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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,

Plaintiff Below-Appellant,

v.

COMMERZBANK CAPITAL FUNDING TRUST II; COMMERZBANK CAPITAL FUNDING LLC II; and COMMERZBANK AKTIENGESELLSCHAFT,

Defendants Below-Appellees.

No. 372, 2012

COURT BELOW:

COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 5580-VCN

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NATURE OF PROCEEDINGS

Commerzbank Aktiengesellschaft (the "Bank"), a German bank, has periodically issued trust preferred securities—or TruPS—to investors. In 2006, through a Delaware trust funding structure, the Bank organized Commerzbank Capital Funding LLC II (the "Company") and Commerzbank Capital Funding Trust II (the "Trust") (collectively and together with the Bank, "Commerzbank"). Commerzbank is authorized to make Capital Payments to holders of Commerzbank Capital Funding Trust II securities (the "CoBa II TruPS") if the Bank meets a profit-based test. In addition—and regardless of whether the profit test is met—a "Pusher Provision" provides for a mandatory payment to CoBa II TruPS investors if any payment is made to investors in a contractually defined group of "Parity Securities." The Pusher Provision protects the CoBa II TruPS investors from being treated unequally to Parity Securities investors by requiring that, if the Bank or one of its affiliates makes any payment on any Parity Security, Commerzbank must also pay the CoBa II TruPS investors on the immediately following payment date, occurring annually on April 12. This action results from Commerzbank's failure to make Capital Payments due under the Pusher Provision.

On May 11, 2009, the Bank acquired Dresdner Bank. As part of that merger, the Bank assumed Dresdner Bank's obligations to holders of the DresCap I and IV Securities. In 2009, the Bank made payments at the full stated rate on DresCap I Securities. Then, with the March 31, 2010 payment date for the DresCap IV Securities approaching, the Bank restructured the DresCap IV Securities to make them senior to the CoBa II TruPS. The Bank admitted that it did this in an attempt to avoid a pushed payment, seeking to undermine the Pusher Provision's protection against unequal treatment of the CoBa II TruPS investors. The scheduled payment on the DresCap IV Securities was then paid in full on March 31, 2010. Despite the payments on the two series of DresCap Securities, Commerzbank made no payment to the CoBa II TruPS investors on April 12, 2010. Even though the Bank previously recognized that the DresCap Securities are Parity Securities, in this litigation it has relied on a strained and unreasonable interpretation of the Parity Securities definition to justify its failure to make the required April 12, 2010 payment to the CoBa II TruPS investors.

On June 18, 2010, The Bank of New York Mellon, solely in its capacity as property trustee under the CoBa II trust agreement (the "Trustee"), filed suit in the Court of Chancery against Commerzbank seeking: (i) a declaratory judgment that, among other things, a pushed payment became due on the CoBa II TruPS on April 12, 2010; (ii) specific performance; and (iii) the costs and expenses of enforcement incurred by the Trustee.

On February 15, 2011, the parties cross-moved for summary judgment on counts I and II. In light of the Bank's continued payments on the DresCap Securities during the litigation, the Trustee's summary judgment papers also requested a declaration that a further pushed payment was due on April 12, 2011. A57-58. In a memorandum opinion issued August 4, 2011, the Court of Chancery held that the DresCap Securities were not Parity Securities and granted summary judgment for Commerzbank on counts I and II. *See* Memorandum Opinion, Exhibit A hereto ("Op."); *see also* Letter Opinion, Exhibit B hereto ("Ltr. Op."); Final Judgment Entered Pursuant to Rule 54(b), Exhibit C hereto. This is the Trustee's appeal from that decision.

SUMMARY OF ARGUMENT

As the Court of Chancery noted below, "[t]he question of whether the DresCap Trust Certificates are Parity Securities drives this case." Op. 22. "If they are, then the [Trustee] may be correct in arguing that making payments on the DresCap Trust Certificates in 2009 and 2010 'pushed' payments on the Trust Preferred Securities." *Id.* Because the DresCap Securities are within the Parity Securities definition, the decision below should be reversed and summary judgment granted in favor of the Trustee.

1. The Court of Chancery erred in holding that the definition of Parity Securities in the Company's LLC Agreement unambiguously excludes the DresCap Securities, even though they were instruments qualifying as consolidated Tier I regulatory capital of the Bank. The Parity Securities definition includes:

> 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

A168 (emphasis added). Despite acknowledging that the Trustee's reading of the Parity Securities definition "does flow somewhat more naturally than [Commerzbank's]" (Op. 25), the court rejected that "more natural[]" reading to hold that the trailing modifier "subject to any guarantee or support agreement ..." modified all three of the preceding items based on a misunderstanding of "inclusive or." Case law, secondary sources, and the manual for contract drafting published by the American Bar Association make clear that "inclusive or" has a settled meaning unrelated to the effect of trailing modifiers.

Regardless of the Court of Chancery's incorrect understanding of "inclusive or," the DresCap Securities are within the plain language of the Parity Securities definition. Indeed, in seeking to demonstrate how Commerzbank's reading could have been "more clearly" expressed, the lower court resorted to inserting the additional words "provided in each

case" in the definition (Op. 29 n.87), words that Commerzbank used in another definition appearing on the same page of the LLC Agreement but determined *not* to use in the definition of Parity Securities. Commerzbank's reading also effectively renders the middle term of the Parity Securities definition surplusage. It also violates the Rule of the Last Antecedent. And even if this Court finds the definition ambiguous, the doctrine of *contra proferentem* provides that the definition should be construed against the issuer—Commerzbank—not investors who had no say in drafting the LLC Agreement. In any event, Commerzbank's undisputed repeated, pre-litigation acknowledgments that the DresCap Securities were Parity Securities provide dispositive extrinsic evidence that this Court can use to construe the contract without remanding. *Chakov v. Outboard Marine Corp.*, 429 A.2d 984 (Del. 1981).

2. The Court of Chancery further erred in holding that the Pusher Provision in Section 7.04(b)(ix) of the LLC Agreement was not triggered by payments on the DresCap Securities. The court based this holding solely on its conclusion that the DresCap Securities were not Parity Securities. Op. 30. If that underlying conclusion is reversed, the holding that the Pusher Provision was not triggered should also be reversed. The Pusher Provision's plain language provides that if a payment is made on a Parity Security, a pushed payment "shall be authorized to be declared and paid on the Class B Payment Date *falling contemporaneously with or immediately after* the date on which [the Parity Security payment was] made." A189 (Emphasis added.) Commerzbank argued below that the court should disregard this plain language and substitute unwritten modifications to avoid the possibility that a pushed payment on the CoBa II TruPS would "push" payments on other Parity Securities having pusher provisions of their own, creating a supposedly infinite cycle of reciprocal pushed payments that "can never stop." That the Pusher Provision may be disadvantageous to the Bank—or that it may interact with other contractual obligations that the Bank assumed of its own choice—is no excuse for disregarding the Pusher Provision's plain language. Commerzbank's claim that the Trustee's reading would give rise to a cycle of pushed payments that can never stop is also incorrect. And, again, even if this Court finds the Pusher Provision ambiguous, any ambiguity should be resolved against Commerzbank and in favor of investors who had no say in drafting the LLC Agreement.

3. The Court of Chancery further erred in holding that the Support Undertaking—under which the Bank promised not to enter into new agreements "relating to the support or payment of … other Parity Securities … that would in any regard rank senior in right of payment to the Bank's obligations under this Agreement" (A225)—was not breached when the Bank restructured the DresCap IV Securities in early 2010, moving them from Tier I capital into Tier II capital in a conceded attempt to avoid the Pusher Provision. The court based its holding solely on its conclusion that the DresCap Securities were not Parity Securities. Op. 30-32. If that underlying conclusion is reversed, the holding that the restructuring did not breach the Support Undertaking should also be reversed. The DresCap IV restructuring involved entry into an amendment agreement "relating to the support or payment of … other Parity Securities," and that agreement made the DresCap IV Securities "senior in right of payment" to the CoBa II TruPS. This Court should order specific performance requiring the Bank to perform its obligations under the Support Undertaking.

STATEMENT OF FACTS

A. The Bank and its capital requirements

The Bank is a German stock corporation and international banking institution. Op. 1; A257. "Commerzbank ... set itself the goal of becoming Germany's leading commercial bank" and "intend[ed] to expand through organic growth combined with acquisitions wherever a suitable opportunity arises." A1552.

"German banks are required to cover counterparty and market risks with Tier I capital ... and Tier II capital" and maintain a "solvency ratio" according to a specified formula. A287-88. Tier I capital is the "core measure of a bank's financial strength for regulatory purposes." Op. 3.

- Tier I capital instruments have many of the characteristics of common stock, and "consist[] mainly of subscribed capital plus reserves, silent participations, hybrid capital and minority interests" less certain items. A298; *see also* Op. 3.
- Tier II capital—also called "supplementary" capital—"comprises profit-sharing certificates and subordinated long-term liabilities." A298.
- Tier III capital "consists of short-term subordinated liabilities." A298.

Both Tier I and Tier II can include "[h]ybrid capital" such as TruPS. A298.

B. The CoBa II TruPS

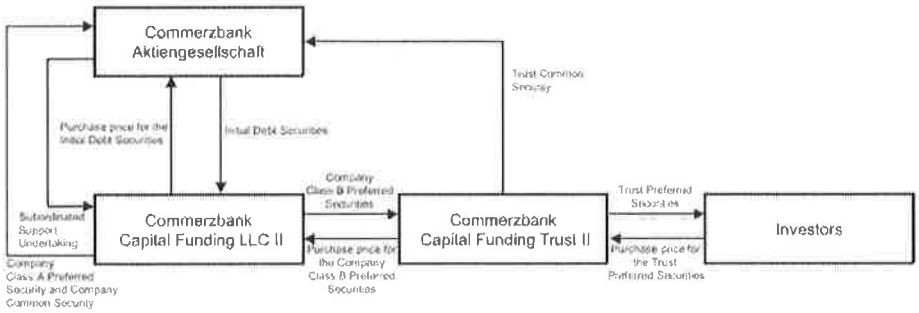
In 2006, the Bank formed the Company and the Trust as part of a funding structure designed to issue TruPS to raise the consolidated Tier I regulatory capital of the Bank. A1475, A1478, A1495.

The Company is a Delaware limited liability company governed by the Amended and Restated Limited Liability Company Agreement dated March 30, 2006 (the "LLC Agreement"). A157-219. The Trust is a Delaware statutory trust governed by the Amended and Restated Trust Agreement dated March 30, 2006 (the "Trust Agreement"). A66-156. The LLC Agreement and the Trust Agreement both provide that they are governed by Delaware law. LLC Agreement § 16.04; Trust Agreement § 14.02. The Bank and the Company also entered into a Support

Undertaking dated March 30, 2006, discussed below (the "Support Undertaking"). A220-27. Though written in English, it provides that it is governed by German law. Support Undertaking § 13.

The Company and the Trust exist for the sole purpose of issuing the CoBa II TruPS to investors to raise consolidated Tier I regulatory capital for the Bank. A964, A1494-95. The Bank maintains control over the Company and the Trust through a voting Company Common Security, a non-cumulative Company Class A Preferred Security, and a Trust Common Security from the Trust. Op. 4: A101, A1475, A1494. The directors and officers of the Company are all officers or employees of the Bank or its subsidiaries. A1513.

The Trust issued the CoBa II TruPS and sold them into the market. The Trust used the proceeds to purchase Class B Preferred Securities from the Company, which in turn purchased £800 million in subordinated notes from the Bank. Op. 4; A1475, 1494-95. The prospectus for the CoBa II TruPS depicts the relationship among the Company, the Trust and the Bank as follows (A280):



Beginning on the Initial Redemption Date—April 12, 2018—the Company has an option to redeem the Class B Preferred Securities in full, triggering redemption of the CoBa II TruPS. LLC Agreement §7.04(d)(i); Trust Agreement § 7.03.

C. CoBa II's payment mechanism

The CoBa II contracts generally provide: (1) that the Bank make payments to the Company on the subordinated notes, (2) that the Company use those payments, if certain conditions are met, to fund capital payments on Class B Preferred Securities held by the Trust or, if the conditions are

not met, to make payment on Class A Preferred Shares held by the Bank, and (3) that the Trust use any Class B payments it receives to fund Capital Payments from the Trust to the TruPS holders. Class B payments accrue at a fixed rate of 5.905% per annum through April 12, 2018, after which they change to a floating rate. LLC Agreement § 7.04(b), (d). Class B payments and the rights of CoBa II TruPS holders are "noncumulative"—*i.e.*, if Commerzbank is not required to make a payment on one payment date, the payment obligation is not carried forward. LLC Agreement § 7.04(b)(vii); Trust Agreement § 6.01(a); *see also* A1497, A1517.

The first part of Section 7.04(b)(ix) of the LLC Agreement provides that the Company shall only be authorized to declare and pay distributions on the Class B Preferred Shares—thereby triggering payments from the Trust to the TruPS holders—if two conditions are met: the Company must have "Company Operating Profits" sufficient to cover the payment amount, and the Bank must have "Bank Distributable Profits" for the prior fiscal year sufficient to cover the payment amount plus the amount of any payment to Parity Securities. LLC Agreement § 7.04(b)(ix).

The second part of Section 7.04(b)(ix) protects the CoBa II TruPS investors through the "Pusher Provision." It provides that, "[n]otwithstanding the foregoing," if the Bank or any of its subsidiaries declares or makes any payment on a Parity Security or Junior Security, a Capital Payment shall be "deemed declared" and therefore required to be made on the Class B Payment Date "falling contemporaneously with or immediately after the date" on which the other payment was made. LLC Agreement § 7.04(b)(ix). The definition of Parity Securities—on which the trial court's decision turned—is discussed in detail at Argument I.C, *infra*.

D. The Support Undertaking

In connection with issuing the Class B Preferred Shares, the Bank and the Company entered into the Support Undertaking, in which the Bank committed to "ensure that the Company shall at all times be in a position to meet its obligations ... to pay Capital Payments." Support Undertaking § 2(a). The Bank further committed that it would not "enter into any ... 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." Support Undertaking § 6.

The Trustee has authority to enforce the Bank's obligations under the CoBa II contracts. The Trust Agreement vests in the Trustee the right to enforce the terms of the Class B Preferred Shares, including the right to Capital Payments in the event of a declaration or deemed declaration. Trust Agreement § 2.08. The Trustee is also a third-party beneficiary of the Support Undertaking, capable of enforcing the Bank's obligations. Support Undertaking § 3.

E. The DresCap Securities

On May 11, 2009, Dresdner Bank merged with and into the Bank. A1613, A1616. The Bank had been contemplating a Dresdner acquisition since as early as 2000, consummating the deal after "years of hesitation." A2104, A2106. As a result of the transaction, the Bank assumed all of Dresdner's assets, liabilities, and contractual obligations, including Dresdner's obligations under contracts governing its own series of hybrid Tier I capital. Among those series were Dresdner Capital I and Dresdner Capital IV securities (the "DresCap Securities").

The DresCap I Securities, issued in an initial liquidation amount of $1 billion, are governed by an LLC Agreement, a Declaration of Trust, a Silent Partnership Agreement, a Waiver and Improvement Agreement, and a Subordinated Note. A322-40 The terms of these May 1999 contracts provided for Dresdner to pay the holders of the DresCap I Securities non-cumulative distributions semi-annually at a fixed rate per annum of 8.151%. A310.

The DresCap IV Securities, issued in an initial liquidation amount of ¥15 billion, were similarly governed by an Amended and Restated LLC Agreement, an Amended and Restated Declaration of Trust, a Silent Partnership Agreement, a Waiver and Improvement Agreement, and a Subordinated Note. A606-800. The terms of these March 29, 2001 contracts provided for Dresdner to pay the holders of the DresCap IV Securities non-cumulative distributions semi-annually at a fixed rate per annum of 3.5%. A376.

In its 2009 Annual Report, the Bank reported the DresCap I and DresCap IV Securities as "Core capital (Tier 1)." A298 (reporting €3.820 billion of hybrid capital as "Core capital (Tier I)" and zero hybrid capital as Tier II). At the time the DresCap IV Securities were issued, operative German banking regulations permitted banks to count as Tier I capital instruments that paid based on a capital ratio test. The DresCap Securities were capital-ratio dependent and, pursuant to grandfathering provisions in those regulations, the DresCap Securities remained Tier I capital even when the requirements for Tier I capital status later changed. When the Bank assumed Dresdner's contractual rights and obligations on May 11, 2009, the DresCap Securities became Tier I capital of the Bank. A298. The Bank reported the DresCap Securities as consolidated Tier I capital. A298.

On June 30 and December 31, 2009, the Bank made semi-annual distribution payments on the DresCap I Securities at the full stated rate. Although the Pusher Provision requires equal treatment of the CoBa II TruPS through an actual or deemed declaration of a Capital Payment "on the Class B Payment Date falling contemporaneously with or immediately after" the date of payment on a Parity Security, the Company failed to declare a Capital Payment on the next Class B Capital Payment Date, April 12, 2010.

F. Commerzbank restructures the DresCap IV Securities in an attempt to avoid the Pusher Provision.

With the March 31, 2010 payment date for the DresCap IV Securities approaching, the Bank concluded that such a payment would trigger the Pusher Provision of the LLC Agreement, thereby requiring a Capital Payment to the CoBa II TruPS holders on April 12, 2010. A504-06, A520-22, A532-38, A546-47, A550-52, A567. In an effort to avoid having to make that Capital Payment to the CoBa II TruPS holders, the Bank restructured the DresCap IV contracts.

The Bank entered into an Amendment Agreement dated as of February 25, 2010 amending the DresCap IV Silent Partnership Agreement, Subordinated Note, and Waiver and Improvement Agreement to improve the DresCap IV Securities' place in the Bank's capital structure. A801-42. Specifically, the Bank removed the capital-ratio test in a new Amended Waiver and Improvement Agreement and added a liquidation preference to the DresCap IV Securities in a new Amended

Subordinated Note. According to the Bank's own auditors, "[t]he **purpose** of the modification [was] the removal of the so-called 'push effect' of servicing the [DresCap] IV on ... Commerzbank Capital Funding Trust I-III .... Restructuring is intended to achieve the [DresCap] IV no longer being considered a 'Parity Security' ...." A534 (emphasis in original); *see also* A845; Op. 12. One Bank board member "expressed misgivings about the 'sleight of hand' and its effects on the reputation" of the Bank. A864.

The Bank took affirmative steps to prevent details of the restructuring from getting out, instructing employees that any "statement made to investors should ... consciously leave unanswered whether [the Bank took] the initiative to reclassify [DresCap IV] Hybrid Tier 1 into Lower Tier 2 or whether this originated from BaFin [a German financial regulator]." A878; Op. 12-13.

The DresCap IV restructuring closed March 5, 2010. The same day, the Bank announced that it would not declare a Capital Payment on the CoBa II TruPS for April 12, 2010. A914. On March 26, the Trustee wrote to the Bank, stating that the DresCap I and IV Securities were Parity Securities; that the payments on the DresCap I and IV Securities triggered an obligation to make a Capital Payment on the CoBa II TruPS; and that the DresCap IV restructuring breached the Support Undertaking. A935-37. In a letter dated April 12, 2010, the Bank denied that any payment was due. The Bank's letter asserted—post-restructuring—that "Dresdner Funding Trust IV securities ... are no[t] Parity Securities." A939. But the Bank did not dispute that the DresCap I Securities are Parity Securities—instead arguing that no April 12, 2010 CoBa II Capital Payments were due "since payments made in mid and late 2009 on Parity Securities depending on Distributable Profits were relating to the financial year 2008" and "the payments made in mid and late 2009 on other hybrid instruments not depending on Distributable Profits do not trigger payment obligations on the [CoBa II TruPS] related to the financial year 2009." A939. This litigation followed.

During the litigation, the Bank has continued making payments on DresCap Securities while refusing to make payments on the CoBa II TruPS. For example, the Bank made semi-annual distribution payments on the DresCap I Securities on June 30 and December 31, 2010. A605.

The CoBa II TruPS investors did not receive payments on the Class B Payment Date in 2010, 2011, or 2012.

At the start of this litigation, the Trustee sought an April 12, 2010 Capital Payment of approximately £47.2 million. A230. During the litigation, Commerzbank has conducted multiple tenders for the CoBa II TruPS. *E.g.*, A11, A2177, A2309-10. It is the Trustee's understanding that approximately £93.1 million of the original £800 million is now left outstanding due to the tenders to date. As a result, the Trustee calculates that the amount of Capital Payments that would have been due for the remaining holders on April 12, 2010 is approximately £5.5 million. Another approximately £5.5 million would have been due for the remaining holders on April 12, 2011.[1]

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[1] Commerzbank noted below that "[i]n late 2008 and early 2009, with the financial crisis in full swing, ... the Bank received a government recapitalization totaling €18.2 billion from Sonderfonds Finanzmarktstabilisieurung ('SoFFin')," a German program similar to TARP. A973. In June 2011, the Bank redeemed some €14.3 billion of SoFFin's investment and made another payment to SoFFin of €1.03 billion. A2310.

ARGUMENT

I. THE DRESCAP SECURITIES ARE PARITY SECURITIES.

A. Question Presented

Did the Court of Chancery err in holding that the DresCap Securities were not "Parity Securities" under the LLC Agreement? This question was raised below (A34-38, A1966-78, A2271-73) and considered by the Court of Chancery (Op. 22-30).

B. Scope of Review

"On appeal from the Court of Chancery's decision to grant summary judgment, '[t]his Court's review is "*de novo*, not deferential, both as to the facts and the law ...."'" *Reddy v. MBKS Co.*, 945 A.2d 1080, 1081 n.2 (Del. 2008) (quoting *Williams v. Geier*, 671 A.2d 1368, 1375-76 (Del. 1996)).

C. Merits of Argument

The threshold issue is whether the DresCap Securities—which Commerzbank concedes were "characterize[ed] as consolidated regulatory Tier I capital of the Bank" (A975)—are Parity Securities.

The LLC Agreement defines "Parity Securities" as follows:

> ***Parity Securities*** means (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.

Subsection (i) of the definition is not at issue. Subsection (ii) contains the following items separated by "or": "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 ...." The parties dispute whether the trailing modifier "subject to any guarantee or support agreement" following the last item modifies only that last item—the Trustee's reading—or each of the preceding items—Commerzbank's reading, which the Court of Chancery held was correct "as a matter of law." Op. 30.

1. The trial court based its interpretation on an incorrect understanding of "inclusive or."

a. The lower court acknowledged that the Trustee's reading "does flow somewhat more naturally than [Commerzbank's]" (Op. 25) and "sympathize[d] with the [Trustee] and others working their way through this definition" (Op. 29 n.87). But the court rejected that "more natural[]" reading as contrary to the "plain language of Subsection (ii)," stating that "there is no need to depart from grammatical norms to reach that conclusion." Op. 30 n.89.

The Court of Chancery based its rejection of the Trustee's reading on an incorrect understanding of "inclusive or." The Trust Agreement provides that—"unless the context requires otherwise"—"'or' is not exclusive." Trust Agreement § 1.02(b)(x). The Court of Chancery relied on this definition to find that "or" was also "not exclusive" in the LLC Agreement. The court then held that the use of an "inclusive or" required that "the various clauses set off by the word 'or' in [sub]section (ii) ... 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 did not cite any case where these principles were used to discern the parties' intent when interpreting a trailing modifier.

b. The Court of Chancery erred by using the "inclusive or" to resolve the interpretive question caused by the trailing modifier in subsection (ii). "Inclusive or" and "exclusive or" have settled meanings unrelated to whether a trailing modifier at the end of a list of items modifies all the preceding items or only the last of them.

For example, the *Manual of Style for Contract Drafting* published by the ABA explains that "*or* can be 'inclusive,' with *A or B* meaning *A or B or both*, or 'exclusive,' with *A or B* meaning *A or B, but not both.*" KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING ¶ 10.30 (2d ed. 2008). Nowhere does the *Manual*'s multi-page discussion of drafting issues relating to "or" state that the use of an "inclusive or" somehow suggests—let alone requires—that a trailing modifier modifies each of the preceding items. And only a few pages later, the next chapter of the *Manual* discusses trailing modifiers at length—noting that "it's often unclear whether a clause that follows two or more nouns (a 'trailing' modifier) modifies all the nouns or only the last of them." *Id.* ¶ 11.6; *see also id.* ¶¶ 11.7-11.9 & 11.19-11.26. The *Manual*'s section on trailing modifiers does not mention "inclusive or" as a relevant interpretive tool.

Garner's Dictionary of Legal Usage likewise defines the "inclusive *or*" as "A or B, or both" and the "exclusive *or*" as "A or B, but not both." BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 639 (3d ed. 2011). Garner too does not suggest that use of an "inclusive or" affects trailing modifiers. *See also In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 305 (3d Cir. 2010) (bankruptcy code's provision that "[i]n this title ... 'or' is not exclusive" means that "if a party 'may do (a) or (b)', then the party may do either or both" and "is not limited to a mutually exclusive choice between the two alternatives"); *SouthTrust Bank v. Copeland One, L.L.C.*, 886 So.2d 38, 42 (Ala. 2003) ("inclusive or" means "A or B, or both" and "excusive or" means "A or B, but not both"). The sense in which "or" is used—inclusive or exclusive—does not determine whether a trailing modifier modifies only the last item in the list or all of the items.

c. *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, ____ A.3d ___, 2012 WL 2783101 (Del. July 10, 2012), provides a recent illustration. This Court held that "[t]he disjunctive 'or'" in a contractual provision addressing 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 contradicts [a] claim that Evaluation Material falls within the purview of Paragraph 3." *Id.* at *14. It was clear from context that the use of "or" in the *Martin Marietta* letter agreement was "inclusive," as the NDA surely prohibited disclosure of "Evaluation Material" *or* "any of the facts, the disclosure of which is prohibited under paragraph (3)," *or both*. But this Court did not read that

"inclusive or" to mean that the trailing modifier "the disclosure of which is prohibited under paragraph (3)" modified both preceding items.

Likewise, the "non-exclusive" meaning of "or" in the LLC Agreement makes clear that if a security is A or B *or both* it is within the definition of Parity Security. The "inclusive or" does not resolve whether subsection (ii)'s trailing modifier modifies all of the preceding items or the last item only. The Court of Chancery's use of the "inclusive or" as its basis for resolving that question was error.

2. Under the LLC Agreement's plain language, the DresCap Securities are Parity Securities.

a. The lower court's incorrect understanding of "inclusive or" caused it to depart from the plain-language reading of subsection (ii), under which the DresCap Securities—as "instruments qualifying as consolidated Tier I regulatory capital of the Bank"—are within the definition of Parity Securities.

b. "[T]he most important guide to the meaning of a contract is what the words most naturally convey." *Martin Marietta Materials, Inc. v. Vulcan Materials, Inc.*, 2012 WL 1605146, at *27 (Del. Ch. May 4, 2012), *aff'd*, ___ A.3d ___, 2012 WL 2783101 (Del. July 10, 2012). As the Court of Chancery acknowledged, "[the Trustee]'s reading does flow somewhat more naturally than [Commerzbank's]." Op. 25.

An ordinary reader parsing subsection (ii) would most naturally read the trailing modifier at the end of subsection (ii) as modifying only the last item. The length of the three-item list and the presence of an "internal" modifying clause in the middle of subsection (ii) make it awkward to read the trailing modifier as applying to all three preceding items. The absence of a comma before the trailing modifier provides a further signal to the reader that the modifier applies only to the immediately preceding item.[2]

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[2] *Compare Manhattan Constr. Co. v. United States*, 2008 WL 355519, at *8 (Fed. Cl. Jan. 31, 2008) ("[T]he absence of a comma before the [adjectival] clause denotes that it applies only to the final noun or clause."), *and La.-Pac. Corp. v. Beazer Mats. & Servs., Inc.*, 811 F. Supp. 1421, 1427 (E.D. Cal. 1993) ("Because of the lack of a comma after the [noun] phrase ... the most natural reading of the statutory language is that

The trial court's attempt to show how Commerzbank could have drafted subsection (ii) to "more clearly" express the parties' respective readings (Op. 29 n.87) confirms that the Trustee's reading is the more natural one. To more clearly express the Trustee's reading, the trial court "[d]ivid[ed] subsection (ii) into enumerated clauses"—*i.e.*, inserted numbered sub-parts without adding new words. By contrast, to more clearly express Commerzbank's reading, the trial court was required to add the words "*provided in each case*" before the trailing modifier. Adding new words is a substantial drafting change. Equally important, the added words are words that Commerzbank itself used on the very same page of the LLC Agreement—before another trailing modifier at the end of the definition of "Permitted Investments"—but determined *not* to use in the definition of "Parity Securities."

c. Commerzbank's reading effectively renders the middle term of subsection (ii)—"other instruments qualifying as consolidated Tier I regulatory capital of the Bank"—surplusage. *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010); *see also Tang Capital Partners, LP v. Norton*, 2012 WL 3072347, at *5 (Del. Ch. July 27, 2012) (trailing modifier modified only the last term where reading it as modifying both terms would "render[] a portion of [the provision] superfluous"). Commerzbank's reading would tack on an additional requirement that instruments qualifying as Tier I capital also be subject to a guarantee or support agreement of the Bank. If modified in this way, it is difficult to see what additional instruments the middle term would encompass that would not also be covered by the third term. *Any* 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. By contrast, the Trustee's reading gives the middle term non-redundant effect.

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the [trailing modifier] modifies only that phrase."), *with Elliot Coal Mining Co. v. Director*, 17 F.3d 616, 630 (3d Cir. 1994) ("[U]se of a comma to set off a modifying phrase from other clauses indicates that the qualifying language is to be applied to all of the previous phrases and not merely the immediately preceding phrase."), *and In re Envirodyne Indus. Inc.*, 161 B.R. 440, 447 (Bankr. N.D. Ill. 1993) ("[T]he comma before the restrictive adjectival phrase .... strongly suggests the phrase was designed to apply to both preceding subjects ....").

d. The Trustee's more natural reading of the contract is not undermined by the fact that—as the trial court and the parties agreed (Op. 25; A982, A1969)—subsection (ii)'s reference to "preference shares" cannot be unmodified. Leaving "preference shares" unmodified would swallow the narrower reference to "each class of the most senior ranking preference shares of the Bank" in subsection (i), rendering it surplusage. But the Trustee's reading—*i.e.*, that "preference shares" is modified by the phrase "qualifying as consolidated Tier I regulatory capital of the Bank"—avoids the problem.

Certain types of preference shares count as Tier I capital. *See, e.g.*, Basel Committee on Banking Supervision, International Convergence of Capital Measurement and Capital Standards: A Revised Framework 245 (June 2006), *available at* http://www.bis.org/publ/bcbs128.pdf ("Tier 1: includes ... perpetual non-cumulative preference shares ...."). According to *Black's Law Dictionary*, "preference shares" is another term for "preferred stock." BLACK'S LAW DICTIONARY 1457 (9th ed. 2009); *see also* RICHARD A. BOOTH, FINANCING THE CORPORATION § 2:4 (2011) (equating "preferred" and "preference" shares). Multiple sources confirm that preferred stock can count as Tier I capital. *See, e.g.*, 10 AM. JUR. 2D BANKS AND FINANCIAL INSTITUTIONS § 284 (2012) (for FDIC-insured institutions, "Tier 1" capital includes "noncumulative perpetual preferred stock"); Federal Reserve Capital Adequacy Guidelines for Bank Holding Companies: Risk-Based Measure, 12 C.F.R. Pt. 225, App. A (June 21, 2011) (Tier I capital includes "[q]ualifying noncumulative perpetual preferred stock" and "[q]ualifying cumulative perpetual preferred stock").

Commerzbank nonetheless argued below that the Trustee's reading was impossible because, "under German law, preference shares *cannot qualify* as Tier I regulatory capital." A984-85 (emphasis in original). The Court of Chancery found Commerzbank's argument "unconvinc[ing]" based on the German Stock Corporation Act. Op. 25-26. And putting aside German law, Commerzbank could also have affiliates in countries besides Germany issuing preference shares under different statutory schemes that could qualify as consolidated Tier I regulatory capital. Indeed, there is no reason to limit the definition of preference shares to the meaning of the term under German law, because the LLC Agreement expressly provides that Delaware law—not German law—governs. LLC Agreement § 16.04. *See QVT Fund LP v. Eurohypo Capital Funding LLC I*, 2011 WL 2672092, at *9 (Del. Ch. July 8, 2011) (holding that whether

certain securities were "'preference shares' as that term is used in those Agreements, must be determined under Delaware law" rather than German law). Thus, because the internal modifier "qualifying as consolidated Tier I regulatory capital of the Bank" can intelligibly limit "preference shares" in subsection (ii), it is not necessary for the trailing modifier at the end of subsection (ii) to do so.

e. The Trustee's reading is further supported by the Rule of the Last Antecedent, which "requires that a qualifying or modifying phrase be construed as referring to its nearest antecedent." *NBC Universal, Inc. v. Paxson Commc'ns Corp.*, 2005 WL 1038997, at *6 (Del. Ch. Apr. 29, 2005) (citing *New Castle County v. Nat'l Union Fire Ins. Co.*, 174 F.3d 338, 348 (3d Cir. 1999)). While Delaware courts have not given the Last Antecedent Rule "undue weight" (*see, e.g.*, *E.I. du Pont de Nemours & Co. v. Green*, 411 A.2d 953, 956 (Del. 1980)), the Rule is at least a further factor in support of the Trustee's reading.

f. In any event, even assuming *arguendo* that Commerzbank's reading is correct and a guarantee or support agreement is required in order to meet subsection (ii)'s definition of Parity Securities, the DresCap Securities meet even Commerzbank's definition. The definition of Parity Securities refers to "*any* guarantee or support agreement" and does not define "guarantee or support agreement." Although the DresCap Securities are memorialized in contracts with different titles, they have functionally similar effect to the Support Undertaking: The DresCap contracts give DresCap holders direct enforcement rights against the Bank itself. Among other things, the DresCap IV Subordinated Note provides that "holders of Partnership Interests and the Trust Certificates are entitled [subject to certain limitations] to directly institute legal proceedings against the [Bank] under this Subordinated Note." A799. The DresCap IV Waiver and Improvement Agreement likewise provides that, under certain circumstances, "beneficial holder[s] of Partnership Interests or Certificates ... may, to the fullest extent permitted by law, directly institute a legal proceeding against the Bank ...." A776; *see also* A694, A641-42, A1320.

3. Any ambiguity should be resolved in favor of finding that the DresCap Securities are Parity Securities.

a. As set forth above, the Drescap Securities are within the natural reading of the Parity Securities definition. But in the event the Court finds any ambiguity in the definition of Parity Securities, it should be resolved in favor of finding the DresCap Securities to be Parity Securities.

b. The definition of Parity Securities is a term in the LLC Agreement—the organizing document of a Delaware LLC formed by the Bank and the Trust. "[W]here an entity's governing instruments are involved, the onus is on the drafter to be clear." *Stockman v. Heartland Indus. Partners, L.P.*, 2009 WL 2096213, at *5 (Del. Ch. July 14, 2009). "[T]he issuer ... is the entity in control of the process of articulating the terms.... [T]he investor[s] usually ha[ve] very little say about those terms except to take them or leave them .... Therefore, it is incumbent upon the dominant party to make terms clear. Convoluted or confusing terms are the problem of the ... issuer—not the ... investor." *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149-50 (Del. 1997).

Contra proferentem thus applies with special force here. The Trustee has sued on behalf of investors who had no say in the drafting of the LLC Agreement. Any ambiguous terms in the LLC Agreement should be construed against Commerzbank, "the entity solely responsible for the articulation of [its] terms." *Si Mgmt., L.P. v. Wininger*, 707 A.2d 37, 43 (Del. 1998).

c. If the LLC Agreement's plain language and the doctrine of *contra proferentem* are somehow insufficient to resolve whether the DresCap Securities are Parity Securities, this Court can construe the contract based on the extrinsic evidence without the need for a remand to make further findings. That is what this Court did in *Chakov v. Outboard Marine Corp.*, 429 A.2d 984 (Del. 1981), where the Superior Court had granted summary judgment based solely on contractual language, holding extrinsic evidence inadmissible. *Id.* at 985. On appeal, this Court determined to "assume ambiguity in the [contract provision] in the case ...." *Id.* Even though the trial court's ruling was based solely on the language of the contract, this Court looked to extrinsic evidence and resolved the interpretive issue rather than remanding for further proceedings, noting that "the parties agreed at oral argument here that the

record on the question of intention is complete" and finding "no genuine issue of fact." *Id.* at 986.

The interpretive question here can likewise be resolved on appeal even if this Court finds resort to extrinsic evidence warranted. Similar to *Chakov*, "[n]o party has argued that an issue of material facts exists to preclude the Court from resolving the merits of the dispute, which is purely a matter of contract interpretation." Op. 16-17. And the Court of Chancery concluded that "a trial would not produce a more informed analysis of the [Trustee's] claims," issuing its decision "on the merits based on the record submitted by the parties." Op. 17.

The extrinsic evidence supporting the Trustee's reading of "Parity Securities" is uniform, overwhelming, and admitted by Commerzbank:

- *Communications with regulators.* Before this litigation arose, the Bank repeatedly told its regulators that the DresCap Securities were Parity Securities. *See* A414 (May 2009 presentation to BaFin: "dissolution of Dresdner Funding Trusts I, II & IV removes … basis for 'parity security pushes', which would have brought about the priority servicing of the … Commerzbank trust"); A429 (May 14, 2009 email from the Bank to BaFin: "[t]he Dresdner Funding Trust II is defined as a Parity Security from the perspective of the three Commerzbank Capital Funding Trusts, meaning that a payment obligation is triggered as to these profit-dependent transactions if the Dresdner Funding Trust II pays a coupon"); A451

REDACTED

- *DresCap IV restructuring.* The Bank also restructured DresCap IV to make the securities senior to the CoBa II TruPS and move DresCap IV into Tier II capital. The Bank expressly

designed the restructuring as part of an attempt to eliminate that series' "push effect" on the CoBa TruPS precisely because the DresCap IV securities were Parity Securities. *See, e.g.*, A505 REDACTED

; A521 (January 25, 2010 email from Bank legal group: "since the Dresdner Funding Trust IV structure *no longer* qualifies as a Parity Security after the reorganization, even an interest payment can *no longer* push interest payments under the Commerzbank Capital Funding Trust I-III" (emphasis added)); A533-34, A547 (February 19, 2010 opinion letter from the Bank's auditor: "The **purpose** of the modification is the removal of the so-called 'push effect' of servicing the [DresCap] IV on ... Commerzbank Capital Funding Trust I-III.... Restructuring is intended to achieve the [DresCap] IV no longer being considered a 'Parity Security' ...." (emphasis in original)); A567 (memorandum for February 9, 2010 Commerzbank board meeting: "[t]he Parity Security characteristics of the Dresdner Funding Trust IV is thereby cancelled, along with the associated push effect for [Commerzbank Capital Funding Trust I-III]").

- *Other internal Bank statements*. *See* A587 (June 4, 2009 email: if the Bank's "capital quotas" are met and "no regulatory intervention takes place," "investors can expect to receive coupons for .... Commerzbank Trust PrefS I-II due to the 'Parity Security Push' by Dresdner Trust PrefS (but this is not certain until the Dresdners pay)"); A593 REDACTED

Even after the Trustee filed its complaint in this action on June 18, 2010, internal communications continued to reflect the Bank's own view that the DresCap Securities were Parity Securities. *See* A2303 (September 6, 2010 email: "[T]here is ... reason to believe ... that the

instruments of the Dresdner Funding Trust Structures I and IV are Parity Securities ....").

- *Investor communications.* In a November 2009 email exchange, a Bank Treasury employee responded to a question from an investor by stating: "yes, the [DresCap I securities] is a hybrid Tier instrument which would qualify as a parity instrument." A496.

- *Ratings agencies.* Third-party ratings agencies, which were in contact with the Bank, stated to the investing public that the DresCap Securities were Parity Securities. The Bank did not correct these public statements. *See, e.g.*, A947 (Moody's March 22, 2010 report: "[i]f a coupon is paid on the Dresdner security, payment on Commerzbank's hybrids is triggered"); A951 (S&P March 8, 2010 report: after restructuring, DresCap IV "is *no longer* considered a parity security" (emphasis added)); A2267-68 (discussing relationship between ratings agencies and the Bank).

"[A] construction given by acts and conducts of the parties before any controversy has arisen is entitled to great weight ...." *Shields Dev. Co. v. Shields*, 1981 WL 7636, at *4 (Del. Ch. Dec. 8, 1981). "When interpreting an ambiguous contract, the parties' prior conduct under the agreement is an important source of evidence to which the court should turn. 'The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning.'" *Bd. of Educ. v. Appoquinimink Educ. Ass'n*, 1999 WL 826492, at *8 (Del. Ch. Oct. 6, 1999) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 202, cmt. g (1981)). Commerzbank's repeated acknowledgments that the DresCap Securities were Parity Securities—including restructuring DresCap IV precisely because of that series' status as Parity Securities—provides dispositive extrinsic evidence in favor of the Trustee's reading.

II. A DEEMED DECLARATION OCCURRED ON APRIL 12, 2010, "PUSHING" A CAPITAL PAYMENT.

A. Question Presented

Was the LLC Agreement's Pusher Provision triggered so that a "deemed declaration" occurred on April 12, 2010? This question was raised below (A38-46, A1978-82), and considered by the Court of Chancery (Op. 30).

B. Scope of Review

Review of the Court of Chancery's decision to grant summary judgment is *de novo* as to facts and law. *See* Argument I.B, *supra*.

C. Merits of Argument

1. Because the DresCap Securities are Parity Securities, the Bank's June 30 and December 31, 2009 payments on DresCap I [and March 31, 2010 payment on DresCap IV] "pushed" a CoBa II Capital Payment on April 12, 2010. The Bank's continued payments on the DresCap Securities during this litigation similarly pushed another CoBa II Capital Payment on April 12, 2011.

2. The first paragraph of Section 7.04(b)(ix) of the LLC Agreement provides for Capital Payments on the CoBa II Securities to be authorized according to a profit-based test. The second paragraph provides that, "[n]otwithstanding the foregoing," if the Bank or any of its subsidiaries has declared or made a payment on any Parity Securities, the Company is authorized to make a Capital Payment on the CoBa II Securities.

This "Pusher Provision" provides:

> Notwithstanding the foregoing, if the Bank 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 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 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 in full for the Class B Payment Period 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.

LLC Agreement § 7.04(b)(ix) (A188-89). The third paragraph of Section 7.04(b)(ix) contains a second "Pusher Provision" requiring the Company to authorize Capital Payments in the event the Bank or any of its subsidiaries pays any capital payments, dividends or other distributions on Junior Securities.

Section 9.01(b) of the LLC Agreement provides that if the Company "does not declare [Capital Payments] despite its authorization to do so provided in Section 7.04(b)(ix), then such Capital Payments shall be deemed to have been declared and be payable." LLC Agreement § 9.01(b). Thus, pushed payments are mandatory.

3. Based on its conclusion that "the DresCap Trust Certificates are not Parity Securities," the Court of Chancery held that Commerzbank was "entitled to judgment in their favor as a matter of law regarding the [Trustee's] claim under the Pusher Provision." Op. 30. The Court of Chancery ended its analysis there, noting that "[t]he question of whether the DresCap Trust Certificates are Parity Securities drives this case," because "[i]f they are, then the [Trustee] may be correct in arguing that making payments on the DresCap Trust Certificates in 2009 and 2010 'pushed' payments on the Trust Preferred Securities." Op. 22.

4. Mechanically, the Pusher Provision consists of three parts: a payment trigger, a provision regarding the timing of pushed payments, and

a provision setting forth a formula for calculating the amount of payment due if a payment is pushed. Under the plain language of these three parts, a deemed declaration occurred on April 12, 2010.

(i) The payment trigger. The first part of the Pusher Provision sets forth the condition for a pushed payment. This payment trigger is satisfied "if the Bank or any of its subsidiaries pays any ... distributions on any Parity Securities in any Fiscal Year." There is no dispute that the Bank made semi-annual distributions on the DresCap I Securities on June 30 and December 31, 2009. A255, A604-05. These payments therefore satisfied the Pusher Provision's triggering condition.

(ii) The timing clause. The second part of the Pusher Provision provides that, if the payment trigger discussed above is met, "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." The Class B Payment Date falling immediately after the June 30 and December 31, 2009 DresCap distributions was April 12, 2010. Capital Payments were therefore authorized to be declared on April 12, 2010. Because the Company did not exercise its authorization to do so, Capital Payments were deemed to have been declared on April 12, 2010 under Section 9.01(b) of the LLC Agreement.

(iii) The payment formula. The rest of the Pusher Provision sets forth the method of calculating the required payment amount, providing that a pushed payment "bears the same relationship to the aggregate amount of Capital Payments payable at the Stated Rate in full for the Class B Payment Period ... as the [triggering payments] paid during the Fiscal Year ... bears to the full stated amount of [payments due] on such Parity Securities during such Fiscal Year." The relationship between a pushed payment and the triggering payment can thus be expressed as follows:

$$\frac{\text{pushed payment}}{\text{full amount payable for Class B Payment Period}} = \frac{\text{triggering payments on Parity Security during a Fiscal Year}}{\text{full amount payable on the Parity Security during that Fiscal Year}}$$

For example, if the Bank paid 50% of the full annual amount payable on a Parity Security, the pushed payment on the next Class B Payment Date

would be 50% of the stated rate for that Class B Payment Period. Here, Commerzbank made semi-annual distribution payments at the stated rate in full on a Parity Security. The Pusher Provision thus required a Capital Payment at the full stated rate on the next Class B Payment Date—April 12, 2010.

5. Commerzbank argued below that this reading of the Pusher Provision was incorrect, and that the Pusher Provision should instead be read to mean "that if the Bank or one of its affiliates makes a payment on a Parity Security *with respect to* a particular fiscal year, it must also make a payment on the [CoBa II TruPS] *with respect to* that fiscal year." A962 (emphasis added). Commerzbank thus argued that the payments made on the DresCap I Securities on June 30 and December 31, 2009 were "with respect to" Fiscal Year 2008 and did not trigger the Pusher Provision because the CoBa II Securities had already been paid at the full stated rate on April 12, 2009 "with respect to" fiscal year 2008.

But that is not what the Pusher Provision says. Accepting Commerzbank's position requires reading references to the present Fiscal Year as disguised references to past years. According to Commerzbank, triggering payments "*in* any Fiscal Year" should be read to mean payments "*with respect to* the immediately prior Fiscal Year." Likewise, Commerzbank would read "*during* the Fiscal Year in which such payment occurs" as "with respect to the Fiscal Year immediately *before* the Fiscal Year in which such payment occurs" or "the Fiscal Year to which such payment *relates*." In *QVT Fund LP v. Eurohypo Capital Funding LLC I*, 2011 WL 2672092 (Del. Ch. July 8, 2011), the Court of Chancery denied the defendants' motion to dismiss based on the same argument regarding a similar pusher provision, stating that "[i]n support of their contention that the effect of the pusher provisions is not limited to a fiscal year analysis, Plaintiffs correctly point out that [the pusher provision] does not contain clear language limiting the pusher provisions to a given fiscal year." *Id.* at *12.

6. The straightforward mechanics of the Pusher Provision are not a mistake. That Section 7.04(b)(ix) authorizes a Capital Payment to be declared on the next Class B Payment Date after a payment on a Parity Security—rather than requiring some contractually unspecified analysis of which Fiscal Year the payment is "with respect to"—is confirmed by the Junior Security Pusher Provision appearing in the very next paragraphs of

Section 7.04(b)(ix). That provision repeatedly provides that Capital Payments pushed by distributions on Junior Securities will be calculated based on Junior Distributions "made *in the Class B Payment Period* preceding the relevant Class B Payment Date." LLC Agreement § 7.04(b)(ix)(A) (bb), (cc) (emphasis added). The Junior Security Pusher Provision thus also does not attempt to match up payments made "with respect to" fiscal years. Indeed, because a Class B Payment Period can run across two fiscal years, the Junior Security Pusher Provision contemplates pushed payments being triggered by Junior Security payments occurring in the preceding fiscal year. The inquiry is not whether the payment was made "with respect to" a particular fiscal year, but whether the payment was "made *in* the Class B Payment Period *preceding* the relevant Class B Payment Date." Commerzbank's strained reading of the Parity Security Pusher Provision should thus be rejected for the further reason that it would create needless inconsistency with the Junior Security Pusher Provision.

7. Both the DresCap Securities and another series of CoBa TruPS with different payment dates have parity pusher provisions of their own. Commerzbank argued below that a departure from the Pusher Provision's plain language was therefore necessary to avoid the possibility of one pushed payment triggering the other securities' parity pusher provisions, in turn re-triggering the CoBa II Pusher Provision, in "a cycle which would repeat itself indefinitely," "ad infinitum," through reciprocal pushed payments that "can never stop." A991.

Hypothetical scenarios involving other securities' pusher provisions should not drive this Court's interpretation of the CoBa II Pusher Provision. Even assuming that the Pusher Provision may interact with other contractual obligations that the Bank assumed of its own choice, or limit the Bank's ability to pay on Parity Securities without also paying the CoBa II TruPS, it is no excuse for disregarding the Pusher Provision's plain language. "Parties have a right to enter into good and bad contracts, the law enforces both." *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010); *see also Great-West Investors LP v. Thomas H. Lee Partners, L.P.*, 2011 WL 284992, at *8 (Del. Ch. Jan. 14, 2011) ("That [a contracting party] does not like the result ... does not render it ambiguous if the result is required by the plain language of the contract."). "A wide gulf exists between construing an ambiguous contract as commanding an absurd result and simply enforcing the language of a revised contract that

appears to be a poor bargain based upon a close and careful reading of its terms." *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *12 (Del. Ch. Nov. 2, 2007), *aff'd*, 985 A.2d 391 (Del. 2009).

Moreover, Commerzbank's claim that the Trustee's reading of the Pusher Provision would give rise to an "*ad infinitum*" cycle of reciprocal pushed payments that "can never stop" is overstated. The Bank is not required to have other securities with parity pusher provisions. The Bank also has the option of repurchasing or redeeming other securities or the CoBa II TruPS. And Commerzbank ignores the LLC Agreement's escape valve clause—appearing immediately following the Pusher Provision—which provides that the Bank's regulators at the BaFin can stop pushed payments. That override provision expressly contemplates "an order of the BaFin ... pursuant to the German Banking Act or any other regulatory provision, prohibiting the Bank from making any distribution" and provides that "[t]he Company shall have no obligation to make up, at any time, any Capital Payments not paid in full ... as a result of ... an order of the BaFin." LLC Agreement § 7.04(b)(x).[3]

8. While the Pusher Provision's plain language is clear, should this Court find the Pusher Provision ambiguous, any ambiguity should be resolved against the Bank—which drafted the LLC Agreement—and in

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[3] The Bank has long been aware that the LLC Agreement's escape valve clause puts a limit on the Pusher Provision. For example, one internal, pre-litigation Bank document regarding the DresCap Securities' "push effect" on the CoBa II TruPS dropped a footnote off of the Pusher Provision discussion noting that "[t]he Commerzbank Funding Trusts contain a provision according to which payout will not take place if BaFin or another authorized supervisory authority forbids Commerzbank AG ... to carry out payouts from its profits." A593; *see also* A452 (January 2010 presentation to BaFin noting "BaFin ... prohibits a push by subsidiaries to CB TruPS" among potential "Hybrid Push" alternatives); A927 (March 2010 "Internal Speakers Guidance" for announcement by the Bank: "it's to be taken into consideration that furthermore the [BaFin] has the right ... to ban payments on Parity Securities as well as on the Commerzbank Capital Funding Trusts").

favor of the CoBa II investors whose interests the Trustee represents. *See* Argument I.C.3.b, *supra.*

9. Even under the Bank's "with respect to a particular fiscal year" interpretation, to the extent the DresCap I Securities are Parity Securities there can be no real dispute that that the Company has breached the Pusher Provision. Commerzbank conceded below that "if there were a payment on a Parity Security with respect to a fiscal year in which the Trust Preferred Securities were not paid, and if that payment occurred after the April 12 payment date for the Trust Preferred Securities, that payment on a Parity Security would push a payment on the next Trust Preferred Securities payment date." A2061.

During this litigation, the Bank has continued making payments on DresCap Securities and refusing to make payments on the CoBa II TruPS. For example, the Bank made semi-annual distributions on the DresCap I Securities on June 30 and December 31, 2010. A605. The CoBa II TruPS did not receive payments on the Class B Payment Date in 2010 or 2011. Thus, even if this Court accepts Commerzbank's "with respect to a fiscal year" interpretation of the Pusher Provision—which it should not—the June 30 and December 31, 2010 payments on the DresCap I Securities would still trigger a pushed payment on April 12, 2011.

III. THE DRESCAP IV RESTRUCTURING BREACHED THE SUPPORT UNDERTAKING.

A. Question Presented

Did the Bank's entry into an agreement modifying the DresCap IV Securities breach Section 6 of the Support Undertaking? This question was raised below (A46-52, A1982-86) and considered by the Court of Chancery (Op. 30-32).

B. Scope of Review

Review of the Court of Chancery's decision to grant summary judgment is *de novo* as to facts and law. *See* Argument I.B, *supra.*

C. Merits of Argument

1. In addition to the LLC Agreement and Trust Agreement, the Bank also entered into a separate Support Undertaking, in which the Bank "undert[ook] to ensure that the Company shall at all times be in a position to meet its obligations if and when such obligations are due and payable" and "that in the event of any liquidation of the Company, the Company shall have sufficient funds to pay the aggregate Liquidation Preference Amount." Support Undertaking § 2 (A224).

Section 6 of the Support Undertaking further provides:

> 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.

2. Based on its conclusion that "the DresCap Trust Certificates do not qualify as ... Parity Securities," the Court of Chancery held that Commerzbank was "entitled to judgment in their favor as a matter of law regarding the [Trustee's] claims that the amendment of the DresCap Trust IV Certificates required the Defendants to amend the Trust Preferred Securities." Op. 31-32. The Court of Chancery again ended its analysis there. Because the DresCap IV Securities are Parity Securities, or at least were Parity Securities before the restructuring, this Court should consider whether the DresCap IV restructuring breached the Support Undertaking and, if so, whether specific performance is warranted.

3. The Bank's restructuring of the DresCap IV Securities, making them senior to the CoBa II TruPS and moving them from Tier I capital into Tier II capital—in a conceded attempt to remove them from the definition of Parity Securities and avoid the Pusher Provision (Point I.C.3.c, *supra*)—breached Section 6 of the Support Undertaking. To effect the restructuring, the Bank "enter[ed] into an[] ... agreement relating to the support or payment of ... other Parity Securities that would in any regard rank senior in right of payment" to the CoBa II TruPS. The Amendment Agreement gave the DresCap IV Securities a more senior liquidation preference than the the CoBa II TruPS' preference. A795, A805. It also removed the DresCap IV Securities' capital-ratio test, making payment automatic. A806.

Yet the Bank did not make equivalent changes—or any changes—to the CoBa II TruPS documents, as required by Section 6 of the Support Undertaking. To protect the contractual rights of the CoBa II TruPS holders in being treated equally to investors in Parity Securities, the Court should order the Bank to specifically perform its contractual obligations under the Support Undertaking.

4. As noted, while written in English, the Support Undertaking is governed by German law. Support Undertaking § 13. "Delaware courts will generally honor a contractually-designated choice of law provision so long as the jurisdiction selected bears some material relationship to the transaction," if not "repugnant to the public policy of Delaware." *J.S. Alberici Constr. Co. v. Mid-West Conveyor Co.*, 750 A.2d 518, 520 (Del. 2000). "Under German law, strict performance is expected and can be enforced.... [S]pecific performance constitutes the rule in German law." CLEMENS KOCHINKE, BUSINESS LAWS OF GERMANY § 18:13 (2012).

Respecting German law's preference for specific performance here is not "repugnant to the public policy of Delaware."

5. Specific performance is also appropriate under Delaware law. Delaware equity courts have the power to order specific performance of contractual obligations, including requiring a party to negotiate contract terms. *See, e.g.*, *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 759 (Del. Ch. 2008) (ordering specific performance of merger agreement covenants, including covenants to "enter into definitive agreements" and "take any and all action necessary" to obtain antitrust approval); *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 82-84 (Del. Ch. 2001) (ordering acquirer to specifically perform obligations under a merger agreement).

This Court can order specific performance here. *See Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010) (listing elements). The Support Undertaking is a valid contract. The Trustee is ready, willing and able to perform all amendments necessary to give the CoBa II TruPS *pari passu* treatment with the restructured DresCap IV Securities. And the right of CoBa II TruPS investors "to be treated *pari passu* with others as to distributions" is a "distinctive right [that] confers leverage and violation of it would not be adequately compensated by an order ... to make payments due; to measure loss or damage for its breach would be problematic." *Boesky v. CX Partners, L.P.*, 1988 WL 42250, at *253 (Del. Ch. Apr. 28, 1988) (enjoining distribution that would violate *pro rata* requirement in limited partnership agreement).

6. This Court should order specific performance requiring the Bank to perform its obligation under the Support Undertaking to accord the CoBa II TruPS *pari passu* treatment with the DresCap IV Securities. Such an order would require the Bank to (i) elevate the CoBa II TruPS to the same, more senior Tier II status as the DresCap IV Securities; (ii) maintain the CoBa II TruPS' accrual of capital payments at a fixed rate of 5.905% per annum; and (iii) modify the CoBa II TruPS so that they have the same liquidation preference as the DresCap IV Securities.

CONCLUSION

For the foregoing reasons, the decision of the lower court should be reversed. The case should be remanded for determination of amounts payable to the CoBa II TruPS holders and entry of judgment for the Trustee on counts I and II.

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August 20, 2012

Exhibit A

EFiled: Aug 4 2011 11:17AM EDT
Transaction ID 39086413
Case No. 5580-VCN

IN THE COURT OF CHANCERY 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,	:	
Plaintiff,	:	
v.	:	**C.A. No. 5580-VCN**
COMMERZBANK CAPITAL FUNDING TRUST II; COMMERZBANK CAPITAL FUNDING LLC II; and COMMERZBANK AKTIENGESELLSCHAFT,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: April 12, 2011
Date Decided: August 4, 2011

Neal J. Levitsky, Esquire, Leslie B. Spoltore, Esquire, and Seth A. Niederman, Esquire of Fox Rothschild LLP, Wilmington, Delaware, and Sigmund S. Wissner-Gross, Esquire and Emilio A. Galván, Esquire of Brown Rudnick LLP, New York, New York, Attorneys for Plaintiff.

William M. Lafferty, Esquire, Thomas W. Briggs, Jr., Esquire, and Ryan D. Stottmann, Esquire of Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware, and Amanda J. Gallagher, Esquire, Martin S. Bloor, Esquire, Kate Z. Machan, Esquire, and Patrick C. Ashby, Esquire of Linklaters LLP, New York, New York, Attorneys for Defendants.

NOBLE, Vice Chancellor

I. INTRODUCTION

Commerzbank *Aktiengesellschaft* ("Commerzbank" or the "Bank") agreed to acquire Dresdner Bank *Aktiengesellschaft* ("Dresdner" or "Dresdner Bank") in September 2008.[1] As part of the deal, Commerzbank also acquired Dresdner Bank's trust preferred structures, and holders of Dresdner's trust preferred securities received distributions in both 2009 and 2010. The plaintiff claims that paying those distributions "pushed," or required the Bank to make distributions on, a class of its own preferred securities in which the plaintiff has an interest, and, by the complaint, the plaintiff asks the Court to enforce that alleged obligation. The plaintiff also seeks specific performance of a support agreement that is argued to require the elevation of the liquidation preference of the Bank's trust preferred securities in response to a restructuring of one class of the Dresdner securities. This memorandum opinion addresses the parties' cross motions for summary judgment.

II. BACKGROUND

A. *Parties*

The Defendants are Commerzbank, a German stock corporation operating as an international bank, and the related entities Commerzbank Capital Funding Trust II ("Trust II") and Commerzbank Capital Funding LLC II (the "Company")

[1] Transmittal Aff. of Amanda Gallagher, Esq. ("Gallagher Aff.), Ex. 11, Commerzbank 2008 Annual Report, at 5.

(collectively, the "Defendants"). Both Trust II and the Company are Delaware entities.[2]

Plaintiff The Bank of New York Mellon (the "Plaintiff") brought this action in its capacity as the Property Trustee for Trust II and acts for the benefit of the holders of the "Trust Preferred Securities" that were issued by Trust II.[3]

B. *The Undisputed Material Facts*[4]

Commerzbank organized Trust II and the Company in 2006 as part of a trust funding structure designed to issue trust preferred securities to raise consolidated Tier I regulatory capital (as defined under German law) for Commerzbank Group.[5]

1. The Commerzbank Capital Funding Trusts

a. *The Bank's Capital Structure*

Under German banking regulations, the Bank's capital is classified as Tier I ("core"), Tier II ("supplementary"), or Tier III capital.[6]

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[2] Gallagher Aff. Ex. 6, Amended and Restated Trust Agreement of Commerzbank Funding Trust II (the "Trust Agreement"), Preamble; Gallagher Aff. Ex. 7, Amended and Restated Limited Liability Company Agreement of Commerzbank Fapital Funding LLC II (the "LLC Agreement"), Preamble.

[3] Aff. of Seth Niederman, Esq. ("Niederman Aff."), Ex. F, Commerzbank Capital Funding Trust II Prospectus (the "Trust Preferred Securities Prospectus") at 7.

[4] The Plaintiffs have identified certain facts as to which a dispute remains. For example, the Defendants characterize the DresCap Trust Certificates (described *infra*) as making payments in relation to a fiscal year, while the Plaintiff argues that these certificates have payment triggers that are unrelated to a fiscal year. In this and other instances, the Court concludes that the disputed facts are not material to its disposition of the parties' motions.

[5] Trust Preferred Securities Prospectus at 7, 10, 27.

[6] Niederman Aff., Ex. G, Commerzbank 2009 Annual Report (the "2009 Annual Report"), at 295.

Tier I capital is the core measure of a bank's financial strength for regulatory purposes and consists primarily of common stock and disclosed reserves, but may also include non-redeemable, non-cumulative preferred stock.[7] In 2006, Trust II issued a series of trust preferred securities (the "Trust Preferred Securities"). At that time, German law provided that only profit-dependent securities (that is, those that could only make capital payments if the Bank had distributable profits) could qualify as Tier I capital; the Trust Preferred Securities were, therefore, issued as such.[8]

Tier II capital includes undisclosed reserves, general loss revenues, and subordinated debt, and is further subdivided into Upper Tier II capital, which must be perpetual and may have interest payments on it deferred, and Lower Tier II capital, which need not possess these attributes.[9] Both Tier I and Tier II capital are subordinate to any senior debt instruments.

The Bank's Tier I capital instruments include, among others, those issued by Trust II, Commerzbank Capital Funding Trusts I and III ("Trust I" and "Trust III," respectively) and, as a result of a merger with Dresdner Bank (consummated in 2009 and described more fully *infra*), Dresdner Funding Trusts I, II, III, and IV

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[7] *See* Matthew Berger, *Securitization and Capital Implications Under the Basel II Accord*, 30 No. 1 Banking & Fin. Services Pol'y Rep. 6, 8 (Jan 2011).
[8] Aff. of Norbert Dörr ("Dörr Aff.") ¶¶ 4, 5; LLC Agreement § 7.04(b)(ix); Trust Preferred Securities Prospectus at 28. *See also infra* note 20, and accompanying text.
[9] 2009 Annual Report at 295).

("DresCap Trusts I-IV"). The Dresdner Trust instruments include the "DresCap Trust I Certificates," "DresCap Trust III Certificates," and "DresCap Trust IV Certificates." (collectively, the "DresCap Trust Certificates").[10]

b. *The Trust II Structure*

The proceeds from the 2006 sale of the Trust Preferred Securities were used by Trust II to purchase all of the "Class B Preferred Securities" that were simultaneously issued by the Company.[11] The Company then used the proceeds from the sale of the Class B Preferred Securities to acquire £800 million in subordinated notes issued by the Bank (the "Initial Debt Securities").[12] Trust II also issued a common security (the "Trust Common Security") to the Bank, which granted the Bank a beneficial interest in Trust II.[13] The Company issued a voting common security ("Company Common Security") and one noncumulative Class A preferred security ("Company Class A Preferred Security") to the Bank.[14]

The Initial Debt Securities are the Company's sole asset and they are held by the Plaintiff for the benefit of investors in the Trust Preferred Securities. The Company is governed by the LLC Agreement, and Trust II is governed by the Trust Agreement.

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[10] The DresCap Trust II Certificates have been redeemed.
[11] Trust Preferred Securities Prospectus at 27; Trust Agreement § 2.03.
[12] Trust Preferred Securities Prospectus at 7, 26.
[13] *Id.*; Trust Agreement § 4.01.
[14] Trust Preferred Securities Prospectus at 7, 26.

c. *Capital Payment Rights of the Class B Preferred Securities and Trust Preferred Securities*

Distributions from the Bank to the Company on the Initial Debt Securities fund distributions from the Company to Trust II on the Class B Preferred Securities.[15] These distributions fund "Capital Payments" that Trust II pays to the holders of the Trust Preferred Securities.

The Company makes Capital Payments on the Class B Preferred Securities (which, in turn, fund payments on the Trust Preferred Securities) if (1) the Board of Directors declares a Capital Payment or (2) a Capital Payment is deemed declared in accordance with the LLC Agreement.[16] 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 Security or Junior Security.[17] The LLC Agreement defines a Parity Security 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).[18]

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[15] Trust Preferred Securities Prospectus; LLC Agreement § 7.04; Trust Agreement § 6.01(b).
[16] LLC Agreement § 7.04(b)(ix); Trust Preferred Securities Prospectus at 48-49.
[17] LLC Agreement § 7.04(b).
[18] *Id.* at § 1.01.

Junior Securities are:

> (i) common stock of the Bank, (ii) each class of preference shares or other instruments of the Bank ranking junior to Parity Securities of the Bank, if any, and any other instruments of the Bank ranking *pari passu* or junior to any of these and (iii) 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.[19]

The Company may declare and pay distributions on the Class B Preferred Securities, however, only to the extent that (1) the Company has operating profits at least equal to the amount of the capital payments and (2) the Bank has an amount of Bank Distributable Profits for the preceding fiscal year at least equal to the aggregate amount of the capital payment on the Class B Preferred Securities, and capital payments, dividends, or other distributions on Parity Securities.[20] An exception to this rule is created by a "Pusher Provision":

> Notwithstanding the foregoing, if the Bank 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 shall be authorized to be declared and paid on the Class B Payment Date contemporaneously with or immediately after the date on which such capital payment, dividend or other distribution [was] made . . . .[21]

Payments on the Trust Preferred Securities are noncumulative.[22]

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[19] *Id.*
[20] *Id.* at § 7.04(b)(ix).
[21] *Id.*
[22] Trust Preferred Securities Prospectus at 11-13, 28.

d. *The Support Undertaking*

Before issuing the Class B Preferred Shares, the Bank and the Company entered a "Support Undertaking" under which the Bank committed to "ensure that the Company shall at all times be in a position to meet its obligations to pay Capital Payments . . . ."[23] The Bank further committed that it would:

> . . . 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.[24]

2. The Acquisition of and Merger with Dresdner Bank

The Bank merged with Dresdner on May 11, 2009, with the Bank becoming the survivor and legal successor to Dresdner,[25] stepping into Dresdner's shoes with respect to Dresdner's assets, liabilities, and obligations.[26]

a. *The Dresdner Funding Structure*

Before the merger with the Bank, Dresdner acted through its New York branch to create its own trust preferred structures: in 1999, it created Dresdner

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[23] Gallagher Aff. Ex. 8 (the "Support Undertaking"), § 2(a).
[24] *Id.* at § 6.
[25] 2009 Annual Report at 14, 17.
[26] Gallagher Aff., Ex. 25, Dep. of Norbert Dörr ("Dörr Dep.") at 91-92; Aff. of Peter Waltz, Esq. ¶ 8, attached to Defs.' Mot for Summ. J.

Capital Funding LLC I ("DresCap LLC I"), Dresdner Capital Funding LLC II ("DresCap LLC II"), and the related Dresdner Trusts I and II; in 2001, it created Dresdner Capital Funding LLC III ("Dresdner LLC III"), Dresdner Capital Funding LLC IV ("Dresdner LLC IV") and Dresdner Trusts III and IV.[27]

The DresCap LLCs issued common limited liability company interests to Dresdner Bank (the "DresCap LLC Common Securities") and silent partnership interests ("DresCap Partnership Interests") to their respective DresCap Trusts.[28] The DresCap LLCs then invested the proceeds from the sale of these securities in a subordinated note (the "Subordinated Note") issued by Dresdner Bank, which then became the sole asset of the DresCap LLCs.[29]

b. *Terms of Payment under the DresCap Trusts*

The interest on the Subordinated Note is distributed by the DresCap LLCs to the DresCap Partnership Interests.[30] Under a Waiver and Improvement Agreement, the DresCap LLCs waive their right to receive interest payments on the Subordinated Note while a "Shift Event" is ongoing; a Shift Event begins if (1) Dresdner's (or, after the merger, the Bank's) total capital ratio or Tier I capital ratio has fallen below limits set by the German Banking Act; (2) the Bank becomes

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[27] Gallagher Aff., Exs. 1-3 (Offering Memoranda for Dresdner Funding Trust I, Dresdner Funding Trust II, and Dresdner Funding Trust III and IV, respectively).
[28] Gallagher Aff., Ex.1 at CMZB 00000494.
[29] The principal amount of the Subordinated Note is ¥15,015,000,000, and it accrues interest at 3.5%.
[30] *Id.* Ex. 1 at CMZB 00000494, 500; Ex. 2 at BNYM0021134, 21140; Ex. 3 at CMZB 00012386, 12392-93.

insolvent; or (3) the Bank's regulator takes over the Bank, and the Shift Event continues until the triggering condition no longer applies.[31] Payments missed as a result of Shift Events are noncumulative.[32]

Payments to the DresCap Partnership Interests are passed on to the holders of the DresCap Trust Certificates. Because the DresCap Trust Certificates were issued before a banking regulation that applied to the Trust Preferred Securities was implemented, payments on DresCap Trust Certificates are conditioned on meeting a capital ratio test instead of a profit-dependent test.[33]

3. Post-merger Developments and Capital Payments

a. *Government Recapitalization and Capital Payments in 2009*

During the financial crisis of 2008-2009, the Bank received significant aid from the German government and, as a result of receiving this aid, became subject to prohibitions on making discretionary distributions on profit-dependent securities;[34] these restrictions apply to payments contemplated in 2010 for fiscal year 2009 and to payments contemplated in 2011 for fiscal year 2010.

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[31] *Id.* Ex. 1 at CMZB 00000507,515; Ex. 2 at BNYM0021147, 21155; Ex. 3 at CMZB 00012400, 12408.
[32] *Id.* Ex. 1 at CMZB 00000515-16; Ex. 2 at BNYM0021155-56; Ex. 3 at CMZB 00012408.
[33] Dörr Aff. ¶¶ 3-6.
[34] For example, the Bank may not make coupon payments on profit-dependent securities unless "such payments are mandatory without utilization of reserves or special provision pursuant to [the German Commercial Code]." Gallagher Aff. Ex 12, May 7, 2009 Company Announcement re: "Interest or profit participation payments."

In 2009, payments were made on all of the outstanding Trust Preferred Securities and DresCap Trust Certificates for fiscal year 2008.[35] The Bank announced on November 3, 2009, that it did not expect to make any payments in 2010 for fiscal year 2009 on any of its profit-dependent securities.[36] The Bank did not make a profit in fiscal year 2009.[37]

b. *Liability Management and Capital Structure Harmonization*

By mid-2009, the DresCap Trust Certificates were trading below par, and yet still carried payment obligations that the Bank's profit-dependent securities did not. The Bank states that it then began a program of reducing its debt load and harmonizing its capital structure.

Accordingly, the Bank redeemed the DresCap Trust II Certificates on June 30, 2009. The Bank states that it also attempted to launch a liability management exercise aimed at removing the capital-ratio trigger in the remaining DresCap Trust Certificates, but that this effort was rejected by the Bundesanstalt für Finanzdienstleistungsaufsicht ("BaFin"), which regulates Germany's financial industry.[38]

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[35] 2009 Annual Report at 224; Ex. 11 at 212.
[36] Gallagher Aff. Ex. 14, Nov. 3, 2009 Company Announcement re: "Interest or profit participation payments."
[37] 2009 Annual Report at 191.
[38] Dörr Dep. at 63-65.

The Bank argues that, at the time, it was operating under an "assumption"[39] that, due to their characterization as consolidated Tier 1 capital of the Bank, the DresCap Trust Certificates and the Trust Preferred Securities were Parity Securities, and it was therefore concerned that any payment on DresCap Trust IV Certificates would "push" an April 12, 2010 payment on the Trust Preferred Securities.[40]

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[39] Defs.' OB to its Mot. for Summ. J. at 14.

[40] Dörr Dep. at 80-81, 102; Gallagher Aff., Ex. 26, Dep. of Kerstin Neumann, Esq. at 39-40. The Plaintiff identifies fifteen documents, dated from May 2009 through March 2010, that illustrate the Defendants' belief, during that period, that the DresCap Trust Certificates and the Trust Preferred Securities were Parity Securities; these include, by way of example:

- A chart included in the Bank's 2009 Annual Report that characterized all of the Bank's hybrid capital (which would include the DresCap Trust Certificates and the Trust Preferred Securities) as "Core capital (Tier 1)." Niederman Aff. Ex. G. at 295.
- A May 2009 presentation to BaFin in which the Bank represented that "[c]omplete dissolution of Dresdner Funding Trusts I, III, & IV removes the 'soft coupon trigger' definitions and the basis for 'parity security pushes,' which would have brought about the priority service of the Dresdner and Commerzbank trust." *Id.* Ex. M at CMZB002788.
- An email sent from an employee in the Bank's Legal Affairs division to BaFin on May 14, 2009 stating that "[t]he Dresdner Funding Trust II is defined as a Parity Security from the perspective of the three Commerzbank Capital Funding Trusts, meaning these profit-dependent transactions trigger if the Dresdner Funding Trust II . . . pays a coupon." *Id.* Ex. N.
- An email sent from the head of Commerzbank Group Treasury to BaFin on June 8, 2009, stating that "there are tier 1 instruments [in the Bank's capital structure], whose interest payments are not bound to the Commerzbank balance profit, but rather to the fulfillment of the legal minimum capital quotas of the Commerzbank (Dresdner Funding Trust I, III & IV). For the mentioned instruments, there may be extra payments dues to these deviating 'trigger conditions,' which also could lead to required payments of interest due to so-called 'pusher regulations' by the Commerzbank Capital Funding Trust I-III." *Id.* Ex. O
- A February 19, 2010 opinion letter from PricewaterhouseCoopers AG, the Bank's auditor, representing that:

The Bank then restructured the DresCap Trust IV Certificates in response to this concern.[41] The restructuring was accomplished by amending the Subordinated Note, the Waiver and Improvement Agreement, and the Silent Partnership Agreement to change the DresCap Trust IV Certificates' liquidation preference to align it with those of the Bank's Lower Tier II instruments and to remove the Certificates' capital ratio trigger.[42] The parties agree that this had two effects: the DresCap Trust IV Certificates were recategorized as Lower Tier II capital, and they acquired a liquidation preference senior to the Trust Preferred Securities.[43]

The Plaintiff notes that, despite the efforts to restructure the DresCap Trust IV Certificates, the Bank created external communication guidelines that instructed its employees that "statement[s] made to investors . . . should . . . consciously leave unanswered whether we have taken the initiative to reclassify

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> the purpose of the modification is the removal of the so-called "push effect" of servicing [DresCap Trust IV] on three other capital instruments (Commerzbank Capital Funding Trust I-III, CCFT).
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> ***
>
> Restructuring is intended to achieve the DFT IV no longer being considered a "Parity Security," with the consequence that the equality clause does not intervene. *Id.* Ex.V.

- A February 23, 2010 Commerzbank Earnings Call, during which the Bank indicated that there would be a "push . . . if any instrument of Dresdner has been paid before the payment of" the Trust Preferred Securities. Niederman Supp. Aff., Ex. EEE (Tr. of Feb. 23, 2010 earnings call, at 13).

[41] Dörr Dep. at 101.

[42] Gallagher Aff. Ex. 17, Dresdner Capital LLC IV Amendment Agreement ("DresCap IV Amendments"), §§ 2.1.3, 2.1.5, 3.1.2, 4.

[43] *Id.* at §§ 2.1.3, 2.1.5, 3.1.2; Ex. 25 at 22-23, 100.

Hybrid Tier 1 into Lower Tier 2 or whether this originated from BaFin."[44] Further, the Bank did not announce that the DresTrust IV Certificates had been elevated, and instead informed only the American Family Life Assurance Company—AFLAC, a single rating agency, and the Bank's regulators of that fact.[45]

The Bank did announce, on March 5, 2010, that it did not expect to make distributions on any Parity Securities before Trust II's April 12, 2010 payment date, and that, therefore, there would not be a Deemed Declaration for the Trust Preferred Securities on that date.[46] The Plaintiff sent the Bank a letter on March 26, 2010, that asserted (1) the DresCap Trust I and DresCap Trust IV Certificates were Parity Securities; (2) the restructuring of the DresCap Trust IV Certificates required a similar elevation[47] of the Trust II Preferred Securities; and (3) that the 2009 payments on the DresCap Trust I Certificates and the pending March 31, 2010 payment on the DresCap Trust IV Certificates required the Bank to make the April 12, 2010 payment on Trust II.[48]

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[44] Niederman Aff. Ex. QQ, Commerzbank Questionnaire re: "Equity-like instruments such as silent deposits, hybrid capital or participation certificates of Commerzbank Group" at T-CMZB 0028756.

[45] Dörr Dep. at 126, 141-42.

[46] Gallagher Aff. Ex. 18, Mar. 5, 2010 Commerzbank Ad hoc Announcement re: "Interest or Capital Payments" at CMZB 00006529.

[47] Despite the recategorization from Tier 1 to Lower Tier II capital, the word "elevation" is used to refer to the relative liquidation preferences of the capital in each tier.

[48] Gallagher Aff. Ex. 21, Mar. 26, 2010 Letter from Pl. to Commerzbank, Commerzbank Capital Funding LLC I and Commerzbank Capital Funding LLC II, at CMZB 0040921-22.

The Bank made a payment on the DresCap Trust IV Certificates on March 31, 2010,[49] and on April 12, it responded to the Plaintiff's letter of March 26 by asserting that (1) the DresCap Trust IV Certificates are not Parity Securities; (2) Section 2 of the Support Undertaking does not obligate the Bank to make payments on the Trust Preferred Securities, but only to ensure that the Company has sufficient funds in the event that a payment arises; and (3) Section 6 of the Support Undertaking was not applicable because the payments identified in the Plaintiff's letter were based on fiscal years 2008 and 2009, and could not, therefore, trigger payment obligations in 2010.[50]

4. Procedural History

The Plaintiff filed a Verified Complaint on June 18, 2010, seeking declaratory judgment and an order that the Defendants specifically perform their obligations under the LLC Agreement and the Support Undertaking by making a capital payment on the Trust Preferred Securities for the April 12, 2010 distribution. It also asks the Court to order Defendants to specifically perform the Support Undertaking by elevating the Trust Preferred Securities to the Lower Tier 2 Capital in the same way the DresCap Trust IV Certificates were amended.

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[49] *Id.* Ex. 22, Mar. 31, 2010 Dresdner Capital LLC IV Notes, at DRES00000012; *Id.* Ex 23, Unanimous Written Consent of the Board of Directors of Dresdner Capital LLC IV, at CMZB_HC 00000065.

[50] *Id.* Ex 24, Apr. 12, 2010 Letter from Norbert Dörr and Gunnar Graf to Pl., at CMZB 00053093.

III. CONTENTIONS

The threshold issue of this case is whether the DresCap Trust Certificates qualify as (or must be regarded as) Parity Securities, as defined by the LLC Agreement. Although the Court recently considered similar issues in *QVT Fund v. Eurohypo Capital Funding LLC I*,[51] resolution of the issue presented by this case turns on the particular contractual language of the documents governing Trust II.

Thus, the parties advance competing textual arguments in support of their positions on this issue; additionally, the Plaintiff contends that the Defendants are bound by their previous characterizations of the DresCap Trust Certificates as Parity Securities.

The Plaintiff contends that, because the DresCap Trust Certificates are Parity Securities, payments on the DresCap Trust Certificates "pushed" payments on the Trust Preferred Securities and that, under the Support Agreement, elevation of the DresCap Trust Certificates' liquidation preference required the Trust Preferred Securities to be amended in the same fashion. The Defendants respond that, even if the DresCap Trust Certificates are Parity Securities, payments on those certificates for the 2008 and 2009 fiscal years did not push payments on the Trust Preferred Securities in 2010. They also contend that the Plaintiff's reading of the

[51] 2011 WL 2672092, at *6 (Del. Ch. July 8, 2011) ("Counts I through IV of the Amended Complaint are premised on Plaintiffs' assertion, which the Defendants dispute, that participation Certificates qualify as Parity or Junior Securities.").

Support Undertaking is mistaken and that the DresCap Trust Certificates do not fall within the class of the securities covered by § 6 of that document.

IV. DISCUSSION

A. *Legal Standards*

1. The Standard for Cross Motions for Summary Judgment

Summary judgment is appropriate where the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[52] The burden of showing "both the absence of a material fact and entitlement to judgment as a matter of law" falls on the moving party.[53] The Court must view the evidence in the light most favorable to the nonmoving party.[54] Where, as here, the parties have filed cross motions for summary judgment, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions," unless one party presents an argument that there is an issue of fact that would be material to disposition of either motion.[55] No party has argued that an issue of material fact exists to preclude the Court from resolving the merits of the

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[52] Ct. Ch. R. 56(c).
[53] *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002) (internal quotation omitted).
[54] *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 356 (Del. Ch. 2008).
[55] Ct. Ch. R. 56(h).

dispute, which is purely a matter of contract interpretation.[56] Thus, a trial would not produce a more informed analysis of the Plaintiff's claims, and the Court will issue a decision on the merits based on the record submitted by the parties.

2. Standards of Contract Interpretation

The Company and Trust II are Delaware entities, and both the LLC Agreement and the Trust Agreement provide that Delaware law will govern their interpretation and application;[57] thus, the Court interprets these documents under Delaware law. In addressing a question of contract interpretation, the Court's role is to "effectuate the parties' intent."[58] The Court determines the parties' intent objectively, by reference to the language of the agreement: "The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."[59] The Court "must construe the agreement as a whole, giving effect to all the provisions therein."[60] The Court must give unambiguous language its plain meaning; it must not twist language to create ambiguity where none exists, because doing so could, "in effect, create a new contract with rights, liabilities and duties to which the parties had not

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[56] As the Court has noted, *supra* note 4, those few facts that remain in dispute are not material to the outcome of this case.
[57] LLC Agreement § 16.04; Trust Agreement § 14.02.
[58] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).
[59] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-6 (Del. 1992).
[60] *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

assented."[61] A contract is not ambiguous merely because the parties interpret it differently.[62] Instead, a contract is considered ambiguous only if it is "reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[63] Further, "[u]nless the contract language is ambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity." If the Court determines that contractual language is ambiguous, then "all objective extrinsic evidence is considered: the overt statements and acts of the parties, the business context, prior dealings between the parties, and other business customs and usage in the industry."[64]

a. *Whether the Court May Consider the Defendant's Prior Characterizations of the DresCap Trust Certificates as Parity Securities as Evidence of the Parties' Conduct under the LLC Agreement even if the LLC Agreement is Unambiguous*

The Plaintiff argues that, irrespective of the language of the LLC Agreement, the Defendants are bound by their pre-April 2010 statements, both non-public and public,[65] that indicated that the Defendants once believed that the DresCap Trust Certificates qualify as Parity Securities; the Plaintiff argues that the Court may consider the statements, as well as the elevation of the DresCap

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[61] *Rhone-Poulenc Basic Chems.*, 616 A.2d at 1195-6.
[62] *Standard Power & Light Corp. v. Investment Assoc., Inc.,* 51 A.2d 572, 576 (Del. 1947)
[63] *Rhone-Poulenc Basic Chemicals Co. v. American Motorists Insurance Co.,* 616 A.2d 1192, 1196 (Del. 1992).
[64] *In re Explorer Pipeline Co.*, 781 A.2d 705, 713-14 (Del. Ch. 2001) (quotations omitted).
[65] *See supra* note 40.

Trust IV Certificates' liquidation preference, as evidence of the parties' course of conduct, informing the meaning of the LLC Agreement. In support of this proposition, the Plaintiff invokes *Global Energy Finance LLC v. Peabody Energy Corp.*, in which the Superior Court (1) determined that the language of the contract at issue was not ambiguous[66] and (2) gave great weight to the parties' "conduct over many years" in determining that extrinsic evidence confirmed the Court's interpretation of the contract's plain language.[67] The *Global Energy* Court, however, considered extrinsic evidence of the contract's meaning only "in the alternative": it was the plain meaning of the contract that controlled the Court's interpretation of the document.[68] Thus, *Global Energy* is consistent with other Delaware cases indicating that "[i]f a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity;[69] instead, extrinsic evidence such as the parties' course of conduct under the contract is relevant to interpretation only if the contractual language is ambiguous.[70]

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[66] 2010 WL 4056164, at *22 (Del. Super. Sept. 7, 2010).
[67] *Id.* at *25, *28-*29.
[68] *Id.* at *25.
[69] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997); *see also ThoughtWorks, Inc. v. SV Inv. P'ners, LLC*, 902 A.2d 745, 747, 754 (Del. Ch. 2006) (holding that the plain meaning of a contractual provision controlled, and that the plaintiff's argument to the contrary was unsupported by the plaintiff's prior conduct).
[70] *See Carriage Realty P'ship v. All-Tech Auto Auto., Inc.*, 2001 WL 1526301, at *6 (Del. Ch. Nov. 27, 2001).

b. *Whether the Defendants' Prior Characterizations of the DresCap Trust Certificates are Binding Admissions*

To the extent that the Plaintiff argues that the Defendants' characterizations of the DresCap Trust Certificates as Parity Securities should be considered binding admissions (as opposed to evidence of the parties' course of conduct), that argument must be rejected. The question of whether a security qualifies as a Parity Security under the LLC Agreement is one of contract interpretation, and thus a conclusion of law; further, the Defendants' position regarding the DresCap Trust Certificates has, quite evidently, changed. A party's withdrawn or changed conclusion of law binds neither the party nor the Court because "judicial admissions apply only to admissions of fact, not to theories of law, such as contract interpretation."[71]

The Plaintiff contends that the Defendants had no business reason to amend the DresCap Trust IV Certificates unless those certificates were once Parity Securities. The Defendants characterize the amendments as part of a broader plan to harmonize the Bank's capital structure. Even if the Court were to accept that the Defendants amended the certificates solely because of their belief that the DresCap Trust Certificates were Parity Securities, that action would only confirm that the Defendants once held that belief; it would not confirm the correctness of that belief. If 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.

[71] *Lillis v. AT&T Corp.*, 896 A.2d 871, 880 n.10 (Del. Ch. 2005) *clarified,* 2005 WL 3111991 (Del. Ch. Nov. 17, 2005), *aff'd* 970 A.2d 166 (Del. 2009); *but see AT&T Corp. v. Lillis*, 970 A.2d 166, 172 (Del. 2009) (holding that, although the statements incorporated into AT&T's withdrawn answer, "once withdrawn, were no longer legally binding *as admissions,* their withdrawal did not eliminate or alter their probative value *as evidence* of a disputed material fact—the parties' intended meaning of the ambiguous term 'economic position.'") (emphasis in original). Thus, *AT&T* supports the conclusion that the Court may consider the Defendants' prior statements for purposes of interpreting the LLC Agreement, but only if the LLC Agreement is ambiguous.

The Plaintiff also argues that the Defendants are bound under the doctrine of quasi-estoppel, which applies:

> when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit. To constitute this sort of estoppel the act of the party against whom the estoppel is sought must have gained some advantage for himself or produced some disadvantage to another.

Pers. Decisions, Inc. v. Bus. Planning Sys., Inc., 2008 WL 1932404, at *6 (Del. Ch. May 5, 2008), *aff'd*, 970 A.2d 256 (Del. 2009). Although the Defendants imply that reliance is a required element of a quasi-estoppel claim, Delaware law does not require a showing of reliance. *See id.*; *cf. Farkas v. Jarell*, 1993 WL 401878, at *3 (Del. Ch. Sept. 1993) (applying New Jersey law to deny a quasi-estoppel claim because the defendant failed to show reliance on the plaintiff's prior representations). Thus, the Plaintiff contends that, "if there is a benefit to the Bank, that is all [it needs] to show to invoke the quasi-estoppel doctrine." Apr. 12, 2011 Oral Arg. on Cross Motions for Summ. J. Tr. ("Tr.") at 81.

The Plaintiff squarely articulates a single benefit that it argues the Bank received from its earlier representations that the DresCap Trust Certificates were Parity Securities. (The Plaintiff also raised, for the first time (and without citation to the record) in its Reply Brief a second way in which the Bank may have benefited from its prior representations. The Court has corresponded with the parties to ask, *inter alia*, whether the argument has been fairly raised.) The Plaintiff contends that the Bank needed to count the DresCap Trust Certificates as part of the Bank's consolidated Tier I regulatory capital and that, to do so, the Bank also had to acknowledge that the DresCap Trust Certificates were Parity Securities. Once litigation began, the Plaintiff argues, the Bank changed its position and now argues that the DresCap Trust Certificates are neither Parity Securities nor consolidated Tier I regulatory capital. Its reading is apparently rooted in the Defendants' current argument that "preference shares" cannot qualify as Tier I capital, and the Plaintiff's belief that the DresCap Trust Certificates are "preference shares."

This does not appear to be an accurate reading of the Defendants' arguments. First, the Defendants' argue, as discussed *infra*, that the DresCap Trust Certificates' status as consolidated Tier I regulatory capital of the Bank does not, *ipso facto*, indicate that they are also Parity Securities. Second, the Defendants' arguments that preference shares cannot qualify as Tier I regulatory capital do not appear to conflict with their consistent representations that the DresCap Trust Certificates qualify (or did qualify, in the case of the amended DresCap Trust IV Certificates) as consolidated Tier I regulatory capital of the Bank because the Defendants do not argue that the DresCap Trust Certificates are preference shares. *See* Defs.' Reply Br. in Supp. of Their Mot. for Summ. J. ("Defs.' RB") at 11 ("The Trust Preferred Securities, however, are not preference shares.") (explaining that the use of the word "preferred" does not indicate that the Trust Preferred Securities qualify as "preference shares" under German law. The same logic would apply to the DresCap Trust Certificates, which are also described as "trust preferred securities.").

The Court notes that neither the LLC Agreement nor the Trust Agreement defines "preference shares," and the Court need not decide whether the DresCap Trust Certificates are preference shares under German law.

What matters here is that the Defendants' arguments regarding preference shares in this litigation do not represent or imply a change in the Defendants' position, as previously communicated to BaFin, that the DresCap Trust Certificates are consolidated Tier I regulatory

B. *Whether the DresCap Trust Certificates are Parity Securities under the LLC Agreement*

The question of whether the DresCap Trust Certificates are Parity Securities drives this case. If they are, then the Plaintiff may be correct in arguing that making payments on the DresCap Trust Certificates in 2009 and 2010 "pushed" payments on the Trust Preferred Securities. If they are not, this claim is not viable,

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capital. Similarly, the Defendants' arguments that the DresCap Trust Certificates are not Parity Securities does not imply that they also argue that the Certificates are not Tier I regulatory capital.

Thus, it appears that the Defendants did not receive the benefit that the Plaintiff contends they received—treatment of the DresCap Trust Certificates as Tier I capital—as the direct result of their high-level employees' pre-April 2010 representations that the DresCap Certificates were Parity Securities. Accordingly, the Defendants are not barred by the doctrine of quasi-estoppel from asserting a different position on that issue now.

The Plaintiff also argues that the "mend-the-hold" doctrine bars the Defendants from now asserting that the DresCap Trust Certificates are not Parity Securities in the face of their high-level employees' previous representations that they were Parity Securities. The mend-the-hold doctrine "bars a party who rejects a contract on certain specified grounds from changing position after litigation is filed when those grounds for rejection do not pan out. In other words, the party cannot mend its hold to come up with new grounds for justifying its prior position." *Liberty Prop. Ltd. P'ship v. 25 Massachusetts Ave. Prop. LLC*, 2008 WL 1746974, at *14 (Del. Ch. Apr. 7, 2008), *aff'd*, 970 A.2d 258 (Del. 2009) (citing *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 363 (7th Cir.1990) (Posner, J.) (observing that the doctrine overlaps with the implied covenant of good faith because when "[a] party ... hokes up a phony defense to the performance of his contractual duties and then when that defense fails (at some expense to the other party) tries on another defense for size [he] can properly be said to be acting in bad faith.")).

Although the Defendants have now taken a position that is different from the one previously taken by certain of their high-level employees, it cannot be said, based on the record before the Court, that they have done so in bad faith, or that the position the Defendants now assert is somehow phony or trumped up. Further, the Defendants asserted their position that the DresCap Trust Certificates are not Parity Securities in their first response to the Plaintiff's assertion that a payment on the Trust Preferred Securities had been pushed. *See* Gallagher Aff. Ex 24, Apr. 12, 2010 Letter from Norbert Dörr and Gunnar Graf to Pl., at CMZB 00053093 ("Dresdner Funding Trust IV securities . . . are not Parity Securities."). Under these circumstances, the Court concludes that the "mend-the-hold" doctrine does not bar the Defendants from asserting that same position here.

since the LLC Agreement's "Pusher Provision" applies only to Parity Securities.[72] The claim that the Defendants breached the Support Undertaking, which applies only to Parity Securities and Junior Securities, by failing to amend the Trust Preferred Securities after Amending the DresCap Trust IV Certificates, is viable only if the DresCap Trust Certificates may be categorized as one or the other.[73]

1. Subsection (i) of the definition of "Parity Securities" ("Subsection (i)")

Under Subsection (i) of the definition of Parity Securities in § 1.01 of the LCC Agreement, two types of securities are Parity Securities: first, "each class of the most senior ranking preference shares of the Bank" and, second, "other instruments of the Bank qualifying as the most senior form of Tier I regulatory capital of the Bank."

The parties agree that this part of the definition excludes the DresCap Trust Certificates because the DresCap Trust Certificates are not instruments of preference shares "of the Bank" because they were issued by Dresdner and not by the Bank.[74] Further, they are not "Tier I regulatory capital of the Bank," but, instead, *consolidated* capital of the Bank, again because they were not issued by Bank. Thus, the DresCap Trust Certificates do not qualify as Parity Securities under Subsection (i) of the LLC Agreement's definition of that term.

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[72] LLC Agreement § 7.04(b)(ix).
[73] Support Undertaking § 6.
[74] Pl.'s AB at 11; Defs.' OB at 20.

2. Subsection (ii) of the definition of "Parity Securities" ("Subsection (ii)")

The parties dispute whether Subsection (ii) designates the DresCap Trust Certificates as Parity Securities. The Defendants contend that the three categories of securities identified by Subsection (ii) (namely, "preference shares," "other instruments qualifying as Tier I regulatory capital of the Bank," or "any other instrument of any Affiliate of the Bank") are all modified by the clause "subject to any guarantee or support agreement of the Bank ranking *pari passu* with the obligations of the Bank under the Support Undertaking." Under this construction, the DresCap Trust Securities would not be Parity Securities because they are not subject to any guarantee or support agreement of the Bank.[75]

The Plaintiff argues that "the sheer distance of the clause 'subject to any guarantee or support undertaking' from the words 'preference shares' makes the Defendants' argument an implausible stretch."[76] Instead, it contends, the "subject to any guarantee or support undertaking" must modify only the immediately preceding antecedent. The Plaintiff agrees that "preference shares" is a modified term, but argues that that term is modified by the same clause as modifies "other instruments" within the subsection. This construction would result in Subsection (ii) covering three classifications of Parity Securities: (1) "preference shares . . .

[75] Aff. of Walter Petzinger ("Petzinger Aff.") ¶ 3.
[76] Pl.'s Br. in Opp'n to Defs.' Mot for Summ. J. ("Pl.'s AB") at 7.

qualifying as consolidated Tier I regulatory capital of the Bank," (2) "other instruments qualifying as consolidated Tier I regulatory capital of the Bank," and (3) "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." Under the Plaintiff's construction, the DresCap Trust Certificates would be Parity Securities because they qualify as consolidated Tier I regulatory capital of the Bank.

The Court agrees with the parties that the term "preference shares" in Subsection (ii) must be modified, because, if it were to stand alone, it would subsume the more specific category of preference shares appearing in Subsection (i): the "most senior ranking preference shares of the Bank."[77]

What, precisely, modifies "preference shares" as that term appears in Subsection (ii) is a more difficult question. The Plaintiff's reading does flow somewhat more naturally than the Defendants', if such a judgment can be applied to a document as dense as this one is, but that is not the criterion by which the meaning of the definition can be interpreted.

The Defendants first argue that "preference shares" cannot be modified by "qualifying as consolidated Tier I regulatory capital of the Bank" because, under

[77] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("We will read a contract as a whole and we will give each provision and term effect so as not to render any part of the contract mere surplusage.").

their interpretation of the German Stock Corporation Act, preference shares must be cumulative and Tier I capital must be non-cumulative. Ultimately, the Court is unconvinced of this proposition. The Court's review of those provisions of the German Stock Corporation Act that have been cited by the parties indicates that (1) in the default, shares may be issued with varying payment rights;[78] (2) preference shares may be issued with a voting right;[79] and (3) only non-voting preference shares must carry a cumulative preference right.[80] Presumably then, noncumulative preference shares that have voting rights could qualify as consolidated Tier I regulatory capital; thus, the Defendants' argument that German law precludes the Plaintiff's construction of the definition of Parity Securities is unconvincing.

The Defendants next ask the Court to import the definition of "or" from the Trust II Agreement, which was executed contemporaneously with the LLC Agreement.[81] In *Crown Books Corp. v. Bookstop, Inc.*, the Court held that, in construing an unambiguous contract, "it is appropriate for the court to consider not

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[78] German Stock Corporation Act § 11 ("Specific kinds of shares may have various rights, namely in the distribution of the profits and of specific assets. Shares with equal rights form one class.").

[79] *Id.* at § 12 ("(1) Each share confers a voting right. Preferred shares may be issued pursuant to provisions of this law as shares without voting rights") (including no affirmative requirement that preference shares *must* be issued without voting rights).

[80] *Id.* at § 139 ("Shares which carry the benefit of a cumulative preference right with respect to the distribution of profits may be issued without voting rights").

[81] Trust Agreement Preamble; LLC Agreement Preamble (each effective as of Mar. 30, 2006).

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."[82] Thus, the Court may consider that the Trust II Agreement, which employs a definition of "Parity Securities" that is almost identical to what appears in the LLC Agreement,[83] specifically provides that "'or' is not exclusive."[84] This suggests that the various clauses set off by the word "or" in section (ii) of the 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. Under *Crown Books*, the Court considers that the functionally identical words used to define "Parity Securities" in the LLC Agreement and in the Trust II Agreement should be given the same meaning, namely that each type security identified in Subsection (ii) is only a Parity Security if it is "subject to any guarantee or support agreement of the Bank ranking pari passu with the obligations of the Bank under the Support Undertaking."

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[82] 1990 WL 26166, at *1 (Del. Ch. Feb 28, 1990).

[83] Trust Agreement § 1.01:

> ***Parity Securities*** means (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 16,000 noncumulative trust preferred securities issued by Commerzbank Capital Funding Trust II).

[84] LLC Agreement § 1.02(b)(x).

This construction is consistent with the Court's analysis of subsection (iii) of the LLC Agreement's definition of "Junior Securities," which captures "(iii) 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."[85]

In this definition, as in Subsection (ii) of the definition of Parity Securities, the words "preference shares" cannot be unmodified, or the definition would subsume the more limited subset of "the most senior ranking preference shares of the Bank" that are defined as Parity Securities by Subsection (i). The only other clause appearing in section (iii) of the Junior Securities definition that could modify "preference shares" is "subject to any guarantee or support agreement of the Bank ranking junior to the obligations of the Bank under the Support Undertaking." Therefore, that clause must modify not only "any other instrument of any Affiliate of the Bank" but also "preference shares," with the "or" that appears between the two types of securities acting as an inclusive conjunction. From this, the Court determines that where "or" appears in Subsection (ii) of the Parity Securities definition, it must be read non-exclusively,[86] and, as a result, in Subsection (ii) of the definition of Parity Securities, the clause "subject to any

[85] LLC Agreement § 1.01.

[86] *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

guarantee or support agreement of the Bank ranking *pari passu* with the obligations of the Bank under the Support Undertaking" modifies each of the three categories of securities identified in that subsection. That is, to qualify as Parity Securities under Subsection (ii), securities must be "preference shares . . . subject to any guarantee or support agreement of the Bank ranking *pari passu* with the obligations of the Bank under the Support Undertaking"; "other instruments qualifying as consolidated Tier I regulatory capital of the Bank" subject to such a guarantee; or "any other instrument of any Affiliate of the Bank" subject to such a guarantee.[87] It is not disputed that the DresCap Trust Certificates are not subject to

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passage that spawns much of the disagreement among the parties" in resolving that textual disagreement.).

[87] The Court sympathizes with the Plaintiff and others working their way through this definition. Indeed, there is no question that Subsection (ii), and the definition of "Parity Securities" in general, could have been drafted more clearly. For example, if the drafter of the LLC Agreement had wanted to give Subsection (ii) the meaning the Plaintiff would ascribe to it, they could have done so with very few changes to the existing language. Dividing Subsection (ii) into enumerated clauses, for example, would likely have yielded a different interpretation than the one reached by the Court:

> (ii) (1) preference shares or other instruments qualifying as consolidated Tier I regulatory capital of the Bank or (2) 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).

Alternatively, the drafters could have employed slightly different language to show more clearly that Subsection (ii) has the meaning the Court has, after some effort, determined it to have. For example:

> (ii) (1) preference shares or (2) other instruments qualifying as consolidated Tier I regulatory capital of the Bank or (3) any other instrument of any Affiliate of the Bank, *provided in each case that they are* subject to any guarantee or support agreement of the Bank ranking *pari passu* with the obligations of the Bank under

any guarantee or support undertaking of the Bank.[88] Accordingly, the Court holds that the DresCap Trust Securities are not Parity Securities under the LLC Agreement.[89]

The Pusher Provision applies only when payments are made on Parity Securities.[90] Because the DresCap Trust Certificates are not Parity Securities, the Defendants are entitled to judgment in their favor as a matter of law regarding the Plaintiff's claim under the Pusher Provision.

C. *Whether the plain language of the LLC Agreement indicates that the DresCap Trust Certificates are Junior Securities, and whether the Support Undertaking applies to the DresCap Trust Certificates*

Because Section 6 of the Support Undertaking applies to both Parity Securities and Junior Securities, the Plaintiff's claims under the Support

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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).

That a definition is difficult to understand, or that it could have been drafted more clearly, however, does not necessarily mean that the language is ambiguous: as here, it may simply be needlessly dense. Here, the Court is satisfied that careful parsing of the existing language and reference to the other provisions of the LLC Agreement and the Trust Agreement indicate that Subsection (ii) is not ambiguous and that it encompasses only securities that are "subject to any guarantee or support agreement of the Bank ranking *pari passu* with the obligations of the Bank under the Support Undertaking. . . ."

[88] Petzinger Aff. ¶ 3.

[89] The Plaintiff contends that the Defendants have failed to offer any business rationale that would justify departing from grammatical norms to conclude that only securities subject to a guaranty or support undertaking of the Bank may qualify as Parity Securities under Subsection (ii). *See* Pl.'s AB at 8. 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; it need not speculate as to their reasons for using the language that they employed.

[90] LLC Agreement § 7.09(b)(ix).

Undertaking could be viable if the DresCap Trust Certificates are Junior Securities.[91] As discussed with regard to the Parity Securities definition, they are not instruments "of the Bank." Thus, the DresCap Trust Certificates are not "common stock of the Bank," and do not qualify as Junior Securities under section (i) of the definition. Similarly, they do not qualify as Junior Securities under section (ii) of the definition, which applies to "preference shares or other instruments of the Bank" and "other instruments of the Bank." Finally, they do not qualify as Junior Securities under section (iii) of the definition because, as the Court has determined,[92] the securities identified in that section of the definition are all modified by the clause "subject to any guarantee or support agreement of the Bank ranking junior to the obligations of the Bank under the Support Undertaking," and the DresCap Trust Certificates are not subject to such a guarantee.

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. Accordingly the Defendants are entitled to judgment in their favor as a matter of law regarding the

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[91] The Plaintiff does not specifically contend that the DresCap Trust Certificates qualify as such but the analysis is necessary to fully resolve the Plaintiff's claims under the Support Undertaking.

[92] *See supra* notes 85-86 and accompanying text.

Plaintiff's claims that the amendment of the DresCap Trust IV Certificates required the Defendants to amend the Trust Preferred Securities.

V. CONCLUSION

For the forgoing reasons, the Defendants are entitled to judgment in their favor as a matter of law, and their motion for summary judgment is therefore granted. The Plaintiff's motion for summary judgment is denied.

An implementing order will be entered in due course.[93]

[93] Because it is unclear whether one of the Plaintiff's arguments has been fairly presented, the Court has written to the parties and solicited their views on this question. *See supra* note 71 and accompanying text.

Exhibit B

EFiled: May 31 2012 3:18PM EDT
Transaction ID 44563101
Case No. 5580-VCN

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Re: *The Bank of New York Mellon v. Commerzbank Capital Funding Trust II, et al.*
C.A. No. 5580-VCN
Date Submitted: February 22, 2012

Dear Counsel:

The Court granted the Defendants' motion for summary judgment,[1] but along with the Memorandum Opinion, the Court issued a letter, explaining that one issue remained to be addressed. Specifically, the Court stated that it had yet to address the Plaintiff's argument that, under the doctrine of quasi-estoppel, the

[1] *The Bank of New York Mellon v. Commerzbank Capital Funding Trust II*, 2011 WL 3360024, at *11 (Del. Ch. Aug. 4, 2011) (the "Memorandum Opinion" or "Mem. Op."). The Court presumes familiarity with the Memorandum Opinion and will generally employ the nomenclature that is used in that decision.

Bank should be estopped from arguing that the DresCap Trust Certificates were not Parity Securities because "the Bank benefited from representations that the DresCap Trust Certificates were Parity Securities 'by attracting and maintaining investors in the Commerzbank Trust Instruments, who were told that the Dresdner Trust Instruments were Parity Securities . . . .'"[2] That particular quasi-estoppel argument (the "Quasi-Estoppel Argument") was not squarely raised until the Plaintiff's Reply Brief, and the Plaintiff did not reference any record evidence in support of that argument. Thus, the Court asked the parties to submit answers to a series of questions about the Quasi-Estoppel Argument in order to aid the Court in determining what effect, if any, that argument should have on the Court's decision to grant the Defendants' motion for summary judgment. The Plaintiff has failed to show that there is any support for the Quasi-Estoppel Argument in the evidentiary record, and therefore, that argument has no effect on the Court's decision.

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[2] *The Bank of New York Mellon v. Commerzbank Capital Funding Trust II*, 2011 WL 3423358, at *1 (Del. Ch. Aug. 4, 2011) (the "August 4 Letter") (citing Plaintiff's Reply Brief in Further Supp. of its Mot. for Summary Judgment (the "Plaintiff's Reply Br." or "Pl.'s Reply Br.") at 13).

* * *

When a person has "gained some advantage for himself or produced some disadvantage to another" by maintaining a position, quasi-estoppel acts to prevent that person from changing his position.[3] In *Personnel Decisions*, this Court determined that quasi-estoppel prevented a defendant from arguing that the Delaware Uniform Arbitration Act ("DUAA") did not apply to an arbitration agreement. The defendant had initially maintained that the DUAA did apply to the arbitration agreement and sought to exploit certain provisions of the DUAA to its benefit. Therefore, the Court held that the defendant could not deviate from its initial position that the DUAA was applicable. Moreover, the Court explained that "[a]side from the benefits . . . [the defendant] received from its offensive use of § 5703(c) of the DUAA, its invocation of that statute caused material detriment to . . . [the plaintiff]."[4] Thus, *Personnel Decisions* makes clear that quasi-estoppel is concerned with a person's prior position; the key issue is whether a person's

[3] *Pers. Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at *6 (Del. Ch. May 5, 2008) (quoting *KTVB, Inc. v. Boise City,* 486 P.2d 992, 994 (Idaho 1971)).
[4] *Id.* at *7.

prior position has given him some advantage or produced some disadvantage for someone else.[5]

The Plaintiff contends that the facts relevant to the Quasi-Estoppel Argument are that: (1) the Bank initially adopted the position that the DresCap Trust Certificates were Parity Securities; (2) that position benefitted the Bank because it helped the Bank attract and maintain investors in the Bank's securities; (3) the Bank then adopted a new position, namely, that the DresCap Trust Certificates were not Parity Securities; and (4) that new position both benefitted the Bank and harmed the holders of the Trust Preferred Securities.[6] The Plaintiff

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[5] The Plaintiff appears to agree with this interpretation of quasi-estoppel. *See* Letter from Neal J. Levitsky, Esq. to the Court, dated September 12, 2011 ("Levitsky's September 12 Letter"), at 9-10 ("'[Q]uasi-estoppel applies where a party's previous action has 'gained some advantage for himself or produced some disadvantage to another,' making it inequitable 'to maintain a position inconsistent with one to which he [previously] acquiesced, or from which he accepted a benefit.'") (quoting Mem. Op., 2011 WL 3360024, at *8 n.71).

[6] *See* Pl.'s Reply Br. at 13 ("The Defendants have failed to cite any evidence to rebut the Plaintiff's showing that the Bank: (i) reached the reasoned conclusion that the Dresdner Trust Instruments were Parity Securities; (ii) made numerous representations to this effect, including to BaFin, SoFFin, and investors, upon which they relied; (iii) obtained a benefit from these representations . . . by attracting and maintaining investors in the Commerzbank Trust Instruments, who were told that the Dresdner Trust Instruments were Parity Securities; (iv) presented its 'new' contrived interpretation of the Parity Securities definition only in response to the threat of litigation; and (v) never informed anyone outside the context of this litigation that its prior conclusion was merely a mistaken 'assumption.'").

makes several arguments about facts (3) and (4), and seems to suggest that the benefit the Bank received from its change in position, as well as the harm the holders of the Trust Preferred Securities incurred as a result of that change, each independently supports an application of quasi-estoppel.[7] As explained above, however, quasi-estoppel is concerned with a person's prior position. Quasi-estoppel would only prevent the Bank from changing its position, if the Bank's initial position, that the DresCap Trust Certificates were Parity Securities, either benefitted it or disadvantaged someone else.

The Plaintiff does not argue that the Bank's initial position disadvantaged anyone. The Plaintiff does argue that the Bank benefitted from adopting its initial position because that position helped the Bank attract and maintain investors in the Bank's securities. That is the argument that the Court specifically referenced in the August 4 Letter, and asked the parties to discuss. In its response to the August 4 Letter, the Plaintiff offers several contentions in support of the Quasi-Estoppel Argument.[8] None of those contentions, however, references the

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[7] *See* Levitsky's September 12 Letter at 3 ("[T]he Bank . . . 'saved' substantial capital payments that it otherwise would have made on the Trust II Securities, and . . . imposed significant financial detriments on the Trust II holders, both by failing to make significant capital payments and by improving the liquidation preference (and payment terms) of what it had previously represented to investors were Parity Securities, thus impairing the relative position of the Trust II holders' investment in the Bank. For . . . these reasons, the issue of quasi-estoppel has been properly raised and fairly joined . . . .").

[8] *See* Levitsky's September 12 Letter at 2 ("[S]enior Bank representatives . . . repeatedly, consistently and specifically represented to investors that the Dresdner Trust Instruments were Parity Securities . . . benefitting the Bank in numerous ways, including enhancing investor

evidentiary record. The Plaintiff has failed to point to any evidence supporting the argument that the Bank benefitted from its initial position that the DresCap Trust Certificates were Parity Securities.[9]

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confidence and interest in the Commerzbank Trust Instrument at a time when, by Defendants' own admission, the Bank had recently been 'in need of government assistance' and was 'unprofitable by every measure.'") (citing Opening Br. in Supp. of Defs.' Mot. for Summary Judgment); *id.* at 6 ("It is axiomatic, as the record reflects, that issuers such as the Bank with instruments containing pari passu provisions benefit from maintaining investor confidence by assuring investors that the Bank will stand behind and honor its pari pasu obligations."); *id.* at 14 (Representations that the Dresdner Trust Instruments were Parity Securities benefitted the Bank because the Bank "planned to return to the capital markets to issue additional capital securities to refinance securities purchased by a German government agency."); Letter from Neal J. Levitsky, Esq. to the Court, dated September 26, 2011, at 2 ("[T]he interests of the Bank were affirmatively served by communicating to existing and potential investors the Bank's position that the DresTrust securities were Parity Securities, and by extension, that the Bank would honor the rights and protections the Commerzbank Trust securities were designed to provide to market participants (including the Trust II holders).").

[9] The Plaintiffs may be correct that reliance is not a required element of a quasi-estoppel claim under Delaware law. *See* Mem. Op., 2011 WL 3360024, at *8 n.71. But if a plaintiff argues that a defendant should be "quasi-estopped" because he received a benefit, a plaintiff has to show that a benefit was actually received, and what that requires will vary based on the alleged benefit. For example, if a defendant receives $100 from adopting position A, and then subsequently adopts position B, a plaintiff can show that the defendant received a benefit for purposes of quasi-estoppel by pointing to the $100 he received. The issue of whether the plaintiff relied on the fact that the defendant received $100 would be irrelevant.

Here, however, the Plaintiff's theory of benefit is not that simple. The Plaintiff has not pointed to a discrete item that the Defendants received through their representations that the DresCap Trust Certificates were Parity Securities. Rather, the Plaintiff argues that by making certain representations, the Bank was able to attract and maintain investors. Therefore, while reliance is not an element of quasi-estoppel, if a plaintiff claims that a defendant should be quasi-estopped from changing its position from A to B on the basis that people invested in the defendant because it adopted position A, the plaintiff must show that that is what actually happened; the plaintiff must show that people actually invested in the defendant because it adopted position A. Thus,

* * *

Therefore, the Quasi-Estoppel Argument does not affect this Court's decision to grant the Defendants' motion for summary judgment.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

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here, on summary judgment, the Plaintiff must raise a material fact issue as to whether people invested in (or continued to hold) the DresCap Trust Certificates because they were held out as Parity Securities—that is the benefit that the Plaintiff alleges was received. There is nothing in the evidentiary record about whether individual investors relied on the Bank's statements that the DresCap Trust Certificates were Parity Securities, and the Plaintiff appears to share at least some of the responsibility for this fact. *See* Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Compel Disc. at 9 ("This case turns on what Defendants were obligated to do under the Operative Documents, and whether the Defendants satisfied those obligations, not the identity and holding of any beneficial holder. Who they are and what their holdings are has no bearing on any cause of action, allegation, or defense in this case, making their identities and holdings patently irrelevant and not a proper subject of discovery."). Moreover, even if the Plaintiff would not be required to show individualized reliance by each investor, the Plaintiff would at least need to show that the fact that the DresCap Trust Certificates were classified as Parity Securities was material to investors. The Plaintiff has not brought forth any evidence on this point either. The closest it comes is its counsel's assertion that "[i]t is axiomatic" that parity classification would maintain investor confidence. *See* Levitsky's September 12 Letter at 6. Although that proposition has some appeal, a plaintiff attorney's statement that investors relied on a specific representation by the defendant does not, without more, support a reasonable inference that investors actually relied or that the defendant obtained a benefit. Conclusory statements, even when given in absolute terms, do not raise triable fact issues. Therefore, the Plaintiff has failed to raise an issue of material fact as to whether the Bank actually received a benefit, and its Quasi-Estoppel Argument fails as a matter of law.

Exhibit C

IN THE COURT OF CHANCERY 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,	)	
Plaintiff,	)	
v.	)	C. A. No. 5580-VCN
COMMERZBANK CAPITAL FUNDING TRUST II; COMMERZBANK CAPITAL FUNDING LLC II; and COMMERZBANK AKTIENGESELLSCHAFT,	)	
Defendants.	)	

FINAL JUDGMENT ENTERED PURSUANT TO RULE 54(b)

AND NOW, this ____ day of June 2012, the Court having considered Defendants' motion for summary judgment and the parties' submissions and argument in connection with the motion, and a decision thereon having been issued by the Court by Memorandum Opinion dated August 4, 2011 and Letter Opinion dated May 31, 2012 (collectively, the "Opinions");

AND WHEREAS the Opinions did not resolve Plaintiff's Third Cause of Action set forth in Plaintiff's Verified Complaint dated June 18, 2010 ("Count III"), a contractual claim for certain costs and expenses, including reasonable attorneys' fees, under Section 3.02 of the Amended and Restated Trust Agreement of Commerzbank Capital Funding Trust II, dated as of March 30, 2007;

AND IT APPEARING that the resolution of Count III will not affect the resolution of the claims resolved by the Opinions;

AND IT FURTHER APPEARING that it is in the interests of justice and the parties to enter a final judgment now on the First and Second Causes of Action set forth in Plaintiff's Verified Complaint dated June 18, 2010 ("Counts I and II"):

IT IS THEREFORE HEREBY EXPRESSLY DETERMINED, under Rule 54(b), that there is no just reason to delay entry of judgment on Counts I and II pending resolution of Count III.

IN ADDITION, IT IS EXPRESSLY DIRECTED AND ORDERED, under Rule 54(b), for the reasons set forth in the Opinions, that summary judgment is hereby granted in favor of the Defendants and against the Plaintiff on Counts I and II.

_____

The Honorable John W. Noble

This document constitutes a ruling of the court and should be treated as such.

Court:	DE Court of Chancery Civil Action
Judge:	John Noble
File & Serve Transaction ID:	44737410
Current Date:	Jun 13, 2012
Case Number:	5580-VCN
Case Name:	CONF ORD ON DISCOVERY Bank of New York Mellon vs Commerzbank Capital Funding Trust II et al
Court Authorizer:	John Noble

/s/ Judge John Noble

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing (REDACTED) Opening Brief For Appellant was electronically served by LexisNexis E-filing on September 4, 2012 upon the following counsel of record:

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/s/ Ryan D. Stottmann

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