

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ROLAND KISER,

Plaintiff,

-against-

HSH NORDBANK AG,

Defendant.

09 Civ. 8849 (JSR) (AJP)

**HSH NORDBANK AG'S  
ANSWER, AFFIRMATIVE  
DEFENSES AND  
COUNTERCLAIMS**

HSH NORDBANK AG,

Counter-claimant,

-against-

ROLAND KISER,

Counter-defendant.

Defendant and Counter-claimant HSH Nordbank AG (“HSH Nordbank” or the “Bank”), by and through its undersigned counsel of record, Latham & Watkins LLP, respectfully submits its Answer, Affirmative Defenses and Counterclaims as follows:

**ANSWER TO COMPLAINT**

1. HSH Nordbank admits that Kiser held the titles of General Manager and Chief Operating Officer (“COO”) of HSH Nordbank’s New York Branch from June 2002 until September 17, 2009 and further admits that the New York Branch is a New York State licensed branch of a German Landesbank. HSH Nordbank denies the remaining allegations in Paragraph 1 of the Complaint.

2. HSH Nordbank admits that Landesbanks are state-majority-owned banks. HSH Nordbank denies the remaining allegations in Paragraph 2 of the Complaint.

3. HSH Nordbank admits that Kiser had a role in HSH Nordbank achieving and maintaining Financial Holding Company status with the Federal Reserve Board in January 2009. HSH Nordbank further admits that from 2002 through 2008, the New York Branch generated approximately \$1.1 billion in revenue and a net operating result of approximately \$548 million, and that Kiser co-led the growth of the New York Branch. HSH Nordbank denies that the New York Branch was the best performing branch of HSH Nordbank from 2002 through 2008. HSH Nordbank further denies that Kiser's performance as general manager and COO was exemplary at all times, and denies that Kiser was proposed by members of HSH Nordbank's Board of Directors (the "Board") to be Group COO and a Board member. HSH Nordbank lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 3 of the Complaint.

4. HSH Nordbank admits the allegations in Paragraph 4 of the Complaint, except denies that the exceptions in the Agreement are only resignation or termination for "cause".

5. HSH Nordbank denies the allegations in Paragraph 5 of the Complaint.

6. HSH Nordbank denies the allegations in Paragraph 6 of the Complaint.

7. HSH Nordbank admits that the Board, by a 2-0 vote, terminated Kiser's employment for cause on September 17, 2009. HSH Nordbank further admits that the German elections were held on September 27, 2009. HSH Nordbank denies the remaining allegations in Paragraph 7 of the Complaint.

8. HSH Nordbank denies the allegations in Paragraph 8 of the Complaint.

9. HSH Nordbank admits that “Nordbank first hired its outside counsel, the recognized New York law firm Moses & Singer (“M&S”), to investigate these allegations”. HSH Nordbank lacks knowledge or information sufficient to form a belief about the truth of the allegation regarding mental states of the former employees. HSH Nordbank denies the remaining allegations in Paragraph 9 of the Complaint.

10. HSH Nordbank denies that Proskauer conducted an investigation which “exonerated” Kiser. HSH Nordbank lacks knowledge or information sufficient to form a belief about the truth of the allegation regarding mental states of the former employees. HSH Nordbank denies the remaining allegations in Paragraph 10 of the Complaint.

11. HSH Nordbank denies the allegations in Paragraph 11 of the Complaint.

12. HSH Nordbank admits, on information and belief, that the former employees received “right to sue” letters from the EEOC. HSH Nordbank further admits that both former employees filed separate legal actions. HSH Nordbank lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 12 referring to other “allegations.”

13. HSH Nordbank denies that the second motion was filed on October 9, 2009 and denies the allegations in the last sentence of Paragraph 13. HSH Nordbank admits the remaining allegations in Paragraph 13 of the Complaint.

14. HSH Nordbank denies the allegations in Paragraph 14 of the Complaint.

15. HSH Nordbank admits the allegations in Paragraph 15 of the Complaint, except denies that there were no significant losses at the New York Branch.

16. HSH Nordbank admits that the allegations of the complaints were the subject of media attention in Germany, and denies the remaining allegations in Paragraph 16 of the Complaint.

17. HSH Nordbank admits that neither the payment to Goldman Sachs nor the Omega transaction in any way implicated the New York Branch. HSH Nordbank denies the remaining allegations in Paragraph 17 of the Complaint.

18. HSH Nordbank admits that general elections in Schleswig-Holstein were held in September 2009. HSH Nordbank further admits that the Bank and Prof. Dr. Dirk Jens Nonnenmacher (“Dr. Nonnenmacher”) became subjects of debate in that election. HSH Nordbank denies the remaining allegations in Paragraph 18 of the Complaint.

19. HSH Nordbank admits that an investigation into Kiser’s conduct commenced in or around May or June of 2009. HSH Nordbank denies the remaining allegations in Paragraph 19 of the Complaint.

20. HSH Nordbank denies the allegations in Paragraph 20 of the Complaint.

21. HSH Nordbank admits that Kiser was terminated “for cause” on September 17, 2009. HSH Nordbank denies the remaining allegations in Paragraph 21 of the Complaint.

22. HSH Nordbank denies the allegations in Paragraph 22 of the Complaint.

23. HSH Nordbank admits that Kiser’s improper handling of employee investigations was among the reasons he was terminated for cause. HSH Nordbank denies the remaining allegations in Paragraph 23 of the Complaint.

24. HSH Nordbank denies the allegations in Paragraph 24 of the Complaint.

25. HSH Nordbank admits that it issued press releases on September 21, 2009 and October 14, 2009. HSH Nordbank denies the remaining allegations in Paragraph 25 of the Complaint.

26. HSH Nordbank admits, on information and belief, the allegations in Paragraph 26 of the Complaint.

27. HSH Nordbank admits the allegations in Paragraph 27 of the Complaint.

28. HSH Nordbank admits the allegations in Paragraph 28 of the Complaint.

29. HSH Nordbank admits the allegations in Paragraph 29 of the Complaint.

30. HSH Nordbank admits the allegations in Paragraph 30 of the Complaint.

31. HSH Nordbank admits that Kiser was hired by the Bank in 2002 and had over 20 years experience in the international banking industry. HSH Nordbank lacks knowledge or information sufficient to form a belief about the truth of the allegations about Kiser's reputation with U.S. regulators. HSH Nordbank denies the remaining allegations in Paragraph 31 of the Complaint, including the allegation that his termination was wrongful.

32. HSH Nordbank admits the allegations in Paragraph 32 of the Complaint.

33. HSH Nordbank admits that, by 2008, the New York Branch had generated approximately \$1.1 billion in revenue equating to a net operating result of approximately \$548 million. HSH Nordbank denies the remaining allegations in Paragraph 33 of the Complaint.

34. HSH Nordbank admits the allegations in Paragraph 34 of the Complaint, except denies that the Employment Agreement was effective through June 1, 2013, and further denies that "Kiser's success was acknowledged by Nordbank as reflected by, among other things, Nordbank's entering into the Employment Agreement with Kiser."

35. HSH Nordbank admits that its organizational structure includes Regional Heads and Global Heads of different substantive divisions that supervise their areas depending on where they are located geographically. HSH Nordbank lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 35 of the Complaint.

36. HSH Nordbank lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 36 of the Complaint.

37. HSH Nordbank admits that there was a restructuring in 2007. HSH Nordbank lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 37 of the Complaint.

38. HSH Nordbank admits that there was a restructuring and that HSH Nordbank employee Carolina Rappold (“Rappold”) was scheduled to relocate from Germany to New York to assume her position at the New York Branch on January 1, 2008. HSH Nordbank further admits that Rappold was interviewed by both branch managers of the New York Branch in August 2007. HSH Nordbank lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 38 of the Complaint.

39. HSH Nordbank admits that the addition of Rappold in New York would have given the New York branch three M&C executives. HSH Nordbank lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 39 of the Complaint.

40. HSH Nordbank admits that Krasner and Colamaria made a business trip to Germany in August 2007 that included a visit to the home office. HSH Nordbank lacks

knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 40 of the Complaint.

41. HSH Nordbank admits that the restructuring of the Marketing and Communications Department was announced on September 18, 2007. HSH Nordbank admits that Krasner and Colamaria complained that Kiser was handling their employment unfairly because of a paramour relationship between Kiser and another employee of the New York Branch, Melissa Campfield. HSH Nordbank denies that Krasner and Colamaria first complained about the paramour relationship on or after September 18, 2007. HSH Nordbank lacks knowledge and information sufficient to form a belief about the truth of the remaining allegations in Paragraph 41 of the Complaint.

42. HSH Nordbank lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 42 of the Complaint.

43. HSH Nordbank admits that Rappold's employment at the New York Branch was scheduled to begin on January 1, 2008. HSH Nordbank further admits that the employments of Krasner and Colamaria were terminated on November 5, 2007. HSH Nordbank denies the allegation that the terminations were known to and approved by all responsible senior officials of HSH Nordbank. HSH Nordbank denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 43 of the Complaint.

44. HSH Nordbank admits that both Krasner and Colamaria filed lawsuits against HSH Nordbank in the Southern District of New York, and that Krasner's lawsuit also named Kiser as an individual defendant. HSH Nordbank lacks knowledge or information sufficient to form a belief about the truth of the complaint "allegations" referenced in the remaining allegations in Paragraph 44 of the Complaint.

45. HSH Nordbank admits the allegations in Paragraph 45 of the Complaint.

46. HSH Nordbank denies the allegations in Paragraph 46 of the Complaint.

47. HSH Nordbank admits that the allegations relating to Rhona Aledia and David Lopez involved the Bank's Commodity Finance division operating primarily in South America, and further admits that those allegations "had nothing to do (a) with Kiser, other than that he was necessarily one of the persons involved in investigating them; and (b) with the Krasner and Colamaria allegations." HSH Nordbank denies the remaining allegations in Paragraph 47 of the Complaint.

48. HSH Nordbank admits the allegations in Paragraph 48 of the Complaint.

49. HSH Nordbank denies that "those investigations were thorough or impartial." HSH Nordbank further denies that "[b]oth exonerated Kiser, on behalf of Nordbank, as innocent of the Krasner/Colamaria allegations." HSH Nordbank admits the remaining allegations in Paragraph 49 of the Complaint.

50. HSH Nordbank admits that the M&S "investigation" started in or around September 2007 and concluded in or around October 2007. HSH Nordbank denies the allegations in the second sentence of Paragraph 50. HSH Nordbank lacks knowledge or information sufficient to form a belief about the truth of the third and fourth sentences of Paragraph 50 of the Complaint. HSH Nordbank denies the allegations in the last sentence of Paragraph 50.

51. HSH Nordbank denies that the New York Branch was never "accused" of "having either of these problems." HSH Nordbank admits the remaining allegations in Paragraph 51 of the Complaint.

52. HSH Nordbank admits the allegations in Paragraph 52 of the Complaint.



53. HSH Nordbank admits that it is a state-majority owned Landesbank and further admits that elections were held on September 27, 2009. HSH Nordbank denies the remaining allegations in Paragraph 53 of the Complaint.

54. HSH Nordbank admits that the German media learned of the allegations in the Krasner and Colamaria complaints against HSH Nordbank and ran sensationalistic articles about them. HSH Nordbank lacks knowledge or information sufficient to form a belief as to the truth of the allegations that “those allegations were untrue” and denies the remaining allegations in Paragraph 54 of the Complaint.

55. HSH Nordbank lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 55 about Kiser and his family. HSH Nordbank denies the remaining allegations in Paragraph 55 of the Complaint.

56. HSH Nordbank admits that the Laender Parliament passed a resolution that the annual compensation of any HSH Nordbank Board member was not to exceed €500,000. HSH Nordbank further admits that general elections in Schleswig-Holstein were held on September 27, 2009. HSH Nordbank denies the remaining allegations in Paragraph 56 of the Complaint.

57. HSH Nordbank denies the allegations in Paragraph 57 of the Complaint.

58. HSH Nordbank denies the allegations in Paragraph 58 of the Complaint.

59. HSH Nordbank admits that the Bank issued a press release on August 26, 2009. HSH Nordbank denies the remaining allegations in Paragraph 59 of the Complaint.

60. HSH Nordbank admits that there was an August 26, 2009 Press Release and admits that the Release included the quoted words. HSH Nordbank denies the remaining allegations of Paragraph 60 of the Complaint.

61. HSH Nordbank denies the allegations in Paragraph 61 of the Complaint.

62. HSH Nordbank denies the allegations in Paragraph 62 of the Complaint.

63. HSH Nordbank denies the allegations in Paragraph 63 of the Complaint.

64. HSH Nordbank denies the allegations in Paragraph 64 of the Complaint.

65. HSH Nordbank admits that Dr. Nonnenmacher caused a short summary of the “new investigation” to be prepared for the Board. HSH Nordbank further admits that the Board voted on a resolution terminating Kiser’s employment for cause. HSH Nordbank denies the remaining allegations in Paragraph 65 of the Complaint.

66. HSH Nordbank denies the allegations in Paragraph 66 of the Complaint.

67. HSH Nordbank denies the allegations in Paragraph 67 of the Complaint.

68. HSH Nordbank denies the allegations in Paragraph 68 of the Complaint.

69. HSH Nordbank admits that the Board voted 2-0 to terminate Kiser’s employment for cause. HSH Nordbank denies the remaining allegations in Paragraph 69 of the Complaint.

70. HSH Nordbank admits that general elections in Schleswig-Holstein were held on September 27, 2009 and that there was a September 17, 2009 Press Release, and HSH Nordbank further denies Kiser’s characterization of that release. HSH Nordbank denies the remaining allegations in Paragraph 70 of the Complaint.

71. HSH Nordbank denies the allegations in Paragraph 71 of the Complaint.

72. HSH Nordbank denies the allegations in Paragraph 72 of the Complaint.

73. HSH Nordbank denies the allegations in Paragraph 73 of the Complaint.

**AS AND FOR A FIRST CAUSE OF ACTION  
(BREACH OF CONTRACT)**

74. HSH Nordbank repeats and incorporates its responses to Paragraphs 1 through 73, as if fully set forth herein.

75. HSH Nordbank admits the allegations in Paragraph 75 of the Complaint, except denies that the Employment Agreement was effective through June 1, 2013.

76. HSH Nordbank admits that there is at the Bank a favorable review relating to Kiser, and denies the remaining allegations in Paragraph 76 of the Complaint.

77. HSH Nordbank denies the allegations in Paragraph 77 of the Complaint.

78. HSH Nordbank denies the allegations in Paragraph 78 of the Complaint.

79. HSH Nordbank denies the allegations in Paragraph 79 of the Complaint.

80. HSH Nordbank denies the allegations in Paragraph 80 of the Complaint.

81. HSH Nordbank denies the allegations in Paragraph 81 of the Complaint.

**AS AND FOR A SECOND CAUSE OF ACTION  
(VIOLATION OF NEW YORK LABOR LAW)**

82. HSH Nordbank reasserts and incorporates its responses to Paragraphs 1 through 81, as if fully set forth herein.

83. HSH Nordbank admits the allegations in Paragraph 83 of the Complaint.

84. HSH Nordbank denies the allegations in Paragraph 84 of the Complaint.

85. HSH Nordbank denies the allegations in Paragraph 85 of the Complaint.

86. HSH Nordbank denies the allegations in Paragraph 86 of the Complaint.

87. HSH Nordbank denies the allegations in Paragraph 87 of the Complaint.

**AS AND FOR A THIRD CAUSE OF ACTION  
(DEFAMATION)**

88. HSH Nordbank reasserts and incorporates its responses to Paragraphs 1 through 87, as if fully set forth herein.

89. HSH Nordbank admits the existence of the August 26, 2009 and September 17, 2009 press releases and further admits the existence of the Board Summary. HSH Nordbank denies the remaining allegations in Paragraph 89 of the Complaint.

90. HSH Nordbank admits the existence of the August 26, 2009 and September 17 2009 press releases and further admits that the press releases were posted on HSH Nordbank's English language website. HSH Nordbank denies the remaining allegations in Paragraph 90 of the Complaint.

91. HSH Nordbank denies the allegations in Paragraph 91 of the Complaint.

92. HSH Nordbank denies the allegations in Paragraph 92 of the Complaint.

93. HSH Nordbank denies the allegations in Paragraph 93 of the Complaint.

94. HSH Nordbank denies the allegations in Paragraph 94 of the Complaint.

95. HSH Nordbank lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 95 of the Complaint, but to the extent any such allegation implies wrongdoing by HSH Nordbank, HSH Nordbank denies such allegation.

96. HSH Nordbank denies the allegations in Paragraph 96 of the Complaint.

97. HSH Nordbank denies the allegations in Paragraph 97 of the Complaint.

98. HSH Nordbank denies the allegations in Paragraph 98 of the Complaint.

**AS AND FOR A FOURTH CAUSE OF ACTION  
(FRAUD)**

99-104. This cause of action was dismissed by stipulation of the parties and an Order of the Court dated January 10, 2010.

**AS AND FOR A FIFTH CAUSE OF ACTION  
(AGREEMENT TO INDEMNIFY)**

105. HSH Nordbank reasserts and incorporates its responses to Paragraphs 1 through 104, as if fully set forth herein.

106. HSH Nordbank denies the allegations in Paragraph 106 of the Complaint.

107. HSH Nordbank denies the allegations in Paragraph 107 of the Complaint.

108. HSH Nordbank lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 108 of the Complaint.

109. HSH Nordbank denies the allegations in Paragraph 109 of the Complaint.

**AS AND FOR A SIXTH CAUSE OF ACTION  
(CONVERSION)**

110. HSH Nordbank reasserts and incorporates its responses to Paragraphs 1 through 109, as if fully set forth herein.

111. HSH Nordbank denies the allegations in Paragraph 111 of the Complaint.

112. HSH Nordbank denies the allegations in Paragraph 112 of the Complaint.

113. HSH Nordbank denies the allegations in Paragraph 113 of the Complaint.

114. HSH Nordbank denies the allegations in Paragraph 114 of the Complaint.

**AS AND FOR A SEVENTH CAUSE OF ACTION  
(INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS)**

115-123. Following HSH Nordbank's motion to dismiss, this cause of action was dismissed by Order of the Court dated January 19, 2010.

**REQUEST FOR PUNITIVE DAMAGES**

124. HSH Nordbank reasserts and incorporates its responses to Paragraphs 1 through 123, as if fully set forth herein.

125. HSH Nordbank denies the allegations in Paragraph 125 of the Complaint.

126. HSH Nordbank denies the allegations in Paragraph 126 of the Complaint.

127. HSH Nordbank denies the allegations in Paragraph 127 of the Complaint

128. HSH Nordbank denies the allegations in Paragraph 128 of the Complaint.

129. HSH Nordbank denies the allegations in Paragraph 129 of the Complaint.

### **AFFIRMATIVE DEFENSES**

#### **FIRST AFFIRMATIVE DEFENSE**

The Complaint fails, in whole or in part, to state claim upon which relief can be granted.

#### **SECOND AFFIRMATIVE DEFENSE**

Plaintiff's claims for breach of contract and/or violation of New York's Labor Law fail because HSH Nordbank had cause to terminate Plaintiff's employment, and HSH Nordbank at all times acted in compliance with all terms of Plaintiff's Employment Agreement.

#### **THIRD AFFIRMATIVE DEFENSE**

Plaintiff's claims for unpaid wages and compensation fail pursuant to the faithless servant doctrine.

#### **FOURTH AFFIRMATIVE DEFENSE**

With respect to the purportedly defamatory statements made in HSH Nordbank's press releases, Plaintiff's defamation claim fails because the statements regarding Plaintiff's conduct were true when made. The other alleged statements referenced in Plaintiff's defamation claim also provide no basis for a cause of action because the alleged statements were true when made.

#### **FIFTH AFFIRMATIVE DEFENSE**

With respect to the purportedly defamatory statements made to United States and German regulators, Plaintiff's defamation claim fails because any purportedly defamatory statements were made were subject to absolute privilege.

#### **SIXTH AFFIRMATIVE DEFENSE**

Plaintiff fails to state a claim for defamation because the purportedly defamatory statements were made subject to conditional, common interest, or qualified privilege, and Plaintiff has failed to demonstrate that the allegedly defamatory statements were made with actual malice.

#### **SEVENTH AFFIRMATIVE DEFENSE**

The Complaint fails, in whole or in part, because even assuming wrongdoing by HSH Nordbank, which HSH Nordbank expressly denies, it was not the proximate cause of Plaintiff's alleged injuries; Plaintiff's alleged injuries resulted from prior, intervening, and/or subsequent conditions, causes, or occurrences attributable to Plaintiff or third parties over whom HSH Nordbank exercises no control, and for whom HSH Nordbank is not responsible.

#### **EIGHTH AFFIRMATIVE DEFENSE**

Even if Plaintiff is entitled to recover damages, which HSH Nordbank expressly denies, any damages to which Plaintiff is entitled are limited, or eliminated altogether, by the discovery of after-acquired evidence.

#### **NINTH AFFIRMATIVE DEFENSE**

Plaintiff has failed to take adequate action to mitigate any damages that allegedly were sustained.

#### **TENTH AFFIRMATIVE DEFENSE**

Plaintiff fails to allege a cause of action demonstrating entitlement to attorneys' fees and/or punitive damages, or the relief sought is not permitted by law.

**ELEVENTH AFFIRMATIVE DEFENSE**

The Complaint fails, in whole or in part, because Plaintiff is estopped by his conduct from recovering for the causes of action alleged.

**TWELFTH AFFIRMATIVE DEFENSE**

The Complaint fails, in whole or in part, because Plaintiff's claims are barred by the doctrine of unclean hands.

**THIRTEENTH AFFIRMATIVE DEFENSE**

The Complaint fails, in whole or in part, because Plaintiff's claims are frivolous, brought in bad faith, and/or are brought for an improper purpose.

**FOURTEENTH AFFIRMATIVE DEFENSE**

The Complaint fails, in whole or in part, because each and every one of HSH Nordbank's allegedly improper actions was taken for a legitimate business purpose and/or amount to an appropriate exercise of supervisory authority.

**PRAYER FOR RELIEF**

**WHEREFORE**, HSH Nordbank prays for judgment as follows:

- (a) That Plaintiff takes nothing by way of the Complaint against HSH Nordbank and that the Complaint be dismissed with prejudice;
- (b) That HSH Nordbank be awarded reasonable attorneys' fees and cost of suit; and
- (c) That HSH Nordbank be awarded such other and further relief that the Court deems just and proper.



## **COUNTERCLAIM**

Defendant and Counter-claimant HSH Nordbank AG (“HSH Nordbank” or the “Bank”), by and through its undersigned counsel of record, Latham & Watkins LLP, hereby counterclaims against Plaintiff and Counter-defendant Roland Kiser (“Kiser”) as follows:

### **The Parties**

1. On information and belief, Kiser is a citizen of the State of New York residing at 3197 Clubhouse Road, Merrick, New York, 11156.
2. HSH Nordbank is a banking corporation organized pursuant to the laws of Germany, having its principal places of business in Hamburg and Schleswig-Holstein, Germany. HSH Nordbank maintains a branch in New York located at 230 Park Avenue, New York, New York, 10169.

### **Jurisdiction and Venue**

3. This Court has subject matter jurisdiction over this counterclaim pursuant to 28 U.S.C.A. § 1332(a)(2) because the amount in controversy exceeds \$75,000, exclusive of interest and costs, and this counterclaim is asserted against a citizen of New York by a foreign entity.
4. Pursuant to 28 U.S.C.A. § 1391, venue is appropriate in the Southern District of New York because Kiser filed the underlying lawsuit in this District, and a substantial part of the events giving rise to HSH Nordbank’s counterclaims took place in this District.
5. Both parties are subject to personal jurisdiction in this District. HSH Nordbank maintains a branch in this District, and, during the period relevant to this counterclaim, Kiser was employed in this District.

### **The Long-Term Incentive Plan**

6. In and around late 2005, HSH Nordbank's New York Branch (the "Branch") introduced a Long-Term Incentive Plan ("LTIP" or the "Plan") in order to benefit a select group of employees in the Branch. The Plan's duration was five years.

7. For each year following the LTIP's inception, the Compensation Committee (the "Committee"), which in 2008 was comprised of Kiser, former Global Head of Energy and former Branch general manager Klaus Bernhart, and the Branch's Head of Human Resources Dr. Björn Hackert, awarded LTIP participants--a group that included Kiser--a certain number of "units" out of a total of 10,000 units. A "unit" represented a participant's share in the accumulated LTIP pool.

8. Under the Plan, no payments could issue until after the close of the third year, at the earliest. Payments of any remaining amounts credited to the LTIP pool were to be made at the end of the fifth Plan year.

9. Pursuant to the Plan, the Branch could contribute to the LTIP pool only if cumulative pre-tax earnings met or exceeded a threshold set at 12% annual growth from an established baseline equal to pre-tax earnings for fiscal year 2005. The calculation of pre-tax earnings depends significantly on the difference between the Branch's profits and losses ("P&L") for each relevant fiscal year. If the LTIP earnings target was satisfied, the LTIP pool contribution would equal 10% of the difference between the Branch's pre-tax earnings for the relevant fiscal year and a 10% increase over the established baseline for pre-tax earnings for that year.

10. Loan loss provisions--expenses charged against the Branch's earnings to create reserves for anticipated losses on loans--constituted a loss which must be subtracted from the

Branch's profits for a fiscal year. As a result, recognition of loan loss provisions, like other losses, would reduce, and could eliminate altogether, the LTIP pool.

11. On or about January 9, 2009--several days before a meeting of HSH Nordbank's Board of Directors--Kiser and Dr. Hackert submitted a memorandum addressing the New York Branch's "2008 Bonus request", among other items, to Peter Rieck, then a member of HSH Nordbank's Board of Directors (the "Board"), and Dr. Stefan Brüggemann, Global Head of Human Resources. The memorandum stated that, LTIP awards "are due for payment February 15<sup>th</sup> 2009." That statement was false. Kiser knew that there was no requirement that such payments had to be made by February 15, 2009, if they were made at all. Nevertheless, Kiser actively sought to accelerate the payment of the LTIP awards.

12. At a meeting on January 13, 2009, the Board resolved that for 2008 the Bank would not pay a standard bonus to any employee. That decision did not preclude payment of contractually "guaranteed bonuses".

13. On or about January 24, 2009, Kiser was notified of a loan loss provision of approximately \$11 million affecting the Branch's earnings for fiscal year 2008. As of that date, no LTIP awards had issued. At that time, as a general manager and the Chief Operating Officer ("COO") of the Branch who admits to having responsibility for the Branch's "banking operation," Kiser had a duty to prevent any distribution of LTIP awards until the LTIP pool could be adjusted to account for the negative impact of the loan loss provisions on pre-tax earnings for fiscal year 2008.

14. On or about February 4 and 5, personnel from HSH Nordbank's Group Risk Management ("GRM") department informed Kiser that the Branch would need to book loan loss provisions and write-offs totaling approximately \$120 million for the year ended December 31,

2008 (and another \$8 million in equity write-offs). Kiser acknowledged in writing the existence of loan loss provisions for fiscal year 2008 that were not included in the Branch's earlier calculation of pre-tax earnings for 2008. At that time, no LTIP awards had issued.

15. As a general manager and the COO of the Branch, Kiser had a duty to prevent any distribution of the LTIP awards after he learned that the Branch's initial calculation of pre-tax earnings for fiscal year 2008 was incorrect due to the failure to apply the loan loss provisions. Instead, he withheld material information from key decision-makers at the Bank and actively sought to accelerate the payment of the LTIP awards without re-calculating the LTIP pool to account for the loan losses at the New York Branch.

16. The LTIP pool contribution for fiscal year 2008 was approximately \$5.37 million. Kiser himself recognized that the application of the loan loss reserves would reduce earnings for fiscal year 2008 to \$43.3 million--a level below the performance threshold the Branch needed in order for any funds to be added to the LTIP pool for 2008 results.

17. Although no one at the Branch was entitled to LTIP payments for 2008, Kiser caused those payments to be made to employees on February 13, 2009.

18. Directly benefiting from his own wrongful conduct, Kiser reaped one of the largest payouts among LTIP award recipients--approximately \$1.7 million.

#### **Kiser's Vehicle-Related Expenses**

19. Section 4(f) of Kiser's Employment Agreement provides:

During the Employment Term, the Company will provide a vehicle allowance to [Kiser] in the amount of USD 1,000.00 per month, which [Kiser] may use for the costs of leasing a motor vehicle, vehicle payments, operating expenses, insurance, maintenance, service, etc. [Kiser] understands and acknowledges that the Company shall not be responsible for any tax liabilities associated with such reimbursement in accordance with the Company's practices with respect to its executives. If [Kiser] leases a motor vehicle, [he] may continue to use such

vehicle at [his] own expense after the termination of his employment until the end of the lease term.

20. Rather than provide Kiser a monthly allowance of \$1,000, the Branch served as a lessee on Kiser's vehicle and paid the monthly lease rate to the lessor. Kiser was responsible to reimburse to HSH Nordbank on an annual basis any vehicle-related charges covered by the Bank and incurred on Kiser's behalf that exceeded Kiser's \$1,000 monthly allowance.

21. From June 2007 through the termination of Kiser's employment for cause on September 17, 2009, HSH Nordbank expended approximately \$21,599 for Kiser's vehicular expenses over and above Kiser's \$1,000 monthly vehicle allowance.

**COUNT 1**  
**BREACH OF FIDUCIARY DUTY**

22. HSH Nordbank repeats and incorporates the allegations in paragraphs 1 through 21 of this Counterclaim as if fully set forth herein.

23. As general manager and the Chief Operating Officer of the New York Branch, Kiser owed fiduciary duties to HSH Nordbank.

24. Kiser's fiduciary duties required him to prevent any issuance of the LTIP awards until those awards could be properly calculated based on the impact of the loan loss provisions on pre-tax earnings for fiscal year 2008.

25. Kiser breached his fiduciary duties to the Bank by intentionally accelerating the issuance of the LTIP awards on February 13, 2009, despite knowing that those awards were calculated using preliminary P&L figures that did not account for all loan loss provisions taken for the 2008 fiscal year.

26. As a proximate and direct result of Kiser's misconduct, HSH Nordbank was damaged. The Branch contributed approximately \$5.37 million to the LTIP pool based on the

preliminary P&L figures, when the LTIP pool contribution would have been \$0 if the loan loss provisions had been properly applied.

**WHEREFORE**, HSH Nordbank demands judgment against Kiser:

- (a) awarding \$5,370,000 damages, plus interest;
- (b) awarding HSH Nordbank reasonable attorney's fees and costs of suit; and
- (c) granting such other relief that the Court deems just and proper.

**COUNT 2**  
**FAITHLESS SERVANT DOCTRINE**

27. HSH Nordbank repeats and incorporates the allegations in paragraphs 1 through 26 of this Counterclaim as if fully set forth herein.

28. As a corporate officer of HSH Nordbank's New York Branch, Kiser owed fiduciary duties to the Bank.

29. In or around January and February of 2009, Kiser knew or should have known that significant loan loss provisions impacting the Branch's pre-tax earnings for fiscal year 2008 would affect materially the evaluation of the LTIP award payments.

30. As a general manager and the Chief Operating Officer of the New York branch, Kiser had fiduciary duties to stop the issuance of LTIP awards until the LTIP pool was recalculated based on the impact of the loan loss provisions on pre-tax earnings for fiscal year 2008.

31. Kiser intentionally failed to stop the issuance of the LTIP awards in order to ensure for himself a greater LTIP award than that to which he was entitled. Kiser therefore placed his own interest above that of the Bank, proximately causing HSH Nordbank damage.

32. Kiser's misconduct demonstrates his failure to exercise the utmost good faith and loyalty during the performance of his employment duties. His disloyal activities were directly

related to the performance of his duties, permeated his service to the Bank in its most material and substantial part, and directly and proximately caused damage to HSH Nordbank.

33. As a result of his faithlessness and disloyalty, Kiser must disgorge compensation earned during the entirety of his period of disloyalty, which spanned from at least January 24, 2009--when Kiser became aware of the first loan loss provision--through September 17, 2009--the date on which the Bank terminated Kiser's employment for cause.

**WHEREFORE**, HSH Nordbank demands judgment against Kiser:

- (a) awarding \$1,736,115 damages, plus interest, constituting the LTIP award that Kiser received on or about February 13, 2009;
- (b) awarding \$205,681.82 damages, plus interest, constituting the salary that Kiser received from HSH Nordbank during his period of his disloyalty;
- (c) awarding HSH Nordbank reasonable attorney's fees and costs of suit; and
- (d) granting such other relief that the Court deems just and proper.

**COUNT 3**  
**CONVERSION**

34. HSH Nordbank repeats and incorporates the allegations in paragraphs 1 through 33 of this Counterclaim as if fully set forth herein.

35. The Bank maintained legal ownership and immediate superior right of possession over the monies used to pay out LTIP awards at HSH Nordbank's New York Branch.

36. HSH Nordbank maintained legal ownership and immediate superior right of possession over the monies used to pay for Kiser's vehicle-related expenses from June 1, 2007 through September 17, 2009 which exceeded Kiser's \$1,000 monthly allowance.

37. By distributing from the LTIP pool monies that Kiser knew should have been excluded from the pool, and by failing to reimburse the Bank for expenses for which he was

personally responsible, Kiser purposefully and knowingly converted HSH Nordbank's funds, exercising an unauthorized dominion over those funds to the exclusion of the Bank's rights.

Kiser's misconduct directly and proximately caused damage to the Bank.

**WHEREFORE**, HSH Nordbank demands judgment against Kiser:

- (a) awarding \$5,370,000 damages, plus interest;
- (b) awarding approximately \$21,599 damages, plus interest, for HSH Nordbank's payments for Kiser's vehicle-related expenses for which Kiser has not reimbursed the Bank;
- (c) awarding punitive damages;
- (d) awarding HSH Nordbank reasonable attorney's fees and costs of suit; and
- (e) granting such other relief that the Court deems just and proper.

**COUNT 4**  
**UNJUST ENRICHMENT**

38. HSH Nordbank repeats and incorporates the allegations of paragraphs 1 through 37 of this Counterclaim as if fully set forth herein.

39. By manipulating the administration of the LTIP payouts, Kiser received an LTIP award that far exceeded the amount to which Kiser actually was entitled. As a direct result of Kiser's wrongful conduct, HSH Nordbank conferred on Kiser an unearned benefit. Kiser became aware of that benefit upon accepting the LTIP award.

40. HSH Nordbank also conferred an unearned benefit on Kiser insofar as the Bank paid for Kiser's vehicle-related expenses in amounts exceeding Kiser's \$1,000 monthly allowance. Kiser was aware of that benefit, and did not reimburse the Bank for those charges.

41. Fairness, equity, and good conscience demand that Kiser not be permitted to retain any of his undeserved benefits.



**WHEREFORE**, HSH Nordbank demands judgment against Kiser:

- (a) for approximately \$571,905 as restitution, plus interest, for the difference between the LTIP award that Kiser received and the award that Kiser should have received had the LTIP pool accounted for the impact of the loan loss provisions;
- (b) for approximately \$21,599 as restitution, plus interest, for HSH Nordbank's payments for Kiser's excess vehicle-related expenses;
- (c) awarding HSH Nordbank reasonable attorney's fees and costs of suit; and
- (d) granting such other relief that the Court deems just and proper.

**LATHAM & WATKINS LLP**

Dated: New York, New York  
February 2, 2010

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