EFiled: Oct 19 2012 08:36PM EDT
Filing ID 47172585
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

PUBLIC VERSION
FILED: OCTOBER 19, 2012

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October 4, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Other Authorities

PRELIMINARY STATEMENT

Commerzbank argues in its answering brief that the Trustee seeks a "windfall" through a contractual interpretation that "defies common sense" and leads to a supposedly "absurd" result.

In reality, it is Commerzbank that is seeking a windfall with a strained reading of the Parity Securities definition and the Pusher Provision. As the court below acknowledged, the Trustee's reading of the Parity Securities definition—*i.e.*, reading the trailing modifier at the end of subsection (ii) as modifying only the last item—"does flow somewhat more naturally." Op. 25. Commerzbank's interpretation, by contrast, requires an awkward reading and renders part of the definition surplusage. Subsection (ii)'s middle term "other instruments qualifying as consolidated Tier I regulatory capital of the Bank" must have meaning, yet Commerzbank does not even attempt to explain how its reading gives the middle term meaning. And the fact that Commerzbank *did not* include the middle term in the supposedly "mirror" Junior Securities definition that Commerzbank claims supports its reading only highlights that the middle term should have effect where it *does* appear. Other contract construction principles provide still further support for the Trustee's reading.

Commerzbank itself read the Parity Securities definition the same way as the Trustee. As detailed in the Trustee's opening brief, before litigation, Commerzbank well understood that the DresCap Securities were Parity Securities that could trigger pushed payments. In internal emails and presentations, and in external communications with regulators, senior Bank personnel said again and again that the DresCap Securities were Parity Securities that would have a "push effect" on Commerzbank TruPS. Op. Br. 21-22. The Bank's auditors and rating agencies said the same thing. Op. Br. 22-23. And even in response to a question from an investor, a Bank Treasury employee responded, "yes, the [DresCap I Securities] is a hybrid Tier 1 instrument which would qualify as a parity instrument." A496. After the Trustee filed its complaint in this action, Bank employees continued to email internally that "there is ... reason to believe ... that the instruments of the Dresdner Funding Trust Structures I and III are Parity Securities ...." A2303. Faced with the overwhelming evidence that Commerzbank *itself* understood the Parity Securities definition to include the DresCap Securities, Commerzbank's answering

brief does not dispute these facts or cite to a single contrary pre-litigation statement.

Commerzbank's pre-litigation construction did not end with what it said. The Bank also took *action* in an attempt to avoid its obligations under the Pusher Provision. Precisely because it understood that the DresCap Securities were Parity Securities, the Bank spent time and money—including seeking and obtaining regulatory approval—to restructure the DresCap IV Securities. A memorandum to the Bank's board explained that, as a result of the restructuring, "[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]." A567. Yet the Bank sought to obscure the reasons for the restructuring, instructing its 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." A878. Commerzbank's present effort to characterize the DresCap Securities as outside of the Parity Securities definition is a litigation-driven attempt to avoid the correct construction that Commerzbank itself gave that definition.

In a similar departure from its pre-litigation understanding, Commerzbank accuses the Trustee of "for the first time ... deconstructing" the Pusher Provision. Ans. Br. 22. In fact, the Trustee broke the Pusher Provision into the same three parts Commerzbank *itself* used in its March 2006 Offering Memorandum explaining the Pusher Provision to potential investors. A1530. Seeking to override the Pusher Provision's plain-language, chronological payment sequence, Commerzbank argues that the Trustee's reading is "absurd" because it would supposedly trigger an "endless waterfall" of reciprocal pushed payments that can "never stop." Ans. Br. 2, 24. Commerzbank's claims of absurdity are misplaced. There are multiple ways a cycle of pushed payments could stop. In addition, any problems are of Commerzbank's own making. Commerzbank focuses on its CoBa III TruPS series, but the Bank issued that series nine months *after* CoBa II, and could have avoided any potential waterfall by giving the CoBa III TruPS the same payment date as CoBa II or obtaining advance consent to amend the CoBa II documents. The Bank also could have sought a Pusher-related consent from the CoBa II TruPS holders at the time it acquired Dresdner Bank—a transaction the Bank had been contemplating for years (A2104, A2106)—

to avoid later Pusher Provision issues. Where any disadvantageous contractual obligations Commerzbank owes are the consequence of its own voluntary business decisions, "it is not the job of a court to relieve [Commerzbank] of the burdens of contracts they wish they had drafted differently but in fact did not." *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *2 (Del. Ch. Jan. 23, 2006) (cited at Ans. Br. 10, 22, 27).

Finally, while Commerzbank seeks to obscure the Bank's breach of Section 6 of the Support Undertaking by claiming that the DresCap IV restructuring "*relegated* the DresCap IV Certificates to lower Tier II capital" (Ans. Br. 9 (emphasis added)), Tier II capital is in fact senior in right of payment to Tier I. Commerzbank's attempt to limit Section 6 only to a "guarantee or similar obligation" ignores the Bank's obligation under that section not to "enter into any other agreement relating to the ... payment of any amounts in respect of any other Parity Securities ... that would in any regard rank senior in right of payment to the Bank's obligations." A225. Commerzbank does not dispute that if there is a breach of the Support Undertaking, the preferred German law remedy of specific performance is appropriate.

* * *

Since the Trustee filed its complaint in June 2010, Commerzbank has exploited the uncertainty and delay created by this litigation and the trial court's ruling to conduct multiple tender offers for CoBa II TruPS, at depressed prices, substantially reducing the pushed payments it would owe. *E.g.*, A11, A2177, A2309-10. At this point, it is the Trustee's understanding that Commerzbank has repurchased some 88% of the CoBa II TruPS, leaving £93.1 million of the original £800 million outstanding. Op. Br. 12. The tender offers have reduced the amount that would have been payable on April 12, 2010 and April 12, 2011, in the event of a pushed payment, from approximately £47.2 million per payment at the start of litigation to approximately £5.5 million per payment today. Thus, regardless of this Court's ruling, Commerzbank has already obtained a windfall by using its strained interpretation of the contract to delay and reduce the amount it would owe in the event of a pushed payment.

But that is no reason to permit Commerzbank to avoid its remaining Parity Securities obligations. This Court should reject Commerzbank's litigation-driven interpretation and enforce the LLC Agreement's protections for CoBa II TruPS investors.

ARGUMENT

I. THE PARITY SECURITIES DEFINITION

A. "Inclusive or" does not resolve the question.

a. As set forth in the Trustee's opening brief, the court below incorrectly used "inclusive or" to determine whether the trailing modifier at the end of subsection (ii) modified all of the preceding items. Op. Br. 14-16. Along with case law and other secondary sources, the manual 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) ("MANUAL"). Commerzbank does not dispute this definition of "inclusive or," but argues only that the definition is "not inconsistent" with reading the trailing modifier as modifying all of the items in subsection (ii). Ans. Br. 13. But that is the point: Whether "or" is inclusive or exclusive is *irrelevant* to the question of trailing modifiers. It doesn't resolve the question one way or the other.[1]

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[1] As illustrated below, one can read "or" inclusively in subsection (ii) and apply the two modifiers four different ways (for brevity, the three items in subsection (ii) are denoted "A," "B" and "C" and the internal and trailing modifiers are denoted "Tier I" and "a guarantee," respectively). "Inclusive or" is used in *all* of these examples:

> Parity Securities means ... [1] A or [2] B qualifying as Tier I or [3] C subject to a guarantee, *or any two or all three.*
>
> Parity Securities means ... [1] A qualifying as Tier I or [2] B qualifying as Tier I or [3] C subject to a guarantee, *or any two or all three.*
>
> Parity Securities means ... [1] A subject to a guarantee or [2] B qualifying as Tier I subject to a guarantee or [3] C subject to a guarantee, *or any two or all three.*
>
> Parity Securities means ... [1] A qualifying as Tier I subject to a guarantee or [2] B qualifying as Tier I subject to a guarantee or [3] C subject to a guarantee, *or any two or all three.*

b. The Trustee's opening brief cited this Court's decision in *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, ___ A.3d ___, 2012 WL 2783101 (Del. July 10, 2012), as an example of a contract interpretation case where this Court "did not read [an] 'inclusive or' to mean that [a] trailing modifier ... modified both preceding items." Op. Br. 15-16. Attacking a straw man, Commerzbank asserts that "*Martin-Marietta* is simply not persuasive authority that the 'subject to' clause at issue here should not be read to modify each of the instruments separated by an 'or' in Subsection (ii)." Ans. Br. 14. Commerzbank misses the point that *Martin Marietta* confirms that the fact that "or" was used inclusively is the wrong place to look.

c. There is no shortage of case law and commentary that can be brought to bear on trailing modifiers. *See* Op. Br. 16 n.2, 19 (collecting cases); MANUAL ¶¶ 11.6-11.9 & 11.19-11.26. None of these authorities suggest that "inclusive or" should be used to resolve trailing modifier questions. Yet—without citing any support—the Court of Chancery relied on "inclusive or" as its basis for casting aside the Trustee's more natural reading. Op. 27, 28-29. That was legal error.

B. The plain language of the Parity Securities definition encompasses the DresCap Securities.

Commerzbank contends that the Court of Chancery "held" that the Trustee's "reading of the operative documents ... ignores their plain language." Ans. Br. 3. In fact, the Court of Chancery "held" just the opposite, and acknowledged that the Trustee's reading "does flow somewhat more naturally" (Op. 25) and "sympathize[d] with the [Trustee]" as "there is no question that Subsection (ii) ... could have been drafted more clearly" (Op. 29 n.87).

a. Commerzbank does not explain why its reading of subsection (ii) is "plain" beyond a conclusory statement that it is so. *See* Ans. Br. 15. Unlike the Trustee (*see* Op. Br. 16-17), Commerzbank never walks the Court through its reading of the text of the definition. And Commerzbank has nothing to say about the lower court's addition of the words "provided in each case" to the Parity Securities definition—words that Commerzbank used elsewhere on the very same page of the LLC Agreement but determined *not* to use in the definition of Parity Securities—to "more clearly" express Commerzbank's reading. Op. 29 n.87.

b. As set forth in the Trustee's opening brief, Commerzbank's reading effectively renders the middle term of subsection (ii)—"other instruments qualifying as consolidated Tier 1 regulatory capital of the Bank"—surplusage. Op. Br. 17. Notably, the phrase "qualifying as consolidated Tier I regulatory capital of the Bank" does not appear in the Junior Securities provision, highlighting that the phrase was placed in subsection (ii) intentionally. *See Alpine Inv. Partners v. LJM2 Capital Mgmt., L.P.*, 794 A.2d 1276, 1282-83 (Del. Ch. 2002) (fact that two statutory provisions were parallel with one difference made the difference "particularly noteworthy" and that "when different terms are used ... it is reasonable to assume that a distinction between terms was intended" (citation omitted)); *General Motors Corp. v. Burgess*, 545 A.2d 1186, 1191 (Del. 1988) (similar). That Commerzbank *did not* include the middle term in the supposedly "mirror" portion of the Junior Securities definition only highlights that the middle term should have effect where it *does* appear.

Instead of trying to explain why its reading does not render the middle term of subsection (ii) surplusage—something that Commerzbank does not even attempt to do—Commerzbank makes two nonsubstantive arguments for why the Court should ignore words appearing in the very subsection at issue. The Court should accept neither.

First, Commerzbank complains that the argument "was not raised in the Court of Chancery and thus cannot be raised for the first time on appeal." Ans. Br. 17. On the contrary, the Trustee argued below that the contract must be "construe[d] ... as a whole, giving effect to all provisions therein" and "interpreted in such a way as to not render any of its provisions illusory or meaningless." A35. Commerzbank itself argues in its answering brief that the contract should be read to avoid rendering portions surplusage and that "a court must give effect to every provision of the contract and, if possible, reconcile all of the provisions as a whole." Ans. Br. 12-13. The Trustee is not barred from relying on language appearing in the very definition at issue.

Second, Commerzbank argues that there is "no evidence in the record" supporting the Trustee's argument that Commerzbank's reading would render the middle term surplusage. Ans. Br. 17. But determining whether an interpretation would render a term surplusage is not something that requires going beyond the contract language. *See, e.g., Martinez v.*

Regions Fin. Corp., 2009 WL 2413858, at *9 (Del. Ch. Aug. 6, 2009) (finding that a party's construction would render contract terms surplusage based on analyzing the contract text); *NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007) (similar), *aff'd*, 945 A.2d 594 (Del. 2008) (Table). Indeed, Commerzbank's own surplusage argument does not cite any "record evidence" beyond the language of the contract. *See* Ans. Br. 13.

c. Commerzbank also argues—without citing record evidence—that "[t]he Trustee's reading would ... effectively render as surplusage the term preference shares." Ans. Br. 17. In fact, Commerzbank's own reading would effectively render "preference shares" surplusage. If the term "preference shares" in subsection (ii) is modified so that only preference shares subject to a guarantee or support agreement of the Bank are within the definition of Parity Securities, it is difficult to see what "preference shares" the definition would encompass that would not also be affiliate instruments subject to a guarantee or support agreement of the Bank. Because the Trustee's reading does not render "preference shares" surplusage any more than Commerzbank's reading, Commerzbank's surplusage argument regarding "preference shares" does not favor one interpretation over the other.

d. The Trustee cited the rule of the last antecedent among many other interpretive principles supporting its reading. Commerzbank claims that the Trustee is "grasping at straws" and that the rule of the last antecedent is "not recognized with *any* authority in Delaware." Ans. Br. 18 (emphasis added). But the rule of the last antecedent is "recognized" in Delaware—as one contract interpretation principle designed to assist in determining intent that is not given "undue weight" over other interpretation principles. Op. Br. 19. The rule of the last antecedent is simply another further factor weighing in favor of the Trustee's reading.[2]

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[2] A footnote in the Trustee's opening brief stated that the absence of a comma in subsection (ii) is a "further signal" that the trailing modifier applies only to the last item. Op. Br. 16 n.2. Commerzbank claims that this argument is "directly contradict[ed]" by *Martin Marietta*—which read a trailing modifier as applying only to the last item even though it *was* preceded by a comma—and that, if the Trustee's position about the effect of a comma is right, "then *Martin-Marietta* ... was incorrectly decided."

e. Offering little by way of affirmative construction of the text of the Parity Securities definition itself, Commerzbank's argument focuses on—indeed, leads with—language in *other* provisions, namely, the Junior Securities definition and Section 2(c) of the Support Undertaking. Commerzbank claims that these other provisions show that "'preference shares' *must* be modified by the 'subject to' language." Ans. Br. 12-13 (emphasis added). In fact, these provisions support the Trustee's reading.

First, Commerzbank contends that the Junior Securities definition "closely mirrors" the Parity Securities definition and that, because the "subject to" language modifies "preference shares" in the Junior Securities definition, the "subject to" language must also modify "preference shares" in the Parity Securities definition. Ans. Br. 12-13. But Commerzbank fails to address a critical difference between the Parity Securities definition and the Junior Securities definition: The key phrase "other instruments qualifying as consolidated Tier I regulatory capital of the Bank" appears in the Parity Securities definition but *not* in the Junior Securities definition. The Junior Securities definition thus should not be used to resolve the meaning of a provision that does include that phrase. To the contrary, that Commerzbank *did not* include this key phrase in the supposedly "mirror" portion of the Junior Securities definition highlights that the phrase must be given meaning where it appears in the Parity Securities definition—which the Trustee's reading does while Commerzbank's reading does not. *See* Argument I.B.b, *supra*.

Second, Commerzbank contends that Section 2(c) of the Support Undertaking favors Commerzbank's reading. Ans. Br. 13. In fact, Section 2(c) cuts the other way. Commerzbank's reading injects a circularity into Section 2(c) of the Support Undertaking, which under Commerzbank's reading would provide that "the obligations of the Bank under this Section 2 ... shall rank pari passu ... (ii) with [instruments] subject to any guarantee or support agreement of the Bank ranking pari

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Ans. Br. 16. But the presence or absence of a comma is a "signal" to be considered—among others. That the presence of a comma was not outcome-determinative in *Martin Marietta* does not mean that this Court should ignore the absence of a comma before the trailing modifier altogether.

passu with the obligations of the Bank under this Agreement." Such circularity is tantamount to surplusage. The Trustee's reading of subsection (ii), by contrast, provides something with a priority independent of the Support Agreement for the Support Undertaking to rank *pari passu* with—*i.e.*, instruments qualifying as consolidated Tier I regulatory capital—rather than simply being *pari passu* with itself.

f. The Trustee's opening brief also presented an alternative argument that "even assuming *arguendo* that ... a guarantee or support agreement is required in order to meet subsection (ii)'s definition of Parity Securities," the DresCap Securities meet even that definition because the DresCap Securities contracts "have functionally similar effect to the Support Undertaking" by "giv[ing] DresCap holders direct enforcement rights against the Bank itself." Op. Br. 19. Although not necessary to finding that the DresCap Securities are Parity Securities, this alternative argument was presented to the Court below in response to Commerzbank's arguments. A2085; A2271-73.

Commerzbank asserts that the Trustee's argument that the DresCap Securities contracts have functionally similar effect to the Support Undertaking is "misguided" because "a direct enforcement right simply gives the DresCap Certificate holders an avenue through which to sue the Bank [and] in no way, guarantees payment on the DresCap Certificates, or guarantees that the DresCap Certificates will be paid in insolvency." Ans. Br. 14-15. Commerzbank ignores the fact that subsection (ii)'s trailing modifier is not limited to guarantees, but encompasses instruments subject to "any guarantee *or support agreement* ...." (Emphasis added.) Moreover, Commerzbank's argument actually highlights the similarity between the DresCap Securities and the Support Undertaking: While the Support Undertaking "provides the [B]ank has a direct obligation with respect to the [T]rust through the third-party beneficiary provision in Section 3 of the Support Undertaking" (A2226-27; *see also* Support Undertaking § 3 (A224-25)), it also expressly states that it "shall not constitute a guarantee or undertaking of any kind that the Company will at any time have sufficient assets, or be authorized pursuant to the LLC Agreement, to declare a Capital Payment or any other distribution." Support Undertaking § 2(d) (A224); *see also* A1498 (CoBa II Offering Memorandum: "No Guarantee Provided by the Support Undertaking").

C. Any ambiguity should be resolved in favor of the Trustee's interpretation.

While the DresCap Securities are within the natural reading of the Parity Securities definition, in the event the Court finds the definition ambiguous, Commerzbank's answering brief leaves no question that the Trustee's reading should prevail.

a. Commerzbank does not dispute that *contra proferentem* applies with special force against the drafter of an entity's governing documents like Commerzbank. *See* Op. Br. 20 (collecting cases); *see also Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 309-10 (Del. Ch. 2002) (similar). Commerzbank's only response is to argue that the Trustee's invocation of *contra proferentem* is "misplaced" because the contract is unambiguous (Ans. Br. 17)—failing to even attempt to address what should happen if the contract *is* found ambiguous. If this Court finds the contract to be ambiguous, *contra proferentem* is dispositive.

b. Moreover, any ambiguity should be resolved in favor of the Trustee for the further reason that uniform and overwhelming extrinsic evidence—collected in the Trustee's opening brief at pp. 21-23—supports the Trustee's reading of the Parity Securities definition. Commerzbank's arguments for disregarding this uniform and overwhelming extrinsic evidence are without merit:

1. Commerzbank asserts that the only extrinsic statements that the Court may consider in resolving a contractual ambiguity are "statements ... at the time the agreements were being drafted," claiming that later statements cannot be considered. Ans. Br. 18-19. There is no such bar on considering post-drafting statements or conduct as evidence of the parties' intent, especially when the statements or conduct are against interest and made prior to the dispute. *See Julian v. Julian*, 2010 WL 1068192, at *7 (Del. Ch. Mar. 22, 2010) (considering post-signing statements and actions in resolving contractual ambiguity); *CA, Inc. v. Ingres Corp.*, 2009 WL 4575009, at *44 (Del. Ch. Dec. 7, 2009) (considering party's "own documents" and internal emails among party's employees in resolving contractual ambiguity), *aff'd*, 8 A.3d 1143 (Del. 2010); *Shields Dev. Co. v. Shields*, 1981 WL 7636, at *4 (Del. Ch. Dec. 8, 1981) ("[A] construction

given by acts and conducts of the parties before any controversy has arisen is entitled to great weight ....").[3]

Nor does Commerzbank address the fact that the Bank's restructuring of the ¥15 billion DresCap IV series was not a statement, but an *action*—and one in which Commerzbank invested substantial time and money based on its understanding that the DresCap Securities were Parity Securities. Commerzbank also asserts that the DresCap Securities "were never confirmed to investors as Parity Securities." Ans. Br. 19. In fact, Commerzbank directly responded to an investor by stating "yes, the [DresCap I securities] is a hybrid Tier 1 instrument which would qualify as a parity instrument." A496 (cited at Op. Br. 23).

2. Commerzbank attempts to play down the overwhelming pre-litigation extrinsic evidence, suggesting that certain employees "assumed" that "because ... the DresCap Certificates were consolidated Tier I regulatory capital, the DresCap Certificates were Parity Securities," and that they were "concerned" that payments on DresCap Securities could push a payment on the CoBa II TruPS. Ans. Br. 8. The documentary record shows that high-level Bank personnel were not so equivocal at the time. What the documents reflect is Commerzbank's *understanding* of

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[3] The cases Commerzbank cites for the proposition that there is a *per se* bar on considering post-execution statements or conduct to resolve a contractual ambiguity do not support that proposition. *Tang Capital Partners, LP v. Norton*, 2012 WL 3072347 (Del. Ch. July 27, 2012) (cited at Ans. Br. 18), is not remotely on point. *Tang* simply declined to consider *any* extrinsic evidence because the contract at issue was unambiguous. *Point Management, LLC v. MacLaren, LLC*, 2012 WL 2522074 (Del. Ch. June 29, 2012) (cited at Ans. Br. 18), actually supports the Trustee's position. To resolve a contractual ambiguity, the court in that case considered "interactions between the parties and their attorneys up to *and beyond the signing of the transaction.*" *Id.* at *17 (emphasis added). Along with other evidence, the court looked even to the period "[a]fter closing" in resolving the ambiguity. *Id.* at *18. *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1 (Del. Ch. 2003) (cited at Ans. Br. 18), used pre-signing negotiating history to resolve an ambiguity, but did not address use of post-execution statements or actions as an aid to determining intent.

what the Parity Securities definition meant—in real time, before litigation, captured in internal communications, auditors' reports, communications with Bank regulators, and the action of restructuring to get around the definition and its push effect. Commerzbank cites *not one pre-litigation document* going the other way.

3. Commerzbank also claims that "[t]he regulators would not have approved the issuance of the [CoBa II TruPS] as consolidated Tier I regulatory capital of the Bank if the ... Parity Security definition captured ... the DresCap Certificates ... because to do so would have, in effect, substituted a capital ratio payment trigger for the profit-dependent payment trigger" and "would have violated BaFin requirements" that the CoBa II TruPS be profit-dependent. Ans. Br. 24. The Court should give this contention no weight. Contrary to Commerzbank's current position, before litigation the Bank repeatedly *told* its regulators that the DresCap Securities were Parity Securities. A414, A429, A451, A575. Commerzbank has not cited anything in the record reflecting regulator disagreement with that understanding—or even a surprised reaction.

4. Commerzbank's fallback position is that "the current record does not contain sufficient evidence" to resolve an ambiguity. Ans. Br. 4. But the Court of Chancery below "deem[ed] the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions" and Commerzbank never argued below that an issue of material fact existed that would preclude resolution on the merits based on the record submitted. Op. 16-17; *see also* Ch. Ct. R. 56(h). Commerzbank's own case, *Point Management* (cited at Ans. Br. 18), states that courts "may resolve an ambiguity on a summary judgment motion 'when the moving party's record is not ... rebutted so as to create issues of material fact.'" 2012 WL 2522074, at *16 (citation omitted). Moreover, where a party "chose not to introduce any extrinsic evidence in the proceedings below," this Court "will not remand to allow [the party] to now do so." *Intel Corp. v. Am. Guarantee & Liab. Ins. Co.*, ___ A.3d ___, 2012 WL 3889138, at *7 (Del. Sept. 7, 2012). Commerzbank has not offered evidence to rebut the overwhelming extrinsic evidence supporting the Trustee's reading of the Parity Securities definition. And this extrinsic evidence consists largely of documents that *Commerzbank* produced in discovery. Remand for presentation of further extrinsic evidence is thus not warranted.

II. THE PUSHER PROVISION

As set forth in the Trustee's opening brief, if the DresCap Securities are Parity Securities, the Pusher Provision's plain language has been triggered. Op. Br. 24-30.

a. The Pusher Provision states that if there is a payment on a Parity Security, there will be a pushed payment on the CoBa II TruPS "on the Class B Payment Date [*i.e.*, April 12] falling *contemporaneously with or immediately after* the date on which such capital payment, dividend or other distribution [was] made ...." LLC Agreement § 7.04(b)(ix) (A189) (emphasis added). In the face of this straightforward, chronological payment sequence, Commerzbank contends that, because the words "in any Fiscal Year" appear elsewhere in the Pusher Provision, "pushed payments are limited to a fiscal year" and what the Pusher Provision really requires is "that instruments are to be treated equally *with respect to* particular fiscal years." Ans. Br. 23, 24 (emphasis added). Commerzbank does not explain why in a coherent way, or systematically parse the provision's language.

b. Commerzbank complains that the Trustee's reading of the Pusher Provision "deconstruct[s]" it into "three separate and distinct mechanical parts." Commerzbank claims that this supposedly "indiscriminate chopping" of the Pusher Provision "obscure[s] its limitations" and amounts to "attempted sleight of hand." Ans. Br. 22-23. Respectfully, far from a novel "deconstruction" of the Pusher Provision, the three parts—a payment trigger, a timing clause, and a payment formula—*are exactly the same three parts* that Commerzbank itself used to explain the Pusher Provision to potential investors in the CoBa II Offering Memorandum:

- *First*, the Offering Memorandum describes a *payment trigger*: "Notwithstanding the foregoing [the profit-based test], the Company will be authorized to declare Class B Capital Payments if the Bank or a Bank Affiliate declares or pays any capital payments, dividends or other distributions on any Parity Securities." A1530. The Offering Memorandum describes this payment trigger in a standalone sentence. It does not mention a fiscal year limitation.

- *Second*, the Offering Memorandum describes the *timing* of the pushed payment: "The Class B Capital Payments to be made as a result of such a deemed declaration will be payable on the first Payment Date falling contemporaneously with or immediately after the date on which the Bank, or the Bank Subsidiary, as the case may be, declared the related dividend or made the related payment." A1530. Again, the Offering Memorandum describes the timing clause in a standalone sentence. Again, it does not mention a fiscal year limitation.

- *Finally*, the Offering Memorandum describes the *payment formula* for calculating the amount of the pushed payment:

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

A1530. Again, the Offering Memorandum describes the payment formula in standalone sentences. It is the payment formula that mentions fiscal years. Moreover, the Offering Memorandum's reference to using payments "in the *then* current fiscal year" to calculate the amount of Class B Capital Payments payable on the *next* Class B Payment Date plainly contemplates pushed payments being made in a different fiscal year than the triggering payment.

The Court's interpretation of the Pusher Provision should of course begin with the text of the provision. But the Offering Memorandum's gloss does show that the Trustee's interpretation is not a novel "deconstruction." Commerzbank knew perfectly well that its own Offering Memorandum broke up the Pusher Provision the same way, as Commerzbank cites to *the same page* of the Offering Memorandum. Ans. Br. 22, 24 (citing A1530).

c. The Court of Chancery interpreted a similar pusher provision in *QVT Fund LP v. Eurohypo Capital Funding LLC I*, 2011 WL 2672092, at *10-13 (Del. Ch. July 8, 2011) (cited at Op. Br. 27). In that case, Vice Chancellor Parsons denied defendants' motion to dismiss based on the same argument Commerzbank advances here, holding that the similar pusher provision at issue in *Eurohypo* "does not contain clear language limiting the pusher provisions to a given fiscal year." *Id.* at *12. Commerzbank's answering brief does not address *Eurohypo*.

d. As set forth in the Trustee's opening brief, the Trustee's reading of the Pusher Provision as providing for pushed payments across fiscal years is further confirmed by the Junior Security Pusher Provision, which appears immediately after the Parity Security Pusher Provision. *See* Op. Br. 27-28. Ironically, Commerzbank—which elsewhere urges the Court to look to the supposedly "mirror" Junior Securities provision for guidance (*see* Ans. Br. 12-13)—argues that the Court should be barred from doing the same thing with respect to the Junior Securities Pusher Provision appearing at the end of Section 7.04(b)(ix). Ans. Br. 24. The Junior Securities Pusher Provision is just further support for the plain-language reading of the Parity Pusher Provision that the Trustee has advocated throughout this case.

e. At its core, Commerzbank's argument is that the Pusher Provision's literal language should be disregarded because it would lead to a supposedly "absurd" result. Ans. Br. 24. As set forth in the Trustee's opening brief—in cases that Commerzbank does not attempt to distinguish—Delaware courts have been reluctant to accept arguments that plain language should be overridden to avoid supposed "bad contracts," where "[one party] does not like the result" or the contract "appears to be a poor bargain." Op. Br. 28-29 (citing *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010), *Great-West Investors LP v. Thomas H. Lee Partners, L.P.*, 2011 WL 284992, at *8 (Del. Ch. Jan. 14, 2011), and *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)); *see also In re Last Will & Testament of Palecki*, 920 A.2d 413, 415-16 (Del. Ch. 2007) ("'[I]f ... the plain meaning of a provision, not contradicted by any other provision of the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation,

unite in rejecting the application.'" (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202-03 (1819) (Marshall, C.J.))).

Even one of the cases Commerzbank itself cites rejected an argument that applying the plain language of a contract was "absurd," finding such "disavowal of the plain language of the [contract] unconvincing." *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *2 (Del. Ch. Jan. 23, 2006) (cited at Ans. Br. 10, 22, 27). That court further observed, in words applicable here, that "it is not the job of a court to relieve sophisticated parties of the burdens of contracts they wish they had drafted differently but in fact did not." *Id.* Commerzbank's "absurdity" argument regarding the Pusher Provision should likewise fail, for multiple reasons.

1. Commerzbank's extreme claims that adopting the Trustee's reading means that "once a payment is made on any Parity Security, payments can never stop"; makes "the pusher provision ... become the exclusive rule"; and "require[es] an endless waterfall of payments from now until maturity" (Ans. Br. 2, 24) are incorrect. Even assuming that the pusher provisions in Commerzbank's other contracts operate the way Commerzbank claims, there are multiple ways to stop a cycle of pushed payments from continuing—or even from happening in the first place.

- Any initial triggering payment on a Parity Security is an event outside the CoBa II contracts. Commerzbank could have taken steps to avoid making—or being obligated to make—the triggering payment in the first place.
- Even if the relevant contracts interact so as to create a cycle of pushed payments, the series do not last forever. For example, CoBa I has an initial redemption date of April 12, 2016. B533.
- Commerzbank has the ability to buy out series. The Bank redeemed the DresCap II certificates in mid-2009. Op. 10; B470. The Bank has also explored redemption of CoBa I and III, and obtaining "exit consents" from DresCap Securities investors, but BaFin did not give approval for either approach. A2235, B523.
- As set forth in the Trustee's opening brief, the LLC's escape valve clause—appearing immediately following the Pusher Provision—contractually authorizes BaFin to stop pushed

payments, as Commerzbank's pre-litigation documents recognized. *See* Op. Br. 29 & n.3 (discussing LLC Agreement § 7.04(b)(x)).

- Finally, the Bank could buy out the CoBa II TruPS themselves, eliminating its obligation entirely. Indeed, it is the Trustee's understanding that Commerzbank has already repurchased some 88% of the CoBa II TruPS as a result of tender offers during the pendency of this litigation. Op. Br. 12.

To be sure, the Pusher Provision means that Commerzbank has additional obligations that may be triggered beyond the baseline profit-dependent test. But that is hardly absurd. Of course the Pusher Provision imposes additional obligations. Otherwise there would be no reason to put it in the contract.

2. In addition, this Court should not accept Commerzbank's claim of an absurd result based on *other* contracts extrinsic to the CoBa II contracts, for multiple reasons. *First*, Commerzbank's claim that paying the CoBa II TruPS would trigger reciprocal pushes depends on the operation of different contracts. There can be no guarantee that different pusher provisions would be found to have this effect.

Second, interactions with other contracts involving different series, held by different investors, should not trump the unambiguous language of *this* contract and the contractual rights of *these* investors. If Commerzbank did not also have outstanding Parity Securities, or had not made payments on those Parity Securities, the Pusher Provision would not be an issue.

Finally, even assuming that paying the CoBa II TruPS would trigger reciprocal pushed payments on Parity Securities with different payment dates, Commerzbank was not required to enter into those other contracts. The CoBa I and II TruPS were issued in March 2006, both with an April 12 annual payment date. A1342, A1469. In December 2006, some nine months later, the Bank made a voluntary decision to issue CoBa III TruPS. A964. The Bank could have avoided the potential for triggering pushed payments by selecting the same April 12 payment date for the CoBa III TruPS or obtaining advance consent to amend the CoBa II documents, but the Bank did neither. The Bank's May 2009 acquisition of Dresdner Bank was likewise a voluntary decision. The Bank could

have taken steps at the time of the Dresdner transaction—such as seeking consents—to avoid the situation the Bank now claims it is in. Commerzbank should not be able to avoid its Pusher Provision obligations by creating a disadvantageous situation for itself through its own voluntary business decisions and then calling the foreseeable consequences of those decisions "absurd." If the Bank by its own voluntary, post-contract actions built a corporate structure in which its various contractual obligations to investors interact with each in ways that the Bank now regrets, the consequences should be borne by Commerzbank—not CoBa II investors.

f. As set forth in the Trustee's opening brief, should the Court find the Pusher Provision ambiguous, any ambiguity should be resolved against the Bank, which drafted the LLC Agreement. Op. Br. 29-30. Commerzbank's answering brief does not dispute this.

g. Finally, Commerzbank argues that this Court should not consider the Trustee's request that this Court also find that "the June 30 and December 31, 2010 payments on the DresCap I Securities ... pushed a payment on April 12, 2011" because "[a]rguments that are not raised in the court below ordinarily cannot be raised for the first time on appeal" and "[t]o the extent that [a party] has not briefed claims in the original motion for summary judgment, those claims are deemed waived and abandoned." Ans. Br. 25. In fact, the Trustee repeatedly asserted the claim below. The Trustee's opening summary judgment brief expressly requested a declaration that a further pushed payment was due April 12, 2011. A57-58. At oral argument on the summary judgment motions—held on April 12, 2011—the Trustee's counsel again made clear that, due to further DresCap distribution payments since the complaint was filed, the Trustee was now seeking *two* pushed payments, for April 12, 2010 and April 12, 2011. A2177, A2183-84, A2192; *see also* Op. 1, 22 (explicitly recognizing that the Trustee "may be correct" that "payments on the DresCap Trust Certificates in 2009 and 2010 'pushed' payments on the Trust Preferred Securities."). Commerzbank did not object below. It cannot object now.

III. THE DRESCAP IV RESTRUCTURING BREACHED THE SUPPORT UNDERTAKING.

Commerzbank contends that its restructuring of the DresCap IV Securities did not violate Section 6 of the Support Undertaking because "the Bank did not provide any guarantee, support undertaking or similar undertaking with respect to the DresCap IV Certificates." Ans. Br. 27.

While the Trustee disputes that contention (*see* Op. Br. 19), it also does not end the inquiry. What the Bank promised in Section 6 was "that it shall not give any guarantee or similar undertaking with respect to, *or enter into any other agreement* relating to the ... payment of any amounts in respect of any other Parity Securities ... that would in any regard rank senior in right of payment to the Bank's obligations." Support Undertaking § 6 (A225); *see also* Op. Br. 31-33. Commerzbank's attempt to limit the Bank's Section 6 obligation only to a "guarantee or similar undertaking" ignores the Bank's obligation not to enter into "any other agreement relating to ... payment of any amounts in respect of any other Parity Securities."

Commerzbank also claims that "the only remedy" for breach of Section 6 is contained in Section 6's "unless" clause, which provides that the Bank shall not engage in the prohibited conduct "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 to such guarantee or support agreement relating to Parity Securities." Ans. Br. 28. In fact, Section 6's "unless" clause is more accurately characterized as a safe harbor, not an exclusive remedy. Because Commerzbank has not done anything to bring the restructuring within the "unless" clause, it is responsible for the breach of its promise in Section 6's first clause.

Commerzbank does not dispute that German law governs the Support Undertaking or that, if there is a breach of the Support Undertaking, specific performance is the appropriate remedy under German law. Accordingly, this Court should enforce German law's preferred remedy for breach of contract and require Commerzbank to specifically perform its promise in Section 6. The way to achieve that is clear: Require Commerzbank to elevate the CoBa II TruPS to the same, more senior Tier II status as the DresCap IV Securities as set forth in the Trustee's opening brief. Op. Br. 33.

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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October 4, 2012

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2012, the foregoing Reply Brief for Appellant (Public Version) was caused to be served upon the following counsel of record in the manner indicated:

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