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
PLAINTIFF'S SECOND AMENDED COMPLAINT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Defendant Bank of America, N.A. ("Bank of America") respectfully submits this memorandum of law in support of its motion to dismiss plaintiff U.S. Bank, N.A.'s ("Plaintiff") Second Amended Complaint (Dkt. No. 58), pursuant to Fed. R. Civ. P. 12(b)(6).

This is Plaintiff's third attempt to plead a cause of action against Bank of America. Unfortunately for Plaintiff, the third time is no charm. This Court's December 11th order (Dkt. No. 56) granting Bank of America's prior motion to dismiss was unequivocal: To maintain a cause of action against Bank of America, Plaintiff must plausibly allege that Barclays fulfilled its assignment obligations. Yet despite this clear directive, Plaintiff once again fails to allege a set of facts under which Bank of America—instead of Barclays—could be liable. The Court should dismiss the Second Amended Complaint as to Bank of America with prejudice.

FACTUAL BACKGROUND

For purposes of this motion to dismiss only, Bank of America accepts the facts alleged in the Second Amended Complaint ("Sec. Am. Cplt.") as true.

A. The MLPA And The PSA

On or about April 19, 2006, Barclays Capital Real Estate, Inc. ("Barclays") originated a $24 million commercial mortgage loan ("Thayer Loan"), which was evidenced by a promissory note made payable by the borrower to Barclays. Sec. Am. 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.

By Mortgage Loan Purchase and Sale Agreement ("MLPA," attached at Trunk Decl., Ex. A) dated June 22, 2006, Barclays sold the Thayer Loan to Banc of America Commercial Mortgage Inc. ("BACM"),[1] so that it could be pooled in a trust with other commercial mortgage

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

loans, securitized, and sold to investors. Sec. Am. Cplt. ¶¶ 11-12. Barclays agreed under the MLPA to assign all of its rights and interest in the collateral securing the Thayer Loan—including its rights as beneficiary of the Letter of Credit—to BACM, and it represented and warranted that it had done so. *Id.* ¶¶ 16-17; see also Dkt. No. 56, *Decision and Order Denying Barclays' Motion to Dismiss and Granting Bank of America's Motion to Dismiss*, dated Dec. 11, 2012 ("Order") at 9 (citing MLPA § 4(b); Sched. II, Rep. 43).

Also on June 22, 2006, BACM 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. Sec. Am. Cplt. ¶ 12. The PSA authorized Bank of America to act as "Master Servicer" for the Thayer Loan so long as the loan was not in default or in imminent danger of default. *Id.* ¶ 13.

B. Expiration Of Letter Of Credit And Default Of Thayer Loan

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. Sec. Am. Cplt. ¶¶ 26, 28. On May 1, 2010, the Letter of Credit expired. *Id.* ¶ 29.

Plaintiff alleges that "[e]vents of default have occurred" in connection with the Thayer Loan, including the borrower's failure to make its required payments. Sec. Am. Cplt. ¶ 30. Plaintiff, as trustee, is presumably attempting to liquidate the collateral for the Thayer Loan 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.* ¶ 31. 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 seeks damages in an amount no less than the $1.25 million original value of the Letter of Credit. *Id.* ¶¶ 48, 56.

PROCEDURAL HISTORY

This is Plaintiff's third attempt to state a claim against Bank of America:

A. Original Complaint

Plaintiff's original complaint contained three counts: a claim for breach of contract against Barclays (Count I), along with claims for breach of contract (Count II) and breach of fiduciary duty (Count III) against Bank of America. See Dkt. No. 1. Bank of America and Barclays both moved to dismiss the complaint. See Dkt Nos. 22, 25. Plaintiff filed a brief in opposition to Barclays' motion to dismiss (Dkt. No. 32), and, soon thereafter, filed an amended complaint withdrawing its breach of fiduciary claim against Bank of America (Dkt. No. 36).

B. Amended Complaint

Plaintiff's amended complaint focused primarily on Barclays' alleged misconduct. Plaintiff alleged that, despite Barclays' contractual obligations under the MLPA, Barclays "failed to assign its rights as beneficiary of the Letter of Credit" (Dkt No. 36, ¶ 26), and subsequently "took no action to cure its breach." *Id.* ¶ 28. Plaintiff contended that Barclays' "failure to assign its rights as beneficiary under the Letter of Credit constituted a Material Breach or Material Document Defect under the MLPA." *Id.* ¶ 27. "Although Barclays was no longer the rightful beneficiary of the Letter of Credit and was obligated by the MLPA and PSA to transfer its rights as beneficiary," Plaintiff continued, Barclays failed to "notify anyone of its receipt of the Non-Extension Notice" (*id.* ¶ 33), "caus[ing] [Plaintiff] to lose collateral for the Loan in the amount of $1,250,000.00." *Id.* ¶ 51.

By contrast, the allegations against Bank of America in Plaintiff's amended complaint were something of an afterthought. Plaintiff alleged that Bank of America breached its obligations under Section 3.02(b)(ii) of the PSA by failing "to notify the Issuer of the Letter of Credit (*i.e.*, itself) that Bank of America (as the Master Servicer of the Loan) should be the beneficiary under its own Letter of Credit," and by failing to "'maintain' and 'execute' the Letter of Credit (whatever that means)." Order at 7. The amended complaint also alleged that Bank of America violated the PSA's "Servicing Standard" by failing to "take some kind of action with respect to the Letter of Credit," either before or after its expiration. *Id.*

C. This Court's Decision And Order On The Motions To Dismiss The Amended Complaint

Bank of America and Barclays both moved to dismiss the amended complaint. On December 11, 2012, this Court entered an order denying Barclays' motion, and granting Bank of America's motion, with leave to amend in part.

As relevant here, the Court held that "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." Order at 12. While it was "plain from the Amended Complaint that Plaintiff believes that Bank of America and Barclays [could] be found jointly liable," the Court explained, "Bank of America's liability is contingent on Barclays *not* being liable." *Id.* at 13 (emphasis in original). And the amended complaint simply failed to allege any plausible alternative theory of relief against Bank of America. *Id.* "In other words," the Court noted, "there is nothing . . . along the lines of '***if, in the alternative, Barclays did assign the Letter of Credit, and thus is not liable***, then Bank of America breached its obligations under the PSA.'" *Id.* (emphasis added).

The Court's dismissal of the amended complaint was without prejudice in part. Plaintiff was given the opportunity—if it chose—to present allegations that "Barclays did assign the Letter of Credit" (*id.*), and that Bank of America subsequently breached its contractual obligations.[2]

D. Second Amended Complaint

Plaintiff filed its Second Amended Complaint on December 20, 2012. See Dkt. No. 58. For present purposes, the changes from its First Amended Complaint can be characterized as purely cosmetic. Plaintiff has revised the section headings of its complaint to suggest that its allegations against Bank of America are "in the alternative" to its allegations against Barclays. See Sec. Am. Cplt. at 6 ("Plead Alternatively to Allegations Against Barclays"); *id.* at 8 ("Plead in the Alternative to Claims Against Barclays"); see also *id.* ¶ 56 (demanding judgment against Bank of America "alternatively").[3] Critically, however, Plaintiff does ***not*** allege that Barclays may have properly assigned the Letter of Credit—an indispensable factual predicate to any claim against Bank of America.

[2] The Court also dismissed with prejudice Plaintiff's allegation that Bank of America breached the PSA by "fail[ing] to take any action between the closing date of the [Thayer] Loan and the cancellation of the Letter of Credit to cause or effect the assignment and/or transfer of the Letter of Credit, including but not limited to directing Barclays to transfer and assign the Letter of Credit." Order at 13 (quoting Dkt. No. 36, ¶ 38). The Court concluded that Barclays was not obligated to transfer and assign the Letter of Credit (but rather to assign its right to the proceeds), and that "[n]owhere in the PSA or the MLPA [wa]s there any indication that Barclays could be forced by Bank of America to do anything," and therefore no injury could have resulted from Bank of America's alleged inaction. See Order at 13-14.

[3] Plaintiff also revised its complaint, in accordance with the Court's order, to reflect that only Barclays was responsible for assigning the Letter of Credit, and to eliminate its allegation relating to Bank of America's actions after the closing of the Thayer Loan.

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 Mgmt., 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).

ARGUMENT

The Court's December 11th order could not have been clearer: Because Bank of America's obligations under the PSA were not triggered unless and until Barclays assigned its right to the proceeds of the Letter of Credit, Plaintiff must allege something "along the lines of 'if, in the alternative, Barclays did assign the Letter of Credit, and thus is not liable, then Bank of America breached its obligations under the PSA.'" Order at 13.

Despite that clear guidance, Plaintiff alleges no facts—not one—to plausibly suggest that Barclays properly assigned the Letter of Credit. In fact, Plaintiff continues to allege just the opposite: According to Plaintiff, "Barclays failed to assign its rights as beneficiary of the Letter of Credit" (Sec. Am. Cplt. ¶ 33), and such "failure to assign its rights as beneficiary under the

Letter of Credit constituted a Material Breach or Material Document Defect under the MLPA." *Id.* ¶ 34. Plaintiff also alleges that, when the Notice of Non-Extension was sent to Barclays in February 2010, Barclays was "still the listed beneficiary under the Letter of Credit" (*id.* ¶ 26), even though it was "no longer the rightful beneficiary" (*id.* ¶ 28). These allegations belie any claim that Barclays properly assigned the Letter of Credit.

Under *Iqbal*, in order for a complaint to meet the standard of facial plausibility, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678. Here, Plaintiff has failed to plead any facts from which one could reasonably infer that Bank of America is liable. The Court has already held (correctly) that Barclays' assignment of the Letter of Credit was a necessary factual predicate to Bank of America's liability. Because Plaintiff nowhere alleges that factual predicate—in the alternative or otherwise—Plaintiff has failed to state a claim against Bank of America.

Although a plaintiff "need not use particular words to plead in the alternative" (Order at 13 (quoting *G-I Holdings, Inc. v. Baron & Budd*, 238 F. Supp. 2d 521, 536 (S.D.N.Y. 2002)), its complaint must still contain "sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Even when pleading in the alternative, a plaintiff must allege factual content from which a court could reasonably infer that the defendant is liable. See, *e.g.*, *Brown v. Kay*, No. 11-cv-7304, -- F. Supp. 2d --, 2012 WL 408263, at *14 (S.D.N.Y. Feb. 9, 2012) (dismissing conversion claim pled in alternative to fraud claim where complaint alleged hypothetical scenario without corresponding factual content).

Plaintiff's addition of boilerplate language that its claim against Bank of America is pled "in the alternative" to its claim against Barclays is insufficient to support a claim against Bank of America. Plaintiff's revisions, which are purely cosmetic, do not furnish the necessary "factual matter" to state a claim for relief—particularly where the facts that Plaintiff ***does*** allege flatly contradict any theory of liability against Bank of America. See, *e.g.*, Sec. Am. Cplt. ¶¶ 26, 28, 33, 34. Further, Plaintiff's statement that it does not intend to incorporate the "allegations and claims against Barclays set forth above" in its claim against Bank of America (*id.* ¶ 49) is ineffective. It is unclear which allegations Plaintiff purports to disclaim but, in any event, all of its allegations—including its preliminary factual allegations—command an inference that Barclays never assigned the Letter of Credit.

It would be futile for the Court to allow Plaintiff to amend its complaint for a third time. The Court has already made clear that Plaintiff must allege, at a bare minimum, that Barclays assigned the Letter of Credit in order to support a claim against Bank of America. Plaintiff could not bring itself to do so. Quite obviously, Plaintiff simply does not believe that Barclays assigned the Letter of Credit. That should end the matter. Plaintiff's case lies against Barclays only, and Bank of America should be dismissed as a defendant.

CONCLUSION

For the reasons stated above, Bank of America respectfully requests that the Court dismiss the Second Amended Complaint as to Bank of America with prejudice.

Dated: January 3, 2013

s/ Richard A. Sauber
Richard A. Sauber (*pro hac vice*)
Jennifer S. Windom (*pro hac vice*)
William J. Trunk (Bar No. 4720090)
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411L
Washington, D.C. 20006
Phone: 202-775-4500
Fax: 202-775-4510

Attorneys for Bank of America, N.A.