1 of 2 DOCUMENTS

THE BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL ASSOCIATION, TRUSTEE FOR THE REGISTERED CERTIFICATE HOLDERS OF MORGAN STANLEY CAPITAL I INC., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-IQ14, ACTING BY AND THROUGH C-III ASSET MANAGEMENT LLC AS SPECIAL SERVICER, Plaintiff, -against- MORGAN STANLEY MORTGAGE CAPITAL, INC., Defendant.

11 Civ. 0505 (CM)(FM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

June 27, 2011, Decided

JUDGES: Colleen McMahon, United States District Judge.

OPINION BY: Colleen McMahon

OPINION

DECISION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS BUT DIRECTING THE FILING OF AN AMENDED COMPLAINT ALLEGING FACTS ESTABLISHING STANDING

McMahon, J.

Defendant Morgan Stanley Mortgage Capital, Inc., ("Defendant") moves to dismiss plaintiff Bank of New York Mellon Trust's ("Plaintiff") complaint under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim. Defendant's motion to dismiss is denied.

I. Background

A. The Transaction

On December 29, 2006, Morgan Stanley Mortgage Capital, Inc. ("Defendant") [*2] made a mortgage loan in the amount of $81,000,000 (the "Mortgage Loan") to City View Center, LLC ("Borrower") in connection with Borrower's purchase of a retail shopping center (the "Property) from Garfield Land Development, LLC ("Garfield"). (Compl. ¶ 6-7). The shopping center was, at the time, anchored by Wal-Mart, the largest tenant at the Property. Wal-Mart leased approximately twenty-nine percent of the net square footage at the shopping center. (The "Underlying Lease")(Compl. ¶ 17).

On May 1, 2007, Defendant sold this Mortgage Loan to Morgan Stanley Capital I, Inc., (the "Intermediate Purchaser") pursuant to a Mortgage Loan Purchase Agreement (the "MLPA"). (Compl. ¶ 24; Compl. Ex. A). By the terms of the MLPA and pursuant to a Pooling and Servicing Agreement (the "PSA") (Compl. ¶¶6, 33; Compl. Ex. B) Morgan Stanley Capital I deposited this loan and others into a trust designated "Morgan Stanley Capital I Trust 2007-IQ14" (the "Trust"). Plaintiff is the named trustee of that trust. (Compl. Ex. B at 1)

At the time of the sale it was known that the Property was the site of a former municipal landfill, and that it was subject to an Ohio Environmental Protection Agency ("Ohio EPA") "Rule 13 [*3] Authorization" to ensure that it was in line with certain regulations stemming from concerns over the landfill. (Compl. ¶¶ 8-10). Between 2005 and 2008, both prior to and after the execution of the MLPA and PSA, the Ohio EPA issued a number of Notices of Violation ("NOV") with regard to the Property.

In light of this, the MLPA contained certain warranties made by the Defendant / Lender about the condition of the Property. In pertinent part, Defendant warranted that:

> "[A]n environmental site assessment, or an update of a previous such report, was performed with respect to each Property in connection with the origination or the acquisition of the related Mortgage Loan, a report of each such assessment (or the most recent assessment with respect to each Property) (an "Environmental Re-

> port") has been delivered to the Purchaser, and [Defendant] has no knowledge of any material and adverse environmental conditions or circumstance affecting any Property that was not disclosed in such report."

(Compl. ¶ 25) (the "Environmental Warranty").

Pursuant to this warranty, Defendant provided Plaintiff with the Phase I Environmental Site Assessment of the Property (the "IVI Report"), which was prepared [*4] on July 25, 2006. (Compl. ¶ 26). A second Phase I Environmental Site Assessment (the "HzW Report") had been prepared for the Defendant in November of 2006, but this report was never provided to the Plaintiff. (Compl. ¶¶ 41-52). This means, of course, that the IVI Report was not the "most recent assessment with respect to" the Property at the time the MLPA was executed in May 2007.

Defendant also warranted:

> "To [Defendant's] knowledge, there exists no material default, breach, violation or event of acceleration (and no event which, with the passage of time or the giving of notice, or both, would constitute any of the foregoing) under the documents evidencing or securing the Mortgage Loan, in any such case to the extent the same materially and adversely affects the value of the Mortgage Loan and the related Property."

(Compl. ¶ 28)(the "No Default Warranty")

Both the No Default Warranty and Environmental Warranty were originally made by Defendant to the Intermediate Purchaser under the MLPA (Compl. ¶¶ 24-25, 28). The Intermediate Purchaser's rights were subsequently assigned to the Plaintiff pursuant to the PSA (Compl. ¶ 26).

B. The Environmental Default

On December 14, 2006, shortly before [*5] the loan was made, Wal-Mart delivered a written notice of default ("First Notice of Default") to Garfield, alleging that Garfield had failed to perform duties under the terms of Wal-Mart's lease regarding the management of methane gas from the landfill and that, as a result, methane had reached dangerous levels in Wal-Mart's store. (Compl. ¶ 56).

On December 26 and December 28, 2006, Wal-Mart and Garfield entered into two letter agreements (the "December Letter Agreements") to set up a method to cure the default. Pursuant to that letter agreement, Garfield was obligated to monitor and regulate intrusions of methane gas into the Property. (Compl. ¶¶ 58, 59).

On December 28, 2006, Borrower and Garfield entered into the "Wal-Mart Indemnity Agreement", assigning Garfield's responsibility for fixing methane intrusion to Borrower / City View. (Compl. ¶¶ 62, 63).

On the same day Wal-Mart sent Defendant an estoppel certificate, (the "Wal-Mart Estoppel"), which identified the methane problem on the property, and set out Borrower's as-yet unfulfilled responsibilities under the December Letter Agreements and the Wal-Mart Indemnity Agreement. (Compl. ¶¶ 64-66). The loan was conveyed and received [*6] nonetheless, as set forth above.

Over the following two years, Wal-Mart sent Defendant a series of letters of default in response to Borrower's ongoing failure to address the methane problems on the property, and on January 30, 2009, Wal-Mart notified Borrower that it was terminating the lease. This was presumably done in accordance with the terms of the Underlying Lease, which is not in the record. (Compl. ¶¶ 108-120). Shortly thereafter, Borrower defaulted on its debt service payments under the Mortgage Loan. (Compl. ¶ 122).

C. The Instant Lawsuit

Plaintiff, acting through special servicer C-III Asset Management LLC, now brings suit, claiming that i) Borrower / City View was in default under the Underlying Lease at the time the MLPA was executed, ii) Defendant / Lender knew that Borrower was in default but failed to disclose it pursuant to the terms of the No Default Warranty, iii) adverse environmental conditions not disclosed by the IVI Report (which was provided to the Intermediate Purchaser and thence to Plaintiff) existed on the Property at the time the MLPA was executed, and iv) Defendant knew of these conditions and did not disclose them pursuant to the terms of the Environmental [*7] Warranty.

Plaintiff is now asking this Court to enforce the terms of the MLPA. Under the MLPA, where a breach of warranty materially and adversely affects the value of the Mortgage Loan, it is considered a Material Breach, (MLPA at 15), and the lender is required to repurchase the loan if unable to cure a Material Breach. (MLPA at 16). The breach here is clearly incurable, and so Plaintiff asks this court to order Defendant / Lender to repurchase the loan.

II. Discussion

A. Applicable Legal Standard

In deciding a motion to dismiss pursuant to *Rule 12(b)(6)*, the Court must liberally construe all claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. See *Cargo Partner AG v. Albatrans, Inc., 352 F.3d 41, 44 (2d Cir. 2003)*; see also *Roth v. Jennings, 489 F.3d 499, 510 (2d Cir. 2007)*.

To survive a 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, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "A claim has facial plausibility when the plaintiff pleads factual content that allows [*8] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing *Twombly, 550 U.S. at 556*). "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief 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* (internal quotations, citations, and alterations omitted). Thus, unless a plaintiff's well-pleaded allegations have "nudged [its] claims across the line from conceivable to plausible, [the plaintiff's] complaint must be dismissed." *Id. at 570*; *Iqbal, 129 S. Ct. at 1950-51*.

In deciding a motion to dismiss, this Court may consider the full text of documents that are quoted in or attached to the complaint, or documents that the plaintiff either possessed or knew about and relied upon in bringing the suit. *Rothman v. Gregor, 220 F.3d 81, 88-89 (2d Cir. 2000)* (citing *Cortec Indus. Inc. v. Sum Holding L.P., 949 F.2d 42 (2d Cir. 1991)*, cert. denied, *503 U.S. 960, 112 S. Ct. 1561, 118 L. Ed. 2d 208 (1992))*; *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos., 75 F.3d 801, 808 (2d Cir. 1996)*. [*9] "Plaintiffs' failure to include matters of which as pleaders they had notice and which were integral to their claim--and that they apparently most wanted to avoid--may not serve as a means of forestalling the district court's decision on the motion." *Cortec 949 F.2d at 44 (2d Cir. 1991)*; see also *I. Meyer Pincus & Assocs. P.C. v. Oppenheimer & Co., 936 F.2d 759, 762 (2d Cir. 1991)* ("plaintiff cannot evade a properly argued motion to dismiss simply because plaintiff has chosen not to attach the [document] to the complaint or to incorporate it by reference").

Plaintiff pleads two counts of contractual breach of warranty. Under New York law, "in order to prevail on a breach of contract claim, a plaintiff must establish: (1) the existence of a contract; (2) performance by the party seeking recovery; (3) nonperformance by the other party; and (4) damages attributable to the breach." *Martinez v. Vakko Holdings A.S., 2008 U.S. Dist. LEXIS 56274, 2008 WL 2876529*. A claim for breach of contract must state that the damages caused were a direct and proximate result of the alleged breach. *National Mkt. Share, Inc. v. Sterling Nat'l Bank, 392 F.3d 520, 525 (2d Cir. 2004)*.

B. Breach of Environmental Warranty

Defendant contends that [*10] Plaintiff has failed to state a claim with the failure to disclose environmental conditions on the Property to Plaintiff pursuant to the MLPA.

Defendant argues that the IVI Report included with Plaintiff's complaint, and provided to Plaintiff upon sale of the Mortgage Loan, disclosed all of the environmental risks that Plaintiff now cites in its claim as evidence of breach. This being so, Defendant asserts, Plaintiff was fully informed of any and all environmental issues relating to the property and, therefore, Plaintiff cannot state a claim for breach of warranty. Specifically, Defendant points out that the IVI Report discloses the following facts: i) the Property is built on a former landfill, ii) it requires monitoring for methane, iii) it is under the supervision of the Ohio EPA, and iv) it requires approximately $100,000 dollars in repairs to address outstanding environmental violations.

Defendant errs in concluding it is self-evident that the two reports are effectively equivalent. In fact, it is far from self-evident that the disclaimers in the IVI Report are equivalent to those in the HzW Report. The IVI Report clearly states its intended purpose:

> "The purpose of this report is [*11] to identify *Recognized Environmental Conditions* in connection with the property... Recognized Environmental Conditions are defined... as ...the presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground."

(IVI Report at 2) (emphasis added). It concludes: "This assessment has revealed no evidence of *recognized environmental conditions* in connection with the [Property] and no further investigation is currently recommended." (IVI Report at 26)(emphasis added). The IVI Report

notes some concern with methane on the property; however it refers to the existence of methane as an "item of environmental concern" and not a *"Recognized Environmental Condition."* The most natural reading of the IVI Report therefore-- putting to one side this court's duty to draw all reasonable inferences in favor of the plaintiff, See *Cargo Partner AG v. Albatrans, Inc., 352 F.3d 41, 44 (2d Cir. 2003)*; see also *Roth v. Jennings, 489 F.3d 499, 510 (2d Cir. 2007)*-- is that items of "environmental [*12] concern" are not necessarily congruent with "Recognized Environmental Conditions" and so may not include "a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground."

Furthermore, whether the IVI and HzW Reports disclose the same condition in the same manner presents an issue of fact--not a question of law that can be resolved on a motion to dismiss. In short, the fact that the IVI Report identifies methane as an issue of environmental concern does not pose a question of law which could preclude Plaintiff's claim for breach of warranty.

C. Breach of No Default Warranty

Defendant also argues that Plaintiff has failed to state a claim with regard to the second alleged breach of warranty: the failure to disclose any material defaults related to the Underlying Lease. According to Plaintiff's complaint, Defendant warranted, in part, that:

> "To [Defendant's] knowledge, there exists no material default, breach, violation or event of acceleration (and no event which, with the passage of time or the giving of notice, or both, would constitute any of the foregoing) under the documents evidencing or securing the Mortgage Loan, [*13] in any such case to the extent the same materially and adversely affects the value of the Mortgage Loan and the related Property."

(Compl. MLPA, Ex. 2, Representation 27).

Only if the complaint and documents filed therewith demonstrates that Defendant did not know about any material default or breach between Wal-Mart and Borrower at the time the MLPA was executed, this claim could be dismissed. But they show nothing of the sort. Rather, they raise various issues of fact that cannot be resolved on a motion to dismiss.

To bolster its claim that Defendant knew about the existence of a default under the Lease when the MLPA was executed, Plaintiff cites the "First Notice of Default", sent from Wal-Mart to Garfield on December 14, 2006. Wal-Mart had already sent this letter identifying the methane gas intrusion at the Wal-Mart Store and accusing Garfield of failing to deliver an effective venting system. (Compl. ¶¶ 56-57). The subsequent "December Letter Agreements" of December 26 and December 28, 2006, in which Wal-Mart and Garfield agreed to require Garfield (and later upon Borrower / City View pursuant to the "Wal-Mart Indemnity Agreement" executed by Garfield and Borrower) to address the [*14] methane problem. Wal-Mart was experiencing. By imposing on Garfield an obligation to cure the methane problem, Garfield (and later Borrower) effectively admitted the existence of a default.

Defendant contends that the "December Letter Agreements" show that any defaults on the Underlying Lease that may have existed at the time of the "First Notice of Default" were being handled to the satisfaction of Garfield and Wal-Mart, so there was in fact no default. Defendant also argues that the "Wal-Mart Estoppel" letter demonstrates conclusively that by the time the MLPA was executed (May 1, 2007), Defendant had no knowledge of any ongoing material default or breach of contract between Wal-Mart and Borrower. This, too, is logically flawed.

While the December Letter Agreements represent on their face an effort to resolve the problems that underlie the notice of default, they do not in any way suggest that the default had been cured by the time the loan was made. Therefore, the only issue is whether the subsequent Wal-Mart Estoppel letter bars this claim as a matter of law. It does not.

The Second Circuit has explained that "The general purpose of an estoppel certificate is to assure one or both [*15] parties to an agreement that there are no facts known to one and not the other that might affect the desirability of entering into the agreement and to prevent the assertion of different facts at a later date." *ReliaStar Life Ins. Co. of New York v. Home Depot U.S.A., Inc., 570 F.3d 513 (2d Cir. 2009)* Defendant argues that the "Wal-Mart Estoppel," with its assertion that the lease was in "full force and effect", effectively represented that neither party was in default at the time of the Estoppel letter. This argument seems predicated on the assumption that a contract cannot be in full force and effect while one party is still in default.

But that is nonsense. "Default" is defined as "The omission or failure to perform a legal or contractual duty..." Black's Law Dictionary, Seventh Edition., Brian Garner, 1999. A failure to perform one's contractual duties does not in all cases immediately abrogate that contract. In this case, the terms of the lease are not pleaded in the complaint, but it is not at all clear that the exis-

tence of a default under the lease is enough to void the lease. In most cases, a party is contractually required to take some affirmative step (like giving notice [*16] and an opportunity to cure) before a lease actually ceases to be in "full force and effect." The alleged terms of the First Notice of Default suggest that the lease in this case contained such a clause and that the existence of a default, while perhaps a condition precedent to termination, did not in and of itself end the lease. Therefore, the Wal-Mart Estoppel does not bar the breach of warranty claim.

D. Proximate Cause / Damages

Under New York law, a claim for breach of contract, in addition to its other elements, must state that the damages caused were a direct and proximate result of the alleged breach. *National Mkt. Share, Inc. v. Sterling Nat'l Bank, 392 F.3d 520, 525 (2d Cir. 2004)*. Accordingly, "In the absence of a causal link between [the] defendant's alleged wrongful conduct and [the] plaintiff's alleged damages, the complaint must be dismissed."

In this case, the terms of the MLPA put additional limitations on Plaintiff's rights to bring suit. Plaintiff may only bring a claim against Defendant for repurchase of the Mortgage Loan when an alleged breach "materially and adversely affects the value of the Mortgage Loan." (MLPA § 5(b)).

Defendant argues that Plaintiff has failed [*17] to plead that the breach materially affects the Mortgage Loan. This is simply not so.

Plaintiff alleges that Wal-Mart's cessation of operations at the Property materially and adversely affected the value of the Mortgage Loan, because Wal-Mart was the anchor tenant, occupying approximately twenty-nine percent of the Property. The fair inference that rises from these facts is that the loss of the anchor tenant, and the vacation of nearly a third of the Property, would materially affect the mortgage lease.

1. Proximate Cause

Defendant raises two arguments to the effect that Plaintiff's claim fails to allege sufficient proximate cause between Defendant's actions and any alleged damage to the value of the Mortgage Loan. Both arguments are defenses to be proven, not reasons to dismiss the complaint.

Defendant first argues that its alleged breach of either warranty had no bearing on Wal-Mart's decision to leave the property--the failure to remedy the gas leak was the precipitating factor. It then argues that as Defendant's actions not the proximate cause of Wal-Mart's departure, they were not the cause of any damage to the value of the loans.

If this argument had force, a breach of warranty could [*18] *never* result in damages: clearly an absurd outcome. By the nature of warranties, the damages that result from breach are those that result from the *risks* that are warranted against. Thus, it is never the breach of warranty itself that causes the damage, but the occurrence of events warranted against. In this case, Defendant warranted that there existed no "material and adverse environmental conditions" except those disclosed by the IVI report. Defendant also warranted that there existed "no material default" on the Underlying Lease. The risks fairly understood to be warranted against, then, are the *harms resulting from* environmental conditions or material defaults other than those disclosed at the time the MLPA was executed.

At this stage, the Court is required to "draw all reasonable inferences in favor of the plaintiff." See *Cargo Partner AG v. Albatrans, Inc., 352 F.3d 41, 44 (2d Cir. 2003)*; see also *Roth v. Jennings, 489 F.3d 499, 510 (2d Cir. 2007)*. It is, therefore, the duty of this Court to draw the favorable (and, indeed, highly plausible) inference that Wal-Mart terminated its lease *as a direct and proximate cause of those risks* that Defendant failed to disclose at the time [*19] the MLPA was executed. This inference satisfactorily gaps the bridge in logic that the Defendant cites as a fatal omission.

Defendant's second argument is that neither of its alleged breaches of warranty could possibly be the direct and proximate cause of the damage to the Mortgage Loan, because it was actually the intervening fact that the Borrower failed to make the necessary repairs and additions to the property's methane management infrastructure that led to lease termination. This argument makes the faulty assumption that a failure by an individual, (not party to the contract), to perform actions anticipated by the Defendant completely immunizes the Defendant from any claim brought against him for breach of warranties about conditions that could affect the third party's ability or willingness to perform.

The Second Circuit has explicated the limited usefulness of "but for" proximate cause analysis where multiple parties and events may have contributed to the damage done. *Zuchowicz v. U.S., 140 F.3d 381, 388 (2d Cir. 1998)* Given that proximate cause analysis for breach of contract generally mirrors that for tort liability, see *Exxon Co., v. Sofec, Inc. 517 U.S. 830, 839-40, 116 S. Ct. 1813, 135 L. Ed. 2d 113 (1996)*, [*20] the question that must be asked, then, is whether the damage done to the value of the Mortgage Loan was "the natural and probable consequence of the [breach], and that it ought to have been foreseen in the light of the attending circumstances." *Scheffer v. Washington City, V.M. & G.S.R.Co., 105 U.S. 249, 252, 26 L. Ed. 1070 (1881)*. The answer to this question, taking into account the in-

tervening acts and omissions of Garfield and Borrower, is appropriately left to the finder of fact.

2. Damages

Defendant argues that no damages are alleged because (a) certain risks were disclosed in the IVI Report and so cannot be a predicate for breach, and (b) to the extent that the HzW Report discloses other risks, the Report opines that these conditions would not imperil the price and so could not represent the cause of any damages.

I have already refused to dismiss on the ground that the IVI report disclosed the risk. As to Defendant's other argument, that is simply a defense, and not a basis for dismissal. The HzW Report states "It is common knowledge that the property is situated on two (2) former landfills which have been issued Final Findings and Orders. The Property was sold based on cash value of the leases. [*21] *No discount was applied for known environmental condition.*" (emphasis added) Defendant relies on this statement in its assertion that the HzW estimates no effect to the value of the property as a result of environmental conditions. That is not at all clear from a natural reading of the report. Furthermore, Defendant's interpretation of the HzW Report does not more than set up its defense. I have little doubt that Plaintiff will find an expert who opines otherwise.

E. Plaintiff's Performance

Under New York Law, a party suing for breach of contract is required to claim performance of its contractual obligations. *Martinez v. Vakko Holdings A.S., 2008 U.S. Dist. LEXIS 56274, 2008 WL 2876529*. Defendant contends that Plaintiff has failed to allege performance under both the PSA and the MLPA because it fails to allege facts tending to show that it gave notice of the breach of warranty to Defendant within three business days of its discovery of the breach. Defendant's argument is without merit.

This Court first notes that Plaintiff is only bringing action for breach of contract under the MLPA. Accordingly, Plaintiff is not required by New York Law to claim performance under any other contract in order to survive a motion [*22] to dismiss. Defendant retains the right to legal action if it believes Plaintiff has violated the terms of the PSA, but for the purposes of this suit it is only Plaintiff's performance under the MLPA that is of legal significance.

Under the terms of the MLPA, Plaintiff is required to:

> "Promptly (but in any case within three Business Days) upon becoming aware of any such Material Document Defect or Material Breach... request that the seller, not later than 90 days from the Seller's receipt of the notice of such Material Document Defect or Material Breach, cure such Material Document Defect or Material breach..."

(MLPA at 15). The failure to disclose back in 2007--before the purchase was made--that Defendant knew about 1) a default on the Underlying Lease, and 2) the existence of undisclosed environmental conditions, is obviously not curable. But that does not mean that it is not actionable. I take Defendant's argument to be that once Plaintiff learned of the alleged breach, which could be no later than the date Wal-Mart terminated the Underlying Lease, it had three days to demand that Defendant "cure" the breach by repurchasing the mortgage, and that in any case plaintiff has pleaded insufficient [*23] factual detail to survive a motion to dismiss.

Defendant's contention that Plaintiff has pleaded no more than the "threadbare recitals of the elements of a cause of action" disavowed by *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1940, 173 L. Ed. 2d 868 (2009)*, assumes the need for a greater degree of detail in pleading than Twombly or Iqbal requires for a simple breach of contract claim. *129 S. Ct. 1937, 1940, 173 L. Ed. 2d 868 (2009)*. Plaintiff has alleged compliance, not only with the contract generally, but with the notice provision specifically. Nothing more is required.

Defendant next asserts that Plaintiff knew of a material breach as early as August 21, 2008--when Borrower defaulted on its loan agreement--but failed to deliver a notice of material breach until March 18, 2009, months after the three business day deadline, thereby barring the claims sued on. This issue will no doubt re-emerge in a motion for summary judgment, where it may be ripe for adjudication. At the pleading stage, it is not, but it is not clear from the facts pleaded, that Plaintiff knew about any Material Breach more than three days prior to the giving of notice.

In order to trigger the three day notice period, Plaintiff would have to have known more than [*24] that the Borrower was in default or that there were undisclosed environmental conditions at the time the MLPA was executed. Plaintiff would have had to have also known that *Defendant knew these things* when it warranted the facts were otherwise. Plaintiff could not have known about any Material Breach prior to discovering that Defendant possessed that knowledge and failed to disclose it by the time the MLPA was executed. Nothing in Plaintiff's complaint suggests that Plaintiff became aware of Defendant's knowledge of the existence of the defects

more than three days before it sent notice to cure to Morgan Stanley. Accordingly, nothing in the complaint contradicts Plaintiff's assertion that it "fully performed and fulfilled its obligations under the MLPA and PSA, including without limitation compliance with the applicable notice provisions of the PSA." (Compl. ¶ 144). Dismissal is, therefore, unwarranted.

F. Standing

Finally, Defendant moves to dismiss because the party bringing the action--the Special Servicer--lacks standing to do so. Plaintiff has, pursuant to the terms of the PSA, elected to act through the auspices of a Special Servicer, C-III Asset Management LLC, in bringing this [*25] action. But, the PSA nominates Centerline Servicing, inc., and not C-III Asset Management LLC, to act in the capacity of Special Servicer. Plaintiff explains in its response to Defendant's memorandum that C-III is the new name for the Special Servicer formerly known as Centerline. The complaint must be amended to clarify this. See *O'Brien v. National Property Analysts Partners, 719 F.Supp. 222, 229 (S.D.N.Y, 1989)*.

Plaintiff has argued that Defendant, not being a party to the PSA, has no standing to invoke its terms. Regardless of Defendant's right to invoke the terms of the PSA, this Court may do so. "In deciding a motion to dismiss, this Court may consider the full text of documents that are quoted in or attached to the complaint, or documents that the plaintiff either possessed or knew about and relied upon in bringing the suit. *Rothman v. Gregor, 220 F.3d 81, 88-89 (2d Cir. 2000)*. This Court is entitled to inspect the terms of the PSA, included with and critical to Plaintiff's complaint, in deciding the pending motion, and will do so in order to ensure the proper parties are involved in the action. Plaintiff is accordingly required to amend its complaint to address this problem.

Defendant [*26] also contends that there exists a discrepancy regarding the Plaintiff's qualification as the trustee to the PSA. The PSA named 'The Bank of New York Trust' as the trustee, (PSA at 1), whereas Plaintiff has identified itself as 'The Bank of New York Melon Trust'. (Compl. ¶ 2). This apparent contradiction is clarified within the complaint by the "Second and Supplemental Notice of Material Breach", which identifies The Bank of New York Melon Trust as the trustee and successor by merger to the Bank of New York Trust. (Compl. Ex. D at 1). The amended complaint should specifically allege this as well.

Defendant further argues that Plaintiff has failed to allege that C-III has the requisite written authorization to retain counsel and bring litigation on behalf of the trustee, as required by the PSA. Plaintiff's complaint does indeed omit this detail; however, this Court is required to "draw all reasonable inferences in favor of the plaintiff." See *Cargo Partner AG v. Albatrans, Inc., 352 F.3d 41, 44 (2d Cir. 2003)*; see also *Roth v. Jennings, 489 F.3d 499, 510 (2d Cir. 2007)*. It is reasonably inferred from Plaintiff's complaint that the Special Servicer, through whom Plaintiff is acting, has [*27] the written consent required by the PSA to bring this suit. As Plaintiff is in any event required to amend its complaint in order to address the aforementioned inconsistency regarding C-III's name, Plaintiff is advised, for the sake of clarity, to address this detail as well.

Plaintiff should file this modestly amended pleading by June 30, 2011.

III. Conclusion

The clerk is directed to dismiss Plaintiff's complaint without prejudice pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, until such time as Plaintiff has filed an amended complaint addressing the problems set out herein.

Dated: June 27, 2011

/s/ Colleen McMahon

U.S.D.J.