SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

FINANCIAL GUARANTY INSURANCE COMPANY, Plaintiff-Respondent, - against - MORGAN STANLEY ABS CAPITAL I INC., MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC, MORGAN STANLEY & CO. LLC, as successor to MORGAN STANLEY & CO., INC., MORGAN STANLEY, and SAXON MORTGAGE SERVICES, INC. Defendants-Appellants.	:	New York County Clerk's Index No. 652914/2014

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF-RESPONDENT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS OR, IN THE ALTERNATIVE, FOR REARGUMENT

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Defendants-Appellants Morgan Stanley ABS Capital I Inc., Morgan Stanley Mortgage Capital Holdings LLC, Morgan Stanley & Co. LLC, as successor to Morgan Stanley & Co., Inc., Morgan Stanley, and Saxon Mortgage Services, Inc. (collectively, "Morgan Stanley") respectfully submit this memorandum in opposition to the motion of Plaintiff-Respondent Financial Guaranty Insurance Company ("FGIC") for leave to appeal to the Court of Appeals or, in the alternative, to reargue certain issues determined by this Court's Decision and Order dated September 13, 2018 (the "Decision").

PRELIMINARY STATEMENT

This Court's Decision was a straightforward application of binding precedent. In *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569 (2018) ("*Ambac II*"), the Court of Appeals affirmed that any compensatory damages on a monoline insurer's fraud claim in a case such as this "should be measured only by reference to claims payments made based on nonconforming loans." 31 N.Y.3d at 581. As this Court correctly held, FGIC's alleged damages for its breach of contract claim are likewise the claims payments made based on nonconforming loans. Thus, the fraud claim was properly dismissed under the longstanding "rule that parties may not assert fraud claims seeking damages that are duplicative of those recoverable on a cause of action for breach of contract." *MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC*,

No. 603751/2009, 2018 WL 4353836, at *3 (1st Dep't Sept. 13, 2018) ("*Credit Suisse*"). FGIC now seeks either leave to appeal to the Court of Appeals or to reargue before this Court, but has failed to show why this Court's routine application of a well-established rule merits such extraordinary relief.

Permissive review by the Court of Appeals is appropriate only to resolve issues that are novel or of public importance, or if the Decision conflicts with prior decisions of the Court of Appeals or the Appellate Divisions. 22 N.Y.C.R.R. § 500.22(b)(4). None of these criteria is satisfied here. Indeed, if any were, plaintiff in *Credit Suisse* would presumably have sought leave to appeal this Court's decision applying the same rule in the same way on the same day. But, having no valid grounds to do so, it did not.

It is therefore unsurprising that FGIC does not seriously attempt to argue that this issue is novel or of public importance. The requirement that a fraud claim must seek damages distinct from a companion contract claim has been the rule in the First Department for nearly a quarter-century. *See, e.g.*, *Andres v. LeRoy Adventures, Inc.*, 201 A.D.2d 262, 262 (1st Dep't 1994).

Unable to mount a credible argument that this issue is novel or important enough to merit review by the Court of Appeals, FGIC instead attempts to manufacture a conflict between the Decision and the Court of Appeals' and this Court's precedents. These are the same mistaken arguments advanced in FGIC's

merits brief, which the Court rejected. Most fundamentally, none of the cases relied on by FGIC even addressed an argument that a fraud claim should be dismissed based on duplicative theories of damages. The Decision cannot possibly conflict with decisions that never addressed the issue at hand.

Reargument also should be denied because the Court did not overlook or misapprehend anything in rendering its Decision. *See People v. D'Alessandro*, 13 N.Y.3d 216, 219 (2009) (citing CPLR 2221(d)(2)). The parties extensively briefed and argued the relevant issues, and the Decision, far from being based on any mistakes of law or fact, was consistent with the governing precedents.

For these reasons, and those set forth more fully below and in Morgan Stanley's merits briefs, the Court should deny FGIC's motion for leave to appeal or for reargument.

THE DECISION BELOW AND THIS COURT'S DECISION

Morgan Stanley securitized 5,337 mortgage loans (the "Mortgage Loans") in the Morgan Stanley ABS Capital I Inc. Trust 2007-NC4 ("MSAC 2007-NC4"). R. 122 (Compl. ¶ 73). In a Representations and Warranties Agreement, dated June 20, 2007 (the "RWA"), and a Pooling and Servicing Agreement, dated May 1, 2007 (the "PSA"), Morgan Stanley made various representations and warranties about the Mortgage Loans and agreed to cure, repurchase or substitute loans that materially breached those representations and warranties. R. 475-77, 481-88

(RWA §§ 2, 4(a) & Ex. 1); R. 293-94, 414-16 (PSA §§ 2.03(a), (d), (f) & schs. II-A, III).

FGIC issued a financial guaranty insurance policy for the most senior classes of the MSAC 2007-NC4 certificates pursuant to an Insurance and Indemnity Agreement (the "Insurance Agreement"). R. 417-63. In the Insurance Agreement, Morgan Stanley agreed to reimburse FGIC for insurance claims payments FGIC made, if any, arising as a result of Morgan Stanley's failure to cure, repurchase or substitute any defective Mortgage Loan. R. 443 (Insurance Agreement § 3.03(b)).

FGIC's complaint against Morgan Stanley alleged contractual breaches of representations and warranties and also alleged that Morgan Stanley fraudulently induced FGIC to issue the insurance policy. R. 110-14 (Compl. ¶¶ 39-50). The harm alleged by FGIC under both of these claims was the claims payments it may have to make under the insurance policy. *See, e.g.*, R. 168-69 (Compl. ¶¶ 203, 206). In addition to seeking, under both its contract and fraud claims, reimbursement for insurance payments made as a result of allegedly breaching loans, FGIC also had sought fraud damages for insurance payments unconnected to any allegedly breaching loans, but this Court held such damages to be unavailable, and that aspect of this Court's Decision is not at issue on this motion. (*See* Decision at 6-7.)

Morgan Stanley moved to dismiss the complaint on several grounds. As relevant here, Morgan Stanley argued that FGIC's fraud claim should be dismissed because its fraud damages were based on the same alleged harm as its contract damages—namely, insurance payments attributable to breaching loans. The IAS Court (Friedman, J.) acknowledged this Court's precedents holding that a fraud claim could be dismissed as duplicative if it seeks the same damages as a contract claim, but concluded that it was premature to reach that question. R. 12-13 (IAS Court Decision at 4-5).

Morgan Stanley appealed that holding. In opposition, FGIC argued that it could pursue a fraud claim even if it was based on the same theory of damages as its contract claim, but argued in the alternative that the "quantum" of its fraud damages would be different from its contract damages. Pl.-Resp't's Br. 32-36. Morgan Stanley argued that, under this Court's precedents, FGIC was required to plead a theory of damages or harm resulting from the alleged fraud distinct from that underlying its contract damages, that FGIC had failed to do so, and that its arguments about the "quantum" of damages were misconceived and did not lead to a different result. Defs.-Appellants' Reply Br. 16-20.

On September 13, 2018, this Court issued its Decision, reaffirming its well-established line of cases holding that "[a]n action for fraud may be dismissed where the damages sought are duplicative of the damages sought for breach of

contract." Decision at 6 (citing *Mañas v. VMS Assocs.*, 53 A.D.3d 451, 454 (1st Dep't 2008)). Because FGIC had failed to allege any theory of available damages other than for claims payments it would be required to make as a result of breaching loans—i.e., the very same type of damages it would be entitled to under its contract claim—the Court dismissed the fraud claim. *Id.* ("Since plaintiff can only recover insurance payments caused by the alleged misrepresentations and breaches, the only damages plaintiff could recover on its fraud claim are those resulting from the non-conforming loans, which are precisely the damages plaintiff is entitled to recover on its breach of contract claims."). The Court reached the same holding in *Credit Suisse* on the same day, observing that "[i]t has long been the rule that parties may not assert fraud claims seeking damages that are duplicative of those recoverable on a cause of action for breach of contract." *Credit Suisse*, 2018 WL 4353836, at *3. Plaintiff-appellant in *Credit Suisse* has not sought leave to appeal or to reargue.

ARGUMENT

Permissive review by the Court of Appeals is appropriate only when this Court's decision involves "issues [that] are novel or of public importance, [that] present a conflict with prior decisions of th[e] Court [of Appeals], or [that] involve a conflict among the departments of the Appellate Division." 22 N.Y.C.R.R. § 500.22(b)(4); *see, e.g.*, *In re Hart's Estate*, 24 N.Y.2d 158, 160 (1969). A

motion for leave to reargue should be granted only in the rare circumstances when "matters of fact or law" were "overlooked or misapprehended by the court in determining the prior motion." *D'Alessandro*, 13 N.Y.3d at 219 (quoting CPLR 2221(d)(2)). "It is well settled that a motion to reargue is not an appropriate vehicle for raising new questions." *Id.* (internal quotation marks omitted).

I. The Decision Involved the Straightforward Application of a Well-Established Rule and Is Consistent with Court of Appeals Precedent

It has been black-letter law in this Department for almost a quarter-century that a fraud claim premised on the same harm as an accompanying contract claim should be dismissed, and that determination is routinely made at the pleadings stage. *See, e.g.*, *Mañas*, 53 A.D.3d at 454 (concluding duplicative damages was an "independent reason" to dismiss the fraud claim at the pleadings stage); *Chowaiki & Co. Fine Art Ltd. v. Lacher*, 115 A.D.3d 600, 600-01 (1st Dep't 2014) (dismissing fraud claim, on the pleadings, as "redundant of the breach of contract claim, since it also seeks the same damages"); *Triad Int'l Corp. v. Cameron Industries, Inc.*, 122 A.D.3d 531, 532 (1st Dep't 2014) (affirming dismissal of fraud claim at the pleadings stage because "plaintiff seeks the same compensatory damages for both [its fraud and contract] claims"); *Mosaic Caribe, Ltd. v. AllSettled Grp., Inc.*, 117 A.D.3d 421, 422-23 (1st Dep't 2014) (holding, at pleadings stage, that "fraud claim was duplicative of the breach of contract claim" because it "seeks the same damages as the breach of contract claim"); *LeRoy*

Adventures, 201 A.D.2d at 262 (holding, at pleadings stage, that "[u]nder either theory of pecuniary loss discernible from plaintiffs' papers, . . . their damages under the fraud claim are limited to out-of-pocket expenses that do not exceed the recovery sought under the contract cause of action and are therefore duplicative") (citations omitted).

Moreover, this Court has consistently held that duplicative damages is an "independent" basis for dismissing the fraud claim, even where the plaintiff has otherwise alleged facts sufficient to state a cause of action for fraud. *See* Defs.-Appellants' Reply Br. 11-16; *see also Mañas*, 53 A.D.3d at 454 ("Causes of action for breach of contract and fraud based on a breach of a duty separate from the breach of the contract are designed to provide remedies for different species of damages . . . ."); *Triad*, 122 A.D.3d at 532 (affirming dismissal of fraud claim and denying leave to amend because the "purported fraud damages are actually contract damages"); *Chowaiki*, 115 A.D.3d at 600 (dismissing based on duplicative damages, even though "plaintiffs sufficiently allege an independent duty owed to them").[1]

[1] FGIC's failed attempts to distinguish these cases were addressed at length in the merits briefing, *see* Pl.-Resp't's Br. 41-42; Defs.-Appellants' Reply Br. 12-13, and were rejected by this Court. *See* Decision at 6 (citing *Mañas*, 53 A.D.3d at 454); *Credit Suisse*, 2018 WL 4353836, at *3 (citing *Mañas*, 53 A.D.3d at 454; *Chowaiki*, 115 A.D.3d at 600-01; *Triad*, 122 A.D.3d at 531-32; *Mosaic Caribe*, 117 A.D.3d at 422-23).

Notwithstanding this longstanding line of authority, FGIC rests its motion on the dubious assertion that the Decision conflicts with the Court of Appeals' and this Court's precedents. Nearly all of these arguments were raised in the merits briefing and none establish any actual conflict with the Decision.

First, FGIC resurrects its failed argument that the line of cases cited above conflicts with the Court of Appeals' 1969 decision in *Jo Ann Homes at Bellmore, Inc. v. Dworetz*, 25 N.Y.2d 112 (1969). Just as it had argued in the merits briefing, Pl.-Resp't's Br. 43, FGIC attempts again to convince the Court that *Jo Ann Homes* "stands for the proposition that where parallel fraudulent inducement and breach of contract claims are each legally sufficient, both can be presented to a jury, with any duplication of damages to be addressed after receiving a verdict on both claims." Mem. 9-10.[2] As Morgan Stanley already explained, *see* Defs.-Appellants' Reply Br. 15-16, and as the Court implicitly agreed, this interpretation is fatally flawed. Most importantly, the parties in *Jo Ann Homes* never argued that the fraud claim sought damages duplicative of the contract claims. On the contrary, through trial and on appeal, the defendants vigorously disputed whether the alleged misrepresentations were incorporated into the parties' contract at all, and thus necessarily disputed whether any damages were recoverable under the contract. *See Jo Ann Homes*, 25 N.Y.2d at 114 (describing points of counsel); Defs.-

[2] "Mem." refers to the memorandum of law in support of FGIC's motion.

Appellants' Reply Br. 15-16 & n.7. As a result, the Court of Appeals never purported to address an argument that the fraud claim sought the same damages. The Decision cannot possibly conflict with *Jo Ann Homes* on an issue that the Court of Appeals never considered.[3] Moreover, the Court of Appeals itself noted that its observation that the contract claim could have been sustained—because plaintiff had proved at trial that the misrepresentations were part of the contract—was dicta. *See Jo Ann Homes*, 25 N.Y.2d at 121 ("Having sustained the fraud action, the contract action becomes academic.").[4]

FGIC next attempts to manufacture a "conflict" with *DDJ Management LLC v. Rhone Group LLC*, 15 N.Y.3d 147 (2010), arguing that *DDJ* supports its position that it can proceed on a fraud claim that seeks duplicative damages. The fact that FGIC never made this argument in its merits briefing—but now argues that *DDJ* compelled this Court to rule in its favor—speaks volumes. FGIC, of

[3] *See Chianese v. Meier*, 285 A.D.2d 315, 321 (1st Dep't 2001) ("Since this particular [issue] was neither raised by the parties nor considered by the Court in *Rangolan*, we cannot assume that the Court of Appeals by implication rejected its application in circumstances such as these."), *modified on other grounds*, 98 N.Y.2d 270, 276 (2002) ("[O]ur decision in *Rangolan* does not resolve this question . . . . [The issue] was neither raised by the parties nor addressed by the Court.").

[4] FGIC cites *France & Canada S.S. Corp. v. Berwind-White Coal Mining Co.*, 229 N.Y. 89, 96 (1920) for the unremarkable proposition that the law permits recovery in both contract and fraud in appropriate cases. Mem. 10. This is entirely consistent with the Court's conclusion that "fraud damages are meant to redress a different harm than damages on a cause of action for breach of contract." *Credit Suisse*, 2018 WL 4353836, at *3. As the Court correctly found, FGIC's fraud claim fails because it is not based on a different theory of harm than its contract claim.

course, cannot seek reargument based on arguments it failed to make and cases it failed to cite the first time around. *See, e.g., D'Alessandro,* 13 N.Y.3d at 220 (referring to "straightforward statutory and decisional law that narrowly limits reargument to issues previously raised").

DDJ dealt with an entirely different question than the one presented here, and there is no "conflict" between this Court's Decision and *DDJ*. *DDJ* in no way addressed the issue of duplicative damages; it merely addressed an issue concerning justifiable reliance—namely, it held that obtaining contractual warranties about represented facts may be sufficient to prove justifiable reliance, even if the plaintiffs did no diligence to determine if those representations were true. 15 N.Y.3d at 156. The Court never addressed the circumstances in which such a fraud claim would be duplicative of a contract claim, because the plaintiffs did not have *any* contract claim against the named defendants.[5] Thus, *DDJ* cannot possibly conflict with this Court's Decision that FGIC cannot maintain both a fraud claim and a contract claim premised on the same theory of damages. FGIC

[5] *DDJ* involved alleged misrepresentations about the financial statements of a company ("ARI"), which were repeated in a loan agreement solely between plaintiffs and ARI. 15 N.Y.3d at 151. ARI, however, was not a party to the litigation; plaintiffs had sued ARI's parents, directors, and executives, who were not in contractual privity with plaintiffs. *See DDJ Capital Mgmt., LLC v. Rhone Grp. LLC*, No. 601832/2007, 2008 WL 1837442, at *1 (Sup. Ct. N.Y. Cty. Apr. 24, 2008). As the Court of Appeals noted, "as a contractual matter, the only rights plaintiffs acquired under the warranties were against ARI," and "[i]f plaintiffs prove only that the warranties were false [but fail to prove scienter], they cannot recover against [ARI's parents]." *DDJ*, 15 N.Y.3d at 157.

argues mistakenly that "[c]ontrary to [*DDJ*'s] teaching that contractual warranties are consistent with, and indeed *improve* fraud claims, the Decision found FGIC's fraud claim defective precisely because FGIC had secured contractual warranties confirming some (but not all) of Morgan Stanley's pre-contractual representations." Mem. 13 (emphasis in original). That is not "precisely" what the Decision held—it is not what the Decision held at all. The Decision did not hold that FGIC's fraud claim was duplicative because the contractual warranties overlapped with the pre-contractual representations, but for the independent reason that FGIC had not alleged a distinct type of harm caused by the alleged fraud.[6]

FGIC also fails to show any inconsistency between the Decision and this Court's subsequent decision in *Syncora Guarantee Inc. v. Macquarie Securities (USA) Inc.*, 164 A.D.3d 1141 (1st Dep't 2018). *Syncora* had nothing to do with whether a fraud claim should be dismissed because it was premised on the same harm as an accompanying breach of contract claim. As in *DDJ*, the defendants in *Syncora* were not even parties to any contract with plaintiff. *See Syncora Guarantee Inc. v. Alinda Capital Partners LLC*, No. 651258/2012, 2017 WL

[6] FGIC implausibly argues that the Decision will discourage parties from including material factual representations in their contracts because "the more comprehensive the contractual warranties are, the more difficult it would be to plead fraud damages that would not be deemed duplicative under the Decision's reasoning." Mem. 13. This argument suffers from the same misinterpretation of the Decision described above, and in all events, is a non sequitur. No reasonable contracting party would forego easier-to-prove contract damages just so it can preserve its ability to recover the *same damages* on a fraud claim.

589104, at *1 (Sup. Ct. N.Y. Cty. Feb. 14, 2017).[7] Rather, the issue in *Syncora* was whether the monoline plaintiff could obtain rescissory damages under a fraud claim after having accepted the benefits of the contract; the IAS Court concluded that it could not, but that even if rescissory damages were unavailable, other damages might be available, and therefore the fraud claim should not be dismissed altogether. *See id.* at *5. This Court affirmed that decision. *Syncora*, 164 A.D.3d at 1141. *Syncora* in no way supports the conclusion that a fraud claim cannot be dismissed at the pleadings stage where the harm alleged is duplicative of an accompanying breach of contract claim; again, this Court has repeatedly dismissed fraud claims at the pleadings stage on that basis. *See, e.g.*, *Mañas*, 53 A.D.3d at 454; *Chowaiki*, 115 A.D.3d at 600-01; *Triad*, 122 A.D.3d at 532; *Mosaic Caribe*, 117 A.D.3d at 422-23; *LeRoy Adventures*, 201 A.D.2d at 262. Indeed, *Syncora* is entirely consistent with the Decision, which similarly declined to resolve at the pleadings stage whether FGIC's attempt to recover all claims payments was the equivalent of rescissory damages. *See* Decision at 5.

FGIC's remaining arguments about the alleged inconsistencies with this Court's own precedents were already addressed at length in the merits briefing and were rejected by the Decision. *See* Pl.-Resp't's Br. 38-42; Defs.-Appellants' Reply

[7] As in *DDJ*, Syncora brought claims against defendants who allegedly induced it to enter agreements with other non-parties. *Syncora*, 2017 WL 589104, at *1-2.

Br. 14-15. As previously explained, these cases merely stand for the proposition that a non-duplicative fraud claim must be based on facts collateral to the contract. *See Wyle Inc. v. ITT Corp.*, 130 A.D.3d 438, 438-39 (1st Dep't 2015); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 293 (1st Dep't 2011); *First Bank of Ams. v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 291-92 (1st Dep't 1999). None suggests that a fraud claim meeting that standard can be maintained even when it alleges no theory of damages distinct from the contract claim. It is FGIC, not the Court, that misapprehends these decisions. The Decision does not conflict with these, or any other decision of the Court of Appeals or any Appellate Division. Leave to appeal or reargue on the basis of any alleged conflict should be denied.

II. The Court Did Not Overlook or Misapprehend Any Law or Fact

FGIC's assertions that it is entitled to reargument because this Court "overlooked" or "misapprehended" differences between its fraud and contract damages are also unavailing. These arguments were thoroughly briefed and addressed at oral argument, and nothing in the Decision suggests that they were "overlooked" or "misapprehended."

FGIC sets up a strawman by arguing that the Decision held that the "quantum of damages" for FGIC's fraud and contract claims must be "identical," and then arguing that it was premature to make such a determination. But the

Decision, and the precedents on which it is based, never attempted to predict the precise "quantum" of damages that could be awarded after trial, and never used that as the relevant standard. Rather, the standard is whether the damage alleged in plaintiff's fraud claim is its failure to receive the benefit of the contractual bargain—as it was here. If courts were required to determine that the "quantum" of damages would necessarily be identical, it would be impossible ever to dismiss a fraud claim on this basis at the pleadings stage, and yet such claims have regularly been dismissed at this stage on the basis of duplicative theories of damages. *See, e.g.*, *Mañas*, 53 A.D.3d at 451; *Chowaiki*, 115 A.D.3d at 600; *Triad*, 122 A.D.3d at 531; *Mosaic Caribe*, 117A.D.3d at 423. Thus, contrary to FGIC's argument—which it likewise made in the merits briefing and which was rejected by the Court—it is irrelevant that fraud and contract claims may be subject to different elements and defenses. That is always the case for fraud and contract claims, and yet is not a barrier to dismissal of the fraud claim at the pleadings stage where it seeks to recover for the same harm as the contract claim. There is no basis to conclude that the Court "overlooked" or "misapprehended" any issue relating to the different elements that FGIC must prove on its contract and fraud claims, including the requirement to prove "notice" or "discovery" under the

repurchase protocol. On the contrary, the Decision is consistent with this Court's precedents and the principles underlying them.[8]

Similarly, it is not plausible that this Court "overlooked" FGIC's contention that its fraud damages would need to be "offset by the amount of premiums already received." Mem. 18-19. The parties addressed this issue thoroughly in the merits briefing, Pl.-Resp't's Br. 34; Defs.-Appellants' Reply Br. 18, as did the parties in *Credit Suisse*. Nor did the Court "misapprehend" the issue. That FGIC's fraud damages might be *reduced* by its premiums is not a basis for deeming its fraud claim non-duplicative. *See, e.g.*, *LeRoy Adventures*, 201 A.D.2d at 262 ("Under either theory of pecuniary loss discernible from plaintiffs' papers . . . [plaintiffs'] damages under the fraud cause of action are limited to out-of-pocket expenses that *do not exceed* the recovery sought under the contract cause of action . . . and are therefore duplicative.") (citation omitted) (emphasis added). Under the applicable

[8] The Decision likewise did not rest on a "misapprehension of *Ambac*." Mem. 16. The Decision relied on *Ambac II* solely for the correct proposition that, under that decision, FGIC's fraud claim does not allow it to recover insurance payments made as a result of non-breaching loans, but only those made as a result of breaching loans. Decision at 5. The latter are the same type of damages undergirding FGIC's demand for reimbursement of insurance payments pursuant to the Insurance Agreement. *See* R. 173 ("Fifth Cause of Action (For Reimbursement Against MSMC and MS)"); R. 443 (Insurance Agreement § 3.03(b)); R. 13 (IAS Court Decision at 5 (addressing reimbursement claim)). Because FGIC has not alleged any distinct type of harm for its fraud claim, the Court correctly dismissed the fraud claim. This in no way reflects a "misapprehension of *Ambac*." Nor is it relevant that *Ambac II* "allowed both claims to proceed to trial," Mem. 16 (emphasis omitted), because the Court in that case was never presented with and therefore never addressed the issue of whether that plaintiff's fraud damages were duplicative.

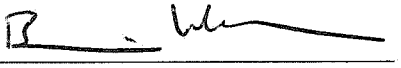
precedents, which were correctly applied by this Court, in order for FGIC's fraud claim to have been sustained, FGIC had to have alleged some harm that it suffered distinct from its failure to receive the benefit of the contractual bargain, but it failed to do so.

CONCLUSION

For all of the foregoing reasons, Morgan Stanley respectfully submits that FGIC's motion for leave to appeal to the Court of Appeals or to reargue should be denied.

Dated: New York, New York
October 29, 2018

DAVIS POLK & WARDWELL LLP

By: 

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