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Case No. 5881-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

QVT FUND LP and QUINTESSENCE FUND L.P.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 5881-VCP
EUROHYPO CAPITAL FUNDING LLC I, EUROHYPO CAPITAL FUNDING LLC II, and EUROHYPO AG,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: March 29, 2011
Decided: July 8, 2011

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PARSONS, Vice Chancellor.

This action is before the Court on a motion to dismiss relating to the amended complaint of plaintiff investment funds seeking to compel payment on preferred securities they purchased through various affiliates of a German bank. The defendant bank had sought to raise capital in a manner that would allow it to boost its core capital solvency ratios without diluting common shareholders. To do so, the bank issued a tranche of trust preferred securities through a pair of Delaware limited liability companies and Delaware trusts. The holders of the trust preferred securities were entitled to dividend payments if the bank met certain profitability targets or made payments on other preferred securities.

The dispute between the parties involves whether a series of payments made in 2009 to third-party holders of certain participation certificates of the bank triggered an obligation to make payments on the trust preferred securities. The plaintiffs allege that the participation certificates qualify as preferred securities, which, as discussed below, is a predicate to their argument that they are owed dividends. They further contend that, as a result, even though dividends were paid to them earlier in 2009, the bank is required to pay them additional dividends because the payments made on the participation certificates were not made before or contemporaneously with the dividends they received earlier that same fiscal year. In opposition, the defendants deny that the participation certificates are preferred securities. Moreover, they argue that the plaintiffs received all payments they were entitled to because the only requirement of the relevant provision in the governing trust agreements is that the trust preferred securities be treated equally.

The defendants contend that this provision is therefore inapplicable because the plaintiffs received the dividend they were entitled to in that same fiscal year.

The plaintiffs further allege that the defendants violated the Delaware implied covenant of good faith and fair dealing both by failing to make payments on their preferred securities, despite making similar payments in previous years, and by ceasing to be a profit-seeking entity as a result of the bank's entry into a domination agreement. The plaintiffs contend that under the operative governing documents, the defendants were required to protect the plaintiffs' interests. The defendants counter that they violated no duty because the operative documents did not require any such payment. Alternatively, they seek to dismiss or stay this action in favor of first-filed litigation in German courts, both because key witnesses are located in Germany and because the outcome is dependent on the resolution of key questions of German law.

I have carefully considered the parties' submissions and their various arguments. For the reasons stated in this Memorandum Opinion, I deny the defendants' motion to dismiss.

I. BACKGROUND

A. The Parties

Plaintiffs, QVT Fund LP and Quintessence Fund L.P. (collectively, "Plaintiffs"), are limited partnerships organized in the Cayman Islands. They purport to bring this action on behalf of two Delaware trusts, Eurohypo Capital Funding Trust I ("Trust I") and Eurohypo Capital Funding Trust II ("Trust II") (collectively, the "Delaware Trusts" or "Trusts").

Defendant Eurohypo AG ("Eurohypo" or the "Bank") is a German stock corporation that operates as an international bank. It is indirectly wholly owned by Commerzbank AG ("Commerzbank") through Commerzbank's subsidiary, Commerzbank Inlandsbanken Holding GmbH ("IBH"). Eurohypo organized two Delaware limited liability companies, Defendant Eurohypo Capital Funding LLC I ("LLC I") and Defendant Eurohypo Capital Funding LLC II ("LLC II") (collectively, the "Delaware LLCs") in order to raise capital. Collectively, the Bank and the LLCs are referred to as Defendants.

B. Facts

1. The relevant capital structure

Under the German Banking Act, banks are required to hold a minimum amount of capital known as Regulatory Banking Equity Capital.[1] While a variety of securities qualify as Regulatory Banking Equity Capital, all such securities must possess certain equity-like features. Debt instruments cannot be counted as Regulatory Banking Equity Capital.

Between 1998 and 2007, Eurohypo AG raised over €1 billion in Regulatory Banking Equity Capital by issuing securities to the investing public in Germany and the United States. Those securities included trust preferred securities that were issued by the

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[1] First Am. and Suppl. Compl. ("Am. Compl.") ¶ 23. Unless otherwise noted, the facts recited in this Memorandum Opinion are drawn from the Amended Complaint and are presumed to be true for purposes of the pending motion to dismiss.

Delaware Trusts (the "Trust Preferred Securities") and certain "Participation Certificates" or "Participation Rights" issued in Germany by the Bank.

Trust preferred securities are attractive for German banks because they qualify as Regulatory Banking Equity Capital, yet can be marketed effectively to international investors. Trust preferred securities are issued frequently by Delaware statutory trusts established for this purpose. Proceeds from the sale of these securities then are used to purchase subordinated debt from the sponsoring bank, with interest payments on the debt funding any preferred dividends on the trust preferred securities.

Here, the relevant capital structure relating to Plaintiffs' Trust Preferred Securities follows a similar model. Specifically, the Bank created the Delaware LLCs and exchanged subordinated notes for capital. The LLCs, in turn, created the Delaware Trusts. The LLCs also issued two classes of preferred securities. They issued Class A Preferred Securities, as well as common securities, to the Bank and Class B Preferred Securities to each of the two Delaware Trusts. Proceeds from the sale of the Class B Preferred Securities funded the capital the LLCs paid to the Bank in exchange for the subordinated notes. Finally, the Trusts issued the Trust Preferred Securities to United States investors and used the resulting proceeds to fund their purchase of the Class B Preferred Securities.

Both the Delaware Trusts and LLCs are governed by agreements (collectively, the "Agreements") that spell out the terms and conditions under which payments are to be

made on the relevant securities.[2] Each Agreement is governed by Delaware law pursuant to an express choice of law provision.[3] A limited number of provisions in the Agreement, however, explicitly incorporate or reference German laws and regulations.[4]

In some situations under the Agreements, described in greater detail below, when the Bank makes coupon payments on the subordinated notes held by the LLCs, the LLCs make payments on the Class B Preferred Securities, which then permit the Trusts to make dividend payments to the holders of their Trust Preferred Securities. When the LLCs do not make payments to the Delaware Trusts on the Class B Preferred Securities, however, the coupon payments on the subordinated notes flow back to the Bank as owner of the Class A Preferred Securities. While the Bank is the controlling member of both LLCs, its ability to limit payments on the Class B Preferred Securities is restricted by contract. The LLC Agreements both state that "[i]t is the intention of the [LLCs] not to [make] capital payments on the Class A Preferred Securities."[5] Moreover, the terms of the LLC Agreements obligate the LLCs to make payments on the Class B Preferred Securities

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2 *See* Am. Compl. Exs. 3-6, Am. and Restated Limited Liability Company Agreement governing Eurohypo LLC I ("LLC I Ag."), Am. and Restated Limited Liability Company Agreement governing Eurohypo LLC II ("LLC II Ag."), Am. and Restated Trust Agreement for Trust I ("Trust I Ag."), Am. and Restated Trust Agreement for Trust II ("Trust II Ag.").

3 LLC I Ag. § 16.04; LLC II Ag. § 16.04; Trust I Ag. § 14.02; Trust II Ag. § 15.02.

4 *See, e.g.*, LLC I Ag. § 1.01; LLC II Ag. § 1.01; Trust I Ag. § 1.01; Trust II Ag. § 1.01.

5 LLC I Ag. § 7.03(b); LLC II Ag. § 7.03(b).

when certain requirements are met. For one, the LLCs must make annual payments on the Class B Preferred Securities if Eurohypo has sufficient Distributable Profits.

2. The pusher provisions

Importantly, the LLC Agreements contain "pusher provisions" that provide if the Bank makes any payment, redemption, or other distribution on any so-called "Parity" or "Junior" securities, the LLCs must make a corresponding payment on the Class B Preferred Securities held by the Trusts. In turn, the Trusts must make a corresponding payment to holders of the Trust Preferred Securities. The LLC Agreements define "Parity Securities," in pertinent part, as "each of the most senior ranking preference shares of the Bank, if any."[6] "Junior Securities" are defined broadly to encompass "each class of preference shares of the Bank ranking junior to Parity Securities, if any, and any other instrument of the Bank ranking *pari passu* therewith or junior thereto [any class of preference shares]."[7] Complicating matters in this dispute is the fact that the term "preference shares" as used in the definitions of both Parity and Junior Securities is not defined in the Agreements.

In relevant part, the first pusher provision relates to Junior Securities and states that:

> [I]f the Bank or any of its subsidiaries declares or pays any dividend or makes any other payment or other distribution on its Junior Securities, the [LLCs] shall be deemed to have

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6 LLC I Ag. § 1.01; LLC II Ag. § 1.01; Trust I Ag. § 1.01; Trust II Ag. § 1.01.

7 LLC I Ag. § 1.01; *accord* LLC II Ag. 1.01.

> declared Capital Payments on the Class B Preferred Securities at the Stated Rate in full . . . for the Class B Payment Date falling on or after the date on which such dividend was declared or payment made if such Junior Securities pay dividends annually.[8]

Another almost identical provision relates to Parity Securities and provides that:

> [I]f the Bank or any of its subsidiaries declares or pays any dividend or makes any other payment or other distribution on any Parity Securities in any Fiscal Year, the [LLCs] shall be deemed to have declared Capital Payments on the Class B Preferred Securities for the Class B Payment Date falling contemporaneously with or immediately after the date on which such dividend was declared or other payment or distribution made.[9]

A third provision deals with circumstances in which the Bank redeems, repurchases, or acquires Parity or Junior Securities. It reads:

> If the Bank or any of its subsidiaries redeem, repurchase, or otherwise acquire any Parity Securities or Junior Securities for any consideration except by conversion into or exchange for common stock of the Bank . . . the [LLCs] shall be deemed to have declared Capital Payments on the Class B Preferred Securities at the Stated Rate in full for the Class B Payment Date falling on or after the date on which such redemption, repurchase or other acquisition occurred.[10]

The Payment Dates for the Class B Preferred Shares for LLCs I and II are May 23 and March 8 of any given fiscal year, respectively.[11]

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[8] LLC I Ag. § 7.04(b)(x); LLC II Ag. § 7.04(b)(x).

[9] LLC I Ag. § 7.04(b)(x); LLC II Ag. § 7.04(b)(x).

[10] LLC I Ag. § 7.04(b)(x); LLC II Ag. § 7.04(b)(x).

[11] The LLCs' fiscal years coincide with the calendar year and run from January 1 to December 31 of any given year.

3. Payments on the Bank's Participation Certificates

A central fact in the parties' dispute is that the Bank made dividend payments on certain of its Participation Certificates on July 1, September 1, and November 30, 2009 and redeemed Participation Certificates on June 30 and September 1, 2009. Additionally, the Bank redeemed Participation Certificates on November 30, 2010. In 2010, the Bank was unprofitable; it made no payments on the subordinated notes held by LLC I and LLC II or the Participation Certificates. Nor have the Trusts made any payments on the Trust Preferred Securities in 2011. As set forth below, the parties vigorously dispute whether the Participation Certificates constitute "preference shares" as that term is used in the definitions of "Parity" and "Junior" Securities in the pusher provisions.

4. The Domination Agreement

Under German law, the subjugated party to a domination and profit surrender agreement undertakes to transfer all of its annual profits, if it has any, to the company controlling it. The Amended Complaint alleges that the controlling company may direct the management of the controlled company, even in ways that negatively affect its financial outlook.

In 2007, the Bank entered into such a domination and profit surrender agreement with IBH, a wholly-owned subsidiary of Commerzbank (the "Domination Agreement"). The Bank allegedly did not earn a profit in 2007 or 2008, but made scheduled payments on the Trust Preferred Securities in 2008 and 2009.

C. Procedural History

On October 7, 2010, Plaintiffs filed their original Complaint, which sought to compel Eurohypo to make capital payments on the profit-dependent Trust Preferred Securities in 2010 for fiscal year 2009. Defendants promptly moved to dismiss or, in the alternative, stay this action. On December 3, 2010, Defendants filed their opening brief in support of that motion.

Then, on January 3, 2011, Plaintiffs filed their Amended Complaint, which again seeks to compel Eurohypo to make capital payments on the same Trust Preferred Securities. The Amended Complaint asserts six claims. Counts I and II allege a breach of contract against LLCs I and II, respectively. Count III asserts that Eurohypo breached its fiduciary duty. Count IV seeks a declaration against all Defendants under 10 *Del. C.* § 6501, clarifying the parties' legal rights under the Trust and LLC Agreements. Finally, Counts V and VI allege a breach of the implied covenant of good faith and fair dealing against LLCs I and II, respectively.

On January 24, 2011, Defendants filed their Motion to Dismiss as to the Amended Complaint. The Motion seeks to dismiss Counts I through VI for failure to state a claim or, alternatively, to stay Counts V and VI either on the grounds of the *McWane* first-filed doctrine or *forum non conveniens*.

D. Parties' Contentions

The parties dispute whether Participation Certificates qualify under the Agreements as preference shares and, by extension, Parity or Junior Securities, and if so, whether payments on these securities obligated the Bank to make payments on the Trust

Preferred Securities. Defendants contend that the Participation Certificates are debt securities and, thus, are not Parity or Junior Securities as defined under the Agreements. Moreover, they contend that even if the Participation Certificates were found to qualify as such, the Bank would not be obligated to cause payments to be made on the Trust Preferred Securities because distributions were already paid on these securities in Fiscal Year 2009—the period during which the questioned payments were made. Accordingly, on these two grounds, Defendants seek dismissal of Counts I through IV.

Under Defendants' reading of the Agreements, payments made on the Participation Certificates only trigger payments to Trust Preferred Securities holders under the pusher provisions if Trust Preferred Securities holders have received less than equal treatment in a given fiscal year. That is, if Trust Preferred Securities holders received their full dividend in a fiscal year, then even if distributions were made on Participation Certificates, they would not trigger additional payments on Trust Preferred Securities in the next fiscal year. Essentially, Defendants read the pusher provisions to apply only if the Bank makes distributions on Parity or Junior Securities related to one fiscal year and the Class B Preferred Shareholders did not receive a commensurate payout for that same fiscal year.

Defendants also seek to dismiss Counts V and VI on the grounds that Plaintiffs failed to state a claim or, alternatively, under the *forum non conveniens* doctrine. They further seek a stay pending resolution of certain first-filed German actions (the "German Actions") that they contend involve the same underlying issues.

By contrast, Plaintiffs assert that their claims under Counts I through IV are valid because the functional characteristics of the Participation Certificates qualify them as preference shares and, thus, Junior or Parity Securities. Moreover, they contend that the plain language of the Agreements requires the payment of dividends on the Trust Preferred Securities on the next dividend date if any payment on or redemption of Parity or Junior Securities is made—regardless of whether that date is in the next fiscal year. Therefore, Plaintiffs claim that the Bank was obligated to make payments in 2010 on the Trust Preferred Securities because it made payments on or redemptions of the Participation Certificates on June 30, July 1, September 1, and November 30, 2009. Plaintiffs also assert that they properly have stated claims for relief under Counts V and VI. Further, they argue that those claims are subject to resolution under Delaware law, and not German law, and, thus, should be decided by this Court.

II. ANALYSIS

A. Standard for a Motion to Dismiss

When considering a motion to dismiss under Rule 12(b)(6), a court must assume the truthfulness of the well-pleaded allegations in the complaint and afford the party opposing the motion "the benefit of all reasonable inferences."[12] But, the court need not accept inferences or factual conclusions unsupported by specific allegations of fact.[13]

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12 *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002) (citing *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996)).

13 *Ruffalo v. Transtech Serv. P'rs Inc.*, 2010 WL 3307487, at *10 (Del. Ch. Aug. 23, 2010).

Consequently, to survive a Rule 12(b)(6) motion, a complaint must contain allegations of facts supporting an inference of actionable conduct, not simply a conclusion to that effect.[14] In line with the standard articulated by the United States Supreme Court in *Bell Atlantic v. Twombly*,[15] the court must determine whether the complaint offers sufficient facts plausibly to suggest that the plaintiff ultimately will be entitled to the relief she seeks.[16] "If a complaint fails to do that and instead asserts mere conclusions, a Rule 12(b)(6) motion to dismiss must be granted."[17]

In considering a motion to dismiss for failure to state a claim, a court generally may not consider matters beyond the complaint.[18] If it does, the motion must be treated as one for summary judgment under Rule 56 and the court must give the parties a reasonable opportunity to take discovery and present all material relevant to a summary judgment motion.[19] In certain limited circumstances, however, the court may consider documents, including SEC filings, beyond the complaint without being required to

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14 *Desimone v. Barrows*, 924 A.2d 908, 928-29 (Del. Ch. 2007).

15 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

16 *Desimone*, 924 A.2d at 928-29.

17 *Ruffalo*, 2010 WL 3307487, at *10 (citing *Desimone*, 924 A.2d at 929).

18 *See Robotti & Co. v. Liddell*, 2010 WL 157474, at *5 (Del. Ch. Jan. 14, 2010).

19 *See, e.g.*, *Liddell*, 2010 WL 157474, at *5; *Kessler v. Copeland*, 2005 WL 396358, at *4 (Del. Ch. Feb. 10, 2005) (when a Rule 12(b)(6) motion is converted to a Rule 56 motion due to consideration of extrinsic matters, the parties must be permitted to take discovery).

convert a motion to dismiss into one for summary judgment.[20] For example, a court may take judicial notice of the contents of an SEC filing, but only to the extent that the facts contained in them are not subject to reasonable dispute.[21] In addition, a court may consider a document beyond the complaint on a motion to dismiss if the proponent establishes that such document is either "[1] integral to, and incorporated within, the plaintiff's complaint; or . . . [2] not being relied upon for the truth of [its] contents."[22] Indeed, "a complaint may, despite allegations to the contrary, be dismissed where the unambiguous language of documents upon which the claims are based contradict the complaint's allegations."[23]

To some extent, this action involves questions of contract interpretation. In that context, "the Court must not choose between reasonable interpretations of ambiguous

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20 *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006) ("This Court has recognized that, in acting on a Rule 12(b)(6) motion to dismiss, trial courts may consider hearsay in SEC filings 'to ascertain facts appropriate for judicial notice under [Delaware Rule of Evidence] 201.'").

21 *See Fleischman v. Huang*, 2007 WL 2410386, at *3 (Del. Ch. Aug. 22, 2007). Under Rule 201, a fact is not subject to reasonable dispute if it is either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." D.R.E. 201.

22 *See, e.g., Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996); *Liddell*, 2010 WL 157474, at *5; *Addy v. Piedmonte*, 2009 WL 707641, at *6 (Del. Ch. Mar. 18, 2009).

23 *Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 327 (Del. Ch. 2003).

contract provisions when considering a motion to dismiss under Rule 12(b)(6).[24] Contractual provisions are ambiguous when they are 'reasonably or fairly susceptible of different interpretations.'"[25] Unless the moving party's interpretation is the only "reasonable construction as a matter of law," the moving party is not entitled to dismissal.[26]

B. Are the Bank's Participation Certificates Either Parity or Junior Securities?

1. Does the internal affairs doctrine apply?

Counts I through IV of the Amended Complaint are premised on Plaintiffs' assertion, which Defendants dispute, that Participation Certificates qualify as Parity or Junior Securities. This is because the pusher provisions only apply with regard to payments or redemptions made on Parity or Junior Securities, both of which are defined in terms of whether they constitute preference shares of the Bank.[27] As noted previously, the term "preference shares" is not defined in the LLC or Trust Agreements. Thus,

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24 *Kahn v. Portnoy*, 2008 WL 5197164, at *3 (Del. Ch. Dec. 11, 2008) (citing *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003)).

25 *VLIW Tech.*, 840 A.2d at 615 (quoting *Vanderbilt Income & Growth Assocs.*, 691 A.2d at 613.

26 *Id.* ("Because the provisions at issue in the Agreement are susceptible to more than one reasonable interpretation, for purposes of deciding a motion to dismiss, their meaning must be construed in the light most favorable to the non-moving party.").

27 Again, the LLC Agreements define "Parity Securities," in pertinent part, as "each of the most senior ranking preference shares of the Bank, if any," LLC I Ag. § 1.01; LLC II Ag. § 1.01, and define "Junior Securities" as "each class of preference shares of the Bank ranking junior to Parity Securities, if any, and any other instrument of the Bank ranking *pari passu* therewith or junior thereto," LLC I Ag. § 1.01; LLC II Ag. § 1.01.

whether Participation Certificates are Parity or Junior Securities such that the LLC Agreements' pusher provisions might have obligated the LLCs to make payments on the Class B Preferred Securities depends on whether Participation Certificates constitute "preference shares."

The parties raise a threshold issue, however, about what law this Court should apply to make this determination. Defendants characterize this issue as requiring the Court to determine where Participation Certificates rank within the capital structure of a German bank, a task which would require the Court to look to German corporate law under the internal affairs doctrine ("IAD").[28] While they concede that Delaware law should govern Plaintiffs' contractual claims (*i.e.*, the issue of whether Participation Certificates are Parity or Junior Securities), they contend that German law must govern the predicate issue of whether such securities are preference shares (*i.e.*, where such securities rank within the capital structure of the Bank) because that issue raises a question that is integral and peculiar to the internal affairs of the Bank.[29] In addition, Defendants claim that this Court's resolution of that predicate issue could affect

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28 Defs.' Op. Br. ("DOB") 11-13 ("Because the Bank is a German corporation, the internal affairs doctrine requires that this issue be determined under German (not Delaware) law."). Moreover, Defendants note that the term "preference shares," which is not defined under Delaware law, is defined in the German Stock Corporation Act. They argue that this fact demonstrates that the parties intended this issue to be governed by German law. *Id.* at 13 n.7.

29 *See* Defs.' Rep. Br. ("DRB") 8. Defendants argue that the IAD is applicable where the dispute over third-party contractual rights depends on a threshold issue that is specific to the internal affairs of a corporation. *Id.* at 11.

nonparties to the LLC Agreements, including the holders of the Participation Certificates, because it could subject them to inconsistent rulings as to the nature of their instruments.

Plaintiffs reject Defendants' incantation of the IAD and, instead, argue that Delaware law, as the LLC Agreements' chosen law, should govern the relationship between the Bank and the holders of the Trust Preferred Securities, including the interpretation of the term "preference shares." Specifically, Plaintiffs argue that the IAD is inapplicable because it does not control third-party claims, like those of Plaintiffs, and the resolution of the instant claims will not affect the relationship or status of the Bank's investors, officers, or directors.[30] In addition, they assert that applying German law would contravene the expectations of investors who purchased Trust Preferred Securities because they would expect to have Delaware law govern disputes relating to those securities.[31]

The IAD provides that the law of the jurisdiction of incorporation will apply to disputes relating to a corporation's internal affairs.[32] Because the authority to regulate a corporation's internal affairs rests in one jurisdiction under the doctrine, it serves as a mechanism to prevent corporations and their officers, directors, and investors from being

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30 Pls.' Ans. Br. ("PAB") 15-16.

31 *Id.* at 24-25.

32 *See McDermott Inc. v. Lewis*, 531 A.2d 206, 214-15 (Del. 1987); *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 958 (Del. Ch. 2007).

subjected to inconsistent legal standards.[33] The IAD is not just a conflict of laws principle; rather, it also is rooted in the decisions of the U.S. Supreme Court and the Due Process Clause's implicit guarantee that directors and officers of a corporation will know what law will be applied to their actions and a corporation's stockholders will know the standards of accountability to which they may hold such individuals.[34]

The doctrine does not apply, however, merely because a corporation finds itself in litigation with multi-jurisdictional implications. Rather, the doctrine, "although potent, has very specific applications."[35] Indeed, the IAD "governs the choice of law determinations involving matters *peculiar* to corporations, that is, those activities concerning the relationships *inter se* of the corporation, its directors, officers and shareholders."[36] As such, it "does not apply where the rights of third parties external to the corporation are at issue, *e.g.*, contracts and torts."[37]

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33 *See VantagePoint Venture P'rs 1996 v. Examen, Inc.*, 871 A.2d 1108, 1112-13 (Del. 2005).

34 *See id.* at 1112-13; *Newcastle P'rs, L.P. v. Vesta Ins. Gp., Inc.*, 887 A.2d 975, 981-82 (Del. Ch. 2005), *aff'd*, 906 A.2d 807 (Del. 2005).

35 *See In re Am. Int'l Gp., Inc.*, 965 A.2d 763, 817-18 (Del. Ch. 2009), *aff'd sub nom., Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. Jan. 3, 2011); *see also McDermott Inc.*, 531 A.2d at 214-15 ("Under Delaware conflict of laws principles and the United States Constitution, there are appropriate circumstances which mandate application of this doctrine.").

36 *McDermott Inc.*, 531 A.2d at 214-15; *In re Am. Int'l Gp., Inc.*, 965 A.2d at 817-18 (internal quotations omitted).

37 *VantagePoint Venture P'rs 1996*, 871 A.2d at 1113 n.14; *McDermott Inc.*, 531 A.2d at 214-15 ("It is essential to distinguish between acts which can be performed by both corporations and individuals, and those activities which are

With these principles in mind, I find that German law is applicable to this dispute, but only to a very limited extent. To the limited extent the Court is required to identify the attributes of the Bank's Participation Certificates for purposes of determining whether they are "preference shares" within the meaning of the relevant Agreements, the Court looks to German legal sources to do so.

Once the Court identifies the relevant characteristics of the Participation Certificates, however, it must apply Delaware law to determine whether those features bring the Participation Certificates within the definition of "preference shares" as used in the Agreements. This is because what is at issue here are the contractual rights of third parties external to the Bank, *i.e.*, the Plaintiffs. As such, the IAD, and, thus, German law, does not govern the proper interpretation of the term "preference shares," an undefined phrase used in certain of the Agreements executed under and governed by Delaware law. Rather, consistent with the investors' bargained-for rights under the LLC and Trust Agreements, that term must be interpreted under Delaware law. This conclusion is bolstered by the Delaware choice of law provisions contained in the Agreements. In addition, where the parties intended the laws of another jurisdiction to apply, they

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> peculiar to the corporate entity. Corporations and individuals alike enter into contracts, commit torts, and deal in personal and real property. Choice of law decisions relating to such corporate activities are usually determined after consideration of the facts of each transaction. . . . In such cases, the choice of law determination often turns on whether the corporation had sufficient contacts with the forum state, in relation to the act or transaction in question, to satisfy the constitutional requirements of due process. The internal affairs doctrine has no applicability in these situations.").

explicitly stated so in the Agreements. For example, the Agreements define Distributable Profits as fiscal-year balance sheet profit "determined in accordance with the provisions of the German Stock Corporation Act (Aktiengesetz) and accounting principles generally accepted in the Federal Republic of Germany as described in the German Commercial Code . . . ."[38] Therefore, the parties knew how to, and did, carve out certain exceptions to the general rule that Delaware law would apply. The absence of any reference to German law in the definition of Parity or Junior Securities undermines Defendants' contention that German law governs this dispute. Moreover, under Delaware law, "[t]he courts of Delaware are bound to respect the chosen law of contracting parties so long as that law has a material relationship to the transaction."[39] Furthermore, by statute, a Delaware choice of law provision provides conclusive proof of a "material and reasonable relationship with this State and shall be enforced whether or not there are other relationships with this State."[40]

Additional support for the conclusion that the IAD does not compel this Court to apply German law to interpret the term "preference share" exists in the fact that determining the definition and scope of a preference share does not implicate a matter peculiar to the Bank or the relationships among its directors, officers, or stockholders. A

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38 LLC I Ag. § 1.01; LLC II Ag. § 1.01; Trust I Ag. § 1.01; Trust II Ag. § 1.01

39 *Abry P'rs V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1046 (Del. Ch. 2006) (citing *J.S. Alberici Const. Co. v. Mid-West Conveyor Co.*, 750 A.2d 518, 520 (Del. 2000)).

40 6 *Del. C.* § 2708; *see also Abry P'rs*, 891 A.2d at 1046.

determination by this Court that a Participation Certificate would meet the definition of a preference share under a Delaware contract presumably would not establish as a matter of German law the scope of the rights of the holders of the Bank's Participation Certificates such that a different ruling from a German court would subject them, or any other corporate constituency, to inconsistent obligations.

Defendants rely on *Clark v. Kelly*[41] as support for their contention that this issue of whether Participation Certificates are preference shares must be determined under German law because, among other things, it implicates an issue peculiar to the Bank's internal capital structure. The *Clark* case involved a dispute regarding who were the rightful managers of a Delaware limited liability company. To resolve that question, the court had to determine the ownership of a California corporation, which was a member of the Delaware entity. The limited liability company operating agreement contained a Delaware choice of law provision. Nevertheless, the court concluded that ownership of the California corporation presented a question of California law under the IAD because "how else can [the] Court determine the 'equity owners' of a California corporation except by looking to California law?"[42]

Unlike the *Clark* case, this action does not require the resolution of any issue related to the "relationship among or between [the Bank] and its officers, directors, and

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41 1999 WL 458625 (Del. Ch. June 24, 1999).

42 *Id.* at *4.

shareholders."[43] There, the Court was required to determine the ownership of the California corporation at issue as one step in determining who the rightful managers of the related Delaware entity were. Here, in contrast, this Court needs to look to German law only to discern the attributes of a Participation Certificate for purposes of comparing those attributes to the definition of preference shares as supplied by a Delaware contract governed by Delaware law. Unlike in *Clark*, this Court does not need to make a final determination of any issue regarding the rights or ownership of any stockholder or manager of a foreign corporate entity to resolve the parties' dispute. Hence, *Clark* is distinguishable.

Thus, except to the limited extent identified *supra*, the Agreements, and, specifically, the issue of whether Participation Certificates constitute "preference shares" as that term is used in those Agreements, must be determined under Delaware law. In that regard, I reject Defendants' argument that the IAD requires an analysis of that issue under German law.

2. Are the Participation Certificates Parity or Junior Securities under Delaware law?

Having concluded that Delaware law applies to this dispute, I next examine whether the Participation Certificates constitute Parity or Junior Securities under Delaware law. As discussed *supra*, the Agreements define Parity Securities as "each of

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[43] *VantagePoint P'rs*, 871 A.2d at 1113.

the most senior ranking preference shares of the Bank, if any."[44] Furthermore, while the term "preference shares" is undefined, "Junior Securities" are defined broadly to encompass "each class of preference shares of the Bank ranking junior to Parity Securities, if any, and any other instrument of the Bank ranking *pari passu* therewith or junior thereto [any class of preference shares]."[45] As outlined above, the parties disagree as to whether Participation Certificates qualify as preference shares.

Defendants rely on the Offering Circulars for the Trust Preferred Securities as evidence that the Participation Certificates do not qualify as Parity or Junior Securities. The Offering Circulars state that payments on the Trust Preferred Securities "will be subordinated to all senior and subordinated debt obligations of the Bank (including profit [P]articipation [R]ights) . . . ."[46] Accordingly, Defendants contend that the Participation Certificates do not qualify as preference shares, because they are debt securities and are not treated *pari passu* with the Trust Preferred Securities. Defendants assert that the Offering Circulars further buttress this conclusion because they refer to Trust Preferred Securities as Tier I Capital and Participation Certificates as Tier II Capital.[47] This distinction purportedly supports Defendants' position that these two types of securities fall within different categories of the Bank's capital structure.

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44 LLC I Ag. § 1.01; LLC II Ag. § 1.01; Trust I Ag. § 1.01; Trust II Ag. § 1.01.

45 LLC I Ag. § 1.01; *accord* LLC II Ag. § 1.01.

46 Am. Compl., Ex. 1 at 21, Ex. 2 at 18.

47 Am. Compl., Ex. 1 at 96, Ex. 2 at 85-86.

In arguing to the contrary that Participation Certificates constitute Parity or Junior Securities, Plaintiffs note that Delaware law emphasizes the function of securities as opposed to their form when determining the hierarchy of a firm's capital structure. They further assert that the functional characteristics of the Participation Certificates justify characterizing them as preference shares and, therefore, as Parity or Junior Securities.

Under Delaware law, securities are not classified merely by the label attached to them, but rather through an analysis of their functional characteristics.[48] Therefore, even though the Offering Circulars do not refer to the Participation Certificates as preferred or preference shares, this Court still must examine the legal rights of the holders of such securities to determine whether such a classification reasonably might be warranted. In fact, the Participation Certificates have a number of the characteristics of preferred shares. Among other things, the Participation Certificates include: (i) a cumulative preferred dividend that is senior to the common shareholder dividend; (ii) a liquidation preference over other shares issued by the Bank; (iii) a status subordinate to all senior debt; and (iv) a participation in losses of the Bank, with the Bank being able to defer payments and write down the Certificates' par value if losses occur.[49] Based on these characteristics, the Participation Certificates plausibly could qualify as "preference

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48 *See, e.g.*, *In re Louisville Gas & Elec. Co.*, 77 F. Supp. 176, 178 (D. Del. 1948) ("The term 'preferred stock' is not a term of art under the Delaware Corporation Law, and the nature of the security must be determined from its rights and character and not its name.").

49 Am. Compl. ¶¶ 7, 25, 42.

shares," and, thus, as Parity or Junior Securities. For purposes of Defendants' Motion, I must draw all inferences in favor of Plaintiffs. Therefore, while Defendants' contrary interpretation also is plausible, I cannot conclude that it is the only reasonable interpretation. Thus, I find these provisions of the relevant Agreements to be ambiguous and, on that basis, deny this aspect of Defendants' Motion to Dismiss.

C. Is there a Fiscal Year Limitation in the Pusher Provisions?

Under Delaware law, a court is bound to evaluate a contract based on the plain meaning of its terms.[50] As discussed *supra*, however, on a motion to dismiss, if a particular contractual term is ambiguous, the Court must draw all inferences in favor of the nonmoving party. Accordingly, if the nonmoving party's interpretation of a material contractual term is reasonable, it would not be appropriate to dismiss that party's claim for breach for failure to state a claim.

The parties further disagree as to the timing effect of the pusher provisions in the LLC Agreements. Each of the LLC Agreements states:

> [I]f the Bank or any of its subsidiaries declares or pays any dividends or makes any other payment or other distribution on any Parity Securities in any Fiscal Year, the [LLC] shall be deemed to have declared Capital Payments on the Class B Preferred Securities for the Class B Payment Date falling contemporaneously with or immediately after the date on which such dividend was declared or other payment or distribution made such that the aggregate amount of Capital Payments on the Class B Preferred Securities paid on such Class B Payment Date bears the same relationship to the

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50 *See DeLucca v. KKAT Mgmt., LLC*, 2006 WL 224058, at *2 (Del. Ch. Jan. 23, 2006).

> aggregate amount of Capital Payments on the Class B Preferred Securities payable at the Stated Rate in full for the Class B Payment Period ending on such Class B Payment Date as the aggregate amounts of dividends or other payments or distributions on such Parity Securities paid during the Fiscal Year in which such payment occurs bears to the full stated amount of dividends or other payments or distributions payable on such Parity Securities during such Fiscal Year.[51]

In analyzing the effect of these and similar provisions, I assume for the reasons stated in the previous section that Participation Certificates are Parity or Junior Securities.

Defendants contend that this provision mandates payment to the Trust Preferred Securities holders[52] only if they have not been treated in an equal manner (in terms of payments received). Hypothetically speaking, under Defendants' interpretation, if both the Trust Preferred Securities and Participation Certificates were entitled to preferred dividends of 8% in any given year (to the extent any dividends are paid), a payment on Participation Certificates would trigger an obligation to make a payment on the Trust Preferred Securities only to the extent that the Participation Certificates received preferential treatment. For example, if the Participation Certificates had received a dividend equal to the full 8%, the Trust Preferred Securities holders would only be

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51 LLC I Ag. § 7.04(b)(x); LLC II Ag. § 7.04(b)(x). As previously discussed *supra* Part I.B.2, there also is an analogous provision that deals with junior securities.

52 Payments on the Class B Preferred Securities, which are owned by the Trusts, are used exclusively to fund payments on the Trust Preferred Securities. Therefore, any payments on the Class B Preferred Securities will flow through to the owners of the Trust Preferred Securities. For simplicity and brevity, I will treat a payment made on Class B Securities as equivalent to a payment made on Trust Preferred Securities and refer only to the latter.

entitled to payment to the extent they had been paid less than 8% in that same fiscal year. Thus, if the Trust Preferred Securities holders had received payments equal to 6%, the pusher provisions would entitle them to payments worth an additional 2%. If Trust Preferred Securities holders had received payments equal to 8%, however, no further payments would be required. Therefore, this pusher provision would be inapplicable in all circumstances in which the Trust Preferred Securities holders had received their full dividend for those years in which they had been treated on an equal basis as Participation Certificate holders.

Similar analysis would apply if redemptions were made. If Participation Certificates were redeemed in a fiscal year in which full dividends were paid on the Trust Preferred Securities, no further payments would be required under the pusher provisions. If no dividends were paid on the Trust Preferred Securities, a dividend would be required on the next Payment Date. If a partial dividend were paid, however, an additional payment might or might not be required on the Trust Preferred Securities depending on whether that partial payment was in proportion to the "dividends or other payments" on the Participation Securities to their full stated amount of such payments.

Plaintiffs, by contrast, assert that whether they received any dividend payments earlier in the fiscal year is unrelated to whether this provision entitles them to an additional payment in the next year. Rather, they argue that if any distribution is made on Participation Certificates after the annual payment date for the Trust Preferred Securities, owners of Trust Preferred Securities are entitled to a dividend in the year *after* such distributions on the Participation Certificates are made.

Based on the language of § 7.04(b)(x) of the Agreements, both parties' interpretations are reasonable. Defendants might be right that the provision makes more sense when read according to their interpretation. Unless the pusher provisions only applied to providing Trust Preferred Security holders with equal treatment in a given fiscal year, there would be little reason to include the language referring to "payment[s] or other distribution[s] on any Parity Securities in any *Fiscal Year* . . ."[53] That is, there would be little practical effect of language relating to the "fiscal year" if it did not serve to limit payments to that period. If the parties merely intended any payment on Parity or Junior Securities to trigger a payment on the next Trust Preferred Securities Payment Date, the fiscal year language arguably would be superfluous. Under Defendants' interpretation, holders of Trust Preferred Securities would not be due any payment in Fiscal Year 2010[54] for the following three reasons: (1) the Bank was unprofitable in Fiscal Year 2009; (2) the Participation Certificates do not qualify as Junior or Parity Securities and, thus, no payments were made that would trigger the pusher provisions; and (3) even if the Participation Certificates do qualify as Parity or Junior Securities, the pusher provisions do not apply because the Trust Preferred Securities holders were treated on an equal basis in Fiscal Year 2009.

In support of their contention that the effect of the pusher provisions is not limited to a fiscal year analysis, Plaintiffs correctly point out that § 7.04(b)(x) of the Agreements

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53 LLC I & II Ags., § 7.04(b)(x) (emphasis added).

54 The LLCs' Fiscal Year 2010 ran from January 1, 2010 to December 31, 2010.

does not contain clear language limiting the pusher provisions to a given fiscal year. Rather, under the Agreements, if any such payment is made on Parity or Junior Securities, the Bank will be "deemed to have declared Capital Payments on the Class B Preferred Securities for the . . . Payment Date falling *contemporaneously with or immediately after* the date on which such dividend was declared."[55] Plaintiffs have alleged that the Bank made triggering distributions in June, July, September, and November 2009. The relevant yearly payment dates for LLC I and LLC II are May 23 and March 8, respectively. Defendants essentially contend that the "contemporaneously with or immediately after" language of the Agreement only applies if Trust Preferred Securities did not receive their dividend in that fiscal year. If dividends had been paid on the Trust Preferred Securities earlier that fiscal year (as they were in 2009), any distribution on Parity or Junior Securities would not trigger any additional payment on the Trust Preferred Securities. While such an interpretation might be reasonable, the language in the Agreement is not sufficiently clear to make that the only reasonable interpretation. In the absence of clear language defining "contemporaneously" to include payments made approximately two months in advance, the plain language of the provision reasonably could be read to trigger a capital payment on the Payment Dates "immediately after," which for LLC I and LLC II are May 23, 2010 and March 8, 2010, respectively. Under Plaintiffs' interpretation, therefore, they were entitled to a payment

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55 LLC I & II Ags., § 7.04(b)(x) (emphasis added).

in 2010 because payments made in 2009 triggered the pusher provisions, and the next Payment Date occurred in 2010.

Accordingly, I am persuaded that both parties have proffered reasonable interpretations of § 7.04(b)(x) of the Agreements. Because I must draw all inferences in favor of Plaintiffs, based on the limited record in front of me, I am unable to conclude that Plaintiffs have failed to state a claim that they are due payments on the Trust Preferred Securities as a result of the pusher provisions. Therefore, Defendants' motion to dismiss Counts I through IV on that basis must be denied.

D. Should Counts V and VI be Dismissed for Failure to State a Claim or Alternatively Dismissed or Stayed in Favor of First-Filed Actions?

1. Did Defendants' failure to make dividend payments on the Trust Preferred Securities breach the implied covenant of good faith and fair dealing?

Plaintiffs contend in Counts V and VI that the Bank undertook an implied obligation under Delaware law to protect the interests of the Trusts in the event that "the Bank cease[d] to be a profit-seeking entity."[56] They further argue that this obligation was triggered when the Bank entered into the Domination Agreement, which had the potential effect of preventing the Bank from continuing to be a profit-seeking business and, as a result, threatening the ability of the holders of the Trust Preferred Securities to receive future payments. Specifically, they allege that Defendants violated Delaware's implied covenant of good faith and fair dealing by "refusing to make required payments on the Class B Preferred Securities in 2010 despite the earlier recognition of the obligation to

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56 Am. Compl. ¶¶ 81, 88.

make such payments following the Bank's entry into the Domination Agreement."[57] Further, they argue that Defendants' reliance on the European Commission ("EC") directive that prohibited the Bank from making "discretionary payments on profit-related securities" is misplaced because the obligation to make the payments in question was mandatory, and not discretionary.[58]

Defendants respond that Plaintiffs have failed to state a claim for breach of the implied covenant because it "does not apply when the subject at issue is expressly covered by the contract." According to Defendants, any payments sought by Plaintiffs in 2010 necessarily would have been discretionary because the LLC Agreements specify only two conditions under which the LLCs were required to make mandatory payments on the Class B Preferred Securities: where the Bank made a profit in the preceding fiscal year or where the pusher provisions required such payments. According to Defendants, neither of those conditions was satisfied in 2010 because the Bank did not make a profit in fiscal 2009 and, as discussed *supra*, the pusher provisions did not require a payment in 2009. Defendants argue, therefore, that the payments Plaintiffs seek under their implied covenant claim are discretionary in nature and effectively barred by the EC directive.

Under Delaware law, the implied covenant of good faith and fair dealing (the "implied covenant") inheres in every contract and "requires 'a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of

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57 *Id.* ¶¶ 84, 91.

58 *Id.* ¶ 47.

preventing the other party to the contract from receiving the fruits' of the bargain."[59] Rather than constituting a free-floating duty imposed on a contracting party, it is only invoked to insure that the parties' reasonable expectations are fulfilled.[60] "The Court must focus on 'what the parties likely would have done if they had considered the issues involved.' It must be 'clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of . . . had they thought to negotiate with respect to that matter.'"[61]

Thus, to state a claim for breach of the implied covenant, Plaintiffs must allege: "(1) a specific implied contractual obligation, (2) a breach of that obligation by the defendant, and (3) resulting damage to the plaintiff."[62] The implied covenant comes into play, however, only where a contract is silent as to the issue in dispute.[63] That is, it "does not apply when the subject at issue is expressly covered by the contract."[64] If the contract

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59 *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 888-89 (Del. Ch. 2009) (internal citations omitted); *HSMY, Inc. v. Getty Petroleum Mktg., Inc.*, 417 F. Supp. 2d 617, 621 (D. Del. 2006).

60 *See Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005); *Kuroda*, 971 A.2d at 888-89 (internal quotation marks omitted).

61 *Lonergan v. EPE Hldgs. LLC*, 5 A.3d 1008, 1018 (Del. Ch. 2010) (internal citations omitted).

62 *Overdrive, Inc. v. Baker & Taylor, Inc.*, 2011 WL 2448209, at *8 (Del. Ch. June 17, 2011) (internal citations omitted).

63 *AQSR India Private, Ltd. v. Bureau Veritas Hldgs., Inc.*, 2009 WL 1707910, at *11 (Del. Ch. June 16, 2009).

64 *Nacco Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 20 (Del. Ch. 2009); *see also Nemec v. Shrader*, 991 A.2d 1120, 1125-26 (Del. 2010); *Overdrive, Inc.*, 2011 WL

clearly delineates the parties' rights, there is "no room for the implied covenant" because it cannot override the express terms of a contract.[65] Moreover, while the doctrine permits parties to fill in gaps in a contract, it does so only regarding unanticipated developments and not events that the parties merely failed to consider.[66] "The doctrine thus operates only in that narrow band of cases where the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to provide an explicit answer."[67]

Although implied covenant claims rarely are invoked successfully,[68] Plaintiffs' Amended Complaint alleges sufficient facts to survive Defendants' motion to dismiss. As to the first element of an implied covenant claim, Plaintiffs identify a specific implied obligation in the LLC Agreements; namely, that the LLCs undertook to protect the Trusts' interests in the event that the Bank ceased being a profit-seeking enterprise.[69] This specific implied obligation, according to Plaintiffs, was triggered when the Bank

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2448209, at *8 ("Delaware courts will not imply a covenant 'where the contract addresses the subject of the alleged wrong, but fails to include the obligation alleged.'").

65 *See Nacco Indus.*, 997 A.2d at 20; *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 146 (Del. Ch. 2009) (internal citations omitted).

66 *Overdrive, Inc.*, 2011 WL 2448209, at *8.

67 *Lonergan*, 5 A.3d at 1018 (internal citations omitted).

68 *Kuroda*, 971 A.2d at 888-89.

69 PAB 38; Am. Compl. ¶ 88.

entered into the Domination Agreement in 2007 and potentially supports their claim that a mandatory payment was owed to them in 2010.[70]

Defendants argue, however, that Plaintiffs' invocation of the implied covenant is misplaced and that the implied covenant does not mandate payments in 2010 because the LLC agreements specifically address the subject matter at issue, *i.e.*, the conditions precedent for mandatory payments on Class B Preferred Securities. The LLC Agreements require the LLCs to make payments on the Class B Preferred Securities in two situations: (1) where the Bank earned sufficient profits in the preceding fiscal year (the "profit prong"); and (2) even if it did not earn sufficient profits, where it makes a payment on a Parity or Junior Security under the pusher provisions discussed *supra* (the "pusher prong").[71] Because they aver that neither of these situations existed in 2010, Defendants argue that the implied covenant doctrine cannot create an additional condition requiring mandatory payments in contravention of the express terms of the parties' agreement.

Importantly, Plaintiffs' implied covenant claim does not depend on the success of their claims in Counts I through IV, which rely on their assertion that the pusher provisions required a mandatory payment in 2010.[72] Rather, I understand the implied

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70 Because I find that Plaintiffs have stated a claim that the implied covenant may have required mandatory payments in 2010, I need not reach the issue of whether it also might have required discretionary payments.

71 LLC Ag. I § 7.04(b)(x); LLC Ag. II § 7.04(b)(x).

72 *See* PAB 40.

obligation they contend exists as pertaining to the profit prong of § 7.04(b)(x) in each LLC Agreement. This prong mandates that a payment will be due if the Bank made sufficient profits in the preceding year, but does not address whether the Bank was required to continue to be a profit-seeking enterprise at all times. The Amended Complaint acknowledges that the Bank did not make sufficient profits in 2009 so as to trigger a payment under the profit prong in 2010.[73] But, the Amended Complaint alleges sufficient facts to support a reasonable inference that the reason the Bank did not attain such profits was a direct consequence of its having entered into the Domination Agreement. Under such an agreement, for example, the dominating company, here IBH, has the ability to force the subjugated company, here the Bank, to take actions inimical to the latter's financial interests.[74] Thus, one plausible inference is that the Bank did not make sufficient profits in 2009 to trigger the profit prong because its controlling company took certain actions to limit or eliminate its profitability. This subject is not explicitly addressed in the LLC Agreements. Furthermore, on the limited record before me, I cannot rule out the possibility that the Bank's action of entering into the Domination Agreement might not have been foreseeable to the Trusts' U.S. investors, who reasonably might have expected the Bank to remain a profit-seeking entity and not take action deliberately to change that status. Hence, application of the implied covenant is not

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73 Am. Compl. ¶ 9.

74 *Id.* ¶ 83 ("The controlling company may, for example, force the controlled company to transfer profitable business opportunities, assume loss-making positions, or sell assets at below-market prices.").

barred by the express terms of the Agreements. In addition, based on the express terms of § 7.04(b)(x) in each Agreement, for example, had they considered the possibility that the Bank might enter into a domination agreement and cease to be profitable as a result, the parties would have agreed to provide some protection to holders of Trust Preferred Securities, the value of which depended, in part, on the Bank remaining a profitable venture.

Plaintiffs also arguably satisfy the second and third elements of an implied covenant claim here: breach and injury. They sufficiently allege that the Bank breached its implicit obligation to protect the holders of the Trust Preferred Securities should it cease to be profit-seeking as a result of having entered into the Domination Agreement. In addition, Plaintiffs' allegations that the Bank failed to achieve sufficient profits in 2009 so as to trigger a mandatory payment in 2010 under the profit prong of § 7.04(b)(x) as a result of entering into the Domination Agreement, is sufficient to meet the injury requirement. Therefore, to the extent specified above, I hold that Plaintiffs have stated a claim for a breach of the implied covenant of good faith and fair dealing. The merits of that claim will have to be assessed after further proceedings in this action.

2. Should Counts V and VI be dismissed or stayed in favor of first-filed actions?

Defendants argue that this action should be dismissed in favor of the German Actions if their Motion to Dismiss under Rule 12(b)(6) is not granted. In assessing which of multiple actions challenging the same conduct should proceed, the Court often applies the *McWane* doctrine, also known as the first-filed rule. Under this doctrine, the Court has broad discretion to dismiss or stay an action when "there is a prior action pending

elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues . . . ."[75] Under *McWane*, the parties and issues need not be identical. "Instead, the courts examine whether the ultimate legal issues to be litigated will be determined in the first-filed action, and thus, repeatedly have held that *McWane* requires only a showing of '[s]ubstantial or functional identity.'"[76] Similar issues are those that arise out of a "common nucleus of operative facts."[77] Likewise, parties are considered substantially the same for purposes of *McWane* "where related entities are involved but not named in both actions" and, for example, the exclusion is 'more a matter of form than substance.'"[78] Factors the Court may consider in deciding whether to dismiss or stay include avoiding "the wasteful duplication of time, effort, and expense that occurs when judges, lawyers, parties and witnesses are simultaneously engaged in the adjudication of the same cause of action in two courts" and preventing "the possibility of inconsistent and conflicting rulings and judgments."[79]

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75 *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970) (granting stay while Alabama proceeding involving same issues and parties was adjudicated).

76 *McQuaide v. McQuaide*, 2005 WL 1288523, at *4 (Del. Ch. May 24, 2005) (quoting *AT&T Corp. v. Prime Security Distrib., Inc.*, 1996 WL 633300, at *2 (Del. Ch. Oct. 24, 1996)); *see also Chadwick v. Metro Corp.*, 856 A.2d 1066 (Table), 2004 WL 1874652, at *2 (Del. 2004); *Transamerica Corp.*, 1995 WL 1312656, at *3.

77 *Schnell v. Porta Sys. Corp.*, 1994 WL 148276, at *4 (Del. Ch. Apr. 12, 1994).

78 *McQuaide*, 2005 WL 1288523, at *4 (quoting *FWM Corp. v. VKK Corp.*, 1992 WL 87327, at *1 (Del. Ch. Apr. 27, 1992)).

79 *Id.*

Defendants contend that *McWane* weighs in favor of a stay or dismissal of this case because the German Actions involve "how . . . entry into a domination agreement affects the rights of holders of then-outstanding profit-dependent securities."[80] They argue that this is a "purely legal question" that is a matter of first impression under German law.[81] In opposition, Plaintiffs assert that the claims made in Counts V and VI do not hinge on any question of German law, but rather depend only on the application of Delaware's implied covenant of good faith and fair dealing. Furthermore, they point out that the LLCs are not parties to the German Actions and the principal question to be resolved by the German courts involves whether the Bank is obligated to make payments on the Participation Certificates—not the Trust Preferred Securities. By contrast, Plaintiffs seek relief based solely on payments *already made* on the Participation Certificates.

After carefully reviewing the parties' arguments, I conclude that the central questions before this Court require the application of Delaware law, are different than those to be decided in the earlier-filed German Actions, and thus should not be stayed or dismissed pending resolution of the German Actions. The key issue that must be resolved as to Counts V and VI is whether distributions made on the Participation Certificates in 2010, despite the Bank's unprofitability in Fiscal Year 2009, still obligated the Bank's subsidiaries to make dividend payments to Trust Preferred Security holders in

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80 DOB 21.

81 *Id.*

2010. If so, the dividend payments to Trust Preferred Securities arguably would be mandatory, and not discretionary, and therefore, not subject to the EC's directive prohibiting discretionary payments. Therefore, the critical question of German law, *i.e.*, the effect that the Domination Agreement might have on the obligation to make payments on the Trust Preferred Securities, is not central to this action. Resolution of whether payments on the Trust Preferred Securities were mandatory—the central issue in this case—revolves around the interpretation of the LLC Agreements, which are governed by Delaware law. Accordingly, I conclude that the core claims raised by Plaintiffs are not substantially or functionally identical to the claims raised in the German Actions. Thus, I decline to dismiss or stay this action on *McWane* grounds.

3. Should Counts V and VI be dismissed on *forum non conveniens grounds*?

Finally, Defendants seek either a stay or dismissal under the doctrine of *forum non conveniens*, which grants the Court discretion "to decline jurisdiction whenever considerations of convenience, expense, and the interests of justice dictate that litigation in the forum selected by the plaintiff would be unduly inconvenient, expensive or otherwise inappropriate."[82] A party seeking dismissal on such grounds, however, "must establish with particularity that it will be subject to overwhelming hardship and inconvenience if required to litigate in Delaware."[83] Specifically, the Court examines six

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82 *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 559 A.2d 1301, 1304 (Del. Super. 1988) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)).

83 *Vichi v. Koninklijke Philips Elecs. N.V.*, 2009 WL 4345724, at *12 (Del. Ch. Dec. 1, 2009).

factors when assessing whether a stay or dismissal is appropriate under a *forum non conveniens* analysis: "1) the applicability of Delaware law, 2) the relative ease of access of proof, 3) the availability of compulsory process for witnesses, 4) the pendency or non-pendency of a similar action or actions in another jurisdiction, 5) the possibility of a need to view the premises; and 6) all other practical considerations that would make the trial easy, expeditious, and inexpensive."[84] In support of dismissal, Defendants repeat their allegations that this action presents unique questions of German law best resolved by a German court. Defendants also make a few cursory arguments that because many of the witnesses and much of the evidence is located in Germany, considerations of convenience and expense warrant a stay of this case in favor of the German Actions.

None of Defendants' purported hardships, however, warrant granting dismissal on *forum non conveniens* grounds. First, as discussed *supra* Part II.D.2, the key issues presented to this Court involve questions of Delaware law, not German law. Defendants' arguments relating to inconvenience and expense also are unavailing. "[M]ost corporate litigation in the Court of Chancery involves companies and documents located outside Delaware, and this mere inconvenience, without more, does not warrant a stay or dismissal."[85] Defendants have not pointed to specific documents or witnesses whose presence in Germany or elsewhere creates sufficient expense or inconvenience that it

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84 *Ryan v. Gifford*, 918 A.2d 341, 351 (Del. Ch. 2007) (quoting *In re Chambers Dev. Co. S'holder Litig.*, 1993 WL 179335, at *6 (Del. Ch. May 20, 1993)).

85 *Id.* (internal quotation marks omitted); *Warburg Pincus Ventures, L.P. v. Schrapper*, 774 A.2d 264, 271 (Del. 2001).

would be an overwhelming hardship for Defendants to proceed with this litigation in Delaware. The fact that this case involves claims against Delaware LLCs and Trusts reinforces that conclusion. Furthermore, even if this case presented novel issues of foreign law, that fact alone would not warrant a dismissal or stay here.[86] Therefore, I deny Defendants' motion to stay on *forum non conveniens* grounds.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, Defendants' Motion is denied.

IT IS SO ORDERED.

[86] *Berger v. Intelident Solutions., Inc.*, 906 A.2d 134, 137 (Del. 2006).