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 SECOND AMENDED COMPLAINT

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Defendant Bank of America, N.A. ("Bank of America") respectfully submits this reply brief in support of its Motion to Dismiss Plaintiff's Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6).[1]

As we explained in our motion, Plaintiff has failed for the third time to state a claim against Bank of America. The Court rejected Plaintiff's most recent effort in an opinion and order dated December 11, 2012. See Dkt. No. 56 (hereinafter, "Order"). There, the Court held that Bank of America's contractual obligations to Plaintiff were "contingent upon Barclays assigning its right to the proceeds from the Letter of Credit to the trust." *Id*. at 12. Because Plaintiff uniformly alleged just the opposite—that Barclays ***failed*** to assign the Letter of Credit—the Court dismissed the First Amended Complaint, without prejudice in part.

Plaintiff has not cured the defect. In its opposition brief, Plaintiff fails to identify a single factual allegation that would support a claim against Bank of America—which is not surprising, because Plaintiff has not ***added*** any such allegations to the pleading that this Court previously dismissed. Perhaps in recognition of that fact, Plaintiff attempts to resurrect a theory of liability that this Court already has firmly rejected. These misguided efforts demonstrate that any further pleading would be futile. The Second Amended Complaint should be dismissed as to Bank of America with prejudice.

ARGUMENT

Plaintiff offers two arguments in response to Bank of America's motion to dismiss. First, Plaintiff contends that it has in fact alleged that Barclays assigned the Letter of Credit. See Pl. Opp. at 4-5. Second, and alternatively, Plaintiff argues that the Pooling and Servicing

[1] On January 18, 2013, Plaintiff filed its Memorandum in Support of its Opposition to Bank of America's Motion to Dismiss or, Alternatively, Motion for Leave to Amend the Complaint. See Dkt. No. 63 (hereinafter, "Pl. Opp.").

Agreement ("PSA") independently required Bank of America to satisfy the Servicing Standard, even if Barclays never assigned the Letter of Credit. See *id.* at 6-9. Both arguments fail, for the reasons explained below.

I. PLAINTIFF FAILS TO ALLEGE THAT BARCLAYS ASSIGNED THE LETTER OF CREDIT

Plaintiff admits that, although it need not use particular words to plead in the alternative, it must allege factual content from which a court could reasonably infer that Bank of America is liable. See Pl. Opp. at 6. That factual content is conspicuously absent from Plaintiff's Second Amended Complaint. The Second Amended Complaint omits any allegation that Barclays assigned the Letter of Credit, which this Court previously held is a necessary prerequisite to Bank of America's liability.

Plaintiff points to a single allegation in the Second Amended Complaint to argue that it has satisfied its pleading obligations. Plaintiff quotes from Paragraph 16, which states (in part) that "Barclays represented that all of its rights and interest in any material collateral securing the Loan was assigned to BACM," and contends that this allegation "clearly suggests that Barclays did in fact assign the Letter of Credit." Pl. Opp. at 4.[2] Plaintiff's logic does not follow. Paragraph 16 asserts simply that, "[p]ursuant to Section 4(b) of the MLPA," Barclays ***contractually represented*** that it had assigned all of its rights and interest in material collateral, including the Letter of Credit. See Dkt. No. 58 (hereinafter, "Sec. Am. Cplt.") ¶ 16. But that hardly equates to an allegation that Barclays ***fulfilled*** its assignment obligations—in fact, Plaintiff's entire case relies on the premise that Barclays did ***not***. See, *e.g.*, Order at 6 (Plaintiff claims that Barclays breached Section 4(b) of the MLPA); Sec. Am. Cplt. ¶ 33 (alleging Barclays

[2] Plaintiff mistakenly attributes this allegation to Paragraph 15.

failed to assign its rights as beneficiary under the Letter of Credit). Paragraph 16 simply does not have the meaning that Plaintiff ascribes to it.[3]

More fundamentally, though, this allegation appeared—in identical fashion—in Plaintiff's previous complaints. See Dkt. No. 36 (First Amended Complaint) ¶ 16; Dkt. No. 1 (Original Complaint) ¶ 16. If this language were sufficient to allege that Barclays had assigned the Letter of Credit, Plaintiff's First Amended Complaint would not have been dismissed. "It is a well-established principle that the doctrine of the law of the case applies to issues that have been decided either expressly or by necessary implication." *Catanzano by Catanzano v. Wing*, 103 F.3d 223, 230 (2d Cir. 1996) (quotation marks omitted); see *State Farm Mut. Auto. Ins. Co. v. Mallela*, No. 00-CV-4923, 2002 WL 31946762, at *8 (E.D.N.Y. Nov. 21, 2002) (applying law of the case where amended complaint was "very similar" to previously-dismissed complaint). Plaintiff may not rely on an allegation that this Court necessarily has deemed inadequate to support a claim against Bank of America.[4]

Plaintiff's contention that it has "pled separately" its claims against Barclays and Bank of America (Pl. Opp. at 5) is beside the point. As we explained in our opening brief (at 7-8), the addition of boilerplate language that Plaintiff's claims are pled "in the alternative" cannot

[3] Contrast Paragraph 16, for example, with other allegations in the Second Amended Complaint in which Plaintiff has unmistakably alleged that a party properly transferred and assigned its rights to another. See Sec. Am. Cplt. ¶ 12 (alleging "BACM transferred and assigned its right, title, and interest in the Loan to LaSalle Bank National Association, as Trustee"); *id.* ¶ 15 (alleging "Original Holder transferred and assigned all of its right, title, and interest in the Loan Documents to Holder").

[4] Plaintiff contends that it also has alleged that Barclays sold the Thayer Loan and its collateral, which was "ultimately securitized" through the PSA. See Pl. Opp. at 5. It is unclear where such an allegation appears in the Second Amended Complaint. But such an allegation—even if it were present—would not even implicitly suggest that Barclays had properly assigned the Letter of Credit. Plaintiff's core contention is that Barclays falsely represented that it had assigned the Letter of Credit, and that the Thayer Loan was securitized without the Letter of Credit having been properly assigned to the trust. Once again, that is Plaintiff's entire theory of relief against Barclays.

somehow inject factual content to a claim where such content is lacking. Plaintiff has not alleged any additional facts against Bank of America, and its cosmetic revisions are insufficient to "nudge[] [its] claim[] across the line from conceivable to plausible." See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

II. PLAINTIFF ATTEMPTS TO RESURRECT A THEORY OF LIABILITY THAT THIS COURT HAS REJECTED

Plaintiff contends, in the alternative, that Bank of America and Barclays can be jointly liable for loss of the Letter of Credit because Bank of America independently breached its obligations under the PSA's "Servicing Standard." Plaintiff's erroneous reading of the PSA ignores what this Court already has held.

Plaintiff insists that its claim against Bank of America "arise[s] out of Bank of America's independent obligation to service the Loan in accordance with the servicing standard, notwithstanding whether Barclays properly assigned the Letter of Credit." Pl. Opp. at 6. But this Court already has held, in no uncertain terms, that Bank of America cannot be liable—under the Servicing Standard or otherwise—unless Barclays first assigned the Letter of Credit. See Order at 12 ("Bank of America's obligations under Section 3.02(b)(ii) of the PSA and the PSA's Servicing Standard were indeed contingent upon Barclays assigning its right to the proceeds from the Letter of Credit to the trust."); *id*. at 13 ("Bank of America's liability is contingent on Barclays *not* being liable.") (emphasis in original); *id*. at 9 ("Only if Barclays assigned its right to the proceeds of the Letter of Credit to the new holder of the Loan would Plaintiff have any claim to the proceeds of the Letter of Credit.").

In the same vein, Plaintiff contends that Bank of America violated the Servicing Standard by failing to notify the Trustee or otherwise "take any action to preserve the Letter of Credit."

Pl. Opp. at 7. But that theory of relief likewise was addressed, and rejected, by this Court's prior opinion:

> Nowhere in the PSA or the MLPA is there any indication that Barclays could be forced by Bank of America to do anything. So even if Bank of America had an obligation to take steps with respect to the Letter of Credit under Section 3.02(b)(ii) of the PSA or the PSA's Servicing Standard, and failed to do so, it was still necessary for Barclays to act in order for Plaintiff to receive the benefits of the Letter of Credit. Accordingly, as presently pleaded, there was no injury flowing from Bank of America's alleged breach.

Order at 13-14.

These holdings—which Plaintiff ignores—are the law of the case. See *United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991) ("[W]hen a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case."); see also *Chan v. Reno*, 991 F. Supp. 266, 272 (S.D.N.Y. 1998). Plaintiff cannot revive a previously-rejected theory of relief unless it presents "cogent or compelling reasons" for this Court to revisit its December 11th decision. See *Uccio*, 940 F.2d at 758 (quotation marks omitted). Yet Plaintiff has never moved for reconsideration of the Court's decision, and offers no cogent or compelling reasons for the Court to do so now.

Plaintiff cites cases that range from unhelpful to irrelevant. For example, *McKenna v. Wright*, 386 F.3d 432 (2d Cir. 2004), addressed the standard for dismissal based on the affirmative defense of qualified immunity. Here, Plaintiff's complaint was not dismissed based on an affirmative defense, but because Plaintiff failed to plead a factual predicate necessary to support liability in the first instance. Nor is *LaSalle Bank N.A. v. Citicorp Real Estate, Inc.*, No. 01-CV-4389, 2002 WL 181703 (S.D.N.Y. Feb. 5, 2002)—which Plaintiff cited in opposition to Bank of America's prior motion to dismiss (Dkt. No. 47 at 11)—any help to Plaintiff. The court in *LaSalle* held that the complaint presented a question of fact as to whether the defendant-

servicer violated its duties under a contractual servicing standard. *LaSalle Bank*, 2002 WL 181703, at *3-5. No similar factual question exists here. The Court already has held that Bank of America's servicing obligations with respect to the Letter of Credit were not triggered unless and until Barclays assigned its beneficiary rights under the Letter of Credit. See Order at 12. Because Plaintiff alleges without exception that Barclays never did that, any questions as to Bank of America's obligations under the Servicing Standard are purely academic.

* * *

The Court should not entertain Plaintiff's request—made only in the title of its opposition brief—to amend its complaint for a third time. For one thing, a court may deny leave to amend "when leave is requested informally in a brief filed in opposition to a motion to dismiss." *In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, 220 (2d Cir. 2006). That alone is reason enough to deny the request. In addition, however, leave to amend "should generally be denied" where, as here, the plaintiff has displayed a "repeated failure to cure deficiencies by amendments previously allowed." *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 126 (2d Cir. 2008) (per curiam) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Not only did the Court clearly identify the defects in Plaintiff's claim against Bank of America, but it could not have offered a more lucid explanation as to how Plaintiff could remedy those defects. See Order at 13. Plaintiff has tried, and failed, to do so. Plaintiff is not entitled to yet another bite at the apple. See, *e.g.*, *Payne v. Malemathew*, No. 09-CV-1634, 2011 WL 3043920, at *6 (S.D.N.Y. July 22, 2011) (denying leave to amend where plaintiff had "repeatedly failed to cure the defects in his claims despite having received detailed instructions" on how to do so); *In re Eaton Vance Mut. Funds Fee Litig.*, 380 F. Supp. 2d 222, 242 (S.D.N.Y. 2005) (denying leave to amend where plaintiffs had two opportunities to cure known defects).

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the Court should dismiss the Second Amended Complaint as to Bank of America with prejudice.

Dated: January 28, 2013

/s/ Richard A. Sauber
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CERTIFICATE OF SERVICE

I hereby certify that, on January 28, 2013, 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 Second Amended Complaint to be served by ECF on all counsel of record.

/s/ William J. Trunk