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

MEMORANDUM OF DEFENDANT BANK OF AMERICA, N.A.
IN SUPPORT OF ITS MOTION TO DISMISS

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Defendant Bank of America, N.A. ("Bank of America") respectfully submits this memorandum of law in support of its motion to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(6).

PRELIMINARY STATEMENT

Plaintiff U.S. Bank, N.A. ("Plaintiff" or "Trustee") alleges that, in connection with the securitization of a pool of commercial mortgage loans, Barclays Capital Real Estate, Inc. ("Barclays"), the originator of one of the loans, failed to transfer and assign its rights in a small part of the collateral securing the loan, as required by the relevant Mortgage Loan Purchase and Sale Agreement ("MLPA"), when Barclays sold the loan into the pool. Plaintiff contends that "Barclays breached its obligations under the MLPA by failing and/or refusing to assign its beneficiary rights" under a $1.25 million letter of credit that partially secured the loan. Complaint ("Cplt.") ¶ 37.

Plaintiff attempts to convert this routine breach of contract claim against Barclays into a case against Bank of America. The Court should reject that effort. Even assuming for purposes of this motion that Plaintiff has a viable claim against Barclays, Plaintiff's claims against Bank of America must fail because Bank of America was not a party to the MLPA, and had neither a duty nor the authority to assign or transfer the letter of credit. Plaintiff's claims against Bank of America ignore explicit contractual disclaimers of liability, well-settled precedent on fiduciary duty, and common-sense principles of causation. The complaint against Bank of America should be dismissed in its entirety, and with prejudice.

FACTUAL BACKGROUND

For purposes of this motion to dismiss only, Bank of America accepts the facts alleged in the Complaint as true.

A. The Thayer Loan And The Letter Of Credit

On April 19, 2006, Barclays originated a $24 million commercial mortgage loan ("Thayer Loan"). Cplt. ¶¶ 7-8. The collateral for the Thayer Loan included, among other things, a $1.25 million letter of credit issued for the benefit of Barclays ("Letter of Credit"). *Id.* ¶ 9. The Letter of Credit could be drawn upon by the beneficiary under certain conditions specified in the loan agreement, including (among other things) if the borrower defaulted on the loan.

B. The MLPA And The PSA

A few months after it made the Thayer Loan, on June 22, 2006, Barclays sold the Thayer Loan to Banc of America Commercial Mortgage Inc. ("BACM" or "Depositor") pursuant to the terms of the MLPA (attached at Trunk Decl., Ex. A), to be pooled in a trust with other commercial mortgage loans, securitized, and sold to investors. Cplt. ¶¶ 11-12. Notably, Bank of America was not a party to the MLPA, and the MLPA did not impose any obligations on Bank of America.

The MLPA imposed several obligations on Barclays with respect to the Thayer Loan and the Letter of Credit. First, the MLPA obligated Barclays to "transfer, assign, set over and otherwise convey to [BACM], without recourse . . . all the right, title and interest" it held in the Thayer Loan. See Ex. A § 2(a) (p. 2). The MLPA further obligated Barclays to assign and transfer its rights as beneficiary under the Letter of Credit, which Barclays represented and warranted that it had done. See Ex. A §§ 2(c), 4(b) (pp. 2-3, 5), Schedule II ¶¶ 2, 43 (pp. 1, 12); see also Cplt. ¶¶ 16-19. As Plaintiff alleges, "[p]ursuant to Section 2(c) of the MLPA, Barclays agreed to assign and transfer its rights and interest in the collateral securing the Loan to the Depositor, including its rights as beneficiary of the Letter of Credit" (Cplt. ¶ 17), and "[p]ursuant

to Section 4(b) of the MLPA, Barclays represented that all of its rights and interest in any material collateral securing the Loan" had been so assigned. Cplt. ¶ 16.

Also on June 22, 2006, BACM[1] closed on the Pooling and Servicing Agreement ("PSA," excerpts attached at Trunk Decl., Ex. B), pursuant to which BACM transferred and assigned its rights, title, and interest in the Thayer Loan to LaSalle Bank National Association—former trustee for the registered certificate holders of the securitization trust and Plaintiff's predecessor-in-interest. Cplt. ¶ 12. At the same time, "Barclays agreed to meet all of the requirements of Section 2.01 of the PSA" (Cplt. ¶ 18), which "obligate[d] Barclays to prepare, execute, and deliver all documentation necessary to transfer and assign its rights as the beneficiary of the Letter of Credit." Cplt. ¶ 19; see also Ex. A § 2(d) (p. 3) (Barclays "hereby represents that it has . . . delivered to the Trustee the Mortgage File for each Mortgage Loan").

The PSA specified that Bank of America was to be the "Master Servicer" for the Thayer Loan. Cplt. ¶ 13. Under the PSA, the Master Servicer generally is responsible for servicing the loans, maintaining servicing files, collecting mortgage payments, and the like. See generally Ex. B Art. III (pp. 106-96).

C. Plaintiff's Claims

Plaintiff alleges that, despite Barclays' contractual obligations under the MLPA, Barclays "failed to assign its rights as beneficiary of the Letter of Credit" (Cplt. ¶ 23), and subsequently "took no action to cure its breach." *Id.* ¶ 25. Plaintiff contends that Barclays' alleged "failure to assign its rights as beneficiary under the Letter of Credit constituted a Material Breach or Material Document Defect under the MLPA." *Id.* ¶ 24.

[1] BACM is not a party to this case.

Plaintiff separately alleges that Bank of America, as "Master Servicer" of the Thayer Loan, had a fiduciary duty to "effectuate the terms of the PSA" on the Trustee's behalf, and to service the Thayer Loan with "care, skill, prudence, and diligence" in accordance with the Servicing Standard. Cplt. ¶¶ 13, 21. Plaintiff further alleges that Bank of America was obligated under the PSA to notify the issuer of the Letter of Credit within 60 days of the closing date of the PSA of the change in beneficiary under the Letter of Credit. *Id.* ¶ 22. Plaintiff alleges, "upon information and belief," that "Bank of America failed to effectuate the assignment of the Letter of Credit," and failed to provide notice of the change in beneficiary to the issuer of the Letter of Credit. *Id.* ¶¶ 26-27.

According to Plaintiff, on February 11, 2010, Barclays received a Notice of Non-Extension of the Letter of Credit and failed to notify anyone of its receipt of this Notice. *Id.* ¶¶ 28-29. On May 1, 2010, the Letter of Credit expired. *Id.* ¶ 30.

Plaintiff alleges that "[e]vents of default have occurred" in connection with the Thayer Loan (*id.* ¶ 33), presumably meaning that the borrower has failed to make its required payments, and that Plaintiff, as Trustee, is now trying to liquidate the collateral for the Thayer Loan in order to recoup the losses stemming from the borrower's default. Plaintiff alleges that, because the Letter of Credit expired, it "could not draw on the Letter of Credit," which "caused a material and adverse effect on the distributions payable on the certificates." *Id.* ¶ 34.

On June 21, 2012, in its capacity as Trustee for the registered certificate holders, Plaintiff filed this suit against Barclays and Bank of America. Plaintiff has sued Barclays for breach of contract, and Bank of America for breach of contract and breach of fiduciary duty. Plaintiff seeks damages in an amount no less than the $1.25 million original value of the Letter of Credit. *Id.* ¶¶ 41, 45, 51.

STANDARD FOR DISMISSAL

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain "sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although the Court must accept well-pleaded facts as true, it need not accept as true "legal conclusions or unwarranted deductions of fact." *Scalisi v. Fund Asset Management, L.P.*, 380 F.3d 133, 137 (2d Cir. 2004). Plaintiff's pleading obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Further, the court's plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557) (additional internal quotation omitted).

On a motion to dismiss under Rule 12(b)(6), the court may consider documents incorporated by reference in the complaint, as well as documents integral to the complaint. See, *e.g.*, *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (defining "integral" as where complaint "relies heavily" upon document's "terms and effect"). The MLPA and PSA unquestionably satisfy both standards: Plaintiff relies on those agreements as the exclusive source of defendants' obligations, and the Complaint cites numerous times to their terms. Accordingly, Bank of America attaches the MLPA and relevant excerpts of the PSA in support of its motion.[2]

[2] Plaintiff's claims should be evaluated under New York law, as specified in the relevant agreements. See Ex. A § 14 (p. 14); Ex. B § 12.04 (p. 282).

ARGUMENT

Plaintiff alleges that Barclays failed to transfer and assign its rights under the Letter of Credit, failed to execute and deliver the documentation necessary to effect such transfer and assignment, and failed to act upon the Non-Extension Notice before the Letter of Credit expired. The Complaint contains only two contentions as to Bank of America: First, in support of its breach of fiduciary duty claim, Plaintiff alleges without any basis that "Bank of America owed [Plaintiff] a fiduciary duty to carry out the provisions of the PSA, including taking action to assign the beneficiary rights of the Letter of Creditor [*sic*] from Barclays to the Master Servicer or Special Servicer," and that "Bank of America's failure to take the actions necessary to effect the assignment of the Letter of Credit was a breach of its fiduciary duty." Cplt. ¶¶ 48-49; see also *id.* ¶ 26 (alleging same "[u]pon information and belief"). Second, in support of its breach of contract claim, Plaintiff alleges that "Bank of America breached the PSA by failing [to] notify the provider of the Letter of Credit that the Master Servicer of [*sic*] Special Servicer shall, on behalf of the Trustee, be the beneficiary under the Letter of Credit." *Id.* ¶ 43; see also *id.* ¶ 27 (alleging same "[u]pon information and belief").

Plaintiff's allegations fail to state any claim for which relief may be granted against Bank of America. For starters, both of Plaintiff's claims are premised on alleged misconduct for which the exclusive remedy lies in the MLPA—to which Bank of America was not a party. Plaintiff's claim for breach of fiduciary duty additionally fails because Plaintiff has not alleged any facts to support a plausible inference that a fiduciary relationship existed with Bank of America. Plaintiff can allege no such facts, because the only relationship between the two sophisticated banks arose from an arm's-length business agreement that expressly ***disclaimed*** such a relationship. Finally, Plaintiff does not—and cannot—explain how Bank of America's

alleged breach of a single notification provision in the PSA (assuming it even applied) could possibly have caused any of Plaintiff's damages, given that Barclays was the only party with the power to transfer and assign its interest in the Letter of Credit. Put simply, Bank of America has no place in this dispute. The claims against Bank of America should be dismissed with prejudice.

I. PLAINTIFF'S CLAIMS AGAINST BANK OF AMERICA ARE BARRED BY THE CLEAR TERMS OF THE PSA

The gravamen of the Complaint—and the source of Plaintiff's injury—is Barclays' alleged failure to transfer and assign its rights under the Letter of Credit. According to Plaintiff, "Barclays agreed to assign and transfer its right and interest in the . . . Letter of Credit" (Cplt. ¶ 17); "Barclays represented that all of its rights and interest in any material collateral" had been assigned (*id.* ¶ 16); but Barclays "failed to assign its rights as beneficiary of the Letter of Credit." *Id.* ¶ 23.

Plaintiff's allegations against Bank of America are entirely derivative of those allegations against Barclays. Indeed, Plaintiff characterizes this entire action as one concerning "Defendants' failure to properly effect the transfer and assignment of a certain Letter of Credit." Cplt. ¶ 6; see also *id.* ¶ 32 (alleging "Bank of America's failure to take action to cause the assignment of the Letter of Credit"). But the PSA is unambiguous and without exception: "The applicable Mortgage Loan Purchase and Sale Agreement provides the ***sole remedy*** available to the [Trustee] respecting any Breach or Document Defect with respect to Mortgage Loans sold by the related Mortgage Loan Seller." Ex. B § 2.03(h) (p. 95) (emphasis added). And, in Plaintiff's own words, "Barclays [*sic*] failure to assign its rights as beneficiary under the Letter of Credit constituted a Material Breach or Material Document Defect under the MLPA." Cplt. ¶ 24. Plaintiff's exclusive remedy in this case therefore lies in the MLPA—against Barclays. Bank of

America was not a party to the MLPA, and Plaintiff has no recourse under the MLPA against Bank of America.[3]

This Court's analysis must begin and end with the clear and unambiguous terms of Section 2.03(h). Plaintiff attempts to plead around the PSA's exclusive-remedy provision by alleging that Bank of America failed to perform particular tasks associated with Barclays' required assignment. Although Plaintiff alleges (correctly) that Barclays was the party obligated to "prepare, execute, and deliver all documentation necessary to transfer and assign its rights as the beneficiary of the Letter of Credit to [Plaintiff]" (Cplt. ¶ 19), Plaintiff incongruously pleads that ***Bank of America's*** "failure to execute the documents necessary to have the Letter of Credit assigned," including its failure to "notify" the provider of the Letter of Credit of the change in legal beneficiary, somehow caused Plaintiff's losses. See *id.* ¶¶ 27, 32.

Plaintiff is wrong. First of all, Plaintiff nowhere alleges that Bank of America in fact owed any duty to "execute" the documentation necessary to effect assignment. Nor, as discussed in further detail *infra*, did Bank of America owe any duty to "notify" the issuer of the Letter of Credit of the change in beneficiary when no such change had occurred. In other words, Plaintiff has not pled facts sufficient to create a plausible inference that Bank of America was responsible for these particular tasks under the circumstances alleged in the Complaint.

[3] Even if Plaintiff had not particularly alleged that Barclays' failure of assignment "constituted a Material Breach or Material Document Defect under the MLPA" (Cplt. ¶ 24), it nevertheless would qualify as such under the PSA. Barclays represented and warranted in the MLPA that it had "validly and effectively conveyed to the Purchaser all legal and beneficial interest in and to each Mortgage Loan," and that "[a]ll of [its] interest in any material collateral securing any Mortgage Loan has been assigned to the Purchaser." See Ex. A § 4(b) (p. 5), Schedule II ¶¶ 2, 43 (pp. 1, 12). The PSA provides that a breach of those representations and warranties constitutes a "Breach . . . with respect to Mortgage Loans" (Ex. B § 1.01 (p. 16)), which triggers application of PSA Section 2.03(h), and limits the Trustee's recourse to the MLPA.

In any event, the PSA makes abundantly clear that Bank of America bears no responsibility for any failure involving the documentation relating to assignment of the Letter of Credit. Section 2.01(b) of the PSA states that Bank of America, as Master Servicer, shall not be liable "for any failure by [Barclays] . . . to comply with the document delivery requirements of the [MLPA] and this Section 2.01(b)." Section 2.01(b), in turn, required Barclays to "deliver to and deposit with, or cause to be delivered to and deposited with, the Trustee . . . the Mortgage File and any Additional Collateral . . . for each Mortgage Loan," and to "cause to be prepared, executed and delivered to the issuer of each such Letter of Credit such notices, assignments and acknowledgments as are required under such Letter to Credit to assign, without recourse, to the Trustee the related Mortgage Loan Seller's rights as the beneficiary thereof and drawing party thereunder." Ex. B § 2.01(b) (p. 87).[4] Indeed, the PSA forswears any duty by Bank of America to determine whether a Letter of Credit even ***exists***, much less to confirm that it was properly assigned and delivered. See Ex. B § 2.02(d) (p. 91) ("Master Servicer" is not under any obligation "to determine whether any of the documents specified in [certain parts of the definition of 'Mortgage File,' including letters of credit] exist or are required to be delivered by [Barclays] in respect of any Mortgage Loan.").[5]

Thus, whether Plaintiff styles its case against Bank of America as a failure to "take action to cause the assignment of the Letter of Credit" (Cplt. ¶ 32), or a failure to "execute the documents necessary to have the Letter of Credit assigned" (*id.*), the PSA unequivocally bars its claims. Plaintiff's claims against Bank of America must be dismissed.

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[4] The PSA's definition of "Additional Collateral" includes the Letter of Credit. See Ex. B § 1.01 (p. 8).

[5] In fact, the PSA expressly charges ***Plaintiff*** with this responsibility. See Ex. B § 2.02(d) (p. 91) ("with respect to Letters of Credit . . . the Trustee shall perform the review set forth in Section 2.02(b)(iii)(A)-(C)").

II. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY

Even if Plaintiff were able to overcome the unambiguous exclusive-remedy provision of the PSA, it still will have failed to state a claim against Bank of America for breach of fiduciary duty. Plaintiff alleges that "Bank of America owed [] a fiduciary duty to carry out the provisions of the PSA, including taking action to assign the beneficiary rights of the Letter of Creditor [*sic*] from Barclays to the Master Servicer or Special Servicer," and that "Bank of America's failure to take the actions necessary to effect the assignment of the Letter of Credit was a breach of its fiduciary duty." Cplt. ¶¶ 48-49. As a matter of law, however, Bank of America owed no fiduciary duties to Plaintiff.

A. The PSA Did Not Create—But Affirmatively Forswore—A Fiduciary Relationship

New York law is "quite clear" that "'a conventional business relationship, without more, does not become a fiduciary relationship by mere allegation.'" *Compania Sud-Americana de Vapores, S.A. v. IBJ Schroder Bank & Trust Co.*, 785 F. Supp. 411, 426 (S.D.N.Y. 1992) (quoting *Oursler v. Women's Interart Ctr., Inc.*, 566 N.Y.S.2d 295 (N.Y. App. Div. 1991)). Indeed, "'where parties deal at arms length in a commercial transaction, no relation of confidence or trust sufficient to find the existence of a fiduciary relationship will arise absent extraordinary circumstances.'" *Id*. (quoting *Nat'l Westminster Bank, U.S.A. v. Ross*, 130 B.R. 656, 679 (S.D.N.Y. 1991)); see also *Valjean Mfg., Inc. v. Michael Werdiger, Inc.*, No. 03 Civ. 6185, 2004 WL 1948752, at *4 (S.D.N.Y. Sept. 2, 2004) (dismissing fiduciary duty claim on motion to dismiss). Thus, an agreement that, "on its face, is an arm's-length contract between sophisticated parties [] will not be held to entail fiduciary duties absent some express agreement to that effect." *Calvin Klein Trademark Trust v. Wachner*, 129 F. Supp. 2d 248, 250 (S.D.N.Y.

2001); see also *Teachers Ins. and Annuity Ass'n of Am. v. CRIIMI Mae Servs. Ltd. P'ship*, No. 06 Civ. 0392, 2007 WL 7569162, at *1 (S.D.N.Y. Sept. 7, 2007).

Here, Plaintiff and Bank of America are both sophisticated banks brought together by an over 600 page, arm's-length commercial loan servicing agreement that spells out the respective duties and obligations of each party in detail. The PSA established a quintessential "conventional business relationship," and Plaintiff fails to allege "extraordinary circumstances" that make it anything more. *Compania Sud-Americana de Vapores*, 785 F. Supp. at 426 (internal quotation marks omitted).

Not only does Plaintiff fail to allege any extraordinary circumstances that would give rise to a fiduciary relationship in the context of this commercial transaction, but the contract affirmatively ***forswears*** any fiduciary relationship between Plaintiff and Bank of America. In particular, the PSA states that the relationship between Bank of America and the Trustee was "intended by the parties to this Agreement to be that of an ***independent contractor and not that of a[n] . . . agent.***" See Ex. B § 3.01(d) (p. 107) (emphasis added). This provision is dispositive and "precludes a finding of a fiduciary relationship." *Teachers Ins.*, 2007 WL 7569162, at *1. Indeed, where a loan servicing agreement specifies an independent-contractor relationship, the servicer owes no fiduciary duties as a matter of law. *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 196 n.16 (S.D.N.Y. 2011) (independent-contractor provisions "ha[ve] been found to preclude the existence of a fiduciary duty in servicers"); *Calvin Klein*, 129 F. Supp. 2d at 250 (dismissing fiduciary duty claim where the "Servicing Agreement suggests, if anything, the absence of any fiduciary relationship" by "disavow[ing] any joint venture or partnership relationship" and stating that "the Servicer is to be considered an 'independent contractor'"); see also *Physicians Mut. Ins. Co. v. Greystone*

Servicing Corp., No. 07 Civ. 10490, 2009 WL 855648, at *5 (S.D.N.Y. Mar. 25, 2009); *Valjean Mfg.*, 2004 WL 1948752, at *4-5.

As if that were not enough, further proof that Bank of America was not intended to be a fiduciary can be found elsewhere in the contract. Section 8.01 of the PSA provides that "the Trustee is at all times acting in a fiduciary capacity with respect to the Certificateholders." Ex. B § 8.01(a) (p. 248). No similar provision exists with respect to the Master Servicer. Even more starkly, the PSA explicitly contrasts Bank of America's contractual ***duty of care*** (pursuant to the "Servicing Standard") to certificate holders on the one hand, with the Trustee's ***fiduciary duties*** to certificate holders on the other hand. See Ex. B § 3.05(a) (p. 124). Clearly, had the parties wished to create a fiduciary relationship, they knew how to do so. *Cf. Brown v. Health Care and Ret. Corp. of Am.*, 25 F.3d 90, 92-93 (2d Cir. 1994) ("[T]he specific language in . . . the agreement [] demonstrates that when the parties intended to draw a distinction based on how many hours employees were scheduled to work, they did so explicitly.").

B. The Contractual Provisions Relied Upon By Plaintiff Are Legally Irrelevant And Cannot Support A Fiduciary Duty Claim

Despite all of this, Plaintiff attempts to manufacture a fiduciary duty claim by adverting selectively to the PSA and asserting, in conclusory fashion and without support, that Bank of America "owed [] a fiduciary duty to carry out [its] provisions." Cplt. ¶ 48; see also *id.* ¶ 13 (Bank of America, as Master Servicer, "had the duty to effectuate the terms of the PSA on [Plaintiff's] behalf"). Plaintiff is wrong.

For one thing, "a plaintiff must 'set forth allegations that, ***apart from the terms of the contract,*** the parties created a relationship of higher trust than would arise from their contracts alone so as to permit a cause of action for breach of a fiduciary duty independent of the contractual duties.'" *Ellington Credit Fund*, 837 F. Supp. 2d at 196 (quoting *Brooks v. Key Trust*

Co. Nat'l Ass'n, 809 N.Y.S.2d 270, 272-73 (N.Y. App. Div. 2006)) (alterations omitted). The Complaint identifies only ***contractual*** duties allegedly owed by Bank of America. As a matter of law, those allegations are insufficient to support a breach of fiduciary duty claim. See *id.* ("Because any fiduciary duty here would be 'derived directly and exclusively from [the] contractual relationship' . . . the[] claims are redundant under New York law.") (quoting *Physicians Mut. Ins. Co.*, 2009 WL 855648, at *10); *Banco Espirito Santo de Investimento, S.A. v. Citibank, N.A.*, No. 03 Civ. 1537, 2003 WL 23018888, at *15-16 (S.D.N.Y. Dec. 22, 2003) (collecting cases).

In any event, the contractual provisions referenced in the Complaint cannot support a fiduciary duty claim. Plaintiff alludes (without citing) to Section 3.01(a) of the PSA, which provides that Bank of America "shall service and administer the Serviced Loans . . . on behalf of the Trustee, and in the best interests and for the benefit of the Certificateholders." Ex B § 3.01(a) (p. 106); see Cplt. ¶¶ 13, 47. But another court in this district has firmly rejected that position, holding that a virtually identical provision (also in a PSA) created no fiduciary relationship where, as here, the servicer was an independent contractor. See *Teachers Ins.*, 2007 WL 7569162, at *1 (provision stating that "the Servicer and the Special Servicer, each as an independent contractor servicer, shall service and administer the Mortgage Loans on behalf of the Trust Fund solely in the best interests of and for the benefit of all of the Certificateholders") (internal quotation marks omitted).

Nor does the PSA's "Servicing Standard" create a fiduciary relationship. See Cplt. ¶ 21. The Servicing Standard called for Bank of America to fulfill its duties and obligations under the PSA with "the same care, skill, prudence and diligence as is normal and usual in [] general mortgage servicing." *Id.*; see Ex. B § 1.01 (p. 72) (definition of "Servicing Standard"). It is a

contractual duty of care—nothing more. As one court observed, simply accepting "'certain contractual responsibilities to service and account for mortgage loan pools[] does not mean that there was the sort of special relation of great intimacy, confidentiality, reliance and superiority of influence of the sort required for a fiduciary relationship.'" *Ellington Credit Fund*, 837 F. Supp. 2d at 194 (quoting *Orix Real Estate Capital Mkts., LLC v. Superior Bank, FSB*, 127 F. Supp. 2d 981, 985 (N.D. Ill. 2000)) (alteration omitted). Indeed, if a contractual servicing standard were sufficient to create a fiduciary relationship, then virtually every mortgage servicer would be thrust into a fiduciary position not contemplated by the contract, and contrary to the parties' intentions. Courts have soundly rejected that prospect. *Ellington Credit Fund*, 837 F. Supp. 2d at 194-95 (collecting cases and observing that "several courts in this district have dismissed certificateholders' breach of fiduciary duty claims against mortgage servicers," because absent "extraordinary circumstances," mere "status as a servicer does not confer fiduciary duties").

C. Even If A Fiduciary Relationship Existed, Bank Of America Had No Fiduciary Duty To Perform Acts Expressly Disclaimed In The PSA

Finally, even assuming Plaintiff could plausibly allege a fiduciary relationship with Bank of America, as a matter of law, that relationship could not embrace a duty "to take the actions necessary to effect the assignment of the Letter of Credit." Cplt. ¶ 49. That is because, as explained *supra*, the PSA states expressly that Bank of America was under no obligation even to determine whether a Letter of Credit ***existed***, much less to effectuate its assignment. See Ex. B §§ 2.01(b), 2.02(d) (pp. 87, 91). "An express disclaimer of a duty in a contract precludes a suit upon that duty." *Trafalgar Power Inc. v. Aetna Life Ins. Co.*, 396 B.R. 584, 595 (N.D.N.Y. 2008), *vacated in part on other grounds by Christine Falls Corp. v. Algonquin Power Fund, Inc.*, 401 F. App'x 584 (2d Cir. 2010).

III. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR BREACH OF CONTRACT

Plaintiff's breach of contract claim against Bank of America also must be dismissed. To be clear, Plaintiff does not allege that Bank of America was contractually obligated to ensure that Barclays complied with ***its*** obligation to transfer and assign the Letter of Credit. The PSA imposes no such obligation. Instead, Plaintiff implausibly contends that Bank of America's alleged breach of a single notice provision in the PSA somehow caused its injury. Plaintiff's argument proves too much. Plaintiff's own allegations demonstrate that Bank of America had no notice obligation with respect to the Letter of Credit. Even assuming, however, that Bank of America did have such an obligation, and breached that obligation, Plaintiff has not alleged any facts to support a plausible inference that Bank of America's breach caused Plaintiff's alleged losses.

A. Accepting Plaintiff's Allegations As True, Bank Of America Had No Notice Obligation

Plaintiff alleges that Bank of America was required to notify the provider of the Letter of Credit within 60 days of the closing date that the Master Servicer or Special Servicer was to be the new beneficiary under the Letter of Credit. Cplt. ¶ 22. Plaintiff pleads "[u]pon information and belief" that Bank of America failed to provide such notice. *Id.* ¶ 27. Plaintiff contends that Bank of America's failure to provide this notice "breached the PSA," causing Plaintiff "to be unable to draw on the Letter of Credit," and "to lose collateral for the Loan in the amount of $1,250,000.00." *Id.* ¶¶ 43-45.

Under the facts alleged in the Complaint, Bank of America could not have had any notice obligation with respect to the Letter of Credit. Plaintiff presumably relies on Section 3.02(b)(ii) of the PSA as the source of Bank of America's alleged notice obligation. That provision reads, in relevant part:

> Within 60 days after the Closing Date (or within such shorter period as may be required by the applicable Letter of Credit), the Master Servicer shall notify each provider of a Letter of Credit for any Serviced Loan that the Master Servicer or the Special Servicer, on behalf of the Trustee for the benefit of the Certificateholders, shall be the beneficiary under each such Letter of Credit.

Ex. B § 3.02(b)(ii) (p. 112). Clearly, for there to exist any obligation to notify the issuer of the change in beneficiary under the Letter of Credit, ***there must first have been a change in beneficiary under the Letter of Credit***. But, of course, that is precisely the event that Plaintiff alleges never occurred. See, *e.g.*, Cplt. ¶ 23 (citing Barclays' failure "to assign its rights as beneficiary of the Letter of Credit").

"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." *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) (internal quotation marks omitted); see also *Fisk v. Letterman*, 401 F. Supp. 2d 362, 368 (S.D.N.Y. 2005) (court is "not obliged to reconcile plaintiff's own pleadings that are contradicted by other matters asserted or relied upon or incorporated by reference by a plaintiff in drafting the complaint"). Plaintiff's primary grievance is that Barclays failed to transfer and assign its interest in the Letter of Credit, and therefore Plaintiff was unable to draw on the Letter of Credit prior to its expiration in May 2010. Given that theory of the case, this Court should not credit Plaintiff's contradictory allegation that Bank of America breached the contract by failing to provide notice of Barclays' transfer and assignment. Since that allegation forms the only basis for Plaintiff's contract claim, the Court must dismiss that claim.

B. Bank Of America's Alleged Breach Of The Notice Provision Could Not Have Caused Plaintiff's Losses

Even if this Court were to credit Plaintiff's assertion that Section 3.02(b)(ii) required Bank of America to provide notice of transfer and assignment where no transfer or assignment occurred, Plaintiff's breach of contract claim still must fail. Given that Barclays was the only party with the power or authority to transfer and assign its interest in the Letter of Credit, Plaintiff does not allege any facts to support a plausible inference that Bank of America's violation of the notice provision (even if true) could have caused Plaintiff's injury.

Plaintiff alleges throughout the Complaint that Barclays, as the named beneficiary to the Letter of Credit, is the party that "failed to assign its rights as beneficiary of the Letter of Credit." Cplt. ¶ 23; see also *id.* ¶ 31 (alleging "Barclays' failure to fulfill its obligation to transfer the Letter of Credit to the Master Servicer"). As the named beneficiary, Barclays was the only party with the power or authority to effect transfer and assignment of the 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).

Plaintiff does not—and cannot—allege that Bank of America had any authority or ability to transfer or assign the Letter of Credit. The PSA plainly contemplates that Barclays—the one and only party with such authority and ability—would do so, as required by the MLPA. Thus, even if Bank of America had a notification obligation and failed to satisfy that obligation (which

we do not admit), Plaintiff has not alleged any consequence of that supposed failure. See, *e.g.*, *LNC Investments, Inc. v. First Fidelity Bank, N.A.*, 173 F.3d 454, 465 (2d Cir. 1999) ("There is, of course, a fundamental requirement, similar to that imposed in tort cases, that the breach of contract be the cause in fact of the loss . . . .") (quoting E. Allan Farnsworth, *Contracts* § 12.1, at 841 (2d ed. 1990)).

Paragraphs 44 and 45 of the Complaint are vague and conclusory, and do not sufficiently allege that Bank of America's breach of its notice obligation was the "cause in fact" of Plaintiff's damages. Plaintiff alleges that Bank of America's failure to provide notice "caused [Plaintiff] to be unable to draw on the Letter of Credit" (Cplt. ¶ 45), and "caused [Plaintiff] to lose collateral for the Loan in the amount of $1,250,000.00" (*id.* ¶ 44), but nowhere does Plaintiff fill the wide causal gap created by these statements. Put another way, Plaintiff pleads no facts suggesting that, had Bank of America notified the issuer of the change in beneficiary under the Letter of Credit, such notification in fact would have effected legal assignment and transfer of the Letter of Credit. The Court should not credit these "unwarranted deductions of fact." *Scalisi*, 380 F.3d at 137.

Plaintiff has not pled sufficient facts to create a plausible inference that Bank of America's alleged breach ***caused*** the injury alleged in the Complaint. The contract claim against Bank of America therefore must be dismissed.

CONCLUSION

For the reasons set forth above, Defendant Bank of America, N.A. respectfully requests that the Court dismiss both claims against Bank of America with prejudice.

Dated: August 30, 2012

/s/ William J. Trunk

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