IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CENTRAL MORTGAGE COMPANY, Plaintiff, v. MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC, as successor-in-interest to MORGAN STANLEY MORTGAGE CAPITAL, INC., Defendant.	)	Civil Action No. 5140-CS

MEMORANDUM OPINION

Date Submitted: June 22, 2012
Date Decided: August 7, 2012

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STRINE, Chancellor.

I. Introduction

Central Mortgage Company services residential mortgage loans. Morgan Stanley Mortgage Capital, Inc., the predecessor-in-interest to the defendant Morgan Stanley Mortgage Capital Holdings LLC, was also a player in the mortgage loan industry. Morgan Stanley purchased loans from originators, aggregated the loans into pools, and sold those pools to other investors in the form of securitized transactions.

Central Mortgage and Morgan Stanley entered into a 2005 contract (the "Master Agreement") concerning the purchase of servicing rights for loans that Morgan Stanley planned to sell in the future to government-backed agencies Fannie Mae and Freddie Mac (the "Agency Loans") and to private investors (the "Private Loans"). In the Master Agreement, Morgan Stanley made certain representations and warranties to Central Mortgage as the servicer about the loans. From October 2005 through August 2007, Central Mortgage and Morgan Stanley entered into 26 separate transactions under that Master Agreement involving more than 20,000 individual loans.[1] Central Mortgage had the opportunity to review the underlying loan documentation in the loan files before entering into each of these transactions.

Coincident with the advent of the financial crisis, many of the loans for which Morgan Stanley sold the servicing rights to Central Mortgage began to fall delinquent. Starting in 2008, Fannie Mae and Freddie Mac (the "Agencies") exercised their contract right to put certain delinquent Agency Loans back to Central Mortgage, which the Agencies had the flexibility to do for a host of reasons.

[1] Am. Compl. ¶ 5.

Central Mortgage, which now alleges that it had in fact not looked at the loan files before buying the servicing rights, at that point turned around and demanded that Morgan Stanley repurchase the loans that the Agencies had returned to Central Mortgage. Although Central Mortgage's theory as to why Morgan Stanley was contractually obligated to do so has evolved over the course of this litigation, its current pleading alleges that the loans were put back by the Agencies due to conduct by Morgan Stanley that also constituted breaches of certain representations and warranties made by Morgan Stanley in the Master Agreement.

In December 2009, Central Mortgage filed a complaint against Morgan Stanley (the "Original Complaint"), alleging that Morgan Stanley breached express and implied contractual obligations relating to 47 loans that the Agencies had returned to Central Mortgage and that Morgan Stanley refused to repurchase from it (the "Original Loans"). Morgan Stanley moved to dismiss that complaint under Rule 12(b)(6) for failure to state a claim, and this court granted that motion ("*Central Mortgage I*").[2] I dismissed Central Mortgage's claim for breach of contract without prejudice on the basis that Central Mortgage had not pled that it gave Morgan Stanley actual specific notice of the alleged breaches as prescribed by the Master Agreement, and I dismissed its claim for breach of the implied covenant with prejudice because the claim was duplicative of its breach of contract claim and thus failed under New York law for that reason.

[2] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 2010 WL 3258620 (Del. Ch. Aug. 19, 2010) [hereinafter *Central Mortgage I*].

Central Mortgage appealed *Central Mortgage I* to our Supreme Court, arguing that the Master Agreement did not require pre-suit notice and, in the alternative, that it had adequately pled that it gave Morgan Stanley contractually proper notice. Central Mortgage also appealed the decision to dismiss its implied covenant claim. The Supreme Court reversed this court ("*Central Mortgage II*"), and held that both claims were legally sufficient to withstand Morgan Stanley's motion to dismiss under the liberal federal pleading standard the Supreme Court embraced, and remanded the case for further proceedings.[3]

Rather than proceed on the Original Complaint, in November 2011 Central Mortgage filed an amended complaint (the "Amended Complaint") to add new breach of contract and implied covenant claims for an additional 218 Agency Loans that have since been put back by the Agencies (the "New Agency Loans"). In addition, Central Mortgage challenged the Private Loans (together with the New Agency Loans, the "New Loans"). Prompted by the Agency put-backs, Central Mortgage allegedly undertook by its own initiative an analysis of a statistically meaningful sample of the Private Loans and discovered pervasive breaches of Morgan Stanley's representations and warranties about the loan data. Central Mortgage used the loan files it had in its possession to reach this conclusion. Central Mortgage's claims based on the New Loans have dramatically expanded the scope of this case and, if allowed, will require Morgan Stanley to defend its

[3] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 541 (Del. 2011) [hereinafter *Central Mortgage II*].

representations about loans that were sold by Morgan Stanley to investors as many as seven years ago and originated by others years before that.

Morgan Stanley moves to dismiss the Amended Complaint. First, it renews the arguments it made in support of its original motion to dismiss about the merits of Central Mortgage's contract and implied covenant claims. Second, as a separate reason to dismiss Central Mortgage's claims that are premised on the New Loans, as well as on any Original Loans whose servicing rights were purchased more than three years before the date of the Original Complaint, Morgan Stanley argues that these claims are barred by Delaware's three-year statute of limitations for claims sounding in contract. In response, Central Mortgage argues that the claims based on the New Loans relate back to the date of the Original Complaint and thus are, for the most part, timely on that basis. Central Mortgage further argues that it should benefit from certain tolling exceptions to the statute of limitations, which work to save those remaining causes of action that accrued more than three years before the Original Complaint was filed.

In this opinion, I deny Morgan Stanley's motion to dismiss to the extent that it rehashes theories that this court and our Supreme Court have already considered in the context of its original motion to dismiss. The Supreme Court held that Central Mortgage's claims for breach of contract and breach of the implied covenant as to the Original Loans withstand Rule 12(b)(6). The law of the case leaves me no room to re-dismiss under Morgan Stanley's previously raised theories or theories that it could have but failed to raise in its prior briefing, such as a challenge to the timeliness of the Original Loans at the time the Original Complaint was filed.

But, I do grant Morgan Stanley's motion to dismiss the claims for breach of contract and breach of the implied covenant related to the New Loans because those claims are barred by Delaware's statute of limitations. The last servicing rights contract for any New Loan was entered into by the parties more than three years before Central Mortgage filed the Amended Complaint, and thus claims arising out of those contracts are time-barred.

The claims as to the New Loans do not relate back to the Original Complaint. That pleading gave Morgan Stanley notice that it would have to defend itself against the 47 Agency Loans specifically pled. It did not put Morgan Stanley on notice of its alleged breaches as to 218 more Agency Loans and more than 12,000 Private Loans, especially in light of the specific notice and cure regime prescribed by the Master Agreement that requires Central Mortgage to give Morgan Stanley "prompt written notice" of its alleged breaches. Central Mortgage would end run this clear contractual loan-by-loan requirement and our state's statute of limitations by its argument in support of relation back. Central Mortgage's theory is that so long as a party files one claim and alleges that it expects further claims of a similar nature may be discovered in the future, then any claim for breach of contract of a similar nature that it later sues on in an amended complaint relates back. Thus, under Central Mortgage's theory, its Original Complaint as to the 47 Agency Loans was a placeholder that served to make any later-filed amendment as to the thousands of other Agency Loans and Private Loans timely. That position is not in accord with the relation back doctrine as fairly, equitably, and efficiently interpreted.

Likewise, I conclude that Central Mortgage has not pled facts from which I can infer, on a generous reasonable conceivability standard, that any tolling exception applies.

II. Factual And Procedural Background

These are the facts alleged in the Amended Complaint and the incorporated documents.

A. An Overview Of The Parties' Contractual Relationship

Central Mortgage is a self-described "highly regarded" servicer of residential mortgage loans.[4] Servicers handle the administrative aspects of the mortgage loan, such as sending bills to and collecting payments from borrowers, and remitting those payments to the mortgage loan holder, in exchange for a servicing fee. A servicer purchases the servicing rights to a mortgage loan from the owner of the underlying mortgage,[5] such as Morgan Stanley in this case. Importantly, Morgan Stanley did not originate the mortgage loans whose servicing rights Central Mortgage purchased; rather, Morgan Stanley purchased the loans from originators, pooled the loans based on certain loan criteria, and sold those newly formed loan pools to other buyers, either in bulk or through securitized transactions. Buyers included the Agencies as well as private investors.

In the spring of 2005, Morgan Stanley offered for sale approximately $1 billion in mortgage servicing rights. The offering document prepared in connection with that solicitation contained the disclaimer that "[a]ny [offer to sell or solicitation of an offer to buy] would be made only after a prospective purchaser had completed its own

[4] Am. Compl. ¶ 2.
[5] *Id.* ¶ 27.

independent investigation of the instruments, transactions or the servicing rights and received all information it required to make its own investment decision."[6] This disclaimer made clear that any servicer would have the opportunity to conduct its own due diligence on the loans at issue before entering into a particular sale transaction.

Central Mortgage bid on the servicing rights offered by Morgan Stanley, and that bid was accepted. On July 25, 2005, the parties entered into the Master Agreement, which was later amended and restated in November 2006. The Master Agreement was a comprehensive document that set forth the terms and conditions for the series of future transactions that the two parties would undertake on an ongoing basis, and their respective obligations related to those transactions. Under the Master Agreement, Central Mortgage obtained the right (but not the obligation) to purchase the servicing rights for specific pools of loans based on the characteristics of those loans as documented in the underlying loan files.[7] Central Mortgage represented to Morgan Stanley that it understood that "certain of the [m]ortgage [l]oans have certain characteristics which may increase the likelihood of defaults under the [m]ortgage [n]otes."[8] In accordance with the terms of the Master Agreement, Central Mortgage was provided access to the loan files before purchasing the servicing rights to each loan pool

[6] Original Complaint Ex. A (Servicing Rights Offering Memorandum) at 2. This document is proper to consider on this motion because it is incorporated by reference in the Amended Complaint. *See* Am. Compl. ¶ 30.
[7] *Id.* ¶ 33; *id.* at Ex. A (Master Agreement) § 2.04. The loan file is a compilation of origination, underwriting, processing and closing documents related to each loan. Am. Compl. ¶ 7.
[8] Master Agreement § 3.02.

so that it could perform its own review of the underlying loan information,[9] and Central Mortgage could refuse to close any particular servicing rights sale transaction if it determined "that the results of its due diligence review of the [s]ervicing [r]ights and related [m]ortgage [l]oans are unsatisfactory."[10]

Not only did Central Mortgage have the opportunity to look at the loan files, Central Mortgage represented that it in fact had looked at the loan files and performed its own necessary due diligence in connection with seeking Agency approval of the transfer of servicing rights. For instance, in the approval form submitted to Freddie Mac, Central Mortgage warranted that it "shall have received and shall possess all records, legal documentation, files and funds relevant to the transferred [m]ortgages,"[11] and that it "shall have examined such records and shall have determined whether such records are correct."[12] In addition, Central Mortgage represented that "it performed whatever due diligence review of the [s]ervicing rights to be transferred hereunder that [i]t deemed appropriate before entering into this agreement, including without limitation, review of the [m]ortgage files."[13] Central Mortgage further warranted that it was "not relying … upon Freddie Mac to identify any deficiencies with respect to the [m]ortgages,"[14] driving home the point that it was up to Central Mortgage do its own diligence and determine the

[9] *See* Master Agreement § 8.01; Am. Compl. Ex. D (Letter of Understanding).
[10] Master Agreement § 13.01.
[11] Orig. Compl. Ex. H (Freddie Mac Form 981). This document is incorporated by reference in the Amended Complaint. *E.g.*, Am. Compl. ¶ 49.
[12] Freddie Mac Form 981.
[13] *Id.*
[14] *Id.*

soundness of the loans before agreeing to enter into any individual servicing rights transaction.

These due diligence representations were important and made sense in light of Central Mortgage's contractual obligations in connection with the loans ultimately sold to the Agencies. For example, as transferee of the servicing rights, Central Mortgage represented to the Agencies that it would "assume[] full responsibility and liability for the correctness of [all records, legal documentation, files and funds relevant to the transferred Mortgages],"[15] and, it further "acknowledge[d], covenant[ed], and warrant[ed] that it [would] be responsible for all representations, covenants and warranties concerning the eligibility of the [m]ortgages for purchase by Freddie Mac as provided in [the Freddie Mac Guidelines]."[16] Central Mortgage made an equivalent representation in connection with the Agency Loans sold to Fannie Mae.[17] Thus, the due diligence representations were a way of ensuring that Central Mortgage knew what it was getting itself into when agreeing to purchase the servicing rights to the Agency Loans.[18]

In addition to the loan files, Morgan Stanley made available to Central Mortgage certain documents that it created for the purpose of synthesizing information contained in the loan files. These documents included a "Mortgage Loan Schedule," which listed on a

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[15] *Id.*
[16] *Id.*
[17] *E.g.*, Orig. Compl. Ex. G (Fannie Mae Approval Letter) ("By implementing this transfer of servicing, transferor and transferee agree to be jointly and severally liable to Fannie Mae for all the responsibilities, duties, and selling warranties of the transferor, and any prior seller or servicer."); Am. Compl. ¶ 49.
[18] *See* Freddie Mac Single-Family Seller/Servicer Guide ("Freddie Mac Guidelines") § 56.3, *available at* http://www.freddiemac.com/sell/guide (requiring Agency approval before a transfer of servicing rights could take place).

loan-by-loan basis 37 categories of loan information (such as the borrower's income, credit score, and debt-to-income ratio), and a "Data File," which relayed the accompanying information in electronic form.[19]

In the Master Agreement, Morgan Stanley represented, among other things, that "[t]he information set forth on the related Mortgage Loan Schedule and the accompanying Data Files [would be] true, complete and accurate in all material respects,"[20] that "[a]ny and all requirements of any federal, state or local law … have been complied with,"[21] and that "[t]he origination practices used by … [the originator], with respect to the [m]ortgage [l]oans, have been in all material respects in compliance with applicable laws or regulations."[22] Morgan Stanley further represented that it did not commit fraud with regard to the loans, and that "to the best of [its] knowledge," neither did the originator or the borrower.[23] These representations and warranties were incorporated by reference into the transaction-specific documents memorializing each sale of servicing rights[24] and were said to be true as of that date.[25]

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[19] Am. Compl. ¶ 34; Master Agreement § 1.01.
[20] Master Agreement § 10.08.
[21] *Id.* § 10.10.
[22] *Id.* § 10.12.
[23] *Id.*
[24] The transaction-specific documents included a letter agreement, a purchase agreement, and a sale of servicing rights agreement, and were all subject to the Master Agreement's integration clause. The agreements that the parties submitted to the Agencies (a Form 981 to Freddie Mac, and a Form 629 to Fannie Mae) seeking Agency approval of the servicing rights transfer form the basis of the parties' liability to the Agencies and do not contain a clause incorporating the terms of those agreements to the Master Agreement.
[25] *See* Am. Compl. Ex. D. (Servicing Rights Purchase Agreement) at 3; Master Agreement at Art. 10.

In the event of a breach of one of Morgan Stanley's representations and warranties, the Master Agreement prescribed a notice and cure regime whereby the party discovering the breach was to give prompt written notice of the breach to the other party:

> Upon discovery by either Seller [Morgan Stanley] or the Servicer [Central Mortgage] ***of a breach of any of the foregoing representations and warranties***, the party discovering ***such breach*** shall give prompt ***written notice*** to the other party.
>
> Within 60 days of the earlier of either discovery by or notice to the Seller of any such breach of a representation or warranty which materially and adversely affects the ownership interest of the Servicer in the [s]ervicing [r]ights related to any [m]ortgage [l]oan, the Seller shall use its best efforts to promptly cure such breach in all material respects, and if such breach cannot be cured, the Seller shall, at the Servicer's option, repurchase the [s]ervicing [r]ights affected by such breach at [a price set by a contractual formula].[26]

The Master Agreement also provided that Morgan Stanley's representations inured to Central Mortgage's benefit "notwithstanding … [its] failure to examine any [loan] [f]ile,"[27] and that "no remedy under this [Master] Agreement is intended to be exclusive of any other available remedy" available at law or in equity "except as otherwise set forth" in the Master Agreement.[28]

For its part, Central Mortgage was obligated to service the loans in accordance with Agency requirements.[29] Important to the present dispute is the requirement that both the seller (Morgan Stanley) and servicer (Central Mortgage) agree to repurchase loans

[26] Master Agreement § 10.13 (emphasis added).
[27] *Id.* § 10.13.
[28] *Id.* § 14.20.
[29] *See id.* § 3.01.

from the Agencies in certain circumstances,[30] an obligation that is also embodied in separate contracts entered into between Central Mortgage and the Agencies.[31] For example, the Freddie Mac guidelines specify that the seller or the servicer may be required to repurchase Freddie Mac's interest in a loan for a host of reasons, including the "[f]ail[ure] to provide Freddie Mac with information that is true, complete and accurate concerning the [m]ortgage," or the "[d]eliver[y] or servic[ing] [of] a [m]ortgage in violation of the [s]eller's or [s]ervicer's representations and warranties."[32] The guidelines also provide that Freddie Mac may put back a loan to either the seller or servicer if the "[t]he [b]orrower or any other party in the [m]ortgage transaction has made any false representation in conjunction with such transaction, whether or not the [s]eller or [s]ervicer was a party to, or had knowledge of, such false representation."[33] The Agencies could put back the loan to either Morgan Stanley or Central Mortgage regardless of which party was responsible for the underlying reason for the put-back. If Morgan Stanley or Central Mortgage failed to comply with its repurchase obligation, it risked disqualification as an Agency-approved seller or servicer.

Notably, however, neither the Master Agreement nor any of the transaction-specific documents contained any indemnification provision in favor of Central Mortgage for loans put back to it by the Agencies. Rather, the indemnification rights that the Master Agreement did address ran in favor of Morgan Stanley for loss or damage

[30] Am. Compl. ¶¶ 47-50.
[31] *Id.*
[32] *See* Freddie Mac Guidelines § 72.1.
[33] *Id.* § 72.1.

resulting from a breach of the Master Agreement by Central Mortgage or Central Mortgage's failure to service the loans in accordance with applicable requirements.[34] Morgan Stanley also assigned to Central Mortgage the indemnification rights it had against the loan originators in connection with any breach of representation or warranty made by the originators to Morgan Stanley, including the right "to require the repurchase of a [m]ortgage [l]oan" by the originator.[35]

The Master Agreement, together with the transaction documents incident to each sale of servicing rights, were to constitute "***the entire Agreement between the Parties***,"[36] and could only be "***amended***" or "***waived***" "***in writing signed by the party against whom such enforcement is sought***."[37] Likewise, the contract contained a separate no-waiver clause such that "***[t]he waiver by any party … of a breach of any provision of this Agreement shall not operate or be construed as a waiver of any other subsequent breach***."[38] Also, the Master Agreement contained a choice of law provision in favor of New York[39] and a forum selection provision in favor of Delaware.[40]

From October 2005 through August 2007, Central Mortgage and Morgan Stanley entered into 26 separate servicing rights sales transactions, in which Central Mortgage purchased servicing rights to seven pools of Agency Loans and nineteen pools of Private Loans. In total, these pools encompassed more than 20,000 individual loans.

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[34] Master Agreement §9.01.
[35] *Id.* § 2.04.
[36] *Id.* § 14.03.
[37] *Id.*
[38] *Id.* § 14.02.
[39] *See id.* § 14.06.
[40] *See id.* § 14.16.

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Central Mortgage alleges that in February 2006, after it had purchased servicing rights to three pools of Private Loans but not yet to any Agency Loans, it visited Morgan Stanley's due diligence facility in Florida where it vetted the underlying loans. During that visit, Morgan Stanley representatives allegedly sought to differentiate itself from its competitors by making certain extra-contractual, oral representations about the quality of its due diligence and its review of the completeness and accuracy of the information obtained in the loan origination process.[41] Morgan Stanley also allegedly assured Central Mortgage that each loan encompassed by the 2005 offering would be screened by this due diligence facility, and that it had hired "a company known in the industry for its performance of mortgage due diligence" as its agent "to review each loan file and to ensure the loan met the applicable underwriting criteria."[42] Central Mortgage avers that Morgan Stanley representatives even walked the Central Mortgage team through the facility, and they before their very eyes "[Morgan Stanley] due diligence team members [who] were physically reviewing loan files to verify the underwriting criteria."[43]

Central Mortgage alleges that Morgan Stanley's actions "bolstered" the representations and warranties made to it in the Master Agreement,[44] despite the absence of any contractual representation related to the due diligence process that Morgan Stanley would undertake in connection with the sale of servicing rights, and the presence of terms

[41] *See* Am. Compl. ¶¶ 55, 57.
[42] *Id.* ¶ 55.
[43] *Id.* ¶ 57.
[44] *Id.* ¶ 59.

that contemplate that Central Mortgage would conduct its own due diligence. After that visit, between March 2006 and February 2007, Central Mortgage purchased servicing rights to three pools of Agency Loans and ten pools of Private Loans.[45] Each time it did so it reaffirmed its binding promise that the Master Agreement and the transaction-specific documents were the "entire [a]greement" between itself and Morgan Stanley, and that the Master Agreement and the transaction-specific documents could not be modified or waived except in writing.[46]

In March 2007, Central Mortgage noticed that the loans were displaying "unusually high delinquencies,"[47] and it brought this to Morgan Stanley's attention. Morgan Stanley attributed these delinquencies to a problem affecting the loans that occurred before Central Mortgage's purchase of the servicing rights, and agreed to provide Central Mortgage with a price reduction, as reflected in the transaction-specific agreements.[48] In April 2007, Central Mortgage continued to notice "abnormally high delinquency rates" for the loans, and so representatives from Central Mortgage and Morgan Stanley met again on April 11, 2007 to discuss the issue.[49] At that meeting, the Morgan Stanley representative that had negotiated the Master Agreement – Joe Francis – allegedly "made an additional and new disclosure as an explanation for the loans' poor

[45] *Id.* ¶ 60.
[46] *Id.* ¶ 61.
[47] *Id.* ¶ 63.
[48] *See id.* at Ex. D (Freddie Mac Bulk Servicing Schedule).
[49] *Id.* ¶ 66.

performance,"[50] which was that the loans "had not in fact been screened at [Morgan Stanley's] due diligence facility."[51] Central Mortgage further avers that:

> Mr. Francis promised that Morgan Stanley, consistent with its obligations, would "take care" of Central Mortgage – *i.e.*, indemnify Central Mortgage – for any adverse consequences that might arise with respect to the loans as a result of Morgan Stanley's misrepresentations and failure to undertake sufficient due diligence.[52]

I note that only the words "take care" are alleged as a direct quote from Mr. Francis. At the same time, however, the complaint alleges that Mr. Francis also offered on behalf of Morgan Stanley to repurchase from Central Mortgage the servicing rights to any loans that went delinquent in the first twelve months of servicing.[53] This specific promise by Mr. Francis was accepted and memorialized in the way the Master Agreement contemplated – by a written amendment to the Master Agreement. Thus, the parties signed a written amendment to the Master Agreement, retroactively dated as of January 19, 2007, to memorialize that specific repurchase obligation, consistent with the provision of the Master Agreement requiring that modifications to the Master Agreement be in writing.[54] In that same amendment, Central Mortgage and Morgan Stanley "ratified and confirmed" the Master Agreement "in all respects," except as "expressly" modified by the amendment.[55] Central Mortgage thus again promised that the Master Agreement and transaction-specific documents were the "entire [a]greement" between the parties and

[50] *Id.* ¶ 67.
[51] *Id.*
[52] *Id.* ¶ 68.
[53] *Id.*
[54] *See id.* at Ex. E (Amendment No. 1 to Master Agreement).
[55] *Id.*

could only be modified in writing, and that no conduct would work a waiver of the Master Agreement's terms.[56]

During the April 11, 2007 meeting, Mr. Francis allegedly agreed that Central Mortgage had "the right to demand repurchase based on misrepresentations by Morgan Stanley."[57] This, of course, is consistent with the contractual remedy explicitly contemplated by § 10.13 of the Master Agreement for a misrepresentation by Morgan Stanley. As the attentive reader may recall, the Master Agreement granted Central Mortgage the "option"[58] (*i.e.*, the "right") to demand the "repurchase"[59] of the "[s]ervicing [r]ights related to any [loan] affected by [Morgan Stanley's misrepresentation]" in a material way.[60] In other words, the complaint cites words from Mr. Francis, who had negotiated the terms of the Master Agreement with Central Mortgage (and who was thus, one can imagine, familiar with those terms), that are consistent with a reaffirmation that Morgan Stanley would abide by the terms of the Master Agreement.

Central Mortgage further alleges that at this meeting Mr. Francis agreed to allow Central Mortgage to transfer the servicing rights to 1,600 poorly performing loans back to Morgan Stanley, to be reimbursed the purchase price of those servicing rights, and then to subservice those loans on a contract basis for the normal servicing fee and reimbursement

[56] Master Agreement § 14.03.
[57] Am. Compl. ¶ 68.
[58] Master Agreement § 10.13.
[59] *Id.*
[60] *Id.*

for out-of-pocket expenses.[61] According to Central Mortgage, Mr. Francis also allegedly stated that Morgan Stanley would from that point forward review all future loans whose servicing rights it offered to Central Mortgage for quality and compliance.[62]

Despite having only gotten one concession in writing, albeit a very important one involving Morgan Stanley's promise to take back the servicing rights to any loan that became delinquent within a year, Central Mortgage alleges that Morgan Stanley's oral assurances excluded by the integration clause, the no-oral modification clause (which also included a no non-written waiver provision), and the no-waiver clause, were "comfort[ing]" to it.[63] Thus, Central Mortgage claims that it went forward, not in reliance on the amended Master Agreement or the transaction-specific documents, but on oral assurances like the one that Morgan Stanley would "take care" of it.[64]

From April 2007 through August 2007, Central Mortgage purchased servicing rights for three more pools of Agency Loans, and five more pools of Private Loans. Each time it did so, it reaffirmed the Master Agreement, as amended, and the transaction-specific documents constituted the "entire [a]greement" between the parties.[65]

B. The Agencies Begin To Put Back Loans As The Financial Crisis Takes Hold

Starting in 2008, coincident with the advent of the deepest economic recession of our era, the Agencies began sending Central Mortgage repurchase demands for individual loans. The Agencies could not demand repurchase of a loan simply because the loan had

[61] Am. Compl. ¶¶ 64, 68.
[62] *Id.* ¶ 69.
[63] *Id.* ¶ 70.
[64] *See id.*
[65] *Id.* at Ex. D (Servicing Rights Purchase Agreement) § 12.

fallen into default, but they had broad flexibility to put back loans for a variety of reasons. Accordingly, for each such demand, Agency would send a letter identifying the loan at issue and the reason for the put-back. Central Mortgage alleges that these repurchase demands "arose solely because Morgan Stanley had made misrepresentations to the Agencies when selling the underlying loans,"[66] although I note Central Mortgage originally asserted in the Original Complaint that for "most of the loans" at issue, "the borrowers [had] engaged in fraud at the time of origination by misstating material information such as their income, occupation, and assets."[67] This gamesmanship in pleading is not lost on the court, and is relevant for the following reason.

Central Mortgage cannot obtain relief against Morgan Stanley under the Master Agreement simply by alleging that the Agencies put back loans. This is because the fact that an Agency puts back a loan does not give rise to a breach of the Master Agreement or the transaction-specific documents. And, as reflected by the terms of the Agency guidelines, an Agency may require Central Mortgage to repurchase a loan on grounds that do not implicate Morgan Stanley's representations and warranties to Central Mortgage.[68] Rather, in order for Central Mortgage to state a contract claim against Morgan Stanley arising out of the repurchase request under the Master Agreement, the Agency must put back the loan for a reason that also constitutes a breach of a representation and warranty made by Morgan Stanley to Central Mortgage in that

[66] *Id.* ¶ 73.
[67] Orig. Compl. ¶ 86.
[68] *E.g.*, Freddie Mac Guidelines § 72.1 (providing for repurchase in the event that the servicer services a Mortgage in violation of the servicer's representations and warranties); *id.* (providing for repurchase in the event that the mortgage insurer cancels coverage).

Agreement. Because Morgan Stanley's representation in § 10.13 related to fraud by the borrower or originator contains a knowledge qualifier, thus making it more difficult to prove up,[69] Central Mortgage has tactically focused its breach of contract theory on Morgan Stanley's representation in § 10.08 that the information it provided in the Mortgage Loan Schedule and Data File was "true, complete and accurate in all material respects."[70]

Central Mortgage's principal theory of relief linking the Agency put-backs to Morgan Stanley's representations in the Master Agreement goes like this: (i) the Agencies put back loans because "one or more of the characteristics of a loan had been misrepresented by Morgan Stanley,"[71] and so Morgan Stanley had breached the representation it made to the Agencies that the loan information it provided to them was "true, complete and accurate;"[72] (ii) Morgan Stanley had made the same representation to Central Mortgage by warranting that the information it provided to Central Mortgage on the Mortgage Loan Schedule and Data File was "true, complete and accurate in all material respects;"[73] and so, (iii) "a determination by the Agency that Morgan Stanley

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[69] *See* Lou R. Kling & Eileen T. Nugent, 2 *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* § 11.02, at 11-18 (2001) ("It is with respect to the … ability to sue for damages … that the use of a knowledge limitation makes the biggest difference. If the representation at issue is qualified by a knowledge limitation, the [suing party], in order to recover damages, not only has to show that the underlying representation was false, but that the [representing party] was aware of it."); ABA, *Model Merger Agreement for the Acquisition of a Public Company* 28 (2011) ("[T]he qualification of a representation as being made to the target's knowledge may have a significant impact on the availability of post-closing indemnification.").
[70] Master Agreement § 10.08.
[71] Am. Compl. ¶ 76.
[72] *Id.* ¶ 74 (citing Freddie Mac Guidelines § 6.1).
[73] *Id.* ¶ 75.

had misrepresented certain loan characteristics constitutes a prima facie breach"[74] of at least Morgan Stanley's mirror image representation in the Master Agreement that it would provide Central Mortgage with information in the Mortgage Loan Schedule and Data File that is "true, complete and accurate in all material respects."[75]

The parties naturally dispute the meaning of this representation made by Morgan Stanley. Central Mortgage's view is that the representation that the information contained in the Mortgage Loan Schedule and Data File would be "true, complete and accurate in all material respects" requires that the underlying data itself be true, complete and accurate in all material respects. By contrast, Morgan Stanley argues that the representation only refers to the truth and accuracy of the transcription of the information from the loan files to the Mortgage Loan Schedule and Data File. If I were to accept Morgan Stanley's competing interpretation, Central Mortgage's theory linking the Agency put-backs to a breach of the Master Agreement becomes less tenable. But, for purposes of this motion and the questions I am called to answer, I accept Central Mortgage's interpretation as a possible, if strained, one given the broad language of § 10.08.[76]

Importantly, Central Mortgage contends that it only learned of these alleged defects in the loan data when the Agencies began putting the loans back in 2008, for the following reason. Despite its myriad representations that it would review the loan files before entering into each servicing rights purchase, Central Mortgage now claims that it

[74] *Id.*
[75] *Id.*
[76] *See Central Mortgage I* at *9 n.75.

actually did not do that.[77] It decided that such an exercise would be too cumbersome and expensive because of the loan files were voluminous.[78] Instead, Central Mortgage confined its evaluation of the loans offered in an individual servicing rights transaction to the information contained in the Mortgage Loan Schedule and Data File provided by Morgan Stanley. Thus, the first time Central Mortgage alleges it sent Morgan Stanley "prompt written notice" of its breach of representation as required by the Master Agreement was in 2008, when it forwarded the repurchase demands sent by the Agencies to Morgan Stanley. Through March 2009, Morgan Stanley allegedly "cur[ed]" its breaches as to these loans by working with Central Mortgage to appeal the repurchase demand when appropriate, and to otherwise fulfill the Agency's repurchase demand in 47 separate instances by buying the repurchased loan from Central Mortgage or reimbursing Central Mortgage for its make-whole payment to the Agency.[79]

In March 2009, however, Morgan Stanley stopped repurchasing the loans from Central Mortgage or reimbursing it for its make-whole payments to the Agencies, and has stopped cooperating with the appeals process.[80] Since March 2009, Central Mortgage has assumed sole responsibility for the Agency Loans subject to repurchase, which numbered 265 at the time of the Amended Complaint.[81] Central Mortgage continues to fight the Agencies' decision to put back loans through the Agency appeals process.

[77] Am. Compl. ¶ 34.
[78] *Id.* (stating that reviewing the loan files would be "cost prohibitive").
[79] *Id.* ¶ 80.
[80] *Id.* ¶¶ 83-88.
[81] *Id.* ¶ 88.

C. The Original Complaint And This Court's Decision On The Motion To Dismiss That Complaint

On December 14, 2009, Central Mortgage filed the Original Complaint and sued on 47 individual Agency loans that the Agencies had put back allegedly based on behavior attributable to Morgan Stanley but that Morgan Stanley refused to repurchase from Central Mortgage (what I have called the "Original Loans").[82] Central Mortgage asserted that Morgan Stanley breached its representations and warranties under the Master Agreement and transaction-specific documents as to those Original Loans,[83] and pled a host of ancillary contract- and tort-based claims as well.[84] Importantly, Central Mortgage limited its substantive allegations to the Original Loans. Central Mortgage did not allege that it gave Morgan Stanley contractual notice of a breach of a representation or warranty concerning any other loans, but it did assert that "[n]early [140] rejections are pending, and further mortgage rejections are occurring on an ongoing basis."[85]

Morgan Stanley moved to dismiss the Original Complaint under Rule 12(b)(6) for failure to state a claim, and this court granted that motion in *Central Mortgage I*.[86] In relevant part, I dismissed Central Mortgage's breach of contract claim without prejudice because I concluded that Central Mortgage had not given Morgan Stanley proper

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[82] *See* Orig. Compl. Ex. K (Loan-By-Loan Breach Chart) (detailing loan data inaccuracies for 47 loans).
[83] *E.g.*, Orig. Compl. ¶¶ 97, 106.
[84] Specifically, Central Mortgage asserted the following claims in the Original Complaint: (1) breach of contract; (2) breach of representations and warranties; (3) repudiation; (4) breach of the implied covenant of good faith and fair dealing; (5) implied indemnity; (6) rescission for unilateral mistake; (7) negligent misrepresentation; (8-9) two separate counts of promissory estoppel; and (10) unjust enrichment.
[85] Orig. Compl. ¶ 7.
[86] 2010 WL 3258620 (Del. Ch. Aug. 19, 2010).

contractual notice as specified under the Master Agreement. Specifically, I concluded that Central Mortgage's forwarding of the Agency repurchase demand to Morgan Stanley did not constitute proper notice because Central Mortgage did not "point out to Morgan Stanley where the representations and warranties in the Master Agreement had been violated."[87] I allowed Central Mortgage to replead its contract claim once it had provided Morgan Stanley with actual specific notice of the alleged breaches in terms of specifically relating the Agency put-backs and the reasons for those put-backs to Morgan Stanley's conduct and duties under the Master Agreement and transaction-specific documents.[88] Also, I dismissed Central Mortgage's breach of the implied covenant claim with prejudice because I concluded that it was based on allegations that were duplicative of those supporting the breach of contract claim and thus failed as a matter of New York law.[89]

D. The Supreme Court Reverses

Central Mortgage appealed that decision to our Supreme Court, but only on the questions of whether it adequately stated a claim for (i) breach of contract and (ii) breach of the implied covenant.[90]

In *Central Mortgage II*, the Supreme Court reversed and remanded.[91] First, the Court reversed the dismissal of the breach of contract claim on the basis that Central

[87] *Central Mortgage I* at *8.
[88] *Id.* at *8.
[89] *Id.* at *10.
[90] In the Original Complaint, Central Mortgage also alleged a second breach of contract claim based on a separate provision in the Master Agreement, the dismissal of which it also appealed. Because Central Mortgage fails to pursue that claim in its Amended Complaint, for the sake of economy I limit my discussion and analysis of the procedural history to its contract claim premised on the breach of representations and warranties.

Mortgage had adequately pled that it satisfied the contractual notice provision, concluding that this court had held the plaintiff to a higher procedural standard than appropriate on a motion to dismiss by analyzing whether the alleged notice given was in fact contractually sufficient.[92] Second, the Court reversed the dismissal of the implied covenant claim, holding that the fact allegations underlying the implied covenant claim (in particular, the extra-contractual, oral statements by Morgan Stanley representatives relating to the quality of its due diligence facility) sufficiently differed from those allegations underlying the accompanying breach of contract claim, which were grounded in the specific representations in the Master Agreement.[93]

E. Central Mortgage Files The Amended Complaint And Adds New Claims, And Morgan Stanley Moves To Dismiss

On November 4, 2011, Central Mortgage filed the Amended Complaint in order to add breach of contract and breach of the implied covenant claims for 218 new individual Agency Loans that the Agencies had put back since the filing of the Original Complaint (the "New Agency Loans"). In the Amended Complaint, Central Mortgage also alleges for the first time a seventh pool of Agency Loans purchased at some point between April and August 2007 (the "New Pool"),[94] whereas the Original Complaint only alleged six pools.[95]

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[91] 27 A.3d 531 (Del. 2011).
[92] *Id.* at 538-39.
[93] *Id.* at 541.
[94] Am. Compl. ¶ 71.
[95] During the pendency of its appeal of a decision of this court specifically giving it the revised right to file a new complaint after giving Morgan Stanley the proper contractual notice, Central Mortgage gave notice to Morgan Stanley about the Original Loans and other loans that it viewed

Central Mortgage further expanded the scope of the Original Complaint by adding breach of contract and implied covenant claims for the Private Loans (together with the New Agency Loans, the "New Loans"), and seeks rescission of all Private Loan transactions. The Original Complaint provided no factual detail regarding the Private Loans, other than mentioning that such Private Loans existed. Rather, Central Mortgage waited until the Amended Complaint to describe the Private Loan transactions or to base any claims on the Private Loans. Central Mortgage explains its delay in the following way. It contends that it was only "prompted" to "review the information that Morgan Stanley provided when selling the servicing rights to the [Private Loans]" once it "[u]ncovered Morgan Stanley's serial misrepresentations" with the Agency Loans due to the Agency repurchase demands.[96]

To that end, Central Mortgage undertook an analysis in which it examined, at the individual loan level, the loan information for a "statistically significant portion"[97] of the more than 12,000 Private Loans. In total, 203 Private Loans were sampled. Drawing the inference that this sample was representative of all the Private Loans, Central Mortgage alleges that the analysis revealed that "Morgan Stanley is in material breach of one or more of its representations and warranties with respect to substantially all of the Private [Loans],"[98] and projected that "100% of the Mortgage Loan Schedules are likely to contain at least two material misrepresentations or defects, and over 50% are likely to

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as according with the contractual requirements for notice as this court understood them in *Central Mortgage I*.

[96] Am. Compl. ¶ 89.

[97] *Id.* ¶ 11.

[98] *Id.* ¶ 89.

contain at least six material misrepresentations."[99] Central Mortgage was able to undertake this analysis and uncover loan information errors using the loan files that it had in its possession the whole time it was servicing these loans.[100] Central Mortgage alleges it gave Morgan Stanley loan-by-loan notice of the breaches related to the 203 sampled Private Loans and the 218 New Agency Loans before filing the Amended Complaint.

Morgan Stanley moves to dismiss the Amended Complaint under Rule 12(b)(6). It argues that Central Mortgage's claims for breach of contract and breach of the implied covenant are legally insufficient on grounds other than those addressed by the Supreme Court in *Central Mortgage II*. In addition, Morgan Stanley argues that the contract and implied covenant claims relating to the New Loans, which are alleged for the first time in the Amended Complaint, as well as to any Original Loans whose servicing rights were purchased more than three years before the date of the Original Complaint, are barred by Delaware's three-year statute of limitations for contract claims. I address these arguments in turn.

III. Legal Analysis

A. Standard Of Review

As made clear by our Supreme Court in *Central Mortgage II*, the standard on a motion under Rule 12(b)(6) is a plaintiff-friendly one. "[A] trial court should accept all well-pleaded factual allegations in the [c]omplaint as true, accept even vague allegations

[99] *Id.* (emphasis omitted); *see also* P. Ans. Br. at 12.
[100] *See* Am. Compl. ¶¶ 89-91; *id.* at Ex. G (Loan-By-Loan Breach Chart); *id.* at Ex. H (Supplemental Loan-By-Loan Notice) (notifying Morgan Stanley that "the table below reflects the discrepancies between the information provided by Morgan Stanley in the Mortgage Loan Schedule and the actual information contained in the loan file.").

in the [c]omplaint as 'well-pleaded' if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof."[101]

But, I cling to the view that even this liberal pleading standard is not toothless, for the court is only required to accept as true "well-pleaded allegations of fact."[102] As our Supreme Court explained in *In re General Motors (Hughes) Shareholder Litigation*, and recently in *Price v. E.I. DuPont de Nemours & Co.*,[103] "[a] trial court is not … required to accept as true conclusory allegations 'without specific supporting factual allegations.'"[104] The Court in *General Motors* that said this also said verbatim the reasonable conceivability language embraced by the Court in *Central Mortgage II*.[105] In opinions issued after *Central Mortgage II*, this court has taken the same approach of subjecting the standard of reasonable conceivability to the caveat that the court need not accept conclusory allegations unsupported by specific facts.[106] Thus, even in a post-*Central*

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[101] *Central Mortgage II* at 536 (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).
[102] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).
[103] 26 A.3d 162, 166 (Del. 2011).
[104] *Gen. Motors*, 897 A.2d at 168 (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. 1995)).
[105] *See id.*
[106] *See, e.g.*, *Blaustein v. Lord Baltimore Capital Corp.*, 2012 WL 2126111, at *4 (Del. Ch. May 31, 2012) (noting that the court need not accept "conclusory allegations unsupported by specific facts."); *Hamilton P'rs, L.P. v. Highland Capital Mgmt., L.P.*, 2012 WL 2053329, at *2 (Del. Ch. May 25, 2012) ("[T]he [c]ourt need not accept conclusory allegations unsupported by specific facts or ... draw unreasonable inferences in favor of the non-moving party.") (citation and internal quotation marks omitted); *In re K-Sea Transp. P'rs L.P. Unitholders Litig.*, 2012 WL 1142351, at *5 (Del. Ch. Apr. 4, 2012) (same); *Clean Harbors, Inc. v. Safety-Kleen, Inc.*, 2011 WL 6793718, at *3 (Del. Ch. Dec. 9, 2011) (same); *In re Krafft-Murphy Co.*, 2011 WL

Mortgage II world, this court believes our Supreme Court continues to require a plaintiff to plead specific facts that make out a cause of action, rather than rely on conclusory allegations, in order to withstand a motion to dismiss.

B. The Supreme Court's Ruling Mandates Denying The Motion To Dismiss As To The Originally Pled Claim

Morgan Stanley moves to dismiss the Amended Complaint in its entirety, including those claims the dismissal of which was reversed by our Supreme Court. These claims include Central Mortgage's breach of contract and implied covenant claims premised on the Original Loans. Morgan Stanley asserts that because the Supreme Court in *Central Mortgage II* did not address or decide the other independent reasons why Central Mortgage's claims fail under Rule 12(b)(6), this court is therefore free to consider those independent reasons on remand.[107]

It is fundamental that "the trial court is required to comply with the appellate court's determinations as to all issues expressly or implicitly disposed of in its decision."[108] Thus, in order to determine whether the Supreme Court left any room for me to consider Morgan Stanley's renewed arguments in favor of dismissal, I turn to the appellate decision in this case and focus on the specific holdings relevant to the motion before me.

6287998, at *6 (Del. Ch. Nov. 9, 2011) (same); *In re Alloy, Inc.*, 2011 WL 4863716, at *6 (Del. Ch. Oct. 13, 2011) (same). Indeed, the Supreme Court itself reaffirmed the requirement to plead specific facts rather than conclusory allegations merely three months before issuing its opinion in *Central Mortgage II*. *See E.I. DuPont de Nemours & Co.*, 26 A.3d at 166 ("We decline … to accept conclusory allegations unsupported by specific facts ….") It seems unlikely that the Court meant to overrule this requirement in *Central Mortgage II* absent specific language to that effect.

[107] *See* Defs. Op. Br. at 36; Tr. 14.

[108] *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 39 (Del. 2005).

First, in connection with its examination of the breach of contract claim, the Supreme Court held that "[w]e reverse the Vice Chancellor's dismissal of [the] breach of contract claim[] because [Central Mortgage's] pleadings regarding notice satisfy the minimal standards required at this early stage of litigation."[109] To my mind, a reversal of a decision to grant a motion to dismiss means that the motion to dismiss is denied and the claim at issue can move forward. Notably, the Supreme Court declined to affirm my dismissal on a different ground, even though Morgan Stanley argued those reasons in its appellate briefing and gave the Court the chance to adopt them.[110] Nowhere in *Central Mortgage II* does the Supreme Court ask me to explore whether the claim is subject to dismissal on grounds apart from contractual notice. Rather, the Supreme Court's mandate plainly says that "we reverse the … judgment dismissing all … of [Central Mortgage's] claims, and remand this case to the Court of Chancery for further proceedings consistent with this Opinion."[111] I thus adhere to that ruling.[112]

Second, as to breach of implied covenant, the Supreme Court stated that "[w]e hold only that [Central Mortgage's] implied covenant claim is sufficiently distinct from

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[109] *Central Mortgage II* at 538-39.

[110] *See* Brief for Appellee, *Central Mortgage II* at 27 (in section of brief entitled "Multiple Other Grounds Support Dismissal of [Central Mortgage's] Breach of Representations and Warranties Claim," arguing that "[t]his Court may, however, affirm the Court of Chancery's decision based on any of the other grounds raised by Morgan Stanley, if it wishes to do so.") (citing *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995)).

[111] *Central Mortgage II* at 541.

[112] Interestingly, both Morgan Stanley and Central Mortgage briefed the question of the legal sufficiency of the originally pled loans as if I could take a wholesale shot at them again. Central Mortgage did not raise the Supreme Court's decision as a basis for me to deny Morgan Stanley's motion to dismiss with regard to the Original Loans. Although, as a general matter, arguments not briefed are deemed waived, this is a principle of discretion and I am bound by *Central Mortgage II*'s ruling on the breach of contract claim whether or not Central Mortgage thinks that is the case.

its breach of contract claims and sufficiently well pleaded to survive Morgan Stanley's [m]otion to [d]ismiss."[113] In so holding, the Supreme Court concluded that the implied covenant claim was not duplicative of Central Mortgage's breach of contract claim because it was supported by Morgan Stanley's extra-contractual, oral representations about the quality of its due diligence. I note that the Court did not consider or address whether implying a term based on such oral, extra-contractual promises is permitted under New York law given that the Master Agreement and transaction-specific documents contain an integration clause, a no oral-modification clause, and a no-waiver clause.[114] But, the Court's language is plain and requires that I find for purposes of this motion that the implied covenant claim as to the Original Loans is "sufficiently well pleaded" to survive a motion to dismiss.[115]

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[113] *Central Mortgage II* at 541.

[114] *Id.* at 540-41.

[115] To be candid, the Supreme Court's reasoning is a bit puzzling. Even though the Court held that the implied covenant claim is non-duplicative and "sufficiently well pleaded," it also declined to "address whether [Central Mortgage's] pleading with respect to the implied covenant could survive summary judgment or prevail at trial," *id.* at 541, thus leaving open the possibility of challenging the legal theory on which the Supreme Court's dismissal was based. Indeed, the Supreme Court acknowledged and relied on the alleged fact that "Morgan Stanley made the [due diligence] promise outside of the contract – a fact that serves as part of the basis for [Central Mortgage's] claim for breach of the implied covenant." *Id.* Thus, a strong argument could be made in Morgan Stanley's favor that a court applying New York law may not imply an obligation into a contract that is inconsistent with the rest of the terms of the written contract, *see State St. Bank & Trust Co. v. Inversiones Errazuris Limitada*, 374 F.3d 158, 170 (2d Cir. 2004); *MBIA Ins. Co. v. Residential Funding Co., LLC*, 2009 WL 5178337, at *6 (N.Y. Sup. Ct. 2009), especially when doing so would run afoul of an integration clause, a no-oral modification clause, and a no-waiver clause, *see Ralco, Inc. v. Citibank, N.A.*, 820 N.Y.S.2d 248 (N.Y. App. Div. 2006). *See also Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (a Delaware Supreme Court case to the same effect). For present purposes, however, *Central Mortgage II* states that the implied covenant claim survives the motion to dismiss and can only be considered again at summary judgment. That ruling requires adherence.

In sum, I am constrained by the mandate of *Central Mortgage II* and conclude that Central Mortgage's breach of contract and breach of the implied covenant claims that relate to the Original Loans must survive dismissal.

C. Testing The Legal Sufficiency Of The New Claims Made In The Amended Complaint

The remainder of my analysis is focused on the legal sufficiency of the claims that appear for the first time in the Amended Complaint. In particular, I address whether these new claims are time barred. The new claims include breach of contract and breach of the implied covenant claims as to 218 additional Agency Loans (what I have defined as the "New Agency Loans") and nearly all the Private Loans (what I have defined together with the "New Agency Loans" as the "New Loans"). The servicing rights contracts for the New Loans were entered into on dates ranging from October 2005 through August 2007.[116] The Amended Complaint was filed on November 4, 2011, more than four years later. The critical question, therefore, is whether the applicable statute of limitations bars Central Mortgage's contract claims related to the New Loans.

A claim may be dismissed for failure to comply with the statute of limitations "if the facts pled in the complaint, and the documents incorporated within the complaint, demonstrate that the claims are untimely."[117] The plaintiff bears the burden to plead facts

[116] Central Mortgage concedes in its brief that it purchased servicing rights for certain of the New Loans before December 14, 2006 (three years before the Original Complaint was filed). It does not identify the specific New Loans that were purchased in that time period. *See* P. Ans. Br. at 16 n.17.

[117] *CertainTeed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6 (Del. Ch. Jan. 24, 2005).

that demonstrate the applicability of an exception to the statute of limitations.[118] Otherwise, "[w]hen that burden is not met, the court must dismiss the complaint if filed after expiration of the limitations period."[119]

As a court of equity, this court "analyzes questions of time bars and undue delay under the doctrine of laches,"[120] but will typically apply the applicable statute of limitations by analogy.[121] The statute of limitations for a claim essentially provides the outermost limit for a plaintiff, filing in Chancery, to bring a claim, with laches typically acting to require even earlier filing.[122] For instance, a laches bar may arise earlier than the statutory cut-off when a plaintiff seeks equitable remedies such as a mandatory injunction or rescission, as Central Mortgage does here.[123] This court has often noted the "importance of acting with alacrity" when pursuing such remedies.[124] Relief of this kind will only be obtained "if the plaintiff acts with dispatch,"[125] and will normally be

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[118] *Id.*
[119] *Id.*
[120] *Petroplast Petrofisa Plasticos S.A. v. Ameron Int'l Corp.*, 2011 WL 2623991, at *14 (Del. Ch. July 1, 2011).
[121] *See Kahn v. Seaboard Corp.*, 625 A.2d 269, 271 (Del. Ch. 1993).
[122] *See Territory of U.S. Virgin Islands v. Goldman, Sachs & Co.*, 937 A.2d 760, 808 (Del. Ch. 2007), *aff'd*, 956 A.2d 32 (Del. 2008).
[123] *See State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 527 (Del. Ch. 2005).
[124] *AQSR India Private, Ltd. v. Bureau Veritas Holdings, Inc.*, 2009 WL 1707910, at *10 (Del. Ch. June 16, 2009); *see also Carey v. Landy*, 1989 WL 44051, at *3 (Del. Ch. Apr. 27, 1989) ("Injunctive relief will be denied where a plaintiff inexcusably delays for several years before taking action."); *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 817 A.2d 160, 174 (Del. 2002) ("It is a well-established principle of equity that a plaintiff waives the right to rescission by excessive delay in seeking it. Furthermore, it is not a matter of laches and there is no requirement that the defendant show prejudice from the delay. Rather, it is the plaintiff's burden to prove promptness, not the defendant's to prove delay.") (internal citation marks and quotations omitted) (alterations omitted).
[125] *Brady*, 870 A.2d at 527.

"foreclosed to a plaintiff who sits on its hands until near the end of the analogous limitations period."[126]

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Before I begin the statute of limitations analysis in connection with the New Loans, I note at the outset that Morgan Stanley has waived the ability to challenge any of the Original Loans on statute of limitations grounds for purposes of this motion because it did not raise this affirmative defense in its original or appellate briefing.[127] At oral argument, Morgan Stanley defended the tardiness of this argument based on the fact that the Original Complaint did not give it enough information at the time to raise the defense, because there were no allegations as to the dates on which the servicing rights contracts for the 47 Original Loans were entered into by the parties. So, the argument goes, Morgan Stanley could not know whether any of those loans were within the limitations period and thus at the time of its original motion to dismiss it lacked sufficient information to raise this defense.[128]

Although I agree that the Original Complaint does not allege what dates the servicing rights for the Original Loans were entered into, Central Mortgage did plead in the Original Complaint that certain Agency Loan transactions occurred in March 2006,[129]

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[126] *Id.*

[127] *See Ins. Corp. of Am. v. Barker*, 628 A.2d 38, 42 (Del. 1993) ("We … adhere to the well-settled rule that 'a party cannot raise anew on remand an issue that it failed to pursue on appeal.'") (citation omitted).

[128] Tr. 5-6.

[129] *See* Orig. Compl. ¶ 43 ("Morgan Stanley and Central Mortgage entered into their first Agency transaction under the [Master Agreement] in early 2006, agreeing to sell and purchase servicing rights to approximately $500 million in Freddie Mac loans. The final purchase agreement for this transaction was dated effective March 16, 2006.").

more than three years before the December 14, 2009 date of the Original Complaint, and thus Morgan Stanley was on notice that certain of the Original Loans might be subject to a statute of limitations defense. What's more, the same deficiency cited by Morgan Stanley as a reason to excuse its belatedly raised argument exists with regard to the Amended Complaint. That is, I still cannot determine the individual dates on which each of the servicing rights contracts for the Original Loans was entered into, and neither can Morgan Stanley.[130] Morgan Stanley accordingly is not entitled to take advantage of the legal doctrine that allows the trial court to revisit the Supreme Court's conclusion of law based on "changed circumstances."[131] The law of the case therefore dictates that the claims related to the Original Loans survive a dismissal motion.

Even if I were to consider this statute of limitations argument, however, I would decline to dismiss any of Central Mortgage's claims related to the Original Loans on limitations grounds. This is because, for reasons that I will discuss, the determination of the limitations period depends on the relevant contract date on which the servicing rights for each individual Original Loan were purchased. Those dates are not ascertainable from the face of the complaint or the attached documents, and thus cannot form a proper basis for a motion to dismiss.[132] In fact, in its brief Morgan Stanley concedes that "[i]t is unclear from the face of the [Amended] Complaint which of the [Original Loans], if any,

[130] *See* Defs. Op. Br. at 21; Tr. 6.
[131] *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 39 (Del. 2005).
[132] *See CertainTeed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6 (Del. Ch. Jan. 24, 2005).

were purchased after December 14, 2006,"[133] and then requests that "[Central Mortgage] … be compelled to provide such information in order to demonstrate the timeliness of its claims."[134] A motion to dismiss, however, is not the proper procedural vehicle to compel a plaintiff to provide information relevant to a defendant's statute of limitations defense. Instead, Morgan Stanley may raise the statute of limitations as an affirmative defense in its responsive pleading to the Amended Complaint, and request that information through discovery.[135]

1. Delaware's Three-Year Statute Of Limitations Applies To The Breach Of Contract Claims

Morgan Stanley and Central Mortgage agree, as do I, that Delaware's statute of limitations for contract claims applies in this case.[136] The question of which jurisdiction's statute of limitations applies is a procedural question determined by the rules of the forum court,[137] so I look to Delaware law to determine the limitations period.[138] Under Delaware's "borrowing" statute, "where a cause of action arises outside of [Delaware], an action cannot be brought in a court of [Delaware] to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this

[133] Defs. Op. Br. at 21 n.14; *see also* Tr. 6 (counsel for Morgan Stanley stating that "frankly, ... I still can't tell that from this pleading" whether the statute of limitations on the Original Loans had run by the time the Original Complaint was filed).
[134] Defs. Op. Br. at 21 n.14.
[135] *See* Ct. Ch. R. 8(c); *cf.* 5 Wright & Miller, *supra* note 145, § 1277 ("[T]he failure to raise an affirmative defense by motion will not result in a waiver as long as it is interposed in the answer.").
[136] *See* Defs. Op. Br. at 17; P. Ans. Br. 13-23.
[137] *Chaplake Holdings, Ltd. v. Chrysler Corp.*, 766 A.2d 1, 5 (Del. 2001) ("As a general rule, the law of the forum governs procedural matters.").
[138] A contractual choice of law provision does not change the result, unless the provision explicitly calls for the application of that law's statute of limitations. *See In re Winstar Commc'ns, Inc.*, 435 B.R. 33, 45 (Bankr. D. Del. 2010).

State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action."[139] Here, Delaware's three-year limitations period governs Central Mortgage's breach of contract claims under the Master Agreement and transaction-specific agreements because it is shorter than the equivalent period prescribed by New York law, which is six years.[140] The three-year limitations period also applies to Central Mortgage's claim for breach of the implied covenant of good faith and fair dealing.[141]

Delaware's statute of limitations for contract claims begins to run on the date of the breach, regardless of whether the plaintiff is ignorant of the cause of action.[142] That is established law and not subject to debate. "Because representations and warranties about facts pre-existing, or contemporaneous with, a contract's closing are to be true and accurate when made," a breach of such representations and warranties "occurs on the date of the contract's closing and hence the cause of action accrues on that date."[143]

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[139] 10 *Del. C.* § 8121.
[140] *Compare* 10 *Del. C.* § 8106, *with* N.Y. C.P.L.R. § 213.
[141] *E.g.*, *Homsey Architects, Inc. v. Nine Ninety Nine, LLC*, 2010 WL 2476298, at *8 (Del. Ch. June 14, 2010).
[142] *E.g.*, *SmithKline Beecham Pharms. Co. v. Merck & Co.*, 766 A.2d 442, 450 (Del. 2000) (citation omitted).
[143] *GRT v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *6 (Del. Ch. July 11, 2011); *see also CertainTeed Corp. v. Celotex Corp.*, 2005 WL 217032, at *8 (Del. Ch. Jan. 24, 2005) (noting that claim for breach of representations and warranties accrued on the date of the contract's closing); 6 *Del. C.* § 2-725(2) (in the context of analogous principles found in Delaware's version of the UCC, prescribing that "a breach of warranty occurs when tender of delivery is made," except with regard to warranties explicitly extending to future performance); 54 C.J.S. *Limitations of Actions* § 215 (same); *accord* 12A William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 5615, at 336 (perm. ed., rev. vol. 2009) ("The closing date [of the contract] itself triggers the contractual limitation on liability [for a breach of representation or warranty] if either the seller or buyer discovers that a representation or warranty made by the other party in the acquisition agreement is not true."). Central Mortgage's

Here, the servicing rights contracts for the New Loans were entered into between October 2005 and August 2007. The cause of action related to those New Loans began to accrue on those dates. So, to comply with the three-year limitations period, Central Mortgage had until October 2008 through August 2010 to file suit, depending on the date of the particular contract's closing.

Central Mortgage filed the Original Complaint on December 14, 2009, a date that is within the limitations period for any New Loan to which the servicing rights were purchased on or after December 14, 2006. But, the operative pleading is the Amended Complaint, which was filed on November 4, 2011, more than four years after the servicing rights for the last New Loans were purchased. Thus, all claims regarding the New Loans are time-barred unless the relation back doctrine or a tolling exception applies.

2. Does The Statute Of Limitations Bar The New Contract Claims?

The gateway question is whether the contract claims regarding the New Loans relate back to the Original Complaint, in which case they would benefit from that earlier filing date of December 14, 2009. I then consider whether Central Mortgage has pled any tolling exception sufficient to excuse the untimeliness of the Amended Complaint. I address these questions in turn.

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implied covenant claim is similarly premised on a breach of Morgan Stanley's oral representation to undertake due diligence for each loan. *See* Am. Compl. ¶ 134 ("Morgan Stanley made specific representations which would imply that Morgan Stanley had conducted or would conduct due diligence on both the Agency and Private [] [L]oans.").

a. Relation Back

Under Court of Chancery Rule 15(c), "[a]n amendment of a pleading relates back to the date of the original pleading when … the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading …."[144] Wright & Miller explain with regard to the analogous federal rule that "if [a] plaintiff attempts to allege an entirely different transaction by amendment, Rule 15(c)[] will not authorize relation back."[145] By contrast, "if the amendment merely expands or amplifies what was alleged in the support of the cause of action already asserted, it relates back to the commencement of the action, and is not affected by the intervening lapse of time."[146] The "determinative factor" for a Delaware court applying Rule 15(c) is "whether a defendant should have had notice from the original pleadings that the plaintiff's new claim might be asserted against him."[147]

Central Mortgage argues that relation back applies to the newly added claims in its Amended Complaint because those claims are "based on the same Master Agreement, the same conduct of the parties and the same series of closely related transactions as the claims in the [Original Complaint],"[148] and thus arose out of the same core operative facts as originally alleged. According to Central Mortgage, this satisfies Rule 15(c)'s

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[144] Ct. Ch. R. 15(c)(2).
[145] 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil* § 1497 (3d ed. updated 2012) (emphasis added) (footnotes omitted).
[146] *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 264 (Del. 1993); *see also* Wright & Miller, *supra* note 145, § 1497 ("[A]mendments that do no more than restate the original claim with greater particularity or amplify the details of the transaction alleged in the preceding pleading fall within [Rule 15(c) of the Federal Rules of Civil Procedure].").
[147] *Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1065 (Del. Ch. 1989) (citation omitted).
[148] P. Ans. Br. at 2.

"conduct, transaction or occurrence" test and its inquiry into whether the defendant had fair notice of the general fact situation giving rise to the new claims. For its part, Morgan Stanley argues that the newly added claims do not arise out of the same "conduct, transaction or occurrence" as the originally pled claims and thus do not satisfy Rule 15(c) because Central Mortgage's claims are based on independent breaches of the Master Agreement and loan-specific documents and therefore do not concern the same set of operative facts.[149] Furthermore, Morgan Stanley argues that the Original Complaint did not give it fair notice of the claims regarding the 218 New Agency Loans and 12,000 plus Private Loans because the Master Agreement requires loan-specific notice for any breach of its representations and warranties. I agree with Morgan Stanley, for the following reasons.

First, each sale of loan servicing rights constituted a separate and independent transaction. A breach of a representation in one transaction-specific contract does not "arise" out of the same "transaction or occurrence" as the breach of the same representation made in a different contract.[150] As Wright & Miller explain, an amendment to a complaint alleging "the breach of an independent contract … may be subject to the defense of statute of limitations because of a failure to meet the transaction

[149] Defs. Reply Br. at 5-6.

[150] *Cf. Morgan Distrib. Co., Inc. v. Unidynamic Corp.*, 868 F.2d 992, 994 (8th Cir. 1989) (affirming denial of application of savings statute that would have required that the amended complaint was in "substance" similar to the original complaint, because "[i]t is clear on its face that the [initial] complaint, as originally filed, stated a set of facts involving a different breach, of a different contract, and occurring in a different year than did the [amended] complaint.").

standard."[151] Thus, on this basis alone, both the New Pool and the sales of servicing rights to the Private Loans – each of which constitutes a separate, independent transaction that was not alleged in the Original Complaint – do not relate back to the date of the Original Complaint.[152]

Second, and perhaps more importantly, each alleged breach of contract due to a breach of representation made by Morgan Stanley as to each individual loan constitutes a separate transaction or occurrence, regardless of the fact that the loans might have been part of the same loan pool. This is because a separate independent violation of the same contract provision does not "arise" out of the same conduct, transaction or occurrence as did the first, unrelated violation. The breaches alleged with respect to the New Loans in the Amended Complaint are entirely separate instances of breach from those alleged in the Original Complaint, because they are based on different loans and distinct instances

[151] Wright & Miller, *supra* note 145, § 1497 (emphasis added) (footnotes omitted). In analyzing questions under Rule 15(c), Delaware courts have often looked to the application in federal court of the analogous Rule 15 of the Federal Rules of Civil Procedure. *E.g.*, *Comm'rs of Town of Slaughter Beach v. County Council of Sussex County*, 1983 WL 142509, at *3 (Del. Ch. Nov. 16, 1983).

[152] *See In re Rationis Enters., Inc. of Pan.*, 45 F. Supp. 2d 365, 367 (S.D.N.Y. 1999) (stating that "[t]he fourth [contract] is a separate transaction which does not arise out of the same transaction asserted in Washington's timely claims and therefore does not relate back under Rule 15(c)," when original transaction involved separate contracts for different cargo transported on the same ship); *Scott Fetzer Co. v. Douglas Components Corp.*, 1994 WL 148282, at *6 (Del. Ch. Apr. 12, 1994) ("While Scott Fetzer alleges breach of contract claims with respect to both the CERCLA claims and the Workers' Compensation liability claims, these are *separate and distinct contractual claims* involving different facts and circumstances.") (emphasis added); *see also Hamilton v. O'Connor Chevrolet, Inc.*, 2003 WL 22953337, at *3 (N.D. Ill. Dec. 12, 2003) ("Relation-back is improper when the amendments concern new and distinct claims, even though they may arise from the same general occurrence or injury.").

of misrepresentation.[153] This is made clear by the breach of contract allegations in Central Mortgage's own pleading.[154] Thus, the relevant "conduct, transaction[s] or occurrence[s]" alleged in the Original Complaint were loan specific.[155]

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[153] In this regard, the U.S. District Court for the District of Delaware's analysis in *Seidel v. Lee* is instructive. In that case, the original complaint alleged a number of "discrete transactions, each of which by themselves constitute a violation of the Investment Act," and the amended complaint alleged additional instances of these "discrete transactions." 954 F. Supp. 810, 815 (D. Del. 1996). The court rejected the plaintiff's relation back argument because "the proposed amendments neither make the previously alleged allegations more specific, nor do they arise out of conduct previously alleged." *Id.* The court elaborated: "Because each transaction is a separate potential violation and not a mere attempt to refine broader allegations, and because Plaintiff claims individual injury in each of the transactions as a result of numerous securities laws violations, the Court concludes that the prior Complaint did not give Defendants adequate notice of the additional eight transactions in issue." *Id. See also Commonwealth Fin. Corp. v. USAmeribancs, Inc.*, 1987 WL 19142, at *1-3 (N.D. Ill. Oct. 20, 1987) (refusing to apply relation back when the plaintiff alleged a new claim for a separate violation of similar, though not identical, contractual representations implicated by the original complaint).

[154] *E.g.*, Am. Compl. ¶ 92 ("With respect to *each mortgage loan* for which Morgan Stanley failed to provide true, complete, and accurate information regarding borrower income, Morgan Stanley is in material breach of Section 10.08 of the [Master] Agreement.") (emphasis added); *id.* ("With respect to *each mortgage loan* for which Morgan Stanley failed to provide true, complete, and accurate information regarding the [debt-to-income ratio], Morgan Stanley is in material breach of Section 10.08 of the [Master] Agreement.") (emphasis added); *id.* ("With respect to *each mortgage loan* for which Morgan Stanley failed to provide true, complete, and accurate information regarding the [loan-to-value ratio], Morgan Stanley is in material breach of Section 10.08 of the [Master] Agreement.") (emphasis added); *id.* ¶ 93 ("With respect to *each [m]ortgage [l]oan* that lacks a HUD-1 Settlement Statement [under the Real Estate Settlement Procedures Act], Morgan Stanley is in material breach of Section 10.10 and Section 10.12 of the [Master] Agreement.") (emphasis added); *id.* ¶ 96 ("With respect to *each [m]ortgage [l]oan* that was subject to fraud in the origination, Morgan Stanley is in material breach of Section 10.12 of the [Master] Agreement.") (emphasis added).

[155] *See Mayle v. Felix*, 545 U.S. 644, 661 (2005) (instructing that, when specifying the "transaction or occurrence" for purposes of applying relation back, a court should look to "[t]he dispositive question in an adjudication of that claim."). Here, the "dispositive question" is whether there was a misrepresentation at the individual loan level for which Morgan Stanley can be held liable. For similar reasons, Central Mortgage's argument that Morgan Stanley's alleged breach of contract regarding the New Loans arises out of the same "pattern of conduct" as pled or attempted to be pled in the Original Complaint is unconvincing, because the relevant "conduct" for purposes of Central Mortgage's contract claims is loan-specific. The cases Central Mortgage cites for this principle involve tort and statutory based claims with different proof requirements, and thus are inapposite for that reason. *E.g.*, *F.D.I.C. v. Conner*, 20 F.3d 1376, 1378 (5th Cir. 1994) (breach of fiduciary duty and negligence action); *USX Corp. v. Barnhart*,

That is the only result that makes any sense in this context. Central Mortgage is not alleging a new theory of relief on facts already alleged as to loans it already sued upon,[156] or adding new facts to support a particular claim as to loans it already sued upon.[157] Rather, it seeks to assert brand new claims for breach of representations and warranties for hundreds of New Agency Loans and thousands of Private Loans, each for different underlying reasons that have no bearing on each other. That is, evaluating the accuracy of Morgan Stanley's representations as to Loan A is an independent inquiry from that evaluation as to Loan B. This plain reality undercuts Central Mortgage's argument that the Original Complaint put Morgan Stanley on "detailed notice of the exact fact situation that gave rise to the new claims,"[158] which is off the mark for another

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395 F.3d 161, 167 (3d Cir. 2004) (statutory violation); *N.J. Carpenters Vacation Fund v. Royal Bank of Scot. Group, PLC*, 720 F. Supp. 2d 254, 266-67 (S.D.N.Y. 2010) (Securities Act claims); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 2005 WL 2148919, at *10 (S.D.N.Y. Sept. 6, 2005) (Securities Exchange Act claims).

[156] *See Shandler v. DLJ Merchant Banking, Inc.*, 2010 WL 2929654, at *19 (Del. Ch. July 26, 2010) (finding timely notice when the defendant knew that the plaintiff "sought to hold it responsible in damages for harm [caused by] its allegedly deficient performance [in rendering a fairness opinion]," and a new allegation of aiding and abetting breach of fiduciary duty based on that same conduct merely "support[ed] an additional legal theory as to why any harm suffered … should be remedied by [the defendant]."); *see also In re Marvel Entm't Group, Inc.*, 273 B.R. 58, 81 (D. Del. 2002) (contract claim related back when it was "simply another legal theory grounded in the same set of facts" as those underlying the claims initially pled by the plaintiff); *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 264 (Del. 1993) (stating that the "fact that the amendment changes the legal theory on which the action was originally brought is of no consequence if the factual situation upon which the action depends remains the same.").

[157] *See Telxon Corp. v. Bogomolny*, 792 A.2d 964, 972 (Del. Ch. 2001) (finding amended complaint timely when it converted the action from a derivative one to a direct one and supplemented original fact allegations with more detail, "reflect[ing] only a greater access to information" at the time of the amended complaint); *cf. Chaplake Holdings, Ltd. v. Chrysler Corp.*, 766 A.2d 1, 8 (Del. 2001) (permitting relation back in the context of adding a new plaintiff when "[the defendant] has been fully apprised of the specific claims asserted in the amended complaint since the inception of the litigation and the amended complaint does not seek to add new facts or change the circumstances from which those claims arose.").

[158] P. Ans. Br. at 14.

reason that is shown by the following case-relevant illustration. Assume a loan-servicer plaintiff files a complaint giving notice of a breach of representations and warranties related to five specific loans out of a tranche of 1,000 loans. That plaintiff, who has for its own economic reasons decided not to investigate the bases for its contract claims in a timely way in spite of making representations to other parties that it had done due diligence before purchasing the servicing rights, generally avers in that complaint that it has a basis to believe that it will plead more breaches in the future that are of the same character of the claims already pled. Under Central Mortgage's theory, any later claim regarding the other 995 loans will relate back to the first complaint because the suing plaintiff wagged its threatening finger, and so that plaintiff has an indefinite amount of time to sue on the remaining loans.

This argument lacks grounding under our law, and most importantly in this case, under the terms of the Master Agreement to which Central Mortgage is bound. The Master Agreement specifically regulates how Central Mortgage is to provide Morgan Stanley with notice of a breach of a representation or warranty, and it requires that Central Mortgage do so in a loan-specific way.[159] Under the Master Agreement, "[u]pon discovery by [Central Mortgage] of a breach" of representations and warranties made by Morgan Stanley, Central Mortgage is required to "give prompt written notice" of the breach to Morgan Stanley.[160] The breaches alleged here are loan-specific in that Central Mortgage says that Morgan Stanley misrepresented information related to specific

[159] *See Cantera v. Marriott Senior Living Servs., Inc.*, 1999 WL 118823, at *7 (Del. Ch. Feb. 18, 1999) (stating that questions of laches must be "answered by reference to the contract").
[160] Master Agreement § 10.13.

loans.[161] Furthermore, the Master Agreement contemplates a loan-specific cure, providing that "[w]ithin 60 days of … notice to [Morgan Stanley] of any such breach of a representation or warranty which materially and adversely affects the ownership interest of [Central Mortgage] in the [s]ervicing [r]ights related to *any [m]ortgage [l]oan*, the seller shall use its best efforts to promptly cure such breach … and, if such breach shall not be cured, [Morgan Stanley] shall, at [Central Mortgage's] option, repurchase *the [s]ervicing [r]ights affected by such breach* …."[162] These provisions in the Master Agreement cannot in any way be read as meaning that notice of the breach of one loan is notice as to breach of all other 20,000 plus loans. If accepted, Central Mortgage's argument would disrespect not only the contracts it signed, but also work injury to the efficiency of commercial law in general. Complex agreements like the Master Agreement and the transaction-specific documents that Central Mortgage affirmed in writing at least 28 times often contain multiple representations and warranties whose subject matter applies to diverse factual situations.[163] The idea that a complaint claiming a breach of representation and warranty "X" and "Y" as to specific factual situations puts a defendant on fair notice for relation back purposes that it will face suit for violation of representation and warranty "X" and Y" as to all the other factual situations that could

[161] *E.g.*, Am. Compl. ¶¶ 91-99 (referring to breaches of contract "with respect to each [m]ortgage loan"). See *supra* note 154, for a citation of these allegations in greater detail.
[162] *Id.* (emphasis added).
[163] *See* James C. Freund, *Anatomy of a Merger* 230 (1975) (explaining that the representations and warranties "constitute a systematic smoke-out of the data" considered by the contracting parties to be most important); *see generally* Kling & Nugent, *supra* note 69, § 1.05[2], at 1-38 ("[R]epresentations and warranties are statements made by a party about itself or the company it owns. The representations in effect paint a picture of such party as of the date of the agreement….").

possibly give rise to their breach is not only inefficient, but inequitable as well given the scope of information subject to the representations and warranties provisions listed in commercial agreements.

More generally, the lack of notice in the Original Complaint applies with special force to the Private Loans, which were specifically disclaimed as a subject of Central Mortgage's suit in the Original Complaint and at oral argument.[164] Central Mortgage has pointed me to no case where a complaint provides *actual* notice that the plaintiff was *not* bringing certain claims, but a court nonetheless permitted relation back on the basis that the defendant should have been aware from that complaint that those claims might be asserted against it anyway.[165]

Central Mortgage cannot avoid Delaware law and the plain terms of the Master Agreement by pointing to certain ominous allegations in its Original Complaint, such as the one averring that "currently pending are approximately 140 additional Agency repurchases or reimbursement requests related to Morgan Stanley sold loans," and that

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[164] *E.g.*, Orig. Compl. ¶ 58 ("Although Central Mortgage also purchased from Morgan Stanley servicing rights to private label loans under the Flow Agreement, this dispute arises out of six 'Agency' loan transactions executed by the parties from March 2006 – August 2007"); Defs. Reply Br. Ex. A (Oral Argument Transcript on Morgan Stanley's Original Motion to Dismiss) at 89-90 (counsel for Central Mortgage informing the court that "[w]e're not suing [on] those [Private Loans] because no one is bringing those back to us," and that "[w]e made no allegation" to putting back the servicing rights to the Private Loans); Tr. 83 ("At that time the [Original] [C]omplaint was not about the private loans.").

[165] *See In re ML/EQ Real Estate P'ship Litig.*, 1999 WL 1271885, at *12 (Del. Ch. Dec. 21, 1999) (denying relation back when "[t]he [original] complaint's total silence about the Saab transaction and its failure to focus on the payment involved in the Northland transaction … imply that the plaintiff had no gripe about the characterization of the funds involved in those transactions."); *see also Marine Midland Bank v. Keplinger & Assocs., Inc.*, 94 F.R.D. 101, 104 (S.D.N.Y. 1982) ("The original complaint concerned itself only with events prior to and including August, 1977, and cannot be viewed to have put defendants on notice that acts up to July, 1978 would also be a part of this action.").

the Agencies continue to put back loans "with no end in sight."[166] To the extent this allegation can be inferred as a threat to plead contract claims related to those "140 additional Agency repurchases" currently pending, it still does not constitute fair notice under Rule 15(c) because it does not give Morgan Stanley a basis to determine the "general fact situation"[167] giving rise to the claim for breach of representations and warranties as to those specific 140 Agency Loans, let alone the 78 additional Agency Loans and all the Private Loans now at issue in this suit.[168]

The idea that a sophisticated commercial party may invoke relation back by pleading some claims for breach of representations and warranties along with a general allegation that it expects to do so again at some point in the future, if embraced, would turn 15(c) into a license for sloth, undermining the General Assembly's policy determination in setting a statute of limitations for contract claims, and would be inequitable. Most of all, it would undermine the finality of contracts by subjecting sellers to a series of late-filed claims brought by amended pleadings based on stale records, by a counterparty calculating enough to put in a general threat to sue in the future in its first complaint.

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[166] Orig. Compl. ¶ 92.

[167] *Mullen v. Alarmguard of Delmarva*, 625 A.2d 258, 264 (Del. 1993).

[168] For similar reasons, its request in the Original Complaint for injunctive relief seeking indemnification for "any and all damages resulting from Morgan Stanley's breach of its contractual obligations" related to "Morgan Stanley-sold mortgages that are in the future put back to Central Mortgage by the Agencies" does not constitute fair notice. Orig. Compl. ¶ 100. This allegation is a request for relief for any breach of contract claims Central Mortgage becomes aware of in the future rather than a fact allegation of those alleged breaches of contract, and thus did not give Morgan Stanley notice of the "general fact situation" underlying whatever breaches of contract Central Mortgage seeks an injunction against. *Mullen*, 625 A.2d at 264.

Put simply, relation back does not provide Central Mortgage with a license to advance an allegation that it *might* plead more claims along with an allegation as to the general basis for why it thinks that there may be more claims, and then allow the plaintiff to sit back knowing that it has indefinitely stalled the running of the limitations period. Claims cannot be preserved indefinitely just because of artful pleading that says so.[169] Any argument that it does runs afoul of clear Delaware law, under which an action for breach of contract has a three-year limitations period and begins to run when the contract is breached, regardless of when the plaintiff discovers its injury.[170] It may be true, as Central Mortgage contends, that additional Agency Loans were put back after the filing of the Original Complaint and that the Agencies continue to put back loans "with no end in sight,"[171] but that is of no moment. The act of the Agency putting back the loan does not give rise to a claim for breach of contract against Morgan Stanley. Central Mortgage's breach of contract claims under the Master Agreement and transaction-specific documents are for *breaches of the representations and warranties* with respect to the information about *particular loans*.[172] Those claims accrued under Delaware law when Central Mortgage bought the servicing rights. The accuracy of the underlying loan information data is independent of whether the Agencies put back the loans, because if

[169] This danger is further illustrated by the fact that, at oral argument, Central Mortgage revealed that it is still unsure of the number of loans the Agencies will put back. *See* Tr. 69.
[170] *See, e.g.*, *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004); *Isaacson, Stolper & Co. v. Artisans' Sav. Bank*, 330 A.2d 130, 132 (Del. 1974); *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999).
[171] Orig. Compl. ¶¶ 85, 104.
[172] *See* Am. Compl. Ex. G (Loan-By-Loan Breach Chart).

that information was not accurate, it was not accurate from the time the contract was entered, regardless of whether the Agency discovered it or not. Rather, the Agencies' decision to put back the loans simply gave Central Mortgage a reason to dig into the files of the specific loans to determine whether a breach by Morgan Stanley in fact occurred.

Moreover, the Agencies can put back loans for a host of reasons that may have nothing to do with any breach of representations or warranties on Morgan Stanley's part. Central Mortgage itself has been fighting the Agencies' determination for many of the returned loans, so it cannot be said that the mere act of putting back a loan is a notice of breach. This reality is further demonstrated by Central Mortgage's representation to the Agencies that it was not "relying" upon them to "identify any deficiencies with respect to the [loans]."[173] Essentially, Central Mortgage wishes to have me hold that a breach of contract occurs not at closing, but when the plaintiff first perceives the injury (*i.e.*, when the Agencies put back a loan). Its argument is thus with Delaware law and Delaware law is settled.

Statutes of limitations are enacted "to require plaintiffs to use diligence in bringing suits so that defendants are not prejudiced by undue delay,"[174] in recognition of the fact that memories fade and information goes stale.[175] Stale claims pose an obvious threat to doing real justice, as any trial judge knows. It is difficult enough to discern what happened when adverse parties are talking about what happened last year. Here, Central

[173] Freddie Mac Form 981.
[174] *Chaplake Holdings, Ltd. v. Chrysler Corp.*, 766 A.2d 1, 6 (Del. 2001).
[175] *Id.* ("Statutes of limitation are designed to avoid the undue prejudice that could befall defendants, after the passage of an unreasonable amount of time, due to the loss of evidence, disappearance of witnesses, or fading memories.") (citing cases).

Mortgage seeks to sue on loans originated over five years ago, by parties other than Morgan Stanley. Memories must be dimmed by now, and the economy has changed in a way that may be relevant to whether any breach was in fact material, as it must be to support relief for Central Mortgage,[176] and that may bear on the equity of affording it any relief. To allow Central Mortgage to amend its complaint to add breach of contract claims based on loans that were originated before 2007 whenever the Agency puts back a loan and have it relate back to the Original Complaint defeats the plain purpose of statutes of limitation, which is to confine these problems to a legislatively-set time period. I refuse to undermine the General Assembly's intent by adopting an inequitable gloss on Rule 15(c).[177] Central Mortgage had the ability to determine in a timely way whether the loan information was accurate based on the loan files it had in its own possession or independent investigations that it could have conducted if it so chose. Central Mortgage's own sampling efforts undertaken in this litigation reveal that such a task was feasible.

In sum, relation back principles do not support permitting the breach of contract claims related to the New Loans. Thus, only the claims related to the Original Loans

[176] *E.g.*, Master Agreement § 10.13 (providing Central Mortgage with the option to require Morgan Stanley to repurchase servicing rights affected by a breach of representation only if that breach "materially and adversely" affects Central Mortgage's ownership interest in the servicing rights); *id.* § 10.08 (representing that the mortgage loan information is "true, accurate and complete in all material respects"); *id.* § 10.12 (representing that the "origination practices used by [the originator], with respect to the [m]ortgage [l]oans have been in all material respects in compliance with applicable laws and regulations.").

[177] *See Chaplake Holdings*, 766 A.2d at 6 (explaining that "[i]nterpretation of Rule 15(c) should preserve the balance between the statute of limitations and the relation-back doctrine – encouraging the disposition of cases on their merits while ensuring defendants receive adequate notice of the claims so that they are not unduly prejudiced in defense of the action.").

have the benefit of the earlier filing date of December 14, 2009. The limitations period for the newly alleged claims must be measured against the filing date of the Amended Complaint – November 4, 2011. Accordingly, all of Central Mortgage's claims premised on the New Loans are barred by the three year statute of limitations, unless some basis for tolling of the statute exists and operates to render any of these claims timely.

b. Do Any Tolling Exceptions Apply?

Central Mortgage argues that the statute of limitations is subject to the applicability of two recognized tolling exceptions: (1) the inherently unknowable injury doctrine; and (2) equitable tolling under the so-called "repair rule." In its briefing, however, Central Mortgage limits its tolling argument to the subset of New Loans purchased before December 14, 2006 under the assumption that relation back applied to save the others.[178] But, because I conclude the Amended Complaint does not relate back to the Original Complaint, and in the interest of fairness and giving full effect to the procedural standard, I consider whether Central Mortgage has demonstrated a justification for tolling the statute of limitations for any of the claims related to the New Loans.

i. Inherently Unknowable Injury

Under the inherently unknowable injury doctrine, also known as the "discovery rule," the statute of limitations is tolled "where it would be practically impossible for a plaintiff to discover the existence of a cause of action"[179] and "the claimant is blamelessly

[178] P. Ans. Br. at 16.
[179] *In re Tyson Foods, Inc.*, 919 A.2d 563, 584 (Del. Ch. 2007).

ignorant of the wrongful act and the injury complained of."[180] If this "narrowly confined"[181] exception applies, the running of the statute will not start until the date on which the plaintiff is on inquiry notice of her claims, meaning that she becomes aware of "facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery [of injury]."[182]

Central Mortgage contends that the statute of limitations should be tolled because "prior to early 2007, [it] did not have notice of Morgan Stanley's breaches, and there were no facts that would have fairly put [it] on notice of Morgan Stanley's breaches."[183] This argument falls short of the required standard, for the following reasons.

Central Mortgage has not pled facts supporting a reasonable inference that there we "no observable or objective factors to put [it] on notice of an injury."[184] Central Mortgage had access to the loan files. It had the opportunity to review the loan files before transacting with Morgan Stanley in the first place, and one would hope that, as the servicer of the loans, it occasionally read the loan files. Perhaps most importantly, Central Mortgage represented to the Agencies that it had performed the necessary due diligence and read the loan files. Once Central Mortgage looked at the loan files in its own possession, it was able to discover Morgan Stanley's breaches.[185] In the face of

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[180] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) (citation and internal quotation marks omitted).
[181] *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 835 (Del. 1992).
[182] *Wal-Mart Stores*, 860 A.2d at 319.
[183] P. Ans. Br. at 20.
[184] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999).
[185] *E.g.*, P. Ans. Br. at 40 (stating that it provided Morgan Stanley with a notice letter as to the Private Loans "following a laborious review of the Private [Loans] led by independent industry

these uncomfortable realities, Central Mortgage asserts that it was "blamelessly ignorant" of the alleged breaches because "it was not economically feasible … to review the voluminous 'loan files.'"[186] But, there is no tolling exception under the doctrine of inherently unknowable injury because a company with a billion-plus market capitalization did not wish to read any of the files of the loans it agreed to service in contravention of its own representations to the contrary.[187]

Furthermore, Central Mortgage's failure to review and investigate the loan files *for years* after buying the servicing rights from Morgan Stanley takes much of the "reasonable conceivability" out of Central Mortgage's assertion that all the problems with the loans that went into default were caused by fraud and other misstatements made by the borrower and other factors at origination, which were not vetted out by Morgan Stanley. As Central Mortgage and the rest of the world know, a debacle occurred in our economy. No doubt loans went into default because they never would or should have been made if the real economic facts were set forth. But, loans also went into default because borrowers lost their jobs, and because lenders, not just borrowers, bet on rising real estate prices and endless refinancing opportunities. In short, there could be many

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experts."); Am. Compl. ¶ 89. Just because a review is laborious, of course, does not make it practically impossible for purposes of the inherently unknowable injury rule.

[186] P. Ans. Br. at 7.

[187] *See Playtex, Inc. v. Columbia Cas.*, 1993 WL 390469, at *4 (Del. Super. Sept. 20, 1993) (explaining that the "inherently unknowable" theory of tolling does not apply where a "wealth of information regarding [the cause of action] was generally available" at the time the cause of action accrued); *cf. Ambase Corp. v. City Investing Co.*, 2001 WL 167698, at *5 (Del. Ch. Feb. 7, 2001) (rejecting the plaintiff's equitable tolling argument based on fraudulent concealment when the plaintiff's claims could have been discovered by reasonable diligence and noting that "[i]t was simply not a practical impossibility for [the plaintiff] to discover a breach of a contract it had in its own possession").

reasons for a loan to have become non-performing, and the length of time that passed between the underwriting of the loans and default on the loans makes it become more conceivable that independent economic factors, not breaches in the origination process and representations and warranties of Morgan Stanley, caused default.

Central Mortgage's view of these realities is odd. Its view was that it had no reason to read a loan file so long as a borrower was paying. Thus, if a loan did not become problematic for five, ten, or fifteen years (and so on), Central Mortgage should not have been bothered to open the file. Rather, it could sit back and enjoy low-cost servicing. Only when there was a delinquency or action by others (such as an Agency put-back) would Central Mortgage shake the dust off the files and dig into the documentation. But, equity aids only the vigilant,[188] and Delaware law on this subject is plain that a cause of action for breach of representation accrues on the date of the contract's closing.[189] Central Mortgage was not entitled under the discovery rule to sit back and wait for symptoms of a breach to surface before pursuing its claims.[190]

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[188] *See, e.g.*, *Whittington v. Dragon Group, L.L.C.*, 991 A.2d 1, 8 (Del. 2009) (expressing principle); 2 *Pomeroy's Equity Jurisprudence* § 418 (5th ed. 1941) (stating maxim that "equity aids the vigilant, not those who slumber on their rights.").

[189] *See* cites *supra* note 143.

[190] *See CertainTeed Corp. v. Celotex Corp.*, 2005 WL 217032, at *11 (Del. Ch. Jan. 24, 2005) (noting that because the plaintiff had reason to suspect breaches of representations relating to two facilities it had acquired from the defendant, the plaintiff "could not fail to act with diligence as to other possible instances of non-compliance" by looking into the condition of a third acquired facility); *see also Gen. Video Corp. v. Kertesz*, 2008 WL 509816, at *5 (Del. Ch. Feb. 25, 2008) (concluding that there was no reason to toll the limitations period where the plaintiffs did not independently confirm the continued validity of a patent that formed the basis of a licensing agreement between the parties and therefore failed "to exercise reasonable diligence."); *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *8 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999) (explaining that "[p]laintiffs were not entitled to sit idly by, blindly relying on defendants' assurances, when the documents and disclosures plaintiffs received regularly were so

Even if I were to accept Central Mortgage's theory, however, none of the claims related to the New Loans would be saved. The doctrine of inherently unknowable injuries only stops the statue from running until the plaintiff is on inquiry notice of its claims, and Central Mortgage concedes that "at the very minimum, the first 'observable or objective factors to put [it] on notice of an injury' occurred in February or March of 2007, when [it] first noticed the high delinquencies in Morgan Stanley's loans and Morgan Stanley [allegedly] admitted that it failed to conduct due diligence."[191] Central Mortgage thus admits that it was on inquiry notice of any of its claims based on problems with the loan data representations by March 2007. The extended limitations period would have expired in March 2010, still well before the filing of the Amended Complaint.

ii. Equitable Tolling

Under equitable tolling, a court may disregard the statute of limitations if a plaintiff "allege[s] facts with sufficient specificity to indicate a defendant affirmatively acted to mislead and induce [the plaintiff] from bringing suit …."[192] But, "[m]ere attempts to repair or a promise to repair [a breach of contract] do not preclude the running

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suggestive of mismanagement" thereby putting them on inquiry notice of the existence of the cause of action).

[191] P. Ans. Br. at 22 (citing Am. Compl. ¶¶ 63-67) (case citation omitted).

[192] *Williamson v. New Castle County*, 2002 WL 453926, at *4 (Del. Ch. Mar. 13, 2002) (citation omitted); *see also Ont. Hydro v. Zallea Sys., Inc.*, 569 F. Supp 1261, 1272 (D. Del. 1983) (finding that there were no "special circumstances to estop the application of the statute of limitations" because the complaint "contain[ed] no factual allegations with sufficient specificity to indicate that [defendant] in fact affirmatively acted to mislead and induce [plaintiff] from bringing suit."); *Lee v. Linmere Homes, Inc.*, 2008 WL 4444552, at *6 (Del. Super. Oct. 1, 2008) ("Allegations of estoppels must contain facts with 'sufficient specificity to indicate a defendant affirmatively acted to mislead and induce that part from bringing suit….'") (citing *Ensminger v. Merritt Marine Const., Inc.*, 597 A.2d 854, 855 (Del. Super. 1988)).

of the statute."[193] "As the repair rule is based on the principle of estoppel, there must be strong elements of reliance and inducement to justify a defense to the statute of limitations."[194] Furthermore, this doctrine is not lightly invoked, because "[e]quitable exceptions to statutes of limitations are narrow and designed to prevent injustice."[195]

Central Mortgage places the weight of its estoppel argument on its allegation that Mr. Francis said that it would "take care" of Central Mortgage after he revealed the defects in Morgan Stanley's due diligence process. Although Central Mortgage only directly quotes Mr. Francis as saying Morgan Stanley would "take care" of Central Mortgage, Central Mortgage alleges that what Mr. Francis meant by that statement was that if any Agency ever gave back a loan to Central Mortgage at any time in the future, Morgan Stanley had supposedly promised to take back ownership of that loan if Morgan Stanley's conduct caused the put-back. Apparently, Central Mortgage now broadens this out to mean that if any Private Loan went delinquent at any time, Morgan Stanley would also take back ownership.[196] "Take care" indeed. Essentially, Central Mortgage says that Morgan Stanley promised that it would simply accept back any loan at any time so long

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[193] *Burrows v. Masten Lumber & Supply Co.*, 1986 WL 13111, at *2 (Del. Super. Oct. 14, 1986).
[194] *Id.* (citations omitted).
[195] *Pomeranz v. Museum Partners, L.P*, 2005 WL 217039, at *13 (Del. Ch. Jan. 24, 2005); *see also Ambase Corp. v. City Investing Co.*, 2001 WL 167698, at *6 (Del. Ch. Feb. 7, 2001) ("Equitable tolling doctrines are an exception to the normal rule, and should not be lightly invoked.").
[196] *See* P. Ans. Br. at 18 ("When it first came to light that Morgan Stanley failed to conduct due diligence on a number of loans, Morgan Stanley represented to [Central Mortgage] that it would remedy its breaches and restructure its due diligence process…. [Central Mortgage] understandably did not sue at that time.").

as Central Mortgage contended that Morgan Stanley did something wrong in processing it.

The problems with this argument are several. They begin with the fact that equitable estoppel is a narrow doctrine that is sparingly invoked and the party seeking to rely upon it has the burden to plead facts to support an equitable estoppel claim with "sufficient specificity."[197] But, what Mr. Francis is quoted as saying is nothing nearly as vast or generous as Central Mortgage contends. For one thing, a vague commitment to "take care" of Central Mortgage does not equate to a promise to repurchase or make Central Mortgage whole for any loan that was put back by the Agencies. Central Mortgage's artful amended complaint only quotes the words "take care" as coming out of the mouth of Mr. Francis. Its translation of that ambiguous phrase into the specific assertion that Morgan Stanley would "indemnify Central Mortgage [] for any adverse consequences that might arise with respect to the loans as a result of Morgan Stanley's misrepresentations and failure to undertake sufficient due diligence"[198] is not done by way of quotation, and contextually is a translation. For another critical thing, Mr. Francis is never quoted as stating that timeliness does not matter and that Morgan Stanley would take back loans regardless of the statute of limitations. Moreover, what Mr. Francis is quoted as saying is entirely consistent with the *written amendment* to the Master Agreement that Morgan Stanley entered into in which it agreed to repurchase the servicing rights to loans that went delinquent within the first twelve months. Mr. Francis'

[197] *Williamson*, 2002 WL 453926, at *4.
[198] Am. Compl. ¶ 68.

statement to "take care" of Central Mortgage is also consistent with Morgan Stanley saying that it would honor the contractual remedy of "repurchas[ing] the [s]ervicing rights [materially] affected by [a breach of Morgan Stanley's representations and warranties]" upon receiving "prompt written notice" by Morgan Stanley of that breach and the expiry of the 60-day cure period.[199] Indeed, Central Mortgage has cited no other examples of contract commitments made by Morgan Stanley to repurchase from Central Mortgage anything other than the servicing rights to a loan, as opposed to the underlying loan itself. This hardly supports an equitable estoppel argument on the theory that Morgan Stanley made a "specifi[c] represent[ation]"[200] that it would take back any Agency Loan returned by an Agency at any time based on Central Mortgage's contention that Morgan Stanley was somehow at fault. Even less does it support an equitable estoppel claim as to the Private Loans.

But I need not rest my conclusion on that, because for a party to be entitled to equitable estoppel, it has to plead reasonable reliance.[201] Central Mortgage's argument fails on this front as well because no oral statement of the vague kind alleged to have made by Mr. Francis could have been reasonably relied upon to excuse compliance with the applicable statute of limitations, let alone the Master Agreement's notice provision. Central Mortgage allegedly chose to rely on an expansive interpretation of what "take care" meant to delay filing suit when it could have interpreted those words in a manner

[199] Master Agreement § 10.13.
[200] *See Williamson*, 2002 WL 453926, at *4 n.24.
[201] *See id.*; 28 Am. Jur. 2d *Estoppel and Waiver* § 2.

consistent with the written terms of the amended Master Agreement and transaction-specific documents, and the parties' own actions that were taken in accordance with those written terms by amending the Master Agreement in writing. That is, it chose to rely on the one interpretation of "take care" not rooted in any of the contract language or conduct by Morgan Stanley that would imply that it would take back the underlying loan and do so without regard to timeliness considerations, and in that regard Central Mortgage gave meaning to "take care" that was unreasonable in light of the circumstances at the time.[202]

Even assuming that Central Mortgage was entitled to interpret the vague "take care" statement in that liberal way, a party may not reasonably rely on an oral promise that "directly" or "meaningfully" conflicts with the express terms of the parties' written agreement.[203] A promise by Morgan Stanley to repurchase from Central Mortgage any put-back loan due to problems in the origination process resulting in a breach of Morgan Stanley's representation and warranties meaningfully conflicts with the clear procedural notice, cure, and remedy regime set up by the Master Agreement. In particular, in the event of a breach of a representation or warranty made by Morgan Stanley, Central Mortgage must give Morgan Stanley notice of that breach, which Morgan Stanley then

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[202] *See Dep't of Natural Res. v. Front St. Properties*, 808 A.2d 1204, 2002 WL 31432384, at *5 (Del. 2002) (TABLE) (concluding that the plaintiff's reliance on the defendant's "ambiguous statement" that it interpreted in a "self serving" way was unreasonable for purposes of supporting an equitable estoppel claim); *see also Employers' Liab. Assur. Corp. v. Madric*, 183 A.2d 182, 188 (Del. 1962) ("An estoppel may not rest upon an inference that is merely one of several possible inferences.").

[203] *See Grunstein v. Silva*, 2009 WL 4698541, at *11 (Del. Ch. Dec. 8, 2009); *see also Elliot v. Nelson*, 301 F. Supp. 2d 284, 288 (S.D.N.Y. 2004) ("Where there is a 'meaningful' conflict between a written contract and prior oral representations, a party will not be deemed to have justifiably relied on the prior oral representations.") (citation omitted).

has 60 days to cure. If Morgan Stanley fails to cure the breach, the Master Agreement, without excluding other remedies, outlines a specific remedy for a breach of a representation or warranty not embedded in Central Mortgage's subjective perception of what "take care" means. Specifically, Central Mortgage may require Morgan Stanley to repurchase the servicing rights to the materially affected loan at a price set by a contractual formula. It is exceedingly odd – or, I would say, not reasonably conceivable – that this remedy provision of the Master Agreement would continue to exist if Central Mortgage's contention that the vague term "take care" was short-hand for Morgan Stanley's agreement to take back ownership of any loan returned from an Agency at any time. This vast generous "take care" promise is much more expansive than the more limited remedy specifically set forth in the Master Agreement, which involved Morgan Stanley's repurchase of the servicing rights to loans, not the underlying loans themselves.

Nor is it reasonably conceivable that the parties would fail to amend the Master Agreement to include this single remedy – a put-back by an Agency equals a promise by Morgan Stanley to take ownership of the loan – when the parties specifically amended the Master Agreement at that same time to include a different remedy, the one concerning Central Mortgage's right to require Morgan Stanley to repurchase the servicing rights to any loan that went delinquent during the first 12 months of servicing.[204] It would have resolved many of these complicated issues if the parties had just written into the Master Agreement a promise that if the Agencies put back a loan, then Morgan Stanley would take it back, without notice or an opportunity to cure, and thus "take care" of Central

[204] Am. Compl. ¶ 68.

Mortgage. That method would also have complied with the clear promise of the Master Agreement requiring that any amendment be in writing. Central Mortgage's contention that it relied on an oral assurance also therefore "meaningfully conflicts" with the Master Agreement and transaction-specific documents' no-oral modification provision, a provision that Central Mortgage affirmed at least 28 times.

The burden to plead equitable estoppel is a rightly stringent one. When a party can only allege a vague allegation that another party will "take care" of it, when that other party signs a formal amendment specifying a way in which it will take such care, and when those two parties contract eight additional times and the party claiming equitable estoppel agrees each time that the only agreements between itself and the other party are in writing in a detailed agreement, it comes with ill grace to call on equity's mercy. If contract law is to be reliable, promises have to be enforceable. Having signed an integrated agreement with a no-oral modification provision that itself could only be waived in writing, Central Mortgage was already barred from claiming an oral modification. It then reaffirmed its contractual understanding that the written contract was the deal eight times. For Central Mortgage to claim that it did not have to comply with the statute of limitations and the notice provision in the contracts based on oral promises and oral waivers that it disclaimed had any ability to even exist self-evidently involves commercially unreasonable behavior that cannot support an equitable estoppel claim under the "repair" rule.

Secondarily, Central Mortgage argues that Morgan Stanley's repurchase of the first 47 Agency Loans put back by the Agencies supports tolling of its claims as to the

New Agency Loans under principles of equitable estoppel, but I disagree. To the extent that Morgan Stanley was complying with its contract obligation to "cure" any breach of its representations and warranties (as alleged by Central Mortgage), then it is difficult to see how compliance with the contract can be twisted to mean that Morgan Stanley agreed to forever comply with that provision even after the applicable limitations period had run. Moreover, the fact that Morgan Stanley took back some loans that might have been time barred at the time (thus, implicitly waiving a limitations defense) does not mean that it waived the statute of limitations for all loans. Central Mortgage and Morgan Stanley entered into an agreement that made clear that no conduct would work a waiver of its terms,[205] and that "[t]he waiver by any party … of a breach of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach."[206] Central Mortgage has not pled facts from which I can infer that Morgan Stanley's initial accommodation as to some loans constituted misleading conduct that was reasonably relied upon by Central Mortgage and that induced it not to bring suit for any future breach as to other loans. By repurchasing 47 of the Agency Loans, Morgan Stanley did not "specifically represen[t]"[207] to Central Mortgage that the inaccurate loan data was a "mistake that would be corrected"[208] by Morgan Stanley by future repurchases. Contracting parties agree to non-waiver provisions such as the ones agreed to in the Master Agreement for a reason – to bar parties from making the argument that Central

[205] Master Agreement § 14.03.
[206] *Id.* § 14.02.
[207] *Williamson v. New Castle County*, 2002 WL 453926, at *4 n.24 (Del. Ch. Mar. 13, 2002).
[208] *Id.*

Mortgage is making here.[209] Central Mortgage is disrespecting its own contractual promise under the Master Agreement by claiming that the fact that Morgan Stanley bought back some loans was a waiver of the requirement that Central Mortgage sue on claims related to the rest of the loans within the statutory limitations period. A non-waiver clause is designed to give parties a low-cost method of resolving some disputes arising under their agreement.[210] Central Mortgage is dishonoring its own word by now claiming that Morgan Stanley's decision to take back some loans tolled the statute of limitations for all other loans.[211]

Central Mortgage's equitable estoppel argument also runs into timing issues. Equitable estoppel works to excuse an untimely filing only when the offer to repair

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[209] *Rehoboth Mall Ltd. P'ship v. NPC Int'l, Inc.*, 953 A.2d 702, 704 (Del. 2008) ("Generally, no waiver provisions 'give a contracting party some assurance that its failure to require the other party's strict adherence to a contract term ... will not result in a complete and unintended loss of its contract rights if it later decides that strict performance is desirable.'") (citation omitted).

[210] *E.g., Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 2007 WL 1207107, at *27 (Del. Ch. Apr. 2, 2007) ("Non-waiver clauses serve an important purpose in contract law, which is generally to ensure that a party to a contract is given an opportunity to make a thoughtful and informed decision about whether or not to enforce a particular contract right. They give a contracting party some assurance that its failure to require the other party's strict adherence to a contract term during the hectic course of day-to-day business will not result in a complete and unintended loss of its contract rights if it later decides that strict performance is desirable."); *see also Langford Tool & Drill Co. v. 401 Group, LLC*, 2012 WL 896418, at *5 (Minn. Ct. App. Mar. 19, 2012) (explaining that non-waiver clauses allow contracting parties "to forebear small or temporary defects in the [counterparty's] performance without waiving [their] right to terminate the agreement when and if it becomes apparent that the [counterparty] cannot or will not cure the defects.").

[211] Central Mortgage believes that it was free under New York law to repeatedly sign contracts with a non-waiver provision and dishonor that promise with impunity. Delaware is a pro-contractarian state. *See Allied Capital Corp. v. GC–Sun Holdings, L.P.*, 910 A.2d 1020, 1029-30 (Del. Ch. 2006). This court will not undermine the enforceability of contracts of a sister state, like New York, which enforces non-waiver clauses. *See generally Chase Manhattan Bank v. Motorola, Inc.*, 184 F. Supp. 2d 384, 395 (S.D.N.Y. 2002) (stating this principle and citing cases to that effect). Rather, if Central Mortgage does not wish to honor its contractual promises, it can protect itself in the future by not making them in the first place.

persists throughout the statutory period and the plaintiff became aware of the need to bring suit only after it was too late.[212] In other words, if the plaintiff has adequate time to sue within the statutory period once he is put on notice that the defendant no longer plans to cure the breach, then the plaintiff is expected to do so.[213] Here, Morgan Stanley stopped repurchasing the put-back loans in March 2009. Central Mortgage was thus aware by March 2009 of the need to file suit, and had until August 2010 to do so for many of the New Agency Loans whose limitations period had not yet run.[214] In fact, it

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[212] *See Williamson v. New Castle County*, 2002 WL 453926, at *4 n.24 (Del. Ch. Mar. 13, 2002).

[213] This reflects the reality that parties sometimes try to work out disputes within the statutory period. *E.g.*, *Techton Am., Inc. v. GP Chems., Inc.*, 2004 WL 2419129, at *2 (Del. Super. Oct. 25, 2004) ("The court is mindful that parties should be encouraged to work to cure … potential breaches of contract and not immediately rush to court with a lawsuit."). If, for example, the plaintiff learns at the end of the first year of the statutory period that the defendant no longer intends to cure the breach at issue, then the plaintiff is not entitled under an equitable estoppel theory to tack on to the three-year limitations period that first year spent in settlement negotiations. *See Ontario Hydro v. Zallea Sys., Inc.*, 569 F. Supp. 1261, 1272 (D. Del. 1983) (rejecting tolling argument when the application of estoppel would only prevent the accrual of the cause of action to a date that "still left [the plaintiff] with sufficient time to file suit within the limitations period.").

[214] Central Mortgage alleges that it purchased servicing rights to the New Agency Loans on dates ranging from March 2006 through August 2007. Thus, the statutory period for these loans expired three years out from those dates, March 2009 through August 2010. For any of these New Agency Loans whose servicing rights were purchased after March 2006 (with a limitations period ending in March 2009), Morgan Stanley's "offer" to repair in the form of the Agency Loan repurchases did not persist throughout the statutory period because that conduct stopped in March 2009. That leaves the question of the New Agency Loans whose servicing rights were purchased in March 2006. For this small slice of New Agency Loans, even though the so-called "offer" to repair persisted throughout their entire limitations period, Central Mortgage runs into another timing obstacle. Once a plaintiff establishes the predicate showing that the offer to repair persisted throughout the entire statutory period, he then has the amount of time during which the offer to repair persisted to file suit. *See* 51 Am. Jur. 2d *Limitation of Actions* § 157 ("When equitable tolling is applied, the limitations period is deemed interrupted, and when the tolling condition or event has ended, the claimant is allowed the remainder of the limitations period in which to file the action."). Construed in the light most favorable to Central Mortgage, the Amended Complaint alleges a maximum tolling period from April 2007, when Morgan Stanley stated that it would "take care" of Central Mortgage, through March 2009 when Morgan Stanley stopped repurchasing loans. That gave Central Mortgage a 23 month period to tack onto

did sue within that statutory period when it filed the Original Complaint in December 2009. If it had reviewed the loan files, it could have made out its claims in a timely way. Rather, it inexcusably waited until November 2011 to do so by filing the Amended Complaint.

The Amended Complaint therefore contains no allegations sufficient to invoke any of the tolling exceptions. In the alternative, even if the limitations period were tolled under either theory advanced by Central Mortgage, the extended limitations period would still have expired before the Amended Complaint was filed on November 4, 2011. Thus, I conclude that the claims with regard to the New Loans are untimely as a matter of law.

IV. Conclusion

For the foregoing reasons, Morgan Stanley's motion to dismiss Central Mortgage's claims as to the Original Loans is DENIED. Morgan Stanley's motion to dismiss Central Mortgage's breach of contract and breach of implied covenant claims as to the New Loans (which include the 218 New Agency Loans and all of the Private Loans) is GRANTED. Because the claims concerning the New Loans are time-barred by the Delaware statute of limitations, they cannot be saved by further amendment and thus I

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the original limitations period. *But see* Tr. 90 (Central Mortgage only seeking tolling for the 8 months that Morgan Stanley took back the 47 Agency Loans). Thus, any contract claims related to the March 2006 Agency Loans would have lapsed in February 2011 (3 years + 23 months), still well before the Amended Complaint was filed. *E.g.*, *Singletary v. Continental Ill. Nat'l Bank*, 9 F.3d 1236, 1241 (7th Cir. 1993) ("Equitable estoppel suspends the running of the statute of limitations during any period in which the defendant took active steps to prevent the plaintiff from suing, as by promising the plaintiff not to plead the statute of limitations pending settlement talks or by concealing evidence from the plaintiff that he needed in order to determine that he had a claim.").

dismiss those claims with prejudice. Within thirty days, the parties shall collaborate and propose a schedule to resolve the Original Loan claims.

IT IS SO ORDERED.