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EXHIBIT 2

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EFiled: Mar 18 2019 12:04PM EDT
Transaction ID 63075559
Case No. 8601-VCZ

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN THE MATTER OF THE	)	
LIQUIDATION OF	)	C.A. No. 8601-VCZ
INDEMNITY INSURANCE	)	
CORPORATION, RRG	)	

ORDER DENYING MOTION TO COMPEL

1. This Order addresses the Receiver's December 31, 2018 Motion to Compel (the "Motion")[1] documents from intervening third-party Plaintiff, Branch Banking and Trust Company ("BB&T"). The Receiver requests that the Court order a production under the "at issue" exception to the attorney-client privilege. I deny the Motion.

2. The "broad scope of discovery is limited by a number of privileges, including the attorney-client privilege, codified in Rule 502 of the Delaware Rules of Evidence, which protects from discovery certain communications between attorney and client."[2] "However, the attorney-client privilege is not absolute."[3] "[T]he so-called 'at issue' exception to the attorney-client privilege applies where either '(1) a party injects the privileged communications themselves into the litigation, or (2) a party injects an issue into the litigation, the truthful resolution of

[1] Docket Item ("D.I.") 671. I refer to briefing on the Motion as the Motion, the Opposition, and the Reply. *See* D.I. 671, 680, 687.

[2] *In re Quest Software Inc. S'holders Litig.*, 2013 WL 3356034, at *2 (Del. Ch. July 3, 2013).

[3] *Id.*

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which requires an examination of confidential communications.'"[4] The exception "recognizes that a party cannot use the attorney-client privilege as both a 'shield' from discovery and a 'sword' in litigation."[5]

3. "A party's admission that it sought legal counsel does not imply that the party necessarily acted in reliance upon the legal advice received, thereby placing the communications with counsel 'at issue.'"[6] Such an admission, without more, "does not reflect reliance on that advice . . . . [n]or does it inject the substance of any specific advice into this case."[7] Privileged communications may fall under the "at issue" exception where a party attempts to both shield and weaponize arguments that the party, for instance, "acted in accordance with the legal advice they received," "cannot be liable because they relied on some specific advice of counsel," or that otherwise "make bare factual assertions[] 'the veracity of which are central to the resolution of the parties' dispute, and then assert the attorney-client privilege as a barrier to prevent a full understanding of the facts disclosed.'"[8]

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[4] *In re William Lyon Homes S'holder Litig.*, 2008 WL 3522437, at *3 (Del. Ch. Aug. 8, 2008) (quoting Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 7.02[c][2] (2008)).

[5] *In re Quest Software*, 2013 WL 3356034, at *2.

[6] *Id.* at *3.

[7] *In re Comverge, Inc. S'holders Litig.*, 2013 WL 1455827, at *4 (Del. Ch. Apr. 10, 2013)

[8] *Id.* at *5; *In re Kent Cty. Adequate Pub. Facilities Ordinances Litig.*, 2008 WL 1851790, at *5 (Del. Ch. Apr. 18, 2008) (quoting *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259 (Del. 1995)).

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4. The Receiver claims that BB&T waived an unspecified quantum of privileged communications between BB&T's predecessor in interest, Susquehanna Bank, and its counsel, related to the loan transaction at issue on summary judgment (the "Transaction").[9] The Receiver asserts BB&T waived its privilege over these communications via a statement in its summary judgment brief that Susquehanna "was represented by eminent counsel" in the Transaction,[10] a four-page section in James Wrynn's rebuttal expert report titled "[t]he Bank Sought the Advice of Professionals When Structuring the Loan Agreement,"[11] related statements from that expert's deposition,[12] and similar representations.[13]

5. The Receiver argues that BB&T injected the substance of privileged communications into the litigation through those statements. I disagree. The Receiver has not identified any statements in the summary judgment briefing or

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[9] BB&T brought its third-party complaint as successor to Susquehanna. *See* D.I. 512 ¶ 3. The Receiver supports its argument with case law from other jurisdictions. I have reviewed those cases, but find that Delaware's existing jurisprudence controls these facts and does not require me to seek persuasive authority from outside this state.

[10] D.I. 655, Opening Br. 49. The Receiver points to additional, similar statements elsewhere in the summary judgment briefing. *See id.* at 33 n.50, 49 (stating generally that each side was represented by counsel in their negotiations).

[11] Mot. Ex. B at 14.

[12] Mot. Ex. C.

[13] *See, e.g.*, Reply Ex. C at 97 (deposition of another BB&T expert, Brian Casey, who testified that "when they inquired with [representatives from other parties to the Transaction] and [Susquehanna's] own counsel, nobody raised a stop sign to say that you can't do it this way"). The Receiver did not focus on these statements in its briefing, and so I do not linger on them here. They do not alter my analysis.

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Wrynn's report through which BB&T or its expert injected the substance of, or advice from, a privileged communication. BB&T and its expert merely refer to Susquehanna having hired and consulted with counsel when structuring the Transaction.[14] Those representations do not place "the communications with counsel 'at issue.'"[15]

6. As to the second prong of the "at issue" exception, the Receiver argues that BB&T injected the issue of whether Susquehanna complied with counsel's advice into the litigation, and that the truthful resolution of that issue requires an examination of confidential communications.[16] I again disagree. BB&T's statements in its summary judgment briefing are one-off, factual representations that it sought and received counsel when structuring the Transaction. BB&T countered

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[14] *See* D.I. 655, Opening Br. 33 n.50 ("There is no issue that the Loan transaction was an arms' length transaction entered into by sophisticated parties represented by separate counsel."), 49 ("More than five years after the discovery of IIC's fraud, and long after Cohen's indictment and sentencing, the Receiver now argues that certain irregularities with the transaction should have been obvious to the Bank. But the Receiver ignores that the Bank was represented by eminent counsel[.]"); Mot. Ex. B at 14-15 ("[T]he Bank sought advice from professionals on how the loan proceeds could be used that included lawyers and accountants . . . . The Bank relied upon at least two lawyers from the offices of Ballard Spahr, LLP . . . .").

[15] *In re Quest Software*, 2013 WL 3356034, at *2; *see also In re Comverge*, 2013 WL 1455827, at *4. The closest statement is made by Wrynn in his expert rebuttal report, but I consider this *infra* under the second prong of the "at issue" exception. *See* Mot. Ex. B at 16 ("It is submitted that none of the parties or their representatives knew about the prior approval requirement referenced by the [Receiver's] experts, so they clearly never intended to defraud anyone.").

[16] *See In re William Lyon Homes*, 2008 WL 3522437, at *3.

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