EFiled: Oct 03 2012 09:42AM EDT
Filing ID 46773455
Case Number 372,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE BANK OF NEW YORK MELLON, solely in its capacity as Property Trustee pursuant to a certain Amended and Restated Trust Agreement described below,	No. 372, 2012
Plaintiff-Below Appellant,	Court Below:
v.	Court of Chancery of The State of Delaware C.A. No. 5580-VCN
COMMERZBANK CAPITAL FUNDING TRUST II; COMMERZBANK CAPITAL FUNDING LLC II; and COMMERZBANK AKTIENGESELLSCHAFT,	REDACTED (PUBLIC) VERSION DATED OCTOBER 3, 2012
Defendants-Below Appellees.	

ANSWERING BRIEF OF DEFENDANTS-BELOW APPELLEES

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
William M. Lafferty (#2755)
Thomas W. Briggs, Jr. (#4076)
Ryan D. Stottmann (#5237)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200
Attorneys for Commerzbank Capital Funding Trust II; Commerzbank Capital Funding LLC II; and Commerzbank Aktiengesellschaft

OF COUNSEL:

Lawrence Byrne
Martin S. Bloor
Patrick C. Ashby
LINKLATERS LLP
1345 Avenue
of the Americas
New York, NY 10105

September 19, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

NATURE OF THE PROCEEDINGS

Commerzbank Aktiengesellschaft (the "Bank") organized Commerzbank Capital Funding LLC II ("CoBa LLC II") and Commerzbank Capital Funding Trust II ("CoBa Trust II") (together with the Bank, the "Defendants") in 2006 as part of a funding structure designed to issue trust preferred securities to raise consolidated Tier I regulatory capital for Commerzbank Group (the "Trust Preferred Securities"). The Trust Preferred Securities are profit-dependent and do not receive a payment unless the Bank makes a distributable profit during a given fiscal year. If payments are made on Parity Securities, as that term is defined in the Amended and Restated Limited Liability Company Agreement of Commerzbank II LLC (the "LLC Agreement"), such payments can trigger payments – a "deemed declaration" – on the Trust Preferred Securities. This Parity Security trigger is a limited exception to the primary, profit-dependent payment mechanism, and it is included in the LLC Agreement to ensure that like instruments are treated equally within any given fiscal year.

In 2009, the Bank merged with Dresdner Bank AG ("Dresdner Bank") and, as a consequence, acquired certain capital ratio dependent securities that had been issued by Dresdner Bank in 1999 (the "DresCap Certificates") pursuant to different regulatory requirements than those in place when the Trust Preferred Securities were issued. The DresCap Certificates receive payment if the Bank meets certain capital ratio requirements; there is no distributable profits test, which is central to the Trust Preferred Securities.

The Bank made full payments on both the Trust Preferred Securities and the DresCap Certificates in 2009. As with many financial institutions at the time, however, the Bank was unprofitable in fiscal year 2009, and, as a result, the Bank was unable to satisfy the profit-test (which looks to the Bank's prior fiscal year) required to make a payment on the Trust Preferred Securities in 2010. Thus, in March 2010, the Bank issued an ad hoc announcement stating that there would be no payments in 2010 on either the Trust Preferred Securities or on any Parity Security.

The Bank of New York Mellon, in its capacity as Property Trustee of CoBa Trust II (the "Trustee"), claims that the holders of the Trust Preferred Securities should have received a payment in April 2010 with respect to fiscal year 2009, despite the fact that the Bank was not profitable. It bases its argument on an erroneous interpretation of the definition of Parity Security, arguing that the DresCap Certificates fall within that definition, and thus payment on the DresCap Certificates in 2009 "pushed" a payment on the Trust Preferred Securities in 2010. The Trustee's position is refuted by both the plain language

of the agreements and by the absurd result of this interpretation, which would effectively read out all payment triggers for the Trust Preferred Securities, requiring an endless waterfall of payments from now until maturity.

On June 18, 2010, the Trustee filed a Verified Complaint in the Court of Chancery for the State of Delaware, seeking declaratory judgment that a deemed declaration had occurred, compelling a capital payment on the Trust Preferred Securities on April 12, 2010; specific performance, compelling payment for April 12, 2010; and costs and expenses.

On February 15, 2011, the parties cross-moved for summary judgment. On August 4, 2011, in a Memorandum Opinion ("Op."), Vice Chancellor Noble of the Court of Chancery held that the DresCap Certificates are not Parity Securities under the plain language of the relevant documents and granted summary judgment in favor of Defendants on counts I (declaratory judgment) and II (specific performance) of the Verified Complaint. Following additional briefing on an issue that had been raised by the Trustee for the first time in reply in connection with its motion for summary judgment, the Court of Chancery entered the implementing order granting summary judgment in Defendants favor on May 31, 2012. Final Judgment was entered on June 13, 2012.

The Trustee filed a Notice of Appeal on July 5, 2012, and on August 20, 2012, filed its Opening Brief in support of its appeal of the Court of Chancery's decision ("Op. Br."). This is Defendants' response to the Trustee's Opening Brief.

SUMMARY OF ARGUMENT

The Trust Preferred Securities issued by CoBa Trust II are profit-dependent securities. In 2009, the Bank, like many other financial institutions, did not make a profit. Nevertheless, the Trustee – on behalf of the directing noteholders, who drive this case – filed this lawsuit in 2010, seeking a windfall payment based upon a reading of the operative documents that defies common sense and, as the Court of Chancery held, ignores their plain language.

The Trustee erroneously claims that the DresCap Certificates, issued through an affiliate of Dresdner Bank before it was acquired and merged with the Bank, are Parity Securities, despite the fact that those securities were issued under a different regulatory environment and contain a more lenient condition precedent to payment, which was impermissible for instruments categorized as consolidated Tier 1 regulatory capital at the time the Trust Preferred Securities were issued. Even though the DresCap Certificates were never intended to be Parity Securities and have never been treated as Parity Securities under the Trust Preferred Securities' operative contracts, the Trustee persists in seeking payment on these profit-depending securities for years where the Bank was undeniably unprofitable. As the Court of Chancery unambiguously held, however, the DresCap Certificates "are not Parity Securities under the LLC Agreement," because the rules of contractual construction do not support the Trustee's interpretation of the relevant provisions of the LLC Agreement, and because Defendants' interpretation is the only interpretation that is "consistent with the Court's analysis" of other portions of the LLC agreement. Op. 26-28, 30. The Trustee cannot escape the plain language of the controlling agreements, and, for the reasons stated herein, the Court of Chancery's decision should be affirmed.

1. Denied. The Court of Chancery correctly ruled that the DresCap Certificates were not Parity Securities, as that term is plainly defined in the LLC Agreement. A Parity Security is defined as:

> (i) each class of the most senior ranking preference shares of the Bank, if any, or other instruments of the Bank qualifying as the most senior form of Tier I regulatory capital of the Bank and (ii) preference shares or other instruments qualifying as consolidated Tier I regulatory capital of the Bank or any other instrument of any Affiliate of the Bank subject to any guarantee or support agreement of the Bank ranking *pari passu* with the obligations of

> the Bank under the Support Undertaking (including, but not limited to, the obligations under the 20,000 noncumulative trust preferred securities issued by Commerzbank Capital Funding Trust I).

A168.[1] The DresCap Certificates do not fit within either Subsection (i) or Subsection (ii) of the Parity Security definition. Contrary to the Trustee's argument, "preference shares," as that term is used in Subsection (ii), is not (and cannot be) modified by "qualifying as consolidated Tier I regulatory capital of the Bank." Rather, the only reasonable reading of the Parity Security definition, and the one that was properly given effect by Vice Chancellor Noble, is that "preference shares" and each of the other instruments enumerated in Subsection (ii) are modified by the phrase "subject to any guarantee or support agreement of the Bank ranking *pari passu* with the obligations of the Bank under the Support Undertaking." This reading is the only one that gives full effect to the plain meaning of the LLC Agreement, and is in accord with the other provisions of that agreement and the other agreements executed contemporaneously with the LLC Agreement. Because the language is unambiguous, it is inappropriate to consider extrinsic evidence. And even if the Court were to resort to extrinsic evidence, contrary to the Trustee's argument, the current record does not contain sufficient evidence bearing on this issue.

2. Denied. The Court of Chancery correctly ruled that the pusher provision in Section 7.04(b)(ix) of the LLC Agreement was not triggered by payments on the DresCap Certificates. As the Court of Chancery correctly held, the DresCap Certificates, as discussed above, are not Parity Securities. That finding ends the analysis of whether there should have been a pushed payment. But, even if the DresCap Certificates were Parity Securities, payments in 2009 could not have pushed a payment on the Trust Preferred Securities in 2010, since both the Trust Preferred Securities and the DresCap Certificates were paid in full (*i.e.*, were treated equally, and with "parity") in 2009. Section 7.04(b)(ix) of the LLC Agreement creates a limited exception, notwithstanding the ordinarily profit-dependent nature of the Trust Preferred Securities, to allow a pushed payment only when necessary so that the Trust Preferred Securities and Parity Securities are treated equally "in any Fiscal Year," which is defined as a calendar year. A188. Since the Trust Preferred Securities and DresCap Certificates were treated equally in 2009, the express terms of the LLC Agreement do not permit

---

[1] "A" cites are to the Appendix filed in connection with the Trustee's Appeal in this action.

payments on the DresCap Certificates in 2009 to push a payment on the Trust Preferred Securities in 2010. If the Trustee's interpretation of the LLC Agreement were accepted, because the payment dates for the Trust Preferred Securities differ from the payment dates of the DresCap Certificates and from the payment dates of the securities issued by CoBa Trust III (which are clearly Parity Securities), once a single payment was made on the DresCap Certificates, it would push a payment on the Trust Preferred Securities, which in turn would push a payment on the securities issued by, for instance, CoBa Trust III, setting off a waterfall effect that would carry on until the instruments' maturity, converting the Trust Preferred Securities from a profit-dependent instrument into a security with a guaranteed payment. This is an absurd result, and it is unsupported by the plain language of the LLC Agreement.

3. Denied. The Court of Chancery correctly ruled that the Support Undertaking was not breached when the Bank restructured certain DresCap Certificates in early 2010. Because the DresCap Certificates are not Parity Securities, the Support Undertaking is inapplicable. Nevertheless, even if the DresCap Certificates were Parity Securities, the Support Undertaking would still be inapplicable to this case. The Support Undertaking is a limited agreement, designed to ensure that CoBa LLC II will "at all times be in a position to meet its obligations *if and when* such obligations are due and payable," because of the guarantee given by the Bank. A224. As part of this Support Undertaking, the Bank undertook that it would not provide a senior ranking guarantee of payment for any Parity Security or Junior Security (as that term is defined in the LLC Agreement), unless the Bank also amends the Support Undertaking so that the guarantee provided by the Support Undertaking ranks *pari passu* with the new guarantee. The Bank did not provide a guarantee, support undertaking, or other similar undertaking as part of the restructured DresCap Certificates; therefore, the Bank's obligations under the Support Undertaking have not been triggered. What is more, even if the Bank's obligations under the Support Undertaking had been triggered, the Bank's only obligation, pursuant to the express terms of the Support Undertaking, would be to modify *the Support Undertaking* to provide a substantially equivalent guarantee of support. There is no basis for the specific performance sought by the Trustee.

STATEMENT OF FACTS

A. The Commerzbank Capital Funding Trust Structure

On March 30, 2006, the Bank established CoBa Trust II for the sole purpose of issuing the Trust Preferred Securities to investors in order to raise Tier I regulatory capital for Commerzbank Group. A1475; A1495; A84 § 2.03. The proceeds from the sale of these Trust Preferred Securities were used to purchase all of the Class B Preferred Securities issued by CoBa LLC II. A1475; A1495; A84 § 2.03. The proceeds from the issuance of the Class B Preferred Securities were then used by CoBa LLC II to acquire £800 million in subordinated notes issued by the Bank (the "Initial Debt Securities") with a maturation date of April 12, 2036. A1475; A1494.

Periodic distributions made by the Bank to CoBa LLC II on the Initial Debt Securities fund distributions made by CoBa LLC II to CoBa Trust II on the Class B Preferred Securities. A107-108; A188; A1475. In turn, these distributions fund Capital Payments made by CoBa Trust II to the holders of the Trust Preferred Securities. A017-108; A1475. In order to qualify as Tier I regulatory capital under the prevailing regulatory requirements in place in 2006, the Trust Preferred Securities had to be profit-dependent securities, which means that Capital Payments are made only when the Bank has Distributable Profits. B2-3; A188 § 7.04(b)(ix); A1496.[2] Additionally, payments could be made if the Board of Directors of CoBa LLC II declared a Capital Payment or when Capital Payments are deemed declared in accordance with the LLC Agreement. A deemed declaration occurs when the Bank, or any of its subsidiaries, declares or pays any capital payments, dividends, or other payments on any Parity Securities or Junior Securities without declaring payment on the Class B Preferred Securities, at which point a payment on such securities is "deemed" declared. A200 § 9.01(b).

B. Support Undertaking

As part of this structure, the Bank and CoBa II LLC also entered into a Support Undertaking governed by German law. A227 § 13; A1476. The Support Undertaking ensures that CoBa LLC II will be in a position to make its

---

[2] Capitalized terms not otherwise defined have the meaning given in the LLC Agreement, the Trust Agreement, and the Memorandum Opinion of the Court of Chancery, dated August 4, 2011.

scheduled Capital Payments if and when such scheduled Capital Payments are due. A224 § 2(a). The Support Undertaking also provides that if the Bank provides a senior ranking guarantee to any Parity Security or Junior Security, it must amend the Support Undertaking to match the priority of the guarantee in the Support Undertaking to the Bank's guarantee to the Parity or Junior Security. A225 § 6. But the Support Undertaking does not require the Bank to ensure that CoBa LLC II actually declares or makes a Capital Payment. A224 § 2(d).

C. The Acquisition of and Merger with Dresdner Bank

In September 2008, the Bank acquired Dresdner Bank, and, by May 11, 2009, Dresdner Bank had completely merged into the Bank, with the Bank becoming the survivor and legal successor to Dresdner Bank. Op. at 7; B153;[3] B 525; A1598. Prior to the merger, Dresdner Bank had established its own trust preferred structures. Op. at 7. The structures established by Dresdner Bank issued the DresCap Certificates, which did not have a profit-dependent trigger, but rather payment was based on a capital ratio test. Op. at 9; A1012; A349; A1230. Distributions on the DresCap Certificates are made as long as the Bank maintains a minimum percentage of Tier I regulatory capital as required by the German Banking Act or the Bank is not insolvent or taken over by its regulator (*i.e.*, there is no Shift Event). A327 – A329; A360 – A362; B41-43. Thus, after the merger, payment on the DresCap Certificates therefore depended on the Bank's capital ratio.

The Trust Preferred Securities and the DresCap Certificates payment triggers differed because they were issued under different German regulatory administrative practices for recognizing Tier I regulatory capital. Op. at 9; B2-3. When the Trust Preferred Securities were issued in 2006, payment tests for Tier I regulatory capital could no longer be based on a capital ratio test and instead had to be based on the profits of the Bank. Op at 9; B3.

D. Liability Management and Capital Structure Harmonization

After the merger with Dresdner Bank, the Bank found itself possessing a heterogeneous mix of Tier I regulatory capital comprised of both capital ratio based securities and profit-dependent securities. In the middle of 2009, the

---

[3] "B" cites are to the supplemental appendix filed by Defendants concurrently herewith.

various hybrid instruments, such as the DresCap Certificates and the Trust Preferred Securities, were trading below par, providing the Bank with possible liability management opportunities whereby it could buy back the DresCap Certificates and the Trust Preferred Securities at distressed prices, enabling it to avoid future costly interest payments on instruments that are not considered "good" capital. B523. Consequently, the Bank analyzed various measures in 2009 through 2010 to harmonize its capital structure and reduce its debt load.

1. The Redemption of the DresCap Certificates Issued by DresCap Trust II

On June 30, 2009, the Bank redeemed the DresCap Certificates issued by DresCap Trust II, which had lost its recognition as Tier I capital due to its scheduled maturation date of June 30, 2011. B470; B4. The redemption also enabled the Bank to begin to homogenize its consolidated capital structure so that all Tier I capital would eventually be profit-dependent, rather than the mix of profit-dependent and capital ratio based securities that the Bank found itself with after the acquisition of Dresdner Bank. B522.

2. The Restructuring of the DresCap Certificates Issued by DresCap Trust IV

REDACTED

Id.

At the time certain employees of the Bank assumed that, because both the Trust Preferred Securities and the DresCap Certificates were consolidated Tier I regulatory capital, the DresCap Certificates were Parity Securities. Op. at 11, fn. 40; B14-15. Based on that assumption, the Bank was concerned that any payment on the certificates issued by the Dresdner Funding Trust IV ("DresCap IV Certificates") in March 2010 could be perceived to "push" a payment on the Trust Preferred Securities in April 2010 even though the Trust Preferred Securities otherwise failed the profit-dependent test. Op. at 11; B524; B527; B531. The Bank responded by restructuring the DresCap IV Certificates in March 2010 in order to remove the capital ratio dependent payment trigger and

relegated the DresCap IV Certificates to lower Tier II capital. Op at 12; B472-473; B526-527. Since restructuring the DresCap IV Certificates, the Bank has undertaken a full analysis of the relevant documents in consultation with counsel and now understands that prior to their restructuring, the DresCap Certificates could not qualify as Parity Securities under the express terms of those documents. B16-17.

E. Capital Payments in 2010

The Bank made payments on all of the outstanding Trust Preferred Securities and DresCap Certificates in 2009. However, as with many financial institutions at the time, the Bank was unprofitable in fiscal year 2009. Thus, on March 5, 2010, the Bank issued an ad hoc announcement stating that because the Bank did not have any Distributable Profits and the Bank did not expect any payments on a Parity Security before the April 12, 2010 payment date for CoBa Trust II, there would not be a payment on the Trust Preferred Securities. A914.

On March 26, 2010, the Trustee sent the Bank a letter claiming that (1) both the certificates issued by DresCap I and DresCap IV were Parity Securities as defined in the LLC Agreement; (2) the restructuring of the DresCap IV Certificates required similar modification and "elevation" of CoBa Trust II Trust Preferred Securities; and (3) the 2009 payments on the DresCap I Certificates and the upcoming March 31, 2010 payment on the DresCap IV Certificates required the Bank to make the April 12, 2010 payment on CoBa Trust II. A935-37.

On March 31, 2010, the Bank made payment on the restructured DresCap IV Certificates. On April 12, 2010, the Bank responded to the Trustee's letter and explained that the DresCap IV Certificates are not Parity Securities and that Section 2 of the Support Undertaking does not obligate the Bank to make Capital Payments on the Trust Preferred Securities. Section 2 only requires the Bank to ensure that CoBa LLC II has sufficient funds in the event a payment obligation arises. A939. The Bank also refuted the applicability of Section 6 of the Support Undertaking and noted that the restructuring did not breach Section 6. Finally, the Bank clarified that Capital Payments are based on the Distributable Profits of the prior fiscal year. *Id.* Thus, in contrast to what the Trustee contended in its letter, payments on the DresCap I Certificates in 2009 do not trigger payment obligations on the Trust Preferred Securities in 2010. *Id.*

Accordingly, CoBa LLC II did not make Capital Payments on April 12, 2010 to CoBa Trust II. *Id.*

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY RULED THAT THE DRESCAP CERTIFICATES ARE NOT PARITY SECURITIES

A. Question Presented

Are the DresCap Certificates Parity Securities under the terms of the relevant documents?

B. Scope of Review

The Court of Chancery's finding that the DresCap Certificates are not Parity Securities was a finding, as a matter of law, based upon undisputed facts, Op. 29-30, and is subject to *do novo* review. *See Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994). The Court of Chancery's legal ruling should be affirmed unless the Vice Chancellor "erred in formulating or applying legal precepts." *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1142 (Del. 1990).

C. Merits of Argument

Under Delaware law, the plain terms of a contract must be given their full effect. *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697, 704 (Del. Ch. 2004) ("When the words of a contract ... are plain and unambiguous, binding effect should be given to their evident meaning"), *aff'd*, 861 A.2d 1251, 1259 (Del. 2004); *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *2 (Del. Ch. Jan. 23, 2006) ("[I]t is the court's job to enforce the clear term of contracts.") As the Court of Chancery noted, "[t]he question of whether the DresCap Trust Certificates are Parity Securities drives this case." Op. 22. The operative definition of the term Parity Security appears in the LLC Agreement, *inter alia*, and is defined as:

> (i) each class of the most senior ranking preference shares of the Bank, if any, or other instruments of the Bank qualifying as the most senior form of Tier I regulatory capital of the Bank and (ii) preference shares or other instruments qualifying as consolidated Tier I regulatory capital of the Bank or any other instrument of any Affiliate of the Bank subject

> to any guarantee or support agreement of the Bank ranking *pari passu* with the obligations of the Bank under the Support Undertaking (including, but not limited to, the obligations under the 20,000 noncumulative trust preferred securities issued by Commerzbank Capital Funding Trust I).

A168. It is undisputed that the DresCap Certificates do not fall within subsection (i) of the Parity Security definition. Op. Br. at 14. The DresCap Certificates do not fall under subsection (ii) of the definition of Parity Security either, because they are not "subject to any guarantee or support agreement of the Bank ranking *pari passu* with the obligations of the Bank under the Support Undertaking," a phrase that must, and does, modify each of the three preceding items, "preference shares," "other instruments qualifying as consolidated Tier I regulatory capital of the Bank," and "any other instrument of any Affiliate of the Bank." The Court of Chancery correctly ruled that this was the appropriate reading of the unambiguous language of the agreement. Op. 30.

1. The Court of Chancery Correctly Interpreted the Term "or" as an "Inclusive Conjunction" in Accordance with the Terms of the Operative Agreements

Subsection (ii) of the definition of Parity Securities contains three distinct instruments: (1) "preference shares," (2) "other instruments qualifying as consolidated Tier I regulatory capital of the Bank," and (3) "any other instrument of any Affiliate of the Bank." A168. The threshold question decided by the Court of Chancery was whether the modifier "subject to any guarantee or support agreement of the Bank ranking *pari passu* with the obligations of the Bank under the Support Undertaking" modified each instrument listed, or only the last instrument, "any other instrument of any Affiliate of the Bank." Looking to the rest of the LLC Agreement, as well as the other agreements executed contemporaneously with the LLC Agreement, the Court of Chancery correctly held that the clause "modifies each of the three categories of securities identified in [Subsection (ii)]." Op. 29. Because it is undisputed that the DresCap Certificates are not "subject to any guarantee or support agreement of the Bank ranking *pari passu* with the obligations of the Bank under the Support Undertaking," the Court of Chancery ruled "that the DresCap Trust Securities are not Parity Securities under the LLC Agreement." Op. 30. The Court of

Chancery held that this result was dictated by "the plain language of Subsection (ii)." *Id.* at 30, fn 89.

As conceded by the Trustee, and as the Court of Chancery specifically held, in order to give effect to each part of the definition of Parity Security, "preference shares," as used in Subsection (ii), *must* be modified, otherwise it would cover *all* preference shares issued by the Bank or its affiliates and thereby subsume the reference to "each class of the most senior ranking preference shares of the Bank" referred to in Subsection (i). As the Court of Chancery recognized, that result would not be a permissible result under well-settled principles of Delaware contract interpretation. Op. 28; *In re Inergy L.P.*, 2010 WL 4273197, at *13 (Del. Ch. Oct. 29, 2010) (noting that it is a "settled principle of contract interpretation that a court must give effect to every provision of the contract and, if possible, reconcile all of the provisions as a whole.").

Given that the term "preference shares" must be modified, the Court of Chancery correctly looked to the other agreements executed in conjunction with the LLC Agreement for guidance with respect to how to interpret the language contained in the LLC Agreement. *Crown Books Corp. v. Bookstop, Inc.*, 1990 WL 26166, at *1 (Del. Ch. Feb. 28, 1990) ("in construing legal obligations created by that document, it is appropriate for the court to consider not only the language of that document but also the language of contracts among the same parties executed or amended as of the same date that deal with related matters"). The CoBa Trust II Agreement contains an identical definition for Parity Security to the one found in the LLC Agreement. That agreement, which was executed in conjunction with the LLC Agreement, contains a definition of the term "or." A83. The definition provides that "'or' is not exclusive." *Id.* Relying on this definition of "or," the Court of Chancery found that "the various clauses set off by the word 'or' in [Sub]section (ii) of the [CoBa] Trust II Agreement's definition of Parity Securities should be considered as a whole, with the whole being modified by the 'subject to' clause that follows it, and not as three distinct categories of securities, with only the last being modified by the 'subject to' clause." Op. 27. The Court of Chancery was correct in this finding.

Further supporting the Court of Chancery's finding is the mirror definition of Junior Securities contained in the LLC Agreement. Op. 28. Indeed, Subsection (iii) of the definition of Junior Securities encompasses "preference shares or any other instrument of any Affiliate of the Bank subject to any guarantee or support agreement of the Bank ranking junior to the obligations of the bank under the Support Undertaking." A167. This language closely mirrors the language in the definition of Parity Securities, where, as in the definition of Junior Securities, "preference shares" cannot remain unmodified. Accordingly,

the "subject to" language *must*, and does, modify "preference shares." *See, e.g.*, *Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 2007 WL 1207107, at *17-18 (Del. Ch. Apr. 2, 2007) (considering a "clause [that] mirrors closely the structure of the clause in the first passage that spawns much of the disagreement among the parties" in resolving that textual disagreement.).

Though not explicitly mentioned by the Court of Chancery, there is additional language that mirrors the definition of Parity Security and that further confirms that "preference shares" *must* be modified by the "subject to" language. Section 2(c) of the Support Undertaking provides that the obligations of the Bank under the Support Undertaking shall rank *pari passu* with Parity Securities and senior to "any other preference shares." A224. In order not to render any of this language surplusage, there must be a difference between "any other preference shares" referenced in Section 2(c) of the Support Undertaking and the preference shares referenced in Subsection (ii) of the definition of Parity Securities. *See In re Inergy L.P.*, 2010 WL 4273197, at *13.

The Trustee attempts to confuse the straightforward reading of the plain language of the LLC Agreement by claiming that the Court of Chancery incorrectly understood "inclusive or" and applied it to determine "whether a trailing modifier modifies only the last item in the list or all of the items." Op. Br. 15. In support of that argument, the Trustee cites to several secondary sources, and case law, none of which discuss a textual situation like the one presented in the LLC Agreement, and none of which describe how a trailing modifier is to be interpreted when following a list of items separated only by inclusive conjunctions. For example, the Trustee's discussion on how to apply "inclusive or" based on the Manual of Style and Garner's Dictionary of Legal Usage is not inconsistent with how the Court of Chancery applied the "inclusive or" to Subsection (ii) of the definition of Parity Security. Those authorities say that where a clause drafted with an "inclusive or" says "A or B," it means "A or B or *both*." KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING ¶ 10.30 (2d ed. 2008). The Court of Chancery recognized that the use of the "inclusive or" between the various instruments meant that they were to be read inclusively – preference shares or other instruments qualifying as consolidated Tier 1 regulatory capital of the Bank or any instrument of an affiliate of the Bank *or all three* – and based on that and the fact that the term "preference shares" could not be unmodified held that the "definition of Parity Securities should be treated as a whole, with the whole being modified by the 'subject to' clause that modifies it." Op. 27. The Court of Chancery did not hold that the use of the "inclusive or" required that the "subject to" modifier be read to modify each of the three instruments set forth in Subsection (ii); rather, the Court held that its use suggested that that was the unambiguous meaning after "careful

parsing of the existing language and reference to other provisions of the LLC Agreement and the Trust Agreement." *Id.* at 30, fn 87.

Indeed, in *Martin-Marietta Materials, Inc. v. Vulcan Materials Co.*, ___A.3d ___, 2012 WL 2783101 (Del. July 10, 2012), relied on by the Trustee, the Court, much like the Court of Chancery here, ultimately interpreted the provision at issue by looking at "the text of these [relevant] provisions, their relationship to each other, and by the canon of construction that requires all contract provisions to be harmonized and given effect where possible." *Id.* at *13. Based on all of those considerations, this Court concluded that the provision at issue, which provided a limitation on disclosure of "any of the other party's Evaluation Material or any of the facts, the disclosure of which is prohibited under paragraph (3) of this letter agreement," "plainly contradicted [the Plaintiff's] claim that the Evaluation Material falls within the purview of Paragraph 3." *Id.* at *14. And unlike Subsection (ii) interpreted by the Court of Chancery, the provision at issue in *Martin-Marietta* contained a comma before the modifier "the disclosure of which is prohibited by paragraph (3) of this letter agreement." *Id.* *Martin-Marietta* is simply not persuasive authority that the "subject to" clause at issue here should not be read to modify each of the instruments separated by an "or" in Subsection (ii). In fact, the Court of Chancery, in finding that the DresCap Certificates were not Parity Securities, undertook a similar analysis that this Court undertook in *Martin-Marietta* in reaching its decision.

The Trustee also claims that, even if the Defendants' and the Court of Chancery's reading of the Parity Security definition is correct, which it is, the DresCap Certificates would still qualify as a Parity Security as they are subject to a "guarantee or support agreement." Op. Br. at 19. The Trustee bases this conclusion on the fact that "guarantee or support agreement" is not defined and some of the contracts relevant to the DresCap Certificates "give DresCap holders direct enforcement rights against the bank itself," which the Trustee claims are "functionally similar" to the payment obligations undertaken by the Bank through the Support Undertaking. *Id.* As the Court of Chancery noted, the issue of whether the DresCap Certificates are subject to "any guarantee or support undertaking of the Bank" is "not disputed," Op. 29-30, the Trustee did not raise it in its original summary judgment briefing, and thus this argument is not properly presented now on appeal. *Equitable Trust Co. v. Gallagher*, 77 A.2d 548, 550 (Del. 1950) ("Appellate Courts generally will refuse to review matters on appeal not raised in the Court below"); *see also Russell v. State*, 5 A.3d 622, 627 (Del. 2010) ("this Court may not consider questions on appeal unless they were first fairly presented to the trial court for consideration. This prohibition applies to both specific objections as well as the arguments that support those objections.").

Nonetheless, the Trustee's argument is misguided, as the Support Undertaking confers rights upon holders with respect to liquidation preference (one of the main benefits of such a protection) that are not mirrored by instruments conferring direct enforcement rights. Indeed, a direct enforcement right simply gives the DresCap Certificate holders an avenue through which to sue the Bank; it, in no way, guarantees payment on the DresCap Certificates, or guarantees that the DresCap Certificates will be paid in insolvency.

2. The Plain Reading of the Parity Security Definition Supports the Court of Chancery's Ruling

The Court of Chancery applied the plain meaning of the language in Subsection (ii) of the definition of Parity Security in concluding that the "subject to" language modified each of the instruments enumerated in that subsection. Indeed, the Court of Chancery specifically rejected the Trustee's contention that it had departed from grammatical norms in rendering its decision. The Court of Chancery was very clear that the plain language of the subsection dictated the result:

> First, the Court has determined that the plain language of Subsection (ii) imposes this requirement; there is no need to depart from grammatical norms to reach that conclusion. Second, if the plain language of an agreement imposes a requirement, as it does here, the Court must give effect to the parties' chosen words…

Op. 30, fn 89.

Beyond the textual and contextual support for the Court of Chancery's finding with respect to the definition of Parity Security, the ruling also comports with the plain meaning and intent behind the definition. *See Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1228 (Del. Ch. 2000) ("Where contract language speaks to a particular dispute, this Court gives those privately negotiated and agreed upon terms their full and plain meaning."). Each subsection of the Parity Security definition refers to instruments as to which the Bank itself has a payment obligation. In Subsection (i), that payment obligation arises because the instruments listed were actually issued by the Bank. A168. In Subsection (ii), that payment obligation arises because the Bank has explicitly obligated itself by entering into a guarantee or support undertaking. A168.

Indeed, Section 2(c) of the Support Undertaking explicitly states that "[t]he obligations *of the Bank* under this Section 2 ... shall rank *pari passu*" with Parity Securities. A224 (emphasis added). Put another way, the Support Undertaking provides that the obligations of the Bank under that agreement will rank *pari passu*, to other specified obligations of the Bank; namely, the most senior form of preference shares and Tier I regulatory capital instruments issued by the Bank and instruments that are subject to a guarantee or support agreement of the Bank that ranks *pari passu* with the Bank's obligations under the Support Undertaking. *Id.* This reading is the only proper way to read the definition of Parity Security, and the Court of Chancery properly gave it full effect. *See Playtex FP, Inc. v. Columbia Cas. Co.*, 622 A.2d 1074, 1085 (Del. Super. Ct. 1992) (noting that clauses of a contract must be interpreted "in relation to the purposes of those clauses"). Indeed, the definition of Parity Security concludes with a parenthetical reference to an instrument qualifying as a Parity Security: the CoBa Trust I Trust Preferred Securities. A168. The CoBa I Trust Preferred Securities are a direct example of an instrument qualifying as consolidated Tier I regulatory capital that is subject to a "guarantee or support agreement of the Bank ranking *pari passu* with the obligations of the Bank under the Support Undertaking." B645-649.

As discussed, *infra* Section II.C., the Court of Chancery's finding that the DresCap Certificates are not Parity Securities also avoids the absurd result that two highly dissimilar instruments with vastly different payment triggers would be treated equally, which would result in the unreasonable situation in which payment on one would start a "waterfall" of never-ending (until maturity) payments. *See Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1063 (Del. 2010) (stating that courts avoid interpreting contracts in a way that would cause unreasonable results).

The Trustee claims that the reading of the language that is most natural is for the "subject to" language to simply modify the last item. Op. Br. at 14. According to the Trustee, this reading is buttressed by the absence of a comma before the "subject to" language. This argument has no merit and directly contradicts *Martin-Marietta*, where the disputed clause that the Court found only applied to the last item contained a comma before the modifier at issue. 2012 WL 2783101 at *14. What *Martin-Marietta* demonstrates is that a clause must be read in the full context of all the relevant terms of the relevant contracts. If the Court were to follow the Trustee's argument regarding the absent comma, then *Martin-Marietta*, which held that the modifying clause only applied to the immediately preceding item (despite the comma), was incorrectly decided. The Trustee cannot credibly maintain that the Court of Chancery erred by not applying the correct principle of grammar to the language at issue here, and then

rely on a case, *Martin-Marietta*, to support their other arguments that directly contradict the cases they cite for that rule of grammar. *Compare* Op. Br. 16-17, fn 2 (citing cases to show that the presence of a comma indicates that the modifier applies to each item preceding the comma) *with Martin-Marietta*, 2012 WL 2783101 at *14 (finding that modifier following comma only applied to immediately preceding item). The Court of Chancery was, therefore, correct in answering this question of contract interpretation by going to the most authoritative spot: the rest of the contract. *See J.C. Penney Life Ins. Co. v. Pilosi*, 393 F.3d 356, 364 (3d Cir. 2004) (stating that canons of construction do not apply when the language of an agreement, viewed in context, is clear); *see also DeCoteau v. Dist. Cnty. Ct. for the Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975) (stating that a "canon of construction is not a license to disregard clear expressions"); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (stating that when language is "unambiguous, then, [the] first canon is also the last: judicial inquiry is complete").

Additionally, because the language of the LLC Agreement is unambiguous, Plaintiff's attempted reliance on the doctrine of *contra proferentem* is misplaced. *E.I. du Pont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985). Indeed, *contra proferentem* is only to be used as a "last resort" and is inappropriate where, as here, the language at issue can be easily interpreted using "more favored rules of construction." *Id.*

The Trustee also claims that the Court of Chancery's ruling renders surplusage the middle term of Subsection (ii), "other instruments qualifying as consolidated Tier I regulatory capital of the Bank." Op. Br. 17. This, like other of the Trustee's arguments, was not raised in the Court of Chancery and thus cannot be raised for the first time on appeal. *Equitable Trust Co.*, 77 A.2d at 550; *see also Russell*, 5 A.3d at 627. In addition, there is absolutely no evidence in the record to support the Trustee's assertion that "*[a]ny* affiliate instrument subject to an appropriate guarantee or support agreement of the Bank – whether qualifying as consolidated Tier I regulatory capital or not – would already be a Parity Security under the third term." Op. Br. 17. The Trustee's reading would also effectively render as surplusage the term preference shares, which it has already conceded cannot remain unmodified. Indeed, it is only the Court of Chancery's reading that gives proper effect to the entirety of the Parity Security definition. *See In re Inergy L.P.*, 2010 WL 4273197, at *13.

In trying to convince this Court of the plain meaning of the language of Subsection (ii), the Trustee argues that the only proper reading of the Parity Security definition is to modify "preference shares," as that phrase appears in Subsection (ii), with "qualifying as consolidated Tier I regulatory capital of the

Bank" Op. Br. at 18. However, the modifier "qualifying as consolidated Tier I regulatory capital of the Bank" clearly "trails" the item "other instruments," which, if the Trustee's previous argument with respect to "trailing modifiers" is to be consistent, means that it should *only* modify "other instruments." Further, the Trustee's reading would render the inclusion of the term "preference shares" surplusage, subsumed by the phrase "other instruments." The Trustee does not, and cannot, offer a cohesive theory as to why the first use of the "inclusive or" should somehow be treated differently than the second.

Finally, grasping at straws, the Trustee argues that the "rule of the last antecedent" should be applied when interpreting the Parity Security definition. Op. Br. 19. However, that rule would not only contradict several of the Trustee's other arguments (particularly the Trustee's argument that the "qualifying as" language modifies "preference shares," despite the fact that it is not the "last antecedent" to "preference shares"), but is also, as the Trustee concedes, not recognized with any authority in Delaware. Op. Br. 19.

3. Bank Employees' Views Concerning the Nature of the DresCap Certificates are Not Relevant

Where, as here, the language of the contract is unambiguous, the Court need not "look beyond its plain meaning." *Tang Capital Partners, LP v. Norton*, 2012 WL 3072347, at *5, (Del. Ch. July 27, 2012) (noting that "extrinsic evidence will inform the Court's determination of the parties' intent only where the contractual language is ambiguous"). Therefore, prior communications of certain employees of the Bank regarding their views concerning the nature of the DresCap Certificates are not relevant. However, even if this Court were to find the language of the agreements to be ambiguous, the statements cited to by the Trustee are still not relevant, as extrinsic evidence may only be considered to determine the parties' intent *when drafting the agreements. Id.*; *see also Point Mgmt, LLC v. MacLaren, LLC*, 2012 WL 2522074, at *16 (Del. Ch. June 29, 2012) (noting that "if the meaning of that language is clear within the four corners of the deed, this Court will not consider extrinsic evidence regarding the parties' intent. If the language in the deed is ambiguous, however, the intent of the parties must be determined ..."). To determine the intent of the parties, the Court may "consider extrinsic evidence to uphold, to the extent possible, the reasonable shared expectations of the parties *at the time of contracting*." *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch., 2003) (emphasis added). The statements pointed to by the Trustee all occurred years after the Trust

Preferred Securities were issued, not at the time the agreements were being drafted.

The Trustee's reliance on *Chakov v. Outboard Marine Corp.*, 429 A.2d 984 (Del. 1981), is misplaced. In *Chakov*, the extrinsic evidence looked to by the court concerned the parties' course of conduct, and what it conveyed about the intent of the contracts *to both parties*. *Id.* at 986. The Trustee attempts to characterize the various statements it cites as a course of conduct of the parties. But the Trustee ignores the fact that payments were *never made* on the basis of the Parity Security status of the DresCap Certificates and they were never confirmed to investors as Parity Securities; thus, no course of conduct exists from which meaning can be derived.

The Court of Chancery considered, and rightly dismissed, the import of the position previously taken by certain of the Bank's employees that the DresCap Certificates may be Parity Securities. As the Court of Chancery held, the fact that certain Bank employees once believed the DresCap Certificates may be Parity Securities does "not confirm the correctness of that belief ... [i]f the LLC Agreement's language is unambiguous, that language must be given effect, even if it differs from the parties' current or former beliefs regarding its meaning." Op. 20, fn 70. The Court of Chancery was correct in this finding.

II. A DEEMED DECLARATION DID NOT OCCUR

A. Question Presented

Did the 2009 payments on the DresCap Certificates trigger the LLC Agreement's pusher provision so that a "deemed declaration" occurred on April 12, 2010?

B. Scope of Review

The Court of Chancery's legal ruling should be affirmed unless the Vice Chancellor "erred in formulating or applying legal precepts." *Gilbert*, 575 A.2d at 1142. *See* Argument I.B, *supra.*

C. Merits of Argument

The Court of Chancery correctly concluded that "[b]ecause the DresCap Trust Certificates are not Parity Securities, the Defendants are entitled to judgment in their favor as a matter of law regarding the Trustee's claim under the Pusher Provision." Op. 30. Should this Court affirm the Court of Chancery's determination that the DresCap Certificates are not Parity Securities, all parties agree that ends any analysis under the pusher provision. *See* Op. Br. 24-25. But even if this Court determines that the DresCap Certificates are Parity Securities, the 2009 payments on the DresCap Certificates did not push a payment on the Trust Preferred Securities on April 12, 2010 because both the DresCap Certificates and the Trust Preferred Securities were paid in full in 2009 (*i.e.*, were treated equally, and with "parity"). The Trustee's arguments for a pushed payment ignore the plain language of the LLC Agreement, and instead of seeking parity treatment for the Trust Preferred Securities, advances a reading of the pusher provision that would give the holders of the Trust Preferred Securities a windfall and, played out to its logical conclusion, would lead to the absurd result whereby the Bank would be required to make payments on the *profit-dependent* Trust Preferred Securities on every payment date until maturity, regardless of the Bank's profitability.

Pursuant to the express terms of the LLC Agreement, Capital Payments on the Class B Preferred Securities (which, in turn, fund the Trust Preferred Securities) are authorized, ordinarily, only when the Bank makes a profit. A188-89. Section 7.04(b)(ix) of the LLC Agreement goes on to create a *limited exception* to this general rule, and it operates to ensure that the Trust Preferred Securities and Parity Securities receive equal, or parity, treatment in each given fiscal year, with a fiscal year being a calendar year, commencing on January 1

and ending on December 31. A166. Specifically, the LLC Agreement states that:

> Notwithstanding the foregoing, if the Bank[4] or any of its subsidiaries declares or pays any capital payments, dividends or other distributions on any Parity Securities *in any Fiscal Year*, Capital Payments[5] shall be authorized to be declared and paid on the Class B Payment Date[6] falling contemporaneously with or immediately after the date on which such capital payment, dividend or other distribution made *such that the aggregate amount of Capital Payments paid on such Class B Payment Date bears the same relationship* to the aggregate amount of Capital Payments payable at the Stated Rate[7] in full for the Class B Payment Period[8] ending on such Class B Payment Date *as the aggregate amounts of capital payments, dividends or other distributions on such Parity Securities paid during the Fiscal Year* in which such payment occurs bears to the full stated amount of capital payments, dividends or other distributions payable on such Parity Securities *during such Fiscal Year*. If such capital payment, dividend or other distribution is only a partial payment of the amount so owing, the amount of the Capital Payment deemed declared on the Company Class B Preferred Securities will be adjusted proportionately.

---

4 Bank is defined as Commerzbank AG together with its successors. A162.

5 Capital Payments are defined as "periodic distributions to Class B Preferred Securityholders declared (or deemed declared) and paid in accordance with this LLC Agreement." A165.

6 Class B Payment Date is defined as April 12 of each year. A165, A186.

7 Stated Rate is defined as 5.905%. A187.

8 Class B Payment Period is defined as April 12 through April 11. A165, A186.

A188-89. Although this provision is dense, it is clear that the "Fiscal Year" serves as the basis by which parity treatment is measured. *See DeLucca*, 2006 WL 224058, at *2 (stating that contract terms must be given their plain meaning). As long as the aggregate amount paid on the Trust Preferred Securities for any given fiscal year, as against the amount payable, bears the same relationship as the aggregate amount paid on Parity Securities as against the amount payable for that same fiscal year, the Trust Preferred Securities have been treated equally – or with parity – and the pusher provision is inapplicable.

This plain reading of the pusher provision is supported by the language contained in the offering memorandum for the CoBa Trust II:

> If the dividend or other payment or distribution on Parity Securities was in the full stated amount payable on such Parity Securities *in the then current fiscal year* through the relevant Payment Date, Class B Capital Payments will be deemed declared at the Stated Rate [*i.e.*, 5.905%] in full *for the then current fiscal year* through such Payment Date. If the dividend or other payment or distribution on Parity Securities was only a partial payment of the amount so owing, the amount of the Class B Capital Payment deemed declared on the Company Class B Preferred Securities will be adjusted proportionally.

A1530. Simply stated, deemed declarations serve to treat the Trust Preferred Securities and Parity Securities equally within a given fiscal year, and this understanding was clear from the face of not just the LLC Agreement, but also from the face of the offering memorandum. Since the Trust Preferred Securities and DresCap Certificates were both paid in full in fiscal year 2009, they were treated equally and with parity (despite not being Parity Securities). Thus, payments on the DresCap Certificates in June and December 2009 did not serve to trigger the pusher provision.

The Trustee attempts to avoid the plain language of the LLC Agreement by (for the first time) deconstructing the single sentence pusher provision into three separate and distinct mechanical parts. Op. Br. 25-26. Despite a complete lack of textual support – and the Trustee's naked assertion that it is *Defendants'* interpretation that "requires reading references" into the pusher provision – the Trustee asserts that this single sentence breaks down neatly into what it terms a "payment trigger," a "timing clause," and a "payment formula." *Id.* at 26. None

of these terms are found in the actual LLC Agreement itself. More important, there is no textual basis for indiscriminately chopping this single sentence pusher provision into three discrete parts. *See USA Cable v. World Wrestling Fed'n Entm't, Inc.*, 2000 WL 875682, at *8 (Del. Ch. June 27) (stating under New York law, which is noted as "in accord" with Delaware law, "single clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part . . . . the word obtains its meaning from the sentence, the sentence from the paragraph and the latter from the whole document"), *aff'd by* 766 A.2d 462, 467 (Del. 2000); *see also Fletcher Intern., Ltd. v. ION Geophysical Corp.*, 2010 WL 2173838, at *4 (Del. Ch. May 28, 2010).

The Trustee apparently hopes that, by separating the pusher provision into separate parts, it can obscure its limitations. Nowhere is the Trustee's attempted sleight of hand more apparent than in where it chooses to delineate the so-called "timing clause," separating the "timing clause" from the "payment formula" not just mid-sentence, but between two continuous words that are themselves not even separated by punctuation. Op. Br. at 26. The Trustee identifies the "timing clause" as: "Capital Payments shall be authorized to be declared and paid on the Class B Payment Date falling contemporaneously with or immediately after the date on which such [triggering payment was] made" *Id.* What the Trustee fails to disclose, or even appropriately acknowledge with an ellipse, is that the very next word begins limiting the pusher provision, stating that payments will be authorized only "*such that* the aggregate amount of Capital Payments paid on such Class B Payment Date bears the same relationship . . . as the aggregate amounts of capital payments, dividends or other distributions on such Parity Securities paid during the Fiscal Year . . . during such Fiscal Year." A188-89. Instead of recognizing that pushed payments are limited to a fiscal year, the Trustee attempts to recast the bulk of the pusher provision as a mere payment formula, thereby removing any limits to the pusher provision, and turning this payment exception into the rule. The natural reading of the pusher provision rejects this interpretation. *Aspen Advisors*, 843 A.2d at 704 ("When the words of a contract ... are plain and unambiguous, binding effect should be given to their evident meaning.").

Under the Trustee's theory, once the Bank made a payment on *any* Parity Security (like the trust preferred securities issued by CoBa Trust III, which are clearly Parity Securities and pay quarterly on March 18, June 18, September 18 and December 18 of each year) in one fiscal year, that payment would automatically push a payment on the Trust Preferred Securities in the next fiscal year, and then that pushed payment would itself push a payment on CoBa Trust III, a cycle which would repeat itself indefinitely (since the Trust Preferred

Securities are paid on April 12, a different date in the fiscal year than the CoBa Trust III securities). *See Axis Reinsurance*, 993 A.2d at 1063 (noting that a court will not adopt an interpretation of a contract that leads to unreasonable results). This domino theory of the pusher provision would mean that once a payment is made on any Parity Security, payments can never stop, the limited exception of the pusher provision would become the exclusive rule, and payments would be made on the profit-dependent Trust Preferred Securities regardless of the Bank's profit.

The Trustee recognizes this inherent problem with its interpretation, but suggests that parties can enter into good and bad contracts, and that bad bargains are enforceable. Op. Br. 28-29. The Trustee's proposed reading of the pusher provision would be more than a bad bargain, however, since drafting such a provision would have violated BaFin requirements that the Commerzbank trust instruments have a profit-dependent payment trigger. B2-3. The regulators would not have approved the issuance of the Trust Preferred Securities as consolidated Tier I regulatory capital of the Bank if the LLC Agreement Parity Security definition captured an instrument with a capital ratio payment trigger (such as the DresCap Certificates) in its definition of Parity Security because to do so would have, in effect, substituted a capital ratio payment trigger for the profit-dependent payment trigger. B10. Indeed, the Trustee attempts to rescue its interpretation by suggesting that the Bank could repurchase or redeem securities or that BaFin might, on its own initiative, step in and stop the payments. Op. Br. at 29. This misses the point. The language of the pusher provision is clear. The Trustee's interpretation would lead to an absurd result that also violates BaFin requirements and should be rejected in favor of the Bank's more reasonable and harmonious interpretation. *See Axis Reinsurance*, 993 A.2d at 1063.

The Trustee also argues, once again for the first time, that the plain reading of the LLC Agreement should be rejected because "it would create needless inconsistency with the Junior Security Pusher Provision." Op. Br. 28; *see Equitable Trust Co.*, 77 A.2d at 550; *see also Russell*, 5 A 3d at 627. The Junior Security provisions make clear that, much like with Parity Securities, the interest is in ensuring that the Trust Preferred Securities are treated equally to Junior Securities. Not only does the plain reading not create an inconsistency with the Junior Security pusher provision, but in fact it is the Trustee's reading that creates a patent inconsistency between the overall pusher provision and the Junior Securities pusher provision, as well as the language in the CoBa Trust II Offering Memorandum, which clearly provides that instruments are to be treated equally with respect to particular fiscal years. A1530.

Finally, the Trustee now asks this Court to find that "the June 30 and December 31, 2010 payments on the DresCap I Securities . . . pushed a payment on April 12, 2011." Op. Br. 30. Arguments with respect to payment on April 12, 2011, however, are not appropriate since they are outside of the scope of the Trustee's Complaint. The Trustee's Complaint brings narrow causes of action, including for declaratory judgment that "a 'deemed declaration' occurred . . . on April 12, 2010," and for specific performance for "the full amount of the Capital Payment scheduled to be paid on April 12, 2010." Complaint at ¶ 44. Relief for claims not raised in a Complaint cannot be granted by a court, much less on appeal. *Pfeiffer v. State Farm Mut. Auto. Ins. Co.*, 2011 WL 7062498, at *8 (Del. Super. Ct.) ("Arguments that are not raised in the court below ordinarily cannot be raised for the first time on appeal."); *see also Bagwell v. Prince*, 683 A.2d 58 (Table), 1996 WL 470723, at *1 (Del. Aug. 9, 1996) ("To the extent that Bagwell has not briefed claims in the original motion for summary judgment, those claims are deemed waived and abandoned and will not be addressed by this Court.").

III. DEFENDANTS HAVE NOT BREACHED THE SUPPORT UNDERTAKING

A. Question Presented

Did the Bank's entry into an agreement modifying the DresCap IV Certificates breach Section 6 of the Support Undertaking?

B. Scope of Review

The Court of Chancery's legal ruling should be affirmed unless the Vice Chancellor "erred in formulating or applying legal precepts." *Gilbert*, 575 A.2d at 1142. *See* Argument I.B, *supra.*

C. Merits of Argument

As the Court of Chancery concluded, because "the DresCap Trust Certificates do not qualify as either Parity Securities or Junior Securities, Section 6 of the Support Undertaking was not triggered by amendment of the DresCap Trust IV Certificates." Op. 31. The Trustee's Opening Brief notes that the Court of Chancery "ended its analysis there," and to the extent that this Court affirms the Court of Chancery's ruling regarding Parity Securities, this Court can similarly end its analysis. Op. Br. 32. Further analysis of the Trustee's arguments under the Support Undertaking, however, only serves to discredit the Trustee's request for "specific performance requiring the Bank to perform its obligation . . . to accord the CoBa II TruPS *pari passu* treatment with the DresCap IV Securities," relief which is wholly unsupported by the plain language of the Support Undertaking. *Id.* at 33.

As part of the issuance of the Class B Preferred Securities (which, in turn, fund the Trust Preferred Securities), the Bank and CoBa II LLC entered into a German law governed Support Undertaking. The Support Undertaking exists to ensure that if Capital Payments are due, CoBa II LLC will have the necessary funds to make them. This is accomplished by Section 2 of the Support Undertaking, titled the "Support Undertaking," whereby the "Bank undertakes to ensure that [CoBa II LLC] shall at all times be in a position to meet its obligations *if and when* such obligations are due and payable" A224 (emphasis added). By its express terms, this limited guarantee by the Bank does "not constitute a guarantee or undertaking of any kind that [CoBa II LLC] will . . . be authorized pursuant to the LLC Agreement, to declare a Capital Payment or any other distribution." *Id.* The Bank simply guarantees that *if* the contractual payment triggers in the LLC Agreement are met for Capital Payments on the

Class B Preferred Securities, CoBa LLC II will have sufficient funds to meet that obligation.

In order to preserve the Bank's level of support, Section 6 of the Support Undertaking also requires that the Bank's guarantee obligations under the Support Undertaking will rank at least *pari passu* with any future guarantees of payment relating to a Parity Security. Section 6 does not, however, in any way ensure that Parity Securities are accorded *pari passu* treatment generally.

Section 6, in its entirety, states:

> The Bank undertakes that it *shall not give any guarantee or similar undertaking* with respect to, or enter into any other agreement relating to the support or payment of any amounts in respect of any other Parity Securities or Junior Securities that would in any regard rank senior in right of payment to the Bank's obligations under this Agreement, *unless the parties hereto modify this Agreement* such that the Bank's obligations under this Agreement rank at least *pari passu* with, and contain substantially equivalent rights of priority as to payment *as such guarantee or support agreement relating to Parity Securities.*

A225 (emphasis added). The plain language of Section 6 is clear, and it is limited: the Bank will not provide a senior ranking guarantee of payment (if and when such payment obligations are due) to any Parity Security or Junior Security, unless the Bank also amends Section 2 of the Support Undertaking so that the guarantee provided by the Support Undertaking ranks *pari passu* with the new guarantee. *See DeLucca,* 2006 WL 224058, at *2 ("[I]t is the court's job to enforce the clear terms of contracts.").

The Trustee has not identified any guarantee provided by the Bank that would trigger the Bank's obligations under Section 6, because no such guarantee exists. Instead, the Trustee generically asserts that "[t]he Bank's restructuring of the DresCap IV [Certificates], making them senior to the CoBa II TruPS and moving them from Tier I capital into Tier II capital . . . breached Section 6 of the Support Undertaking." Op. Br. 32. It did not, and could not have, because the Bank did not provide any guarantee, support undertaking or similar undertaking with respect to the DresCap IV Certificates. *See* B7-B8. In fact, the only

payment obligation of the Bank under the restructuring of the DresCap IV Certificates relates to the subordinated note issued by Dresdner Bank as part of the overall funding structure, *not* the DresCap IV Certificates. *See* B484. Therefore, unlike the holders of the Trust Preferred Securities, the holders of the DresCap IV Certificates have no contractual right to seek payments on the DresCap IV Certificates from the Bank in the event of non-payment. As a result, Section 6 of the Support Undertaking could never have been implicated by the restructuring of the DresCap IV Certificates.

To the extent that the Trustee is asserting that Section 6 of the Support Agreement captures agreements that are of an entirely different nature than a guarantee, such as the documents that effected the restructuring of the DresCap IV Certificates, such argument is unavailing. The overriding purpose of the Support Undertaking is to provide a guarantee that CoBa LLC II will be in a position to meet its obligations, whether in the context of a capital payment or a liquidation, and to protect that guarantee. Section 6 must be read in that light. *See USA Cable*, 2000 WL 875682 at *8 (stating that "single clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part . . . . the word obtains its meaning from the sentence, the sentence from the paragraph and the latter from the whole document"). Plainly, the terms "guarantee," "similar undertaking," and "any other agreement relating to the support or payment of any amounts," all capture the same concept of a guarantee like that provided in the Support Undertaking. For avoidance of doubt, however, the *same sentence* continues, and states that if the Bank does undertake another "guarantee," "similar undertaking," or "any other agreement relating to the support or payment of any amounts" that would rank senior to the Bank's obligations under the Support Undertaking, the Support Undertaking must be amended so that it "contain[s] substantially equivalent rights of priority as to payment *as such guarantee or support agreement relating to Parity Securities*." A 225 (emphasis added). This makes clear that Section 6 only operates to prevent the Bank from providing a senior ranking *guarantee of payment* to a Parity Security or Junior Security, unless it amends the Support Undertaking to provide an equivalent guarantee. *See Joseph B.P. v. Kathleen M.P.*, 469 A.2d 800, 802 (Del. 1983) (stating that Delaware courts "give words in the contract their plain, ordinary meaning").

Finally, the Support Undertaking provides that the only remedy for a breach of Section 6 is to "modify *this Agreement* such that the Bank's obligations under *this Agreement* rank at least *pari passu* with, and contain substantially equivalent rights of priority as to payment as *such guarantee or support agreement relating to Parity Securities*." A225 (emphasis added). Put simply, the Trustee can only seek to have the Support Undertaking itself modified to rank

pari passu with the "guarantee or support agreement relating to Parity Securities." *Id.* Therefore, even if the DresCap IV Securities were Parity Securities, and even if the Bank had provided a guarantee for the DresCap IV Securities implicating Section 6 of the Support Undertaking, the Trustee's request for "specific performance" requiring the Bank to "elevate," "maintain," and "modify" the Trust Preferred Securities would still have to be rejected, since it stands at odds with the plain language of the Support Undertaking. Op. Br. 33. The remedy sought by the Trustee finds no contractual support, and its claim that Defendants breached the Support Undertaking should be rejected.

CONCLUSION

For the reasons set forth herein, this Court should **AFFIRM** the ruling of the Court of Chancery.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Thomas W. Briggs, Jr.

William M. Lafferty (#2755)
Thomas W. Briggs, Jr. (#4076)
Ryan D. Stottmann (#5237)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200
Attorneys for Commerzbank Capital Funding Trust II; Commerzbank Capital Funding LLC II; and Commerzbank Aktiengesellschaft

OF COUNSEL:

Lawrence Byrne
Martin S. Bloor
Patrick C. Ashby
LINKLATERS LLP
1345 Avenue
of the Americas
New York, NY 10105

September 19, 2012

6450750

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2012, the foregoing *REDACTED (PUBLIC) VERSION OF ANSWERING BRIEF OF DEFENDANTS BELOW-APPELLEES* was caused to be served upon the following counsel of record in the manner indicated:

VIA LEXISNEXIS FILE AND SERVE:

Collins J. Seitz, Jr.
Seitz Ross Aronstam & Moritz LLP
100 South West Street
Suite 400
Wilmington, DE 19801

/s/ Ryan D. Stottmann

Ryan D. Stottmann (#5237)