UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

U.S. BANK NATIONAL ASSOCIATION, SUCCESSOR TO WELLS FARGO BANK, N.A., SUCCESSOR TO BANK OF AMERICA, NATIONAL ASSOCIATION, AS SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE REGISTERED HOLDERS OF BANC OF AMERICA COMMERCIAL MORTGAGE INC., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-2, Plaintiff, v. BANK OF AMERICA, N.A., and BARCLAY'S CAPITAL REAL ESTATE INC., Defendants.	Case No. 12-cv-4873-CM

DEFENDANT BANK OF AMERICA, N.A.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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Defendant Bank of America, N.A. ("Bank of America") respectfully submits this Reply in Support of its Motion to Dismiss Plaintiff's First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) (Docket No. 43).[1] In its opposition, Plaintiff glosses over the true cause of its alleged injury – Barclays' breach of contract – and casually dismisses unambiguous language in the applicable Pooling and Servicing Agreement ("PSA") that forbids Plaintiff from suing Bank of America under these circumstances. Plaintiff also urges the Court to endorse its implausible theory of causation and to read unwritten obligations into the PSA. In short, Plaintiff's opposition only underscores the deficiencies of its pleading.

I. PLAINTIFF CANNOT OVERCOME THE SOLE-REMEDY PROVISION OF THE PSA

As explained in our opening brief, the terms of the PSA are clear and unambiguous: Plaintiff's exclusive remedy for the events alleged in the amended complaint lies against Barclays for breach of the Mortgage Loan Purchase and Sale Agreement ("MLPA"). Section 2.03(h) of the PSA states that "[t]he applicable Mortgage Loan Purchase and Sale Agreement provides the ***sole remedy*** available to the Certificateholders, or the Trustee on their behalf, respecting ***any*** Breach or Document Defect with respect to Mortgage Loans sold by the related Mortgage Loan Seller" (emphases added).

That exclusive-remedy provision is dispositive. Plaintiff does not dispute that its alleged loss of the Thayer Letter of Credit "respect[s]" a Material Breach and Material Document Defect, as those terms are used in the PSA and the MLPA. See Am. Cplt. ¶ 27; see also Memorandum of Law in Support of Plaintiff's Opposition to Barclays Capital Real Estate, Inc.'s Motion to Dismiss or, Alternatively, Motion for Leave to Amend Complaint (hereinafter, "Pl.

[1] On October 19th, Plaintiff filed its Opposition to Bank of America's Motion to Dismiss the Amended Complaint. See Docket No. 47 (hereinafter, "Pl. Opp.").

Opp. to Barclays' Mtn.") at 17. Instead, Plaintiff argues that Section 2.03 should be read to limit claims only against ***Barclays*** for its "failure to fulfill its obligations under the PSA and MLPA." Pl. Opp. at 7. Plaintiff is wrong.

By its plain terms, Section 2.03 limits Plaintiff's recovery "respecting ***any*** Breach or Document Defect with respect to the Mortgage Loans" to the MLPA – not only where Barclays has breached its representations or warranties under the MLPA,[2] but also where (as here) there is an alleged material document defect in the mortgage file.[3] This interpretation of Section 2.03 is also consistent with Section 2.01(b) of the PSA, which provides that "[n]one of the Trustee, any Custodian, the Master Servicer or the Special Servicer shall be liable for any failure by any Mortgage Loan Seller or the Depositor to comply with the document delivery requirements of the Mortgage Loan Purchase and Sale Agreements and this Section 2.01(b) [of the PSA]." Plaintiff's exclusive remedy in this case therefore lies against Barclays.

Courts routinely enforce sole-remedy clauses such as the one found in PSA Section 2.03, even where doing so has the effect of precluding suit entirely against particular parties. See, *e.g.*, *Bank of America, N.A. v. Column Financial, Inc.*, No. 10 Civ. 6378, 2011 WL 2652464, at *4 (S.D.N.Y. July 6, 2011) (rejecting proposed claim against depositor where, as here, PSA restricted trustee's remedies to those provided by the MLPA or by express guarantee, and limited responsible parties to the Mortgage Loan Sellers); see also *LaSalle Bank, Nat'l Ass'n v. Citicorp Real Estate, Inc.*, No. 01 Civ. 4389, 2002 WL 181703, at *3 (S.D.N.Y. Feb. 5, 2002) (applying sole-remedy provision in PSA); *MASTR Asset Backed Sec. Trust 2006-HE3 ex rel. U.S. Bank Nat'l Ass'n v. WMC Mortg. Corp.*, 843 F. Supp. 2d 996, 1001 (D. Minn. 2012) (applying sole-remedy clause in purchase agreement to bar claim for money damages).

[2] See PSA Section 1.01 (definition of "Breach").
[3] See PSA Section 1.01 (definition of "Document Defect").

Plaintiff's claim is premised entirely on a Material Breach and Material Document Defect with respect to the Thayer Letter of Credit. Because Bank of America was not a party to the MLPA, and had no authority to transfer or assign the Thayer Letter of Credit pursuant to the MLPA, the claim against Bank of America must be dismissed.

II. IT IS IRRELEVANT THAT BANK OF AMERICA ISSUED THE THAYER LETTER OF CREDIT

Plaintiff's opposition makes much of that fact that Bank of America happened to be the issuer of the Thayer Letter of Credit, in addition to being named the Master Servicer of the Thayer Loan under the PSA. See, *e.g.*, Pl. Opp. at 2, 8-10. Plaintiff contends that, as issuer, Bank of America "obviously knew of the existence of the Letter of Credit," and "knew it was to be held in favor of the Trust with Bank of America listed as its beneficiary." Pl. Opp. at 8, 10. "Despite this knowledge," Plaintiff charges, "not only did Bank of America fail to fulfill its notification obligations under Section 3.02(b)(ii), but it failed to take any steps to effect its assignment." Pl. Opp. at 10. According to Plaintiff, these actions "fall far short of meeting the Servicing Standard the PSA imposed." Pl. Opp. at 10; see also Pl. Opp. at 9 (arguing that Bank of America generally "ignores its independent servicing obligations under the PSA and the fact that it was also the issuer of the Letter of Credit").

Plaintiff's argument is a red herring. Even setting aside the absurdity of treating a multinational banking association of Bank of America's size in such a monolithic fashion, there is nothing in the PSA that creates any special obligations where the Master Servicer happens also to have issued a portion of the collateral securing one of the serviced loans. Plaintiff argues that Bank of America (*qua* Issuer) "obviously knew of the existence of the Letter of Credit," and therefore Bank of America (*qua* Master Servicer) "should have taken action . . . to effect is [sic] proper assignment." Pl. Opp. at 8. Plaintiff proclaims that Bank of America "was in the best

position of all parties to ensure the Letter of Credit was properly delivered to the Trust." Pl. Opp. at 2. But the PSA does not require the Master Servicer to go above and beyond its contractual duties simply because it is in the "best position" to do so (even assuming that were true, which we do not concede). Nor does Bank of America's issuer status somehow allow the Court to "disregard[]" Section 2.02(d) of the PSA (Pl. Opp. at 8), which states that the Master Servicer has no obligation to determine whether a letter of credit exists or is required to be delivered by Barclays. And finally, as discussed in more detail below, the fact that Bank of America issued the Thayer Letter of Credit is especially beside the point because Barclays was the only party with the authority to transfer and assign its rights in favor of the trust.

III. PLAINTIFF'S INTERPRETATION OF THE 'SERVICING STANDARD' IS MISGUIDED

Plaintiff attempts to revive its failed contract claim through heavy reliance on the PSA's "Servicing Standard," which required Bank of America to act "'with the same care, skill, prudence and diligence as is normal and usual in its general mortgage servicing.'" See Pl. Opp. at 3-4. But the PSA's Servicing Standard is not the catchall provision that Plaintiff portrays it to be. The Servicing Standard is nothing more than a contractual duty of care with respect to mortgage servicing – and, critically for present purposes, it does not impose extra-contractual obligations that are inconsistent with the terms of the PSA.

Section 3.01(a) of the PSA is the salient provision. It requires the Master Servicer to "service and administer the Serviced Loans . . . in accordance with any and all applicable laws, ***the terms of this Agreement***, the terms of the respective Serviced Loans and, ***to the extent consistent with the foregoing***, in accordance with the Servicing Standard" (emphases added). Thus, the PSA is clear that the Master Servicer is not required under the "Servicing Standard" to perform functions that are inconsistent with the terms of the PSA.

That point is crucial. On the facts alleged by Plaintiff, each of the obligations that Plaintiff alleges Bank of America failed to perform "in accordance with the Servicing Standard" was expressly disclaimed by the PSA. For example, Plaintiff contends that Bank of America breached the PSA "by failing to notify the issuer of the Letter of Credit (in this case, itself) within 60 days of the closing date that the Master Servicer was to be the new beneficiary under the Letter of Credit pursuant to Section 3.02(b)(ii)." Pl. Opp. at 6. But the PSA required Bank of America to send such a notification only ***after*** the beneficiary was changed by Barclays. See Pl. Opp. to Barclays' Mtn. at 18 ("PSA Section 3.02(b)(ii) only makes sense *after* that event [Barclays' causing the Trustee to be named as the beneficiary of the letter of credit] has taken place.") (emphasis in original). Indeed, in Plaintiff's own words, "[s]ection 3.02(b)(ii) has no practical effect *before* Barclays has taken action to name the Trustee as the beneficiary; in that case, the Master Servicer's notice to the issuer of the Letter of Credit will be rejected because, at that point, Barclays is the only party entitled to transfer the Letter of Credit." Pl. Opp. to Barclays' Mtn. at 18 (emphasis in original).[4]

Similarly, while Plaintiff contends that Bank of America failed to "maintain and execute the Letter of Credit" in accordance with Section 3.02(b)(ii) of the PSA, that provision applies only to letters of credit held in favor of the trust. Here, Plaintiff alleges that the Thayer Letter of Credit was not transferred or assigned by Barclays; in other words, it was never held by the trust. Bank of America therefore had no contractual obligations with respect to the Thayer Letter of Credit. Plaintiff's attempt to impose extra-contractual obligations on Bank of America through

[4] Footnote 3 in Plaintiff's opposition (Pl. Opp. at 10 n.3) conflates Barclays' alleged failure to "deliver[] the Letter of Credit in compliance with its obligations under the MLPA" with Barclays' alleged failure to properly transfer and assign its beneficiary rights under the Thayer Letter of Credit. Barclays' fulfillment of the latter obligation was a necessary prerequisite to Bank of America's notice obligation under PSA Section 3.02(b)(ii), and there can be no dispute (even by Barclays) that this never occurred.

the guise of the Servicing Standard would be inconsistent with Section 3.02(b)(ii) of the PSA, which is precisely what Section 3.01 forbids.

Of course, a plaintiff is allowed to plead facts in the alternative. Pl. Opp. at 9-10. But that is not what Plaintiff has done. The very touchstone of Plaintiff's case is that Barclays' interest in the Thayer Letter of Credit was not properly transferred and assigned to the Trustee, causing Plaintiff to lose the value of the collateral. See, *e.g.*, Pl. Opp. to Barclays' Mtn. at 4 ("The Letter of Credit was not properly assigned or transferred."). Plaintiff cannot now argue that, for purposes of its claim against Bank of America only, the Court should assume that Barclays ***did*** properly transfer and assign the Thayer Letter of Credit such that Bank of America's obligations under the PSA were triggered. Such fundamental contradictions are incompetent to withstand a motion to dismiss. See, *e.g.*, *Nationwide Mut. Ins. Co. v. Morning Sun Bus Co.*, No. 10-cv-1777, 2011 WL 381612, at *6 (E.D.N.Y. Feb. 2, 2011) ("Where plaintiff's own pleadings are internally inconsistent, a court is neither obligated to reconcile nor accept the contradictory allegations in the pleadings as true in deciding a motion to dismiss.") (internal quotation marks omitted).

IV. PLAINTIFF CAN PLEAD NO FACTS TO CREATE A PLAUSIBLE INFERENCE THAT BANK OF AMERICA CAUSED ITS INJURY

There is no set of facts under which Bank of America could be liable for Plaintiff's alleged injury. Again, Plaintiff's alleged injury relates to the failure of the Thayer Letter of Credit to make its way into the trust assets. But even had Bank of America performed all of the functions that Plaintiff alleges it was required to perform under the PSA, the Thayer Letter of Credit still would not have been held by the trust.

Plaintiff does not dispute that, as the named beneficiary, Barclays was the only party with the power or authority to effect transfer and assignment of the Thayer Letter of Credit. See, *e.g.*,

N.Y. U.C.C. § 5-112, Official Comment 1 ("The term 'transfer' refers to the ***beneficiary's*** conveyance of that right."); N.Y. U.C.C. § 5-114(b) ("A ***beneficiary*** may assign its right to part or all of the proceeds of a letter of credit."); *MSF Holding Ltd. v. Fiduciary Trust Co. Int'l*, 435 F. Supp. 2d 285, 296-97 (S.D.N.Y. 2006) (applying International Chamber of Commerce's Uniform Customs and Practice for Documentary Credits, "***beneficiary*** of a letter of credit may transfer the credit to another" or "alternatively may assign its right to the proceeds of the credit") (all emphases added). Nor does Plaintiff dispute that Bank of America lacked the ability to force Barclays' hand and somehow compel it to transfer and assign the Thayer Letter of Credit.

Far from disputing these facts, Plaintiff has repeatedly emphasized them. See Pl. Opp. to Barclays' Mtn. at 15 (acknowledging that, had Barclays merely assigned the proceeds of the Thayer Letter of Credit – as opposed to all right, title, and interest in the collateral – "the Trust would have received a Letter of Credit it could not draw upon"); Pl. Opp. to Barclays' Mtn. at 9 (because "Barclays remained the beneficiary of the Letter of Credit," it was "the only party that could have drawn the Letter of Credit"); Pl. Opp. to Barclays' Mtn. at 12 ("It was Barclays' failure to . . . deliver all of the documents required by, and that meet all of the requirements of, Section 2.01 [] that caused Plaintiff's loss."); Pl. Opp. to Barclays' Mtn. at 16 (observing that "Bank of America [as Issuer] would have been under no obligation to honor a draft made by a party other than Barclays").

That should end the matter. To be clear, Plaintiff's pleading failure is not akin to a failure to "specify the measure of [its] damages." See Pl. Opp. at 13 (quoting *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F. Supp. 2d 258, 272 (S.D.N.Y. 2004)). Nor is it the same thing as saying that Plaintiff "may not be able to prove damages," such as where a holder in securities cannot establish loss causation. See Pl. Opp. at 13 (quoting *In re IPO*

Securities Litig., 241 F. Supp. 2d 281, 351 n.80 (S.D.N.Y. 2003)). Plaintiff's amended complaint might well state a cognizable injury – it simply does not state an injury for which Bank of America, under any set of facts, could be held responsible.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the Court should dismiss the First Amended Complaint as to Bank of America with prejudice. The Court should not entertain Plaintiff's request in its opposition to amend its complaint for a second time. See, *e.g.*, *In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, 220 (2d Cir. 2006) (court may deny leave to amend "when leave is requested informally in a brief filed in opposition to a motion to dismiss"). In any event, any further amendment would be futile. Plaintiff cannot allege any additional facts that would entitle it to relief, nor can it point to any additional provisions in the PSA to rescue its contract claim. See *id*. at 220-21 (affirming district court's denial of leave to amend where plaintiffs could prove no set of facts that would entitle them to relief); *Goodrich v. Long Island R.R. Co.*, 654 F.3d 190, 200 (2d Cir. 2011) (affirming district court's denial of leave to replead where plaintiff had not made "any showing that the deficiencies in the complaint could be cured").

Dated: October 26, 2012

/s/ Richard A. Sauber

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CERTIFICATE OF SERVICE

I hereby certify that, on October 26, 2012, I caused a true and correct copy of the foregoing Defendant Bank of America N.A.'s Reply In Support Of Its Motion To Dismiss Plaintiff's First Amended Complaint to be served by ECF on all counsel of record.

/s/ William J. Trunk