

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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COMMERZBANK AG, DRESNER KLEINWORT :  
SECURITIES LLC and DRESNER KLEINWORT :  
SERVICES LLC, :  
 :  
 : Plaintiffs, :  
 :  
 : - against - :  
 :  
 : JOHN BILELLO, AMY DUNN, TANYA LINCEVSKI, :  
 : VIKAS NIGAM, BEATRICE O'CARROLL, THOMAS :  
 : J. RYAN, ANTHONY TOSCANO and RICARDO :  
 : ZULLIGER, :  
 :  
 : Defendants. :  
----- X

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**COMPLAINT FOR  
DECLARATORY JUDGMENT**

10600452

Plaintiffs, by Epstein Becker & Green, P.C., their attorneys, for their complaint  
allege:

1. This is an action brought by defendants' former employers pursuant to  
CPLR 3001 for a judgment declaring that defendants do not owe any of the plaintiffs any sums  
as bonus payments for work performed in 2008 in addition to the sums already paid to them.  
Plaintiffs contend that pursuant to defendants' respective employment contracts, they were  
eligible for discretionary bonuses only, and none had any contract obligating any of the plaintiffs  
to pay defendants a guaranteed or definite sum.

The Parties

2. Plaintiff Commerzbank AG ("Commerzbank") is a corporation organized  
and existing pursuant to the laws of the Federal Republic of Germany having its principal office  
in Frankfurt, Germany. Commerzbank AG, New York Branch has a place of business at Two  
World Financial Center, New York, New York.

NY:4069011v1

**FILED**  
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NEW YORK

3. Commerzbank is the successor by merger of Dresdner Bank AG ("DBAG"), which merger was consummated on May 11, 2009 (the "Merger"). Prior to the Merger, and at all relevant times, DBAG was a corporation organized and existing pursuant to the laws of the Federal Republic of Germany having its principal office in Frankfurt, Germany. DBAG engaged in commercial and investment banking, itself and through subsidiaries, in among other places, Germany, the United Kingdom and the United States. From 2001 until January 12, 2009 DBAG was a subsidiary of Allianz SE ("Allianz"), a German insurance company.

4. At all relevant times, DBAG's principal office in the United States was its New York state-licensed branch office located at 1301 Avenue of the Americas, New York, New York ("DBAG-NYB"), which engaged in certain commercial banking activities. As a result of the Merger, DBAG-NYB became, by operation of law, a second New York branch of Commerzbank AG, New York Branch.

5. Dresdner Kleinwort Securities LLC ("DK Securities") is a limited liability company organized and existing pursuant to the laws of the State of Delaware, having its principal office at Two World Financial Center, New York, New York. Prior to the Merger, the sole member of DK Securities was DBAG, and currently, its sole member is Commerzbank. DK Securities was formerly known as Dresdner Kleinwort Wasserstein Securities LLC and its principal office previously was located at 1301 Avenue of the Americas, New York, New York.

6. DK Securities is a registered broker-dealer and engages in, among other things, the business of investment banking. DBAG's investment banking activities in Europe, the United States and elsewhere were conducted under the trade styles "Dresdner Kleinwort," "Dresdner Kleinwort Investment Banking" or "DKIB".

7. Plaintiff Dresdner Kleinwort Services LLC ("DK Services") was at all relevant times a Delaware limited liability company with its principal office at 1301 Avenue of the Americas, New York, New York. Prior to the Merger, DK Services's sole member was DBAG. DK Services's employees provided support services, such as accounting, legal, human resources and information technology, to DBAG-NYB and DK Securities.

8. Defendant John Bilello resides at 223 Ocean Avenue, Amityville, New York. From April 8, 2002 to April 30, 2009, Bilello was employed by DBAG-NYB, and thereafter by DK Services until November 29, 2009.

9. Defendant Amy (née Agresta) Dunn resides at 380 Mountain Road, Union City, New Jersey. From August 8, 2005 to April 30, 2009, Dunn was employed by DBAG-NYB, and thereafter by DK Services until November 29, 2009.

10. Defendant Tanya (née Sokolsky) Lincevski resides at 135 Oceana Drive East, Brooklyn, New York. From January 22, 2001 to December 31, 2002, Lincevski was employed by DK Services's predecessor. From January 1, 2003 to April 30, 2009, she was employed by DBAG-NYB, and thereafter by DK Services until November 29, 2009.

11. Defendant Vikas Nigam resides at 271 West 47<sup>th</sup> Street, New York, New York. From July 18, 2008 to April 30, 2009, Nigam was employed by DBAG-NYB, and thereafter by DK Services until November 29, 2009.

12. Defendant Beatrice O'Carroll resides at 35-51 85<sup>th</sup> Street, Jackson Heights, New York. From March 16, 2007 to April 30, 2009, O'Carroll was employed by DBAG-NYB, and thereafter by DK Services until November 29, 2009.

13. Defendant Thomas J. Ryan resides at 3A East Front Street, Red Bank, New Jersey. From February 10, 2004 to April 30, 2009, Ryan was employed by DBAG-NYB, and thereafter by DK Services until November 29, 2009.

14. Defendant Anthony Toscano resides at 40 Mitchell Avenue, Chatham, New Jersey. From April 8, 2002 to April 30, 2009, Toscano was employed by DBAG-NYB, and thereafter by DK Services until September 21, 2009.

15. Defendant Ricardo Zulliger resides at 28 Havilands Lane, White Plains, New York. Zulliger was initially hired on November 27, 2006 by DK Services, and began his employment on January 2, 2007 as an employee of to DBAG-NYB. From April 21, 2009, until February 1, 2010, he was employed by Commerzbank.

Plaintiffs' Discretionary Bonus Policy

16. Each of the defendants entered into an employment contract with DBAG-NYB, DK Services or DK Securities at or before he or she began employment. Copies of these employment contracts, each of which is in the form of an offer letter signed by duly authorized agents of DBAG-NYB, DK Services or DK Securities and countersigned by each defendant, are annexed collectively as Exhibit A. Their terms and conditions are incorporated in this complaint by reference.

17. Each of the defendant's employment contracts contained a provision (the "Bonus Clause") providing that each defendant was eligible for an annual discretionary bonus in addition to his or her salary. For example, defendant Dunn's employment contract stated:

You may also be eligible to receive a discretionary bonus payable under the terms of the Firm's long term incentive and/or deferred compensation programs, as amended from time to time, and paid under the terms of these programs (which generally provide for periodic payments subject to continued employment). Bonus reviews normally are scheduled for no later than March. Bonus awards are not guaranteed and are determined solely at the

discretion of the Firm. You must be on the Firm's active payroll on the day bonus payments are actually made and must not have given notice of your voluntary resignation of employment from the Firm prior to such day in order to be eligible to receive a bonus. [Emphasis added.]

The employment contracts of the other defendants contained an identical or substantially similar provision. (See Exhibit A.)

18. Each of defendant's employment contracts also contained the following provision, or one substantially similar:

This offer constitutes the entire understanding between you and the Firm and contains a complete statement of all the agreements between you and the Firm. This offer supersedes all prior or contemporaneous verbal or written agreements, understandings or communications between you and the Firm. Any subsequent agreement or representation with respect to the matters addressed herein shall not be binding on the Firm unless contained in writing, signed by you, the Regional Co-Head of Capital Markets, DrKW Americas, and the Managing Director of Human Resources. [Emphasis added, see Exhibit A.]

19. The Bonus Clause in each defendant's employment contracts was not amended, modified or superseded during the course of his or her employment, except for Zulliger as to 2009 only.

20. At all relevant times, DBAG-NYB, DK Securities and DK Services distributed to employees the same or a similar employee handbook, which set forth the policies, procedures, employee benefits and other matters regarding defendants' employment (the "Handbook"). Each defendant signed an acknowledgment of receipt of the Handbook stating that he or she read and understood the provisions therein. The Handbook was revised from time to time, and an electronic version has been available on-line to employees.

21. DBAG's discretionary bonus policy was set forth in all versions of the Handbook. The bonus policy, as contained in the July 2008 version, stated as follows:

### Discretionary Bonus Policy

Employees may be eligible to be considered for the payment of an annual discretionary performance bonus. Whether a bonus is awarded and the amount of such bonus, if any, is considered on an individual basis, solely at the discretion of the Firm. Employees must be on the Firm's active payroll on the day bonus payments are actually made and must not have given or received notice of termination of employment from the Firm prior to such day to be eligible to receive a bonus. Bonuses are not guaranteed unless such guarantee is in writing and approved by the Chief Executive Officer, the Americas and Head of Human Resources, the Americas.

Many factors influence the Firm's decision to pay a bonus and the individual amounts paid, if any. These factors include but are not limited to: the profitability of the Firm and its affiliates, the profitability of the Americas region, the profitability of each department, the amount of money made available by the Firm for bonus payments, the monetary and non-monetary contribution of the employee to his or her department and the Firm, the employee's function, the employee's potential for the future, market trends, and the strategic needs of the business. These factors vary and may change from year to year.

The fact that an employee received a bonus in a particular year is not a guarantee that a bonus or a similar level of such bonus will be awarded in the future years. [Emphasis added.]

The foregoing statement of the "Discretionary Bonus Policy" applied to each of the defendants as well as all other employees. (Relevant pages from the July 2008 Handbook are annexed as Exhibit B.)

#### The Merger of DBAG and Commerzbank and the Bonus Pool

22. During the first half of 2008, Allianz and Commerzbank started discussing a possible merger of DBAG with Commerzbank, and Allianz had also commenced a reorganization of DBAG to split DBAG's private and corporate clients from other parts of DBAG (including DKIB). Concerned that employees may leave DBAG in such an uncertain environment, in July 2008, Dr. Stefan Jentsch, the Chief Executive Officer of DKIB, proposed

to the Board of DBAG that a "floor bonus pool" be established for certain employees. On August 12, 2008, the Board approved a pool of EUR 400 million, to be allocated on a discretionary basis to individuals who did not have contractual bonus guarantees.

23. The bonus pool was approved by the Board on the assumption that DBAG's and DKIB's forecasted revenues for 2008 would be EUR 888 million.

24. None of the defendants' contracts of employment was amended by any writing, or even any purported oral agreement, to refer to or reflect the bonus pool approved by the DBAG Board.

25. On August 31, 2008, Allianz and Commerzbank agreed that Commerzbank would acquire Allianz's stake in DBAG. DBAG would later be merged into Commerzbank in 2009.

#### The Bonus Memoranda

26. Each of the defendants received a memorandum dated December 19, 2008, addressed to them individually which stated in pertinent part as follows:

Your discretionary bonus for 2008 as determined in Dresdner Kleinwort's sole discretion and the arrangements given below has been provisionally awarded at

EUR [defendant's award amount].

Your provisional bonus award continues to be discretionary and contingent on, among other things, Dresdner Kleinwort performance. Thus, the provisional bonus award stated above will be paid in accordance with, and is subject to, all applicable Dresdner Kleinwort policies pertaining to the determination and payment of such bonuses and the condition that no additional material deviations in Dresdner Kleinwort's revenue and earnings, as against the forecast for the months of November and December 2008, are identified during preparation of the annual financial statements for 2008 i.e. that Dresdner Kleinwort's earnings position does not deteriorate materially in this period. This will be reviewed in January 2009 by Stefan Jentzsch. In the event that such additional material deviations are identified, the Company

reserves the right to review the provisional award and, if necessary, as determined in its sole discretion, to reduce or eliminate entirely the provisional award. [Emphasis added.]

#### The Bonus Payments

27. During the last four months of 2008, while the preparations for the Merger of DBAG and Commerzbank were proceeding, the world's financial markets were thrown into unprecedented and unexpected turmoil. After Lehman Brothers collapsed on September 15, 2008, stock markets fluctuated wildly and a number of the world's leading financial institutions stood on the brink of failure. The American, German and British governments announced rescue packages totaling more than \$150 billion for their financial systems, and effected partial or complete takeovers of major banks and insurers, including AIG, Hypo Real Estate, the Royal Bank of Scotland, Lloyds TBS and HBOS. Central banks around the world made emergency interest rate cuts in an attempt to prevent a worsening of the "meltdown." On November 3, 2008, Commerzbank received a EUR 8.2 billion funding commitment from the German government's Financial Market Stabilization Fund.

28. DBAG and DKIB were not unaffected by the worldwide financial industry collapse. Although in early November DKIB projected a loss of EUR 2.6 billion, the preliminary actual loss before taxes was EUR 5.9 billion. The final loss for 2008 for DKIB was EUR 6.4 billion. DBAG's annual report for 2008 stated a loss of EUR 6.178 billion.

29. Based on the losses at DBAG and DKIB and other factors, the DBAG Board determined to reduce the balance of the discretionary bonus pool (after payment to employees having guaranteed bonus contracts) by 90 percent. As a result, the discretionary bonuses paid to defendants and other similarly situated employees were reduced by 90 percent, and 10 percent of the amounts set forth in each defendant's December 19, 2008 bonus memorandum was paid to each defendant.

### The Dispute

30. Several other former employees of DBAG-NYB and DK Securities have retained as counsel James M. Griffin, Esq., and Attorney Griffin has commenced arbitrations before the dispute resolution unit of the Financial Institutions Regulatory Authority ("FINRA") alleging, among other things, that DK Securities has breached the claimants' employment contracts by not paying the claimants the full amounts of the discretionary bonus set forth in their respective December 19, 2008 memoranda. DBAG and DK Securities have denied any liability to the claimants in these arbitrations.

31. Attorney Griffin has advised Commerzbank, through its counsel, that he represents each of the defendants in this action and that the defendants have claims identical to those asserted in the arbitrations before FINRA. He requested that Commerzbank stipulate to joining the defendants as party-claimants in the pending FINRA arbitrations in order that they might litigate their claims together. A copy of email correspondence from Attorney Griffin on this subject is annexed as Exhibit C.

32. Commerzbank, through its counsel, declined to agree to arbitration before FINRA and proposed arbitration at the American Arbitration Association. Defendants counsel rejected that counterproposal. A copy of email correspondence between counsel for the parties on this subject is annexed as Exhibit D.

33. Plaintiffs dispute the claims asserted by the claimants in the FINRA arbitration. In addition, DBAG employees in the United Kingdom, Germany and Italy have commenced litigation alleging similar claims, which DBAG and Commerzbank have uniformly disputed.

34. Plaintiffs contended that each of the defendant's employment contracts unequivocally state that they are "eligible," not "entitled," for annual bonuses, and that bonuses

are granted in the sole discretion of the employer. These contracts are consistent with plaintiffs' policy regarding bonuses as set forth in the Handbook. The bonus memoranda of December 19, 2008 also state clearly and unequivocally that the "provisional" discretionary bonus amounts were subject to the plaintiffs' bonus policies and, in addition, could be reduced or even eliminated for any reason, including a marked deterioration in the plaintiffs' financial condition. Moreover, none of the defendants' employment contracts was modified by any signed, written amendment, and any alleged reliance by defendants on general statements made by plaintiffs' management regarding the "guaranteed bonus pool" cannot, as a matter of law, give rise to any enforceable "right" to any bonus, let alone a bonus in a particular amount.

35. This dispute is ripe for adjudication.

36. Plaintiffs do not have an adequate remedy at law.

WHEREFORE, plaintiffs demand judgment declaring that none of them, jointly or severally, is liable to any of the defendants for any bonus payment relating to their work in 2008.

Dated: New York, New York  
February 22, 2010

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