SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SECURITIZED ASSET FUNDING 2011-2, LTD., Plaintiff, v. CANADIAN IMPERIAL BANK OF COMMERCE, Defendant.	Index No. 653911/2015 Hon. Saliann Scarpulla I.A.S. Part: 39 Motion Seq. No.: ___
CANADIAN IMPERIAL BANK OF COMMERCE, Defendant/Counterclaim-Plaintiff, v. SECURITIZED ASSET FUNDING 2011-2, LTD., Plaintiff/Counterclaim-Defendant. and SECURITIZED ASSET FUNDING 2009-1, LTD., PROMONTORIA EUROPE INVESTMENTS XXIII LDC, and CSMC 2012-8R, Ltd., Additional Counterclaim-Defendants.	

PLAINTIFF'S AMENDED MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL PRODUCTION AND TESTIMONY

KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: 202-389-5000

SELENDY & GAY PLLC
1290 Avenue of the Americas
New York, NY 10104
Telephone: 212-390-9000

Date: October 17, 2019

Attorneys for Plaintiff/Counterclaim-Defendants

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

Other Authorities

Plaintiff and Counterclaim-Defendants (together, "Cerberus") submit this memorandum of law in support of their motion to compel Defendant ("CIBC") to produce in full documents improperly withheld or redacted as privileged and allow examination before trial on topics improperly obstructed on the basis of privilege.

PRELIMINARY STATEMENT

On December 11, 2018, the First Department ruled that the contracts at issue in this case (the "A Note" and "B Certificate," together the "Contracts") are "not ambiguous." *Securitized Asset Funding 2011-2, Ltd. v. Canadian Imperial Bank of Commerce*, 167 A.D.3d 468, 469 (1st Dep't 2018). The First Department affirmed most of this Court's holdings, agreed with Cerberus' interpretation of the Contracts, and found CIBC's interpretation "unmoored from the contractual language." *Id.*

This decision left "mistake" as the only basis on which CIBC could try to avoid its contractual obligations. To prove mistake, CIBC must show, by "unequivocal evidence," "exactly what was really agreed upon between the parties"—in other words, an alternative agreement *not* reflected in the Contracts. *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 574 (1986). Thus, CIBC must prove it believed the Contracts did not mean what they say. To this end, its witnesses testify they had "business understandings" that differ from the Contracts' unambiguous meaning, and which they supposedly shared with the CIBC draftsperson of the relevant contract terms (in-house counsel Trusha Patel). CIBC has thus put directly "at issue" its beliefs and understandings about the nature of the agreements.

CIBC's various made-for-litigation "business understandings" are internally inconsistent and contradict not only the Contracts but also CIBC's course of practice and its prior representations to this Court. More fundamentally—and this is the subject of this motion—at the same time as it claims to have had these alternative understandings, CIBC tries to hide the evidence of its *actual* contemporaneous

understandings under the cloak of privilege. CIBC has denied Cerberus the ability to test the truth of its witnesses' testimony by instructing its witnesses not to answer basic questions about their actual intent and understanding, as reflected in communications with Patel and other counsel, and by withholding thousands of documents reflecting its witnesses' understanding.

New York law does not allow such gamesmanship. Where a party "affirmatively places the subject matter of its own privileged communication at issue in litigation, … invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege." *Tower Ins. Co. of New York v. Lowe*, 2014 WL 1279755, at *4 (Sup. Ct. Mar. 20, 2014) (Scarpulla, J.). "Without this [privileged] information, [the requesting party] would be deprived of vital evidence." *Id*. CIBC cannot put at issue its understanding of the Contracts and at the same time prevent Cerberus from examining the contemporaneous evidence of its actual understanding to test the veracity of its mistake claims. *See State-Wide Capital v. Superior Bank*, 2000 WL 20705, at *2 (S.D.N.Y. Jan. 12, 2000) (applying New York law) (where defendant "made assertions regarding the parties' alleged intent and purpose for including certain contractual provisions," privilege "is waived ... to the extent necessary to examine the validity of the parties' assertions of intent in the underlying contract formulations").

CIBC's waiver is underscored by the undisputed fact that the communications at issue were with the very counsel—Patel—who *drafted* the unambiguous contractual terms that CIBC now claims were a "mistake." At-issue waiver applies with special force when a party claiming mistake asserts privilege over testimony of "the draftsperson of the contracts." *Id*.

CIBC's at-issue waiver is coupled with its further, deliberate subject-matter waivers of privilege through selective disclosures of its witnesses' understandings. CIBC's witnesses have not only testified about the substance of their "business

understandings," but have further testified that (1) they communicated these "understandings" to their counsel, Patel, and (2) Patel confirmed the Contracts reflect their "understandings." Having disclosed the substance of their communications to counsel, as well as counsel's advice about the meaning of the Contracts, CIBC has waived privilege over all communications concerning both of these subject matters. *See Orco Bank v. Proteinas Del Pacifico*, 179 A.D.2d 390, 390-91 (1st Dep't 1992) (privilege waived by party's "selective disclosure of [legal] advice" where party employee testified he had "relied upon the advice of [the company's] lawyers" but then "withheld more detailed testimony, and documents, on grounds of attorney-client privilege").

CIBC's gamesmanship with privilege and its refusal to allow Cerberus to test its witnesses' veracity are especially egregious given CIBC's numerous contradictory assertions about the meaning of the Contracts and its purported "understandings."

The Contracts require CIBC to pay Synthetic LIBOR based on Altius IV "Individual RONA"—which, as Cerberus maintained and the First Department held, is the "Relevant Notional Amount" of the Altius IV Swaps. 167 A.D.3d at 469. CIBC never disputed these two terms were identical before this litigation. Nor could it: Patel—the draftsperson—admits that Altius IV Individual RONA "was defined as [the] relevant notional amount in the documents." (Ex. R at 220:21-222:2.[1]) Albert Cohen, who managed CIBC's Synthetic LIBOR payments, admits: "It was our view that the swap notional and the individual RONA were always the same." (Ex. P at 348:19-21.) And CIBC's December 2014 internal analysis of the Contracts confirmed that CIBC must pay "LIBOR on RONA based on Notional of Syn[thetic] Assets," defined as the "CDS" (or Swaps) in the Contracts' portfolios. (Ex. Z at -0030-31.)

[1] "Ex." refers to exhibits to the accompanying Affirmation of Sean P. Baldwin.

CIBC's problem is that the Relevant Notional Amount of the Altius IV Swaps "froze" at approximately $830 million upon the June 2010 physical settlement under those Swaps. When Cerberus raised this in October 2014, CIBC did not deny Synthetic LIBOR was based on the Swaps' Relevant Notional Amount. Instead, it falsely suggested there had been no physical settlement—and thus no freeze in Relevant Notional Amount. CIBC made that false statement despite knowing that physical settlement had occurred in 2010, and that it had itself determined in 2010—and told its Swap counterparty, Goldman Sachs—that because of this physical settlement the Relevant Notional Amount was frozen through 2042.

When Cerberus called out this deception, CIBC changed tack and argued that the Swaps' Relevant Notional Amount must be reduced to zero because Cerberus' proposed liquidation of the underlying Altius IV Notes would "extinguish" the Swaps. But CIBC knew (1) liquidation of the Notes was irrelevant to the determination of the Swaps' Relevant Notional Amount, and (2) CIBC had *already* extinguished the Altius IV Swaps in 2010 (through prepayments to Goldman), yet continued to pay Synthetic LIBOR for four more years.

After Cerberus filed suit, CIBC again changed position. Opposing summary judgment, it argued for the first time that Altius IV Individual RONA was *not* identical to the Swaps' Relevant Notional Amount—despite its witnesses' understanding to the contrary. The First Department rejected this argument. 167 A.D.3d at 469.

CIBC also argued the Swaps' Relevant Notional Amount was *not* frozen by physical settlement—even though Patel admitted, and told Goldman, it *was* frozen in 2010. Continuing its pattern, CIBC reversed its position before the First Department, abandoning the interpretation it had advanced before this Court.

CIBC advanced other scattershot interpretations to avoid liability, arguing: (1) the Contracts do not require it to pay Altius IV Synthetic LIBOR after the

Altius IV bonds are liquidated or the Altius IV Swaps are terminated; (2) the "Synthetic Assets" in the Contracts are both the Swaps and the Swaps' reference obligations; (3) Altius IV Synthetic Interest is based on Altius IV Individual RONA rather than Relevant Notional Amount; and (4) Altius IV Individual RONA is reduced by interest payments. All these arguments contradict the Contracts—as the Courts held—as well as CIBC's own practice and CIBC's witnesses' testimony.

CIBC eventually stopped trying to reconcile its position with the Contracts. During depositions, its witnesses invented "business understandings" between CIBC and Cerberus which were supposedly communicated to CIBC counsel responsible for drafting the Contracts yet somehow were not reflected in the Contracts. But CIBC's witnesses contradict each other about these "understandings." Some claim they "understood" Altius IV Individual RONA was equal to the unpaid principal balance of the Altius IV bonds. Others contend CIBC was required to pay Synthetic LIBOR and Synthetic Interest only to the extent interest was actually paid on the Altius IV bonds. Further, CIBC's contemporaneous projections of payments due to Cerberus were inconsistent with these "understandings." Given these inconsistencies, CIBC cannot claim any such "understanding" reflects "exactly what was really agreed upon between the parties." *See Chimart*, 66 N.Y.2d at 574.

Nor is it credible that CIBC, a sophisticated party represented by sophisticated counsel, held alternative "understandings" directly contrary to the Contracts. Indeed, CIBC's Patel admits these "understandings" cannot be reconciled with the Contracts—which she *drafted*!

CIBC has put forward "understandings" concocted post-litigation and after its spurious interpretations had been rejected by this Court and the First Department. New York courts demand a "high order of evidence" of mistake to guard against precisely this danger: that "a party, having agreed to a written contract that turns out to be disadvantageous, will falsely claim the existence of a different, oral

contract." *Id.* at 573-74. Now, CIBC compounds its duplicity by improperly shielding from examination communications concerning the very "understandings" it put at issue. This Court should compel full discovery of these communications.

BACKGROUND

A. CIBC Enters into the A Note to Help Manage Massive Housing-Related Exposure

During the financial crisis, CIBC incurred huge losses through exposure to the U.S. residential mortgage market. As *Bloomberg* reported, of all Canadian banks, CIBC "suffered the most from the collapse of the U.S. mortgage market after expanding in trading of credit derivatives more rapidly than domestic rivals." (Dkt. 1 ¶ 23.)

In October 2008, shortly after Lehman Brothers collapsed, CIBC borrowed desperately needed capital from Cerberus. Under the A Note, Cerberus lent CIBC $571 million, repayable, with 20% interest, from four defined payment streams: (1) cash flows on the A Note's cash assets; (2) Synthetic Principal; (3) Synthetic Interest; and (4) Synthetic LIBOR. (Dkt. 397 at 2-3.)

B. CIBC's Counsel Drafts the Synthetic Asset Payment Schedule, Defining Altius IV Individual RONA as the Relevant Notional Amount of the Altius IV Swaps

CIBC was represented in the A Note negotiations by in-house counsel, including Patel, and Mayer Brown LLP. (Dkt. 34 ¶11.) In September 2008, the parties executed a commitment letter and non-binding Term Sheet. (Ex. X.) The Term Sheet defined Synthetic LIBOR as LIBOR multiplied by the "Reference Portfolio Notional Balance." (Ex. X at -7656.) However, the definition of "Reference Portfolio Notional Balance" was circular—as Patel admits. (Ex. R at 130:15-131:15.) The Term Sheet (1) stated the Reference Portfolio Notional Balance would reduce—*i.e.*, amortize—by the amount of Reference Portfolio Principal Proceeds paid by CIBC,

but (2) defined Reference Portfolio Principal Proceeds as the amount by which the Synthetic Assets amortized. (Ex. X at -7655-57.)

To clarify CIBC's payment obligations, Patel drafted the Synthetic Asset Payment Schedule for the A Note. She explained: "This 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." (Ex. U at -9323.) Patel's Schedule resolved the Term Sheet's circularity by basing the Synthetic LIBOR calculation on the notional amounts as determined under the swaps listed in the Schedule.

The A Note defines "Synthetic LIBOR" as LIBOR multiplied by the "Reference Portfolio Notional Amount," which is in turn defined as the sum of Synthetic Asset Notional Amounts for all Synthetic Assets. The Synthetic Asset Notional Amounts are defined as the amounts in the "Individual RONA" column in the Synthetic Asset Payment Schedule. Under that Schedule, Altius IV "Individual RONA" is defined as the Swaps' "Relevant Notional Amount reduced in accordance with the terms of the Altius IV Swap Documents which includes any Scheduled Payments." (Dkt. 36 at EXH II-2.) CIBC's Altius IV Synthetic LIBOR obligations are thus based on the Altius IV Swaps' Relevant Notional Amount.

Patel admitted the Contracts define Altius IV Individual RONA as the Swaps' Relevant Notional Amount, but then claimed this definition—*which she drafted*—was a "mistake":

> Q. Your testimony is that RONA was defined to mean something other than the relevant notional amount [under the Altius IV Swaps]?
>
> A: *It was defined as [the] relevant notional amount in the documents* but the intention was – that was not the intention. …
>
> Q. Are you saying there was a mistake in the Synthetic Asset Payment Schedule?

A. If that's how you're reading it, then, yes, there's a mistake.

(Ex. R at 220:21-222:2) (emphasis added). Cohen contradicted Patel's claim that the identification of Individual RONA with Relevant Notional Amount was a mistake: "It was our view that the swap notional and the individual RONA *were always the same*." (Ex. P at 348:19-21) (emphasis added).[2]

C. CIBC Concedes the Relevant Notional Amount Under the Altius IV Swaps Froze Upon Physical Settlement of the Swaps

Under the Altius IV Swaps, following physical delivery of the Altius IV bonds (the presumptive method of settlement for a credit event (*see* Dkt. 87 at 5; Ex. Z at -0030)), "the Relevant Notional Amount hereunder shall not be further reduced pursuant to 'Principal Payments' but shall be reduced by each Scheduled Payment with respect to principal paid by or on behalf of the seller." (*See* Dkt. 33 at 10-11). Upon an April 2010 default on the Altius IV bonds, a credit event occurred under the Altius IV Swaps and the Altius IV bonds were physically delivered to CIBC in June 2010. Contrary to its prior assertions to this Court, *see* p. 12, *infra*, CIBC now concedes this physical settlement froze the Altius IV Swaps' Relevant Notional Amount until the Scheduled Payment of principal in 2042.

CIBC was forced to concede this because, as its witnesses admit, CIBC had determined by July 2010, and told Goldman, that a freeze had occurred. Patel told Goldman:

---

[2] Cohen and two other CIBC witnesses also submitted declarations to this Court asserting that Altius IV Synthetic LIBOR is based on the same notional amount as Altius IV Synthetic Interest—which they testified was Altius IV Individual RONA. (Dkt. 86 at ¶ 27; Dkt. 100 at ¶ 9; Dkt. 324 at ¶ 8.) Under the Synthetic Asset Payment Schedule, Altius IV Synthetic Interest is defined as the Fixed Payment under the Altius IV Swaps, which, as CIBC's witnesses concede, is 10.5 basis points multiplied by the Swaps' Relevant Notional Amount. (Dkt. 33 at 9-10; Ex. O at 73:19-74:2.) Because Altius IV Synthetic Interest is based on the Swaps' Relevant Notional Amount, CIBC's declarations can only be true if CIBC's witnesses understood Altius IV Individual RONA was identical to the Swaps' Relevant Notional Amount.

> 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*.... [T]his particular component of Scheduled Payment is payable at maturity ....

(Ex. CC at -7051 (emphasis added); *see also* Ex. R at 255:8-20; Ex. O at 113:22-114:17.)

After acknowledging the Relevant Notional Amount was frozen, Goldman and CIBC tore up the Altius IV Swaps and settled their accounts. (Dkt. 21 ¶ 46.) CIBC paid Goldman approximately $830 million and retained the Altius IV bonds. (*Id*.)

D. CIBC Sells the B Certificate on Similar Terms to the A Note, Knowing the Altius IV Relevant Notional Amount Was Frozen

In June 2011, CIBC signed the B Certificate and sold any residual proceeds from the cashflow streams set forth in the A Note to Cerberus for $80 million. (Dkt. 397 at 7.) The calculation of the payments due under the B Certificate, including for Altius IV, were identical to the calculations in the A Note. (*Id*.)

As in the A Note, Altius IV Individual RONA, the basis for Synthetic LIBOR payments, was based on the Altius IV Swaps' Relevant Notional Amount. At that time, CIBC knew the Relevant Notional Amount was frozen through 2042 while the principal balance of the Altius IV bonds was reducing through periodic payments. Thus, CIBC entered the B Certificate knowing the Relevant Notional Amount was materially different from the bonds' unpaid principal balance.

Despite telling the Court that Cerberus' reading of the Contracts is "commercially unreasonable" and "economically irrational" (Dkt. 391 at 2-3), CIBC fully understood its possible exposure when it entered the B Certificate. At that time, CIBC forecast potential payment obligations to Cerberus under both Contracts exceeding *$3.4 billion*, with payments on the B Certificate alone potentially exceeding *$1.4 billion* (Ex. DD at -4771-72; Ex. Q at 335:4-336:15; *see also* Ex. EE; Ex. T at 397:21-403:19)—dramatically greater than Cerberus' demand. In short, CIBC

understood its potential liability, but bet its actual obligations would be much less. Having lost that bet, CIBC seeks to renege on its agreement.

E. CIBC Initially Does Not Dispute Synthetic LIBOR Is Based on the Altius IV Swaps' Relevant Notional Amount

In October 2014, Cerberus told CIBC it intended to exercise its control rights to liquidate the collateral supporting the Altius IV bonds. Cerberus noted that, after liquidation, CIBC would continue to owe Synthetic LIBOR (and Synthetic Interest) on the Relevant Notional Amount of the Altius IV Swaps, which was frozen through 2042.

Contrary to its post-litigation purported "understandings," CIBC did *not* respond that its Synthetic LIBOR payment obligations were based on the unpaid principal balance of the Altius IV bonds or were limited to the bonds' cashflows. Nor did CIBC dispute that the Relevant Notional Amount froze upon physical settlement of the Swaps. (Ex. P at 345:10-351:8; Ex. V; Ex. W at -3834-35.) CIBC knew Altius IV Individual RONA, the basis for Synthetic LIBOR payments, was the Relevant Notional Amount of the Altius IV Swaps—as both Patel and Cohen testified, *see* pp. 7-8*, supra*, and its pre-litigation analysis confirmed, *see* p. 3, *supra* and p. 20, *infra*.

1. CIBC Pretends There Was No Physical Settlement

CIBC initially pretended no physical settlement had occurred, and thus the Relevant Notional Amount was not frozen. Cohen told Cerberus that, absent physical settlement, the Relevant Notional Amount would be reduced by all payments of principal on the Altius IV bonds, including liquidation proceeds, and asked: "Are you implying that there was a Physical Settlement Date, and if so, can you explain?" (Ex. W at -3835.)

This was disingenuous. Cohen not only knew about the June 2010 physical settlement, but had personally notified Cerberus when it occurred. Cerberus reminded Cohen by resending him the notices he had provided in 2010. (Ex. V.)

2. CIBC Argues Termination of the Altius IV Bonds Reduced Relevant Notional Amount to Zero Because It Terminated the Swaps

Confronted with the physical settlement, CIBC searched for another pretext. Again, CIBC did *not* say Synthetic LIBOR was based on the unpaid principal balance of the Altius IV bonds or limited by the bonds' cashflows.

Instead, Cohen claimed liquidation of the collateral supporting the Altius IV bonds would "necessarily entail termination of the CDS which quite obviously brings the Relevant Notional Amount to zero." (Ex. W at -5384.) Cohen thus again *conceded* that both Synthetic LIBOR and Synthetic Interest were based on the Swaps' Relevant Notional Amount, but argued the Relevant Notional Amount would be reduced to zero by termination of the Swaps.

Cohen's argument was a *non sequitur*. A credit default swap is a contract under which a "protection buyer" pays a premium to a "protection seller" in return for its agreement to insure payments on an underlying "reference obligation." The amount insured can be based on a notional amount independent of the reference obligation's performance or principal balance—as Patel understood when she drafted the relevant definitions. (Ex. R at 226:16-227:7.)

CIBC knew it had to pay—and in fact had paid—Synthetic LIBOR (and Synthetic Interest) on the Altius IV Swaps after the swaps were "terminated." CIBC had torn up the Altius IV Swaps with Goldman in 2010, yet continued paying Altius IV Synthetic LIBOR and Synthetic Interest every month thereafter. As Cohen testified, the tear-up of the Swaps made no difference to CIBC's payment obligations under the Contracts. (Ex. P at 356:24-357:6 ("Q. Your view was that the unwind of the Goldman swaps was irrelevant to CIBC's obligations under the A note and the B certificate, correct? A. Yes, that was my view.").) This Court and the First Department agreed. (Dkt. 397 at 10-11; 167 A.D.3d at 469.)

F. After Cerberus Files Suit, CIBC Again Changes Positions

After Cerberus filed suit, CIBC advanced several new arguments that contradicted its prior positions, the Contracts' terms, and its witnesses' admissions.

First, CIBC argued Altius IV Individual RONA was *not* identical to the Altius IV Swaps' Relevant Notional Amount—despite Patel's and Cohen's contrary understanding and CIBC's 2014 internal analysis to the same effect. (Dkt. 391 at 12-13.) The First Department rejected this argument. 167 A.D.3d at 469.

Second, CIBC argued that the Altius IV Relevant Notional Amount was not frozen by physical settlement. (Dkt. 391 at 18.) CIBC reversed this position before the First Department, presumably after reviewing its witnesses' 2010 emails informing Goldman Sachs that the Relevant Notional Amount had frozen.

Third, CIBC argued it need not pay Synthetic Libor on the Altius IV Swaps after it had torn up its Swaps. (Dkt. 391 at 11-12.) Both this Court and the First Department rejected this argument. (Dkt. 397 at 10-11; 167 A.D.3d at 469.)

Fourth, CIBC told the First Department that Scheduled Payments *of interest* should reduce Altius IV Individual RONA. (App. Dkt. 19 at 18.) This contradicted both the Contracts and one of CIBC's purported "business understandings"—that Altius IV Individual RONA equaled the unpaid *principal* balance of the Altius IV bonds. The First Department rejected this argument, 167 A.D.3d at 469, and CIBC's witnesses disavow it. (Ex. R at 160:3-23; Ex. O at 316:10-16; Ex. P at 158:2-10.)

Fifth, CIBC argued that the Contracts define "Synthetic Assets" as both the bonds referenced by the Swaps and the Swaps themselves. (Dkt. 391 at 18-20.) Not only is this contrary to the Contracts' terms, as both Courts held,[3] and industry usage, as Patel admits (Ex. R at 110:24-111:13), but CIBC's witnesses have disagreed about

[3] *See* 167 A.D.3d at 469 ("We agree with the motion court that the relevant Synthetic Assets under the A Note and B Certificate are the Altius IV *swaps,* not the Altius IV *notes*.").

it. *Compare* Ex. R at 111:12-13 ("The synthetic assets are not the swaps. The synthetic assets are the bonds.") *with* Ex. O at 43:15-24 ("The synthetic assets were the CDS that CIBC had on those reference obligations Altius III and Altius IV.").

Finally, CIBC told this Court that Synthetic Interest for Altius IV is based on Altius IV Individual RONA. (Dkt. 391 at 12.) As explained above, this is only true if Altius IV Individual RONA is identical to the Relevant Notional Amount under the Altius IV Swaps. *See* n. 2*, supra*.

G. The First Department Holds the Contracts Are Unambiguous

After CIBC reversed its position before this Court and admitted that the Altius IV Swaps' Relevant Notional Amount was frozen by physical settlement, the First Department held the Contracts unambiguously require CIBC to pay Synthetic Interest and Synthetic LIBOR based on the frozen Relevant Notional Amount. *See* 167 A.D.3d at 469.

The First Department also held that CIBC's mistake "counterclaim does not 'show in no uncertain terms … exactly what was really agreed upon between the parties.'" 167 A.D.3d at 469 (quoting *Chimart*, 66 N.Y.2d at 574). However, the Court allowed CIBC to try to show it mistakenly believed "the Relevant Notional Amount for the Altius IV synthetic assets would be reduced by payments of Synthetic Principal." (*Id.*) That is the remaining triable issue.

H. CIBC's Witnesses Assert Inconsistent "Business Understandings"

Following the First Department's decision, CIBC stopped trying to re-interpret the Contracts. Instead, its witnesses now assert novel—and incredible—"business understandings" which were allegedly communicated to CIBC's counsel but somehow not reflected in the Contract terms CIBC's counsel drafted.

1. CIBC's Witnesses Offer Contradictory Supposed "Business Understandings"

CIBC's witnesses disagree about their supposed "business understandings." Some witnesses claim they "understood" Altius IV Individual RONA was not the same as the Altius IV Swaps' Relevant Notional Amount, but instead equaled the unpaid principal balance of the Altius IV bonds. (Ex. P at 152:2-25 (*but see* Ex. P at 348:19-21, saying RONA is the same as Relevant Notional Amount); Ex. O at 91:17-25; *id*. at 100:9-15; Ex. R at 149:3-22; *id*. at 164:3-20; *id*. at 220:8-222:2.) Other CIBC witnesses claim they "understood" CIBC need only pay Altius IV Synthetic Interest and Synthetic LIBOR to the extent interest was actually paid on the Altius IV bonds. (Ex. Q at 14:18-16:23, 215:2-15; Ex. S at 244:20-245:4; Ex. T at 100:21-101:24; 109:21-110:11.)

These purported "understandings" are different (but equally baseless under the Contracts). Under the first, if the underlying bonds did not pay interest, CIBC still must pay Synthetic Interest and Synthetic LIBOR based on the bonds' unpaid principal balance. (Ex. O at 174:10-20; Ex. P at 302:9-20; Ex. R at 92:4-19.) By contrast, under the second "understanding," if the bonds did not pay interest, CIBC would not have to pay *any* Synthetic Interest or Synthetic LIBOR. (Ex. Q at 14:18-16:23, 215:12-15; Ex. S at 244:20-245:4.)

This internal disagreement disposes of CIBC's claim that it had a clear alternative understanding of the Contracts *itself*, much less shared this understanding with Cerberus—eviscerating its "mistake" defense. *See Chimart*, 66 N.Y.2d at 573-75.

2. CIBC's "Business Understandings" Are Inconsistent with Its Contemporaneous Cashflow Projections

CIBC's contemporaneous projections of its payment obligations to Cerberus also disprove its claimed "understandings." CIBC's monthly cashflow projections,

from the closing of the A Note forward, did not limit Synthetic LIBOR and Synthetic Interest to the interest paid on the Altius IV bonds, and did not equate Altius IV Individual RONA with the Altius IV bonds' unpaid principal balance. One set of projections specific to Altius IV—which CIBC's chief modeler sent to Patel in May 2010 when CIBC was analyzing the effect of the Altius IV bonds' default—highlights the inconsistencies. These projections analyze the economic impact to CIBC in the event "CIBC terminates CDS with G[oldman] S[achs] and owns bonds directly," comparing what "CIBC receives" from the Altius IV bonds to what "CIBC pays" on account of the Altius IV Swaps. At that time, over a year before entering the B Certificate, CIBC projected it would pay Cerberus Altius IV Synthetic LIBOR and Synthetic Interest in an amount ($427.6 million) far exceeding what CIBC would receive as interest on the Altius IV bonds ($262.8 million). (*See* Ex. FF; *see also* Ex. GG; Ex. T at 303:22-307:9, 311:4-315:6, 328:5-18, 350:19-353:10.) Further, CIBC calculated Synthetic LIBOR based on an Altius IV Individual RONA that was obviously not the Altius IV bonds' unpaid principal balance. (*See* Ex. FF; Ex. GG; Ex. T at 326:13-327:8.)

3. CIBC's "Business Understandings" Cannot Be Reconciled with the Contracts

Neither of CIBC's new "business understandings" can be reconciled with the Contracts. CIBC drafted the provisions fixing its Synthetic Interest and Synthetic LIBOR obligations based on the Relevant Notional Amount of the Altius IV Swaps. The Contracts do not reference the Altius IV bonds, do not equate Altius IV Individual RONA with the Altius IV bonds' unpaid principal balance, and do not limit CIBC's payments to the bonds' cashflows.

Most of CIBC's witnesses testified they did not read the Contracts and relied on counsel to confirm the Contracts conformed to their "understanding." (Ex. P at 14:14-15:22, 178:16-25; Ex. O at 63:12-64:3, 102:19-25, 104:2-105:2; Ex. Q at 31:5-

32:7, 60:6-25, 122:17-123:1, 138:13-139:13; Ex. S at 122:12-123:10, 125:25-127:1.) When asked how the Contracts could possibly reflect their interpretations, they admitted the Contracts do not reflect them and claimed there were mistakes. (Ex. R at 220:21-221:13; Ex. O at 96:2-14; *see also* Ex. T at 121:18-123:15.)

Patel admits the Contracts defined Altius IV Individual RONA as the Altius IV Swaps' Relevant Notional Amount—contrary to both of CIBC's alternative "business understandings." *See* pp. 7-8*, supra*. It is not credible that Patel defined CIBC's Synthetic Interest and Synthetic LIBOR obligations based on the Swaps' Relevant Notional Amount without understanding exactly what that meant, given that she: (1) was CIBC's in-house expert on swap transactions; (2) negotiated and drafted the Altius IV Swaps; and (3) knew—and advised Goldman—the Relevant Notional Amount froze upon physical delivery. (Ex. R at 20:3-21:22, 168:20-169:3, 255:8-20, 276:17-277:2.)

I. CIBC Refuses to Let Cerberus Test the Veracity of Its Witnesses' "Business Understandings"

To avoid examination about the remaining triable issue, CIBC has withheld documents and blocked deposition questions about its purported "understandings"—even though it selectively introduced testimony about those topics.[4] Critically, CIBC refused to let Patel testify: (1) whether she ever "explain[ed] the meaning of the terms in the [synthetic asset payment] schedule to others at CIBC" (Ex. R at 143:11-144:5); (2) what CIBC's negotiators told her about their understanding in entering into the

[4] *See*, *e.g.*, Ex. P at 146:25-147:7 ("[MR. SELENDY]: What is your understanding of the intent as to the deal between CIBC and Cerberus? MR. KASNER: And, again, let me just caution you, please reflect in your answer anything other than what you may have discussed with counsel."); *see also id*. at 188:8-189:10, 191:12-25; Ex. Q at 29:22-30:1, 222:18-22; Ex. O at 64:4-17; Ex. S at 171:11-20; Ex. T at 79:2-20, 80:3-82:4.

Contracts;[5] or (3) whether she considered the impact of physical settlement on CIBC's payment obligations to Cerberus.[6]

CIBC also asserts privilege or work product protection over more than 10,000 documents relating to: (1) "drafting and/or negotiation of the A Note"; (2) "drafting and/or negotiation of the B Certificate"; (3) "interpretation of A Note or B Certificate"; (4) "assets underlying the A Note or B Certificate"; and (5) "internal reporting or monitoring of A Note or B Certificate." (*See* Ex. N.)

ARGUMENT

A. CIBC Waived Privilege by Placing Its Understanding at Issue

CIBC put its understanding of the Contracts at issue through its mistake and estoppel defenses. The at-issue waiver doctrine prevents CIBC from simultaneously (1) asserting a different understanding than the Contracts' plain meaning, and (2) denying Cerberus evidence that might contradict that assertion.

"An 'at issue' waiver of the privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that

---

[5] *See* Ex. R at 58:6-19 ("[MR. SELENDY]: I would like to know specifically what you were advised by others within CIBC in the 2008 period as to CIBC's intent with respect to the transaction that became the A Note with Cerberus? MR. MUSOFF: And I'm going to instruct you not to answer that question."); *id*. at 170:11-23 ("Q. In fact, everyone did agree that RONA would be defined for Altius IV by reference to the relevant notional amount as defined in the Altius IV swaps; right? … THE WITNESS: There were little or no comments on that section, yes. BY MR. SELENDY: Q. Okay. And no one at CIBC expressed a contrary intent to you when you circulated that schedule? MR. MUSOFF: I'm going to instruct you not to answer."); *id*. at 200:24-201:6 ("Q. As of the time of the A Note, did anyone at CIBC ever express the view that RONA should be based on the unpaid principal balance of the underlying bonds rather than on the notional of the synthetic assets? MR. MUSOFF: I'm going to instruct you not to answer that question.").

[6] Ex. R at 218:20-24 ("[MR. SELENDY]. Did you evaluate the impact of CIBC's obligations to Cerberus as a result of the physical settlement? MR. MUSOFF: I'm going to instruct you not to answer.").

invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information." *Tower Ins.*, 2014 WL 1279755, at *4 (Scarpulla, J.); *accord William Tell Servs., LLC v. Capital Fin. Planning, LLC*, 999 N.Y.S.2d 327, 333 (Sup. Ct. 2014).

"[T]he waiver has been applied … broadly to cover circumstances in which a client does not expressly claim that he has relied on counsel's advice, but where the truth of the parties' position can only be assessed by examination of a privileged communication." *Tupi Cambios, S.A. v. Morgenthau*, 989 N.Y.S.2d 572, 576 (Sup. Ct. 2014) (quoting *Bolton v. Weil, Gotshal & Manges LLP*, 798 N.Y.S.2d 343 (Sup. Ct. 2004)); *see also Arista Records LLC v. Lime Group LLC*, 2011 WL 1642434, at *3 (S.D.N.Y. Apr. 20, 2011) (applying New York law) ("[A] party need not explicitly rely on advice of counsel to implicate privileged communications. Instead, advice of counsel may be placed in issue where, for example, a party's state of mind … is relied upon in support of a claim…. [Because the] legal advice that a party received may well demonstrate the falsity of its claim of good faith belief, waiver in these instances arises as a matter of fairness." (internal quotations omitted) (third and fourth alterations in original)).

At-issue waiver applies with special force where a party has "plac[ed] at issue its contracting intent and interpretation of the [contract]." *MBIA Ins. Corp. v. Patriarch Partners VIII, LLC*, 2012 WL 2568972, at *5 (S.D.N.Y. July 3, 2012) (applying New York law) (holding that where withholding party's witnesses "made factual assertions about [their] 'understanding' of the Master Agreement as well as what was 'intended' by the parties in the Agreement," "[d]isclosure of the documents withheld … as privileged" is required to "permit [the other party] a fair opportunity to assess and challenge [those] factual assertions at trial"). Where a party has "made assertions regarding the parties' alleged intent and purpose for including certain

contractual provisions," and especially where the client's counsel "was the draftsperson of the contracts," privilege "is waived … to the extent necessary to examine the validity of the parties' assertions of intent in the underlying contract formulations, and to examine [counsel's] role as draftsperson of the contracts at issue." *State-Wide Capital v. Superior Bank*, 2000 WL 20705, at *2 (S.D.N.Y. Jan. 12, 2000) (applying New York law); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80 Reporter's Note cmt. b (2000).

CIBC relies upon purported "business understandings" that differ from the Contracts' plain meaning to justify mistake-based reformation. CIBC has thus waived privilege over all communications that might bear on its understanding of the Contracts. *See*, *e.g.*, Dkt. 21 ¶¶ 80, 87-88; *see also* pp. 13-17, *supra*. CIBC's witnesses testified they discussed their "understandings" with counsel—including the draftsperson, Patel—but CIBC has blocked discovery of all such communications. *See* pp. 6-8, 16-17*, supra*.

CIBC's witnesses not only discussed their understanding with counsel before the Contracts were executed, but specifically considered the impact of physical settlement under the Altius IV Swaps on CIBC's payment obligations to Cerberus. In April 2010, upon learning of the Altius IV bonds' default, CIBC personnel discussed "contacting Cerberus in order to discuss termination of the CDS with G[oldman] S[achs] and taking delivery of the bonds." (Ex. Y.) From April-July 2010, CIBC discussed physical settlement of the Altius IV Swaps, informing Goldman that the Altius IV Swaps' Relevant Notional Amount was frozen by physical settlement. (*E.g.*, Ex. CC at -7051; Ex. O at 224:2-235:7, 332:13-335:11.) At the same time, CIBC businesspeople and in-house counsel engaged in a dialogue involving dozens of emails almost completely redacted by CIBC. (*E.g.*, Ex. Y; Ex. AA.)

This email chain clearly addressed CIBC's obligations to Cerberus under the A Note—not just its obligations to Goldman Sachs under the Swaps. Patel attached

both an Altius IV Swap confirmation *and the A Note* to one email (Ex. AA)—confirming the email addressed CIBC's obligations under the A Note. Just days later, CIBC's modeler sent Patel cashflow projections analyzing amounts "CIBC receives" from the Altius IV bonds and amounts "CIBC pays" to Cerberus on account of the Altius IV Swaps in the event "CIBC terminates CDS with GS and owns bond directly." *See* pp. 14-15, *supra*. And on November 17, 2014, after Cerberus asserted its right to Synthetic LIBOR based on a frozen Altius IV Individual RONA, Cohen forwarded the 2010 email chain (attaching the A Note) to CIBC in-house counsel and other employees (Ex. BB), and forwarded it twice more in the next few months—again confirming the chain related to the very issue Cerberus raised.

Indeed, once CIBC learned in 2010 that the Swaps' Relevant Notional Amount was frozen, it *must* have considered whether Individual RONA was likewise frozen for calculation of Synthetic LIBOR. As Cohen testified: "It was our view that the swap notional and the individual RONA were always the same." (Ex. P at 348:19-21.) And CIBC's December 8, 2014 internal presentation—by another recipient of the 2010 email chain—confirmed that, under the Contracts, CIBC was obligated to pay "LIBOR on RONA based on Notional of Syn[thetic] Assets." (Ex. Z at -0031.) However, CIBC refuses to produce unredacted versions of the 2010 or 2014 chains or any other communications with counsel showing its understanding of the Contracts, and has instructed its witnesses not to answer questions on the topic. (Ex. Q at 38:4-15, 220:23-221:24, 222:11-16; Ex. R at 233:13-234:6, 246:7-22, 247:17-24; Ex. T at 272:22-290:22.)

Having put its understanding at issue, CIBC may not hide potentially contradictory communications behind privilege. *See Tower Ins.*, 2014 WL 1279755, at *4; *William Tell*, 999 N.Y.S.2d at 333.

B. CIBC Waived Privilege by Selectively Testifying About the Subject Matter of Attorney-Client Communications

Beyond its at-issue waiver of privilege over communications concerning its contractual intent and understanding, CIBC waived privilege over such communications by proffering selective testimony about their subject matter.

One of CIBC's primary negotiators, Wayne Halenda, testified about the substance of his "business understanding" with Cerberus, and then testified that (1) he conveyed his "business understanding" to CIBC's lawyers—specifically Patel; and (2) although he did not read the Contracts, he believed—based solely on Patel's advice—that his "business understanding" was reflected in the Contracts.[7] In so testifying, Halenda necessarily disclosed both what he told counsel and the substance of counsel's advice to him. Another CIBC witness, George Stefanovic, testified to the same effect. (*E.g.*, Ex. T at 79:2-20.)[8] However, CIBC refuses to disclose any of its witnesses' communications with counsel or allow its witnesses to answer questions about them. *See* pp. 16-17, 20, *supra*.

Having selectively allowed disclosure of both its employees' communications to counsel and counsel's advice to its employees, CIBC cannot curtail inquiry into any such communications based on privilege. *E.g.*, *Orco Bank v. Protenias Del Pacifico*, 179 A.D.2d 390, 390-91 (1st Dep't 1992) (privilege waived by party's "selective disclosure of [legal] advice" where employee testified he had "relied upon the advice of [the company's] lawyers" but then "withheld more detailed testimony, and

---

[7] *E.g.*, Ex. Q at 38:4-11; *id.* at 222:11-22 ("Q. Is your understanding of the synthetic asset payment schedule based on discussions you had with CIBC's lawyers? A. Yes.... Q. Do you have any understanding of the meaning of the terms and provisions in the synthetic asset payment schedule, other than based on conversations with CIBC's lawyers? A. Not that I recall.").)

[8] CIBC also made selective disclosures through Patel, letting her testify about "CIBC's intent" but instructing her to withhold "internal attorney-client communications" about intent. (Ex. R at 113:5-114:24.)

documents, on grounds of attorney-client privilege"); *Vill. Bd. of Vill. of Pleasantville v. Rattner*, 130 A.D.2d 654, 655 (2d Dep't 1987) ("[S]elective disclosure [of privileged material] is not permitted as a party may not rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications.").

C. Cerberus's Motion Is Timely

Contrary to CIBC's argument at the October 16, 2019 compliance conference, Cerberus has not waived its right to bring this motion. *First*, discovery is ongoing, precluding waiver. *See PF2 Securities Evaluations, Inc. v. Fillebeen*, 168 A.D.3d 617, 618 (1st Dep't 2019) (laches doctrine inapplicable to motion to compel where court-ordered deadline for discovery motions had not expired; "Cases in which the court found that the right to compel had been waived generally involved situations in which discovery—including motions to compel—had concluded, either by rule or by court order"). Not only are depositions still underway, but CIBC itself just belatedly produced over *57,000* documents and served an amended privilege log last month (nearly eleven months after the November 2018 production deadline).

Second, when Cerberus first raised CIBC's waiver, it expressly reserved the right to move on the issue if—as has now happened—"CIBC should instruct any witness not to answer a question at a deposition in reliance on any waived privileges or protections." (Ex. J.) Cerberus reiterated this warning during depositions, inviting CIBC to reconsider its position, but CIBC declined. (Ex. R at 24:9-25:13; Ex. O at 222:7-17; Ex. T at 85:2-24.)

Third, Cerberus had to depose numerous witnesses to ensure a clear record of CIBC's instructions to block testimony before seeking a ruling from this Court. *See Tardibuono v. County of Nassau*, 181 A.D.2d 879, 881 (2d Dep't 1992) ("[I]n an

ordinary case, rulings on the propriety of deposition questions should only be made once a specific question has been asked, and its answer has been refused.").

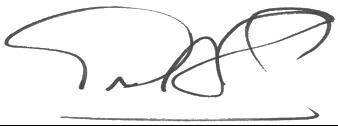
Finally, the selective disclosures by CIBC deponents of inconsistent and contradictory "business understandings" purportedly communicated to CIBC's draftsperson Patel, and Patel's advice that the Contracts reflected those "understandings," constitute independent subject matter waivers—including as recently as last month (*see* n. 8 and accompanying text, *supra*)—that further support this motion.

CONCLUSION

For the reasons set forth above, Cerberus requests that this Court compel CIBC to produce improperly withheld or redacted documents and to make its witnesses (including those already deposed) available to answer questions concerning the subjects as to which privilege has been waived.

Dated: October 17, 2019
New York, NY

Respectfully submitted,

By: 

Philippe Z. Selendy
Sean P. Baldwin
Oscar Shine
SELENDY & GAY PLLC
1290 Avenue of the Americas
New York, NY 10104
Telephone: 212-390-9000

Judson D. Brown
Alexandra I. Russell
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: 202-389-5000

Attorneys for Plaintiff and Counterclaim-Defendants

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

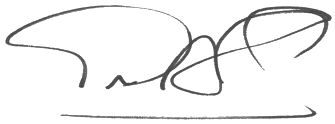
SECURITIZED ASSET FUNDING 2011-2, LTD., Plaintiff, v. CANADIAN IMPERIAL BANK OF COMMERCE, Defendant.	Index No. 653911/2015 Hon. Saliann Scarpulla I.A.S. Part 39 Motion Sequence No. __
CANADIAN IMPERIAL BANK OF COMMERCE, Defendant/Counterclaim-Plaintiff, v. SECURITIZED ASSET FUNDING 2011-2, LTD., Plaintiff/Counterclaim-Defendant. and SECURITIZED ASSET FUNDING 2009-1, LTD., PROMONTORIA EUROPE INVESTMENTS XXIII LDC, and CSMC 2012-8R, Ltd., Additional Counterclaim-Defendants.	

CERTIFICATE OF WORD COUNT COMPLIANCE

As a member of Selendy & Gay PLLC, I hereby certify that this memorandum of law is in compliance with Commercial Division Rule 17. The foregoing document

was prepared using Microsoft Word, and the document contains 6,982 words as calculated by the application's word counting function.

Dated: New York, New York
October 17, 2019



Philippe Z. Selendy