precedent to

Given the allegations in the complaint, it is possible that CMC has viable breach of contract claims, and perhaps even claims that could lead to the rescission of the Master Agreement.[75] But, in order to pursue those claims, CMC must first follow the remedy set

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recovery, and that failure to comply with those requirements constituted a waiver of the plaintiff's claims).

[75] In its briefs, CMC stressed the idea that Morgan Stanley had flatly promised that all the loans were Agency eligible in the sense that all the underlying data provided by borrowers, guarantors, etc., was reliable and accurate such that the loans would never be returned by the Agencies. CMC states that § 10.08 stands for that proposition. Section 10.08 simply states that the information set forth in the mortgage loan schedules and accompanying data was "true, complete and accurate in all material respects." *See* Master Agreement § 10.08. Also, CMC contended at oral argument that a spreadsheet describing each loan that Morgan Stanley sold contained a column in which Morgan Stanley noted whether information in the loan was complete, true, and accurate. For each of the loans that CMC purchased Servicing Rights for, there was a "C" in that column, which CMC argues is a representation that the loans conformed with Agency guidelines. *See Central Mortgage Co. v. Morgan Stanley*, C.A. No. 5140-VCS at 59-60 (May 20, 2010) (TRANSCRIPT).

In response, Morgan Stanley contends, with a good deal of logical force, that § 10.08 only meant that Morgan Stanley had compiled all the loan data accurately and that, if the data was accurate, the loans were eligible for sale to the Agencies. That is, Morgan Stanley claims that it agreed to accurately compile the data that it was given — not to ensure that the underlying data was truthful and correct. In support of that argument, Morgan Stanley points to § 10.12 of the Master Agreement, which expressly limits Morgan Stanley's representations and warranties as to information given to it by, among others, borrowers. *See* Master Agreement § 10.12.

CMC's argument that Morgan Stanley was representing that all of the underlying information in all loan files was accurate seems strained. The more plausible reading of the contract is that Morgan Stanley was simply representing that it accurately compiled the loan data and that, based on that data, the loans were eligible for sale under Agency criteria. To the extent that CMC bases its claims, as it seems to, on the notion that borrowers provided false information or appraisals were inflated, §10.12 of the Master Agreement, rather than § 10.08, seems to be implicated. But because CMC has not given proper notice, I do not resolve that disagreement now.

Likewise, other of CMC's breach of contract arguments are, at this point, some distance from plausible, which weighs in favor of dismissal so that CMC can specify its breach of contract claims as the contract requires. For example, CMC has not pointed to any provision of the Master Agreement creating an express obligation for Morgan Stanley to repurchase or repay CMC for loans that the Agencies returned, or to participate in the Agency appeals process, as the basis for a repudiation claim because no such obligations exist. CMC attempts to stretch the representations in the Master Agreement that information in the loan schedule and data files was "true, complete and accurate in all material respects" and that the loans complied with applicable laws to mean that all loans would comply with Agency guidelines. But, nowhere does the Master Agreement state that the loans would satisfy Agency guidelines. Nor does the Master

forth in § 10.13 of the Master Agreement. Because CMC has failed to do so, I dismiss Counts I and II of the complaint without prejudice.

2 CMC's Claim For Repudiation Fails Because Morgan Stanley Has Not Refused To Perform The Entire Contract

In Count III, CMC claims that Morgan Stanley repudiated the Master Agreement by declining to make additional repurchases or reimbursements of the Agency loans that

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Agreement warrant that Agency loans would never be returned to CMC. Further, CMC's claim that Morgan Stanley violated §10.07 of the Agreement by selling a "high cost" loan is lacking in specificity as to why the loan in question — identified only by number in a chart attached to the complaint — in fact violated the provisions of §10.07. Section 10.07 provides that "[n]o Mortgage Loan is (a) covered by the Home Ownership and Equity Protection Act of 1994 [("HOEPA")] or (b) a 'high cost,' 'threshold,' 'covered,' or 'predatory' or similar loan under any other applicable state, federal or local law." There are, therefore, two loan categories that will violate §10.07: first, loans that are covered by HOEPA; and second, loans that are "high cost" etc. under other applicable state, federal or local law. CMC's complaint makes no reference to HOEPA but instead appears to allege that one of the loans violated §10.07 by falling into the second category because it is "high cost." CMC does not, however, identify under which applicable state, local or federal law the loan is "high cost," or plead any facts to suggest the loan in question was covered by that law. CMC also ignores the fact that the "high cost" provision in §10.07 is a catch-all and does not plead any facts suggesting that the loan in question is akin to a loan covered by any applicable law. To remedy this problem, CMC makes a brazen move by recasting its argument in its answering brief. In that brief, CMC attempts to shoe-horn the loan into the first category by claiming that "high cost" is a term of art under HOEPA. But, CMC does not even reference HOEPA in its complaint, much less allege facts about the loan indicating that it falls within HOEPA's reach. Even worse, CMC selectively quoted §10.07 in the complaint and intentionally excised the portion dealing with HOEPA, an excision that seems to make plain that the loan at issue did not implicate HOEPA. In fact, the term "high cost" does not appear in 15 U.S.C. § 1602(aa), the codification of HOEPA that CMC points to in its brief. Rather, that section lays out a test to determine if mortgages fall under the coverage of HOEPA. For instance, it includes mortgages that have an annual percentage rate more than 10 percentage points higher than the yield on Treasury securities with comparable periods of maturity, or mortgages where "total points and fees payable" at or before closing exceed 8 percent of the total loan amount or $400. 15 U.S.C. §1602 (aa). CMC, however, pleads no facts relating to the annual percentage rate or "total points and fees payable" of the loan that is allegedly "high cost." Therefore, CMC's complaint fails to allege facts supporting a rational inference that the loan fell into either subsection (a) or (b) of §10.07. Indeed, given CMC's loose approach, it could view as "high cost" any loan that is in default. Thus, if CMC follows § 10.13 of the Master Agreement and refiles its claims, it should attempt to correct these deficiencies and acknowledge the reality that it entered into a complex, written agreement with terms that did not guarantee a risk-free deal.

were returned to CMC, or to participate in the Agency appeals process. But CMC has not pled facts sufficient to support an inference that Morgan Stanley has repudiated its contract with CMC for two reasons.

First, under New York law, anticipatory repudiation occurs when one party repudiates his obligations under a contract "prior to the time designated for performance and before he has received all of the consideration due him thereunder."[76] And, a party claiming repudiation has the burden of showing an unequivocal manifestation of the other party's intention not to perform the *entire* contract.[77] But CMC has only alleged that Morgan Stanley has refused to repurchase certain loans that were returned by the Agencies — not that Morgan Stanley clearly informed CMC that it was refusing to perform *all* of its remaining contractual obligations. For this reason alone, CMC's repudiation claim fails.

Second, CMC has failed to show that Morgan Stanley had a contractual obligation in the first place to reimburse CMC or repurchase Agency loans from CMC after those loans were returned by the Agencies, or participate in the Agency appeals process.[78] CMC argues that Morgan Stanley had an obligation, under the Master Agreement, to cure any breaches of its representations and warranties after receiving notice of those

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[76] *Long Island R.R. Co. v. Northville Indus. Corp*., 393 N.Y.S. 2d 925, 930 (N.Y. 1977).
[77] *See De Lorenzo v. BAC Agency, Inc*., 681 N.Y.S. 2d 846, 848 (N.Y. App. Div. 1998); *see also* GLEN BANKS, NEW YORK CONTRACT LAW § 14.1 at 530 (2006) ("[R]epudiation must rise to the level of a clear and unqualified refusal to perform the entire contract.").
[78] Repudiation may not exist without contractual obligations. As the Appellate Division of the New York Supreme Court noted, "a party repudiates a contract when it 'voluntarily disables itself from complying' with its contractual obligations." *Computer Possibilities Unlimited, Inc. v. Mobil Oil Corp.*, 747 N.Y.S.2d 468, 475 (N.Y. App. Div. 2002) (quoting *Goodman Mfg. Co. L.P. v Raytheon Co.*, 1999 WL 681382, at *8 (S.D.N.Y. Aug. 31, 1999)).

breaches.[79] But, as discussed with regard to the prior breach of contract counts, CMC failed to give Morgan Stanley contractually proper notice of its alleged breaches. Having failed to provide notice, Morgan Stanley was under no obligation pursuant to § 10.13 of the Master Agreement to cure. Without proper notice, Morgan Stanley could not have known what it should cure.

Moreover, to the extent that CMC argues that Morgan Stanley failed to acknowledge its duty to repurchase any loan that the Agencies returned to CMC simply because the Agencies returned the loan, CMC's argument is frivolous. Unless Morgan Stanley breached the Master Agreement or the transaction-specific agreements, the mere fact that the Agencies returned a loan to CMC is irrelevant. Absent a contract breach by Morgan Stanley itself, Morgan Stanley had no duty to provide any relief to CMC. CMC's contention that Morgan Stanley was contractually bound to take back any loan CMC received back from the Agencies[80] is entirely inconsistent with the Master Agreement and transaction-specific agreements. These agreements make plan that CMC was at risk of having loans returned by the Agencies and nowhere say that Morgan Stanley was bound to take back any loan simply because it was returned. Rather, in that case, CMC had recourse against Morgan Stanley only if Morgan Stanley breached its specific contractual duties relating to the loans, not simply because the Agencies exercised their rights to return the loan to CMC. In other words, Morgan Stanley did not repudiate the Master Agreement and transaction-specific agreements by failing to

[79] Master Agreement § 10.13.
[80] Pl.'s Ans. Br. at 15 (arguing that the proper remedy for Morgan Stanley's breach is to "repurchase all loans put back by the Agencies.").

embrace CMC's position, which is itself one that is inconsistent with those agreements. Indeed, as discussed with regard to the breach of contract claims, CMC's argument that Morgan Stanley warranted that all of the underlying loan data was truthful and accurate is strained. Rather, given § 10.12 of the Master Agreement, which states that the loans complied with "accepted servicing practices . . . *to the best of [Morgan Stanley's] knowledge*," Morgan Stanley's argument that it only agreed to accurately compile the loan data makes more sense.[81] Once again, however, because CMC failed to give Morgan Stanley contractually proper notice, I need not resolve which party's reading of the representations and warranties is correct.

For these reasons, Count III is dismissed with prejudice.

3. CMC's Claims For Breach Of The Implied Covenant Of Good Faith And Fair Dealing, Implied Indemnity, And Unjust Enrichment Are Dismissed With Prejudice Because The Master Agreement Governs Its Relationship With Morgan Stanley

Next, CMC argues that Morgan Stanley breached the implied covenant of good faith and fair dealing (Count IV), that Morgan Stanley has an implied duty to indemnify CMC (Count V), and that Morgan Stanley will be unjustly enriched (Count X) if it is not required to repurchase the underperforming loans from the Agencies. All of these claims

[81] *Id*. § 10.12 (emphasis added). Importantly, the Freddie Mac guidelines allow it to return mortgages to CMC if the "Borrower or any other party in the Mortgage transaction has made any false representation in conjunction with such transaction, *whether or not the Seller or Servicer* was a party to, or had knowledge of, such false representation . . . ." Compl. Ex. R (emphasis added). The Agencies, therefore, could send mortgages back to CMC when borrowers had made false representations even in situations where Morgan Stanley had no knowledge of such representations. This makes it clear that the Agencies' ability to force a repurchase of the loan is not coterminous with Morgan Stanley's duties under the Master Agreement and transaction-specific agreements.

fail, however, because there is an enforceable agreement that governs the relationship between the parties on these issues.

First, as to the implied covenant of good faith and fair dealing claim, New York law provides that a "party may maintain a claim for breach of the duty of fair dealing *only* if it is based on allegations different than those underlying the accompanying breach of contract claim."[82] But the factual basis for CMC's claim is the same as that underlying CMC's breach of contract claims regarding Morgan Stanley's representations and warranties in the Master Agreement. Thus, because there is "no difference between the factual underpinnings of [CMC's] breach of contract claims and its claim for breach of the implied covenant of good faith and fair dealing," Count IV is dismissed.[83]

Second, CMC argues that it is entitled to indemnification under both an "implied contract" theory and an "implied in law" theory.[84] CMC's implied contract theory alleges that based on the Agency Transfer Agreements, which form the basis of the parties' liability to the Agencies and do not contain an incorporation clause that incorporated those Agreements into the Master Agreement, the court should "imply" an indemnification obligation on the part of Morgan Stanley. But, CMC ignores the reality that the parties' indemnification obligations are addressed in the Master Agreement, which obligates CMC to indemnify Morgan Stanley under certain defined circumstances,

[82] *Siradas v. Chase Lincoln First Bank, N.A.*, 1999 WL 787658, at *6 (S.D.N.Y. Sept. 30, 1999) (emphasis added).
[83] *Sauer v. Xerox Corp*., 95 F. Supp. 2d 125, 132 (W.D.N.Y. 2000), *aff'd*, 5 Fed. Appx. 52 (2d Cir. 2001) (dismissing a claim for breach of the implied covenant of good faith and fair dealing because the claim relied on the same factual allegations as the breach of contract claims).
[84] *See City of New York v. Black & Veatch*, 1997 WL 624985, at *10 (S.D.N.Y. Oct. 6, 1997) (explaining that there are two types of implied indemnification claims under New York law — claims based on an "implied contract theory," and on an "implied in law" theory).

but places no reciprocal obligation on Morgan Stanley.[85] Because the parties' indemnification rights and obligations are dealt with in the Master Agreement, CMC cannot circumvent that Agreement under an implied contract theory.[86]

For similar reasons, CMC's "implied in law" indemnification claim, which alleges that Morgan Stanley is required to indemnify CMC based on a tort theory because CMC was compelled to pay for Morgan Stanley's wrongdoing,[87] is without merit. CMC claims that Morgan Stanley is liable to it in tort for failing to repay or repurchase the Agency loans that were returned. But, the Agencies' repurchase demands are based on the Agency Transfer Agreements and guidelines, and not upon a theory of negligence against either CMC or Morgan Stanley. Thus, because CMC is liable to the Agencies under written agreements, and not due to the alleged negligence of Morgan Stanley, CMC's implied indemnification claim has no basis.[88] Furthermore, even though the Agencies could have, under the Agency Transfer Agreements, chosen to return the loans to Morgan Stanley rather than CMC, that does not mean that Morgan Stanley has any equitable duty to share the costs with CMC of the loans returned to it. As between Morgan Stanley and CMC, their contract allocates responsibility in these circumstances, and leaves no room

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[85] Master Agreement § 9.01.

[86] *See Serv. Sign Erectors Co. v. Allied Outdoor Adver., Inc.*, 573 N.Y.S.2d 513, 514 (N.Y. App. Div. Aug. 22, 1991) (dismissing a claim for implied indemnification based on an implied contract theory because "the subject of indemnification [was] clearly contemplated and expressly addressed by [the parties] in their contract"), *appeal dismissed*, 580 N.Y.S.2d 203 (N.Y. 1991), *appeal denied*, 581 N.Y.S.2d 281 (N.Y. 1992).

[87] *See Margolin v. New York Life Ins. Co.*, 344 N.Y.S.2d 336, 338 (N.Y. 1973) ("The general rule is that a right of implied indemnification will arise in favor of one who is compelled to pay for another's wrong.").

[88] *See In re Poling Transp. Corp.*, 784 F. Supp. 1045, 1049 (S.D.N.Y. 1992) (explaining that, under an implied in law indemnification theory, "[i]mplied indemnification arises where one tortfeasor is held liable solely on account of the negligence of another").

for some vague equitable summing up. CMC may only seek relief from Morgan Stanley for harm suffered from returned loans if relief is available for a breach of the agreements between CMC and Morgan Stanley — namely, the Master Agreement and transaction-specific agreements. By its implied indemnity claims, CMC seeks to ignore the contractual arrangements it struck with Morgan Stanley. This is a bypass not allowed by New York law.[89]

Third, CMC's unjust enrichment claim fails because, under New York law, recovery for unjust enrichment is barred by the existence of an enforceable written contract.[90] CMC alleges that Morgan Stanley has been unjustly enriched because it obtained the proceeds from the sale of the Agency loans at issue while CMC had to bear the losses of those loans by repaying the Agencies, and argues that its claim may proceed despite the presence of an enforceable contract because it is not clear that its contracts with Morgan Stanley set forth the amount of payments to Morgan Stanley, or Morgan Stanley's liability to the Agencies. But, unlike the cases cited by CMC where there was a genuine question as to whether the plaintiffs' claims related to conduct that fell outside the scope of the operative agreements,[91] the conduct alleged by CMC falls directly within the scope of the Master Agreement and specific transfer agreements, which outline the obligations between the parties regarding the Agency loans. Thus, the Master Agreement

[89] *See Serv. Sign Erectors Co.*, 573 N.Y.S.2d at 514.
[90] *E.g.*, *Goldman v. Metro. Life Ins. Co.*, 807 N.Y.S.2d 583, 587 (N.Y. 2005); *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 521 N.Y.S.2d 653, 656 (N.Y. 1987).
[91] *See, e.g.*, *Old Salem Dev. Group Ltd. v. Town of Fishkill*, 754 N.Y.S.2d 333, 334 (N.Y. App. Div. 2003) (finding that a question existed as to whether the defendant was a party to the written agreements governing the dispute).

and individual transfer agreements bar CMC from bringing an unjust enrichment claim based in quasi-contract.[92]

Therefore, CMC's claims in Counts IV, V, and X are dismissed with prejudice.

C. CMC's Negligent Misrepresentation Claim Is Dismissed With Prejudice Because Morgan Stanley Does Not Owe CMC An Extra-Contractual Duty

CMC also brings a claim for negligent misrepresentation in Count VII of the complaint, alleging that Morgan Stanley breached its duty to make accurate representations about the loans for which CMC purchased Servicing Rights. But, CMC has failed to allege that CMC and Morgan Stanley had a special relationship upon which such an extra-contractual duty can be based.

Under New York law, there can be no action for negligent misrepresentation without a "special relationship of trust and confidence" between the parties.[93] Such a "special relationship" is generally found where the parties have "a previous or continuing relationship" implying a "closer degree of trust, confidence, or reliance" than just an ordinary business relationship.[94] But, CMC and Morgan Stanley are related only through the contract which they negotiated at arm's length, which is precisely the type of

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[92] *See MBIA Ins. Co. v. Residential Funding Co., LLC*, 2009 WL 5178337, at *7 (N.Y. Sup. Dec. 22, 2009) ("Under New York law, 'the existence of a valid and enforceable contract governing a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter.'" (quoting *Am. Tel. & Util. Consultants, Inc. v. Beth Israel Med. Ctr.*, 307 A.D.2d 834, 835 (N.Y. App. Div. 2003))); *see also Goldman v. Met. Life Ins. Co.*, 841 N.E.2d 742, 746 (N.Y. 2005) (stating that unjust enrichment "is an obligation the law creates in the absence of any agreement").

[93] *Banque Arabe v. Maryland Nat'l Bank*, 819 F. Supp. 1282, 1293 (S.D.N.Y. 1993) ("Under New York law, there is no cause of action for negligent misrepresentation 'in the absence of a special relationship of trust and confidence between the parties.'"); *Village on Canon v. Bankers Trust Co.*, 920 F. Supp. 520, 531 (S.D.N.Y. 1996).

[94] *Congress Fin. Corp. v. John Morrell & Co.*, 790 F. Supp. 459, 474 (S.D.N.Y. 1992).

relationship that New York courts routinely find does not give rise to a negligent misrepresentation claim.[95] Because CMC has alleged no facts supporting an inference that there is a special relationship of trust and confidence between the parties beyond their business relationship, CMC's negligent misrepresentation claim is dismissed with prejudice.

D. CMC's Unilateral Mistake Claim Is Dismissed With Prejudice Because CMC Has Not Alleged Fraud Or Unconscionability

In Count VI of the complaint, CMC seeks to rescind the parties' agreements on the basis of unilateral mistake. Specifically, CMC argues that it mistakenly believed that the Master Agreement and individual transfer agreements concerned only valuable, Agency guideline compliant loans, and that it paid a premium for Agency-compliant loans based on that belief. CMC claims that this mistake entitles it to rescission of the entire contract. This claim fails for several reasons.

First, under New York law, a contract may generally be rescinded for unilateral mistake where the mistake is "coupled with some fraud."[96] But, as CMC admits, it has not pled that Morgan Stanley engaged in fraud. Instead, CMC argues that, in some limited instances, New York courts have rescinded contracts based on unilateral mistake in the absence of fraud so long as "the other contracting party knew or should have

[95] *See, e.g.*, *id*. ("Courts generally find that an ordinary contractual relationship alone is insufficient to constitute a special relationship."); *Banque Arabe*, 819 F. Supp. at 1293 ("Neither an ordinary contractual relationship nor a banking relationship, without more, is sufficient to establish a 'special relationship,' which occurs only in the context of a previous or continuing relationship between two parties.").

[96] *See Travelers Indem. Co. of Ill. v. CDL Hotels USA, Inc.*, 322 F. Supp. 2d 482, 498 (S.D.N.Y. 2004) (quoting *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991)).

known that such mistake was being made."[97] Notably, the cases that CMC relies upon found that the plaintiff had failed to prove that the defendants knew or should have known that the plaintiff was proceeding under a mistaken assumption.[98] Here, CMC has not alleged that Morgan Stanley knew or should have known about CMC's supposed mistake, and I find no reason to believe that Morgan Stanley should have known about CMC's view that all of the loans met Agency guidelines.

Furthermore, CMC's argument that it mistakenly believed that the loans in the contract were more valuable loans that fully complied with Agency guidelines makes no sense. CMC claims that it, a billion dollar servicer of loans, was duped into paying a premium for loans that did not comply with Agency guidelines — a mistake that it became aware of after the Agencies sent back certain of their loans. But that is hardly an instance of unilateral mistake. Rather, CMC bargained for the terms of the Master Agreement and agreed to the individual service agreements, which nowhere state that the loans comply with Agency guidelines.

Moreover, CMC's argument that it believed it was getting flawless loans with no possibility for error is flatly inconsistent with several provisions of the Master Agreement. This includes the provision that states: "[CMC] acknowledges that certain of the Mortgage Loans have certain characteristics which may increase the likelihood of

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[97] *Ostman v. St. John's Episcopal Hosp.*, 918 F. Supp. 635, 646 (E.D.N.Y. 1996).
[98] *Id*. (holding that a plaintiff's alleged mistake could not be used as a basis for rescission because there was no proof that the defendants knew or should have known that the plaintiff was mistaken as to a material fact in the contract); *Middle East Banking Co. v. State Street Bank Int'l*, 821 F.2d 897, 906 (2d Cir. 1987) (holding that the plaintiff could not rely on the unilateral mistake doctrine because the plaintiff did not allege knowledge on the part of the defendant that the plaintiff entered into a release erroneously).

defaults under the Mortgage Notes."[99] It also includes § 10.12, which indicates that Morgan Stanley was only making a limited representation and warranty as to the truth or accuracy of the loan's underlying information.[100] Indeed, the provision of the amended Master Agreement which allowed CMC to require Morgan Stanley to repurchase any loans that became delinquent within the first year, also reflects a recognition that the loans had a risk of defaulting, a risk that could obviously encompass the possibility that borrowers had inflated their incomes or property values.[101] And, even if CMC entered into the Master Agreement with the understanding that all loans were Agency eligible, in the sense that they were categorically eligible for Agency purchase if the data was as set forth, CMC's further contention — that it believed that Morgan Stanley was guaranteeing that all the Agency loans were so pristine that they would never be returned — is flatly inconsistent not only with amended provisions of the Master Agreement requiring Morgan Stanley to take back loans becoming delinquent within the first year, but also with § 72.1 of the Freddie Mac guidelines and Chapter 2 of the Fannie Mae guidelines which explicitly states that CMC had to accept loans back from the Agencies.[102] There is no way Morgan Stanley or any reasonable party (including a sophisticated party like CMC itself) would or should have had reason to believe that CMC was proceeding on the premise that Morgan Stanley had to take back any loan that was returned by an Agency, simply because of that fact. The unilateral mistake doctrine is reserved for situations

[99] Master Agreement § 3.02.
[100] *Id.* § 10.12.
[101] Compl. Ex. F.
[102] Compl. Ex. R, T.

where a contractual relationship is based on a mistake that was induced by a party's fraudulent or wrongful act,[103] not where one party is simply confused about the terms of the contract.[104]

Second, CMC only complains about 140 loans out of the *thousands* of loans to which it purchased the Servicing Rights. The unilateral mistake doctrine only applies to those basic assumptions that have a *material* effect on the parties' agreement.[105] The contractual remedy process itself addresses the possibility that loans would become delinquent and that Morgan Stanley may have committed breaches. If, upon proper notice, a pervasive pattern of breach emerges, it could be that rescission would be justified. But, CMC's bizarre argument that it never contemplated that Morgan Stanley might breach the agreements or that a loan might be returned from the Agencies is refuted by the plain terms of the Master Agreement and transaction-specific agreements it signed. Perhaps CMC did not adequately focus on the risk that the real estate market bubble would burst and CMC would have to rely on its contractual remedies against Morgan Stanley to address the plain risk that the Agencies would return loans. But a party's miscalculation about the extent to which it might have to use its contractual remedies in light of clear contractual risks is not the sort of material issue that justifies the

[103] *Cornock v. Murnighan*, 727 N.Y.S.2d 803 (N.Y. App. Div. 2001).
[104] *Marren v. Nathan*, 770 N.Y.S.2d 293 (N.Y. App. Div. 2003).
[105] *See* RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981) ("Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable . . . .").

extreme use of the unilateral mistake doctrine. If it were, all contracts would be subject to invalidation simply because one party came to regret the bargain it made.

Third, enforcement of the Master Agreement is not unconscionable. CMC argues that the terms of the Master Agreement are unconscionable, once again without pointing to any specific terms of the Agreement, because they are "so unreasonably favorable to Morgan Stanley that [CMC] would never knowingly have agreed to them."[106] This is clearly not one of those "extreme cases where a contractual term is so outrageous and oppressive as to warrant a finding of unconscionability irrespective of the contract formation process . . . ."[107] Rather, CMC was free to negotiate for any terms in the Agreement that it saw fit, and had a choice as to whether to bid on the Servicing Rights or enter into the Master Agreement at all.[108]

The complaint does not allege that Morgan Stanley fraudulently induced CMC to enter into the Master Agreement, nor does it suggest that Morgan Stanley was even aware of the mistake CMC was allegedly making at the time, nor that the Agreement is in any way unconscionable. Therefore, CMC's rescission claim based on unilateral mistake in Count VI is dismissed with prejudice.

E. CMC's Promissory Estoppel Claims Are Dismissed With Prejudice Because The Master Agreement Precludes Oral Changes To The Parties' Agreements

Finally, CMC brings two claims for promissory estoppel, which both fail to state a claim. In Count VIII, CMC alleges that Morgan Stanley is estopped from denying the

[106] Pl.'s Ans. Br. at 28.
[107] *State v. Wolowitz*, 486 N.Y.S.2d 131, 145 (N.Y. App. Div. 1983).
[108] *Id*. (explaining that the doctrine of unconscionability is an exception to general contract-making principles, and is "designed to insure freedom of contract and not negate it").

enforceability of the oral promise it made at the Little Rock Meeting that it would indemnify CMC for any costs arising from the underperforming loans sold to the agencies. And, in Count IX, CMC argues that it relied on Morgan Stanley's oral representation at the Boca Raton Meeting that the loans sold to the Agencies complied with the Agency guidelines, and therefore Morgan Stanley is estopped from denying the enforceability of that promise. These claims fail, however, because the Master Agreement contained an enforceable integration clause that precluded oral modifications to the contract, and because the alleged "oral promises" are too vague to support promissory estoppel claims.

In § 14.03 of the Master Agreement, the parties agreed that the Master Agreement, along with the parties' commitment letters and acknowledgement agreements for each specific loan, constituted "the *entire* Agreement between the Parties," and that the Agreement "may be amended and any provision hereof waived, but only *in writing* signed by the party against whom such enforcement is sought."[109] CMC argues that, under New York law, Morgan Stanley's "partial performance" of repaying it for or repurchasing Agency loans nullifies the language of § 14.03.[110] But, the so-called "oral modifications" to the Agreement made at the Boca Raton and Little Rock Meetings are not "separate, additional agreement[s] addressing a scenario that was not anticipated and

[109] Master Agreement § 14.03 (emphasis added).
[110] *See Rose v. Spa Realty Assoc*., 366 N.E.2d 1279, 1283 (N.Y. 1977) (holding that oral modifications to a contract had been made, despite a "no oral modification" clause in the contract and noting that "[w]here there is partial performance of the oral modification sought to be enforced, the likelihood that false claims would go undetected is . . . diminished").

not covered by the terms of the" Agreement.[111] Nor does "the conduct of the parties demonstrate[ ] an indisputable mutual departure from the written agreement."[112] In fact, shortly before the Little Rock Meeting, the parties undertook an important *written* amendment to the Master Agreement, evidencing their understanding that all amendments had to be in writing. The nature of the written amendment is also telling and undercuts CMC's argument that it was relying on oral assurances. In the amendment, Morgan Stanley agreed to take back any loan that became 90 or more days delinquent within the first 12 months after the sale to CMC.[113] By necessary implication, in other situations, CMC was left to its pre-existing rights under the Master Agreement and transfer-specific agreements. Thus, § 14.03 of the Master Agreement is enforceable, and precludes the oral modifications that CMC claims took place at the Boca Raton and Little Rock Meetings.

Additionally, the statements from those Meetings that CMC relies upon are too vague to support a claim for promissory estoppel. To support a claim for promissory estoppel, a plaintiff must plead: "(1) a *clear and unambiguous promise*; (2) reasonable and foreseeable reliance by the party to whom the promise is made; and (3) an injury sustained in reliance on the promise."[114] Mike Francis's statement to CMC

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[111] *Gerard v. Cahill*, 888 N.Y.S.2d 104, 106 (N.Y. App. Div. 2009).
[112] *Charles T. Driscoll Masonry Restoration Co., Inc. v. County of Ulster*, 836 N.Y.S.2d 362, 365 (N.Y. App. Div. 2007).
[113] Compl. Ex. F.
[114] *Gurreri v. Assoc. Ins. Co.*, 669 N.Y.S.2d 629, 629 (N.Y. App. Div. 1998) (quoting *Rogers v. Town of Islip*, 646 N.Y.S.2d 158 (N.Y. App. Div. 1996)) (emphasis added).

representatives at the Little Rock Meeting that Morgan Stanley would "take care"[115] of CMC is far from a clear and unambiguous promise to indemnify CMC. Rather, by promising to "take care" of CMC, Francis could have been promising to advise CMC in the case that a loan was returned, to give CMC more business, or even to pay for the CMC representatives' lunches — but nothing in that statement implies a clear and unambiguous promise to indemnify CMC in a blanket way for returned loans, especially because the Master Agreement expressly dealt with indemnification. Francis's statement at the Boca Raton Meeting that its loan contracts were "standard Freddie Mac contract[s]"[116] is similarly vague. CMC claims that this statement meant that all of the loans for which CMC would purchase Servicing Rights would be compliant with Agency guidelines. But Francis may have simply been explaining that certain of its loans were entered into through forms that were routinely used for Agency loans. Indeed, the statement is far from a clear promise that all loans would meet Agency guidelines and would never be returned to CMC.

For related reasons, these facts do not support an inference of reasonable reliance. After all these supposed oral statements, CMC entered into transaction-specific agreements that incorporated the Master Agreement and that again indicated that the complete agreement of the parties was in their *written* agreements. That is, after all the oral statements, CMC once again agreed that the parties' written agreements "constitute[d] the entire Agreement between the parties" and could be amended "only in

[115] Compl. ¶ 54.
[116] *Id.* ¶ 30.

writing."[117] Indeed, the fact that CMC and Morgan Stanley amended the Master Agreement *in writing* illustrates that CMC understood these provisions of the agreements. In this context, it is utterly unreasonable for CMC to claim that Morgan Stanley's alleged oral representations induced it to enter additional integrated agreements to purchase Servicing Rights.

For these reasons, Counts VIII and IX fail, and are dismissed with prejudice.[118]

IV. Conclusion

For the foregoing reasons, Morgan Stanley's motion is GRANTED. Counts I and II of the complaint are dismissed without prejudice. The remainder of the complaint is dismissed with prejudice. IT IS SO ORDERED.

[117] Compl. Ex. H.

[118] *See, e.g., James v. Western N.Y. Computing Syst., Inc.*, 710 N.Y.S.2d 740, 742-43 (N.Y. App. Div. 2000) (dismissing a promissory estoppel claim because "[t]he alleged oral promise is not sufficiently clear and unambiguous to support such a cause of action").