

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

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SECURITIZED ASSET FUNDING 2011-2, LTD., :
Plaintiff, :
v. :
CANADIAN IMPERIAL BANK OF COMMERCE, :
Defendant. :

Index No. 653911/2015
Hon. Joel M. Cohen, J.S.C.
Part 3

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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. :

JUDGMENT

WHEREAS, on November 25, 2015, Plaintiff/Counterclaim-Defendant Securitized Asset Funding 2011-2, Ltd. (“Plaintiff”) filed the complaint (NYSCEF 1, the “Complaint”) in this action against Defendant/Counterclaim-Plaintiff Canadian Imperial Bank of Commerce (“CIBC”), a Canadian bank constituted under the Bank Act, S.C. 1991, c. 46 (Can.), with a principal place of business in Toronto, Ontario;

WHEREAS, the Complaint asserted claims against CIBC for breach of contract of that certain contract entered by the parties on October 16, 2008 (the “A Note”) (Counts I and II) and

that certain contract entered by the parties on June 20, 2011 (the “B Certificate,” and together with the A Note the “Contracts”) (Count III);

WHEREAS, as of October 23, 2015, the A Note was fully repaid;

WHEREAS, on January 15, 2016, CIBC filed its answer and counterclaims (NYSCEF 21) asserting affirmative defenses one through ten to the Complaint as well as counterclaims against Plaintiff and additional Counterclaim-Defendants Securitized Asset Funding 2009-1, Ltd, Promontoria Europe Investments XXIII LDC, and CSMC 2012-8R, Ltd. (together with Plaintiff, “Cerberus”) for declaratory judgment, mutual mistake, unilateral mistake and unjust enrichment;

WHEREAS, on April 3, 2018, the Court (Scarpulla, J.) entered a decision and order dismissing CIBC’s counterclaim for unjust enrichment and otherwise denying Cerberus’ motion for summary judgment (NYSCEF 397);

WHEREAS, on December 9, 2021, the Court entered a decision and order denying CIBC’s motion for summary judgment against Cerberus (NYSCEF 954);

WHEREAS, the Court held a 13-day bench trial commencing on March 7, 2022 and concluding on March 23, 2022;

WHEREAS, on December 1, 2022, the Court issued the Decision After Non-Jury Trial (Liability) (NYSCEF 1185, the “Liability Decision”) adjudging that CIBC is liable for breach of contract as set forth in Counts I, II and III of the Complaint and dismissing all of CIBC’s remaining counterclaims and affirmative defenses;

WHEREAS, on January 3, 2023, the Court issued the Decision After Non-Jury Trial (Damages) (NYSCEF 1188, the “Damages Decision”), awarding Cerberus damages measured as the Synthetic Proceeds Termination Value (as defined in the B Certificate) related to the Altius

IV and Altius III Synthetic Assets, as of September 8, 2015, plus statutory prejudgment interest running from that date;

WHEREAS, following the Court's Damages Decision, the parties met and conferred as to the amount of damages and corresponding calculation of prejudgment interest, assuming the application of the nine percent statutory interest rate, and taking into account all payments made by CIBC related to the Altius III Synthetic Assets from September 8, 2015 to date; and

WHEREAS, on January 20, 2023, the parties filed a stipulation and proposed order reflecting their agreement that, reserving all respective appellate rights and CIBC's intention to challenge the nine percent statutory interest rate as applied here, (i) the total amount of damages plus prejudgment interest, running from September 8, 2015 to December 1, 2022, that CIBC owes to Plaintiff as of December 1, 2022 is \$842,302,723.62; (ii) the total amount of damages plus prejudgment interest, running from September 8, 2015 to January 3, 2023, that CIBC owes to Plaintiff as of January 3, 2023 is \$849,103,903.37, and (iii) the amount of prejudgment interest to be added to the January 3, 2023 amount set forth in clause (ii) is \$207,691.08 per day from January 4, 2023 through the date of entry of judgment.

NOW, upon the Decision After Non-Jury Trial (Liability) entered in the Office of the County Clerk on December 1, 2022, and the Decision After Non-Jury Trial (Damages) entered in the Office of the County Clerk on January 4, 2023, it is hereby:

ORDERED, ADJUDGED, AND DECREED that Plaintiff, a company organized under the laws of the Cayman Islands with a business address c/o Securitized Asset Funding 2011-2, Ltd., 875 Third Avenue, New York, NY 10022, shall have judgment against CIBC, a Canadian bank organized under the laws of Canada with its principal place of business at 81 Bay Street, CIBC Square, Toronto, Ontario, Canada M5J 0E7, in the amount of: (i) **\$849,103,903.37**,

representing damages for CIBC's breaches of contract plus prejudgment interest running from September 8, 2015 through January 3, 2023, based on a statutory rate of nine percent (9%) per annum; plus (ii) prejudgment interest running from January 4, 2023 through the date of entry of this judgment in the amount of \$207,691.08 per day, based on a statutory rate of nine percent (9%) per annum; for (iii) a **TOTAL SUM OF \$ 855,957,709.01**; plus (iv) post-judgment interest on such total sum accrued at a statutory rate of nine (9%) per annum; and that Plaintiff shall have execution therefor¹;

X

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that CIBC's first (declaratory judgment), second (mutual mistake) and third (unilateral mistake) counterclaims and CIBC's affirmative defenses are dismissed; and


¹ The Court has considered and rejected CIBC's novel assertion that the 9% prejudgment interest rate mandated by CPLR 5004 is unconstitutional as applied in this case (NYSCEF 1193), for the reasons ably explained in Cerberus's opposing brief (NYSCEF 1198). The statutory rate, which has been applied in contract cases large and small throughout the State for more than 40 years without meaningful constitutional challenge, reflects a legislative judgment to compensate litigants for the delay in receiving compensation between the time of a breach of contract and the entry of judgment without the need for a case-by-case determination based on fluctuating market conditions. The cases upon which CIBC relies, including those involving the award of punitive damages, are inapposite.

Moreover, CIBC's suggestion that with respect to the Altius III portion of the judgment "the statutory rate results in interest (roughly \$74 million) that exceeds the amount of awarded damages (roughly \$63 million)" (NYSCEF 1193 at 2) is misleading. For purposes of assessing prejudgment interest, the parties *stipulated* (NYSCEF 1197) that "[Altius III] damages as of September 8, 2015 are **\$324,102,567.06**" [emphasis added]. The parties then took into account various Altius III payments CIBC made to Cerberus between that date and December 1, 2022 in calculating the \$74,300,628.82 Altius III prejudgment interest amount that is incorporated in the Court's judgment herein (assuming a 9% interest rate). That approach is consistent with CPLR 5001, which provides that prejudgment interest should be computed based on when the damage was incurred, which in this case required taking into account payments by made by CIBC at various times prior to judgment to reduce the amount of outstanding damages at any given point. In those circumstances, it is not meaningful to compare the *total* Altius III prejudgment interest amount (which was based on more than \$324 million of damages as of September 8, 2015), without explanation, to the *net* amount currently owed ("roughly \$63 million").

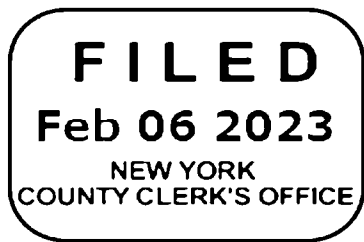
IT IS FURTHER ORDERED that the Clerk is directed to enter Judgment accordingly.

Signed February 6, 2023, at New York, New York.

SO ORDERED AND ADJUDGED:



Hon. Joel M. Cohen
J.S.C.



Clerk of the Court

Judgment Creditor
Securitized Asset Funding 2011-2, LTd.

Judgment Debtor
Canadian Imperial Bank of Commerce

653911/2015

Judgment
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