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Case Number 443,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WINDSOR I, LLC, Below Plaintiff, Current Appellant, v. CWCAPITAL ASSET MANAGEMENT LLC, and U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR TO WELLS FARGO BANK, N.A. AS TRUSTEE FOR THE REGISTERED HOLDERS OF COBALT CMBS COMMERCIAL MORTGAGE TRUST 2007-C2, COMMERCIAL MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2007-C2, Below Defendants, Current Appellees.	)	Case Number 443,2019 Appeal from the Superior Court of the State of Delaware

CORRECTED OPENING BRIEF OF APPELLANT, WINDSOR I, LLC

MONZACK MERSKY MCLAUGHLIN AND BROWDER, P.A.

Melvyn I. Monzack (#137)
Michael C. Hochman (#4265)
1201 North Orange Street, Suite 400
Wilmington, DE 19801
(302) 656-8162
mmonzack@monlaw.com
mhochman@monlaw.com

Attorneys for Below Plaintiff, Current Appellant, Windsor I, LLC

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NATURE OF PROCEEDINGS

After a lengthy sequence related to the potential workout of a distressed loan (the "Loan"), Appellant, Below Plaintiff, Windsor I, LLC ("Windsor") accepted the offer of Appellee, Below Defendant, CWCapital Asset Management LLC ("CWCAM")[1] – (the "Offer") – to sell the subject loan for an all-in amount of $5,288,000 (the "Proposed Transaction").[2] The Offer, included specific conditions: "subject to credit committee approval, adequate proof of the borrower's ability to fund, execution of appropriate documentation and closing by May 30."

To satisfy Below Defendants' pre-closing demands, Windsor materially changed its position and satisfied all of its pre-closing obligations. Windsor agreed to CWCAM's conditions to close within approximately 30 days, provided the requested commitment letter from Windsor's lender, drafted a loan acquisition agreement for FCS, and coordinated with a lender and potential tenants for the former Best Buy location – facts CWCAM had to know would have to occur immediately in order to comply with its 30-day closing requirement – in exchange for what Windsor believed was CWCAM's promise to conduct itself in good faith

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[1] CWCAM and U.S. Bank National Association, as Trustee, successor-in-interest to Bank of America, N.A., as Trustee, successor to Wells Fargo Bank, N.A., as Trustee for the registered holders of COBALT CMBS Commercial Mortgage Trust 2007-C2, Commercial Mortgage Pass-Through Certificates, Series 2007-C2 ("U.S. Bank") are collectively referred to herein as "Below Defendants."

[2] FCS Lending, LLC ("FCS"), a company with some common ownership as Windsor, would be the purchaser.

and to sell the Loan to Windsor for $5,288,000 in accordance with the Proposed Transaction. Consequently, Windsor reasonably relied on the Offer and immediately arranged for the components of the transaction that CWCAM had required. Subsequently, CWCAM reneged, claiming the "credit committee" did not approve Windsor's purchase of the Loan.

In the Superior Court, Windsor asserted that decision was arbitrary and capricious, and not made in good faith. Windsor believes the abrupt and unjustified decision not to consummate the Proposed Transaction was reflective of CWCAM's ongoing pattern of bad conduct in dealing with Windsor, as discussed below.

Windsor reasonably relied on Below Defendants' promise to sell the Loan if the conditions were met, and took action to its detriment. Under the reasonable expectation that the credit committee would approve the Proposed Transaction, Windsor materially changed its position in securing all of the above conditions required to close within the required 30-day window. CWCAM, acting on behalf of U.S. Bank (the trustee holding the Loan for the investors in the Loan ("Investors")), reasonably expected and was aware its representations and promises would (and did) induce Windsor to dedicate time, money and goodwill to satisfy all of CWCAM's requirements. CWCAM did not honor its promise when the credit committee – without any explanation – refused to consummate the Proposed

Transaction and sell the Loan to Windsor at the agreed-to purchase price of $5,288,000. Below Defendants' failure to provide any substantive explanation for the credit committee's rejection creates a presumption that the decision was arbitrary and capricious and not made in good faith. In fact, to date, there is no evidence that the credit committee actually rejected the Proposed Transaction, let alone a supporting rationale.

Before the Superior Court, Windsor argued Below Defendants' promise to sell the Loan to Windsor for $5,288,000 was binding because injustice could only be avoided by enforcement of the promise. As a result of the wrongful rejection of CWCAM and U.S. Bank's own Offer, Windsor suffered damages in an amount no less than $2,112,000 – reflecting the difference between the agreed-to purchase price of $5,288,000 and the $7,400,000 payment Windsor ultimately made to a third-party purchaser of the Loan, WM Capital Partners 66, LLC ("WM"). Upon information and belief, CWCAM sold the Loan to WM at what Windsor believes was effectively less than the amount of the Offer accepted by Windsor. Windsor also asserted it would be inequitable for Below Defendants to enjoy windfall financial benefits resulting from the sale to WM Capital for $5,750,000 ("net of any buyer's premium") ten months later, after refusing to sell the Loan to Windsor for the agreed-to price of $5,288,000 because the credit committee arbitrarily rejected the Offer.

Below Defendants filed a Motion to Dismiss (the "Motion"). On June 28, 2019, the Superior Court heard oral argument on the Motion and took the matter under advisement. On September 27, 2019, the Court issued its decision granting the Motion (the "Opinion").[3]

The Court concluded the "General Release"[4] included in the "RealINSIGHT Marketplace Auction Sale Terms and Conditions/Bidder Confidentiality" ("Auction T&C")[5] for the online auction (the "Auction") barred Windsor's claims. First, Windsor submits that conclusion did not consider the Affidavit of Robert Stella in support of Plaintiff's Answering Brief in Opposition to Defendants' Motion to Dismiss ("Stella's Affidavit") [D.I. 41][6], which reflects Stella did not "click-through" the Auction T&C to bid, and therefore there was no knowing and intelligent waiver of the right to pursue its claims before the lower Court. Also, Below Defendants' argument raised factual issues not contained in the Amended Complaint. At the motion to dismiss stage, Below Defendants did not refute Stella's Affidavit reflecting he had not been required to accept the Auction T&C before bidding. Second, even assuming *arguendo* Below Defendants had refuted Stella's Affidavit and established Stella did click-through prior to bidding, the

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[3] [Certified Docket Index ("D.I.") 44], Attached per Supreme Court Rule 14(b)(vii).
[4] The Superior Court incorporated this defined term in the Opinion ("Op.") at 4.
[5] Exhibit A.
[6] Exhibit B.

Auction T&C were incomplete, and therefore, do not preclude Windsor's claims against Below Defendants because the General Release was not "knowingly and intelligently" executed.

And, CWCAM contemporaneously provided another release related to the potential purchase of the Loan at auction – which required Windsor and each Loan guarantor to sign if the Loan were purchased (the "Purchase Release").[7] Unlike the General Release, the Purchase Release was comprehensive, definitive, and specifically-tailored to cover the Proposed Transaction. CWCAM would not have prepared and required the execution of the Purchase Release if it believed the generic Auction T&C release included the Proposed Transaction. These conflicting releases, at the very least, created factual and legal issues, which should have precluded granting Below Defendants' Motion.

The Superior Court also concluded the Amended Complaint failed to state claims for unjust enrichment and promissory estoppel. Respectfully, the Opinion did not take into consideration: (1) Below Defendants' preemptive, arbitrary and capricious conduct, (2) the fact Windsor materially changed its position and satisfied all of its pre-closing obligations based on Below Defendants' representations and conduct, and (3) Below Defendants' unjustly benefitted from their inequitable conduct. This appeal followed.

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[7] Exhibit B to Windsor's Answering Brief, also attached hereto as Exhibit C.

SUMMARY OF ARGUMENT

1. The Superior Court erred in granting CWCAM's Motion because the General Release contained in the Auction T&C does not preclude Windsor's claims. It was not a knowing and intelligent waiver, as evidenced both by Stella's Affidavit, which the Superior Court did not take into consideration, or reference, in the Opinion, and the language of the General Release itself.
2. If the Auction T&C included a comprehensive release inclusive of all claims related to the Proposed Transaction, CWCAM would not have provided the separate Purchase Release to Windsor, which was comprehensive and specifically tailored to cover the Proposed Transaction.
3. The Superior Court erred in concluding the Amended Complaint did not state a claim for Unjust Enrichment. Equity should not permit Below Defendants to avoid performing after Windsor satisfied all of its obligations to the benefit of Below Defendants, if the credit committee's decision to renege was not made in good faith. Windsor reasonably relied on Below Defendants' promise to sell the Loan if the conditions were met, and took action to its detriment.
4. The Superior Court erred in concluding the Amended Complaint did not state a claim for Promissory Estoppel – (1) Below Defendants promised to sell the Loan to Windsor for $5,288,000 subject to certain conditions that

Windsor met, coupled with "credit committee" approval; (2) it was the reasonable expectation of Below Defendants to induce action or forbearance on the part of Windsor; (3) Windsor reasonably relied on the promise and took action to its detriment; and (4) Below Defendants' promise is binding because injustice can be avoided only by enforcement. Below Defendants unjustly benefitted from their conduct to the detriment of Windsor.

5. Granting Below Defendants' Motion preventing Windsor from recovering constitutes an inequitable outcome in light of their pattern of misconduct related to the Loan.

STATEMENT OF FACTS[8]

Windsor refinances its property.

1. Windsor is the owner of the property located at 2201 Farrand Drive, Wilmington, Delaware (the "Property").[9]

2. Best Buy was the sole tenant of the Property for approximately 20 years.[10]

3. Windsor learned that Best Buy would not be renewing its lease and sought new tenants for its Property. Windsor was initially unable to secure tenants.[11]

4. Faced with the prospect of no tenants and no rent, Windsor sought to restructure its loan and contacted the lender, CWCapital, LLC ("CWC"), to request special servicing for that purpose.[12] The request was accepted, which ultimately resulted in an agreement to negotiate being executed (the "PNA").[13]

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[8] The relevant facts are drawn or summarized from the Amended Complaint with exhibits ("Am. Compl."), [D.I. 1], as supported by Stella's Affidavit.

[9] Am. Compl. ¶13.

[10] *Id.* at ¶14.

[11] *Id.* at ¶14, 22-24. Approximately two-years later, Windsor was able to secure two tenants – Planet Fitness and Aldi – but only after committing to substantial expenditures to bifurcate and improve the Property. *Id.* at ¶24, n. 2. The leases were subject to land use approval and were not finalized until several months later. *Id.*

[12] *Id.* at ¶¶25-27.

[13] *Id.* at ¶¶32-33. Below Defendants referred to this agreement to negotiate as the "PNA." Windsor incorporates that abbreviation for purposes of continuity.

Windsor accepts CWCAM's proposal to sell the Loan for $5,288,000, and satisfies all of CWCAM's pre-closing conditions, but CWCAM subsequently reneges, claiming without any explanation the credit committee did not approve Windsor's purchase of the Loan.

5. Following execution of the PNA, CWCAM did not negotiate with Windsor; and in December 2016, Windsor filed a complaint in the Court of Chancery for the sole purpose of requiring CWCAM to negotiate under the PNA.[14]

6. At oral argument on CWCAM's Motion, CWCAM acknowledged its position the PNA was terminated[15]:

> We [CWCAM] did on a certain level deem the filing of litigation against CWCapital to be effectively and practically a Notice of Termination by the borrower, but there isn't any reason why -- there is nothing irrevocable preventing the borrower and CWCapital to have additional discussions should they all choose to.

7. After briefing and oral argument, the Court of Chancery granted CWCAM's motion, determining the PNA did not obligate CWCAM to *negotiate* in good faith.[16]

8. During this period, on April 26, 2017, CWCAM presented the Proposed Transaction (the Offer) – an all-in amount of $5,288,000 to sell the Loan – which Windsor promptly accepted.[17]

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[14] *Id.* at ¶¶35-37.
[15] *Id.* at ¶39.
[16] *Id.* at ¶¶40, 40, n. 3. Windsor appealed to the Supreme Court. After full appellate briefing, oral argument was requested. Windsor ultimately dismissed the appeal as a result of subsequent developments relating to CWCAM's sale of the Loan. The parties filed a stipulation of dismissal, which was approved.

9. The Offer, included specific conditions: "subject to credit committee approval, adequate proof of the borrower's ability to fund, execution of appropriate documentation and closing by May 30."[18]

10. Upon information and belief, CWCAM's authorized representative had already approved the Offer, including the requirements the transaction close within an approximately 30-day window, and Windsor provide immediate proof of its ability to close within that timeframe.[19]

11. Windsor agreed to CWCAM's conditions to close by May 30th and to provide (and did provide) a commitment letter from its lender.[20]

12. Based on customary, commercial lending practices, CWCAM's expressed, urgent need for the loan commitment coupled with the short-term closing requirement, such approval initially appeared to be a formality.[21]

13. In all events, based on the designation of "credit committee approval," Windsor reasonably believed any review by the credit committee would be substantive and analytical.[22]

14. The sequence of required performance of the terms of the Offer is important. The Offer did not require "credit committee approval" *before* Windsor

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[17] *Id.* at ¶43. As noted *supra*, FCS would be the purchaser.
[18] *Id.* at ¶44.
[19] *Id.* at ¶45.
[20] Am. Cmpl. at 46.
[21] *Id.* at ¶47.
[22] *Id.* at ¶48.

would need to provide a commitment letter from the lender and "appropriate documentation;" nor would it be possible to do so and still close within the required window (by May 30th – approximately one month from the date Windsor accepted the Offer). And, given the contentious history between the parties, Windsor did not believe it had any option other than to accept the terms as CWCAM proposed; particularly since, based upon the context of the negotiations, it appeared credit committee approval would be forthcoming.[23]

15. The Offer did not track any of the specific requirements contained in the PNA. In fact, the Offer made no reference to the PNA, nor did the Offer follow the procedures required by the PNA, *e.g.*, a letter of intent, approval by "senior management," and receipt of an "Authorization Notice."[24]

16. And, the transaction could not have reasonably been completed within 30 days if the procedures enumerated in the PNA were required to be followed.[25]

17. CWCAM did not reference or adhere to the PNA because it was already terminated.[26]

18. Consequently, Windsor reasonably relied on the Offer and immediately arranged for the components required by CWCAM.[27]

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[23] *Id.* at ¶49.
[24] *Id.* at ¶50.
[25] *Id.* at ¶51.
[26] *Id.* at ¶52.
[27] *Id.* at ¶53.

19. Windsor had a loan acquisition agreement drafted, coordinated with its proposed lender and potential tenants for the Property.[28]

20. Three weeks after the parties had agreed, CWCAM notified Windsor the credit committee rejected the Proposed Transaction.[29]

21. No explanation for the credit committee's purported rejection was provided, nor did CWCAM pursue an increased purchase price, which would be expected based on industry practice if CWCAM was in fact seeking to generate the "highest and best" recovery for the Investors.[30]

22. Upon information and belief, the decision to reject the Proposed Transaction was not reasonable, but, in fact, arbitrary and capricious, particularly since CWCAM offered no explanation for the "credit committee rejection."[31]

23. Under exigent circumstances, Windsor agreed to all of CWCAM's terms, secured the loan commitment from its lender, prepared necessary documentation to meet the 30-day settlement requirement, including the draft loan acquisition agreement provided to CWCAM's counsel.[32]

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[28] *Id.* at ¶54.
[29] *Id.* at ¶55.
[30] *Id.* at ¶56.
[31] *Id.* at ¶57.
[32] *Id.* at ¶60.

24. Windsor was ready, willing, and able to close on the Loan, which it communicated to CWCAM.[33]

25. Then, without any explanation – reasonable or unreasonable – its counsel was advised the credit committee had rejected the Proposed Transaction.[34]

26. CWCAM's subsequent, arbitrary rejection potentially impaired Windsor/FCS's credibility with their proposed lender, and potentially limited Windsor/FCS's future financial transactions with the lender. Windsor also spent a significant amount of money to meet the conditions required by CWCAM to close.[35]

27. Below Defendants' failure to provide any substantive explanation for the credit committee's rejection creates a presumption the decision was arbitrary and capricious and not made in good faith.[36] Moreover, they failed to provide a single document – attached to their pleadings or in response to Windsor's targeted discovery requests – relating to the credit committee's purported decision not to proceed with the sale of the Loan to Windsor. The failure to put forth any evidence – affirmatively or defensively – further supports Windsor's position Below Defendants did not act in good faith.

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[33] *Id.* at ¶61.
[34] *Id.* at ¶59
[35] *Id.* at ¶62.
[36] *Id.* at ¶64.

CWCAM's foreclosure action against Windsor.

28. In 2017, CWCAM, on behalf of U.S. Bank (the then-current note-holder), filed a foreclosure action against Windsor (N17L-08-156 ALR). Windsor denied the breach of contract allegations and challenged the amounts purportedly owed under the Loan documents.[37]

29. On December 1, 2017, CWCAM filed a second action in Delaware District Court naming Windsor's guarantors as defendants.[38]

30. While Windsor's discovery requests related to CWCAM's credit committee's refusal to close were pending, CWCAM moved for summary judgment. CWCAM also moved for summary judgment in District Court – after Windsor's guarantors filed a motion to dismiss and before filing an Answer or having the opportunity to propound discovery.[39]

31. On February 15, 2018, the Court stayed briefing on summary judgment, stayed discovery, and ordered the parties to participate in mandatory Alternative Dispute Resolution ("ADR").[40]

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[37] *Id.* at ¶65.
[38] *Id.* at ¶70.
[39] *Id.* at ¶72.
[40] *Id.* at ¶73.

Prior to the ADR, CWCAM initiated preliminary discussions with Windsor about Windsor buying the Loan.

32. Prior to the mediation, CWCAM's Senior V.P. David Smith (Smith") contacted Stella and inquired whether Windsor would be willing to increase the previously agreed-upon amount of $5,288,000 to purchase the Loan.[41]

33. Stella indicated Windsor might be willing to pay closer to $5,500,000.[42] Ultimately, Smith responded CWCAM wanted more, noting CWCAM's duty to obtain the highest and best purchase price for Investors.[43]

34. Smith further stated an auction was the only way CWCAM could justify to Investors CWCAM was creating a market for the asset to generate the highest and best price.[44]

35. Stella responded an auction would not be Windsor's preference, but it would participate in a fair auction with full disclosure to third-party bidders of the outstanding controversies between Windsor and its lender.[45]

36. Smith further indicated the Loan sale/auction would require a ten-day close. Smith asked if the terms were acceptable to Stella and told him he

[41] *Id.* at ¶74.
[42] *Id.* at ¶46.
[43] *Id.* at ¶75.
[44] *Id.* at ¶76.
[45] *Id.* at ¶77.

understood it was likely Windsor, or a related entity, would be the buyer at auction.[46]

37. On February 13th, the Auction began, and FCS participated.[47]

38. Stella, the authorized representative of FCS, registered for the auction, but consistent with his affidavit, was not required to review and accept a "Bidder Registration Certification" window containing the Auction T&C before being able to participate in the Auction, as Below Defendants contend.[48]

39. According to Stella's recollection of that process, he did register for the Auction and received a copy of the terms and conditions applicable to users of the auction platform *website* ("Website User T&C"), which he accepted.[49] At the end of that document, the date and Stella's electronic signature appear:

- Signature : Bob STELLA
- Date: 01-30-2018

40. This document, however, does *not* include the Auction T&C that Below Defendants reference in the Reply, nor that the trial Court indicated Stella had agreed to. *Cf.* Auction T&C. As reflected in Stella's Affidavit, his records

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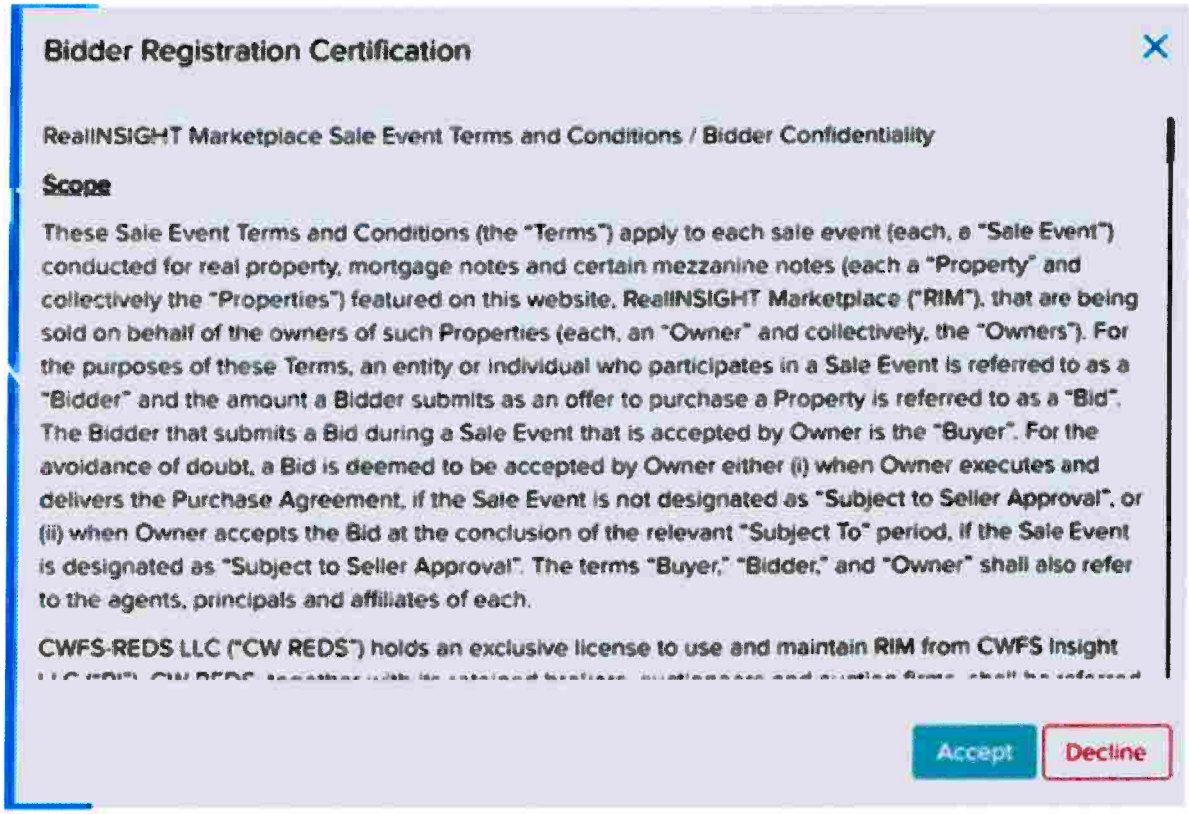
[46] *Id.* at ¶80.
[47] *Id.* at ¶85.
[48] *See generally* Stella's Affidavit; *see also* Below Defendants' Reply ("Reply") [D.I. 39] at 5 and accompanying Affidavit of Victor Gutierrez at ¶¶4-5.
[49] *See* Exhibit D; *see also* Stella's Affidavit at ¶5.

also do not reflect (nor did he recall), ever being presented with the referenced Bidder Registration Certification on which Below Defendants rely:


Bidder Registration Certification

RealINSIGHT Marketplace Sale Event Terms and Conditions / Bidder Confidentiality

Scope

These Sale Event Terms and Conditions (the "Terms") apply to each sale event (each, a "Sale Event") conducted for real property, mortgage notes and certain mezzanine notes (each a "Property" and collectively the "Properties") featured on this website, RealINSIGHT Marketplace ("RIM"), that are being sold on behalf of the owners of such Properties (each, an "Owner" and collectively, the "Owners"). For the purposes of these Terms, an entity or individual who participates in a Sale Event is referred to as a "Bidder" and the amount a Bidder submits as an offer to purchase a Property is referred to as a "Bid". The Bidder that submits a Bid during a Sale Event that is accepted by Owner is the "Buyer". For the avoidance of doubt, a Bid is deemed to be accepted by Owner either (i) when Owner executes and delivers the Purchase Agreement, if the Sale Event is not designated as "Subject to Seller Approval", or (ii) when Owner accepts the Bid at the conclusion of the relevant "Subject To" period, if the Sale Event is designated as "Subject to Seller Approval". The terms "Buyer," "Bidder," and "Owner" shall also refer to the agents, principals and affiliates of each.

CWFS-REDS LLC ("CW REDS") holds an exclusive license to use and maintain RIM from CWFS Insight

Accept Decline

– or being required to accept the Auction T&C – prior to FCS participating in the Auction.[50]

41. After Stella received approval from the Auction operator, his password was then activated to participate, and his recollection is that he was able to enter the Auction portal and bid without any additional steps.[51]

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[50] *Id.* at ¶6. In all events, a side-by-side comparison of the Website User T&C with the Auction T&C makes clear they are not the same document and include significantly dissimilar language.

[51] *Id.* at ¶7.

42. As stated in Stella's Affidavit, "8. I believe the process employed for my participation in the Auction was different than that of the 'typical' prospective bidder as described in the Reply. 9. I was not allowed to have access to the Auction's 'document room,' which I understood to be available to other bidders who were not in litigation with CWCapital Asset Management LLC like Windsor was. 10. Because I was not permitted to access the due diligence documents otherwise available to bidders after they clicked-through the Bidder Registration Certification and RealINSIGHT Marketplace Auction Sale Terms and Conditions/Bidder Confidentiality referenced in the Reply; my access to the Auction was enabled by a different procedure, which did not include reviewing and accepting the Bidder Registration Certification and RealINSIGHT Marketplace Auction Sale Terms and Conditions/Bidder Confidentiality."

43. Stella acknowledges he accepted the terms and condition for using the RealINSIGHT *website* and received a copy of that electronically-signed document.[52]

44. However, Stella's records do not reflect receiving an electronically-signed copy of the Auction T&C, which Below Defendants claimed he had to accept to participate in the Auction.[53] Stella's further understanding was the

[52] *See supra.*
[53] *Id.* at ¶12.

document Below Defendants claim he had to accept related only to bidders who had access to the "document room," which he did not have.[54]

45. As part of the auction process, a separate release was forwarded contemporaneously to Windsor – the Purchase Release. Unlike the General Release, the Purchase Release was comprehensive, definitive, and specifically tailored to cover the Proposed Transaction.[55]

46. CWCAM would not have prepared and required the execution of the Purchase Release if it believed the generic Auction T&C release included the Proposed Transaction.

47. FCS suspected manipulation of the bidding process and tested the bona fides of the unorthodox procedure by continuing to bid up to $6,200,000 for the Loan.[56]

48. When the auction closed, FCS was not the high bidder.[57]

49. Almost immediately after the auction closed, Stella received a call from a representative of CWCAM concerning the auction.[58]

50. The representative indicated the anonymous high bidder had elected not to proceed with purchasing Windsor's Loan.[59]

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[54] *Id.*
[55] *See* Exhibit C.
[56] Am. Cmpl. at ¶88.
[57] *Id.* at ¶89.
[58] *Id.* at ¶90.

51. The representative then inquired if FCS would purchase the Loan for $6,200,000, plus a 5% auction fee.[60]

52. The auction fee would be paid to an affiliated company of CWCAM.[61]

53. In light of what it considered to be an artificial, manipulated procedure employed by CWCAM, FCS was not comfortable with this post-auction proposal.[62]

54. FCS did make a series of counteroffers, which CWCAM rejected.[63]

During the mediation, CWCAM sells the Loan to a third-party.

55. On February 26, 2018, CWCAM requested postponement of the scheduled mediation because it was "actively engaged in discussions to sell the Defendant's mortgage loan."[64] On February 27th, the Court denied CWCAM's request and ordered the parties to negotiate in good faith: "This matter shall be submitted to mediation within the deadline previously set by the Court, *i.e.*, no later than March 15, 2018. . . . *The parties shall negotiate in good faith and make reasonable efforts to resolve the dispute.*"[65]

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[59] *Id.* at ¶91.
[60] *Id.* at ¶92.
[61] *Id.* at ¶93.
[62] *Id.* at ¶94.
[63] *Id.* at ¶95.
[64] *Id.* at ¶96.
[65] *See* February 27, 2018 Order, Am. Cmpl. Exhibit H [D.I. 31] (*emphasis added*).

56. Both CWCAM and Windsor were parties to the Court's Order and bound by its terms.[66]

57. Windsor's principals came to the mediation prepared to purchase the Loan.[67]

58. While under the Court's Order to negotiate in good faith during the mediation, CWCAM sold the Loan to a third-party, WM – on the same day the parties first met to mediate, March 7, 2018.[68]

59. In order to finalize the sale to WM on the same day as the mediation began, CWCAM negotiated the sale to WM prior to the mediation.[69]

60. Having already committed to selling the Loan to WM, CWCAM began the mediation knowing it could not, and would not, sell the Loan to Windsor under any circumstances.[70]

61. Upon information and belief, CWCAM sold the Loan to WM at what Windsor believes was effectively less than the amount of the Offer accepted by Windsor. And CWCAM materially benefitted from the rejection of the Proposed Transaction and the use of the Auction process.[71]

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[66] Am. Cmpl. at ¶97.
[67] *Id.* at ¶98.
[68] *Id.* at ¶99.
[69] *Id.* at ¶100.
[70] *Id.* at ¶101.
[71] *Id.* at ¶102. Subsequent to the filing of the initial Complaint, Defendants represented in an affidavit from James P. Shevlin ("Shevlin's Affidavit"),

62. If CWCAM, as agent for U.S. Bank, had acted in good faith with Windsor, it would have sought the "highest and best" recovery for Investors.[72]

63. Upon information and belief, CWCAM sold the Loan to WM for effectively less than it knew Windsor was willing to pay, and CWCAM's affiliate received a commission from that sale.[73]

64. Upon information and belief, Investors were not aware CWCAM sold the Loan to WM resulting in a net return to Investors less than they would have received based on the amount Windsor agreed to pay ten months prior to the transaction.[74]

65. In all events, the basis for the credit committee's purported rejection of the May 2017 Offer, rather than the details of the subsequent sale to WM ten months later, is the determining factor in assessing Windsor's claim in this matter.

CWCAM's President/COO, the "final sale price of the Loan to WM Capital" on March 7, 2018 was $5,750,000 ... "net of any 'buyer's premium.'" Ex. A to ReplyBrief in Support of Defendants' Motion to Dismiss [D.I. 20]. Upon information and belief, that sale price was effectively *less* than the purchase price in the Offer accepted by Windsor because the Loan continued for 10 additional months during which time accelerated default interest, and penalties accrued in an amount well exceeding the $462,000 difference between Windsor's intended purchase price ($5,288,000) and WM's price of $5,750,000. The affidavit was also silent as to the increased fees CWCAM generated as a result of the nearly year-long delay from the time it refused to consummate the Proposed Transaction and the amount of "buyer's premium" it obtained.

[72] *Id.* at ¶103.

[73] *Id.* at ¶102.

[74] *Id.* at ¶106.

Nevertheless, the circumstances of the sale to WM may be relevant in determining the intent of CWCAM at the time it rejected the Proposed Transaction.[75]

66. The fundamental issue is whether CWCAM acted arbitrarily and capriciously when it rejected the Proposed Transaction in May 2017.[76]

67. Below Defendants' failure to provide any substantive explanation for the credit committee's rejection creates a presumption the decision was arbitrary and capricious and not made in good faith.[77]

68. At the time of the mediation, the sale price to WM was not known.[78]

69. As originally interpreted by Stella, the April 1, 2018 Trepp Report Loan Detail, ("Trepp") – an analytical report of the Loan, which upon information and belief, is based on information CWCAM provides to Investors on a monthly basis – reflected the net sale price of the Loan.[79]

70. In light of Shevlin's Affidavit, Trepp may, in fact, be reflective of the net proceeds to Investors, rather than net sales price.[80]

71. Shevlin's Affidavit states the "final sale price of the Loan to WM Capital" on March 7, 2018 was $5,750,000 … "net of any 'buyer's premium.'"[81]

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[75] *Id.* at ¶107.
[76] *Id.* at ¶108.
[77] *Id.* at ¶109.
[78] *Id.* at ¶110.
[79] *Id.* at ¶112.
[80] *See* Trepp at 1, Am. Cmpl. Exhibit K; *see also* Shevlin's Affidavit generally, and December 18, 2018 Affidavit of Robert Stella, Exhibit A to Amended Complaint at ¶73, also attached hereto as Exhibit E.

72. Upon information and belief, the referenced "final sale price of the Loan to WM Capital" does not reflect the intricacies of that sale, nor does the affidavit reflect whether CWCAM's sale to WM generated the highest and best recovery for Investors, even though that was the purported motivation.[82]

73. According to Trepp, the principal balance due before the sale of the Loan to WM (identified as "Balance Before Disposition") was $6,030,333, and the "Loss Amount" was $1,686,647.[83]

74. Upon information and belief, the difference between the Balance Before Disposition and the Loss Amount ($6,030,333 – $1,686,247) was the net amount paid to Investors.[84]

75. Fees and costs were estimated to be approximately $256,000.[85]

76. Following the sale of the Loan, in order to stop default interest, hyper-interest, and penalties from further accruing, Windsor had no realistic option other than to pay-off the Note at a premium price.[86]

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[81] *Id.* at ¶114.
[82] *Id.* at ¶115.
[83] Trepp at 1. *See also id.* at ¶116. The balance before disposition is understood to be the principal balance remaining and does not include interest, hyper-interest, and penalties. Stella ¶73. Further discovery will help determine the precise composition and all-in sale price – including fees to CWCAM and/or U.S. Bank – of WM's purchase of the Loan and net amount paid to Investors. Windsor's previous discovery attempts to determine the precise fees collected by Below Defendants and/or their affiliates were not answered substantively.
[84] *Id.* at ¶117.
[85] *Id.* at ¶118.

77. Windsor's payoff to WM on March 27, 2018 for the Note was $7,400,000 ("Payoff Amount").[87]

78. The Payoff Amount was approximately $2,112,000 more than the original amount CWCAM agreed to sell the Note to Windsor for, pursuant to the Proposed Transaction.[88]

79. But for the credit committee's arbitrary and capricious rejection of the Proposed Transaction, Windsor would have purchased the Note and related Loan documents nearly a year earlier for more than $2,112,000 less than it paid to WM.[89]

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[86] *Id.* at ¶119.
[87] *Id.* at ¶120. In combination with the payoff to WM, CWCAM's Superior Court and District Court actions were dismissed by stipulation, as was Windsor's appeal of the Chancery decision.
[88] *Id.* at ¶121.
[89] *Id.* at ¶122.

ARGUMENT

Questions Presented

1. Whether the Superior Court erred in granting the Motion because the General Release did not preclude Windsor's claims – it was not a knowing and intelligent waiver, as evidenced by Stella's Affidavit, which the Superior Court did not take into consideration, or reference, in its September 27, 2019 decision. Windsor preserved this question in its Answering Brief below [D.I. 38] at 21-25 and as reflected in Stella's Affidavit at 2-5; *see also* June 28, 2019 Transcript of Oral Argument on Defendants' Motion to Dismiss Amended Complaint[90] [D.I. 49] ("Tr.") at 15, ¶¶15-23; 16, ¶¶1-6; 43-44.

2. Whether the Superior Court erred in granting the Motion because even if the General Release constituted a knowing and intelligent waiver (it did not), it did not include the Proposed Transaction and therefore, did not preclude Windsor's claims. Windsor preserved this question in its Answering Brief below at 21-25, as reflected in Stella's Affidavit at 2-5; *see also* Tr. at 52, ¶¶11-23.

3. Whether CWCAM would have provided the separate Purchase Release to Windsor, which was comprehensive, definitive, and specifically tailored to

[90] Copy of Transcript attached hereto as Exhibit F.

cover the Proposed Transaction, if the Auction T&C included a comprehensive release inclusive of all claims related to the Proposed Transaction.

4. Whether the Superior Court erred in concluding the Amended Complaint did not state a claim for Unjust Enrichment. Windsor preserved this question in its Answering Brief below at 33-36 and as reflected at Tr. at 56-69.

5. Whether the Superior Court erred in concluding the Amended Complaint did not state a claim for Promissory Estoppel. Windsor preserved this question in its Answering Brief below at 28-39 and as reflected at Tr. 56-69.

6. Whether granting the Motion, improperly preventing Windsor from recovering, constitutes an inequitable outcome in light of their pattern of misconduct related to the Loan. Windsor preserved this question in its Answering Brief below at 26, 30, 32, and 33-36 and as reflected at Tr. 56-69.

Scope of Review

This Court reviews *de novo* trial court rulings granting motions to dismiss.[91] The Supreme Court also reviews *de novo* a trial court's interpretation of written agreements.[92] When reviewing a ruling on a motion to dismiss, this Court: (1) accepts all well pleaded factual allegations as true, (2) accepts even vague allegations as "well pleaded" if they give the opposing party notice of the claim, (3) draws all reasonable inferences in favor of the non-moving party, and (4) does not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[93] "Indeed, it may, as a factual matter, ultimately prove impossible for the plaintiff to prove his claims at a later stage of a proceeding, but that is not the test to survive a motion to dismiss."[94] The governing pleading standard in Delaware to survive a motion to dismiss is reasonable "conceivability."[95]

> The appellate court reviews a trial court's grant of a motion to dismiss de novo. When reviewing a ruling on a motion to dismiss, it (1) accepts all well pleaded factual allegations as true, (2) accepts even vague allegations as well pleaded if they give the opposing party notice of the claim, (3) draws all reasonable inferences in favor of the non-moving party, and (4) does not affirm a dismissal

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[91] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).
[92] *Cent. Mortg. Co.*, 27 A.3d at 535.
[93] *Cent. Mortg. Co.*, 27 A.3d at 535.
[94] *Id.*
[95] *Id.* at 536-37.

unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[96]

[96] *RBC Capital Mkts., Ltd. Liab. Co. v. Educ. Loan Tr. IV*, 87 A.3d 632, 639 (Del. 2014).

Merits of Argument

The General Release was not a knowing and intelligent waiver, as evidenced by Stella's Affidavit, which the Superior Court did not take into consideration, or reference, in its September 27, 2019 decision.

The Superior Court incorrectly concluded the General Release "bars Windsor's claims even though Windsor's claims arise from the Proposed Transaction."[97] That decision was predicated on the conclusory statement "As a condition of bidding, Mr. Stella executed [the Auction T&C]."[98] But that conclusion did not take into account Stella's Affidavit, which attests he did not execute the Auction T&C prior to participating in the Auction.

The Court's decision did not consider – or even reference – Stella's Affidavit, which supports Windsor's well-pleaded contentions and refutes the conclusion Windsor "would not be entitled to recover under any reasonably conceivable set of circumstances."[99] In contrast, the Superior Court did reference the Shevlin Affidavit that Below Defendants incorporated in their Motion in support of the assertion Stella presumably did electronically-sign the Auction T&C.[100] But, if Below Defendants were certain Stella had entered the Auction T&C, why were they unable to provide the Court with the best evidence – a copy

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[97] Op. at 7.
[98] Op. at 4.
[99] *RBC*, 87 A.3d at 639.
[100] Op. at 5, n. 15.

of the electronically-signed Auction T&C? If one existed, presumably Below Defendants would have included it with the "supporting" affidavit.

The "reasonable inference" from Stella's Affidavit is that he did *not* provide the knowing and intelligent waiver upon which the trial court's decision relies:

> Because I was not permitted to access the due diligence documents otherwise available to bidders after they clicked-through the Bidder Registration Certification and RealINSIGHT Marketplace Auction Sale Terms and Conditions/Bidder Confidentiality [the "Auction T&C"] referenced in the Reply; my access to the Auction was enabled by a different procedure, which did not include reviewing and accepting the Auction T&C.
>
> As noted above, I accepted terms and conditions for using the RealINSIGHT website and received a copy of that electronically-signed document.
>
> My records do not reflect receiving an electronically-signed copy of the Auction T&C, which [Below] Defendants claim I had to accept to participate in the Auction. In fact, my understanding is that the document [Below] Defendants claim I had to accept relates only to bidders who had access to the "document room," which I did not have.[101]

At the very least, Windsor's factual assertions to the contrary should have militated against granting the Motion. In fact, the Superior Court acknowledged the "dueling affidavits" at oral argument[102] but overlooked Stella's Affidavit in its

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[101] Stella's Affidavit at ¶¶10-12.

[102] "I mean, you can make the argument as to why there is a release, but, clearly, the first question that hits the Court I have dueling affidavits in a 12(b). Should I

written decision. Because Delaware law requires all reasonable inferences to be drawn in favor of the non-moving party, Stella's Affidavit should have been included in the Superior Court's consideration of the Motion as part of Windsor's well-pleaded factual allegations. And, because the affidavit directly contradicts Below Defendants' contention on which the trial court based its decision, *i.e.*, the existence of a knowing and intelligent general waiver, an essential issue of fact remains in dispute, and the lower Court's decision should be reversed and remanded.[103]

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just deny the thing in the first instance, and let you guys go at it in discovery? Why should I be trying to determine who is right and who is wrong in dueling affidavits on a 12(b) motion?" Tr. at 15-16.

[103] *See Cent. Mortg. Co.*, 27 A.3d at 541.

Even assuming *arguendo* Stella had electronically signed the "General Release" to participate in the Auction as referenced in the Superior Court's decision, the waiver was ineffectual because it was not knowing and voluntary. In addition, the General Release was ambiguous, and at most, related only to claims arising from the Auction itself. A separate comprehensive release required by Below Defendants in the event FCS were the successful bidder at the Auction further indicates that the generic auction release did not contemplate waiver of claims related to the Proposed Transaction.

"'The standard for finding waiver in Delaware is quite exacting.' 'Waiver is the voluntary and intentional relinquishment of a known right . . . . It implies knowledge of all material facts and intent to waive.'"[104] "[B]ecause waiver is redolent of forfeiture, 'the facts relied upon to demonstrate waiver must be unequivocal.'"[105]

> It is well-settled that a party may waive her contractual rights; as our Supreme Court has explained, "[w]aiver is the voluntary and intentional relinquishment of a known right." Delaware Courts will find a waiver upon a showing "(1) that there is a requirement or condition capable of being waived, (2) that the waiving party knows of that requirement or condition, and (3) that the waiving party intends to waive that requirement or condition." Waiver involves "knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those contractual rights."[106]

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[104] *In re Mobilactive Media, LLC*, 2013 Del. Ch. LEXIS 26, at *39-40, n. 152 (Del. Ch. Jan. 25, 2013) (*internal citations omitted*)
[105] *Simon-Mills II, LLC v. Kan Am United States XVI Ltd. P'ship*, 2017 Del. Ch. LEXIS 50, at *100-01 (Del. Ch. Mar. 30, 2017).
[106] *Id.*

Here, Windsor (via its associated company, FCS) did not voluntarily and intentionally relinquish its claims against Below Defendants related to enforcement of the Proposed Transaction. As in *Simon-Mills II*, the underlying facts relied upon to demonstrate waiver are not unequivocal.[107]

This matter involved an online auction. Although the Superior Court concluded "Mr. Stella accepted the terms and conditions on behalf of FCS," and "had notice of the terms and conditions," its conclusion did not consider Stella's Affidavit evidencing the contrary. Even if Stella had been required to navigate through the Auction portal to bid online, a bidder would have to purposefully navigate away from the bid portal and the Auction T&C to review and agree to additional "terms and conditions posted on the Property's webpage at the time of the Bid" ("Property T&C"), which were incorporated by reference into the Auction T&C before placing an electronic bid for the Loan.[108]

The Property T&C do *not* appear on the bidder page or in the Auction T&C, nor is a hyperlink to them provided – they are merely *referenced* with no integrated mechanism for the bidder to review prior to agreeing to proceed with a bid. The structured difficulty in locating and reviewing the vaguely referenced Property T&C further demonstrate Stella was not presented with the complete terms and conditions, regardless of whether he had "accepted" the Auction T&C, and

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[107] *Id.*

[108] *See* Exhibit A at 1.

therefore, could not have constituted a knowing and voluntary waiver under either scenario.[109]

As in *Starke v. Squaretrade, Inc.*, Stella was not provided with the *complete* terms and conditions "in a clear and conspicuous way" prior to participating in the online auction, and therefore, did not have reasonable notice of the full terms and conditions on which Below Defendants rely.[110] "In the context of a web-based transaction, to determine whether the plaintiff had reasonable notice of the arbitration provision, courts must analyze whether the provision was provided in a clear and conspicuous way."[111]Here, by the very language of the Auction T&C on which Below Defendants rely, "the terms and conditions posted on the Property's webpage at the time of the Bid" did *not* appear on the portal to bid, were *not* conspicuous, *nor* were they *accessible* via hyperlink. "The reasonable notice standard has governed online contracts across jurisdictions since the early days of the internet, and the inquiry has always been context- and fact-specific."[112]

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[109] *See Anand v. Heath*, 2019 U.S. Dist. LEXIS 109076 (N.D. Ill. June 28, 2019).
[110] 913 F.3d 279 (2d Cir. 2019).
[111] *Id.* at 289. *See also Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014) ("Where the link to a website's terms of use is buried at the bottom of the page or tucked away in obscure corners of the website where users are unlikely to see it, courts have refused to enforce the [ ] agreement."); *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 23 (2d Cir. 2002) (refusing to enforce terms of use that "would have become visible to plaintiffs only if they had scrolled to the next screen.").
[112] *Bekele v. Lyft, Inc.*, 918 F.3d 181, 187 (1st Cir. 2019).

In *Anand*, the court concluded the online agreement – a "hybridwrap"[113] – was unenforceable "because nothing expressly linked the 'I understand and agree . . .' language to the 'Continue' button. There was no 'notice informing the user that, by clicking the button, the user [was] agreeing to' the terms and conditions."[114] Like Anand, Stella was not presented with an "I agree" box after being presented with a *complete* list of terms and conditions of use – inclusive of the Property T&C – and therefore, could not manifest assent. And, unlike Anand, who took the affirmative step of clicking the "Continue" button to proceed through the website to the at-issue survey, here Stella's Affidavit conflicts with Below Defendants' contention he, in fact, did click through to bid.

Here, "looking at the design and content of the relevant interface," Stella did not have reasonable notice, and the purported waiver was not made in a knowing and intelligent manner. With this important factual detail in conflict, the Superior Court should have denied the Motion.[115]

Moreover, a release must be "clear and unambiguous" to be effective. "In determining whether a release is ambiguous, the intent of the parties is controlling as to the scope and effect of the release. It must appear a plaintiff, or a reasonable

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[113] A "hybridwrap" online agreement typically prompts the user to manifest assent after merely presenting the user with a hyperlink to the terms and conditions, rather than displaying the terms themselves. 2019 U.S. Dist. LEXIS 109076, at *12.
[114] *Id.*
[115] *Simon-Mills II*, 2017 Del. Ch. LEXIS 50, at *100-01.

person in the place of the plaintiff, understood the terms of the release. A court determines the parties' intent from the overall language of the document."[116] Here, the General Release is not clear and unambiguous.[117] The phrase "inclusive of any and all claims of which bidder is currently unaware, regardless of whether such claims would affect bidder's release of CW REDA and/or RI" is fundamentally inconsistent with the concept of a knowing and intelligent waiver.

In that regard, Below Defendants claimed language in the Auction T&C constituted a waiver against CWCAM as an "affiliate" of CW REDS. Below Defendants did not disclose that relationship in the Auction T&C, and Windsor did

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[116] *Deuley v. DynCorp International, Inc.*, 8 A.3d 1156, 1163 (Del. 2010).

[117] EACH BIDDER RELEASES CW REDS, RI AND THEIR EMPLOYEES, AGENTS, AFFILIATES, DIRECTORS, AND SUBSIDIARIES ("REPRESENTATIVES") FROM ANY CLAIMS, WHETHER CURRENT OR FUTURE, AGAINST CW REDS, RI OR THEIR REPRESENTATIVES. THIS WAIVER IS INCLUSIVE OF ANY AND ALL CLAIMS OF WHICH BIDDER IS CURRENTLY UNAWARE, REGARDLESS OF WHETHER SUCH CLAIMS WOULD AFFECT BIDDER'S RELEASE OF CW REDS AND/OR RI.

EACH BIDDER WAIVES THE PROVISIONS OF CALIFORNIA CIVIL CODE SECTION 1542 (AND ANY OTHER SUBSTANTIALLY SIMILAR STATE STATUTES), WHICH PROVIDES: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

not voluntarily and intentionally waive its right to pursue claims unrelated to the Auction. Similarly, the referenced terms and conditions do not specify U.S. Bank, which had no involvement with the Auction, as a released party; and therefore, there can be no waiver as to claims against U.S. Bank, or CWCAM acting as U.S. Bank's servicer.

In addition, the Purchase Release[118] CWCAM forwarded to Windsor related to the potential purchase of the Loan at auction – which required Windsor and each Loan guarantor to sign if the Loan were purchased – was comprehensive and specifically tailored to cover a release related to the Proposed Transaction. CWCAM would not have prepared and required the execution of the Purchase Release if it believed the generic Auction T&C release already covered the Proposed Transaction. Here, the trifecta of: (1) Stella's Affidavit, (2) the ambiguous General Release, and (3) the conflict between the Auction T&C and the Purchase T&C shows the underlying facts relied upon to demonstrate waiver were not unequivocal, and the Motion should have been denied.

[118] *See* Exhibit C.

The Court incorrectly concluded the Amended Complaint failed to state claims for Unjust Enrichment and Promissory Estoppel because Below Defendants' inequitable conduct supports claims for both, and were properly pled in the Amended Complaint.

Below Defendants' questionable conduct also supported Windsor's claim for recovery under both unjust enrichment and promissory estoppel theories. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[119] To survive a motion to dismiss a claim for unjust enrichment, a plaintiff must allege: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law.[120] All of these elements were effectively pled. CWCAM clearly benefitted from its inequitable conduct. The Superior Court did not take into account Below Defendants' inequitable conduct in finding the Amended Complaint did not state a claim for unjust enrichment. Windsor reasonably relied on Defendants' promise to sell the Loan if the conditions were met, and took action to its detriment.

Below Defendants *retroactively* claimed they had concerns about prospective tenants for the Property at the time they extended the Offer to justify their failure to consummate the Proposed Transaction. In fact, Below Defendants

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[119] *1 Oak Private Equity Venture Capital Ltd. V. Twitter, Inc.*, 2015 Del. Super. LEXIS 978, at *36-37 (Nov. 20, 2015) (*internal citation omitted*)
[120] *Id.*

did not ask for prospective tenant information prior to, or at the time, the credit committee purportedly rejected the Proposed Transaction. Below Defendants completely ignored the fact they did not request tenant information until January 19, 2018 – nearly nine months *after* CWCAM extended the Offer and eight months after Below Defendants first notified Windsor the credit committee had refused to consummate the sale. At the very least, Below Defendants' revisionist explanation raised material issues of fact not in the Amended Complaint, and further suggests Below Defendants' unclean hands.

Furthermore, Below Defendants misconstrued Windsor's position with respect to CWCAM's duties to its bondholders; Windsor's claim was based upon CWCAM's lack of good faith in rejecting the Proposed Transaction, not whether it fulfilled its fiduciary obligation to bondholders. And, Below Defendants reliance on "business judgment" to defend the credit committee was misplaced. Business judgment does not justify decisions made in the absence of good faith; even if, as Below Defendants incorrectly stated, Windsor were challenging "governance of the Trust."[121] By invoking the business judgment standard, Below Defendants effectively acknowledge owing a duty to Windsor.

Windsor did not assert a claim on behalf of Investors in the Amended Complaint. CWCAM, by its own admission, had the duty to secure the highest and

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[121] *See Brehm v. Eisner* (*In re Walt Disney Co. Derivative Litig.*), 906 A.2d 27 (Del. 2006).

best return for its bondholders. However, if CWCAM did not discharge that responsibility and breached its fiduciary duty to Investors, these facts would constitute persuasive evidence that CWCAM acted arbitrarily and capriciously. CWCAM was agent for the trustee. The trustee had a fiduciary duty to Investors. That is the framework within which CWCAM, as agent for the trustee, should have acted. If the purported rejection by the credit committee had no reasonable, analytical connection with the obligation to obtain the highest and best return for Investors at the time the credit committee purportedly made its decision to reject the Proposed Transaction, that would be persuasive evidence of a bad faith rejection. The details of the subsequent sale to WM, while not dispositive, were relevant to whether CWCAM acted in good faith when it rejected the Proposed Transaction. The Superior Court should have considered this information, but did not, before concluding the Amended Complaint did not state a claim for unjust enrichment.

In addition, the Superior Court incorrectly stated that Windsor "does not argue that Windsor's claim meets the elements of promissory estoppel."[122] All of the necessary elements for a promissory estoppel claim were pled:

> "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment

[122] *Id.* at 22.

> has been made." A promise must be definite and certain. Under the doctrine of promissory estoppel, a plaintiff must prove by clear and convincing evidence that: "(1) a promise was made; (2) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (3) the promisee reasonably relied on the promise and took action to his detriment; and (4) such promise is binding because injustice can be avoided only by enforcement of the promise." [123]

Below Defendants promised to sell the Loan for $5,288,000 subject to certain conditions Windsor met, coupled with "credit committee" approval. "Credit committee" is a term commonly used in the lending industry (including CWCAM's use in this case) reflecting the premise to employ an orderly, analytical process after the initial agreement has already been authorized. Below Defendants attempted to excuse the arbitrary and capricious decision to reject the Proposed Transaction because it was "subject to credit committee approval." This ignored the requirement that the credit committee make such a decision in good faith.

"A 'desire to reach agreement' constitutes good faith bargaining," and conversely "a 'desire not to reach an agreement' is bad faith."[124] Merely going through the motions is not good faith.[125] Contrary to the Superior Court's finding, it *was* the reasonable expectation of Below Defendants to induce Windsor to

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[123] *1 Oak*, 2015 Del. Super. LEXIS 978, at *33.
[124] *Helferstay v. Creamer*, 473 A.2d 47, 53 (Md. Ct. Spec. App. 1984).
[125] *See AFGE v. Trump*, 2018 U.S. Dist. LEXIS 144592, at *117-18 (D. D.C. Aug. 25, 2018), *rev'd and vacated on other grounds by AFGE v. Trump*, 929 F.3d 748 (D.C. Cir. 2019).

action.[126] As plainly stated in the Amended Complaint, and supported by Stella's Affidavit:

> 47. Based on customary, commercial lending practices, and CWCAM's expressed, urgent need for the purchaser's loan commitment coupled with the short-term closing requirement, such approval initially appeared to be a formality.

1 Oak is directly on-point. Equity should not permit Below Defendants to avoid performing after Windsor satisfied all of its obligations to the benefit of Defendants, if the credit committee's decision to renege was not made in good faith. In fact, Defendants produced no documentary evidence of the existence of credit committee deliberations on whether to accept or reject the Proposed Transaction, even though the Offer was made based on a decision maker's authority on behalf of Below Defendants.

Windsor spent money, obtained lender approval, and implemented discussions with prospective tenants in reliance on the Offer it accepted – facts CWCAM had to know would occur immediately in order to comply with the 30-day closing requirement – in exchange for what it believed was CWCAM's promise to conduct itself in good faith and to sell the Loan to Windsor for $5,288,000 in accordance with the Proposed Transaction. Consequently, Windsor

[126] Op. at 23.

reasonably relied on the Offer and immediately arranged for the components of the transaction that CWCAM had required.

Promissory estoppel no longer functions solely as a substitute for contract principles. Although promissory estoppel is often invoked as a substitute for consideration or to avoid the statute of frauds, the principal question in Delaware promissory estoppel cases is 'whether injustice could be avoided only by enforcement of the promise.'"[127] "The prevention of injustice is the 'fundamental idea' underlying the doctrine of promissory estoppel."[128] Here, the elements of promissory estoppel are present and enforcing the terms of the Proposed Transaction would prevent the injustice referenced in *Grustein* and *Chrysler Corp.*

Further analogizing to contract law, "Where the performance of a contract depends upon the satisfaction by one party with the commercial performance of another, the party holding the power to determine whether or not performance is satisfactory must exercise that judgment in good faith."[129] This was not the case with the credit committee, and Below Defendants have consistently refused to provide the true motivation for the credit committee's purported rejection of the Proposed Transaction. Unlike the lender in *Int'l Minerals,* where, after extensive due diligence, bank officials ultimately determined they could no longer

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[127] *Grunstein v. Silva*, 2011 Del. Ch. LEXIS 12, at *37-38 (Del. Ch. Sept. 5, 2014).
[128] *Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1034 (Del. 2003).
[129] *Int'l Minerals & Mining Corp. v. Citicorp North America, Inc.*, 736 F. Supp. 587, 595, n. 7 (D. N.J. 1990).

recommend approval of a loan to the plaintiff; here there is no evidence of any such due diligence to approve, or disapprove, the Proposed Transaction.[130] In *Int'l Minerals*, the District Court wrote, "There can be no doubt that [the lender] fulfilled its duties under the agreement to reasonably investigate the proposed transaction."[131] That is not the case here. Unlike the lender in *Int'l Minerals*, here, there is no evidence that CWCAM, through its credit committee, made an earnest, well-informed decision to reject the Proposed Transaction.[132]

"A covenant of good faith and fair dealing is implied in every contract as a matter of law, absent an express disavowal. *Good faith between contracting parties requires one vested with contractual discretion to exercise it reasonably and not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.*"[133] The parallel concept should apply in the promissory estoppel/unjust enrichment context here.

Similarly, under the forthright negotiator principle, a court "considers the evidence of what one party subjectively 'believed the obligation to be, coupled with evidence that the other party knew or should have known of such belief. In other words, the forthright negotiator principle provides that, in cases where the

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[130] *See id.*
[131] *Id.* at 595.
[132] *See id.* at 595-96.
[133] *State Nat'l Bank v. Academia, Inc.*, 802 S.W.2d 282, 293 (Tex. App. 1990) (*emphasis added*)

extrinsic evidence does not lead to a single, commonly held understanding of a contract's meaning, a court may consider the subjective understanding of one party that has been objectively manifested and is known or should be known by the other party."[134]

Here, Below Defendants knew, or should have known, Windsor understood the credit committee's decision would be substantive and analytical, and that approval was expected; otherwise the Offer, as the culmination of a negotiating process, would not have been extended coupled with such a tight closing date (30 days). Both Below Defendants and Windsor anticipated approval and closing from the outset. If, in fact, CWCAM did not expect approval, its conduct is even more egregious.

Regardless, the credit committee's purported refusal to consummate the Proposed Transaction was arbitrary and capricious – a point Below Defendants did not even attempt to meaningfully refute in their briefing. Instead, they incorrectly argued the Amended Complaint did not state a claim for promissory estoppel or unjust enrichment, and Below Defendants' business judgment in rejecting the Proposed Transaction "is not an appropriate area of inquiry for Windsor or the Court." No substantive explanation for the credit committee's purported rejection was provided, nor did CWCAM pursue an increased purchase price from Windsor.

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[134] *United Rentals, Inc. v. Ram Holdings, Inc.*, 937 A.2d 810, 835-36 (Del. Ch. 2007).

While CWCAM may not have been obligated to make the Offer to Windsor after the PNA was terminated, it did.

In doing so, Below Defendants were required to conduct themselves in good faith (as was, and did, Windsor), and Windsor reasonably relied on the Offer and immediately arranged for the components of the transaction CWCAM had required.[135] This demonstrates why the Superior Court's conclusion Windsor "has not shown that it was the reasonable expectation of the Defendants to induce Windsor to action" was not correct.[136] Similarly, Windsor *has* shown that it "*reasonably* relied on Defendants' alleged promise to affirm the Acceptance."[137]

Also, the Superior Court found, "the terms of the PNA specifically state that the parties may not rely on the representations that the parties' make in their negotiations regarding the sale of the Loan. So, even if the Defendants had promised Windsor to sell Windsor the Loan, Windsor could not have relied on this promise."[138] However, as discussed *supra*, Below Defendants acknowledged the PNA was "dead" prior to the Proposed Transaction,[139] and the Superior Court's decision effectively supported that determination. Had it applied, why did Below Defendants not follow the strictures of the PNA? Why did the Proposed

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[135] *See Liquor Exch. Inc. v. Tsaganos*, 2004 Del. Ch. LEXIS 166, at *12 (Del. Ch. Nov. 16, 2004).
[136] *See* Op. at 23.
[137] *See id.* (*emphasis in original*).
[138] *Id.*
[139] *See also* Amended Complaint at ¶39; Tr. at 63.

Transaction make not a single reference to the PNA? Simply stated, the PNA did not control.

Windsor had a loan acquisition agreement drafted, coordinated with its proposed lender and potential tenants for the Property and spent money to comply with CWCAM's terms.[140] But as noted above, three weeks after the parties had agreed, CWCAM notified Windsor the credit committee rejected the Proposed Transaction. No explanation was provided, nor did CWCAM pursue an increased purchase price, which would be expected based on industry practice if CWCAM was, in fact, seeking to generate the "highest and best" recovery for Investors.

In any event, as pled, the arbitrary and capricious decision to reject the Proposed Transaction should permit recovery against Below Defendants – either under the theory of promissory estoppel or unjust enrichment – and Below Defendants' Motion should have been denied.

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[140] This, in and of itself, contradicts the Superior Court's conclusion "Windsor's sole argument is that the parties only allotted a thirty-day window for closing, so Windsor had to obtain funding from its lender to buy the Loan in order to meet the closing deadline. But, the fact that the credit committee had not approved the sale suggests that Windsor had no reason to believe it would obtain the Loan." Op. at 23.

CONCLUSION

The Superior Court's decision to grant Below Defendants' Motion was incorrect. The Court did not draw all reasonable inferences in favor of Windsor, which on the face of the Amended Complaint, reflect well-pleaded claims. The combination of: (1) Stella's Affidavit, (2) the ambiguous General Release, and (3) the conflict between the Auction T&C and the Purchase T&C shows the underlying facts relied upon to demonstrate waiver were not unequivocal, and the Motion should have been denied. And, Below Defendants' arbitrary and capricious decision to reject the Proposed Transaction constitutes a recoverable action. Applying the *de novo* standard that controls this appeal, the Superior Court's decision granting the Motion should be reversed.

Respectfully submitted,

MONZACK MERSKY MCLAUGHLIN AND BROWDER, P.A.

/s/ Michael C. Hochman
Melvyn I. Monzack (#137)
Michael C. Hochman (#4265)
1201 North Orange Street, Suite 400
Wilmington, DE 19801
(302) 656-8162
mmonzack@monlaw.com
mhochman@monlaw.com

Attorneys for Appellant, Below Plaintiff, Windsor I, LLC

March 6, 2020

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

WINDSOR I, LLC, Plaintiff, v. CWCAPITAL ASSET MANAGEMENT LLC, and U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR TO WELLS FARGO, N.A. AS TRUSTEE FOR THE REGISTERED HOLDERS OF COBALT CMBS COMMERCIAL MORTGAGE TRUST 2007-C2, COMMERCIAL MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2007-C2, Defendants.	)	C.A. No.: N18C-06-115 EMD CCLD

Submitted: June 28, 2019
Decided: September 27, 2019

Upon Defendants' Motion to Dismiss Amended Complaint
GRANTED

Melvyn I. Monzack, Esquire, Michael C. Hochman, Esquire, Monzack Mersky McLaughlin and Browder, P.A., Wilmington, Delaware *Attorneys for Plaintiff.*

Jamie L. Edmondson, Esquire, Daniel A. O'Brien, Esquire, Venable LLP, Wilmington, Delaware, Gregory A. Cross, Esquire, Brent W. Procida, Esquire, Venable LLP, Baltimore, Maryland *Attorneys for Defendants.*

DAVIS, J.

I. INTRODUCTION

This is an action for quasi-contractual relief assigned to the Complex Commercial Litigation Division of the Court. Plaintiff Windsor I, LLC ("Windsor") brings this action for promissory estoppel and unjust enrichment against Defendants CWCapital Asset Management LLC ("CWCAM") and U.S. Bank National Association as trustee for certain holders of certain certificates ("U.S. Bank" and collectively with CWCAM, the "Defendants"). The Defendants now move to dismiss the case (the "Motion"). For the reasons set forth below, the Court **GRANTS** the Motion.

II. BACKGROUND

A. FACTUAL BACKGROUND[1]

Windsor is a Delaware limited liability company[2] that owns a 48,000 sq. ft. plot of land and building located at 2201 Farrand Drive, Wilmington, Delaware (the "Property").[3] CWCAM is a Delaware limited liability company and is the special servicer for U.S. Bank.[4] CWCAM helps restructure distressed loans on behalf of investors who have purchased the loans.[5] U.S. Bank is a national banking association with its headquarters in Cincinnati, Ohio.[6]

On December 27, 2006, Windsor and CWCapital, LLC entered into a mortgage and security agreement for a principal amount of $7.4M (the "Loan") to refinance the debt on the Property.[7] Windsor also signed a promissory note (the "Note") for the benefit of CWCapital,

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[1] Unless otherwise indicated, the following are the facts as alleged in the Amended Complaint. For purposes of the Motion, the Court must view all well-pleaded facts alleged in the Complaint as true and in a light most favorable to WSFS. *See, e.g., Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).
[2] Am. Compl. ¶ 1.
[3] *Id.* ¶ 13.
[4] *Id.* ¶¶ 2-3.
[5] *Id.* ¶ 6.
[6] *Id.* ¶ 4.
[7] *Id.* ¶ 15.

LLC.[8] The Note was subsequently assigned from CWCapital, LLC to other banks and finally to U.S. Bank.[9]

Best Buy, the electronics store, was the sole tenant on the Property for around twenty years. In June 2015, Windsor learned that Best Buy would vacate the Property. Windsor sought to refinance its Loan as a result of its sole tenant vacating the Property. Windsor started working with CWCAM to refinance the Loan. On November 21, 2015, Windsor received a draft "pre-negotiation agreement" ("PNA") from David Smith, a Senior Vice President at CWCAM, discussing the terms under which the parties would negotiate.

On December 12, 2016, Windsor filed a Complaint for specific performance, injunctive, and other equitable relief in Chancery Court (the "Chancery Action").[10] In the Chancery Action, Windsor sought equitable relief to require CWCAM to negotiate with Windsor in good faith. On February 2, 2017, CWCAM filed a motion to dismiss the Chancery Action. The Chancery Court granted that motion to dismiss on July 31, 2017. In dismissing the action, the Chancery Court noted that the PNA did not impose an enforceable obligation to negotiate, stating "when read as a whole, the Pre-Negotiation Agreement is a document that simply establishes rules to govern any discussions that may take place. It does not obligate any party to negotiate or forbear from exercising remedies otherwise available."[11]

On April 26, 2017, CWCAM offered to sell the Loan to Windsor for $5,288,000 ("$5.3M") by email (the "Offer"). The Offer included the following conditions: "subject to credit committee approval, adequate proof of [Windsor]'s ability to fund, execution of appropriate documentation and closing by May 30." Windsor responded via email accepting the Offer (the

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[8] *Id.*
[9] *Id.* ¶ 17.
[10] *Windsor I, LLC v. CWCapital Asset Mgmt., LLC*, 12977-CB.
[11] *Windsor I, LLC v. CWCapital Asset Mgmt., LLC*, 2017 WL 3499919, at *3 (Del. Ch. July 31, 2017).

"Acceptance"). After accepting the Offer, Windsor drafted a loan acquisition agreement and coordinated with a lender to borrow the money to buy the Loan. Three weeks later, CWCAM notified Windsor that the credit committee had rejected the Acceptance. Windsor claims that the Offer and Acceptance created a valid contract (the "Proposed Transaction").

On August 28, 2017, CWCAM, on behalf of U.S. Bank, filed an action for foreclosure against Windsor in the Superior Court (the "Foreclosure Action").[12] CWCAM filed a second action in the Federal District Court for the District of Delaware naming Windsor's guarantors, Robert Stella, Constantine Michell, and Theodore Michell as defendants.[13] On February 15, 2018, the Superior Court stayed the Foreclosure Action and ordered the parties to participate in an alternative dispute resolution process by March 15, 2018.

Between February 13 and February 15, 2018, CWFS-REDS, LLC, an affiliate of CWCAM, held an online auction to sell the Loan. Robert Stella bid in the online auction on behalf of FCS Lending, LLC ("FCS"). Mr. Stella is an equity owner of Windsor. As a condition of bidding, Mr. Stella executed the "RealINSIGHT Marketplace Auction Sale Terms and Conditions/Bidder Confidentiality" (the "terms and conditions"). The terms and conditions contain the following release (the "General Release"):

> EACH BIDDER RELEASES CW REDS, RI AND THEIR EMPLOYEES, AGENTS, AFFILIATES, DIRECTORS, AND SUBSIDIARIES ("REPRESENTATIVES") FROM ANY CLAIMS, WHETHER CURRENT OR FUTURE, AGAINST CW REDS, RI OR THEIR REPRESENTATIVES. THIS WAIVER IS INCLUSIVE OF ANY AND ALL CLAIMS OF WHICH BIDDER IS CURRENTLY UNAWARE, REGARDLESS OF WHETHER SUCH CLAIMS WOULD AFFECT BIDDER'S RELEASE OF CW REDS AND/OR RI.[14]

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[12] N17L-08-156 ALR.
[13] 1:17-CV-01732 (MWB). This action was filed in federal court under the justification of diversity of parties' citizenship.
[14] Motion, Ex. 12, at 6.

In order to accept the terms and conditions, the bidder must scroll through the terms and conditions.

On March 7, 2018, CWCAM sold the Loan to a third-party, WM Capital Partners 66, LLC ("WM Capital"). In the Complaint, Windsor cites the *Trepp Report* issued on April 1, 2018, which estimated that CWCAM sold the Loan for $4.6M.[15] After the sale of the Loan, Windsor paid $7.4M to WM Capital in order to pay off the principal of the Loan and to avoid paying default interest and other penalties.

B. PROCEDURAL BACKGROUND

On June 15, 2018, Windsor filed the complaint (the "Complaint") against the Defendants for breach of contract. Windsor contended that the Defendants breached an alleged agreement when the creditors' committee refused to consummate the Proposed Transaction.

The Court held a hearing on December 3, 2018. At this hearing, the Court held that Windsor could not sustain its claims for breach of contract but may plead quasi-contractual claims. On December 12, 2018, the Court entered an order dismissing the Complaint without prejudice.

On December 21, 2018, Windsor filed an amended complaint (the "Amended Complaint"). The Amended Complaint has two counts. In Count I, Windsor alleges a claim for promissory estoppel. Windsor claims that CWCAM, as an agent for US Bank, promised to sell the Loan to Windsor. Windsor also contends that Windsor reasonably relied on CWCAM's promise to sell and suffered damages as a result of its reliance. In Count II, Windsor brings a claim for unjust enrichment. Windsor asserts that CWCAM gained an enrichment because it accrued ten months of servicing fees after CWCAM should have sold the Loan to Windsor and

[15] CWCAM provides that it sold the Loan for $5.75M and includes an affidavit from James Shelvin, the CEO of WM Capital affirming this number.

CWCAM's affiliate got a 5% auction fee. In addition, Windsor alleges that Windsor suffered an impoverishment because Windsor expended time, money and resources in order to timely comply with the closing requirements for the Proposed Transaction.

On February 1, 2019, the Defendants filed Defendants' Opening Brief in Support of Motion to Dismiss Amended Complaint (the "Motion"). On March 18, 2019, Windsor filed Plaintiff's Answering Brief in Opposition to Defendants' Motion to Dismiss (the "Opposition"). The Defendants filed Defendants' Reply Brief in Support of Motion to Dismiss Amended Complaint (the "Reply") on April 15, 2019. The Court held a hearing on the Motion on June 28, 2019. At the conclusion of the hearing, the Court took the matter under advisement. This is the Court's decision on the Motion.

III. STANDARD OF REVIEW

Upon a motion to dismiss, the Court (i) accepts all well-pleaded factual allegations as true, (ii) accepts even vague allegations as well-pleaded if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) only dismisses a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[16] However, the Court must "ignore conclusory allegations that lack specific supporting factual allegations."[17]

IV. DISCUSSION

A. WINDSOR'S CLAIMS ARE BARRED BY THE GENERAL RELEASE IN THE AUCTION

In the Motion, the Defendants argue that all of Windsor's claims are barred by the General Release contained in the terms and conditions for the online auction.

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[16] *See Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 227 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Academy*, No. 09C-09-136, 2010 WL 5825343, at *3 (Del. Super. Oct. 27, 2010).
[17] *Ramunno v. Crawley*, 705 A.2d 1029, 1034 (Del. 1998).

1. *The General Release Applies to this Case*

Delaware courts recognize the validity of general releases.[18] "It is settled law, in Delaware, that a release must be read as a whole with the intent derived from the entire agreement."[19] Where the language of the release is clear and unambiguous, it will only be set aside "where there is fraud, duress, coercion, or mutual mistake concerning the existence of the party's injuries."[20] The party seeking to nullify the release bears the burden of demonstrating by clear and convincing evidence that the release is invalid.[21]

Windsor makes a number of arguments against application of the General Release. First, Windsor contends that the terms and conditions do not bar Windsor's claims because Windsor's claims arise from the Proposed Transaction rather than the online auction. Second, Windsor asserts that the General Release does not protect U.S. Bank because the term "Representative" does not include U.S. Bank. Third, Windsor states that CWCAM forwarded a Purchase Release to Windsor after the Proposed Transaction that contained a general release.[22] Windsor contends that if CWCAM believed the General Release applied then CWCAM would not have prepared the Purchase Release. Fourth, Windsor argues that the release is not clear and unambiguous because the phrase "inclusive of any and all claims of which bidder is currently unaware, regardless of whether such claims would affect bidder's release of CW REDA and/or RI" is unintelligible.

The Court finds that the General Release bars Windsor's claims even though Windsor's claims arise from the Proposed Transaction. As drafted, the General Release is broad and

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[18] *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 2012 WL 1409013, at *6 (Del. Super. Apr. 4, 2012), *aff'd*, 55 A.3d 330 (Del. 2012).
[19] *See Junge v. Smyrna Rental & Repair, Inc.*, 1998 WL 960716, at *2 (Del. Super. June 2, 1998).
[20] *Edge of the Woods v. Wilmington Sav. Fund Soc'y, FSB*, 2001 WL 946521, at *4 (Del. Super. Apr. 16, 2001).
[21] *Id.*
[22] Windsor does not allege these facts in the Amended Complaint. Windsor presents the facts in its Opposition.

addresses current and future claims of the Bidder. This makes sense under the circumstances. Why would an auctioneer, seller or other entity engage in an auction with someone that would assert legal claims against them—whether current or future claims?

In *Geier v. Mozido, LLC*,[23] the Court of Chancery found that claims which arose before the execution of a general release were barred by the general release. In that case, the Court of Chancery reasoned that the plaintiff was aware of its claims at the time the parties signed the release, but the parties did not carve-out an exception to the general release for the plaintiff's claims. Here, as in *Geier*, Windsor was aware of its claims from the Proposed Transaction before the online auction. Windsor, however, did not carve-out an exception to the General Release for claims arising from the Proposed Transaction. As executed, the General Release bars Windsor's claims arising from the Proposed Transaction. The facts here are more compelling than in *Geier* given the related nature of the transactions—the Proposed Transaction and the online auction were both sales for the same underlying loan.

Moreover, Windsor and the Defendants fall within the definitions of who will be governed by the General Release. In the terms and conditions, "Bidder" is broadly defined as the bidding entity together with its "agents, principals and affiliates."[24] As per the terms and conditions, the Bidder releases "CW REDS, RI AND THEIR EMPLOYEES, AGENTS, AFFILIATES, DIRECTORS AND SUBSIDIARIES...."[25] In order to determine the meaning of the word "affiliate," the Court may look to the Merriam Webster dictionary of "affiliate." The definition includes "an affiliated person or organization," "being close in connection, allied,

[23] 2016 WL 5462437, at *7 (Del. Ch. Sept. 29, 2016).
[24] Motion, Ex. 12, at 6.
[25] Id.

associated, or attached as a member or branch," or "[s]omeone who controls, is controlled by, or under common control with an issuer of a security."[26]

Factually, Mr. Stella is an owner of Windsor and FCS. Mr. Stella accepted the terms and conditions on behalf of FCS, the bidding entity in the online auction. Windsor is considered a Bidder because Windsor and FCS are affiliated entities as a result of their common ownership. Neither party disputes that CWCAM is an affiliate of CWCS-REDS.

The Court holds that the General Release applies to and bars claims against U.S. Bank. CWCAM is the servicer of U.S. Bank. CWCAM is the agent of U.S. Bank. Windsor acknowledges this and alleges in the Amended Complaint that "[a]t all times relevant to this Complaint, CWCAM acted as the authorized agent of U.S. Bank, and its predecessor trusts."[27] In the Amended Complaint, Windsor only mentions U.S. Bank by stating that CWCAM is acting on behalf of U.S. Bank and alleges no separate action or conduct by U.S. Bank.

The Defendants rely upon *Anne Arundel Medical Center, Inc. v. Condon*[28] to contend that the General Release applies to U.S. Bank even though the term "principal" is not included in the defined term "representative." In *Condon*, the Maryland Court of Special Appeals released a principal from liability because the lower court had released the agent from liability. In releasing the principal, the *Condon* Court held that "[a]bsent independent wrongdoing by the principal, the release of an agent will also release the principal as a matter of law[,]" for, in that scenario, the release of the agent "removes the only basis for imputing liability to the

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[26] *See Geier v. Mozido, LLC*, 2016 WL 5462437, at *6 (Del. Ch. Sept. 29, 2016) (analyzing the dictionary definition of "affiliate" in order to determine its meaning in the context of a general release).
[27] Am. Compl. ¶ 12.
[28] 649 A.2d 1189, 102 Md. App. 408, 421 (Md. Spec. App. 1994) ("The release of an agent removes the only basis for imputing liability to the principal").

principal."[29] A later Maryland Court of Special Appeals decision, *Women First OB/GYN Associates, L.L.C. v. Harris*,[30] explained the rationale behind *Condon* as:

> Because common law agency principles dictate that the release of a claim against the employee discharges the employer's vicarious liability for the employee's wrongdoing, the plaintiff's release of her claim against the pathologist discharged her claim against the hospital, as a matter of law, irrespective of her intent. *See also Rivera*, 102 Md. App. at 466, 649 A.2d 1212 ("[T]he release of an agent automatically release[s] the principal" under the common law, which remains unchanged in Maryland.).[31]

In this case, the Court finds the reasoning set out in *Condon* to be persuasive. The Court has explored Delaware law and, while no case specifically addresses this situation, Delaware and Maryland similarly apply the common law of agency.[32] Moreover, Windsor has not alleged any independent basis to hold U.S. Bank liable other than U.S. Bank's involvement as CWCAM's principal. The release of CWCAM under the General Release therefore automatically released U.S. Bank because it removed the only basis for imputing liability to U.S. Bank.

The existence of the Purchase Release does not affect the Court's decision that the General Release acts as a bar to Windsor's claims against CWCAM and U.S. Bank. The fact that CWCAM prepared the Purchase Release with a general release does not mean that the terms and conditions do not contain a valid general release. Because Mr. Stella acted through FCS, CWCAM likely did not know that this participation would bar Windsor's claims until sued.

Importantly, the Court finds that the General Release is clear and unambiguous. The terms of the General Release clearly state that the parties agree to disclaim liability for claims of which they are unaware. As presented, the General Release states, in all caps, that:

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[29] *Id.*
[30] 161 A.3d 28, 232 Md. App. 647 (Md. Spec. App. 2017).
[31] Id. at 661.
[32] *See, e.g., Clark v. Brooks*, 377 A.2d 365, 373-74 (Del. Super. 1977)(discussing common law principles of agency and the Restatement of Agency).

> EACH BIDDER RELEASES CW REDS, RI AND THEIR EMPLOYEES, AGENTS, AFFILIATES, DIRECTORS, AND SUBSIDIARIES ("REPRESENTATIVES") FROM *ANY CLAIMS, WHETHER CURRENT OR FUTURE*, AGAINST CW REDS, RI OR THEIR REPRESENTATIVES. THIS WAIVER IS INCLUSIVE OF *ANY AND ALL CLAIMS OF WHICH BIDDER IS CURRENTLY UNAWARE,* REGARDLESS OF WHETHER SUCH CLAIMS WOULD AFFECT BIDDER'S RELEASE OF CW REDS AND/OR RI. (emphasis added).[33]

The General Release is straightforward and clear—"any claims whether current or future" and "any and all claims of which bidder is currently unaware."[34] Windsor has not provided the Court with any other interpretation of the General Release that is plausible. Moreover, Delaware court have found general releases which disclaim liability for claims of which the parties are unaware to be enforceable.[35]

2. The Terms of Service Create a Valid Contract

Next, Windsor asserts that the Defendants have not stated that bidders on the online auction were required to accept the terms and conditions before placing an electronic bid. The Amended Complaint does not mention the terms and conditions. In response, the Defendants present evidence that all bidders, including Mr. Stella, accepted the terms and conditions before entering a bid. In fact, all bidders were required to scroll through the terms and conditions in a pop-up screen before they could accept them. In addition, the Defendants argue that Delaware courts have found electronic agreements, such as the terms and conditions, enforceable in the same manner as conventional contracts.

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[33] Motion, Ex. 12, at 6.
[34] *Id.*
[35] *See Seven Investments, LLC v. AD Capital, LLC,* 32 A.3d 391, 395 (Del. Ch. 2011) (finding that a general release enforceable in which the parties acknowledged that "they each intended 'to give a full and complete release and discharge of the Released Claims,' notwithstanding that 'they may be unaware of or may discover facts in addition to or different from those which they now know or believe to be true related to or concerning the Released Claims or the Released Persons.'" The parties further acknowledged "that such presently unknown or unappreciated facts could materially affect the claims or defenses of a party or parties and the desirability of entering into this Agreement.").

The Court finds that the terms and conditions create a valid contract. In *Newell Rubbermaid Inc. v. Storm*,[36] the Delaware Court of Chancery found that electronic agreements are enforceable as long as "the party who assented online ha[d] reasonable notice, either actual or constructive, of the terms of the putative agreement and [ ] that party manifest[ed] assent to those terms." In that case, the Court of Chancery also held that,

> It is not determinative that the 2013 Agreements were part of a lengthy scrolling pop-up. [The employee's] failure to review fully the terms (on a 10–page readily accessible agreement) to which she assented also does not invalidate her assent. A party may assent to an agreement on the internet without reading its terms and still be bound by it if she is on notice that she is modifying her legal rights, just as she may with a physical written contract.[37]

Here, Mr. Stella, an owner of Windsor, had notice of the terms and conditions. Mr. Stella had the opportunity to read the terms. In addition, Mr. Stella then accepted these terms and conditions. The facts that Windsor may not have read the terms and conditions, understood that the terms and conditions apply to the Proposed Transaction or known that CWCAM and U.S. Bank are affiliated with CWFS-REDS do not make the terms and conditions unenforceable. This is because Mr. Stella was under no obligation or constraint to sign the terms and conditions or participate in the bidding.

3. The Parties Intended to be Bound by the Terms and Conditions

Finally, Windsor claims that it did not knowingly waive its claims against CWCAM and U.S. Bank. In *Riverbend Community., LLC v. Green Stone Engineering, LLC*,[38] this Court found that the plaintiffs' argument that a release of all liabilities was not valid because the plaintiffs believed they had signed a partial release was unavailing. The Court reasoned that the release clearly and unambiguously released the defendants from *all* liabilities.

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[36] 2014 WL 1266827, at *6 (Del. Ch. Mar. 27, 2014) (internal brackets and quotes omitted).
[37] *Id.* at *7.
[38] 2012 WL 1409013, at *7 (Del. Super. Apr. 4, 2012), *aff'd*, 55 A.3d 330 (Del. 2012).

Here, as in *Riverbend Community*, the release clearly and unambiguous releases the Defendants from all liabilities. Windsor's argument that it did not intend to release the Defendants is not persuasive. This is because Mr. Stella accepted the terms and conditions, which shows that he intended to agree to the terms therein.

The Court finds that Windsor's claims are barred by the release because the release applies to the Proposed Transaction, is clear and unambiguous and is enforceable.

B. THE CLAIMS ARE NOT BARRED BY RULE 13(A)

Rule 13(a), as to compulsory counterclaims, provides that a counterclaim must be brought "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . ."[39] If a compulsory counterclaim is not raised in an earlier action arising out of the same transaction or occurrence, it will be barred in subsequent litigation.[40] The Court holds that Windsor is not barred by Superior Court Civil Rule 13(a) ("Rule 13(a)") from seeking recovery for promissory estoppel and unjust enrichment because it was not required to have pled those claims in earlier foreclosure proceedings.

In the Motion, the Defendants argue that Windsor is barred from seeking recovery for promissory estoppel and unjust enrichment because they failed to plead those actions as counterclaims in the Foreclosure Action. The Defendants go on to argue that because unjust enrichment and promissory estoppel were permitted as affirmative defenses in the Foreclosure Action, Windsor also should have pled these claims as counterclaims.

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[39]Super. Ct. Civ. R. 13(a) ("Compulsory counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the Court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule.").

[40]*See Mott v. State*, 49 A.3d 1186, 1189 (Del. 2012); *see also T.A.H. First, Inc. v. Clifton Leasing Co., Inc.*, 90 A.3d 1093, 1094 (Del. 2014).

In the Opposition, Windsor claims that the Defendants' Rule 13(a) argument fails as a matter of law because promissory estoppel and unjust enrichment could not have been brought as counterclaims in the earlier foreclosure litigation. Windsor notes that foreclosure actions are *in rem* proceedings, while the current dispute about the sale of the loan involves *in personam* claims. Therefore, any claims related to the sale of the loan are not compulsory counterclaims in the foreclosure proceedings.[41]

In prior legal action, the Defendants filed a *scire facias sur* mortgage foreclosure complaint alleging Windsor defaulted on a mortgage loan owed to them and sought to foreclose on the mortgage. In that action, the Court allowed Windsor to raise the affirmative defenses of promissory estoppel and unjust enrichment.[42] The Court noted that Windsor's "Affirmative Defenses constitute permissible pleas in avoidance under *Shrewsbury*[43]. . . [because they] relate to an alleged preliminary agreement to resolve the underlying mortgage, which is the subject matter of the complaint."[44]

In addition to the right of a mortgagee to foreclose on a mortgage in equity, Delaware law allows a mortgagee the additional remedy of enforcing the mortgage by writ of *scire facias* in the Superior Court.[45] A writ of *scire facias* is an *in rem* proceeding.[46] "In essence, a writ of *scire facias* [] is a rule to show cause that requires the mortgagor to appear and establish why the mortgagee should not be allowed to foreclose."[47] Therefore, a mortgagor is permitted to plead

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[41]*See CitiMortgage, Inc. v. Bishop,* 2011 LEXIS 6819, at *2-3 (Del. Super. Mar. 7, 2011).
[42]Motion, Ex. 8.
[43]Motion, Ex. 8, at 4 (citing *Shrewsbury v. The Bank of New York Mellon*, 160 A.3d 471, 475 (Del. 2017) (providing examples of legitimate plea in avoidance defenses).
[44]Motion, Ex. 8, at 4.
[45]*See* 10 *Del. C.* § 5061(a).
[46]*Wells Fargo Bank, N.A. v. Williford*, 2011 WL 5822630, at *3 (Del. Super. Nov. 17, 2011).
[47] *American Nat'l Ins. Co. v. G-Wilmington, Assocs., LLP.*, 2002 WL 31383924, at *2 (Del. Super. Oct. 18, 2002) (tracing the history of the Pennsylvania *scire facias* act to explain the remedy of *scire facias sur* mortgage in Delaware); *see also Davenport Servs., Inc. v. Five North Corp.*, 2003 WL 21739066, at *2 (Del. Super. May 19, 2003) (observing that a *scire facias* mortgage action derives from a writ of *scire facias* which requires "the

only those claims or counterclaims arising under the mortgage itself.[48] This is limited to three defenses: payment, satisfaction, or avoidance of the mortgage.[49] A plea in avoidance, however, "must relate to the mortgage sued upon, *i.e.*, the plea must relate to the validity or illegality of the mortgage documents."[50] Traditionally recognized avoidance defenses include: "acts of God, assignment, conditional liability, duress, exception, forfeiture, fraud, illegality, justification, non-performance of condition precedents, ratification, unjust enrichment, and waiver."[51] If a mortgagor fails to assert one of these legally recognized defenses, the mortgagee is entitled to summary judgment.[52]

In *Gordy v. Reform Building Components, Inc.*, the plaintiff filed an action of *scire facias sur* mortgage to foreclose a mortgage executed by the defendant mortgagor. [53] The plaintiff filed a motion for summary judgement and the defendant moved for permission to file a counterclaim seeking judgement against the individual mortgagees on a different matter that was being litigated in Pennsylvania.[54] The Court found that the issue was "whether the defendant [was] entitled to assert this set off in this mortgage foreclosure action."[55] The Court noted that the counterclaim in *Gordy* was permissive because it did "not arise out of the mortgage transaction

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mortgagor to show cause why judgment should not be given against him for the amount of the mortgage debt with a special execution for the sale of the mortgaged premises").

[48]*American Nat'l Ins. Co.*, 2002 WL 31383924, at *2.

[49]*Id.*

[50]*Id.*

[51]*Id.*

[52]*See JPMorgan Chase Bank v. Hopkins*, 2013 WL 5200520, at *2-3 (Del. Super. Sept. 12, 2013) (granting summary judgment because no genuine issue of material fact existed where defendant did not plead payment, satisfaction, or avoidance of the mortgage); *Wells Fargo Bank, NA v. Nickel*, 2011 WL 6000787, *2 (Del. Super. Nov. 18, 2011) (granting summary judgment because the "Defendant did not plead payment, satisfaction or avoidance of the mortgage in her Answer . . . Defendant has failed to set forth specific facts that a genuine issue of material fact exists and she has raised no defenses that may be properly asserted in an action for *scire facias sur* mortgage"); *CitiMortgage, Inc. v. Kine*, 2011 WL 6000755, at *1-2 (Del. Super. Nov. 1, 2011) (granting plaintiff mortgage company's motion for summary judgment where defendant asserted legal defenses and claimed she never received a copy of the Fair Debt Collections Practices Act).

[53]310 A.2d 893, 894 (Del. Super. 1973).

[54]*Id.*

[55]*Id.*

asserted in the complaint."[56] The Court held "in the light of the long line of precedents and the nature of the proceedings, the permissive counterclaim sought to be asserted in this [*scire* facias] action in this Court is not properly allowable."[57] Subsequent cases have followed the reasoning in *Gordy* and not permitted permissive counterclaims which did not arise out of the mortgage transaction.[58]

In *Citimortgage*, the defendants purchased a property which was the subject of a foreclosure action.[59] The mortgage was secured "through Mortgage Electronic Registration Systems, Inc. acting solely as nominee for lender, Cardinal Financial Company. Subsequently, the mortgage was assigned to Citimortgage, Inc."[60] Citimortgage filed a mortgage foreclosure action against the defendants.[61] The Court held that these counterclaims were not compulsory and noted "the counterclaims raised by the Defendants do not relate the subject matter of Plaintiff's complaint because this is an *in rem* proceeding and the counterclaims are *in personam*."[62] The Court elaborated on this distinction noting that "[e]ven though the counterclaims relate to the mortgage on the property, they are *in personam* because Defendants allege violations of fiduciary duties owed to them, the Real Estate Settlement Procedures Act ("RESPA"), and the Truth In Lending Act ("TILA")."[63] The Court granted the plaintiff's motion to dismiss the counterclaims because they were not compulsory.[64]

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[56] *Id.*
[57] *Id.* at 896.
[58] *See Manley v. MAS Assocs., LLC,* 968 A.2d 492, 2009 WL 378172, at *2 (Del. 2009)(TABLE) (reaffirming that "permissive counterclaims may not be brought as part of a *scire facias* action, but they may be brought as part of a combined *in rem* and *in personam* action").
[59] *CitiMortgage, Inc. v. Bishop,* 2011 LEXIS 6819, at *1 (Del. Super. Mar. 7, 2011).
[60] *Id.* at *2.
[61] *Id.*
[62] *Id.* at * 2-3 (internal citations omitted).
[63] *Id.* at *3.
[64] *Id.*

Here, promissory estoppel and unjust enrichment are not one of the three acceptable defenses for a *scrie facias sur* mortgage foreclosure action, and therefore Windsor was not required to bring those claims. The Delaware Supreme Court has held "[i]n general, only those claims or counterclaims arising under the *mortgage* may be raised in a *scire facias sur* mortgage foreclosure action."[65]

Though the Court allowed the claims as affirmative defenses in the Foreclosure Action, this does not mean that the claims were compulsory counterclaims in the foreclosure action. The Court applied the reasoning from *Gordy*[66] and allowed the affirmative defenses to be raised in order to resolve the underlying mortgage. However, the Court stated it was "permissible" for Windsor to raise the claims as affirmative defenses, rather than "compulsory." As such, Windsor's claims were not compulsory, and therefore they are not barred by Rule 13(a).

The sale of the loan does not arise out of the same transaction or occurrence as the mortgage foreclosure.[67] The Court must examine different evidence for a mortgage foreclosure versus the sale of a loan. In a *scire facias sur* mortgage foreclosure action, the Court will consider the terms of the mortgage contract and the three defenses. This may include among other things, evidence of fraud or duress in drafting the mortgage, and natural disasters destroying the property. For the sale of a loan, the Court will consider the terms of the sale

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[65]*Harmon v. Wilmington Tr. Co.*, 663 A.2d 487, 1995 WL 379214, at*2 (Del. June 19, 1995)(TABLE).
[66]310 A.2d 893, 896 (Del. Super. 1973).
[67]*See Mott v. State*, 49 A.3d 1186, 1189 n.8 (Del. 2012) (noting "[t]he tests applied to a counterclaim arising from the same transaction or occurrence, including same issues of fact and law, use of same evidence, and 'logical relation' between the claims, is whether there is a 'logical relationship' between the original action and the later action"); *see also Brady v. C.F. Schwartz Motor Co., Inc.*, 723 F.Supp. 1045, 1048 (D. Del. 1989) (applying the "logical relationship" test to determine whether a claim is compulsory); *Xerox Corp. v. SCM Corp.*, 576 F.2d 1057, 1059 (3rd Cir. 1978) (noting "a detailed analysis must be made to determine whether the claims involve: (1) many of the same factual issues; (2) the same factual and legal issues; or (3) offshoots of the same basic controversy between the parties"); *Great Lakes Rubber Corp. v. Herbert Cooper Co., Inc.*, 286 F.2d 631, 634 (3rd Cir. 1961) (noting "a counterclaim is logically related . . . where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts").

agreement, and if there is an ambiguity, may consider testimony from the parties where they discuss their intentions drafting the sale agreement. Although the parties and some of the underlying facts are the same, the legal analysis relates to the different contracts and policies. The Court, therefore, finds that Windsor is not barred by Rule 13(a) from seeking recovery for promissory estoppel and unjust enrichment because (i) the counterclaims were not compulsory and (ii) the claims do not arise out of the same transaction or occurrence.

C. THE CLAIMS ARE NOT BARRED BY JUDICIAL ESTOPPEL AND THE PNA

Judicial estoppel is intended to preclude a party from arguing a position that is inconsistent with a position taken in the same or earlier related legal proceeding. The purpose of the doctrine is to protect the integrity of the judicial proceedings. "The two requirements of judicial estoppel are that a litigant advance an argument that contradicts a position previously taken by that same litigant, and that the Court was persuaded to accept as the basis for its ruling."[68]

The Defendants argue that Windsor may not sustain a claim for promissory estoppel or unjust enrichment because the PNA is a valid contract that controls the parties' April and May 2017 negotiations. The Defendants contend that Windsor is barred by the doctrine of judicial estoppel from arguing that the PNA does not govern the negotiations. This is because Windsor stated in the Chancery Action that the PNA is a valid contract which governed the negotiations and the Chancery Court adopted Windsor's argument in its opinion.

The Defendants also claim that the PNA was not terminated before the April and May 2017 negotiations and so applies to the negotiations. This is because the PNA requires written notice to terminate negotiations and can only be amended by a writing executed by all parties. In

[68] *La Grange Cmtys., LLC v. Cornell Glasgow, LLC*, 74 A.3d 653, 2013 WL 4816813, at *4 (Del. Sept. 9, 2013)(TABLE).

this case, the Defendants note that neither party terminated or amended the PNA in writing. Even if the PNA had been terminated, the Defendants emphasize that the terms of the PNA would survive the termination.

The Defendants contend that the PNA specifically states that the parties may not rely on the negotiations. As such, the Defendants argue that Windsor may not claim that it relied on the negotiations to meet the elements of promissory estoppel and unjust enrichment. The Defendants assert that the following provision suggests that the PNA is in effect and governs the sale of the Loan:

> [N]o agreement reached with respect to ***any matter*** (including, without limitation, any waiver of any right or remedy) ***shall have any effect whatsoever*** unless such agreement is reduced to writing, signed and delivered by all parties' authorized representatives.[69]

Finally, the Defendants characterize Windsor's argument that the PNA does not apply as an argument for an implied waiver[70] of the PNA. The Defendants contend that the theory of implied waivers does not apply here.

In response, Windsor argues that the parties terminated the PNA when Windsor filed the Chancery Action. Windsor cites CWCAM's statements at the Chancery Court hearing as support for its contention that both parties deemed the PNA terminated by the Chancery Action:

> "We [CWCAM] did on a certain level deem the filing of litigation against CWCapital to be effectively and practically a Notice of Termination by the borrower, but there isn't any reason why -- there is nothing irrevocable preventing the borrower and CWCapital to have additional discussions should they all choose to."[71]

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[69] Am. Compl., Ex. F, at ¶ 2 (emphasis added).

[70] "The standard for finding waiver in Delaware is quite exacting. Waiver is the voluntary and intentional relinquishment of a known right.... It implies knowledge of all material facts and intent to waive. Moreover, the facts relied upon must be unequivocal in nature." *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1289 (Del. 1994) (internal quotations omitted).

[71] Am. Compl., Ex. G, at 13:6-11.

Windsor also claims that the PNA does not address the sale of the Loan so the PNA is inapplicable. Finally, Windsor contends that it would be untenable for the PNA to apply because CWCAM could not obtain approval from the creditors' committee, proof of Windsor's abilities to fund its purchase of the Loan and execute the appropriate documents within the thirty-day window for closing contemplated in the PNA.

The Court holds that the Defendants cannot sustain a claim for judicial estoppel. The Defendants meet the first element of judicial estoppel. This is because Windsor now takes a contradictory position compared to Windsor's position in the Chancery Action. Here, Windsor argues that the PNA does not govern the April and May 2017 negotiations; however, in the Chancery Action, Windsor argued that the PNA governed these negotiations. But, the Defendants fail to satisfy the second element of a claim for judicial estoppel—that the court adopt the party's position in the earlier case as the basis of its opinion. The Chancery Court did not adopt Windsor's argument that the PNA was a valid agreement which applied to the April and May 2017 negotiations. Instead, the Chancery Court stated "when read as a whole, the Pre-Negotiation Agreement is a document that simply establishes rules to govern any discussions that may take place. It does not obligate any party to negotiate or forbear from exercising remedies otherwise available."[72] So, the Defendants have not stated a claim for judicial estoppel.

The PNA is a valid contract between the parties, but the PNA does not bar Windsor's claims. This is because the PNA is a contract which exclusively governs the negotiations between the parties rather than the sale of the Loan. The PNA specifically states that "[t]his letter constitutes an agreement between Holder and Borrower with respect to negotiations concerning

[72] *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 2017 WL 3499919, at *3 (Del. Ch. July 31, 2017)(internal citation omitted).

the Loan and the Loan Documents . . . ."[73] In addition, the fact that Section 3 of the PNA states the Loan Documents between the parties are still in force suggests that the PNA does not govern substantive Loan provisions. So, the Court rejects the Defendants' argument that Windsor's claims are barred because there is a valid contract between the parties.

D. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT

"Unjust enrichment is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.'"[74] To survive a motion to dismiss a claim for unjust enrichment, a plaintiff must prove: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law."[75]

This Court has held that "a claim for unjust enrichment cannot stand if the parties' relationship and the claims asserted are the subject of an express contract because the terms of that contract control and there is no occasion to pursue the theory of *quantum meruit* or contract implied in law.'"[76]

The Court finds that Windsor's claim for unjust enrichment fails. Windsor does not plead a scenario under which the Defendants were unjustly enriched. This is clear because the Defendants sold a Loan for $7.4 million to the highest bidder for a little less than $6 million. Any enrichment that the Defendants received was a result of a sale of a commercial note (and at a discount from face value) that the Defendants' validly held in the first instance. The only

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[73] Am. Compl., Ex. F at 1.
[74] *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010) (quoting *Fleer Corp. v. Topp Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988)).
[75] *Id.*
[76] *TrueBlue, Inc. v. Leeds Equity Partners IV, LP*, 2015 WL 5968726, at *5 (Del. Super. Sept. 25, 2015)(internal quotations omitted).

damages that Windsor suffered were the costs to obtain a loan in order to consummate the Proposed Transaction. But, the Defendant's conduct in selling the Loan to another buyer did not cause Windsor's damages. This is because the Defendants' sale of the Loan to another buyer did not cause Windsor to spend money to obtain a loan or otherwise enrich the Defendants. Instead, Windsor spent money of its own volition in order to prepare to purchase the Loan and had to pay cost/fees already associated with the original terms and conditions of the Loan.

E. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR PROMISSORY ESTOPPEL

Under the doctrine of promissory estoppel, a plaintiff must prove by clear and convincing evidence that: "(1) a promise was made; (2) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (3) the promisee reasonably relied on the promise and took action to his detriment; and (4) such promise is binding because injustice can be avoided only by enforcement of the promise."[77] In addition, to state a claim for promissory estoppel, a promise "must be definite and certain."[78] In *SIGA Technologies, Inc. v. PharmAthene, Inc.*, the Delaware Supreme Court held that "[p]romissory estoppel does not apply, however, where a fully integrated, enforceable contract governs the promise at issue."[79]

Windsor argues that promissory estoppel is a substitute for consideration and may be used to avoid the statute of frauds. Windsor does not argue that Windsor's claim meets the elements of promissory estoppel. Instead, Windsor states that the only way to avoid injustice is for the Court to allow Windsor to recover under a theory of promissory estoppel. Windsor cites *Grunstein v. Silva*,[80] which states "[a]lthough promissory estoppel is often invoked as a substitute for consideration or to avoid the statute of frauds, the principal question in Delaware

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[77] *Grunstein v. Silva*, 2009 WL 4698541, at *7 (Del. Ch. Dec. 8, 2009).
[78] *Cont'l Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1233 (Del. Ch. 2000).
[79] 67 A.3d 330, 348 (Del. 2013).
[80] 2011 WL 378782, at *11 (quoting *Grunstein*, 2009 WL 4698541, at *7).

promissory estoppel cases is 'whether injustice could be avoided only by enforcement of the promise.'"

Grunstein v. Silva does not state that a court will consider injustice in lieu of the elements of a promissory estoppel claim enumerated above. Windsor has not shown, with more than conclusory statements, that the Defendants promised to affirm Windsor's acceptance to buy the Loan for $5.3M without rigorous review from the creditors' committee or that the creditors' committee's approval was implicit. Instead, the Defendants made a conditional offer, which does not meet the requirements for a definite and certain promise sufficient to sustain a claim for promissory estoppel.

Second, Windsor has not shown that it was the reasonable expectation of the Defendants to induce Windsor to action. Windsor's sole argument is that the parties only allotted a thirty-day window for closing, so Windsor had to obtain funding from its lender to buy the Loan in order to meet the closing deadline. But, the fact that the creditors' committee had not approved the sale suggests that Windsor had no reason to believe it would obtain the Loan.

Third, Windsor has not shown that Windsor *reasonably* relied on the Defendants' alleged promise to affirm the Acceptance. A reasonable person would likely understand the condition that the Offer and Acceptance were subject to the creditors' committee's approval to mean that the parties did not have a valid contract until the creditors' committee had given its approval. Also, the terms of the PNA specifically state that the parties may not rely on the representations that the parties' make in their negotiations regarding the sale of the Loan. So, even if the Defendants had promised Windsor to sell Windsor the Loan, Windsor could not have relied on this promise.

Lastly, Windsor has not shown that the Court would create injustice by preventing Windsor to recover. Parties often incur costs in bidding for an asset such as research costs to assess the appropriate amount for a bid and to obtain financing. But, the fact that bidding parties incur costs does not mean that the deciding party has created an injustice by not granting the asset to each bidding party.

V. CONCLUSION

For all the foregoing reasons, the Court **GRANTS** the Motion.

IT IS SO ORDERED.

/s/ Eric M. Davis
Eric M. Davis, Judge

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