

**Securitized Asset Funding 2011-2, Ltd. v Canadian Imperial Bank of
Commerce**

2023 NY Slip Op 30010(U)

January 3, 2023

Supreme Court, New York County

Docket Number: Index No. 653911/2015

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

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

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

Justice

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SECURITIZED ASSET FUNDING 2011-2, LTD.,

INDEX NO. 653911/2015

Plaintiff,

- v -

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

Defendants.

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DECISION AFTER NON-JURY TRIAL (DAMAGES)

On December 1, 2022, this Court issued a Decision After Non-Jury Trial that was limited to findings of liability in this action (NYSCEF 1185). The Decision found in favor of Plaintiff Cerberus Capital Management, L.P. (“Cerberus”) on all counts, and dismissed Defendant Canadian Imperial Bank of Commerce’s (“CIBC”) affirmative defenses and counterclaims. Before making a final determination and entering a judgment, the Court requested oral argument with respect to the question of Cerberus’s damages.

After hearing oral argument on December 19, 2022, the Court makes the following findings:

A. Measure of Damages

“Contract damages are ... intended to give the injured party the benefit of the bargain by awarding a sum of money that will, to the extent possible, put that party in as good a position as it would have been in had the contract been performed” (*Goodstein Const. Corp. v City of New*

York, 80 NY2d 366, 373 [1992]). Here, the B Certificate itself provides the measure of damage for CIBC's breach.

The agreement provides that “[i]n case an Event of Default shall have occurred and be continuing[,] ... the obligations of CIBC under and in relation to this Certificate may be terminated by [Cerberus] by written notice to CIBC and the Security Agent.” (PX-0035.0020). On September 1, 2015, Cerberus exercised its discretionary right to terminate the B Certificate, setting September 8, 2015 as the Early Termination Date (PX-0859.0002). Accordingly, in view of the Court's findings on liability in this action, CIBC owed Cerberus “the Synthetic Proceeds Termination Value as of [that] date.” (PX-0035.0008).

The Synthetic Proceeds Termination Value is “[t]he present value, as determined by the Calculation Agent,” which became Cerberus after the Event of Default, (PX-0035.0012-13), “of CIBC's obligation to fund the Proceeds Account” with Synthetic Principal, LIBOR, and Interest, (PX-0035.0008-09). Notably, the present value of CIBC's obligation to fund the Proceeds Account must be calculated “without taking into account the creditworthiness of CIBC” (PX-0035.0008). Cerberus limits its Synthetic Proceeds Termination Value to the synthetic payment streams related to the Altius IV and Altius III Synthetic Assets (Tr. 2230:10-13; PX-2005 ¶¶5-6, 21). The parties disagree over the Synthetic Proceeds Termination Value.

a. Altius IV

The calculation of the Synthetic Proceeds Termination Value with respect to the Altius IV Synthetic Assets is relatively straightforward. The parties agree that as of the Early Termination Date, CIBC owed no further Synthetic Principal with respect to Altius IV, leaving only Synthetic LIBOR and Synthetic Interest. Given that the components of those payment streams were either fixed (10.5 bps interest), frozen (RONA approximately \$829 million) or

undisputed (each side used the same LIBOR projections), the only remaining question is determining the present value of those future payments.

The Court finds that Cerberus's application of a blended "risk-free" discount rate, ranging from 0.01 percent to 3.45 percent, is appropriate to determine the present value of CIBC's obligations based on the plain and unambiguous language of the B Certificate. Although CIBC argues that the discount rate should incorporate the risk of CIBC's creditworthiness as an intermediary (suggesting a 3.4% discount rate), the B Certificate expressly provides that CIBC's creditworthiness should not be considered as a factor in calculating present value (PX-0035.0008). The agreement makes no distinction between CIBC's creditworthiness as a counterparty and its creditworthiness as an intermediary. In those circumstances, the Court finds that the Treasury Bill-based rate adopted by Cerberus's expert witness (Dr. Ferrell) is appropriate for calculating present value based on the language of the B Certificate.

Accordingly, applying Cerberus's proposed discount rate, the Court finds that CIBC is liable to Cerberus for \$427 million plus statutory pre-judgment interest running from September 8, 2015, with respect to the Altius IV Synthetic Assets.

CIBC's contention that Cerberus's Altius IV damages should be subject to a \$320 million set-off to account for Altius IV Synthetic Principal Payments received by Cerberus following physical settlement of Altius IV is unavailing. CIBC's argument that under the swaps, there are no further "Principal Payments" paid following Physical Settlement, relies on an incorrect reading of the A Note and B Certificate, which define Principal Proceeds for Altius IV as "[a]ny Principal Payment" (PX-0005.0015-16, 43; PX-0035.0015-16, 46-47). The fact that the agreements elsewhere set forth specific procedures governing "Principal Payments" made "[p]rior to the Delivery Date or the Cash Settlement Date, in the event any payment of principal

(a “Principal Payment”)” does not mean that the stand-alone phrase “Principal Payment” (as used in the B Certificate) is limited to payments made prior to physical settlement. Nor does the fact that the agreements define “Scheduled Payment” to refer to a *subcategory* of “Principal Payment” that is paid after physical settlement change the definition of the broader term. It is clear that “Principal Payment,” as used in the A Note and B Certificate, means “*any* Principal Payment.” Accordingly, the Court finds that Cerberus was entitled to continue receiving each monthly Principal Payment after physical settlement of the Altius IV swaps and therefore no set off against Cerberus’s damages to account for such payments is appropriate.

b. Altius III

The calculation of damages with respect to the Altius III Synthetic Assets is less straightforward because, unlike Altius IV, the Altius III Bonds had not defaulted as of September 8, 2015. Accordingly, uncertainties remained as to the timing and magnitude of synthetic payments to which Cerberus would have been entitled under Altius III if the B Certificate had not been breached. In its damages calculations, Cerberus assumes (as of a September 8, 2015 valuation date) that the Altius III Bond collateral would be liquidated in 2019, immediately following a projected interest shortfall and physical settlement. CIBC disputes those assumptions.

Having considered the parties’ respective submissions, and the testimony of their experts, the Court concludes that with respect to Altius III, CIBC is liable to Cerberus for \$64 million plus pre-judgment interest. As of the Early Termination Date, the collateral underlying the Altius III Notes remained outstanding and the projection of a future event of default (and thereafter liquidation of the collateral) was subject to additional risk and uncertainty. Given these and other uncertainties with respect to future cash flows under the Altius III swaps,

Cerberus's use of a "risk-free" rate to determine present value is not appropriate. The Court finds the "conservative" discount rate proposed by Cerberus—9.4 percent—to be reasonable and appropriate in these circumstances, resulting in a damages figure of \$64 million.¹

As discussed at oral argument, the calculation of prejudgment interest with respect to Altius III damages is not as straightforward as was the case with respect to Altius IV. The parties are requested to submit supplemental briefing (maximum 2,000 words each), on or before January 13, 2023, as to the appropriate prejudgment interest to be applied with respect to Altius III damages, along with a Proposed Judgment.

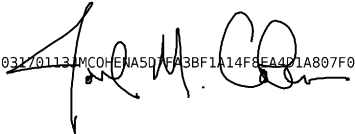
Accordingly, it is

ORDERED and ADJUDGED that Cerberus shall recover as damages for CIBC's breach of contract the following amounts: (i) Altius IV: \$427 million plus statutory prejudgment interest running from September 8, 2015; and (ii) Altius III: \$64 million plus statutory prejudgment interest to be determined by the Court following briefing by the parties; and it is further

¹ The Court disagrees with CIBC's position that Cerberus's damages should be further reduced to account for purportedly speculative assumptions regarding Altius III partial liquidation. Although there is uncertainty as to precisely what would have occurred after the expected interest shortfall in Altius III, and thus it is appropriate to take such uncertainty into account in calculating present value, the forecast of liquidation of collateral upon default is not mere speculation. Indeed, two CIBC witnesses testified that liquidation of collateral supporting a CDO is to be expected following an interest shortfall (Tr. 912-13 (Wayne Halenda); Tr. 1107 (Albert Cohen)). The Court also rejects CIBC's suggestion that Cerberus failed to mitigate damages. That argument, premised on the assertion that Cerberus should have declared a breach of the A Note upon first discovering an underpayment in 2010, which in turn would have obviated the B Certificate, is essentially a rehash of the affirmative defenses and counterclaims the Court rejected in its Liability decision.

ORDERED that the parties submit briefs on or before January 13, 2023 (maximum 2,000 words each) with respect to the prejudgment interest that should be applied to Altius III damages, along with a Proposed Judgment resolving the action.

Together with the Court’s previously issued Decision After Non-Jury Trial (Liability) (NYSCEF 1185), this constitutes the Court’s Decision After Non-Jury Trial.

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JOEL M. COHEN, JSC

DATE: 1/3/2023

Check One:

Case Disposed

Non-Final Disposition

Check if Appropriate:

Other (Specify

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