

**SETTLEMENT AND RELEASE AGREEMENT**

This Settlement and Release Agreement ("Agreement") is made as of this 11<sup>th</sup> day of December, 2012, by, between, and among the following undersigned Parties:

The Plaintiff Federal Deposit Insurance Corporation in its capacity as receiver of Colorado Capital Bank ("FDIC-R"), and Defendants ResortBanc Financial, Inc., Randal Garman and Scott Hovey (collectively the "Settling Defendants"). (The FDIC-R and the Settling Defendants may be referred to herein individually as a "Party" and collectively as the "Parties".)

**RECITALS****WHEREAS:**

- A. Prior to July 8, 2011, Colorado Capital Bank ("Bank") was a depository institution organized and existing under the laws of Colorado.
- B. On March 24, 2011, the Bank filed a Complaint for Declaratory Judgment and Damages against Defendant ResortBanc Financial, Inc. ("ResortBanc") in the District Court for Douglas County, Colorado.
- C. On April 28, 2011, ResortBanc filed its Answer and Counterclaim against the Bank in the District Court for Douglas County, Colorado.
- D. On July 8, 2011, the Bank was closed by the Colorado Division of Banking and, pursuant to 12 U.S.C. § 1821(c), the FDIC-R was appointed receiver. In accordance with 12 U.S.C. § 1821(d), the FDIC as receiver succeeded to all rights, titles, powers and privileges of the Bank, including those with respect to the Bank's claims against the Settling Defendants.
- E. On January 30, 2012, the FDIC-R filed a Notice of Removal of the Douglas County lawsuit to the United States District Court for the District of Colorado, where it was

assigned Civil Action No. 12-cv-00243-WJM-MJW.

F. On July 2, 2012, the FDIC-R filed a Motion to Join Additional Defendants and for Leave to Amend Complaint. The Motion was granted on September 5, 2012, whereby the Court joined ResortBanc's officers, Randall Garman ("Garman") and Scott Hovey ("Hovey"), as additional defendants and accepted the FDIC-R's Amended Complaint which included claims against Garman and Hovey in their individual capacities. The claims for declaratory judgment and damages (the "ResortBanc Action") against all Settling Defendants – ResortBanc, Garman and Hovey – are currently pending. The Settling Defendants have denied liability for these claims.

G. The undersigned parties deem it in their best interests to enter into this Agreement to avoid the uncertainty, trouble, and expense of further litigation.

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, the Settling Defendants agree to pay the FDIC-R the sum of \$35,000 ("the Settlement Funds"). Payment of the Settlement Funds shall occur as follows:

1. Hovey shall pay the sum of \$12,500 no later than December 15, 2012, and an additional \$12,500 no later than January 31, 2013.

2. Garman shall pay the sum of \$5,000 no later than December 15, 2012, and an additional \$5,000 no later than January 31, 2013.

B. The Settlement Funds shall be delivered to FDIC-R by direct wire transfer into an

account designated by FDIC-R, or by certified or cashier's check drawn upon a depository institution acceptable to FDIC-R. In the event that the Settlement Funds are not delivered to the FDIC-R or its counsel on or before the deadlines set forth above, interest shall accrue on all unpaid amounts at the rate of 5% per annum accruing from the date that payment was due.

C. In addition, and without waiving any other rights that the FDIC-R may have, in the event that all Settlement Funds (including all accrued interest) are not received by the FDIC-R on or before January 31, 2013, then, with respect to the Party or Parties that fail to deliver their share(s) of the Settlement Funds, the FDIC-R, in its sole discretion, shall have the right at any time prior to receipt of all Settlement Funds (including all accrued interest) to declare this Agreement null and void, shall have the right to extend this Agreement for any period of time until it receives all Settlement Funds (including all accrued interest), and/or shall have the right to enforce this Agreement against the Party or Parties, failing to deliver their share of the Settlement Funds, in which event the non-delivering Party or Parties agree to jurisdiction in the Federal District Court for the District of Colorado and agree to pay all of the FDIC-R's reasonable attorney's fees expended in enforcing the terms of this Agreement. Any decision by the FDIC-R to extend the terms of this Agreement or to accept a portion of the Settlement Funds shall not prejudice its rights to declare this Agreement null and void with respect to the non-delivering Party or Parties, at any time prior to receipt of all Settlement Funds (including all accrued interest) or to enforce the terms of this Settlement Agreement; provided however, that in the event the FDIC-R declares this Agreement null and void, the FDIC-R will return all amounts paid to it under this Agreement by the non-delivering Party or Parties. In no event shall the FDIC-R declare this Agreement null and void with respect to any Party that has delivered its share of the Settlement Fund (including any accrued interest) on or before the payment deadlines

set forth in Section I.A above. The failure of one Party to deliver its share of the Settlement Funds shall not affect the validity of this Agreement with respect to a Party that has delivered its share of the Settlement Funds.

### **SECTION II: Stay, Stipulation and Dismissal**

A. Upon execution of this Agreement by each of the undersigned Parties, they shall jointly submit a stipulation requesting that the ResortBanc Action be stayed pending final payment of the Settlement Funds (plus any accrued interest) required by Section I of this Agreement.

B. Upon the passing of 91 days after the FDIC-R's receipt of the final payment of the Settlement Funds (plus any accrued interest) the undersigned Parties agree to enter a stipulation providing that the ResortBanc Action shall be dismissed with prejudice, with each party to bear its own costs and attorneys' fees as these were originally incurred.

### **SECTION III: Releases**

A. Release of Settling Defendants by FDIC-R.

1. Release of Hovey: The FDIC-R, for itself and its successors and assigns, releases and discharges Hovey and his respective heirs, executors, administrators, representatives, successors and assigns, from any and all claims, demands, obligations, damages, actions, and causes of action, direct or indirect, in law or in equity, belonging to the FDIC-R, that arise from or relate to: (a) the performance, nonperformance, or manner of performance of the Settling Defendants' respective functions, duties and actions as officers and/or directors of the Bank and/or as parties to the LPO Agreement, including without limitation the causes of action alleged in the ResortBanc Action; and (b) any future claims that the FDIC-R may assert against the Bank and/or its directors, officers,

owners and/or shareholders. *Provided, however,* that the release of Hovey shall not become effective until: (a) he has made all payments to the FDIC-R required of him under Section I.A of this Agreement (plus any accrued interest) described in Section I; and (b) a period of 91 days has expired after his last settlement payment is made, and Hovey has not filed a voluntary petition in bankruptcy or had an involuntary petition in bankruptcy filed against him within that time.

2. Release of Garman: The FDIC-R, for itself and its successors and assigns, hereby releases and discharges Garman and his respective heirs, executors, administrators, representatives, successors and assigns, from any and all claims, demands, obligations, damages, actions, and causes of action, direct or indirect, in law or in equity, belonging to the FDIC-R, that arise from or relate to: (a) the performance, nonperformance, or manner of performance of the Settling Defendants' respective functions, duties and actions as officers and/or directors of the Bank and/or as parties to the LPO Agreement, including without limitation the causes of action alleged in the ResortBanc Action; and (b) any future claims that the FDIC-R may assert against the Bank and/or its directors, officers, owners and/or shareholders. *Provided, however,* that the release of Garman shall not become effective until: (a) he has made all payments to the FDIC-R required of him under Section I.A of this Agreement (plus any accrued interest) described in Section I; and (b) a period of 91 days has expired after his last settlement payment is made, and Garman has not filed a voluntary petition in bankruptcy or had an involuntary petition in bankruptcy filed against him within that time.

3. Release of ResortBanc: The FDIC-R, for itself and its successors and assigns, releases and discharges ResortBanc and its respective heirs, executors,

administrators, representatives, successors and assigns, from any and all claims, demands, obligations, damages, actions, and causes of action, direct or indirect, in law or in equity, belonging to the FDIC-R, that arise from or relate to: (a) the performance, nonperformance, or manner of performance of ResortBanc's respective functions, duties and actions under the terms of the LPO Agreement, including without limitation the causes of action alleged in the ResortBanc Action; and (b) any future claims that the FDIC-R may assert against the Bank and/or its directors, officers, owners and/or shareholders. *Provided, however*, that the release of ResortBanc shall not become effective until: (a) Hovey and Garman have made all payments to the FDIC-R required of them under Section I.A of this Agreement (plus any accrued interest) described in Section I; and (b) a period of 91 days has expired after his last settlement payment is made and neither Hovey nor Garman have filed a voluntary petition in bankruptcy or had an involuntary petition in bankruptcy filed against them within that time.

B. Release of FDIC-R by the Settling Defendants.

Effective simultaneously with the releases granted in Section III.A above, the Settling Defendants, on behalf of themselves individually, and their respective heirs, executors, administrators, agents, representatives, successors and assigns, hereby release and discharge the FDIC-R, and its employees, officers, directors, representatives, successors and assigns, from any and all claims, demands, obligations, damages, actions, and causes of action, direct or indirect, in law or in equity, that arise from or relate to, the Bank or to the performance, nonperformance, or manner of performance of the Bank as party to the LPO Agreement, including without limitation the causes of action alleged in the ResortBanc Action; and any future claims that the Settling Defendants may assert against the Bank or the FDIC-R.

C. Release by Settling Defendants of Each Other.

Effective simultaneously with the releases granted in Sections III. A-B. above, the Settling Defendants, and their respective heirs, executors, administrators, representatives, successors and assigns, hereby release and discharge each other from any and all claims, demands, obligations, damages, actions, and causes of action, direct or indirect, in law or in equity, that arise from or relate to the performance, nonperformance, or manner of performance of their respective functions, duties and actions as officers and/or directors of the Bank, including without limitation the causes of action alleged in the ResortBanc Action.

#### **SECTION V: Representations and Acknowledgements**

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 that this Agreement is not an admission or evidence of liability by any of them regarding any claim.

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. Each of the undersigned persons represents and warrants 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, successors and assigns.

D. Choice of Law and Venue. This Agreement shall be interpreted, construed and enforced according to applicable federal law, or in its absence, the laws of the State of Colorado. The United States District Court for the District of Colorado shall be the exclusive venue for any disputes related to this Agreement.

E. Entire Agreement and Amendments. This Agreement constitutes the entire agreement and understanding between and among the undersigned parties concerning the matters set forth herein. This Agreement may not be amended or modified except by another written instrument signed by the Party or Parties to be bound thereby, or by their respective authorized attorney(s) or other representative(s).

F. Specific Representations Warranties and Disclaimer. The Settling Defendants expressly acknowledge that in determining to settle the claims released here, the FDIC-R has reasonably and justifiably relied upon the accuracy of financial information in the affidavits submitted. If, in their affidavits or financial statements, the Settling Defendants have failed to disclose any interest, legal, equitable, or beneficial that existed as of the date of the affidavits and financial statements, in any asset, the Settling Defendants agree to cooperate fully with the FDIC-R to transfer their interest in the asset to the FDIC-R and to sign any and all documents necessary to transfer their interest in the asset to the FDIC-R. Moreover, if, in their affidavits or financial statements, the Settling Defendants have failed to disclose any interest, legal, equitable, or beneficial that existed as of the date of the affidavits and financial statements, in any asset, the FDIC-R in its sole discretion, may exercise one or more or all of the following remedies: (a) the FDIC-R may declare the releases granted to the non-disclosing Settling Defendant(s) as null and



void; (b) the FDIC-R may retain the Settlement Funds of the non-disclosing Settling Defendant(s); (c) the FDIC-R may sue the non-disclosing Settling Defendant(s) for damages, an injunction, and specific performance for the breach of this agreement; and (d) the FDIC-R may seek to vacate any dismissal order and reinstate the FDIC-R's claims against the non-disclosing Settling Defendant(s). The Settling Defendants agree that if, in their affidavits or financial statements, they have failed to disclose any interest, legal, equitable, or beneficial, in any asset that existed as of the date of the affidavits and financial statements, the non-disclosing Settling Defendant(s) consent to the reinstatement of FDIC-R's claims and waive any statute of limitations that would bar any of the FDIC-R's claims against them.

G. 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 conclude the ResortBanc Action, and to otherwise perform the terms of this Agreement.

2. Further, the Settling Defendants agree to cooperate fully with the FDIC-R in connection with any action required 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 shall consist of:

- a. producing all documents requested by the FDIC-R, without the necessity of subpoena, as determined by the FDIC-R, in its sole discretion, to be relevant to the Bank, except that the Settling Defendants shall not be required to

produce documents protected by the attorney-client privilege or work product protection;

b. making themselves available upon request by the FDIC-R at reasonable times and places for interviews regarding facts, as determined by the FDIC-R in its sole discretion, to be relevant to the Bank;

c. appearing to testify, upon request by the FDIC-R, in any matter determined by the FDIC-R in its sole discretion, to be related to the Bank, without the necessity of subpoena;

d. signing truthful affidavits upon request by the FDIC-R, regarding any matter, as determined by the FDIC-R in its sole discretion, to be relevant to the Bank.

H. Advice of Counsel. Each Party hereby acknowledges that 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 counsel.

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.

Date: Dec 10, 2012

FEDERAL DEPOSIT INSURANCE CORPORATION

(b)(6)

BY: \_\_\_\_\_



NAME: J.S. Tankerson

TITLE: Counsel

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

RESORTBANC FINANCIAL, INC.

BY: \_\_\_\_\_

NAME: \_\_\_\_\_

TITLE: \_\_\_\_\_

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

SCOTT HOVEY

\_\_\_\_\_

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.

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

FEDERAL DEPOSIT INSURANCE CORPORATION

BY: \_\_\_\_\_

NAME: \_\_\_\_\_

TITLE: \_\_\_\_\_

Date: 12/10/12

RESORTBANC FINANCIAL, INC.

(b)(6)

BY: \_\_\_\_\_

NAME: Scott Hovey

TITLE: Vice-President

Date: 12/10/12

SCOTT HOVEY

(b)(6)

Date: 12/11/12

RANDAL GARMAN

(b)(6)



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