

**ONTARIO  
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST**

**BETWEEN:**

**HSH NORDBANK AG, NEW YORK BRANCH  
as administrative and collateral agent**

Applicant

- and -

**INTERWIND CORP.**

Respondent

**RESPONDING MOTION RECORD OF  
LEHMAN BROTHERS HOLDINGS INC.  
(Returnable March 30, 2010)**

March 29, 2010

**STIKEMAN ELLIOTT LLP**  
Barristers & Solicitors  
5300 Commerce Court West  
199 Bay Street  
Toronto, Canada M5L 1B9

**Elizabeth Pillon** LSUC#: 35638M  
Tel: (416) 869-5623  
**Kathy Mah** LSUC#: 51077W  
Tel: (416) 869-5652  
Fax: (416) 947-0866

**Lawyers for Lehman Brothers Holdings  
Inc.**

## INDEX

**ONTARIO  
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST**

BETWEEN:

**HSH NORDBANK AG, NEW YORK BRANCH  
as administrative and collateral agent**

Applicant

- and -

**INTERWIND CORP.**

Respondent

**INDEX**

<u>Tab</u>	<u>Description</u>	<u>Page</u>
1	Affidavit of Andrew Grapkowski	1-7

**TAB 1**

**ONTARIO  
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST**

**BETWEEN :**

**HSH NORDBANK AG, NEW YORK BRANCH  
as administrative and collateral agent**

Applicant

- and -

**INTERWIND CORP.**

Respondent

**AFFIDAVIT OF ANDREW GRAPKOWSKI  
(sworn March 29, 2010)**

I, Andrew Grapkowski of the City of Short Hills, in the State of New Jersey

**MAKE OATH AND SAY:**

1. I am the Senior Vice-President, Private Equity and Principal Investments of Lehman Brothers Holdings Inc. ("Lehman") and as such have personal knowledge of the facts to which I herein depose, except where I have indicated that I have obtained such facts from others sources, in which case I verily believe them to be true.
2. I am swearing this affidavit in response to an application and motion brought by HSH Nordbank AG, New York Branch as Administrative Agent and Collateral Agent of the HSH Bank Syndicate, ("HSH Nordbank") to appoint PricewaterhouseCoopers Inc. as receiver and replace KPMG as the current Court-appointed Monitor in respect of Interwind Corp. ("Interwind"). Lehman and HSH Nordbank are the primary secured creditors of Interwind.

3. In addressing HSH Nordbank's motions, Lehman asks that the Court permit KPMG to continue to act as Monitor of Interwind for the purposes of completing the CCAA proceedings, and to permit KPMG to act as receiver (should it be determined by this Court that a receiver should be appointed) over the Interwind estate. To maintain KPMG as Monitor and Receiver would permit the Interwind proceedings to be completed in the most effective, cost efficient and neutral manner, which would benefit all of Interwind's stakeholders.

#### *CCAA and Receivership Proceedings*

4. As outlined in the HSH Nordbank materials, and in the previous reports filed by the Monitor in the Interwind CCAA proceedings, the majority of Interwind's assets have now been sold and the Interwind estate is now in its final stages.
5. While Lehman does not disagree that transitional steps may be appropriate at or near this time to deal with the remaining tasks to wind-down the Interwind estate, there are concerns that the removal of KPMG as Court Officer may cause undue disruption and inefficiency to the insolvency proceedings.
6. KPMG has been intimately involved in Interwind's restructuring since the outset of these CCAA proceedings. As outlined in various Monitor's Reports which have been filed in these CCAA proceedings, KPMG has been directly involved in Interwind's insolvency proceedings, including: the sales of various assets; review of security documentation; acting as foreign representative in US and Quebec recognition proceedings; and most recently and importantly - the calling for and review of claims

against the Interwind estate (both as against the company and as against the directors and officers of the company).

*Claims Proceedings – conducted by KPMG*

7. The claims proceedings are being conducted in a very time intensive fashion and KPMG, as Monitor, has been working within this tight time frame to review and respond to the various claims that were filed. Lehman believes that the most cost efficient and time effective manner in which to complete the claims procedures for Interwind would be to permit KPMG as Monitor to complete this process.
8. While the secured lenders have been involved in reviewing certain of the information accumulated by the Monitor in the claims process, it is KPMG who has the most direct and hands-on role in the claims process, and it would be ineffective from a process and cost perspective to lose KPMG at this time and appoint a new court officer to step into KPMG's shoes.

*Security review by KPMG*

9. KPMG has also been involved in the review of security held by HSH Nordbank and Lehman. The issue of the security held by these parties and the allocation of proceeds from the sale of assets to date was raised at a motion before Justice Cameron on February 19, 2010. A portion of the motion was adjourned while the Monitor conducted further review of the issues and prepared a report, for the secured creditors, to address issues of security and allocation of proceeds. A draft analysis was recently circulated but is not before the Court at this time.

10. Discussions remain ongoing in respect of the nature of the security interests held over assets sold to date; the effect of a certain Subordination Agreement between Lehman and HSH Nordbank; and the potential allocation of sales proceeds.
11. Specifically, in respect of the Subordination Agreement referred to in HSH Nordbank's motion materials, as outlined before Justice Cameron at the hearing of the February 19, 2010 hearing, there are potential issues between the secured creditors as to the application of the Subordination Agreement, including the timeline of the agreement and potential marshalling arguments which continue to be discussed. It was Lehman's understanding that when the February 19<sup>th</sup> motion was adjourned, the secured creditors would have an opportunity to discuss these issues further and if necessary pursue a motion to have the matters determined.
12. Again, it has been KPMG who was directly involved in the security reviews and preparation of reports and analysis to assist the secured creditors in addressing the Subordination Agreement issues, including the issue of allocation of sales proceeds and potential distributions of sales proceeds to secured creditors. KPMG has conducted this review and prepared its reports as an independent court officer and it would it would ineffective from a process and cost perspective to lose KPMG at this time in respect of this issue.

*PwC's historical role in the Interwind Proceedings*

13. HSH Nordbank notes in its motion materials that PricewaterhouseCoopers Inc. ("PwC") has been involved historically in the Interwind proceedings. PwC has been involved as financial advisor to HSH Nordbank and has in that capacity been a

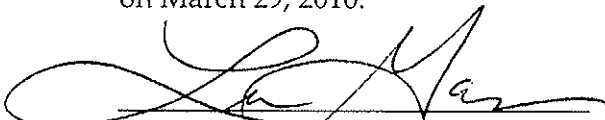
significant advisor and, at times advocate, for HSH Nordbank in Interwind's proceedings.

14. PwC has been an effective advisor and advocate to HSH Nordbank in these proceedings. So effective in fact that Lehman is concerned that PwC may be placed in a difficult position of forced neutrality if it now steps into the role of court-appointed Receiver who acts equally on behalf of all stakeholders of Interwind. While Lehman does not question PwC's credentials in taking on the receiver role - it is the fact that PwC has historically only represented one group of stakeholders, that causes concern. For example,

- (a) Where PwC has to date sought instruction and direction only from its client (HSH Nordbank) in respect of material decisions relating to Interwind, the position of all stakeholders of Interwind, including Lehman would now have to be taken into account. Would PwC find itself in a difficult position now disagreeing with its former client in order to maintain the neutral position required of it as a court-appointed Receiver and Monitor?
- (b) Various information, analysis and advice was confidentially prepared by PwC as financial advisor to HSH Nordbank. Any such information now being used by the Receiver/Monitor should be made available to all stakeholders. Would PwC be in a position to ensure this information is circulated as required or will there be limitations placed on the availability of this information to other stakeholders because of PwC's previous role and obligations to its client?

- (c) PwC has previously assisted HSH Nordbank in preparing and advocating various positions on behalf of the bank. In particular, the calculation of the bank's principal, interest and fee calculations for amounts owing from Interwind. I understand that those calculations were not signed off on by the company or Monitor to date and there may be some disagreement as to how the figures were arrived at and the total amounts owing to HSH Nordbank. Will PwC be in a position to provide a review of HSH Nordbank's figures with "new eyes" - taking into account other stakeholder's views?
- (d) Who will act as independent counsel for the Receiver / Monitor going forward?
15. To avoid these, and other, potentially difficult situations going forward, and to ensure that the Interwind estate can be completed in the most efficient and cost effective means possible, Lehman asks that KPMG be permitted to continue on in its role as Monitor and if required, as Receiver of Interwind.
16. I swear this affidavit in response to HSH Nordbank's application and motion to appoint PwC as Receiver and Monitor of Interwind for a motion returnable March 30, 2010 and for no improper purpose.

SWORN BEFORE ME at the City of  
New York in the State of New York  
on March 29, 2010.

  
Notary Public

  
Andrew Grapkowski

**LISA GARZONA**  
Notary Public, State of New York  
No. 01GA6138334  
Qualified in New York County  
Commission Expires Dec. 19, 2013

HSH NORDBANK AG, NEW YORK  
BRANCH as administrative and collateral  
agent

INTERWIND CORP.  
and

Court File No: CV-10-8637-00CL

Applicant

Respondent

**ONTARIO  
SUPERIOR COURT OF JUSTICE -  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**AFFIDAVIT OF ANDREW GRAPKOWSKI  
(SWORN MARCH 29, 2010)**

**STIKEMAN ELLIOTT LLP**  
Barristers & Solicitors  
5300 Commerce Court West  
199 Bay Street  
Toronto, Canada M5L 1B9

**Elizabeth Pillon** LSUC#: 35638M  
Tel: (416) 869-5623

**Kathy Mah** LSUC#: 51077W  
Tel: (416) 869-5652  
Fax: (416) 947-0866

Lawyers for the Lehman Brothers Holdings  
Inc.

HSH NORDBANK AG, NEW YORK BRANCH  
as administrative and collateral agent

INTERWIND CORP.

and

Court File No: CV-10-8637-00CL

Applicant

Respondent

**ONTARIO  
SUPERIOR COURT OF JUSTICE -  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**RESPONDING MOTION RECORD  
(RETURNABLE March 30, 2010)**

**STIKEMAN ELLIOTT LLP**  
Barristers & Solicitors

5300 Commerce Court West  
199 Bay Street  
Toronto, Canada M5L 1B9

**Elizabeth Pillon** LSUC#: 35638M  
Tel: (416) 869-5623

**Kathy Mah** LSUC#: 51077W  
Tel: (416) 869-5652  
Fax: (416) 947-0866

**Lawyers for Lehman Brothers Holdings Inc.**