

## SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement ("Agreement") is made as of this \_\_\_ day of \_\_\_, 201\_\_\_, by, between, and among the following undersigned parties:

The Federal Deposit Insurance Corporation, as receiver of Security Bank, N.A. ("FDIC-R"), and Timothy H. Kenney, P.A. ("Kenney P.A.") and Timothy H. Kenney ("Kenney") (collectively the "Kenney Parties"). Individually, the FDIC-R and the Kenney Parties may be referred to herein as "Party" and collectively as the "Parties").

### RECITALS

#### WHEREAS:

Prior to May 4, 2012, Security Bank, N.A. ("Bank") was a depository institution organized and existing under the laws of the United States.

On May 4, 2012, the Bank was closed by the Office of the Comptroller of the Currency 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-R as receiver succeeded to all rights, titles, powers and privileges of the Bank, including those with respect to its assets.

Among the assets to which the FDIC-R as receiver succeeded were any and all of the Bank's claims, demands, and causes of actions against its former directors, officers, attorneys and employees arising from the performance, nonperformance and manner of performance of their respective functions, duties and acts as directors and/or officers of the Bank (the "Bank's Claims").

Prior to FDIC-R's acquisition of the Bank's Claims, on April 1, 2011, Kenney P.A. commenced a civil action styled Timothy H. Kenney, P.A. vs. Security Bank, N.A., Case No. 50-2011-CA-004926-XXXX-MB-AI in the Circuit Court for the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (the "Action") seeking \$67,562.31 in fees for legal services allegedly performed for the Bank and seeking to impose retaining and charging liens on the sum of \$56,353.50 representing the proceeds of settlements of the Bank's claims against third parties

that were held in trust by Kenney P.A (the "Trust Account Funds"). The Bank then asserted counterclaims for damages against Kenney P.A. and Kenney alleging breaches of their duties to the Bank as legal counsel and, with respect to Kenney, breaches of his duty as a director. Following FDIC-R's acquisition of the Assets, the Action was removed to the United States District Court for the Southern District of Florida in Timothy H. Kenney, P.A. v. Security Bank, N.A. Case No. 12-80852-CIV-Middlebrooks (the "Removed Action"). FDIC-R has denied liability to Kenney P.A. for the entire amount of damages demanded and the Kenney Parties have denied liability to FDIC-R for breaches of any duty as legal counsel and/or director in the Removed Action.

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: Payments**

A. **Payment to FDIC-R:** As an essential covenant and condition to this Agreement, the Kenney Parties agree to pay the FDIC-R the sum of \$65,000 ("the Settlement Funds") of which sum of \$60,000 is to be paid by Continental Casualty Company ("CCC") and the sum of \$5,000 is to be paid by the Kenney Parties.

B. **Delivery of Settlement Funds:** Upon the execution of an original, or originals in counterpart, of this Agreement by each of the undersigned Parties to this Agreement, 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) by December 1, 2013, interest shall accrue on all unpaid amounts at the rate of 5% per annum from December 1, 2013 through the date of payment. However, if said Settlement Funds are not delivered to the FDIC-R by December 1, 2013, as a result of the FDIC-R's failure to execute this

Agreement, no interest shall accrue until the day after the FDIC-R executes the Agreement.

C. **Payment to Kenney P.A.:** As an essential covenant and condition to this Agreement, and strictly conditioned upon FDIC-R's receipt of, and the clearance of any item representing the Settlement Funds, Kenney P.A. shall 1) receive Receivership Certificates in the face amount of \$12,000 on or before December 1, 2013; and 2) retain for their own accounts the Trust Account Funds in the amount of \$56,353.50. Upon execution of this Agreement by each of the undersigned parties and payment of the \$5,000 by Timothy H. Kenney, P.A. to the FDIC-R, Timothy H. Kenney, P.A. shall be expressly authorized to disburse the Trust Account Funds into Timothy H. Kenney, P.A.'s possession.

D. Provided that the FDIC-R has fully executed the Agreement, 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 December 1, 2013, then, 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 Kenney Parties, in which event the Kenney Parties agree to jurisdiction in Federal District Court for the Southern District of Florida and agree that the prevailing party shall recover its reasonable attorney's fees. Any decision by the FDIC-R to extend the terms of this Agreement or to accept a portion of the Settlement Funds, after December 1, 2013, shall not prejudice its rights to declare this Agreement null and void, 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.

## **SECTION II: Stipulation for Dismissal**

Upon execution of this Agreement by each of the undersigned Parties, the parties shall

execute a Joint Stipulation for Dismissal with Prejudice. The Stipulation shall provide that the Parties shall each bear their own costs and attorneys' fees. The Stipulation shall be held in escrow by counsel for FDIC-R pending receipt and clearance of the Settlement Funds, plus any accrued interest (the "Escrow Release Event").

### **SECTION III: Releases**

#### **A. Release of Individual Kenney Parties by FDIC-R.**

Effective upon the Escrow Release Event, and except as provided in Paragraph III.C. below, the FDIC-R, for itself and its successors and assigns, hereby releases and discharges each of the Kenney Parties and their respective heirs, executors, employees, officers, directors, administrators, insurers, 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, or that arise from or relate to the causes of action asserted as counterclaims in the Removed Action.

#### **B. Release of FDIC-R by the Kenney Parties.**

Effective simultaneously with the release granted in Paragraph III.A. above and except as provided in Paragraph III.D., the Kenney Parties, on behalf of themselves individually, and their respective heirs, executors, administrators, agents, successors and assigns, hereby release and discharge FDIC-R, and its employees, officers, directors, 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 Kenney Parties' respective functions, duties and actions as legal counsel and/or a director of the Bank including without limitation the causes of action alleged in the Removed Action.

#### **C. Express Reservations From Releases By FDIC-R.**

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

a. against the Kenney Parties or any other person or entity for liability, if any, incurred as the maker, endorser or guarantor of any promissory note or indebtedness payable or owed by them to FDIC-R, the Bank, other financial institutions, or any other person or entity, including without limitation any claims acquired by FDIC-R as successor in interest to the Bank or any person or entity other than Bank;

b. against any person or entity not expressly released in this Agreement; and

c. which are not expressly released in Paragraphs III.A. above.

2. Notwithstanding any other provision, nothing in this Agreement shall be construed or interpreted as limiting, waiving, releasing or compromising the jurisdiction and authority of the FDIC-R in the exercise of its supervisory or regulatory authority or to diminish its ability to institute administrative enforcement proceedings seeking removal, prohibition or any other administrative enforcement action which may arise by operation of law, rule or regulation.

3. Notwithstanding any other provision, this Agreement does not purport to waive, or intend to waive, any claims which could be brought by the United States through either the Department of Justice, the United States Attorney's Office for the Southern District of Florida or any other federal judicial district.

**D. Express Reservations From Releases By Kenney Parties.**

1. Notwithstanding any other provision, by this Agreement, the Kenney Parties do not release, and expressly preserve fully and to the same extent as if the Agreement had not been executed, any claims or causes of action:

a. against any person or entity not expressly released in this Agreement; and

b. which are not expressly released in Paragraph III.B above.

**SECTION IV: Waiver of Dividends**

Except as set forth in Paragraph I.C. above, to the extent, if any, that Kenney Parties are or were shareholders of the Bank and by virtue thereof are or may have been entitled to a dividend, payment, or other prorata distribution upon resolution of the receivership of the Bank,

they hereby knowingly assign to the FDIC-R any and all rights, titles and interest in and to any and all such dividends, payments or other pro rata distributions.

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

A. No Admission of Liability. The 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. A facsimile, .pdf or electronic copy of this Agreement and any signature hereon shall be considered for all purposes as originals and delivery of an executed counterpart.

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. This Agreement shall be interpreted, construed and enforced according to applicable federal law, or in its absence, the laws of the State of Florida.

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. Reasonable Cooperation. 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 the Stipulation and any other documents necessary to conclude the Removed Action and to otherwise perform the terms of this Agreement.

G. 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 or her counsel.

H. Authority to Enter Into Agreement. Each individual executing this document represents that he or she has the express authority to act on behalf of the Party for whom he or she is purporting to act.

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: 10/9/13

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FEDERAL DEPOSIT INSURANCE CORPORATION

BY:

TITLE: Counsel - FDIC - Professional Liability

PRINT NAME: Steven C. Morrison

Date: 10/9/13

(b)(6)

TIMOTHY H. KENNEY, P.A.

BY:

TITLE: President

PRINT NAME: Timothy H. Kenney

