

**SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release ("Agreement") is made as of this 15<sup>th</sup> day of September, 2011, by, between, and among the Federal Deposit Insurance Corporation as Receiver for AmTrust Bank, Cleveland, Ohio ("FDIC-R"), and PrimeLending, a PlainsCapital Company ("PrimeLending") (FDIC-R and PrimeLending may each be referred to herein as a "Party" and collectively as the "Parties").

**WHEREAS:**

On December 4, 2009, the Office of Thrift Supervision closed AmTrust Bank, Cleveland, Ohio, previously known as Ohio Savings Bank (the "Bank") and appointed the Federal Deposit Insurance Corporation as its receiver. In accordance with 12 U.S.C. § 1821(d), the FDIC-R succeeded to all rights, titles, powers, and privileges of the Bank, including those with respect to its assets.

On or about July 26, 2010, FDIC-R initiated a lawsuit entitled *Federal Deposit Insurance Corporation as Receiver for AmTrust Bank, Cleveland Ohio v. Daniel Koenn, an individual, and PrimeLending, a Plains Capital Company*, United States District Court Case Number CV10-5528-RGK (VBKx) (hereinafter, the "Action"). On or about May 12, 2011, the FDIC-R filed the First Amended Complaint in the Action, which asserted a claim for relief for breach of contract against PrimeLending.

In the Action, FDIC-R alleged that PrimeLending and the Bank entered into a Master Correspondent Loan Purchase Agreement dated May 8, 2007 (the "Contract").

In the Action, FDIC-R further alleged that, pursuant to the terms of the Contract, PrimeLending delivered to the Bank the following residential mortgage loans: a mortgage loan

(b)(6) to  in the principal amount of \$620,000 (the  Loan") which was secured (b)(6)

by a deed of trust recorded against the real property located at [redacted] Pomona, CA; (b)(6)

(b)(6) and two mortgage loans to [redacted] in the principal amounts of \$545,600 and \$136,400

(b)(6) (collectively, the [redacted] Loan") which were secured by deeds of trust recorded against the real

(b)(6) property located at [redacted] Pomona, CA.

In the Action, FDIC-R asserted that, pursuant to the Contract, PrimeLending was obligated to indemnify FDIC-R for certain deficiencies relating to the [redacted] Loan and the (b)(6) [redacted] Loan.

PrimeLending denies the cause of action alleged against it in the Action.

To avoid the expense and uncertainty of continued litigation, the Parties desire to enter into this Agreement.

NOW, THEREFORE, in consideration of the promises, undertakings, payments, and releases stated herein, the sufficiency of which consideration is hereby acknowledged, the undersigned Parties agree, each with the other, as follows:

**SECTION I: Payment to FDIC-R.**

A. As an essential covenant and condition to this Agreement, on or before September 19, 2011, PrimeLending shall pay to the FDIC-R the total sum of Four Hundred Seventy Five Thousand Dollars and no/cents (\$475,000.00) (the "Settlement Payment"). The Settlement Payment shall be made by wire transfer made payable to "Mortgage Recovery Law Group Client Trust Account," Account Number: [redacted] Routing Number: (b)(4) [redacted] Reference: PrimeLending Settlement.

B. If the FDIC-R does not receive the Settlement Payment in full on or before the date determined by subparagraph A above ("Settlement Payment Due Date"), interest shall accrue at

the rate of 5% per annum, until the date of full payment. In addition, if the FDIC-R does not receive the Settlement Payment in full on or before the Settlement Payment Due Date, the FDIC-R, in its sole discretion, shall have the right to:

1. extend the period of time for payment, including interest accruing from the Settlement Payment Due Date through the date of payment at a rate calculated in accordance with 26 U.S.C. § 6621(b)(3); and/or
2. enforce this Agreement and, in such event, Primelending agrees to jurisdiction in Federal District Court in California and to pay all of the FDIC-R's reasonable attorney's fees and costs expended in enforcing the terms of this Agreement; and/or
3. declare this Agreement null and void, move to vacate any dismissal order, to which Primelending agrees to consent, and re-institute the Action on the FDIC-R's claims; and/or
4. seek any other relief available to it in law or equity.

**SECTION II: Stipulation and Dismissal.**

At any time after FDIC-R receives the fully-executed Agreement and full Settlement Payment, plus any accrued interest if applicable, PrimeLending's counsel may instruct the FDIC-R's counsel to file a Stipulation of Dismissal of the Action, with prejudice (the "Stipulation"), with each party to bear its own costs and attorneys' fees. Upon receipt of such instruction from PrimeLending's counsel, the FDIC-R's counsel shall file the Stipulation within five (5) business days.

At the request of PrimeLending, the FDIC-R agrees to delay the filing of the Stipulation

of Dismissal of the Action so as to allow PrimeLending time to subpoena third parties for deposition in the Action, including but not limited to [redacted] PrimeLending agrees to (b)(6) take reasonable steps to subpoena any third parties for deposition as soon as possible in light of the deadlines associated with the November 15, 2011 trial date. PrimeLending further agrees that if such depositions are not completed in time for the FDIC-R to avoid costs associated with trial-related deadlines or court appearances, or if the court so instructs, the FDIC-R is entitled to file the Stipulation of Dismissal of the Action with prejudice after providing PrimeLending five (5) business days notice. The FDIC-R agrees to provide to PrimeLending any non-privileged (b)(6) documents produced by [redacted] to the FDIC-R in connection with the Action.

**SECTION III: Releases.**

Each Party acknowledges that this Agreement applies to all claims or causes of action for all injuries, damages, or losses of any type or nature (whether those injuries, damages, or losses are known or unknown, foreseen or unforeseen, patent or latent) which that Party may have (b)(6) against the other Party relating to the [redacted] Loan or [redacted] Loan or arising from the [redacted] (b)(6) Loan or [redacted] Loan. Each Party hereby expressly waives application of *California Civil Code §1542* and any other similar statute or rule.

Each Party certifies that they have read and understood the following provisions of *California Civil Code §1542*, which states in pertinent part as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

Each Party understands and acknowledges that the significance and consequence of its waiver of *California Civil Code §1542* is that even if any Party should eventually suffer

(b)(6) additional damages relating to the [ ] Loan or [ ] Loan or arising out of the [ ] Loan (b)(6)

(b)(6) or [ ] Loan, including relating to claims and causes of action that were or could have been

(b)(6) asserted relating to the [ ] Loan or [ ] Loan, or any facts or circumstances related to the

(b)(6) [ ] Loan or [ ] Loan, that Party will not be able to make any claim against the other

Party for those damages, injuries, or loss. Furthermore, each Party acknowledges that it consciously intends these consequences even as to claims for damages that may exist as of the date of this release but which that Party does not know exists, and which, if known, would materially affect that Party's decision to execute this release, regardless of whether that Party's lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

A. The FDIC-R's Release.

Upon receipt of the Settlement Payment, plus any accrued interest, and except as provided in PARAGRAPH III.C., the FDIC-R, for itself and its employees, successors, and assigns hereby releases and discharges PrimeLending and its respective employees, officers, directors, representatives, heirs, executors, administrators, attorneys, shareholders, affiliates (including, but not limited to, PlainsCapital Bank and PlainsCapital Corporation), successors and assigns, from any and all claims, demands, contracts, obligations, damages, actions, and causes of action, direct or indirect, in law or in equity (hereinafter, "Claims") arising out of, or relating

(b)(6) to, the [ ] Loan and the [ ] Loan.

B. PrimeLending's Release.

Effective simultaneously with the release in PARAGRAPH III.A. above, PrimeLending, on behalf of itself and its respective employees, officers, directors, representatives, heirs, executors, administrators, attorneys, shareholders, affiliates, successors and assigns, hereby releases and discharges the FDIC-R, and its employees, officers, directors, representatives, heirs,

executors, administrators, attorneys, shareholders, affiliates, successors and assigns, from any

and all Claims arising out of, or relating to, the [ ] Loan and [ ] Loan.

C. Exceptions to Release by FDIC-R.

Notwithstanding any other provision of this Agreement, the FDIC-R does not release, and expressly preserves fully and to the same extent as if this Agreement had not been executed, any claims or causes of action:

1. against Primelending arising out of any transactions or loans not relating to the [ ] Loan and [ ] Loan, including transactions or loans which arose out of any other existing or failed financial institutions other than AmTrust Bank; and
2. which are not expressly released in PARAGRAPH IIIA. above.

D. Limitations on Release.

1. Notwithstanding any other provision of this Agreement, this Agreement does not waive any claims which could be brought by the United States through the Department of Justice and/or the United States Attorney's Office for any federal judicial district. Should the Department of Justice and/or the United States Attorney bring such a claim, the FDIC-R reserves the right to seek court ordered restitution pursuant to the relevant provisions of the Victim and Witness Protection Act, 18 U.S.C. § 3663, et. seq., if appropriate, subject to offset by the Settlement Payment described in PARAGRAPH IA above.

2. This Agreement is binding on the Federal Deposit Insurance Corporation in its capacity as Receiver for AmTrust Bank, Cleveland, Ohio. Therefore, where the Federal Deposit Insurance Corporation is not acting in its capacity as Receiver for AmTrust Bank, Cleveland, Ohio, nothing herein limits, waives, releases, diminishes or compromises the jurisdiction and authority of the Federal Deposit Insurance Corporation.

**SECTION V: Insolvency.**

A. Insolvency.

PrimeLending warrants as to payments made by or on its behalf that at the time of such payment, it is not insolvent nor will the payment made by or on its behalf render it insolvent within the meaning and/or for the purposes of the United States Bankruptcy Code. This warranty is made by PrimeLending and not by its counsel.

B. Preferences.

In the event that the FDIC-R is required to return any portion of the Settlement Payment due to a final order by a court that the transfer of the Settlement Payment or any portion thereof constituted a preference, voidable preference, fraudulent transfer or similar transaction, then, in its sole discretion, the FDIC-R may, without waiver of any other rights it may have in law or equity, pursue any of the rights and remedies set forth in PARAGRAPH I.B. above, and/or otherwise permitted by law.

**SECTION VI: Termination.**

In the event the FDIC-R exercises its right to declare this Agreement null and void as provided herein in PARAGRAPH I.B.3, then, for the purposes of any statute of limitations or other time-based defense to any of the claims of the FDIC-R, the parties to this Agreement shall be deemed to have reverted to their respective status as of 5:00 p.m. Eastern Time, August 25, 2011.

**SECTION VII: Notices.**

Any notices required hereunder shall be sent by registered mail, first class, return receipt requested, and may also be sent by email, to the following:

If to the FDIC-R:

Vanessa H. Widener  
Anderson, McPharlin & Connors LLP  
444 South Flower Street, 31st Floor  
Los Angeles, CA 90071-2901

(b)(6)

Direct: (213) 236-1613  
Main Phone: (213) 688-0080  
Main Fax: (213) 622-7594

If to Primelending:

Robert Beall, Esq.  
Brian Farrell, Esq.  
Sheppard Mullin Richter & Hampton LLP  
650 Town Center Dr., 4<sup>th</sup> Floor  
Costa Mesa, CA 92626  
(p) (714) 513-5100  
(f) (714) 513-5130

(b)(6)

**SECTION VIII: Other Matters.**

**A. No Admission of Liability.**

The undersigned Parties each acknowledge and agree that the matters set forth in this Agreement constitute the settlement and compromise of disputed claims and defenses, that this Agreement is not an admission or evidence of liability or infirmity by any of them regarding any claim or defense, and that the Agreement shall not be offered or received in evidence by or against any Party hereto, except to enforce its terms.

**B. Execution in Counterparts.**

This Agreement may be executed in counterparts by one or more of the Parties named herein and all such counterparts when so executed shall together constitute the final Agreement, as if one document had been signed by all Parties hereto; and each such counterpart, upon execution and delivery, shall be deemed a complete original, binding the Party or Parties subscribed thereto upon the execution by all Parties to this Agreement.



C. Binding Effect.

All of the undersigned persons represent and warrant that they are a Party hereto or are authorized to sign this Agreement on behalf of the respective Party, and that they have the full power and authority to bind such Party to each and every provision of this Agreement. This Agreement shall be binding upon and inure to the benefit of the undersigned Parties and their respective heirs, executors, administrators, representatives, employees, attorneys, successors and assigns.

D. Entire Agreement.

This Agreement constitutes the entire agreement and understanding between and among the undersigned Parties concerning the matters set forth herein and supersedes any prior agreements or understandings. No representations, warranties or inducements have been made to or relied on by any Party concerning this Agreement and its exhibits other than those contained therein.

E. Amendments.

This Agreement may not be amended or modified, nor may any of its provisions be waived, except in writing by the Party or Parties bound thereby, or by their respective authorized attorney(s) or other representative(s).

F. Reasonable Cooperation.

1. The undersigned Parties agree to cooperate in good faith to effectuate all the terms and conditions of this Agreement, including doing, or causing their agents and attorneys to do, whatever is reasonably necessary to effectuate the signing, delivery, execution, filing, recording, and entry, of any documents necessary to perform the terms of this Agreement.

2. Further, Primelending agrees to cooperate fully with the FDIC-R in

connection with an action that is expressly required of PrimeLending under this Agreement. Any such cooperation that involves any out of pocket costs is subject to reasonable reimbursement by the FDIC-R pursuant to its internal guidelines and policy for such reimbursement. Such cooperation (if relating to an action expressly required of PrimeLending under this Agreement) shall consist of:

- a. producing all documents requested by the FDIC-R, without the necessity of subpoena, as determined by the FDIC-R to be relevant to the Bank;
- b. making themselves available upon request by the FDIC-R at reasonable times and places for interviews regarding facts relevant to the Bank;
- c. appearing to testify, upon request by the FDIC-R on matters related to the Bank, without the necessity of subpoena;
- d. signing truthful affidavits upon request by the FDIC-R, regarding any matter relevant to the Bank.

H. Choice of Law.

This Agreement shall be interpreted, construed and enforced according to applicable federal law, or in its absence, the internal laws of the State of California, without regard to its conflicts of laws.

I. Advice of Counsel.

Each Party hereby acknowledges that he or it has consulted with and obtained the advice of counsel prior to executing this Agreement, and that this Agreement has been explained to that Party by his or its counsel.

J. Title and Captions.

All section titles and captions contained in this Agreement are for convenience only and shall not affect the interpretation of this Agreement.

K. Authorship/Construction.

This Agreement sets forth terms and agreements jointly negotiated by the Parties. It is expressly agreed that this Agreement shall not be construed for or against any party by reason of which party drafted it.

**[SIGNATURES ON FOLLOWING PAGE]**

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by each of them or their duly authorized representatives on the dates hereinafter subscribed.

Approved as to form and content:

**FDIC as Receiver for AmTrust Bank, Cleveland, Ohio**

**Primelending, a Plains Capital Company**

(b)(6) By:

By: \_\_\_\_\_

Name: Patrick M. McCrwick


Name: \_\_\_\_\_

Title: Counsel

Title: \_\_\_\_\_


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Date: \_\_\_\_\_

Approved as to form:   
DATED: September 15, 2011

**ANDERSON, McPHARLIN & CONNERS LLP**

(b)(6)

  
Vanessa H. Widener  
Attorneys for Plaintiff Federal Deposit Insurance Corporation as Receiver for AmTrust Bank, Cleveland, Ohio

DATED: September \_\_\_\_, 2011

**SHEPPARD, MULLIN, RICHTER & HAMPTON LLC**

By: \_\_\_\_\_  
Robert Beall  
Attorneys for Defendant Primelending, a Plains Capital Company

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by each of them or their duly authorized representatives on the dates hereinafter subscribed.

**FDIC as Receiver for AmTrust Bank, Cleveland, Ohio**

**Primelending, a Plains Capital Company**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

By:

(b)(6)

By:

Name: SCOTT BROWN

Title: VICE PRESIDENT

Date: 4-15-11

Approve as to form and content:

DATED: September \_\_, 2011

ANDERSON, McPHARLIN & CONNERS LLP

By: \_\_\_\_\_

Vanessa H. Widener

Attorneys for Plaintiff Federal Deposit Insurance Corporation as Receiver for AmTrust Bank, Cleveland, Ohio

DATED: September 16, 2011

SHEPPARD MULLIN RICHTER HAMPTON LLC

(b)(6)

By: \_\_\_\_\_

Robert Beall

Attorneys for Defendant Primelending, a Plains Capital Company