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

Dear Counsel:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

/s/ John W. Noble

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