Appellate Division First Department No. 2023-03409
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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

LEHMAN BROTHERS INTERNATIONAL (EUROPE)
(in Administration),

Plaintiff-Appellant,

– against –

AG FINANCIAL PRODUCTS, INC.,

Defendant-Respondent.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO REARGUE OR LEAVE TO APPEAL FOR DEFENDANT-RESPONDENT

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PRELIMINARY STATEMENT

This case is a straightforward contract dispute. The Trial Court held a trial to decide whether Assured "reasonably determined" how much it was owed pursuant to the clear and unambiguous terms of the parties' agreement after LBIE defaulted on twenty-eight bespoke credit default swap transactions (the "Transactions").[1] After conducting a five-week trial, hearing testimony from eleven witnesses, reviewing thousands of pages of exhibits and hundreds of pages of post-trial briefing, the Trial Court ultimately issued a well-reasoned thirty-six page opinion (the "Decision After Trial") in Assured's favor, holding that Assured's calculation of its Loss (i.e., the amount owed pursuant to the parties' agreement) was reasonable and that LBIE did not meet its burden to prove otherwise. LBIE appealed, and this Court unanimously affirmed "for the reasons set forth in [the Trial Court's] well-reasoned decision." Decision and Order, *Lehman Bros. Int'l (Eur.) v. AG Fin. Prod., Inc.*, No. 2023/03409 (NYSCEF No. 30) at 1 (Mar. 14, 2024) (the "Decision").[2] This Court held that "there is no basis

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[1] Plaintiff-Appellant Lehman Brothers International (Europe) (in administration) is referred to throughout as LBIE; Defendant-Respondent AG Financial Products Inc., together with its affiliate Assured Guaranty Corp. ("AGC"), which guaranteed the relevant contractual obligations, are referred to as Assured; and the court below is referred to as the Trial Court.

[2] LBIE's Appellate Brief, Brief for Plaintiff-Appellant, *Lehman Bros. Int'l (Eur.) v. AG Fin. Prod., Inc.*, No. 2023/03409 (NYSCEF No. 22) (Sept. 22, 2023),

to disturb the trial court's determination" and that it considered LBIE's arguments and found them "unavailing." Decision at 1–2.

LBIE's motion for reargument or leave to appeal (the "Motion") now seeks a third bite at the apple, making the same arguments that the Trial Court and this Court have already considered and rejected. LBIE comes nowhere close to satisfying the requirements for either reargument or leave to appeal. As this Court has made clear, reargument is only appropriate where a party can identify facts or law that the Court "overlooked or misapprehended," and it "is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dep't 1992) (citation omitted). LBIE's Motion fails to meet that standard and instead recycles two of the same challenges to the Trial Court's decision that it previously raised on appeal (only in a slightly different order): (1) challenging the Trial Court's "application of an objective standard of reasonableness," *compare* Motion at 14 *with* LBIE Appeal Br. at 42; and (2) challenging the Trial Court's "finding [that] market values [were] irrelevant." *Compare* Motion at 18 *with* LBIE Appeal

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is referred to herein as "LBIE Appeal Br." Assured's Appellate Response Brief, Brief for Defendant-Respondent, *Lehman Bros. Int'l (Eur.) v. AG Fin. Prod., Inc.*, No. 2023/03409 (NYSCEF No. 26) (Dec. 15, 2023) is referred to herein as "Assured Appeal Response Br."

Br. at 28. That failure alone is reason enough to deny LBIE's request for reargument.

In any event, both of LBIE's challenges are completely without merit and the Court was correct in rejecting them before. On both issues, LBIE's arguments rely entirely on mischaracterizations of the key terms of the parties' agreement, well-settled New York law and other legal precedents, the law of the case, the evidence at trial, and the Trial Court's findings. There is extensive evidence supporting the Trial Court's finding that Assured calculated its Loss following LBIE's default in an objectively reasonable manner, including testimony from Assured's fact and expert witnesses that the Trial Court found credible and persuasive. That evidence is summarized below and was also discussed in greater detail in Assured's Appeal Response Brief. Assured Appeal Response Br. at 50–59. There is also overwhelming legal and factual support for the Trial Court's determination that Assured was not required to determine its Loss based on market prices and that the purported evidence of market prices that LBIE introduced at trial was not relevant to Assured's bargain. As described below and in Assured's Appeal Response Brief, in assessing the relevance of market prices, the Trial Court appropriately considered the facts and circumstances of this case, including the express terms of the parties' agreement, the economic bargain that was struck,

relevant New York law, and expert evidence regarding market conditions at the time. Assured Appeal Response Br. at 23–32, 46–49.

Finally, LBIE's request for leave to appeal the Court's affirmance to the New York Court of Appeals also fails for the additional reason that the challenges that LBIE raises do not involve questions of law, but instead reflect LBIE's disagreement with the Trial Court's factual findings, including how it weighed the evidence and the credibility determinations it made, and how it applied the law to the unique facts of this case. Review by the Court of Appeals is limited to questions of law and, for this reason, the Motion must be denied. But even if that were not the case, LBIE cannot conceivably satisfy the additional requirements for obtaining leave to appeal, which would require it to identify questions of law that are "novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." Rules of Ct. of Appeals (22 N.Y.C.R.R.) § 500.22(b)(4). Here, the Trial Court's decision and this Court's affirmance are consistent with New York law, supported by the factual record, and reflect the application of settled law to the unique facts of this case.

For these reasons and those set out below, LBIE's Motion must be denied.

PROCEDURAL HISTORY

I. Summary Judgment

In July 2018, the Trial Court issued a decision granting in part and denying in part Assured's motion for summary judgment (the "SJ Decision"). The SJ Decision, later affirmed by this Court, dismissed LBIE's claim for breach of the implied covenant of good faith and fair dealing and dismissed LBIE's breach of contract claim based on the design and execution of Assured's Market Quotation auction. With respect to LBIE's sole remaining claim for breach of contract based on Assured's calculation of Loss, the SJ Decision held that Assured, as the non-defaulting party, was free to "to select any methodology for calculating Loss, so long as such methodology is reasonable and in good faith" and that Assured had the "discretion to calculate Loss without reference to market prices." A-59–60, 62. The SJ Decision held that LBIE raised a genuine question of fact about one issue, whether Assured's Loss calculation departed from "standard industry practice," and that a trial was necessary to determine whether Assured's exercise of its discretion "was objectively reasonable" and "made 'in good faith.'" A-59, 62.

II. The Trial

The Trial Court held a five-week trial from October 18, 2021 to November 19, 2021. During its case-in-chief, LBIE offered a single fact witness (Eduardo

Viegas, a former director at PricewaterhouseCoopers ("PwC") which served as administrator for LBIE after it filed for insolvency) and four expert witnesses (Graham Bruce, Chief Executive of Ainigma Group; Leslie Rahl, Founder and Managing Partner of Capital Market Risk Advisors; Evy Adamidou, a consultant; and Peter Niculescu, Partner at Capital Market Risk Advisors). Assured offered three fact witnesses (Benjamin Rosenblum, the Chief Actuary of Assured; Rob Bailenson, the Chief Financial Officer of Assured; and Michael Schozer, the former President of Assured) and three expert witnesses (Joshua Cohn, Managing Principal of JBHS LLC; Craig Pirrong, Professor of Finance at the University of Houston; and David Prager, Managing Director at Kroll, LLC). The Trial Court also permitted LBIE to present a rebuttal case, during which it introduced additional testimony from two of its expert witnesses (Bruce and Niculescu). In total, the parties introduced more than 300 exhibits, totaling more than 12,000 pages.

The parties submitted two rounds of post-trial briefing (roughly 300 pages in total) and fifteen pages of supplemental briefing at the Trial Court's request on discrete questions relating to the effect of rejecting LBIE's valuation.

III. Decision After Trial

In a detailed, methodical, and well-reasoned thirty-six page decision, the Trial Court ruled that Assured's calculation of Loss was "objectively reasonable

and made in good faith." A-76. On LBIE's breach of contract claim, the Trial Court found that LBIE failed to prove there was a standard market practice from which Assured's conduct departed and that "LBIE's valuation, [which] relied entirely on market prices its experts constructed for this litigation, was insufficient to meet LBIE's burden to prove its own calculations were reasonable." A-77. On Assured's counterclaim, the Trial Court found that Assured met its burden to show that its conduct was "commercially reasonable and in good faith." A-79.

IV. Appellate Division Decision

LBIE appealed the Trial Court's decision to this Court. This Court reviewed more than 150 pages of additional briefing and heard oral argument on February 21, 2024. On March 14, 2024, this Court unanimously affirmed the Trial Court's judgment. This Court affirmed "for the reasons set forth in the [Trial Court's] well-reasoned decision," finding there was "no basis to disturb the [T]rial [C]ourt's determination, which was based upon its resolution of conflicting expert testimony." Decision at 1.

BACKGROUND

I. The Parties

Assured. Assured is a monoline insurer. A-6834–36. This means it is in the business of guaranteeing the payment flow of insured securities as those payments come due in return for regular, fixed, premium payments. A-6834–36.

Assured offered this protection to counterparties under financial guaranties, or through its subsidiary, AGFP, under bespoke credit default swaps ("CDS"). A-1694–95.[3]

Lehman Brothers International (Europe) (in administration) ("LBIE"). LBIE, a foreign subsidiary of Lehman Brothers Holdings Inc. ("LBHI"), was a broker-dealer that, among other things, bought and sold CDS. A-8429. On September 15, 2008, LBHI declared bankruptcy in the United States and LBIE entered administration in the United Kingdom. A-8429, 702–03.

II. The Transactions

Under the terms of the Transactions, "LBIE would make premium payments to Assured in return for Assured covering shortfalls of principal or interest as they became due on" senior tranches of various underlying reference obligations. A-79. Each of the Transactions' underlying reference obligations is an asset-backed security ("ABS") whose payments are generated with cash from collateral assets.

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[3] The Transactions here were CDS with bespoke terms that imposed economic obligations on Assured nearly identical to the obligations it undertakes in financial guaranties. A-3777. Additionally, because AGFP was thinly capitalized, had no employees, and no credit rating of its own, A-2733-34, the parties' economic arrangement depended on AGC (identified in the parties' agreement as AGFP's Credit Support Provider) issuing a financial guaranty insurance policy guaranteeing AGFP's payment obligations. That policy was expressly incorporated into the agreement between LBIE and AGFP, which includes the 1992 ISDA Master Agreement, the schedule thereto, and all confirmations thereunder (together, the "Agreement"). A-7166.

A-352. Fourteen of the twenty-eight Transactions reference UK residential mortgage backed securities ("RMBS"), eleven reference collateralized loan obligations ("CLO"), one references a collateralized debt obligation ("CDO"), and two reference baskets of twenty U.S. subprime RMBS (instead of a single security) that were included in the ABX 2006-02 and 2007-01 indexes ("ABX"). A-80–81.

A. Assured's CDS Were Not Standard Or Easily Tradeable

The Transactions had "bespoke (monoline specific) terms" that were different from the standard terms of most CDS because (1) the Transactions were "pay as you go," which meant that Assured's only obligation was to pay actual shortfalls, if any, as they came due; (2) the Transactions did not provide for "physical" or "cash" settlement; and (3) the Transactions did not require Assured to post collateral. A-105, 78, 2812–13, 2831, 2863–64, 2868, 2813–14, 7051, 1465, 5431–32. Assured's business model was to sell protection, whether in financial guaranty or CDS form, and to hold those contracts to maturity. A-2731–34, 2911, 7852. AGFP and AGC did not trade in and out of the CDS market. A-1699.

B. Structural Protections In The Transactions

As the Trial Court found, the Transactions had "significant structural protections" that made it highly unlikely that Assured would owe payments to LBIE. A-110. For the ABX, Assured only guaranteed senior tranches that would

not incur losses until "junior tranches had suffered their losses entirely and had entirely been written down to zero." A-3959, 1201–02. There were also several layers of structural protection before any losses would be incurred on the ABX because each loan was originally overcollateralized, the pools of loans backing each security were overcollateralized, and the pools generated more cash flow than needed to pay investors. A-3957, 3959.

The UK RMBS and CLOs had many of the same protections, as well as additional protections such as a "master trust structure" under which new loans were always coming into the pool, providing an opportunity to maintain overcollateralization, additional reserve funds, and equity cushions. A-3960–61.

C. Express Contractual Language That Parties "Need Not" Calculate Loss Based On Market Prices

All twenty-eight Transactions were governed by a 1992 ISDA Master Agreement, which allows parties to choose the provisions that will govern in the event of early termination by selecting from either "First Method" or "Second Method" and either "Market Quotation" or "Loss." Here, the parties selected Second Method and Market Quotation. A-7160.

Market Quotation requires the non-defaulting party to solicit quotations from "Reference Market-makers . . . for an amount, if any, that would be paid to such party (expressed as a negative number) or by such party (expressed as a positive number) in consideration of an agreement between such party . . . and the quoting

Reference Market-maker to enter into a transaction (the 'Replacement Transaction')." A-7147. But, "[i]f fewer than three quotations are provided, it will be deemed that the Market Quotation . . . cannot be determined," and the non-defaulting party should then calculate its "Loss." A-7148. The Loss provision gives the non-defaulting party discretion to determine its losses, including based on its "loss of bargain," so long as it does so "reasonably" and "in good faith." A-7147. In doing so, the non-defaulting party "may (but need not)" reference market prices. A-7147. In its entirety, the Loss provision states:

> **"Loss" means**, with respect to this Agreement or one or more Terminated Transactions, as the case may be, and a party, the Termination Currency Equivalent of **an amount that party reasonably determines in good faith to be its total losses and costs (or gain, in which case expressed as a negative number)** in connection with this Agreement or that Terminated Transaction or group of Terminated Transactions, as the case may be, **including any loss of bargain**, cost of funding or, at the election of such party but without duplication, loss or cost incurred as a result of its terminating, liquidating, obtaining or reestablishing any hedge or related trading position (or any gain resulting from any of them). Loss includes losses and costs (or gains) in respect of any payment or delivery required to have been made (assuming satisfaction of each applicable condition precedent) on or before the relevant Early Termination Date and not made, except, so as to avoid duplication, if Section 6(e)(i)(1) or (3) or 6(e)(ii)(2)(A) applies. Loss does not include a party's legal fees and out-of-pocket expenses referred to under Section 11. A party will determine its Loss as of the relevant Early Termination Date, or, if that is not reasonably practicable, as of the earliest date thereafter as is reasonably practicable. **A party may (but need not) determine its Loss by reference to quotations of relevant rates or prices from one or more leading dealers in the relevant markets.**

A-7147. The SJ Decision established that Assured was, therefore, permitted "to

select any methodology for calculating Loss, so long as such methodology is reasonable and in good faith." A-59–60.

III. LBIE Defaults

On September 15, 2008, LBIE filed for insolvency protection in the United Kingdom, entered into administration, and stopped making the fixed premium payments it owed Assured under the Transactions. A-81, 995. Assured terminated the Transactions on July 23, 2009. A-7592. Extensive evidence at trial, summarized in Assured's Appeal Response Brief at 15–27, established that the Transactions had no real-world value to LBIE at the time of termination.

The evidence at trial showed that LBIE's own employees admitted in contemporaneous documents that the Transactions were not assets to LBIE. The evidence also showed that LBIE acknowledged internally that the non-standard terms of the Transactions (including a lack of collateral posting), as well as the counterparty credit risk involved in facing Assured, was a challenge to any potential assignment to another party (or novation) and that the reference obligations were unlikely to experience significant shortfalls.

The evidence further showed that in late 2008 and early 2009, LBIE tried and failed to find counterparties interested in novation, and at trial, LBIE offered no evidence of any party prepared to take LBIE's positions in the Transactions. Although LBIE tried to use three indicative bids (not firm bids by parties willing to

transact) to provide "market color" for the Transactions' market value, the Trial Court correctly found the evidence showed the indicative bids were nothing more than attempts to "bolster" LBIE's "litigation position against Assured" and did not reflect the Transactions' value. A-82–83 (citing A-913–14).

IV. Assured Terminates The Transactions

After unsuccessfully attempting to engage LBIE in settlement negotiations, Assured delivered a notice of termination to LBIE on July 23, 2009 (the "Early Termination Date") and followed the post-termination process established in the ISDA Master Agreement.

A. Valid Market Quotation Auction Did Not Yield A Single Bid

After terminating the Transactions, Assured engaged Henderson Global Investors Ltd., a leading financial advisor, to design and execute an auction of the Transactions as required under the ISDA Market Quotation process. A-41. Not one bidder was willing to pay a single dollar to step into LBIE's position in the Transactions. Although LBIE tried to dismiss the auction as a mere pricing exercise, the Trial Court rejected that argument at summary judgment after finding that LBIE failed to challenge "in any material respect" Assured's proof "that the structure and design of the auction was reasonably calculated to increase the likelihood that the Market Quotation process would be successful." A-48. Because there was no party willing to take LBIE's place and make periodic

premium payments in exchange for protection on shortfalls in the underlying securities, Assured could not preserve the benefit of its bargain by entering into replacement transactions.

B. Assured Calculated Its Loss As Loss Of Bargain

The financial consequence of LBIE's default for Assured was that it would no longer receive premium payments from LBIE over the life of the Transactions and would no longer have to make floating payments in the event of any interest or principal shortfalls. A-2911. As a result, Assured calculated its loss of bargain by calculating the net present value of these two payments streams (i.e., premium payments and floating payments), which is sometimes referred to as a discounted cash flow analysis.[4] A-7594, 2911. Assured's calculation of the first payment stream was straightforward because the premium amounts were contractually fixed. A-88, 7594. Specifically, Assured determined that the present value of the premiums LBIE would have paid Assured from the Early Termination Date through the end of the life of the Transactions was $35,191,751.62. A-7594. LBIE had also already failed to pay $13,049,366.23 in premiums as of the Early

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[4] LBIE attempts to characterize Assured's discounted cash flow analysis as an insurance-specific methodology. Motion at 9, 10, 16. LBIE ignores the fact that a discounted cash flow analysis is a well-established valuation methodology used in a variety of contexts, including by LBIE's own experts when calculating Loss under 1992 ISDA Master Agreements in other cases. *See* Assured Appeal Response Br. at 29, 36–37.

Termination Date, resulting in a total amount owed by it to Assured of $48,241,117.85. A-7594–95.

To calculate the second payment stream, the present value of the floating payments, Assured used the same regular-course-of-business models that its surveillance and loss reserving groups used to estimate expected losses for all of its transactions. A-7595, 2913, 5765. Assured's analysis showed there were no expected losses on twenty-six of the Transactions (all of the UK RMBS, CLO, and CDO Transactions), which continued to be investment-grade during the financial crisis. A-7598–600, 5809–55, 5949–55, 1767–68. This conclusion was consistent with the extensive structural protections in these securities, described above, and with Assured's underwriting analysis, which showed that Assured would not incur a single dollar of loss on the UK RMBS, unless "home prices . . . [had] declined and losses . . . [were] more severe than [anything] ever . . . experienced in the UK market including [during] the bombing of London and the economic fallout around those times," or on the CLOs, unless losses were "two times [historic] averages on the corporate loan losses." A-3962–63, 2794–95, 2819–20.

Assured originally projected no losses on the ABX Transactions, but its updated analysis in 2009, which took into account developments in the housing market and the performance of the mortgages, determined there was the potential for losses. A-5794–804, 1697–1698, 7838–50. As a result, these Transactions

were elevated to Rosenblum for the calculation of expected losses. A-1760–61. To do so, Assured used the same methodology it used for calculating expected losses on all transactions referencing similar securities (U.S. subprime RMBS). A-1760–61. Assured's model—which was run on the industry-standard Intex platform—relied on three key parameters: (1) how many borrowers in the relevant RMBS pools would default on their mortgages (represented as the cumulative default rate or CDR), (2) how many would prepay (represented as the prepayment rate), and (3) how severe losses on mortgages in default would be (represented as the loss severity). A-1794–95. In each case, Assured set these inputs based on actual market data for the specific RMBS at issue—which was available through Intex. A-1706–07.

Assured then had to apply its judgment to determine how defaults, prepayment, and loss severity would evolve over time. A-1760. In doing so, Assured took into account relevant market conditions, including the severity of the downturn in the housing market that had begun in 2007 and the many indications that the housing market was beginning to stabilize, including based on unprecedented government intervention by the Obama administration. A-1728–32. Specifically, Assured continued to use historically high default rates in its model based on then-current observed data for a period of between twenty-four and twenty-seven months, and determined that, over time, each of the parameters in its

model would eventually return to normalized historical levels. A-1606. Based on this modeling, Assured calculated that the present value of the expected losses on the two ABX Transactions would total $27,577,817.65, which it would have been required to pay LBIE. A-7598, 7604, 1761–65. Subtracting this amount from the $48,241.117.85 in unpaid and future premiums owed by LBIE resulted in a Loss calculation of $20,663,300.20 owed by LBIE to Assured. A-7595, 7603–04, 1761–65.[5] This is the economic loss that Assured suffered as a result of LBIE's default as of the Early Termination Date.

There was extensive evidence at trial showing the reliability of Assured's modeling. First, the judgments that Assured made about how to model losses over time were consistent with those made by other market participants who engaged in similar analysis, including Moody's and Standard & Poor's ("S&P"). A-4371–73.

Second, Assured's models were regularly used for multiple business purposes. Assured relied on the same models: (1) in its underwriting process, where accurate modeling was critical to its decisions to enter into new transactions, A-5797, 7842, 2844–46, 2856; (2) after entering into transactions, to monitor their credit quality and determine which transactions required increased surveillance or

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[5] The original statement of calculations, A-7591–602, contained an inadvertent transposition error, which Assured notified LBIE of in July 2019. A-7603–04, 1763–64, 1833–35.

remedial action, A-6838–39; (3) to determine its regulatory loss reserves for its entire portfolio, including "literally hundreds of transactions" unrelated to this dispute, A-4001, 1563–64, 2913; (4) as the basis for its financial reporting to investors, A-6838–41, 6849–50, 6795–96, 6809–10, 7683, 3772–74, 3798; and (5) as the basis for reporting required by its insurance industry regulators. A-9059, 3772–74, 3871. As the Trial Court found, "accurate modelling was essential to [Assured's] risk management." A-89.

Third, because Assured's expected loss methodology was critical to its business, it was subject to multiple layers of internal and external review. A-1710–14, 4002–03.

Finally, the methodology Assured used to calculate Loss was consistent with how it described the value of its CDS transactions in the extensive disclosures it filed as a publicly-traded, regulated insurance company. A-3772–74. Assured repeatedly stated that its economic obligations under its CDS transactions were limited to protecting against shortfalls in interest and principal payments on the reference obligations as they came due. A-3777–78, 3973, 1694–96.

V. Financial Crisis And Market Dislocation

There was extensive evidence at trial that during the financial crisis, many securities (including the U.S. subprime RMBS referenced in the ABX Transactions at issue here) were trading at prices substantially lower than their fundamental

value. *See* Assured Appeal Response Br. at 26–27. This extreme dislocation in the markets further supported Assured's decision to calculate Loss using a discounted cash flow analysis, which tracked the parties' actual economic obligations under the contracts, rather than by using a model based on dislocated market prices, like the one created by LBIE's litigation experts.

LEGAL STANDARD

A motion for leave to reargue may be granted "only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *William P. Pahl Equip. Corp. v. Kassis,* 182 A.D.2d 22, 27 (1st Dep't 1992) (citation omitted). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." *Id.*

Leave to appeal a decision of this Court to the New York Court of Appeals may be granted only for decisions in civil cases that "merit review," meaning they raise issues of law that are "novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 N.Y.C.R.R. § 500.22(b)(4). Leave to appeal is properly denied where the case involves settled general principles of law and "involves mere application to unique facts." N.Y. Court of Appeals Civil Jurisdiction and

Practice Outline, p. 16 (2023), https://www.nycourts.gov/ctapps/forms/civiloutline.pdf. The Court of Appeals has also held that it "is without power to review findings of fact if such findings are supported by evidence in the record." *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 391 (1995).

ARGUMENT

I. There Is No Basis For Reargument Or Leave To Appeal On The Issue Of Whether The Trial Court Correctly Applied The Objective Reasonableness Standard To The Facts Of This Case.

The first issue on which LBIE seeks reargument or a further appeal is whether the Trial Court properly applied the objective standard of reasonableness to the facts of this case. LBIE rehashes two arguments related to this issue, both of which LBIE previously raised in the briefing and argument on its appeal, and which this Court considered and correctly rejected.

First, LBIE argues that Assured's Loss calculation could not have been objectively reasonable because Assured departed from a purported uniform market practice of calculating Loss based on market prices. Motion at 14–16. This is a purely factual argument about what the evidence showed. It fails because it relies entirely on LBIE's mischaracterizations of the factual record and its omission of any reference to the extensive evidence on which the Trial Court relied to support its finding that Assured's Loss calculation was objectively reasonable. LBIE

falsely asserts, as it did in its Appeal Brief, that it presented "unrebutted evidence" that it was "standard market practice" to "calculate Loss by reference to market values." Motion at 15, *see* LBIE Appeal Br. at 44–48. This is simply not true.

As the Decision After Trial makes clear, there was extensive support in the record for the Trial Court's factual finding that LBIE came "nowhere close" to satisfying its burden and completely "failed to prove the existence of a uniform market practice of resorting to market prices to determine 'Loss.'" A-103–04. This includes admissions by LBIE's own experts, treatises and industry reports, case law interpreting the ISDA Loss provision, and guidance published by ISDA itself (the industry group responsible for drafting the Master Agreement) that contradicted the existence of any purported uniform market practice for calculating Loss. Notably:

- LBIE's experts admitted that they did not perform any systematic study or market survey to support the existence of a uniform market practice requiring non-defaulting parties to calculate Loss based on market prices, nor could they point to any. *See* A-420, 2106–07, 2643–44, 1434.
- LBIE's experts had themselves departed from the purported uniform market practice in other lawsuits where they were hired to calculate Loss under the 1992 ISDA Master Agreement. *See* A-104–05 (discussing how two of LBIE's experts did not rely on market prices and instead used a discounted cash flow analysis in the *Devonshire* and *Solstice* cases).
- Treatises by leading scholars affirmed that there was no consensus that Loss requires the use of market data. *See* A-6903–04, 6950.

- Industry reports—including reports on which LBIE's experts purported to rely—demonstrated the absence of any industry-wide consensus for valuing terminated transactions. *See* A-6218, 7834, 3623.

- Case law interpreting the ISDA Loss provision, including the *Intel* and *Devonshire* decisions, supported the Trial Court's conclusion that there was no market consensus requiring a single methodology for calculating Loss. *See* Assured Appeal Response Br. at 34–35.

- And ISDA, which LBIE's own witness referred to as "the voice of the derivatives industry," issued guidance in its User's Guide to the 1992 ISDA Master Agreement that "'Loss' is supposed to be flexible, [and] involves more than what a Market Quotation exercise would take into consideration." A-98, 457.

In light of this overwhelming evidence, as this Court previously recognized, LBIE did not satisfy the standard for overturning the Trial Court's decision, which would have required LBIE to show "that the court's conclusions could not be reached under any fair interpretation of the evidence." Decision at 1 (quoting *Watts v State of New York*, 25 AD3d 324 (1st Dept 2006)).[6]

Second, LBIE argues that, even apart from market practice, the evidence Assured presented was insufficient to show that its Loss calculations were objectively reasonable. LBIE relies on the same criticisms that it raised in its Appeal Brief that Assured's methodology for calculating its Loss was "unprecedented" and "subjective." Motion at 16; *see* LBIE Appeal Br. at 3, 15–

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[6] For example, LBIE misleadingly cites to Assured's filings with the U.S. Securities and Exchange Commission as evidence that Assured acknowledged a purported market practice of calculating Loss using market prices, Motion at 15, but the evidence showed the opposite. *See* Assured Appeal Response Br. at 39–40.

16; Reply Brief for Plaintiff-Appellant, *Lehman Bros. Int'l (Eur.) v. AG Fin. Prod., Inc.*, No. 2023/03409 (NYSCEF No. 29) at 3 (Jan. 12, 2024). LBIE once again relies on its characterization of Assured's loss reserve model as "subjective" to argue that it could not be objectively reasonable, but the Trial Court properly rejected this purely rhetorical argument. LBIE's own valuation expert conceded at trial that all models require the application of subjective judgment, A-2089–90, including LBIE's own litigation model. LBIE's "subjectivity" argument fails to address the *reliability* of Assured's model, which is at the heart of reasonableness. *See* Assured Appeal Response Br. at 54.

LBIE's attacks on Assured's Loss calculation also fail because LBIE distorts the factual record and ignores voluminous testimony from Assured's fact and expert witnesses, as well as documentary evidence introduced at trial, that refutes LBIE's claims and overwhelmingly shows that Assured's Loss calculations were objectively reasonable. This includes evidence that:

- Assured calculated its Loss for all twenty-eight Transactions using the same ordinary course-of-business model that its surveillance and loss reserving groups used for multiple critical business purposes unrelated to this litigation. *See* A-89.
- Assured's loss reserve methodology was "(1) independent and (2) subject to multiple layers of oversight," including by Assured's Loss Reserve Committee, A-89, 1710–14, by a separate Audit Committee, comprised of independent directors of Assured's parent holding company, and by Assured's independent outside auditor, PwC, as part of a "full audit." *See* A-89, 1710–14, 3809;

- Documentary evidence and testimony from Assured's Chief Actuary establishing the basis for Assured's calculations with respect to *each* of the 28 Transactions. *See* Assured Appeal Response Br. at 52–53.

- Credible expert testimony demonstrating that Assured's methodology appropriately accounted for the structural protections within the Transactions that mitigated potential losses, unlike the valuation model proposed by LBIE's expert for purposes of this litigation, which the Trial Court found was invented "out of whole cloth." *See* A-3960–63, 4071–72, 106; *see also* Assured Appeal Response Br. at 11–12, 20–26, 52–53.

- Assured would have exposed itself to significant negative repercussions, such as underreporting losses and overpaying on its purchases of RMBS, if its models had been overly optimistic as LBIE contends. *See* A-1757–59.

- Evidence of substantial similarities between Assured's methodology and those used by the only two independent rating agencies that disclosed their methodology for projecting losses on similar instruments. *See* A-6631, 6355, 4363–72, 4027–28; *see also* Assured Appeal Response Br. at 56–57.

- Evidence that Assured's Loss calculations were consistent with LBIE's own pre-litigation internal assessments. *See* Assured Appeal Response Br. at 57–58.

In short, the record plainly supports this Court's conclusion that "there is no basis to disturb the trial court's determination." Decision at 1. And to the extent that LBIE is arguing (again) that the Trial Court did not apply the correct standard, that argument fails because the Trial Court made explicit in its opinion that it was

applying an "objective reasonableness" standard, which it did by considering all facts and circumstances. A-76, Assured Appeal Response Br. at 30–31.[7]

Not only do LBIE's arguments regarding "the application of an objective standard of reasonableness," Motion at 14, lack merit, but they also fail to satisfy the requirements for granting reargument or leave to appeal. As demonstrated above, LBIE has simply recycled arguments that it made before the Trial Court and before this Court during its appeal. This Court has made clear that "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." *William P. Pahl Equip. Corp.*, 182 A.D.2d at 27. LBIE fails to identify any facts or law that this Court overlooked, and LBIE's assertion that the Trial Court's decision did not involve "conflicting expert testimony" is plainly false. Motion at 13. The Trial Court's opinion not only makes clear that it found LBIE's expert testimony unpersuasive, but also approvingly cited and relied on the testimony from Assured's experts. *See, e.g.*, A-85–87, 89–92, 96, 104–106. Finally, the arguments LBIE presents do not raise a question of law, but instead simply reflect LBIE's disagreements with how the Trial Court applied the law to the unique facts and circumstances of this case.

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[7] As the SJ Decision recognized, "[i]t is a basic tenet, applied across a wide range of legal issues, that the question of what is reasonable may require consideration of the facts and surrounding circumstances in the case." A-58.

Where, as here, there is evidence to support the trial court's findings, the Court of Appeals is "without power" to review those findings. *Dalton*, 87 N.Y.2d at 391. As a result, this Court should deny LBIE's Motion.

II. There Is No Basis For Reargument Or Leave To Appeal On The Issue Of Whether The Trial Court Correctly Found LBIE's Purported "Market Price" Evidence Irrelevant.

The second issue that LBIE raises for reargument or a further appeal is whether the Trial Court incorrectly held that LBIE's market price evidence was irrelevant to assessing the reasonableness of Assured's Loss calculation under the facts of this case. LBIE again rehashes two arguments that it previously raised in the briefing and argument on its appeal, and which this Court considered and correctly rejected.

First, LBIE argues that New York law requires that the Loss calculation under the 1992 ISDA Master Agreement be determined based on market prices. But LBIE's argument contradicts the plain language of the Agreement, which states that "[a] party may (but need not) determine its Loss by reference to quotations of relevant rates or prices from one or more leading dealers in the relevant markets." A-7147. LBIE also ignores case law interpreting the Loss definition that confirms the non-defaulting party has "discretion and flexibility in selecting the means for calculating its Loss" including the "discretion not to use market quotations in determining Loss." A-98 (quoting *In re Lehman Bros.*

Holdings Inc. v. Intel Corp. ("*Intel*"), 2015 WL 7194609, at *12 (Bankr. S.D.N.Y. Sept. 16, 2015)); A-99 (citing *Intel*, at *11). Further, LBIE misleadingly cites cases that do not involve ISDA agreements or interpret similar contractual provisions and therefore have no application here. Motion at 18-20. *Schonfeld v. Hilliard* addressed how to calculate consequential damages in connection with the plaintiff's loss of "an income-producing asset" (i.e., television programming licenses). 218 F.3d 164, 176 (2d Cir. 2000). *White v. Farrell* addressed whether to measure damages as of the date of the breach of contract to purchase a piece of land or as of the date the land was resold. 20 N.Y.3d 487, 489 (2013). Finally, *Credit Suisse First Boston v. Utrecht-America Finance Co.* addressed the calculation of damages resulting from the defendant's "failure to deliver an asset" in the absence of an agreed-upon contractual damages clause. 923 N.Y.S.2d 482, 483 (1st Dep't 2011).[8]

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[8] LBIE also misconstrues the decisions in *Devonshire*, which the Trial Court correctly interpreted and applied here after receiving two rounds of supplemental post-trial briefing on that case's relevance. *See Lehman Bros. Int'l (Eur.) v. AG Fin. Prod., Inc.*, No. 653284/2011 (NYSCEF Nos. 786-89). According to LBIE, the Ontario Court of Appeals' decision in that case stands for the proposition that a Loss calculation must include a risk premium in all cases. Motion at 22. But LBIE disregards that Devonshire, the non-defaulting party, calculated its Loss as the actual amount it would lose as a result of Barclays' default, taking into account the agreement between the parties that set forth the parties' payment obligations. Like Assured, Devonshire did not attempt to calculate a theoretical market price for the terminated transactions, nor did Devonshire add a risk premium to its

The Trial Court appropriately considered the facts and circumstances of this case, including the economic terms of the Transactions and market conditions at the time of termination, in determining that Assured's calculation was reasonable. New York law is clear that reasonableness provides sufficient flexibility to consider "all of the particular circumstances of the case which may reasonably affect the conduct required." *Bethel v. New York City Transit Auth.*, 92 N.Y.2d 348, 353 (1998) (citation omitted). The Trial Court correctly considered the evidence of market conditions at the time and concluded that "LBIE's valuation was commercially unreasonable" in this case because the pricing proxies it put forward reflected market dislocation and not the actual economics of the Transactions, which only required Assured to make payments for shortfalls that occurred on the referenced securities as they came due over the life of the Transactions. A-108.

Second, LBIE argues that the Trial Court misapplied the "cross-check principle." Motion at 2. That is also wrong. The cross-check principle is the notion articulated by some *foreign* courts that the result of Loss and Market Quotation "may be usefully tested by way of cross-check reference to the other." A-98 (quoting *Anthracite Rated Invs., Ltd. v. Lehman Bros. Fin. S.A. in*

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calculation. The trial court in *Devonshire* approved this Loss calculation, and it was not appealed.

Liquidation, [2011] EWHC (Ch) 1822 (Eng.)). Though LBIE describes cross-check as a "bedrock principle," Motion at 20, *Intel*, the only U.S. case to even address this principle, actually approved a Loss calculation that substantially diverged from market prices. *Intel*, 2015 WL 7194609, at *19. And ISDA itself has rejected the cross-check principle, stating that Loss and Market Quotation "could and *should* produce different results in certain scenarios." ISDA's Amicus Brief in Support of Def. Intel Corp.'s Mot for Summ. J., ECF No. 57-1 at 13, *Lehman Bros. Holdings Inc. v. Intel Corp.* ("*In re Lehman Bros. Holdings Inc*."), Case No. 13-1340-SCC (Bankr. S.D.N.Y. Jan. 20, 2015)(emphasis in original).

Nor did the SJ Decision hold that cross-check was law of the case, but merely that there was a triable issue of fact "as to whether the cross-check principle is capable of application to this case." A-68. In fact, that decision held that the Loss definition permits Assured, as the non-defaulting party, the discretion "to select any methodology for calculating Loss, so long as such methodology is reasonable and in good faith" and that there is "nothing in the text of the definition of Loss that explicitly mandates any particular calculation method . . . ." A-59–60. The SJ Decision specifically rejected the notion that the Agreement "categorically prohibits" a non-defaulting party "from calculating its Loss without reference to market prices," and explained that "the Loss provision could not be clearer in

stating that a party 'may (but need not)' calculate Loss using market quotations of rates or prices." A-60.

Consistent with the SJ Decision, after hearing the evidence, the Trial Court properly concluded that the cross-check principle has no application here because the Market Quotation failed and the real-world evidence showed no market participant was willing to pay a single dollar to enter into LBIE's shoes on the Transactions. *See supra* 12–13. In other words, there was no reliable market quotation against which to "cross-check" Assured's Loss calculation. And ultimately, this Court correctly considered and rejected LBIE's argument that the Trial Court's decision was somehow inconsistent with this Court's previous decision on summary judgment. Decision at 2.

Finally, LBIE's arguments regarding the relevance of market prices also do not warrant granting reargument or leave to appeal. *See supra* 19-20. LBIE does not even purport to identify any laws or facts that this Court overlooked or misapprehended in deciding its appeal, as is required for a motion for reargument to succeed. Nor has LBIE presented a question of law that could be appropriately considered by the Court of Appeals. Instead, it merely challenges this Court's factual findings.

And even if LBIE had raised a question of law, it certainly has not presented one meriting review by the Court of Appeals. LBIE does not identify any conflict

with other New York decisions—to the contrary, the Trial Court's decision is entirely consistent with relevant New York law. *See supra* 24–26.[9] Nor does this case present any issue of such public importance that it requires review by the Court of Appeals. Although LBIE suggests that the Trial Court's decision creates uncertainty in the financial markets, Motion at 3, LBIE cites no support for that. This is hardly surprising because, as this Court correctly recognized, the Trial Court's decision is completely consistent with prior case law, and simply applies that law to the unique facts of this case. Further, if anything about this case creates uncertainty, it is LBIE's continued litigation, which runs counter to the intent of the agreement. See *Intel* at *12 (finding that the drafters of the 1992 ISDA Master Agreement intended for non-defaulting parties to have "wide discretion" in calculating Loss and for such calculations to be "conclusive and legally

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[9] Notably, the majority of the cases cited by LBIE addressing ISDA agreements were decided by foreign courts applying English law. Even if there were conflicts between New York law and English law, that would not be a basis for obtaining review by the Court of Appeals. LBIE also omits to mention that the English law cases on which it purports to rely actually impose a much more relaxed standard for assessing the reasonableness of a non-defaulting party's Loss calculation than the standard that the Trial Court applied here. *See, e.g.*, *Anthracite Rated Invs., Ltd. v. Lehman Bros. Fin. S.A. in Liquidation*, [2015] EWHC (Ch) 1307 (Eng.) ¶ 53 ("[T]he relevant authorities now quite clearly establish that in considering whether the non-defaulting party has 'reasonably determined' its Loss, that party is not required to comply with some objective standard of care as in a claim for negligence, but, expressing it negatively, must not arrive at a determination which no reasonable non-defaulting party could come to. It is essentially a test of rationality . . . .").

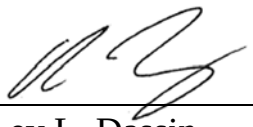
enforceable" in order to "mitigate[e] the risk of fact-specific disputes and the attendant risk of protracted litigation . . .").

CONCLUSION

For the foregoing reasons, this Court should deny LBIE's Motion.

Dated: April 29, 2024
New York, New York

Respectfully submitted,



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