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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ROLAND KISER,

Plaintiff,

-against-

HSH NORDBANK AG,

Defendant.

09 Civ. 8849 (JSR) (AJP)

**PLAINTIFF'S  
AMENDED  
ANSWER TO  
COUNTERCLAIMS**

Plaintiff Roland Kiser (“Kiser”), by his attorneys Miller & Wrubel P.C., as and for his Amended Answer to the Counterclaims of defendant HSH Nordbank AG (“Nordbank”) dated February 2, 2010 (the “Counterclaims”),<sup>1</sup> hereby:

1. Admits the allegations of paragraphs 1, 2, 5, 8 and 9 of the Counterclaims.
2. Avers that paragraphs 3, 4, 23, 28, 35 and 36 of the Counterclaims concern matters of law as to which no response is required.

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<sup>1</sup> Hereafter, capitalized terms not otherwise defined are used with the same meanings as in Kiser’s Complaint in this action and/or in the Counterclaims.

3. Denies the allegations of paragraph 6 of the Counterclaims, except admits that in late 2005 Nordbank's New York Branch introduced the LTIP, which had an initial duration of five years commencing in 2006.

4. Denies the allegations of paragraph 7 of the Counterclaims, except admits that there was a Compensation Committee comprised of Kiser, Klaus Bernhart (who was the responsible Regional Head in addition to holding the positions alleged) and Bjorn Hackert. Paragraph 7 of the Counterclaims is misleading in that it omits at least the following facts: (1) Kiser and the other members of the Compensation Committee did not participate in determining their own LTIP awards; their LTIP awards were determined by Stefan Bruegmann ("Bruegmann"), Global Head of HR for Nordbank, and Peter Rieck ("Rieck"), the Deputy Chief Executive Officer and director of Nordbank responsible for the New York Branch; and (2) all LTIP awards, including for the members of the Compensation Committee, were performance-based.

5. Denies the allegations of paragraphs 10, 11, 13 14, 15, 16, 17, 18, 21, 24, 25, 26, 29, 30, 31, 32, 33, 37, 39, 40 and 41 of the Counterclaims.

6. Denies the allegations of paragraph 12 of the Counterclaims as written, but admits, on information and belief, that on or about January 13, 2009, the Board of Nordbank determined (1) that Nordbank would not pay any discretionary bonuses with respect to 2008, (2) that Nordbank would pay contractually guaranteed bonuses and (3) LTIP distributions due in February 2009 would be treated as guaranteed.

7. With respect to the allegations of paragraph 19 of the Counterclaims, admits the existence of the Employment Agreement, and refers to the Employment Agreement for the full and complete terms thereof.

8. Denies the allegations of paragraph 20 of the Counterclaims, except admits that the New York Branch was the lessee of the vehicle used by Kiser and paid the monthly lease rate to the lessor, and further refers to the discussion below of Nordbank's Company Auto Policies (as defined below).

9. With respect to the allegations of paragraphs 22, 27, 34 and 38 of the Counterclaims, repeats and realleges his responses to the referenced paragraphs.

**ALLEGATIONS COMMON TO  
ALL AFFIRMATIVE DEFENSES**

10. Nordbank's Counterclaims are yet another example of Nordbank's bad faith towards its own officers and directors in an effort to salvage the reputation and career of Nordbank's CEO Dr. Dirk Jens Nonnenmacher ("Nonnenmacher"), widely regarded as "meistgehasster Banker der Republik" – the "most hated banker in Germany." Hamburg Morning Post, February 6, 2010.

11. Known as "Dr. No" for his sinister machinations both in his banking maneuvers – engaging in secret transactions and hiding losses to such an extent that he is currently under criminal investigation by the Hamburg state prosecutor – and his bizarre terminations of numerous officers and directors – several of whom are now taking legal action against Nordbank – Nonnenmacher apparently will stop at nothing to damage those who dare not to be his lackeys, including Kiser.

12. Nordbank's Counterclaims boil down to two contentions: (1) that the LTIP distribution to employees of the New York Branch for 2008, made in February 2009, should not have been as large as it was; and that this supposedly is somehow attributable to wrongdoing by Kiser; and (2) that Kiser owes Nordbank reimbursement as

to a vehicle Nordbank leased and Kiser used. Both these contentions are frivolous and readily disproven.

**A. The LTIP Amounts and Distribution Were Proper, Were Approved by Nordbank's Global Head of HR and the Board of Nordbank, and Were Known to Nordbank and Its Auditors for Many Months Without Any Question Being Raised as to Their Propriety**

13. On or about December 13, 2005, Nordbank's Board approved a new compensation plan for the New York Branch, including the LTIP. As part of this approval, *Nordbank's Board set February 15 of each year as the date on which bonuses, including LTIP, would be paid.* The contention in the Counterclaim that Kiser set this date or had authority to change or disregard it is demonstrably false. The Board of Nordbank set the February 15 date.

14. In addition, every year during the relevant time period, including in late 2008 with respect to payments to be made in February 2009, the New York Branch delivered to Brueggemann, as Global Head of HR, and Rieck, as Deputy CEO and the Board member responsible for the New York Branch, well in advance of the actual payments, a schedule showing the dates by which steps in the bonus process needed to be taken. February 15, or the business day preceding February 15 if that day fell on a weekend or holiday, was used in every case.

15. On or about January 5, 2009, the New York Branch closed its books for the year 2008. This was done in the normal course and with support to the New York Branch from two Global Risk Management ("GRM") representatives from Nordbank's Head Office in Germany, who were responsible for calculating appropriate Loan Loss Provisions ("LLPs") and coordinating the process.

16. On or about January 13, 2009, Nordbank's Board announced: (1) that there would be no discretionary bonuses paid with respect to 2008; however, (2) guaranteed bonuses would be paid and (3) LTIP distributions for 2006-08 would be made. Bjorn Hackert ("Hackert"), head of Human Resources ("HR") at the New York Branch, reported to Kiser in a memorandum dated January 13, 2009 that Hackert had spoken with Bruegmann, and Bruegmann had said that "LTIP was discussed in Board Meeting, is seen as guaranteed, stays as it is." However, the New York Branch was given authority to reallocate the LTIP distributions, in view of there being no discretionary bonuses for 2008, to include a greater number of recipients.

17. On or about January 15, 2009, GRM at Nordbank's Head Office in Germany confirmed the final LLP's taken in all the Branches and Subsidiaries of Nordbank, including the New York Branch. Head Office GRM's LLPs for the New York Branch were consistent with the LLP numbers proposed by the New York Branch as part of the normal year-end closing process.

18. On information and belief, on or about January 18, 2009, the New York Branch sent a proposal to Bruegmann and Rieck, asking to be allowed to increase the number of LTIP participants for 2008 to include additional key performers, and to mitigate problems anticipated with Nordbank's zero discretionary bonus policy. This proposal also reflected the total amount of the LTIP distribution to be made for 2006-2008. The entire process was transparent.

19. As of this time in January 2009, the LLPs for the New York Branch had been examined and determined by the New York Branch and Nordbank's Global GRM group. Had there been any basis in the LLPs for the New York Branch to

change the amount on which the LTIP distribution was based, that basis would have been known to Bruegmann and Rieck by the third week of January 2009.

20. On or about January 21, 2009, the New York Branch requested final approval from Bruegmann and Rieck of the LTIP distribution. ***On or about January 22, 2009, Bruegmann and Rieck gave their approval.*** Bruegmann's approval was verbal (to Hackert); Rieck's approval was written. Bruegmann's written approval – copied to *Nonnenmacher*, among others – was issued on January 30, 2009, ***after*** the first issue arose as to additional LLPs possibly being taken.

21. Nordbank, like many of its peer banks, designated a day in January as its “compensation announcement day;” that is, the day in January on which employees' bonuses and LTIP awards for the prior year, and any changes in compensation for the new year, would be announced. January 23, 2009, was the day designated by the New York Branch as the compensation announcement day with respect to 2008. The compensation announcement day necessarily precedes the actual payroll date (in this case, February 13, 2009) by two to three weeks, in order to allow employees to determine their 401k contributions to be deducted from their compensation awards, based on IRS regulations. HR must be advised of such 401k contributions before starting the payroll process, which in turn precedes the payroll itself by at least a week, in order to properly manage the benefits and tax calculations involved, as well as to properly fund the payroll accounts as necessary.

22. On or about January 23, 2009, the New York Branch issued letters to all LTIP recipients setting forth their LTIP awards for 2006-2008 and stating “All

awards will be paid to you via Payroll on February 13, 2009 [as February 15, 2009 was a Sunday] less statutory deductions.”

23. On or about January 26, 2009, Kiser was informed by various members of the New York Branch, including Timothy Ball (General Manager Financial Markets NY), Orly Watson (Head of Finance NY-Branch) and Herbert Maloney (Head of Middle-Office NY-Branch), about a disagreement with Nordbank’s Head Office concerning LLPs involving two transactions called Capmark Financial Group Inc. (“Capmark”) and RBS Greenwich Capital Markets (“RBS”). In both cases, the responsible New York Branch personnel did not agree with Head Office’s viewpoint on these LLPs, because (1) these two credits were not in default at that time and (2) the Head of Finance in New York believed the accounting treatment of Capmark was in conflict with International Financial Reporting Standards (“IFRS”). In addition, the Capmark transaction was originated by the Financial Institutions Group in Nordbank’s Head Office in Germany, and was only booked in the New York Branch due to some alleged tax advantages in Germany. The Capmark LLP, if any, therefore should have had no direct impact on the LTIP of the New York Branch.

24. From January 26 through February 3, 2009, both the front office and the back office staff of the New York Branch reviewed the proposed Capmark and RBS impairments, including IFRS accounting issues, with various senior Nordbank officers, including the Global Heads of Finance and GRM in Germany. On or about February 3, 2009, Nordbank’s Head Office Accounting wrote to the Head of Finance in New York Branch, that that Head Office of Nordbank agreed with the New York Branch’s assessment concerning accounting treatment under IFRS. However,

Nordbank's Head Office GRM determined, without explanation, to take a "General" LLP approach with respect to the Capmark transaction.

25. On or about February 2, 2009, a meeting was held between Senior Management of the New York Branch and Senior Executives of KPMG New York and Germany, to discuss all matters concerning the year-end closing process. At no time during the entire discussion did the KPMG personnel mention any further pending LLP impairments or problems, nor was there any suggestion by KPMG that the New York Branch should handle the impending LTIP distribution differently. KPMG New York and KPMG Germany even disagreed with each other about the correct accounting treatment of the Capmark and RBS transactions.

26. On or about February 4, 2009, Hackert as HR Director for the New York Branch commenced the payroll process for the February 13, 2009 payments to Nordbank employees, including the LTIP distribution. At or about that time, Kiser sent senior officials of Nordbank, including Nonnenmacher and Rieck, an update concerning Nordbank's highly unusual handling of the Capmark and RBS transactions. Kiser received no response at all to his communication, much less any instruction to handle the impending LTIP distribution differently.

27. On or about February 5, 2009, Kiser sent an e-mail to board members of Nordbank, including Nonnenmacher, informing them about the final examination report of the New York Federal Reserve Board (the "Fed") of the New York Branch, indicating the adequacy of the New York Branch's LLPs as of year-end 2008. Kiser received no response at all to his communication, much less any instruction to handle the impending LTIP distribution differently.



28. At or about this time, Kiser received an e-mail indicating that KPMG and Head Office GRM had decided to add additional LLPs in the amount of \$125 million. On information and belief, these additional LLPs (1) were part of an agreement negotiated between Nordbank GRM and Nordbank's outside auditors, (2) were not properly justified as such and agreed upon with the officers and Board members of Nordbank responsible for the affected business units, and (3) were ordered by Nonnenmacher as part of his scheme to, among other things, manipulate the profits and losses of Nordbank to his own personal and political advantage.

29. At this time KPMG and Head Office GRM decided to add these LLPs, *it was fully known to the senior officials of Nordbank in Germany that the LTIP distributions for 2006-2008 would be made on February 13, 2009.* Not a single person within Nordbank or at KPMG suggested in any way, shape or form to Kiser or anyone else at Nordbank that the LTIP distributions should not be made on February 13. *It is obvious that Nordbank, at the highest levels, considered the last-minute LLPs to be a separate matter from the LTIP distributions for 2006-2008.*

30. The LTIP distributions for 2006-2008 were made on February 13, 2009 as previously scheduled and as promised in the January 23, 2009 award letters.

31. The last-minute, unexplained LLPs caused what internal Nordbank e-mails referred to as "chaos" from an accounting viewpoint, a situation commented on several times in the Branch Special Asset Oversight Committee. On information and belief, the process of implementing these changes and reconciling Nordbank's books continued past February 13, 2009. On further information and belief, the Fed later questioned why the New York Branch booked some of the additional "individual" LLPs

where (1) no defaults existed at that time and (2) the accounts were not reported by the New York Branch loan systems as being on “non-accrual.”

32. On February 18, 2009, KPMG issued its final draft to Nordbank’s Home Office in Germany of its year-end closing report with respect to the New York Branch. ***KPMG was fully aware of both the LTIP distributions for 2006-2008 and the last-minute LLPs; yet KPMG’s report indicated no problems of any type with respect to the New York Branch.***

33. The LTIP program was designed to last for five years, of which 2006-2008 were the first three years. The last-minute LLPs ordered by Nonnmacher in February 2009 created a possible anomaly for the LTIP accounting for 2009-2010 since it was foreseeable that the ultimate losses (or lack thereof) attributable to the credits that were the subject of the LLPs would differ considerably from the LLPs themselves (which, on information and belief, has already proven to be the case).

34. In February and March 2009, the Compensation Committee, including Kiser, wrote several memos, including to Bruegmann and Rieck, addressing the possible anomalies for the LTIP plan created by the last-minute LLPs. ***In those memos, Kiser, on behalf of the Compensation Committee, referred to the fact that the 2008 LTIP distribution had not been changed on account of the last-minute LLPs.*** Thus, again, this fact was no secret – every responsible senior official at Nordbank, including Bruegmann, was fully aware of it. Not a single person at Nordbank suggested there was anything amiss.

35. To the contrary, Bruegmann’s only written response to these detailed memos on the impact of the last-minute LLPs on the LTIP was a short vulgarity

cursing the bad weather that Bruegmann apparently was forced to endure while vacationing in the south of Spain.

36. In March, April and May 2009, Kiser brought the issue of the impact of the LLPs on the LTIP to Bruegmann's attention several more times, in meetings and telephone conferences. ***Bruegmann knew the amount of the LTIP distribution for 2008 and never suggested it was erroneous in any way.***

37. Any doubt that the LTIP Counterclaim is just a bogus, made-up-after-the-fact non-issue is dispelled by the subsequent events leading up to Kiser's wrongful termination by Nordbank in September 2009.

38. As fully set forth in the Complaint in this action, which is incorporated herein by reference, ***from May through September 17, 2009 Nordbank investigated Kiser in excruciating detail, including with the assistance of outside counsel, outside accountants and private investigators, searching (in vain) for the slightest thing that could be portrayed as wrongdoing.*** The result of this investigation was a report by the accounting firm PriceWaterhouseCoopers that lists in detail any item that could be construed as "Cause" to terminate Kiser.

39. ***Even though the 2006-2008 LTIP distribution and the last-minute LLPs were fully known to its auditors and KPMG, the investigative report concerning Kiser does not even mention them.*** It is simply impossible that the LTIP distribution was, in fact, considered wrongful in any way by Nordbank. It is obvious that the LTIP Counterclaim has been made up in bad faith long after the fact.

**B. Nordbank's Counterclaim Concerning  
the Auto Lease Is Equally Spurious**

40. Nordbank also counterclaims against Kiser for amounts it claims to have spent on a company car used by Kiser in excess of the \$1,000 per month provided as a company car allowance in the Employment Agreement.

41. This Counterclaim completely ignores the fact that, in addition to the Employment Agreement's provisions relating to auto use, Nordbank had *company policies* (the "Company Auto Policies") relating to auto use by officers and directors at the "M-1" level, which included Kiser.

42. The Company Auto Policies in effect during the period of Kiser's employment with Nordbank were in German and contained a number of provisions that were based on auto leasing practices in Germany. Auto leasing practices in the United States differ in material respects from auto leasing practices in Germany.

43. In view of the disparity between auto leasing practices in Germany and those in the United States, Kiser consulted with Rainer Krause ("Krause"), Nordbank's Global Head for Facilities (and the highest responsible office at Nordbank with respect to company cars). Kiser sought Krause's direction as to how to apply the Company Auto Policies for all cars in the United States.

44. Under the Company Auto Policies as applied in Germany, certain fuel, maintenance and lease down payments were paid for by Nordbank, not the employee, above and beyond whatever the particular employment agreement provided. Krause directed Kiser that, in order to apply the Company Auto Policies in the United States in a manner equivalent to how they were applied in Germany, the New York

Branch should reimburse applicable employees for the same fuel, maintenance and lease down payments as would be covered by the Company Auto Policies in Germany.

45. Kiser simply applied the Company Auto Policies to himself and others at the New York Branch as Krause directed him to on behalf of Nordbank. Adherence to these policies was reviewed in the normal course by the responsible persons other than those receiving the reimbursement. Nordbank's Counterclaim concerning automobile expenses, like its LTIP Counterclaim, has been made up after-the-fact and is completely without merit.

**AS AND FOR A FIRST AFFIRMATIVE DEFENSE**

46. The Counterclaims fail to state a claim on which relief may be granted.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE**

47. The Counterclaims are barred by the doctrine of ratification.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE**

48. The Counterclaims are barred by the doctrine of waiver.

**AS AND FOR A FOURTH AFFIRMATIVE DEFENSE**

49. The Counterclaims are barred by the doctrine of estoppel.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE**

50. The Counterclaims are barred by the parties' course of dealing.

**AS AND FOR A SIXTH AFFIRMATIVE DEFENSE**

51. The Counterclaims are barred by the doctrine of laches.

**AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE**

52. The Counterclaims are barred by an accord and satisfaction.

**AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE**

53. The Counterclaims are barred by Nordbank's unclean hands.

**AS AND FOR A NINTH AFFIRMATIVE DEFENSE**

54. The Counterclaims are barred because the January 23, 2009 award letters were binding on Nordbank.

**AS AND FOR A TENTH AFFIRMATIVE DEFENSE**

55. The Counterclaims are barred by Nordbank's failure to mitigate its alleged damages.

**AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE**

56. The Counterclaims are barred because the damages sought are speculative.

**AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE**

57. The Counterclaims are barred because Nordbank suffered no actual damages from the conduct of Kiser alleged and, as such, cannot recover damages from Kiser.

**AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE**

58. The Counterclaims are barred by Nordbank's internal policy regarding the LTIP, which was to treat the LTIP as an incentive plan with a long-term focus whose payments should be based on the performance of the New York Branch over several years.

**AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE**

59. The Counterclaims are barred by the terms of Section 8(c) of the LTIP Plan effective June 1, 2006, pursuant to which Kiser, as a member of the Compensation Committee of the New York Branch acting with respect to the LTIP, cannot be “directly or indirectly responsible or under any liability by reason of any action or default by him as a member of the Committee, or the exercise of or failure to exercise any power or discretion as such member.”

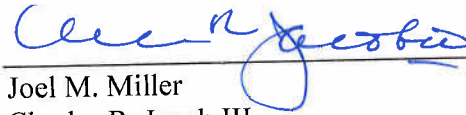
**AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE**

60. The Counterclaims are barred by the doctrines of setoff or recoupment because, under Section 8(c) of the LTIP Plan, Nordbank is required to “indemnify and save harmless each member of the Committee against any and all expenses and liabilities arising out of his own membership on the Committee.”

WHEREFORE, plaintiff Kiser demands judgment in his favor and against defendant Nordbank dismissing the Counterclaims and awarding Kiser his costs, including reasonable attorneys’ fees pursuant to Nordbank’s indemnity obligations to Kiser under Section 8(c) of the LTIP Plan, and/or pursuant to Fed. R. Civ. P. 11 in view of the completely frivolous nature of Nordbank’s Counterclaims.

Dated: New York, New York  
March 11, 2010

MILLER & WRUBEL P.C.



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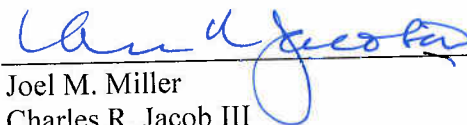
*Attorneys for Plaintiff*

**DEMAND FOR JURY TRIAL**

Pursuant to Fed. R.Civ. P. 38(b), plaintiff hereby demands a jury trial of  
all claims and issues set forth in the Counterclaims that are triable by a jury.

Dated: New York, New York  
March 11, 2010

MILLER & WRUBEL P.C.



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