SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOEL M. COHEN** **PART** 03M (Comm. Div.)

Justice

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SECURITIZED ASSET FUNDING 2011-2, LTD., **INDEX NO.** 653911/2015

Plaintiff,

- v -

CANADIAN IMPERIAL BANK OF COMMERCE, CANADIAN IMPERIAL BANK OF COMMERCE, SECURITIZED ASSET FUNDING 2011-2, LTD., SECURITIZED ASSET FUNDING 2009-1, LTD., PROMONTORIA EUROPE INVESTMENTS XXIII LDC, CSMC 2012-8R, LTD.

Defendants.

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DECISION AFTER NON-JURY TRIAL (LIABILITY)

This is a breach of contract action. In 2008, Canadian Imperial Bank of Commerce ("CIBC") was looking for ways to reduce what had become a substantial exposure to US residential mortgage-backed securities, credit default swaps, and similar assets. CIBC came up with a complex structured note transaction (the "A Note") that persuaded private equity firm Cerberus Capital Management, L.P. ("Cerberus") to make a $571 million limited recourse loan against CIBC's troubled portfolio. The clincher for Cerberus, in addition to the 20% interest rate, was an exotic concoction of "synthetic" cash flows (Synthetic Principal, Interest, and LIBOR) that would be due from CIBC in repayment of the Note independent of cash flows from the underlying residential mortgages. The contract provisions defining those synthetic cash flows—drafted by CIBC—incorporated the equally (if not more) complex provisions of CIBC's credit default swap agreements with various counterparties. Several years later, the parties agreed (at CIBC's suggestion) to a second transaction (the "B Certificate") in which Cerberus

paid $80 million to acquire CIBC's residual interest in the portfolio for the period, if any, after repayment of the A Note.

The dispute arose in late 2014. Cerberus contended that CIBC had been underpaying Synthetic LIBOR and Synthetic Interest under the A Note since 2010, when CIBC's Altius IV Credit Default Swaps defaulted and the counterparty (Goldman Sachs) chose to physically settle the swaps by delivering the underlying bonds to CIBC, thus freezing the notional amount of the swaps for the purpose of calculating synthetic payments under the A Note. Cerberus alleged that CIBC further breached the A Note (as well as the B Certificate) when it stopped making payments altogether with respect to the Altius IV Swaps after the swaps were terminated and the underlying bonds were liquidated. CIBC sharply disagreed with Cerberus's reading of the agreements and pointed out that Cerberus had accepted CIBC's purportedly inaccurate calculations of Synthetic LIBOR and Interest under the Altius IV Swaps for years without complaint. Cerberus sued for breach of contract in 2015.

The core legal issues regarding the proper calculation and payment of Synthetic LIBOR and Synthetic Interest were resolved in Cerberus's favor prior to trial. On Cerberus's motion for partial summary judgment, the First Department held that CIBC's interpretation of key provisions driving the calculation of synthetic payments under the Altius IV Swaps was "unmoored from the contractual language" (*Securitized Asset Funding, Ltd. v Can. Imperial Bank of Commerce*, 167 AD3d 468, 469 [1st Dept 2018]). The court found, however, that CIBC's affirmative defenses (including equitable estoppel and fraudulently induced unilateral mistake) and counterclaims (including rescission) raised questions of fact (*id*. at 469–70) that precluded granting summary judgment in Cerberus's favor.

After a 13-day trial, the Court finds that CIBC is bound by the unambiguous terms of the A Note and B Certificate. Cerberus established that CIBC breached both agreements by miscalculating Synthetic Interest and Synthetic LIBOR after physical settlement of the Altius IV Swaps and by terminating payments altogether upon liquidation of those swaps and their underlying bonds. CIBC did not prove its defenses of equitable estoppel or fraudulently induced unilateral mistake. Nor is CIBC entitled to the remedy of rescinding the B Certificate. CIBC also failed to establish that Cerberus breached the implied covenant of good faith and fair dealing.

To be sure, Cerberus acted aggressively in its economic self-interest and made maximum use of its understanding of these exceedingly complex financial instruments. From the outset of the transaction, it perceived CIBC as seeking to re-trade the deal to undermine the value of the synthetic payment streams and shift more risk to Cerberus. And at times, it responded to what it perceived as misdirection from CIBC not with candor but with more of the same. It observed CIBC's failure to "freeze" notional amounts after physical settlement of the Altius IV Swaps but decided not to point out the discrepancy (which was minimal at first) as part of an overarching strategy of minimizing communications with the bank. Cerberus viewed the A Note as a good investment and wanted to minimize the likelihood that CIBC would focus on and exercise its contractual right to call the Note. And later, when CIBC proposed the B Certificate transaction, Cerberus carefully edited the language to track the terms of the A Note rather than accepting language that might have eliminated synthetic cash flows or re-set notional amounts of the swaps in CIBC's favor. Again, Cerberus did not flag to CIBC that it believed the notional amount of the Altius IV Swaps should have been frozen since physical settlement in 2010.

The evidence did not, however, show that CIBC was a hapless rube led astray. Far from it. CIBC had access to the same documents and information as Cerberus, and simply took a different view of what its obligations were under those agreements, which view it continued to advance—albeit unsuccessfully—during this litigation. If anything, CIBC had a *greater* familiarity than Cerberus with the complex credit default swap agreements upon which the A Note and B Certificate were in part premised. CIBC's in-house deal counsel, who drafted the relevant terms of the A Note, well understood swap mechanics and the Altius IV Swaps in particular, including the implications of physical settlement. CIBC simply took a different (and ultimately incorrect) view of the contractual language. To the extent some CIBC employees later testified that they misunderstood the parties' agreements (and the evidence on that is equivocal), that misunderstanding was not induced or caused by Cerberus. The mistakes, if any, were CIBC's alone. Moreover, CIBC's varying and shifting positions over time as to understanding of the disputed contractual provisions undermine its defenses and its counterclaim for rescission. Accordingly, the Court finds in Cerberus's favor on its claims for breach of contract.[1]

The Court requests oral argument with respect to the question of Cerberus's damages before making a final determination on that issue and entering a judgment. Although damages issues were addressed at trial and in post-trial briefing, the parties' submissions on these complex issues were in many ways ships passing in the night. Among other things, the Court would like counsel to explain the incremental impact on the damages calculation of the Court's acceptance

[1] This result should not be mistaken for affirmative approval of Cerberus's approach to its communications with CIBC. In different circumstances, with a less sophisticated or less well-informed counterparty, the result might well be different.

or rejection of the parties' specific contentions. No additional briefing is requested, but demonstrative slides (which should be submitted in advance) may be used at argument.

PROCEDURAL HISTORY

Cerberus filed suit in this Court on November 25, 2015 (NYSCEF 1). Counts I and II of the Complaint assert claims for breach of the A Note. Specifically, in Count I Cerberus alleges that CIBC failed to pay the full Amount Due in its monthly payment of July 25, 2015 because it improperly reduced the Relevant Notional Amount on the Altius IV Swaps to $0 in July 2015, and thus failed to pay the full amount of Synthetic LIBOR due under the A Note for that month. The claim further alleges that CIBC failed to pay the outstanding principal balance on the A Note ($8,410,952.36), plus interest, on the accelerated Final Maturity Date (August 7, 2015). Count II alleges that CIBC failed to pay the full amount of Synthetic LIBOR and Synthetic Interest under the A Note in each monthly payment after the physical settlement of the Altius IV Swaps in 2010. Count III asserts a claim for breach of the B Certificate. It alleges that events of default under the A Note constitute events of default under the B Certificate. In addition, it alleges that CIBC failed to pay the full amount of Synthetic LIBOR and Synthetic Interest in the monthly payment due on August 25, 2015, which triggered acceleration of the B Certificate, and then failed to pay the Early Termination Amount on the Early Termination Date (September 8, 2015).

CIBC filed its answer and counterclaims on January 15, 2016 (NYSCEF 21). It broadly denied Cerberus's allegations and asserted that its payments to Cerberus "reflected the intent of the Parties as set forth in the A1 Note and as reflected by the economic substance of the transaction, as Cerberus itself repeatedly confirmed by accepting these payments for more than four years before raising this issue" (*id.* ¶ 8). CIBC also asserted counterclaims for rescission, mutual mistake, unilateral mistake, unjust enrichment, and declaratory judgment, as well as

various affirmative defenses including estoppel.

As noted above, CIBC moved for partial summary judgment. On April 3, 2018, the Court (Scarpulla, J.) dismissed CIBC's unjust enrichment counterclaim but otherwise denied Cerberus's motion (NYSCEF 397). Along the way, however, the Court rejected several of CIBC's pivotal contractual arguments justifying the amounts it paid to Cerberus under the A Note. First, it held that the A Note definition of "Synthetic Assets" refers to the Altius IV Swaps (as Cerberus contended), rather than the underlying Altius IV Bonds (as CIBC had contended) (*id*. at 8–10). Second, it held that neither liquidation of the Altius IV Bonds nor liquidation of the Altius IV Swaps relieved CIBC of its obligations to pay Synthetic Interest or Synthetic LIBOR (*id*. at 5–12, 16–19). The Court found, however, that the terms "Relevant Notional Amount" and "Scheduled Payments,' which were key to computing Synthetic LIBOR and Synthetic Interest, were ambiguous, and thus it was unclear whether CIBC's practice of continuing to reduce the notional amount of the Altius IV Swaps after physical settlement was permissible under the agreements (*id*. at 14). Finally, the Court declined to dismiss CIBC's counterclaims for mutual mistake, unilateral mistake, and declaratory judgment (*id*. at 16–20).

The First Department affirmed the Court's decision, albeit with an important revision. The court agreed "that the relevant Synthetic Assets under the A Note and B Certificate are the Altius IV *swaps*, not the Altius IV *notes*" (*Securitized Asset Funding*, 167 AD3d at 469). It also agreed that "the termination of the Altius IV notes does not affect Cerberus's right to payment under the A Note and B Certificate" and that "Cerberus was entitled to Synthetic LIBOR even after the Altius IV swaps were terminated" (*id*.). However, the court disagreed that the terms "Relevant Notional Amount" and "Scheduled Payments" are ambiguous. It held, instead, that "Cerberus's interpretation of the terms, which is based on the plain language of the contract, is

reasonable," whereas "CIBC's interpretation—that Scheduled Payments include payments of Synthetic Principal and proceeds from the liquidation of the Altius IV notes—is unmoored from the contractual language" (*id.*). Despite the latter ruling, which essentially cleared the path for judgment in Cerberus's favor based on the unambiguous language of the agreements, the court "[n]evertheless" affirmed denial of Cerberus's motion for partial summary judgment because CIBC's defenses and counterclaims raise triable issues of fact, including as to estoppel, fraudulently induced unilateral mistake, and rescission (*id*. at 469–70).

After completion of discovery and filing of Note of Issue, the Court conducted a non-jury trial via Microsoft Teams from March 7 through 23, 2022 (NYSCEF 1172–1184) (trial transcripts with stipulated errata).

FINDINGS OF FACT

The Court makes the following findings of fact based on its review of the evidence admitted at trial, including the parties' joint statement of stipulated facts and procedural history (NYSCEF 1115 [Statement of Joint Stipulated Facts and Procedural History ("JSOF")]), and its evaluation of the credibility of the witnesses who testified during the proceedings.

I. The Parties

1. Defendant/Counterclaim-Plaintiff Canadian Imperial Bank of Commerce ("CIBC") is a Canadian bank constituted under the Bank Act, S.C. 1991, c. 46 (Can.), with a principal place of business in Toronto, Ontario (JSOF ¶ 1).

2. Plaintiff/Counterclaim-Defendant Securitized Asset Funding 2011-2, Ltd. is a special purpose investment vehicle affiliated with Cerberus Capital Management, L.P. ("Cerberus"), incorporated in the Cayman Islands with a principal place of business in New York (JSOF ¶ 2).

3. Additional Counterclaim-Defendant Securitized Asset Funding 2009-1, Ltd., is a special purpose acquisition company managed by Cerberus, incorporated in the Cayman Islands (JSOF ¶ 3).

4. Additional Counterclaim-Defendant Promontoria Europe Investments XXIII LDC is a special purpose acquisition company managed by Cerberus Capital Management, L.P., incorporated in the Cayman Islands (JSOF ¶ 4).

5. Additional Counterclaim-Defendant CSMC 2012-8R, Ltd., is a company affiliated with Cerberus, incorporated in the Cayman Islands (JSOF ¶ 5).

II. Factual Background

A. CIBC's Exposure to U.S. Residential Mortgage Assets

6. By 2008, CIBC's structured credit group had accumulated substantial U.S. residential mortgage exposure through cash assets (RMBS and CDOs) and synthetic assets (CDS and VFNs) (Transcript of trial proceedings ("Tr.") at 453:18-25; DX5000 ¶¶10, 22, 33). One source of exposure was intermediation trades in which CIBC simultaneously sold CDS protection on the performance of an underlying CDO and bought CDS protection on the same transaction from a monoline insurer (Tr. 714:12-20; DX5000 ¶¶14-15). These trades gave CIBC an understanding of monoline swaps, which (upon default and physical settlement) could remain outstanding for decades because they insured interest when due but principal only at maturity (Tr. 422:1-424:2, 713:6-714:20).

B. CIBC Entered the Altius IV Swaps

7. In June 2007, CIBC entered into three CDS with Goldman Sachs International ("Goldman") (the "Altius IV Swaps") with a trade date of April 27, 2007 (JSOF ¶ 22). Through the Altius IV Swaps, CIBC sold credit protection to Goldman referencing three

tranches—or pools of similar obligations differentiated by seniority, voting rights and rate of return—of notes issued by a CDO called Altius IV Funding, Ltd. (the "Altius IV Bonds") in exchange for monthly fixed premium payments from Goldman (JSOF ¶ 23). CIBC bought protection from monoline insurer XL on the same bonds (Tr. 424:10-20). CIBC's in-house counsel, Trusha Patel, a derivatives expert, was CIBC's "lead" on the trade, (Tr. 420:16-421:3, 424:3-9), and focused on the settlement mechanisms (Tr. 422:5-25; PX-0112.0009). She later contributed significantly to the drafting of the CIBC/Cerberus "A Note" that is at issue in this action.

8. As the seller of credit protection through the Altius IV Swaps, CIBC was exposed to potential losses on the three tranches of the Altius IV Bonds (JSOF ¶ 24).

9. The Altius IV A-1F CDO tranche was the senior tranche and received priority in principal payments in the order of payments among the different tranches to the Altius IV Bonds (JSOF ¶ 25).

10. The Altius IV Swaps had an aggregate notional amount of approximately $860 million when CIBC and Goldman entered into the Altius IV Swaps (JSOF ¶ 26).

11. By 2008, CIBC put its Structured Credit business in "run-off," meaning it was exiting that line of business and would not take on further exposure (DX0217; DX5000 ¶18; (Tr. 715:9-14). CIBC hired John Paterson to lead the runoff (Tr. 580:19-25, 656:14-657:4).

C. Negotiation of the A Note

12. CIBC contacted Cerberus in March 2008 (Tr. 299:25-300:6). Paterson explained CIBC wanted a "headline transaction announcement" of at least $1 billion, (Tr. 301:15-24), wanted "to cap [Cerberus's] return [and] maintain upside for [CIBC]," (Tr. 307:8-18) and wanted Cerberus's repayments to be based on cashflows coming off CIBC's cash bonds and the

bonds referenced by CIBC's synthetic assets, (Tr. 303:2-7). At the time, Cerberus could—and did—purchase RMBS and CDO bonds in the market, with full upside from any recovery, for a fraction of book value (PX-2001 ¶¶9-10; Tr. 296:7-297:1). Accordingly, CIBC's proposed transaction, as then structured, was not particularly attractive to Cerberus.

13. CIBC sent Cerberus cashflow projections for its CDOs, VFNs, and CDS (PX -0270; PX-2002 ¶12; PX-2004 ¶¶8-12). Cerberus recognized the Altius III and IV assets in the proposed portfolio were monoline-structured swaps (Tr. 64:9-72:23). For these transactions, CIBC's Catherine Tam told Cerberus CIBC was "modeling the terms in [CIBC's] CDS contract, paying any interest shortfall (as you go) and principal shortfall at maturity." (PX-0284 (for Altius IV); *accord* PX-0281 (for Altius III, CIBC is "not required to make any principal loss payments until the reference obligation fails to pay principal payment at maturity")).

14. In June 2008, with CIBC insisting on terms Cerberus considered unrealistic, Cerberus's Lee Millstein emailed Paterson ending discussions (PX-0099).

15. By July 2008, CIBC acknowledged that a glut of US residential mortgage assets was "hitting the street," (PX-0100), placing these assets under "price pressure," (Tr. 609:3-11, 610:19-611:3). CIBC could not close a deal with anyone on its initially proposed terms (Tr. 611:4-10).

16. In August 2008, Paterson returned to Cerberus with "a very different proposal." (Tr. 308:6-309:1). A draft term sheet included two payment streams payable off CIBC's balance sheet based on the notional amount of synthetic assets in the deal: Synthetic LIBOR and Synthetic Interest (PX-0344; Tr. 99:25-100:8). Synthetic LIBOR was "LIBOR … times the notional amount of the swap[s];" Synthetic Interest was "the premiums from the swaps," calculated "based on the notional amount of the swap[s]." (Tr. 97:10-99:15; PX-0344.0005).

17. These payment streams were a "fundamental part of the transaction" for Cerberus Because they were owed "direct from [CIBC's] balance sheet" and provided downside protection (Tr. 308:6-309:1, 309:18-310:5, 1204:24-1205:15). In other words, even if the bonds did not pay principal, Synthetic LIBOR and Interest were still payable by CIBC based on swap notionals, which could remain outstanding for decades (Tr. 1204:24-1205:15; PX-2001 ¶26). At the then LIBOR rate, these payments could contribute $100 million annually to repayment of the loan (Tr. 310:17-311:16).

18. The Term Sheet was heavily negotiated. It referenced the possibility of physical settlement of swaps (PX-0376.0020 ("For the avoidance of doubt, CIBC will be under no obligation to transfer instruments delivered to it by Original Counterparties with respect to CIBC Swaps that are physically settled."); *accord* PX-0044.0011).

19. CIBC proposed that "following an event of default, the Investor's recourse shall be solely to the collateral and not to any other amounts or resources of CIBC." (PX-0181.0010). This "set off alarm bells" for Cerberus, (Tr. 121:15-122:3), because it allowed CIBC to effectively eliminate Synthetic LIBOR and Interest by defaulting and leaving Cerberus undercollateralized (Tr. 278:24-279:24). Cerberus rejected both this proposal, (PX-2002 ¶35), as well as CIBC's subsequent proposal limiting Cerberus's recourse to "the market value of the Synthetic Assets" (PX-0182.0018). Cerberus understood "the swaps themselves versus … the payments that CIBC was obligated to make … on those swaps" were "two different things." (Tr. 127:9-19). Cerberus insisted on recourse to "the market value of cibc's obligations to make payments that reference the synthetic assets." (PX-0391; Tr. 129:10-19).

20. The final Term Sheet contained Cerberus's language, (PX-0044.0012), and based Synthetic LIBOR and Interest on the notional amounts of the deal's Synthetic Assets (PX-

0044.0015-16). As negotiators on both sides testified, and the plain language and negotiating history show, Synthetic LIBOR and Interest were intended to be CIBC obligations based on Synthetic Asset notional amounts (*i.e.*, the notional amounts of the swaps) (PX-2002 ¶¶18-21, 34-46, 62, 66; Tr. 100:25-101:5, 107:13-17, 285:14-24, 308:6-309:1, 485:3-8, 500:5-9, 916:7-9, 939:8-18, 1549:21-1550:10). Thus, they could materially exceed bond cashflows and provided Cerberus downside protection, and Synthetic LIBOR and Interest might be payable for decades (PX-0654; Tr. 1008:22-1009:13).

21. Following the Term Sheet's execution, during a "[d]ocumentation kick-off" call, CIBC proposed an "asset schedule" specifying the payments due on each Synthetic Asset (PX-0398; PX-2002 ¶41). Patel drafted the Synthetic Asset Payment Schedule, (PX-0006), which was a "roadmap for calculating CIBC's payment obligations to Cerberus" (Tr. 766:12-15). She sent her draft to CIBC and Cerberus personnel, stating "[t]his schedule seeks to clearly outline which cashflows are due from CIBC and how the Reference Portf[o]lio Notional Amount will adjust for the purposes of the Synthetic Libor Amount calculation." (PX-0006.0001).

22. CIBC's draft referenced the confirmation for each swap in the Synthetic Portfolio, (PX-0006.0004-06), consistent with the "agreement amongst all parties to use the terminology that [CIBC] had from the derivative instruments in order to put the schedule together" (Tr. 473:25-474:5). It had a column titled "Individual RONA," which for each Synthetic Asset defined the notional amount on which Synthetic LIBOR was calculated (PX-0006.0004-06). Altius IV "RONA" was defined as the "Relevant Notional Amount (As defined in the Reference Document) reduced in accordance with the terms of the Reference Documents which includes any Scheduled Payments" (*id.*). The Reference Document is the "Swap with Goldman Sachs … or if swap goes away then deemed to be outstanding" (*id.*). Incorporating the Swap document by

reference, without qualification, was a key decision with important consequences for the current dispute.

23. Patel testified that "CIBC's definition of RONA for Altius IV as equal to the Relevant Notional Amount as defined in [the] Altius IV Goldman Swap was reviewed and agreed to by everybody" (Tr. 485:9-20). The parties commented on the Synthetic Asset Payment Schedule. Patel rejected Cerberus's change to the Ischus Synthetic Interest definition because it required the parties to amend the notional amount manually, (PX-0425.0006; PX-0105), and Patel preferred "to follow the swap document" (Tr. 155:22-25, 484:1-22).

24. The Synthetic Asset Payment Schedule confirms that the parties intended Synthetic LIBOR and Interest to be based on the Altius IV Swap notionals, reduced in accordance with the terms of the Swaps, including their settlement mechanisms. The document did not say "reduced in accordance with the terms of the swaps except as to settlement mechanisms," (Tr. 479:5-8), nor did it reference the Altius IV Bonds' principal balances, (Tr. 772:5-9), which (unlike synthetic values) are "actual," not "notional".

25. On September 15, 2008, Lehman Brothers filed for bankruptcy, shaking financial markets (Tr. 625:25; 626:4). Nevertheless, Cerberus moved forward with the transaction (Tr. 327:16-328:25), executing a second commitment letter on October 2, 2008 (PX-0447). The next day, CIBC issued a press release announcing that Cerberus "has agreed to invest US$1.050 billion in cash in CIBC's U.S. residential real estate portfolio." (PX-0004A).

26. In fact, however, CIBC received only $571 million from Cerberus upon closing (PX-0008). In an analyst call, CIBC's CEO McCaughey—under whose leadership CIBC acquired all Synthetic Assets in the deal, (Tr. 1998:7-9; PX-0005.0041-45)—stated that Cerberus "*has invested* US $1 billion," and CIBC's CFO claimed "$1.05 billion of *cash*

received from Cerberus," while Lalonde reiterated, "obviously we're getting $1.050 billion of cash here" (PX-0139.0003, 0005, 0011 (emphases added)). These statements did not accurately describe the transaction.

D. The A Note

27. On September 8, 2008, the Parties executed a commitment letter and term sheet that was dated September 7, 2008 (JSOF ¶ 29). On October 2, 2008, CIBC and Cerberus entered into a second commitment letter (JSOF ¶ 30). On October 15, 2008, CIBC and Cerberus entered into a closing letter agreement (JSOF ¶ 31).

28. The A Note closed on October 16, 2008 (JSOF ¶32). The A Note "reference portfolio" consisted of certain Cash and Synthetic Assets (JSOF ¶ 28). The Synthetic Assets are identified on the "Synthetic Portfolio" portion of Exhibit I to the A Note (JSOF ¶ 33) and had an aggregate notional amount of $3,293,668,269.99 at the time the A Note was executed (JSOF ¶ 34). The Cash Assets are identified on the "Cash Portfolio" portion of Exhibit I to the A Note (JSOF ¶ 35), which had an aggregate principal balance of $2,266,585,213.99 at the time the A Note was executed (JSOF ¶ 36).

29. The A Note bore a twenty percent interest rate, (PX-0005.0005), and obligated CIBC to pay Cerberus four payment streams: cashflows on Cash Assets, Synthetic Principal, Synthetic LIBOR, and Synthetic Interest (PX-0005.0017-0018). Consistent with negotiations, Synthetic LIBOR and Interest were CIBC obligations calculated on Synthetic Asset notional amounts.

30. Synthetic LIBOR was one-month LIBOR multiplied by the "Average Reference Portfolio Notional Amount," (PX-0005.0016), which was the average "sum of the Synthetic Asset Notional Amounts for all Synthetic Assets" during each payment period (PX-0005.0015).

Synthetic Asset Notional Amounts were "calculated in accordance with the column entitled 'Individual RONA' in the Synthetic Asset Payment Schedule." (PX-0005.0014-15). Individual RONA for the Altius IV Synthetic Assets was the "Relevant Notional Amount [as defined in the Altius IV Swap Documents] reduced in accordance with the terms of the Altius IV Swap Documents which includes any Scheduled Payments." (PX-0005.0043).

31. Synthetic Interest was "calculated in accordance with the column entitled 'Interest Proceeds' in the Synthetic Asset Payment Schedule," (PX-0005.0015), which defined Altius IV "Interest Proceeds" as "Fixed Payments [as defined in the Swaps] due and payable plus any Collections" (PX-0005.0043). Under the Altius IV Swaps, Fixed Payments were the Fixed Rate (10.5bps) multiplied by the Fixed Rate Payer Calculation Amount, (PX-0001.0012-13), which was the "average of the Relevant Notional Amount for each day during the" relevant period (PX-0001.0012).

32. The four payment streams were applied first to accrued interest on the A Note, then to pay down the A Note's principal balance (PX-0005.0019-20). If the payment streams did not cover accrued interest, the principal balance negatively amortized, increasing the principal amount due by the interest shortfall (PX-0005.0020).

33. CIBC held an option to prepay (or "call") the A Note starting in July 2011 (PX 0005.0011-12). To call, CIBC had to pay the A Note's outstanding principal balance plus (until 2014) a premium payment based on a percentage of the then outstanding principal balance (PX-0005.0011-12). The A Note contained merger and no-waiver clauses, which provided that the contract superseded any previous agreement or understanding and could be amended only in writing. (PX-0005.0024, 0033).

E. **Performance of the A Note**

34. After closing, LIBOR fell from about 3 percent to less than half a percent, increasing the A Note's expected life (Tr. 968:13-15, 1206:5-14).

35. In March 2009, CIBC's Albert Cohen emailed Cerberus proposing to "tear up the bought protection CDS on Altius4" and two tranches of Altius III and have Cerberus "take the cash bonds" in their place (PX-0010). Then, the A Note would "receive the asset spread on the cash bonds, rather than the CDS premium," which Cohen emphasized was "a gain of 12.25bps on Altius4 and 10.75bps on Altius3" (*id.*). Importantly, Cohen noted, "the RONA will be reduced to zero" (*id.*).

36. Cerberus recognized that had it assented to CIBC's proposal, it would no longer have received Altius III and IV Synthetic LIBOR and Interest (Tr. 183:14-18). Instead, it would have received only interest from the bonds (Tr. 1300:7-22). The bond interest rate was slightly higher than Synthetic LIBOR and Interest, as Cohen noted, but it was also, unlike Synthetic LIBOR and Interest, subject to risk of bond non-performance, which Cohen did not mention (*id.*; Tr. 1208:20-1209:23). Michael Edman testified he "thought [CIBC] fully understood the differences between how the swaps would [behave] and what their liabilities would be under the swaps, … and [CIBC] wanted to get the swaps out of there." (Tr. 184:14-20). Millstein was "highly confident [CIBC] knew how [the Contracts] worked" given CIBC's sophistication and familiarity with the documents (Tr. 1565:14-18). Ross Feldman testified Cerberus considered the proposal "disingenuous" and thought Cohen "was trying to trick us" by selling "this as a positive for us." (Tr. 1210:22-1211:7). Frank Bruno testified that he believed CIBC was effectively trying to eliminate the downside protection that had induced Cerberus to do the deal (PX-2001 ¶32; Tr. 322:16-323:1). Cerberus rejected the proposal,

albeit without referencing its suspicions as to CIBC's intentions (Tr. 185:2-3). However, this episode planted the seed (in Cerberus employees' minds, at least) that CIBC—which Cerberus perceived to be a sophisticated party that understood the details of its own agreements, including the Altius IV Swaps—was looking for ways to re-trade to its own advantage a deal to which the parties had agreed.

37. In June 2009, CIBC proposed another substitution with Arca, a Synthetic Asset. Cohen emailed Feldman: "If we decide to tear up the synthetic CDO positions, would you want those to go through the deal waterfall or keep the trades on? As of now, I don't believe any cash flow will be coming off of those assets." (PX-0012.0001). Cerberus again declined, opting to "keep … earn[ing] the synthetic LIBOR amount [on the Arca swaps] until they are written down." (*id.*). Feldman testified he thought Cohen was again "trying to get out of … potential long term cash flows." (Tr. 1216:7-19). Cohen, for his part, testified that his proposals were motivated by CIBC's desire to disintermediate itself on its trades and eliminate certain collateral requirements (Tr. 1098:4-21).

38. Meanwhile, pursuant to the A Note, CIBC sent Cerberus a monthly spreadsheet showing its payment calculations for Cerberus's review and approval (PX-0005.0013-16; DX5001 ¶13). The spreadsheet contained a row entitled "Individual Asset RONA Reduction" that reflected the RONA reductions for each Synthetic Asset each month (*see, e.g.*, DX0139-A at 2, Row 9). CIBC's payments for Altius IV were based on a reducing RONA that tracked the outstanding principal balance of the underlying Altius IV Bonds (DX0200; DX198A at 2; Tr. 1036:8-17, 1043:15-23, 1052:12-15, 1060:16-20). Cerberus reviewed each monthly spreadsheet and made it clear from the outset that it wanted the transaction administered "by the book." (DX0363; Tr. 1249:23-1250:1). If Cerberus objected to CIBC's calculations or determinations,

the parties were required to work together to "mutually agree upon" the correct information (PX-0005.0014).

F. Physical Settlement of the Altius IV Swaps

39. On April 6, 2010, certain tranches of the Altius IV Bonds experienced an interest shortfall, which constituted a Credit Event under the Altius IV Swaps (JSOF ¶ 37). This enabled CIBC and Goldman to settle the swaps, whereby Goldman received the credit protection it purchased from CIBC (DX5000 ¶13).

40. The Altius IV Swaps provided three potential settlement methods: Physical Settlement, Cash Settlement and Modified Cash Settlement (PX0001.0014-15). Under a Physical Settlement, Goldman would physically deliver the underlying reference obligation (*e.g.*, the Altius IV Bonds) to CIBC (PX0001.0015). The Relevant Notional Amount (*i.e.*, balance) of the Altius IV Swaps would freeze (PX0001.0012) and CIBC would owe Goldman monthly interest based on that Relevant Notional Amount (PX0001.0015) but would not owe any principal until the bonds' maturity in November 2042 (PX0001.0018).

41. Under a Cash Settlement, CIBC would immediately owe Goldman a onetime lump-sum payment that represented the total value of the credit protection through maturity of the bond (PX0001.0020). The Relevant Notional Amount of the Altius IV Swaps would immediately go to zero, terminating the swaps (PX0001.0012).

42. Finally, under a Modified Cash Settlement, CIBC would owe Goldman any monthly principal and interest shortfalls (PX0001.0016-17). The Relevant Notional Amount of the Altius IV Swaps would continue to reduce by the sum of any principal payments on the bonds plus any principal shortfall payments by CIBC (PX0001.0012).

43. During this time, George Stefanovic asked Halenda whether they should

"contact[] Cerberus in order to discuss termination of the CDS with GS and taking delivery of the bonds." (PX-0107.0002). Halenda agreed (*id.*). Cohen emailed Feldman, stating: "With respect to the recent EOD on Altius 4, there's a possibility that we may take back the physical bonds … from Goldman and tear up the CDS. That way, we could put the physical bonds in your note, thereby earning the full coupon rather than just the libor amount." (PX-0018). Cerberus again thought Cohen was "trying to trick us and get out of [CIBC's] long term LIBOR and interest obligations related to the synthetic Altius IV assets." (Tr. 1221:5-11). Cerberus thought CIBC "clearly understood the implication of [having] the cash bond" in the deal "rather than the swap," which "would be very beneficial" to CIBC (Tr. 187:10-18).

44. Feldman responded, somewhat cagily, "[t]here's not an appetite around here to deal with the brain damage from changing the docs anymore," and Cerberus would need "to get [its] financer on board which would be difficult." (PX-0018). Cohen forwarded Cerberus's response to his colleagues and commented, without further explication, "As I figured …." (PX-0018).

45. In June 2010, Goldman elected a physical settlement under the Altius IV Swaps of the A-1B and A-1F tranches of Altius IV Bonds respectively, pursuant to which, among other things, Goldman delivered those tranches of the Altius IV Bonds to CIBC (JSOF ¶ 38).

46. On June 7, 2010, CIBC emailed Feldman Notices of Physical Settlement for the Altius IV Swaps (JSOF ¶ 39) stating, "[j]ust an FYI on the Altius IV bonds. B/c of the recent credit event, we have been delivered the physical bonds on 2 tranches in Altius IV. This should not affect anything related to our transaction but just wanted to pass on the notices." (PX-0019.0001). Feldman did not respond (Tr. 1229:16-19).

47. For its part, Cerberus understood that, under the terms of the A Note, Physical Settlement froze Altius IV RONA at $829 million until November 2042 (or the A Note was repaid or called) (Tr. 356:16-25).

48. Cerberus' deal team discussed whether to raise this issue with CIBC (Tr. 1591:15-1592:7). They collectively decided not to do so, which they described as "an easy decision" to make (Tr. 1704:19-1705:4, 1229:16-19, 1592:14-22). Cerberus did not "want any attention drawn to the [A Note] transaction" that would "increase[] the likelihood it could get called." (Tr. 330:12-331:8; *accord* Tr. 1565:5 18). Bruno testified that focusing CIBC's attention on the deal could create "a lot of noise around [the] transaction" and lead to others in the bank who were more confident in a housing recovery wanting to call it (Tr. 340:23 341:13).

49. Based on the documentary record and testimony, the Court finds that Cerberus genuinely believed that CIBC was aware that the Relevant Notional Amount of the Altius IV Swaps froze upon Physical Settlement.[2]

G. Performance of the A Note Post-Physical Settlement

50. In July 2010—the first month post-Physical Settlement—Cerberus reviewed the monthly spreadsheet from CIBC, and realized CIBC continued to pay Altius IV Synthetic LIBOR—but not Synthetic Interest —based on reducing notionals (Tr. 336:22-25). From July to August 2010, December 2010 to May 2011, and August 2011 to May 2012, CIBC paid

[2] Internal CIBC documents indicate that understanding was correct. In July 2010, CIBC's Patel had explained to Goldman Sachs: "Under 'Relevant Notional Amount,' the second paragraph is explicit in stating that the Notional Amount would not be reduced by Principal Payments after the Delivery Date but would instead be reduced by any Scheduled Payment comprising principal payable by Seller." (PX-0110.0002). Milton Bonellos and Halenda also knew this (Tr. 779:6-22, 822:9-17, 1764:20-1765:2). Moreover, at this time, CIBC made payments to, and received premiums from, Goldman under the Altius IV Swaps based on frozen notionals (Tr. 1765:3-11).

Synthetic Interest based on a frozen Altius IV Relevant Notional Amount (PX-2005 ¶58).

51. The deal team discussed whether to inform CIBC of Cerberus's view that CIBC was improperly reducing Altius IV RONA in breach of the A Note (Tr. 1595:6-1596:21, 362:24-363:3), but decided not to "rock the boat" by raising the issue (Tr. 1622:2-7). Millstein and Bruno instructed the deal team not to raise the alleged breaches regarding the Altius IV RONA reductions (Tr. 364:12-17).

52. Cerberus discovered an unrelated error in the July 2010 monthly spreadsheet: missing amortization on another Synthetic Asset called Ischus (DX0140; Tr. 1276:10-20). Cerberus witnesses testified that they believed raising this error would not increase the likelihood of CIBC calling the A Note (Tr. 1277:5-8), and Cerberus pointed out this error, which CIBC agreed to correct (DX0140).

53. Thereafter, for each month CIBC sent Cerberus for review the monthly spreadsheet of its payment calculations, which showed a reducing Altius IV RONA for calculation Synthetic LIBOR (DX0200). Cerberus did not object to or otherwise correct CIBC's calculations at this time. Bruno explained Cerberus's conduct as a "broad policy [of] minimizing communication." (Tr. 364:8-17). Cerberus witnesses testified that they believed they had no duty to raise CIBC's underpayments (Tr. 1257:15-20), which amounted to only about $7,000 prior to the B Certificate transaction in 2011 (Tr. 347:1-348:3).

F. Negotiation of the B Certificate

54. In 2010, the A Note began negatively amortizing (Tr. 399:21-401:19; PX-2005 ¶13). CIBC projected a longer payoff date for the A Note and a correspondingly smaller residual value (Tr. 782:20-783:6, 1456:24-1457:5, 1465:1-12; PX-0936). By January 2011, CIBC projected the A Note would not be repaid (Tr. 784:21-785:9). By April 2011, CIBC had

written down the value of the residuals (that is, what would later become the B Certificate interest) to zero (Tr. 785:13-16; DX0651; *see also* PX-0614; PX-0637).

55. On March 14, 2011, CIBC informed Cerberus that CIBC had been "approached by somebody who is interested in purchasing the equity in the pool of assets that are subject to [the A Note]" and asked whether this would cause Cerberus "any issues or concerns." (PX-0102). At trial, CIBC witnesses testified that no other party had actually bid on the residuals (Tr. 642:19-643:7; PX-3002.0002).

56. Cerberus was concerned that this meant CIBC would call the A Note (which CIBC could do for the first time in July 2011). Millstein testified "if I'm a third-party buyer, I don't want to have a B Note I'm holding with 20-percent interest accruing in front of me." (Tr. 1571:4-18; *see also* Tr. 383:13-17). Cerberus offered to purchase the residual (Tr. 381:11-14, 1600:12-14). It conditioned its bid on CIBC ending discussions with any other parties (Tr. 679:16-680:6).

57. CIBC wanted to "dis-intermediate itself" and sell the rights to the residual cash flows generated by the reference portfolio (DX0040 at 2; Tr. 1603:14-18, 680:7-24).

58. After an initial proposal on March 29, 2011, Paterson sent Cerberus a revised invitation to bid on May 6, 2011 (PX-0052). Paterson proposed two options: a sub-note giving Cerberus "the rights to all residual cash flows ***relating to the Assets***," or that the parties "work to achieve … a mutually agreeable in-kind transaction." (*id.* [emphasis added]).

59. Millstein responded: "John, We have edited this and will send to this group under separate cover." (*id.*). In that separate message, Millstein wrote that "Cerberus hereby confirms its firm bid of USD 80,000,000, to purchase a newly issued note (the 'SubNote')," which "will have the same terms and provisions as the Senior Note [the A Note] but give Cerberus as the

holder of the Sub-Note ***the rights to all of the same cash flows as the Senior Note relating to the identical assets underlying the Senior Note*** upon the payment in full of the Senior Note." (PX-0053 (emphasis added)). Cerberus insisted on the "exact same cash flows" as the A Note, rather than cash flows from "the Assets" because it wanted to retain the diversified payment streams, including synthetic payments (Tr. 344:14-345:4). Cerberus also agreed to work to achieve a mutually agreeable in-kind transaction (PX-0053).

60. The next morning, Paterson replied, "Thank you lee, confirmed" (*id.*), even though he "can't recall comparing the two" versions and did not ask anyone else to do so (Tr. 652:16-654:4). Halenda knew Cerberus's counteroffer altered CIBC's offer (DX5000 ¶62; Tr. 787:12-17), but testified that he "did not understand any of the[] changes [in the bid] to alter the business deal." (DX5000 ¶62; Tr. 899:24-900:8). Halenda testified that he understood Millstein's language "to be consistent with the way the parties had been performing since the inception of the A1 Note" (DX5000 ¶62), but claimed he did not analyze the implications of Cerberus's changes (Tr. 787:18 22). Paterson testified, "we had discussed this [proposal] over the phone, I had sent him the confirmation of what we had discussed, so we both agreed that this was the transaction." (Tr. 683:12-20.)

61. Although CIBC has argued that it would not have entered into the B Certificate if it understood CIBC's payment obligations (Tr. 30:8-17), the evidence suggests that CIBC was unwilling to call the A Note if it had to pay a premium (PX-0143; PX-0361). CIBC also recognized the potential hit to CIBC's reputation and its stock price (PX-2006 ¶¶21-31), having previously touted the A Note transaction as its exit from the residential mortgage asset business.

62. The parties executed a commitment letter based on Cerberus's proposed terms

(PX-0681.0002).

H. The "In-Kind" and "Sub-Note" Alternatives

63. CIBC "prefer[ed] to deliver the CDO portfolio in-kind" over the B Certificate and they agreed to work to achieve that goal (DX0040 at 2; *see also* Tr. 1710:5-10). CIBC witnesses testified that they believed both transactions were financially equivalent because Cerberus agreed to do either for "the same purchase price." (PX-0053; Tr. 682:12-15; 794:7-14).

64. Yet CIBC knew if it delivered the Altius IV Bonds to Cerberus under the "in-kind" alternative, the deal would have substantially less value for Cerberus than the "subnote." Cohen told Halenda if Cerberus "agree[d] to take the assets and take on the derivatives in exchange for retiring the note," that would be "a lot more risky" for Cerberus (PX-0023; Tr. 1008:12-1009:8). He explained: "Since we now own Altius 4 cash bonds we would be delivering them to Cerberus—currently they receive libor from CIBC on the notional but in a post unwind scenario, Cerberus would be relying on the assets inside Altius 4 to generate the libor component." (PX-0024).

65. At Halenda's request, (Tr. 800:13-23), Cohen calculated the "total accumulated interest shortfall over the life of the deal" if Cerberus held the Altius IV Bonds instead of received the Altius IV synthetic payments, concluding that under some scenarios it would be "**1.7bn (yes, billion)**," (PX-0654 (emphasis in original)). CIBC never told Cerberus how much more valuable it believed the sub-note structure could be, testifying that he "would expect that [Cerberus] would do [its] own analysis." (Tr. 1006:14-25, 1103:24-1104:6). Cohen also told Halenda, "I don't think Cerberus knows that they would be receiving the cash bonds on Altius 4." (PX-0023.0002). Cerberus did not know because CIBC had not informed Cerberus it

terminated the Altius IV Swaps a year earlier (Tr. 1713:1-19). Cerberus believed that CIBC's plan to give Cerberus the Altius IV Bonds as part of an in-kind retirement was another attempt to substitute those assets in the deal (Tr. 1714:21-25).

66. Although Cerberus agreed to work with CIBC toward a "mutually agreeable" in-kind retirement, the parties left open the exact structure of any potential deal (Tr. 342:6-343:2, 643:12-644:8). The first step was exploring whether CIBC's swap counterparties would agree to receive credit protection from Cerberus-managed funds rather than a bank (Tr. 647:23-648:4). To that end, Cerberus worked diligently with Goldman, (PX-2007 ¶¶67-68; PX-2009 ¶59; PX-0680; Tr. 802:2-8), but Goldman refused, so the parties proceeded with the sub-note structure, (PX-2009 ¶60), and the parties began negotiating the B Certificate (Tr. 1715:1-5).

I. Drafting the B Note

67. During negotiations, CIBC proposed "language that would allow it to substitute or replace the Synthetic Assets with the underlying cash bonds" unilaterally (Tr. 1582:6-10; *see* PX-0715; PX-2007 ¶73). Not surprisingly, Cerberus rejected this proposal, (Tr. 1697:20-22; PX-0718.0083). CIBC thereafter entered the B Certificate with a Synthetic Asset Payment Schedule "basically unchanged from the A Note" (Tr. 524:16-25; PX-0740; PX-2007 ¶76).

68. As the parties were discussing the B Certificate, CIBC internally acknowledged a possible "misunderstanding" between the parties about CIBC's payment obligations but decided to move forward without resolving it (Tr. 811:12-819:14). At the time, CIBC was discussing terminating the Altius III Swaps with Goldman. On June 2, 2011, Feldman told Cohen Cerberus did not want to substitute the Altius III Bonds for the Altius III Swaps and explained why (Tr. 1237:8-1238:2; PX-0698). Cohen replied, "Okay, I guess that makes sense but not how I thought the deal works hence my confusion." (PX-0698). Cohen forwarded this

exchange to Halenda, stating, "FYI– I think we have a misunderstanding here." (PX-0088).

69. On the same day, Bonellos told Halenda, "it is my understanding that we (CIBC) do not want to move ahead [with termination of the Altius III Swaps] without this approval from Cerberus." (PX-0089). Halenda agreed, saying "Cerberus says no so we leave it," because CIBC did not "want to mess up" the B Certificate (*id.*). Bonellos told Halenda, "[t]here seems to be some misunderstanding with what is being paid on the Cerberus deal, but I guess that's a different conversation to be had" (*id.*). Halenda replied, "We see how this plays out" (*id.*).

70. In its initial draft of the agreement, CIBC specified that the Trade Date for the Trade Date Synthetic Notional Amount (*i.e.*, the starting Notional Amount for each asset) should be a date as of 2011 as opposed to the 2008 date used in the A Note (DX0694 at 9, 37; Tr. 1726:21-1728:14). Cerberus edited the B Certificate to use the 2008 notionals (PX-0718.0088; Tr. 1730:5-1731:3). CIBC's counsel disagreed, writing "we should have the schedules show updated principal balances." (DX0702). Cerberus responded that there was "risk of error" in updating the notional amounts (*id.*).

71. In the first B Certificate draft sent to Cerberus, CIBC included a new provision that required Cerberus to "specifically acknowledge[]" that CIBC's payments under the B Certificate after the A Note is repaid "may be zero" on any settlement date (DX0694 at 84-85). Cerberus witnesses explained that the B Certificate Residual Amount "may be zero" (1) on any Settlement Date before the A Note paid off, (2) between 2042 (when the Swaps terminate) and 2047 (when the B Certificate terminates), and (3) if the parties exercised the asset-replacement provision of the B Certificate (Cerberus Br. 28-29; Tr. 1313:25-1316:4). While the language of the acknowledgment simply says "any Settlement Date," not those between 2042 to 2047, no

CIBC witness testified they were misled by or even read Cerberus's acknowledgment (Tr. 2308:18-2310:7).

J. The B Certificate

72. The parties entered into the B Certificate on June 20, 2011 (JSOF ¶ 44; PX-0035). Cerberus paid CIBC $80 million in connection with the B Certificate (JSOF ¶ 45). The outstanding principal balance of the A1 Note at the time the B Certificate was issued was $543,155,220.28 (JSOF ¶ 46). CIBC gave up its right to call the A Note (Tr. 1307:4-10).

73. CIBC publicly announced that "[a]s a result of the sale of our residual interest, we no longer have any remaining exposure to underlying collateral on investments . . . and written credit derivatives[.]" (PX-0916.0020).

74. CIBC received substantial tax benefits from the sale of the B Certificate (PX-2008 ¶¶30-33).

K. The Disputes Arise

75. In October 2014, Cerberus directed CIBC to pursue a liquidation of the collateral supporting the Altius IV Bonds (JSOF ¶47). Cerberus's Feldman told Cohen that upon liquidation of the Altius IV Bond collateral CIBC would continue to owe Synthetic LIBOR and Interest until maturity based on the frozen Swap notional amounts.

76. On October 27, 2014, Cohen asked Feldman to "confirm my understanding of what you meant last week when we spoke. Are you saying that if the Altius bonds are liquidated and the notionals are reduced to zero, that the RONA balance will NOT be reduced by the reduction in the Altius notionals. If so, do you mind explaining why this would be the case?" (PX-0028.0001). Feldman responded that he was "surprised by the request," and that the "documents are very clear on these points," and asked how Cohen wished to proceed (*id.*).

77. Cohen responded by email dated November 7, 2014. He noted that "[t]he confirmations for the swaps state that, prior to a Physical Settlement Date, the Relevant Notional Amount decreases over time in accordance with the 'Principal Payments' section," and asked whether Feldman was "implying that there was a Physical Settlement Date, and if so, can you explain?" (PX-0029.0002). He then concluded: "Therefore upon receiving the final liquidation proceeds, there would be no reference obligation making the relevant notional amount zero" (*id.*).

78. On November 10, Feldman reminded Cohen that CIBC itself had sent notices of Physical Settlement for the Altius IV Swaps to Cerberus in mid-2010 and provided a copy (*id.* at 0001). Feldman also stated that "[t]he language in the documents … is clear that neither a Physical Settlement nor a liquidation of the CDO makes the Relevant Notional Amount zero as you claim" (*id.*).

79. On November 19, after consulting with Bonellos and in-house counsel Meadowcroft, Cohen responded that: "Our reading of the docs relies on the simple understanding that you cannot have a CDS trade on a [reference obligation] that has ceased to exist. The mechanics of the CDS confirmations just don't make sense in the absence of a [reference obligation]. A liquidation of the Altius deals would therefore necessarily entail termination of the CDS which quite obviously brings the Relevant Notional Amount to zero. We do not see language in either the swap documents or the note that points to a different conclusion" (*id.*). Cohen's response made no reference to the fact that there had been a Physical Settlement.

80. Internally, Cohen conceded that "technically" the swap confirms do "not explicitly say the notional amount goes to zero upon liquidation," and the transaction "still

reference[s]" the swaps (PX-0030). At trial, Cohen acknowledged he found no provision in the Altius IV Swaps requiring the notional amounts to reduce to zero upon liquidation (Tr. 1016:4-9, 1150:12-1151:5).

81. In December 2014, CIBC's Bonellos prepared an internal presentation explaining the Cerberus transaction to bank leadership (Tr. 1814:18-1815:3). This presentation stated (1) Synthetic LIBOR was based on RONA, which in turn was based on the swap notionals, and (2) Synthetic Interest was the swap premiums, (PX-0080.0008), which were likewise based on the swap notionals (Tr. 1793:1-5). Bonellos testified that he understood the "notional was frozen between … Goldman and CIBC on the [Altius IV] swap" in 2010 (Tr. 1762:9-14).

82. When liquidation was completed in July 2015 (JSOF ¶ 48), the Altius IV CDO trustee reduced the bond balance to zero (DX1044 at 8) and CIBC and the A Note trustee similarly reduced Altius IV RONA to zero (DX1043 (cells J2588-L2588); PX-5082.0009). CIBC paid Cerberus the full liquidation proceeds of $191 million (JSOF ¶ 49)—leaving a little more than $8 million left on the balance of the A Note (PX-5082.0003).

83. Following liquidation, CIBC stopped paying Synthetic LIBOR and Synthetic Interest for the Altius IV Synthetic Assets (JSOF ¶ 50).

84. On July 31, 2015, Cerberus declared an event of default under the A Note and provided notice of acceleration of the A Note.

85. Tim Meadowcroft, CIBC's in-house counsel, responded to the declaration of default on August 5, 2015 (PX-0855). First, he asserted that because the Altius IV Notes "have been extinguished … CIBC is no longer obligated to continue paying [Synthetic LIBOR] with respect to those extinguished and non-existent reference obligations" (*id.* at 0002). Second, based on an "ongoing review of our calculation methods," CIBC determined that its credit

protection payments to Goldman Sachs upon tearing up the swaps in 2010 (in excess of $829 million) had "reduced the Relevant Notional Amounts to zero," meaning (according to Meadowcraft) that CIBC has "substantially overpaid Synthetic LIBOR as well as Synthetic Asset Interest Proceeds (which likewise are based on the Relevant Notional Amounts of the Altius IV Swaps)" (*id.*).

86. On September 1, 2015, Cerberus sent CIBC a letter declaring an Event of Default under the B Certificate and provided written notice of termination and acceleration of the B Certificate (JSOF ¶ 52).

CONCLUSIONS OF LAW

I. Cerberus's Claims for Relief (Breach of Contract)

To establish its claims for breach of contract, Cerberus needed to prove "(1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach, and (4) resulting damages" (*Alloy Advisory, LLC v 503 W. 33rd St. Assocs., Inc.*, 195 AD3d 436, 436 [1st Dept 2021]). It is undisputed that Cerberus and CIBC are parties to the A Note and the B Certificate (*see* PX-0005; PX-0035). It is also undisputed that Cerberus performed under both contracts.

Contracts that are "complete, clear and unambiguous . . . must be enforced according to the plain meaning of [their] terms," (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002])—especially where they were "negotiated between sophisticated, counseled business people negotiating at arm's length" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 403 [2009] [citation omitted]). As the First Department held, the A Note unambiguously required CIBC to pay Synthetic LIBOR and Synthetic Interest based on the Relevant Notional Amounts of the Altius IV Swaps, which froze upon Physical Settlement in 2010 (*see Securitized Asset Funding*, 167 AD3d at 469).

The evidence admitted at trial established that CIBC breached both the A Note and the B Certificate by reducing the Altius IV RONA after physical settlement of the swap in 2010. It further breached the agreements by reducing RONA to zero and suspending all Altius IV-related payments under the agreements following liquidation of the Altius IV Bond collateral. Both breaches resulted in CIBC's failure to pay the full Synthetic LIBOR and Synthetic Interest owed to Cerberus under the A Note and the B Certificate.

CIBC's contention that the B Certificate is ambiguous is unavailing. "[A] contract is ambiguous when 'read as a whole, [it] fails to disclose its purpose and the parties' intent,' or when specific language is 'susceptible of two reasonable interpretations'" (*Georgia Malone & Co. v E&M Assoc.*, 163 AD3d 176, 185 [1st Dept 2018]). Here, taken as a whole, the overarching purpose and intent of the B Certificate was to follow form from the A Note with respect to the calculation of monthly payments, including Synthetic Interest and LIBOR. CIBC's efforts during negotiations to change the language to deviate from the A Note payment terms were unequivocally rejected by Cerberus.

CIBC's argument that the B Certificate nevertheless may reasonably be read to change the A Note payment scheme is based mainly on the insertion, at CIBC's request, of a single sentence in which Cerberus acknowledged that payments under the B Certificate "may be zero" in any given month. This sentence does not, however, bear the weight CIBC assigns to it of undermining the clarity of the entire transaction. First of all, Cerberus points out that even with a frozen RONA the monthly B Certificate Residual Amount may in fact have been zero under various circumstances (NYSCEF 1171 at 14). Moreover, there was no evidence that CIBC relied on this sentence in assessing its obligations. Based on the Court's review of the evidence and drafting history, the "may be zero" sentence most likely was added by CIBC as a general

precaution to dispel any suggestion that positive monthly payments were guaranteed under the B Certificate. There is no reasonable inference, based on the evidence, that it was intended to effect a substantive change in CIBC's payment obligations under the B Certificate or that it undermines the clarity of the agreement itself.

Accordingly, Cerberus proved by a preponderance of the evidence that CIBC breached the A Note and the B Certificate.

II. CIBC's Counterclaims and Affirmative Defenses

In its post-trial brief (NYSCEF 1166 at 22–38), CIBC focuses on three legal arguments to negate Cerberus's claims for relief and to support its own affirmative claim for damages. First, it contends that the B Certificate should be rescinded based on fraudulently induced unilateral mistake. Second, it contends that Cerberus's claims are barred by estoppel. Third, it contends that Cerberus breached the implied covenant of good faith and fair dealing. The Court will address each in turn.

A. Rescission Based on Fraudulently Induced Unilateral Mistake

CIBC's principal argument is that the B Certificate should be rescinded based on a fraudulently induced unilateral mistake. As CIBC acknowledges (NYSCEF 1166 at 23), such a claim must be proven by clear and convincing evidence (*Nash v Kornblum*, 12 NY2d 42, 46 [1962]; *Jones Lang LaSalle Brokerage, Inc. v Epix Entertainment LLC*, 183 AD3d 405, 406 [1st Dept 2020]; *Silver v Gilbert*, 7 AD3d 780, 781 [2d Dept 2004]).

"[A] party's unilateral mistake is a ground for rescission of a contract only where it was induced by fraud or other wrongful conduct by the other party" (*Perlbinder v Vigilant Ins. Co.*, 190 AD3d 985 [2d Dept 2021]; *see also Kotick v Shvachko*, 130 AD3d 472, 473 [1st Dept 2015] ["A unilateral mistake induced by fraud is a sufficient basis for rescission"]). "The elements of a

claim for rescission based on fraud are misrepresentation, concealment or nondisclosure of a material fact; an intent to deceive; and an injury resulting from justifiable reliance by the aggrieved party" (*Allen v WestPoint-Pepperell, Inc.*, 945 F2d 40, 44 [2d Cir 1991] [applying New York law]). However, "the equitable remedy of rescission is not available to relieve an allegedly mistaken party of the consequences of their failure to exercise ordinary care" (*Perlbinder*, 190 AD3d at 988). Moreover, because rescission is an equitable remedy, even if a mistake is established, the court may decide that under the circumstances, the remedy of rescission is not appropriate as a matter of equity (*Beudert-Richard v Richard*, 72 AD3d 101, 108 [1st Dept 2010]).[3]

[3] While the equitable doctrines of reformation and rescission are often addressed contemporaneously, as parties tend to bring claims under both doctrines, these remedies are distinct (*see Simons v Crowley*, 112 NYS2d 851, 855 [Sup Ct, NY County 1952] ["Reformation is a holding that there was and is a valid agreement between the parties but that the paper writing must be changed in some respect so as to *conform* to the actual meeting of the minds of the parties which the court would find had been in the document considered. Rescission requires cancellation or destruction—a holding that there is and was no valid and legal agreement between the parties."]; *Batto v Westmoreland Realty Co.*, 231 AD 103, 108 [2d Dept 1930]). Accordingly, Cerberus's reliance on *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986], *Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441 [1st Dept 2007]; *Rosen Auto Leasing, Inc. v Jacobs*, 9 AD3d 798 [3d Dept 2004], is misplaced as these cases only address reformation. Cerberus contends that this Court and the First Department held that to establish unilateral mistake, CIBC must first prove an "intended agreement" not accurately reflected in the contract (br. at 30). But neither court made such a finding as to rescission based on unilateral mistake (*see* NYSCEF 397 at 17; *Securitized Asset Funding*, 167 AD3d at 469). Unlike a claim for reformation, where the court must "remake" a contract that parties have agreed upon (*Nash*, 12 NY2d at 46), and thus "a petitioning party has to show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties" (*George Backer Mgt. Corp. v Acme Quilting Co., Inc.*, 46 NY2d 211, 219 [1978]), to succeed on a claim for rescission, the moving party must show "the agreement does not represent a true meeting of the parties' minds" (*Rodriguez v Mower*, 56 AD3d 857, 859 [3d Dept 2008]).

Based on the evidence admitted at trial, the Court finds that CIBC failed to meet its burden of proving a fraudulently induced unilateral mistake, and thus its counterclaim for rescission and associated affirmative defenses are dismissed.

First, the evidence that CIBC entered into the B Certificate based upon a *mistake* is equivocal. CIBC knew the terms to which it agreed (and which its own counsel mainly drafted) and, at most, failed to foresee the legal implications of those terms under the agreements. "A party who enters into a plain and unambiguous contract cannot avoid it by stating that he erred in understanding its terms" (*Cortino v London Terrace Gardens*, 170 AD2d 305, 306 [1st Dept 1991]). It may be that CIBC was mistaken as to *Cerberus's view* of how the A Note and B Certificate operated after physical settlement of the Altius IV Swap, but even that is unclear. As noted above, CIBC knew of a potential "misunderstanding" concerning its obligations before entering the B Certificate, but went forward anyway, stating "[w]e see how this plays out" (PX-0089).

CIBC's reliance on *Pilkington N. Am., Inc. v Mitsui Sumitomo Ins. Co. of Am.* (460 F Supp 3d 481 [SDNY 2020]), is misplaced. In that case, which involved a claim for reformation rather than rescission, a party was alleged to have fraudulently induced its comparatively unsophisticated counterparty by inaccurately describing certain revisions it had proposed to a draft agreement. Here, by contrast, Cerberus *highlighted* its revisions to the B Certificate in ways that should have made it clear to CIBC—a sophisticated party that was intimately familiar with its own agreements—that Cerberus was insisting upon strict adherence to the A Note's payment terms. The "mistake" asserted by CIBC is, in fact, simply a disagreement on a question of law—specifically, the proper interpretation of the payment terms of the A Note as

incorporated by reference in the B Certificate. The parties were equally equipped to make their own judgments on those legal issues.

Second, CIBC failed to prove by clear and convincing evidence that Cerberus acted with fraudulent intent. Although Cerberus's post-2010 communications with CIBC in connection with the A Note were not a model of clarity or consistency, Cerberus witnesses testified credibly that they genuinely believed that CIBC understood the details of the parties' agreements based on (1) the unambiguous terms of the agreement; (2) the fact that CIBC's counsel drafted and proposed the terms; (3) CIBC's derivatives expertise; (4) the importance of the contracts to CIBC, its CEO, its regulators, and its investors; and (5) CIBC's course of conduct in seeking what Cerberus took to be "re-trades" or substitution options to avoid its long-tailed obligations right up to the execution of the B Certificate. Millstein was "highly confident [CIBC] knew how [the Contracts] worked" given CIBC's sophistication and familiarity with the documents (Tr. 1565:14-18). Feldman believed CIBC purposefully mis-serviced the deal and could not fathom that CIBC did "no due diligence" on deals important to its investors, regulators, and auditors (Tr. 1305:5-1306:5). In short, Cerberus believed CIBC was engaged in an unsparing battle of wits, seeking to gain advantage at Cerberus's expense, and responded in kind by deciding not to be transparent about its own views and strategies in connection with servicing of the A Note or negotiation of the B Certificate. Not laudable, perhaps, but the Court does not believe Cerberus's communications rose to the level of intentional fraud.

Third, CIBC failed to prove by clear and convincing evidence that it actually and justifiably relied on Cerberus's purported misrepresentations in determining whether to enter into the B Certificate transaction, which CIBC itself had proposed. The record shows that both sides projected that the A Note may not pay off (in which case the B Certificate would be worthless),

and CIBC wrote down its residual interest in the portfolio to $0 prior to entering into the B Certificate. Cerberus was willing to pay $80 million to eliminate the call right and acquire the potential upside, and CIBC was willing to accept that amount rather than paying the A Note balance plus a call premium to end up exposed to the same troubled US residential mortgage-backed assets it told the market it was effectively exiting years earlier. Against that backdrop, there is no clear and convincing evidence that CIBC would have called the A Note and/or abandoned the B Certificate transaction but for Cerberus's purported non-disclosures, only the now self-serving testimony of certain CIBC employees. While it is easy in retrospect to make that claim, with the value of the B Certificate now known, that was not the case in 2011 when the B Certificate was negotiated. Finally, no CIBC witness testified they were misled by or even read Cerberus's acknowledgment that monthly payments under the B Certificate "may be zero" (Tr. 2308:18-2310:7). In the absence of evidence that CIBC decision makers actually reviewed and relied on this language, it cannot support a fraud claim (*Zaro v Mason*, 658 F Supp 222, 228 [SDNY 1987]).

Accordingly, the Court concludes that CIBC has not proven its entitlement to rescission of the B Certificate.

B. Estoppel

Relying upon "[t]he same evidence that [it claims] establishes [its] entitlement to rescission" (NYSCEF 1166 at 32), CIBC asserts that Cerberus is estopped from claiming breach of contract. Specifically, CIBC argues that "Cerberus misled CIBC into believing it agreed with CIBC's payment calculations and CIBC detrimentally and justifiably relied on Cerberus's conduct by relinquishing its call right and entering into the B Certificate" (*id.*). Although the foregoing analysis of CIBC's rescission claim substantially undermines the factual basis for

CIBC's estoppel defense, the Court will address the defense in full because it is governed by somewhat different legal standards.

"Estoppel is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.*, 7 NY3d 96, 106 [2006]). A party asserting estoppel must prove it "was misled by another's conduct" and "significantly and justifiably relied on that conduct to its disadvantage" (*id.* at 106–07; *see also Nassau Tr. Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]).

As CIBC acknowledges, the estoppel defense must be established by clear and convincing evidence (NYSCEF 1166 at 32 [*citing Halifax Fund, L.P. v MRV Communications, Inc.*, 00 CIV 4878 HB, 2001 WL 1622261, at *3 [SDNY 2001], *affd*, 53 Fed Appx 598 [2d Cir 2003], *op amended and superseded*, 54 Fed Appx 718 [2d Cir 2003]); *see also Bayuk v Gilbert*, 57 AD3d 227, 227 [1st Dept 2008]; *Greenpoint Mortg. Funding, Inc. v Ehrenthal*, 2022 NY Slip Op 31191[U], 3 [Sup Ct, NY County 2022]; *Polanish v The City of New York*, 2019 NY Slip Op 30317[U], 6 [Sup Ct, NY County 2018]).

CIBC relies heavily on the Second Circuit's decision in *Gen. Elec. Cap. Corp. v Armadora, S.A.*, 37 F3d 41, 45 [2d Cir 1994]). In that case, a borrower (Armadora) sought consent from its lender (GECC) to pre-pay and refinance an outstanding loan. Before agreeing to a contractual addendum permitting the pre-payment, the parties had discussions and exchanged detailed correspondence with respect to calculation of the "special interest payment" that would be due to GECC upon pre-payment. GECC made it clear in those communications,

including a key October 27, 1987 letter, that it calculated the payment to be approximately $3 million based on its understanding of the parties' agreement. In response, Armadora stated its assent to "the agreement which we have reached as recapitulated in [GECC's] letter addressed to [Armadora] dated October 27, 1987." As the court noted: "A more explicit adoption of GECC's interpretation would be difficult to draft" (*id*. at 44). Nevertheless, shortly after the parties signed the addendum, Armadora reneged and "began openly to insist upon an interpretation of [the contract] that was at odds with that embodied in the October 27 letter (*id.*). The trial court found that the contract was ambiguous and, after trial, concluded that the extrinsic evidence favored Armadora's position, which resulted in a substantially smaller special interest payment than GECC had proposed.

The Second Circuit reversed. The court held that regardless of whether the special interest payment provision was ambiguous (on which it expressed no opinion), Armadora's "silence in the face of GECC's assertion of its interpretation [of the special interest payment provision] falsely misrepresented its intent to challenge [GECC's] calculation" (*id.* at 46). The court concluded that "by appearing to adopt the terms of" GECC's letter, which set forth the GECC's interpretation of the provision, Armadora "affirmatively misrepresented [its] intent, a misrepresentation upon which GECC then relied to its detriment in forgoing its right to block the pre-payment of the loan" (*id.*). Applying New York law, the court held that Armadora was estopped from changing the position it had conveyed through its correspondence with GECC.

Even assuming *General Electric* correctly states New York law on estoppel, it is distinguishable from the present case. Whereas GECC unequivocally "stat[ed] [its] understanding of the current state of negotiations," "spelled out [its] calculation," and "at all times made its view clear," (37 F3d at 42), CIBC did not do the same. The closest CIBC comes

is an email from CIBC's Cohen to Cerberus's Feldman stating that physical settlement of the Altius IV Swaps "should not affect anything related to our transaction" (PX-0019.0001). Putting aside the fact that Cerberus did not express assent to Cohen's comment (as Armadora did explicitly in *General Electric*), Cohen's email does not spell out or even address CIBC's position as to how synthetic payments will be calculated. This is not, therefore, a situation in which "[s]ilence in the face of an explicit contrary assumption by an innocent party may constitute a concealment of facts or a false misrepresentation for estoppel purposes" (37 F3d at 45). Indeed, the record is far murkier. Although CIBC reduced RONA on the Altius IV Swaps for purposes of calculating Synthetic LIBOR, it did so only intermittently with respect to Synthetic Interest. And even after the dispute arose in 2015, CIBC's positions as the impact of physical settlement on the complex contractual provisions in the A Note shifted and evolved over time (NYSCEF 1168 at 22-26). In short, this is far from the clear and convincing record of trickery presented in *General Electric*.[4]

Finally, for the reasons stated above with respect to CIBC's claim for rescission, CIBC failed to establish by clear and convincing evidence that it was misled by Cerberus's conduct or that it "significantly and justifiably relied on that conduct to its disadvantage" (*Fundamental Portfolio Advisors*, 7 NY3d at 106–07). Accordingly, its estoppel defense fails as a matter of law and fact and is dismissed.

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[4] Cerberus argues that *General Electric* is distinguishable on the additional ground that the district court found the contract in that case to be ambiguous (thus permitting resort to extrinsic evidence), whereas the agreements in this case have been found to be unambiguous. Although that is accurate, the Second Circuit made clear that it was not relying on the presence of ambiguity to support its decision (37 F3d at 44 ["[t]he district court's view in this regard [*i.e.*, ambiguity] may be correct, but we do not regard those issues as dispositive"]). Accordingly, although the lack of contractual ambiguity in this case generally supports Cerberus's position on each of CIBC's defenses, it does not provide a persuasive basis to distinguish *General Electric*.

C. Breach of the Implied Covenant of Good Faith and Fair Dealing

Finally, CIBC asserts that for "the same reasons" supporting its fraud and estoppel claims, "Cerberus's deceptive, fraudulent and improper conduct violated the implied covenant of good faith and fair dealing, depriving CIBC of the benefits of its bargain, including its call right" (NYSCEF 1166 at 37). This claim (or defense) fails.

First, this claim (or defense) was improperly raised for the first time in CIBC's motion for summary judgment (*Darabont v AMC Network Entertainment LLC*, 193 AD3d 500 [1st Dept 2021] [rejecting implied covenant theory raised for first time in opposition to summary judgment]; *LaRoss Partners, LLC v Contact 911 Inc.*, 11-CV-1980 ADS ARL, 2015 WL 2452616, at *8 [EDNY May 21, 2015] [rejecting implied covenant claim asserted for the first time on summary judgment]. In its post-trial reply brief, CIBC seeks to tether this claim to its eighth affirmative defense, which states that Cerberus's breach of contract claims "are barred . . . by reasons of deceptive . . . and improper conduct by Cerberus" (NYSCEF 21 at 33), but that is beyond a stretch. That affirmative defense is, if anything, a subset or restatement of CIBC's affirmative defense of fraudulently induced unilateral mistake, which has already been addressed and rejected above (*cf. Campaign v Esterhay*, 61 Misc 3d 662, 666 [Sup Ct, NY County 2018] [dismissing implied covenant claim as duplicative of fraud claim]). By contrast, an allegation of breach of the implied covenant is essentially a claim for breach of contract. Such a claim must be pleaded and proved. It cannot simply be added in summary judgment papers a few months before trial, six years after the Answer was filed and well after the close of discovery.

Second, the implied covenant "cannot negate express provisions of the [Contracts]" (*Veneto Hotel & Casino, S.A. v German Am. Cap. Corp.*, 160 AD3d 451, 452 [1st Dept 2018], nor can it "be used to create new contractual obligations that were not bargained for" (*King*

Penguin Opp. Fund III, LLC v Spectrum Grp. Mgmt. LLC, 187 AD3d 688, 690 [1st Dept 2020]). Nor can it "create a special relationship between two parties to a contract which would give rise to a duty to disclose material information" (*Manti's Transp., Inc. v C.T. Lines, Inc.*, 68 AD3d 937, 940 [2d Dept 2009]). Effectively, CIBC is seeking to use the implied covenant to accomplish all of the above.

Even assuming the implied covenant claim could survive the foregoing obstacles, it fails on the merits for the reasons discussed above with respect to CIBC's claims and defenses based on fraud and estoppel.[5]

Accordingly, this defense is dismissed.

CONCLUSION

Accordingly, based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED and **ADJUDGED** that CIBC is liable for breach of contract as set forth in Counts I, II, and III of the Complaint; it is further

ORDERED and ADJUDGED that CIBC's second counterclaim for rescission for fraudulently induced unilateral mistake, sixth affirmative defense for estoppel, seventh affirmative defense of mistake, and eighth affirmative defense for deceptive, fraudulent and improper conduct (as well as all other remaining counterclaims and affirmative defenses) are **DISMISSED**; and it is further

[5] CIBC's attempt to shoehorn its fraud and estoppel allegations into a claim for breach of the implied covenant seems designed, at least in part, to bring to the Court's attention Judge Posner's engaging disquisition on the implied covenant in *Mkt. St. Assoc. Ltd. Partnership v Frey*, 941 F2d 588 [7th Cir 1991] [applying Wisconsin law]. Even assuming that decision is consistent with New York law, however, it is plainly distinguishable on the facts.

ORDERED that oral argument on the issue of damages will be held on December 19, 2022, at 2:30 pm or as soon thereafter as counsel and the Court are available.

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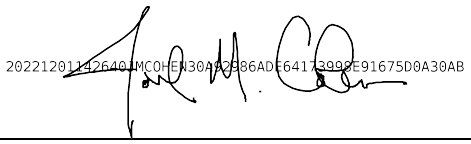

DATE: 12/1/2022 **JOEL M. COHEN, JSC**

Check One: ☐ **Case Disposed** ☒ **Non-Final Disposition**

Check if Appropriate: ☐ **Other (Specify** _____ **)**