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, J.S.C. Part 39 Motion Seq. No. 007
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.	

DEFENDANT/COUNTERCLAIM-PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF/COUNTERCLAIM-DEFENDANTS' MOTION TO COMPEL PRODUCTION AND TESTIMONY

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Canadian Imperial Bank of Commerce ("CIBC") respectfully submits this memorandum of law in opposition to Plaintiff/Counterclaim-Defendants' (together, "Cerberus," and with CIBC, the "Parties") Motion to Compel Production and Testimony (the "Motion").

PRELIMINARY STATEMENT

Cerberus brings this Motion to invade CIBC's privilege in the apparent hope of finding anything to counterbalance the devastating admissions of its own senior-most executives that they intentionally defrauded CIBC. In depositions, Cerberus's witnesses admitted they engaged in a campaign of misrepresentations and omissions designed to, among other things, mislead CIBC into forgoing its contractual right to call the A1 Note and instead sell its residual interest (the B Certificate) for a fraction of what Cerberus now claims it is worth. They further admitted they intentionally concealed their scheme for years to collect as much money from CIBC as possible before ever claiming CIBC breached the agreements or revealing their purported reading of the contracts. These striking admissions definitively resolve in CIBC's favor the "issue of fact as to fraud vis-a-vis unilateral mistake" that this Court recognized in denying Cerberus's motion for summary judgment (Dkt. No. 97, Order at 17-18)—a motion Cerberus tried to use to prevent any discovery in this case and thus to prevent its fraudulent scheme from ever being revealed.

Now, Cerberus moves to compel production of thousands of admittedly privileged documents and to force CIBC's witnesses (most of whom are former employees living outside the U.S.) to sit for a second round of depositions, arguing that CIBC supposedly (i) placed its privileged communications at issue simply by asserting counterclaims of mistake, and (ii) selectively disclosed privileged material, resulting in subject matter waiver. Perhaps aware that its position is directly contradicted by controlling First Department precedent (which Cerberus

ignores), Cerberus's Motion is heavy on rhetoric and ad hominem attacks but light on legal analysis. But Cerberus's pages upon pages of irrelevant, cherry-picked and misleading snippets from the discovery record cannot obfuscate the narrow, straight-forward privilege issue in question. The Motion should be denied for at least the following independent reasons.

First, Cerberus's request—nearly four years after CIBC first asserted its counterclaims and over eight months after Cerberus first received CIBC's privilege log—comes far too late. (*Infra* § I.A.) Indeed, Cerberus could have raised this issue, at the very latest, six months ago ***before*** deposing six CIBC witnesses, when it first informed CIBC it believed CIBC waived privilege. Having sat on its hands for months while the Parties and non-party witnesses expended significant time, money and resources on depositions, Cerberus should not be permitted to upend the progress of this litigation at the eleventh hour.

Second, irrespective of the delay, Cerberus's Motion fails because CIBC has not waived any privilege. (*Infra* §I.B.) Cerberus erroneously claims CIBC's assertion of counterclaims for mistake automatically results in at-issue waiver. But that is not the law. In a decision nowhere mentioned in Cerberus's brief, the First Department made clear "'at issue' waiver occurs 'when the party has asserted a claim or defense that he ***intends to prove by use of the privileged materials***.'" *Deutsche Bank Tr. Co. of Americas v. Tri-Links Inv. Tr.*, 837 N.Y.S.2d 15, 23 (1st Dep't 2007).[1] Merely being relevant "does not, without more, place the contents of the privileged communication itself 'at issue' in the lawsuit" because "if that were the case, a privilege would have little effect." *Id.* ***Here, CIBC will not rely on any privileged communications to prove its claims, as CIBC represented to Cerberus and the Court.*** Rather,

[1] All emphasis is added except as otherwise noted.

CIBC will use non-privileged evidence, including Cerberus's own words and conduct, to prove (i) the Parties' mutual business understanding of the A1 Note transaction and (ii) Cerberus's fraud that prevented CIBC from calling the A1 Note and instead induced it to enter into the B Certificate. (*Infra* § I.B.1.a.) For example, as both this Court and the First Department recognized, the Parties' course of performance for years may be at odds with Cerberus's current litigation position. (Dkt. No. 397, Order at 14, 17-18); *Securitized Asset Funding, Ltd. v. Canadian Imperial Bank of Commerce*, 90 N.Y.S.3d 27, 28 (1st Dep't 2018). While CIBC could only speculate at the time of Cerberus's pre-discovery summary judgment motion as to Cerberus's explanation for its course of performance, Cerberus's witnesses have now admitted they deliberately concealed their secret view of the agreement all along for fear CIBC would call the A1 Note (and certainly not enter into the B Certificate) if it knew Cerberus's interpretation. Moreover, Cerberus concedes it does not need CIBC's privileged communications to prove its claims or contest CIBC's defenses and counterclaims. (*Infra* § I.B.1.b.)

Finally, CIBC did not selectively disclose privileged communications in depositions. (*Infra* § I.B.2.) To the contrary and as required by New York law, CIBC's witnesses testified only to the general subject matter—as opposed to the substance—of communications with counsel.

BACKGROUND

A. The A1 Note Transaction

In 2008, CIBC sought to cap its exposure to its portfolio of asset-backed securities linked to the United States residential real estate market. (CIBC's Counterclaims and Answer, Dkt. No. 21 ("Counterclaims") ¶¶ 1-2.) After months of analyzing CIBC's portfolio and negotiating the structure and terms of a deal, Cerberus entered into a $750 million "A1 Note" with CIBC (Ex. 1[2]) based on the "terms and conditions substantially similar to those set forth" in a term sheet executed by the Parties a month earlier (Ex 2 at CIBC_0097645). The A1 Note was a limited recourse note pursuant to which Cerberus paid CIBC $571 million net (after deductions for pre-closing amortization and other fees), which was to be repaid, with 20% annual interest, if—and only if—the assets in the reference portfolio performed. (Counterclaims ¶ 2.) The reference portfolio at issue consisted of cash assets, such as collateralized debt obligations ("CDOs"), and synthetic assets, such as credit default swaps that gave CIBC "synthetic" exposure to the performance of CDOs. As Cerberus's lead deal lawyer explained at the time, "the business understanding has always been that we [Cerberus] take the risk of performance of the assets, which includes the performance of the cash and synthetic assets." (Ex. 3 at SRZ0006025.) CIBC retained ownership of the reference portfolio and the right to any residual cash flows once the A1 Note was repaid (if ever). (Counterclaims ¶ 4.)

Significantly, CIBC also retained a protective call right exercisable starting in July 2011, whereby it could make one lump-sum payment to Cerberus to extinguish its obligations. Instead of exercising the call, CIBC relinquished that right when it sold its residual interest in the

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[2] Unless otherwise noted, exhibits referenced herein are attached to the accompanying Affirmation of Robert A. Fumerton, dated November 18, 2019 ("Fumerton Aff.")

reference portfolio to Cerberus through the B Certificate (described below). CIBC eventually paid off the A1 Note in due course as of October 2015, ***before*** Cerberus commenced this litigation. (Counterclaims ¶ 6.)

B. The B Certificate Transaction

In 2011, the Parties completed a follow-on transaction (the "B Certificate") whereby Cerberus purchased CIBC's residual interest in the reference portfolio for $80 million. (Ex. 11.) Before executing the B Certificate, the Parties entered into a binding letter agreement to first "work to achieve an in-kind retirement of the [A1 Note] for the same purchase price amount [$80 million]." (Ex. 4 at SAF-00079895.) In an in-kind retirement, the Parties would tear up the A1 Note, CIBC would have no further payment obligations and Cerberus would own the assets outright, receiving whatever cashflows the reference portfolio produced in the future. The Parties agreed to enter into the B Certificate only if the in-kind retirement failed. (*Id.*) Yet, Cerberus's witnesses admitted at depositions that Cerberus never intended to pursue an in-kind retirement for the same purchase price. (*See, e.g.*, Ex. 10, Forrest 250:5-253:19.) Ultimately, Cerberus fraudulently induced CIBC into executing the B Certificate and giving up its call right. In depositions, Cerberus's witnesses could not come up with any rational economic reason why someone in CIBC's position would ***not*** have called the A1 Note if they understood the deal to operate the way Cerberus now urges. (Ex. 5, Millstein 278:5-279:1.)

C. Cerberus Sues and CIBC Asserts Counterclaims and Defenses

In October 2014, Cerberus informed CIBC it would direct liquidation of one of the assets underlying the A1 Note, called "Altius IV." (Ex. 6.) At this point, Cerberus for the first time told CIBC of its position that, after liquidation, CIBC would still owe payments on the liquidated Altius IV assets. Cerberus claimed the Reference Obligation Notional Amount ("RONA" or "Individual RONA") for Altius IV had "frozen" in June 2010 when the Altius IV swaps were

physically settled, which occurred when Goldman Sachs physically delivered the Altius IV bonds to CIBC following an event of default. (Counterclaims ¶ 66.) This position was completely at odds with the Parties' course of performance from June 2010 to October 2014, whereby CIBC continued to reduce the Altius IV RONA based on monthly payments of principal on the underlying bonds, which Cerberus accepted each month without objection. (*Id.* ¶¶ 65-66.) In November 2015, Cerberus filed this lawsuit, alleging CIBC breached the A1 Note (which had already been repaid in full) and the B Certificate.

CIBC filed its Counterclaims and Answer in January 2016, asserting counterclaims for mutual mistake and unilateral mistake and affirmative defenses of estoppel and failure to mitigate damages, among others. CIBC alleged "[i]f Cerberus's new interpretation is accepted by the Court, then the agreements at issue were entered into under mutual mistake as they do not reflect the meeting of the minds of the Parties." (Counterclaims ¶ 80.) CIBC further alleged "[i]f Cerberus believed this new interpretation at the time it negotiated and entered into the B Certificate transaction,"—as its witnesses now admit—"it misrepresented its intent with the respect to the transaction in the agreement itself and fraudulently induced CIBC into entering into the transaction." (*Id.* ¶ 62.)

D. Cerberus Tries To Prevent All Discovery by Moving for Summary Judgment, Which This Court Rejects and the First Department Affirms

In apparent recognition of the impact extrinsic evidence would have on its claim, Cerberus moved for partial summary judgment in an attempt to preclude any discovery in this case. This Court denied Cerberus's motion, holding "CIBC sufficiently alleges that the terms of the A Note should have specifically reflected that payments for Synthetic Libor and Synthetic Interest would be reduced by various means, including principal payments." (Dkt. No. 397, Order at 16-17.) The Court further recognized the Parties' five-year course of performance "also

raises an issue of fact regarding how the parties intended to calculate payments, which may show an intent contrary to Cerberus's litigation position now." (*Id.* at 17.) Accordingly, the Court concluded "Cerberus's representations, coupled with its course of performance, raise an issue of fact as to fraud vis-à-vis unilateral mistake." (*Id.* at 18.)

Cerberus appealed the denial of its motion and the First Department affirmed based on CIBC's well-pled counterclaims and affirmative defenses, indicating the Parties' course of performance may be contrary to Cerberus's litigation position:

> [T]he affirmations that CIBC submitted in opposition to Cerberus's motion show that – according to CIBC – the parties agreed that the Relevant Notional Amount for the Altius IV synthetic assets would be reduced by payments of Synthetic Principal. Viewed in the light most favorable to CIBC (the nonmovant), the evidence shows that, for more than four years, between June 2010 and October 2014, the parties reduced the Relevant Notional Amount of the Altius IV synthetic assets by CIBC's payments of Synthetic Principal (*see Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 85 [1st Dep't 2009]).

Securitized Asset Funding, Ltd., 90 N.Y.S.3d at 28-29.[3]

E. Two Months Before Depositions Begin, Cerberus Claims "At-Issue Waiver" But Elects To Proceed with Depositions Rather Than Move to Compel

Following the denial of Cerberus's summary judgment motion, the Parties engaged in extensive discovery. (Fumerton Aff. ¶ 3.) On February 20, 2019, CIBC served its initial categorical privilege log, disclosing CIBC withheld privileged documents regarding, among other things, its negotiation, drafting, interpretation and performance of the A1 Note and B Certificate. (Ex. 7.)

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[3] While Cerberus claims the First Department's decision resolves any question of contractual ambiguity in its favor, any language in the decision regarding Cerberus's proposed interpretations was "unnecessary to the result reached" and thus constitutes non-binding dicta. *Buller v. Giorno*, 836 N.Y.S.2d 565, 566 (1st Dep't 2007); *see also Grullon v. City of New York*, 747 N.Y.S.2d 426, 429-30 (1st Dep't 2002.)

On April 5, 2019, Cerberus first asserted its claim of "at-issue waiver" in a letter to CIBC based on the same (meritless) arguments it offers now. (Ex. I to the Affirmation of Sean P. Baldwin, dated October 17, 2019 ("Baldwin Aff.").) CIBC advised Cerberus that any motion to compel CIBC's privileged documents should be filed and determined ***before*** depositions began on May 29, 2019. (Fumerton Aff. ¶ 8.) Cerberus responded, "in the interest of moving the case forward to depositions, we do not intend to move to compel CIBC's production of the Withheld Documents at this time." (Baldwin Aff. Ex. J at 2.)

The Parties commenced depositions as scheduled on May 29, 2019. (Fumerton Aff. ¶ 11.) Cerberus deposed six CIBC witnesses, including four former CIBC employees. (*Id.* ¶ 12.) None of these witnesses live in the United States. (*Id.*) Their depositions occurred in London, Toronto and New York. (*Id.*)

F. Cerberus's Witnesses Admit They Realized the Deal Documents Did Not Reflect the Parties' Actual Bargain But Intentionally Concealed Their Secret View from CIBC for Years

While this is not the stage of the proceedings for the Parties to lay bare their evidence in support of their respective claims and defenses, given the nature of Cerberus's moving papers an overview of the record thus far is necessary. In short, Cerberus's witnesses admit they discovered a mistake in the deal documents before CIBC even signed the A1 Note and intentionally concealed and affirmatively misstated for years their view of what the documents meant out of fear CIBC would call the A1 Note. Cerberus then tricked CIBC into unwittingly agreeing to the same mistaken language in the B Certificate and relinquishing its call right.

For example, Lee Millstein, Senior Managing Director and leader of Cerberus's deal team for the CIBC transaction, testified that when Cerberus received the draft A1 Note, its deal team realized the "whole deal changed" compared to the Parties' final term sheet because the schedule for calculating payments referenced the Altius IV swaps rather than the underlying

Altius IV bonds. (*See* Ex. 5, Millstein 140:10-141:19, 158:1-160:17.) Later, in April 2010, CIBC suggested switching the Altius IV Synthetic Assets to Cash Assets. Cerberus declined, citing the supposed "brain damage" changing the deal documents would entail. (Ex. 17.) Millstein admitted that was a lie designed to avoid revealing its secret view of the A1 Note language. (Ex. 5, Millstein 224:2-24.)

Similarly, upon Physical Settlement in June 2010, CIBC expressly told Cerberus—consistent with the Parties' business deal and CIBC's understanding of the deal documents—that "this should not affect anything related to our transaction [the A1 Note]." (Ex. 8 at CIBC_0219954.) In stark contrast, Millstein testified that Cerberus believed Physical Settlement was the "***watershed event***" Cerberus had been waiting for to trigger frozen RONA. (Ex. 5, Millstein 232:23-233:5.) Yet, again, Cerberus decided to stay silent. Millstein admitted he would have been "surprised" if anyone from Cerberus corrected CIBC because Cerberus feared CIBC would call the A1 Note if it knew Cerberus's view that Altius IV Individual RONA had frozen. (*Id.* 230:6-24.) Frank Bruno, Cerberus's current co-Chief Executive Officer, similarly testified that they decided to conceal their view because they were "minimizing contact with [CIBC] to not remind them to call the note." (Ex. 9, Bruno 26:24-27:9.)

Indeed, Millstein conceded Cerberus believed CIBC was underpaying it each month ***for years*** following Physical Settlement, but decided not to correct those supposed underpayments as reflected on monthly reports provided by CIBC to Cerberus and others—despite correcting other purported errors—because it did not want to "rock the boat." (Ex. 5, Millstein 338:17-340:2.) And even after Cerberus tricked CIBC into relinquishing its call right, Cerberus continued to conceal its view so it could extract as much cash from CIBC as possible to preclude CIBC from having any "leverage" in what it knew would be a dispute over frozen RONA. (*Id.*)

Cerberus's witnesses likewise confessed to making misrepresentations in connection with the B Certificate. Cerberus agreed the B Certificate would provide the "same cash flows" as it had been receiving under the A1 Note, despite its secret view that CIBC had already been underpaying Cerberus in breach of the A1 Note for nearly a year. (Ex. 4 at SAF-00079895.) Cerberus also agreed to first pursue an in-kind retirement instead of the B Certificate "for the same purchase price." (*Id.*) Yet, Cerberus managing director Chris Forrest testified that Cerberus never intended to pursue an in-kind retirement for the same purchase price, and only said they would to win the "competitive bidding process" for the residual. (Ex. 10, Forrest 260:13-261:9.) Cerberus even lied in the B Certificate itself, "specifically acknowledg[ing]" that CIBC's payment obligation under the B Certificate "***may be zero***" even after the A1 Note paid off. (Ex. 11 at SAF-00044992.) Millstein admitted "there were no circumstances where the residual amount could be zero" under Cerberus's view. (Ex. 5, Millstein 313:7-314:12.)

G. Cerberus Belatedly Seeks To Obtain CIBC's Privileged Communications and Redo Depositions

Following this string of devastating admissions, Cerberus informed CIBC on September 27, 2019, that it would seek permission to move to (i) strike CIBC's mistake-based counterclaims and defenses, or (ii) compel production of CIBC's privileged communications and re-depose all of CIBC's witnesses. (Fumerton Aff. ¶ 13.) At a compliance conference on October 16, 2019, the Court denied Cerberus's request to move to strike, but allowed Cerberus to move to compel. (*Id.* ¶ 14.) Despite the Court's stated preference that Cerberus move by letter, Cerberus pressed for, and ultimately received, permission to submit full motion papers. (*Id.*) Cerberus then filed this Motion, containing only six pages of argument in its 25-page brief.

ARGUMENT

I. CERBERUS'S MOTION TO COMPEL SHOULD BE DENIED

A. Cerberus's Motion Is Untimely

As a threshold matter, Cerberus's Motion—nearly four years after CIBC first asserted its counterclaims, eight months after Cerberus first had notice of CIBC's position on privilege and six months and twelve depositions after Cerberus first claimed "at-issue wavier"—is untimely. Cerberus knew the Parties' business understanding was at issue in this case, at the latest, when CIBC asserted its mistake-based counterclaims and defenses in January 2016. (Counterclaims ¶¶ 78-89.) Cerberus also knew the basis and scope of CIBC's privilege assertions since the Parties exchanged privilege logs in February 2019. (Ex. 7.) Indeed, Cerberus admittedly had notice of all facts relevant to this Motion by April 5, 2019, at the very latest, when it first asserted CIBC's "at-issue waiver" on the same basis it does now.[4] (Baldwin Aff. Ex. I.) Having sat on its hands, Cerberus should not be permitted to now effectively restart discovery by compelling the production of thousands of privileged documents and forcing CIBC's witnesses to sit for a second round of depositions. *See GoSMILE, Inc. v. Levine*, 977 N.Y.S.2d 206, 207 (1st Dep't 2013) ("[T]he delay [in seeking to compel], coupled with the absence of any rational reason or excuse, is nothing less than a constructive waiver . . . .")[5]

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[4] Contrary to Cerberus's insistence that it "had to depose numerous witnesses to ensure a clear record of CIBC's instructions to block testimony before seeking a ruling from this Court" (Mot. at 22), CIBC's position was clear long before depositions. If anything, CIBC instructing its witnesses not to testify to any privileged information only confirms that CIBC is not relying on such information to prove its counterclaims and defenses. Moreover, the lone case Cerberus cites on this point does not involve privilege, waiver or a motion to compel. *See Tardibuono v. County of Nassau*, 581 N.Y.S.2d 443, 444 (2d Dep't 1992) (protective order prohibiting certain questions at future deposition was speculative and thus improvidently granted). (Mot. at 22.)

[5] This distinguishes *PF2 Securities Evaluations, Inc. v. Fillebeen*, 93 N.Y.S.3d 279, 280-81 (1st Dep't 2019), where defendants moved to compel ***before*** depositions occurred. (Mot. at 22.) As other courts have recognized, "leave to conduct a second deposition of the witness [may be denied] even if relevant documents are produced subsequent to the deposition if the party taking the deposition either failed to request those

The same conclusion applies equally to Cerberus's claim of subject matter waiver. Cerberus admittedly knew of the relevant facts since the deposition of CIBC's employee Wayne Halenda on June 11, 2019. (*See* Mot. at 21 (arguing for subject matter waiver based on Halenda's deposition).) There is no excuse for Cerberus's decision to proceed with four more depositions before raising that issue with the Court.

B. CIBC Has Not Waived Any Privilege

1. Cerberus's At-Issue Waiver Argument Fails

Timing aside, Cerberus's claim of "at-issue waiver" fundamentally misconstrues New York law and CIBC's counterclaims and defenses. As the First Department explained, "'[a]t issue' waiver of privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that 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." *Deutsche Bank Tr. Co. of Americas v. Tri-Links Inv. Tr.*, 837 N.Y.S.2d 15, 23 (1st Dep't 2007). In other words, "'at issue' waiver occurs 'when the party has asserted a claim or defense that he intends to prove by use of the privileged materials.'" *Id.* at 23; *accord Ambac Assurance Corp. v. DLJ Mortg. Capital, Inc.*, 939 N.Y.S.2d 333, 334-35 (1st Dep't 2012) ("Generally, no 'at issue' waiver is found where the party asserting the privilege does not need the privileged documents to sustain its cause of action."); *see also In re County of Erie*, 546 F.3d 222, 229 (2d Cir. 2008). The classic example of at-issue waiver is when a party asserts advice of counsel as a defense. *Deutsche Bank*, 837

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documents in a timely fashion or chose to conduct the deposition prior to the completion of document discovery." *Fresenius Med. Care Holdings, Inc. v. Roxane Labs., Inc.*, No. 205-cv-0889, 2007 WL 764302, at *2 (S.D. Ohio Mar. 9, 2007).

N.Y.S.2d at 23.[6] "[W]here a [party's] claim does not require the introduction of privileged material, ***and [that party] disclaims any such effort***, the attorney client privilege is not waived." *Pivotal Payments, Inc. v. Phillips*, No. 14-cv-4910 (GRB), Memorandum and Order at 14 (E.D.N.Y. Sept. 29, 2016), ECF No. 89 (submitted herewith).

(a) CIBC Has Not and Will Not Rely on Any Privileged Communications To Prove Mistake

Here, CIBC will not rely on any privileged communications to prove its counterclaims and defenses and has repeatedly disclaimed any such reliance, including at the October 16, 2019 compliance conference. (Fumerton Aff. ¶ 15.) Rather, CIBC will prove the actual business deal between the Parties, which is by definition not privileged. Indeed, CIBC could not possibly prove the actual agreement between ***both*** Parties with privileged communications in which Cerberus did not participate. Similarly, as this Court explained, to prove unilateral mistake, CIBC must show Cerberus "fraudulently misled [CIBC], and that the subsequent writing does not express the intended agreement[.]" (Dkt. No. 397, Order at 17.) This too will be proved without any privileged communications.[7]

CIBC will prove the Parties originally intended and agreed that Individual RONA for the Altius IV Synthetic Assets would reduce along with the Altius IV bond notional, regardless of

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[6] Many of Cerberus's cases are of this ilk. *See, e.g.*, *Arista Records LLC v. Lime Grp. LLC*, No. 06 CV 5936(KMM), 2011 WL 1642434, at *3 (S.D.N.Y. Apr. 20, 2011) (at-issue waiver because "failure to follow the advice of counsel given before infringement must factor into an assessment of an infringer's bad faith") (Mot. at 18); *Bolton v. Weil, Gotshal & Manges LLP*, 4 Misc. 3d 1029(A), 2004 N.Y. Slip Op. 51118(U), at *5 (Sup. Ct. N.Y. Cty. 2004) (at-issue waiver in legal malpractice action) (Mot. at 8); *MBIA Insurance Corp. v. Patriarch Partners VIII, LLC*, No. 09 Civ. 3255, 2012 WL 2568972, at *7 (S.D.N.Y. July 3, 2012) (plaintiff "place[d] the opinion of counsel at issue") (Mot. at 18).

[7] *State-Wide Capital v. Superior Bank*, No. 98 CIV. 0817(HB), 2000 WL 20705 (S.D.N.Y. Jan. 12, 2000), on which Cerberus relies (Mot. at 19), does not dictate a different result as it predates the First Department's controlling decision in *Deutsche Bank*.

the mechanics of the Altius IV swaps. Contrary to Cerberus's assertions, CIBC's witnesses testified consistently on this point.[8] For example, CIBC's Wayne Halenda testified "[t]he intention was to replicate [the bond's] cash flows." (Ex. 13, Halenda 18:22-19:10.) Similarly, CIBC's John Paterson recalled working with Cerberus and Halenda to ascertain "how we would mimic the cash flows of the synthetic assets or the synthetic bonds" and that Halenda "found a mechanism" to ensure the synthetic assets mimicked bond performance. (Ex. 14, Paterson 227:25-228:25.) CIBC's Albert Cohen explained "the intent of the transaction was that Cerberus was to gain exposure to the underlying portfolio of assets, and that all cash flow would be paid . . . based on the performance of those assets." (Ex. 12, Cohen 146:25-147:18.)[9]

This is also reflected in both Parties' contemporaneous documents. For example, Cerberus's lead deal lawyer explained that "the business understanding has always been that we [Cerberus] take the risk of performance of the assets, which includes the performance of the cash and synthetic assets." (Ex. 3 at SRZ0006025.) Furthermore, the A1 Note term sheet provided that "the notional amount of [each] Synthetic Asset will be reduced by the amount of such Reference Portfolio Principal Proceeds" for that asset. (Ex. 2 at CIBC_0097656.) Moreover, the press release for the A1 Note—which Cerberus formally approved (Ex. 15 at SAF-00021535)—explained that the deal "sets a floor under CIBC's exposure to the U.S. residential mortgage market," that "recourse . . . will be limited to the assets in the reference portfolio" and that

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[8] While Cerberus makes numerous incorrect factual assertions and repeatedly mischaracterizes the record, CIBC corrects only those that are actually relevant to the narrow privilege question at issue.

[9] Cerberus repeatedly points to Cohen's testimony that "[i]t was [CIBC's] view that the swap notional and the individual RONA were always the same." (Baldwin Aff. Ex. P at 348:19-21.) But this is taken out of context. Cohen was saying he never realized the swap and bond notional diverged and thus he thought ***both*** would have been the same as Individual RONA. He explicitly explained this twice earlier. (Ex. 12, Cohen 333:16-22; 334:17-335:4.) He also testified elsewhere ***sixteen times*** that Individual RONA was based on bond notional. (*See* Ex. 12, Cohen 150:11-20; 150:25-151:15; 171:14-172:4; 172:25-173:4; 190:19-23; 202:4-10; 204:12-13; 204:20-21; 212:20-213:3; 284:10-284:16; 329:12-18; 330:12-15; 334:5-10; 335:20-336:10; 337:7-11; 341:3-8.)

"[i]nterest and principal payments on the senior notes will be paid from the portfolio only if the RMBS and CDOs of RMBS perform." (Ex. 16 at SAF-00021527-28.)

The Parties' course of performance also reflects their true agreement. *See Gulf Ins. Co. v. Transatlantic Reinsurance Co.*, 886 N.Y.S.2d 133, 143 (1st Dep't 2009) (course of performance is the "most persuasive evidence" of the parties' true agreement). Each month, CIBC sent Cerberus a spreadsheet calculating the A1 Note payments for Cerberus's review and approval. Month after month (even after Physical Settlement when, according to Cerberus, Altius IV Individual RONA should have frozen), CIBC reduced Altius IV Individual RONA as principal payments were made on the Altius IV bonds and Cerberus accepted these reductions—and Synthetic Libor payments based on them—without objection. (Ex. 10, Forrest 54:8-55:6, 220:11-224:4.) Even worse, Cerberus repeatedly made ***other*** minor corrections to the monthly calculations while remaining silent as to the Altius IV RONA entries. (*Id.*) This and other evidence will establish that the A1 Note, if interpreted in accordance with Cerberus's position, failed to accurately memorialize the Parties' true deal.

Similarly, CIBC will prove Cerberus fraudulently induced CIBC into entering the B Certificate and giving up the contractual right to call the A1 Note. Indeed, Cerberus's witnesses admitted that when they received the draft A1 Note, they realized the "whole deal changed," compared to what the Parties had agreed to in the final term sheet, without any discussion or negotiation between the Parties. (*See, e.g.*, Ex. 5, Millstein 140:10-141:19, 158:1-160:17.)[10] Yet

[10] This does not undermine CIBC's mutual mistake counterclaim. *See Nash v. Kornblum*, 12 N.Y.2d 42, 46-47 (1962) (finding mutual mistake even though one party realized the mistake at the time of contracting and said nothing). If the A1 Note contract did not accurately reflect the Parties' true agreement, then Cerberus knew that yet said nothing.

Cerberus concealed its secret view of the deal for years. (*See id.* 170:23-172:25, 338:17-340:2; Ex. 9, Bruno 50:10-17; Ex. 10, Forrest 210:5-211:9.)

For example, in April 2010, when the Altius IV bonds defaulted, CIBC offered to switch the Altius IV Synthetic Assets to Cash Assets under the A1 Note,[11] Cerberus declined, saying it did not want to go through the "brain damage" of changing the deal documents. (Ex. 17.) Cerberus's witnesses admitted that was a lie. (Ex. 5, Millstein 224:2-24.) In reality, Cerberus declined because it did not want to give up the possibility of receiving Synthetic Libor based on a frozen Altius IV Individual RONA under its secret view of the A1 Note.

Similarly, in June 2010, when CIBC confirmed for Cerberus that Physical Settlement had occurred under the Altius IV swap, CIBC's Cohen noted—consistent with the Parties' true agreement—that "this should not affect anything related to our transaction [the A1 Note]." (Ex. 8 at CIBC_0219954.) Millstein, on the other hand, testified that the Physical Settlement was the "***watershed event***" that Cerberus was waiting for to trigger frozen RONA. (Ex. 5, Millstein 232:23-233:5.) Yet, again, Cerberus intentionally did not respond to Cohen and, in fact, Millstein admitted he would have been "surprised" if anyone from Cerberus responded because it would have alerted CIBC to Cerberus's position. (*Id.* 230:6-24.)

Indeed, Cerberus's witnesses admitted that, despite accepting monthly payments based on a reducing Altius IV Individual RONA, they affirmatively decided not to say anything to CIBC because Cerberus was "subject to a call option" and they were "minimizing contact with [CIBC]

[11] This, in CIBC's view, would have benefited Cerberus by giving Cerberus the right to the Altius IV bonds' full coupon (LIBOR plus 23 basis points), which exceeded the LIBOR plus 12.5 basis points Cerberus got from the Altius IV Synthetic Assets under the A1 Note, and benefited CIBC by eliminating counterparty risk from Goldman Sachs and freeing up the collateral CIBC was required to post under the swaps. (*See* Ex. 12, Cohen 221:12-227:17.)

to not remind them to call the note." (Ex. 9, Bruno 26:3-27:9; *see also* Ex. 5, Millstein 18:22-20:3; Ex. 10, Forrest 44:4-47:3.)

Accordingly, Cerberus was concerned when it learned CIBC was interested in selling the residual interest, which Cerberus expected would result in the A1 Note getting called. (*See* Ex. 18 at SAF-00107455 (Millstein telling Bruno, "Getting called. Not good").) Cerberus then affirmatively misrepresented its interpretation of the deal to induce CIBC to enter the B Certificate and give up its ability to call the A1 Note. (Ex. 4 at SAF-00079895 (Cerberus agreeing the B Certificate would provide the "same cash flows" as it had been receiving under the A1 Note).)

Cerberus also lied in the B Certificate itself, "specifically acknowledg[ing]" that CIBC's payment obligation under the B Certificate "***may be zero***" even after the A1 Note paid off, which could not be true under its secret interpretation (which would obligate CIBC to make a Synthetic Libor payment each month until 2042). (Ex. 11 at SAF-00044992.) Millstein admitted that, under Cerberus's view, "there were no circumstances where the residual amount could be zero." (Ex. 5, Millstein 314:7-12.) As a result of these, and other, material misrepresentations and omissions, CIBC was induced to enter into the B Certificate.

None of these facts, which will establish CIBC's counterclaims and defense, rely on privileged communications.

(b) Cerberus Concedes It Does Not Need CIBC's Privileged Communications To Litigate CIBC's Counterclaims and Defenses

Similarly, upholding CIBC's privilege here will not "deprive [Cerberus] of vital information," as is required to establish at-issue waiver. *Tower Ins. Co. of N.Y. v. Lowe*, No. 103495/2009, 2014 N.Y. Slip Op. 30732(U), at *8 (Sup. Ct. N.Y. Cty. Mar. 20, 2014) (Scarpulla, J.) (cited in Mot. at 2, 18). While some courts, including this one, have found at-issue waiver in

rare circumstances where "invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege" (*id.*), Cerberus concedes that is not the case here.[12]

Specifically, Cerberus argues the testimony and documents it already has from CIBC reflect conflicting understandings of the business agreement underlying the A1 Note, and thus CIBC supposedly "cannot claim any such 'understanding' reflects 'exactly what was really agreed upon between the parties,'" as required to prove a mutual mistake. (Mot. at 5.) While these assertions are demonstrably false (because CIBC's witnesses have uniformly testified to the same business understanding between the Parties), Cerberus's argument belies any suggestion that CIBC's privileged documents are ***necessary*** to litigate its counterclaims and defenses. Cerberus can explore, and has explored, the Parties' business understanding in depositions and through hundreds of thousands of non-privileged documents. That the record in this case simply does not support Cerberus's positions does not mean this case is incapable of adjudication without invading CIBC's privilege. *See Credit Suisse First Bos. v. Utrecht-Am. Fin. Co.*, 811 N.Y.S.2d 32, 32 (1st Dep't 2006) ("Even if there had been an implied waiver, defendants did not demonstrate the prejudice that failure to breach the privilege would cause, particularly since there would be sufficient available means of discovery . . . ."); *accord In re Bank of N.Y. Mellon*, 42 Misc. 3d 171, 177-78 (Sup. Ct. N.Y. Cty. 2013) (Kapnick, J.).

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[12] Hence, Cerberus's reliance on *Tower Insurance* and on *Tupi Cambios, S.A. v. Morgenthau*, 44 Misc. 3d 800 (Sup. Ct. N.Y. Cty. 2014), is misplaced. (Mot. at 18.) Unlike here, invading privilege was necessary in those cases to resolve whether certain parties notified, or received notification from, their counsel of certain information.

(c) Asserting Mistake Does Not Automatically Result In At-Issue Waiver

Finally, unable to credibly argue that CIBC will have to rely on any privileged communications to prove its counterclaims, Cerberus resorts to arguing that asserting a mistake claim *per se* results in at-issue waiver. First, Cerberus's assertion that "mistake" is the "only basis" on which CIBC could prevail in this litigation (Mot. at 1) is false and ignores CIBC's additional well-pled affirmative defenses. Second, this is not the law.

Specifically, Cerberus argues "[t]he 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." (Mot. at 17.) But ***every*** mistake claim involves "asserting a different understanding than the contract's plain meaning"—indeed, that is the very essence of the claim. *See Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 573 (1986.) Cerberus's suggestion that a party can never assert a mistake claim without waiving privilege is incorrect. *See, e.g.*, *Pivotal Payments*, Memorandum and Order at 1 ("[F]iling of a claim of unilateral mistake does not give rise to a waiver or forfeiture of attorney-client privilege . . . ."); *Citibank, N.A. v. Morgan Stanley & Co. Int'l, PLC*, 797 F. Supp. 2d 254, 261 n.50 (S.D.N.Y. 2011) ("Citibank has not put its counsel's intent 'at issue' in this litigation so as to waive privilege" in action for reformation of credit default swap based on mutual mistake), *aff'd,* 482 F. App'x 662 (2d Cir. 2012).[13]

[13] *See also Markel Am. Ins. Co. v. Baker*, 152 So. 3d 86, 91 (Fla. Dist. Ct. App. 2014) ("[W]e find that the filing of a reformation action, which again involves a question of intent, does not automatically result in a waiver of attorney-client privilege."). *William Tell Services, LLC v. Capital Financial Planning, LLC*, 46 Misc. 3d 577 (Sup. Ct. Rensselaer Cty. 2014), is not to the contrary. (Mot. at 18, 20.) Unlike here, the documents sought there were not privileged to begin with, so at-issue waiver should not have come into play at all. *See William Tell*, 46 Misc. 3d at 581-83.

Contrary to Cerberus's argument, this Court and others have held that asserting claims or defenses involving a party's knowledge or intent does not automatically waive privilege. *See, e.g.*, *Orr v. Yun*, No. 603423/2006, 2013 N.Y. Slip Op. 33412(U), at *3, *6 (Sup. Ct. N.Y. Cty. Dec. 5, 2013) (Scarpulla, J.) (defense that plaintiff "fraudulently induced defendants to enter into the contract" "did not waive attorney-client privilege as they did not place their privileged communications [regarding the contract] at issue"); *Old Republic Ins. Co. v. United Nat'l Ins. Co.*, No. 155995/2012, 2013 NY Slip Op. 33423(U), at *3 (Sup. Ct. N.Y. Cty. Dec. 30, 2013) (Kornreich, J.) ("Where reliance is an element of plaintiff's claim (i.e., claims based on estoppel or fraud), the mere assertion of such a claim does not automatically place privileged communications at issue, regardless of their relevance."); *accord Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 90 Civ. 7811 (AGS), 1994 WL 510043, at *12 (S.D.N.Y. Sept. 16, 1994). These cases stand in stark contrast to Cerberus's repeated (incorrect) insistence that at issue waiver applies with "special force" in these circumstances. (Mot. at 2, 18.) Indeed, Cerberus does not cite a single case that even involves a mistake claim much less that holds the mere assertion of such a claim automatically results in at-issue waiver.

Similarly, Cerberus's speculation that privileged communications "might contradict" CIBC's mistake claims (Mot. at 1, 19) is really just an argument they may be relevant—a position the First Department expressly rejected. *Deutsche Bank,* 837 N.Y.S.2d at 23 ("Of course, that a privileged communication contains information relevant to issues the parties are litigating ***does not***, without more, place the contents of the privileged communication itself 'at issue' in the lawsuit; if that were the case, a privilege would have little effect."); *see also id.* at 26. Other courts, including this one, have reached the same conclusion. *See, e.g.*, *Bew Parking Corp. v. Apthorp Assocs. LLC*, No. 601155/09, 2015 N.Y. Slip Op. 30417(U), at *5 (Sup. Ct.

N.Y. Cty. Mar. 24, 2015) (Scarpulla, J.) ("[A]lthough the privileged communications may have some relevance to the issues litigated by the parties, Apthorp has not put the contents of its privileged communications at issue in this action."); *County of Erie*, 546 F.3d at 229 (rejecting argument that "an assertion of privilege by one who pleads a claim or affirmative defense 'put[s] the protected information at issue by making it relevant to the case,'" which "would open a great number of privileged communications to claims of at-issue waiver"); *accord Aiossa v. Bank of Am., N.A.*, No. CV 10-01275(JS)(ETB), 2011 WL 4026902, at *5 (E.D.N.Y. Sept. 12, 2011).[14]

2. Cerberus's Subject-Matter Waiver Argument Fails

Separately, Cerberus half-heartedly argues for a sweeping subject matter waiver. (Mot. at 21-22.) Cerberus claims CIBC's Halenda "testified that (1) he conveyed his 'business understanding' to CIBC's lawyers—specifically Ms. Patel; and (2) . . . he believed—based solely on Ms. Patel's advice—that his 'business understanding' was reflected in the Contracts." (*Id.*) Cerberus also claims CIBC's Stefanovic testified to the same effect and argues that "[h]aving 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." (*Id.*)

Cerberus's argument fails, first and foremost, because it relies on a mischaracterization of the deposition testimony. Neither Halenda nor Stefanovic disclosed any privileged communications with, or advice from, counsel. To the contrary, both witnesses were carefully instructed to—and did—testify only to the ***topic*** of the communications with counsel, not any

[14] Accordingly, Cerberus's speculation about what certain redactions may or may not cover (Mot. at 19-20) is irrelevant. *See Deutsche Bank,* 837 N.Y.S.2d at 26 (privilege cannot be waived by "nothing more than the theoretical possibility" of an issue concerning attorney's advice).

substance. This does not constitute subject matter waiver under settled New York law. *See Deutsche Bank*, 837 N.Y.S.2d at 26-27 (no subject matter waiver where witness did not "divulge the contents of any of the advice" but instead "simply testified to the fact that . . . Bankers Trust (not surprisingly) considered the advice of its attorneys").[15]

Moreover, even if CIBC's witnesses inadvertently divulged some understanding derived from privileged material (which they did not), "the mere fact that a party makes a partial disclosure of privileged or protected information in a deposition does not result in a subject-matter waiver because there is no use of the testimony by the party holding the privilege." *Mitre Sports Int'l Ltd. v. Home Box Office, Inc.*, 304 F.R.D. 369, 373 (S.D.N.Y. 2015). Cerberus's claim of subject matter waiver, like its claim of at-issue waiver, is meritless.[16]

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[15] Patel's testimony about the Parties' business understanding also does not reveal any privileged communications, similar to the statement of Cerberus's lead deal lawyer that "the business understanding has always been that we [Cerberus] take the risk of performance of the assets, which includes the performance of the cash and synthetic assets." (Ex. 3 at SRZ0006025.)

[16] The cases Cerberus cites (Mot. at 21-22) are inapposite as both involved advice-of-counsel defenses where the parties disclosed the substance of the advice, not just that they received advice. *Orco Bank, N.V. v. Proteinas Del Pacifico, S.A.*, 577 N.Y.S.2d 841, 842 (1st Dep't 1992) (bank counsel's opinion that borrower had adequate collateral for loan); *Vill. Bd. v. Rattner*, 515 N.Y.S.2d 585, 586 (2d Dep't 1987) (village counsel's opinion on selective enforcement of law).

CONCLUSION

For these reasons, Cerberus's Motion should be denied in its entirety.

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Respectfully submitted,

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