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

[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

[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]

[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

[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

[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

[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.

[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

[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

[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.