

IMPORTANT NOTICE

THIS INSTRUMENT CONTAINS A CONFESSION OF JUDGMENT PROVISION WHICH CONSTITUTES A WAIVER OF IMPORTANT RIGHTS YOU MAY HAVE AS A DEBTOR AND ALLOWS THE CREDITOR TO OBTAIN A JUDGMENT AGAINST YOU WITHOUT ANY FURTHER NOTICE.

SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement (“Agreement”) is made by, between, and among the following undersigned parties:

The Plaintiff, Federal Deposit Insurance Corporation as Receiver for Bank of the Commonwealth (“FDIC-R”), and William D. Payne (“Settling Defendant”) (individually, the FDIC-R and the Settling Defendant may be referred to herein as “Party” and collectively as the “Parties”).

RECITALS

WHEREAS:

Prior to September 23, 2011, Bank of the Commonwealth (“Bank”) was a depository institution organized and existing under the laws of Virginia;

On September 23, 2011, the Virginia State Corporation Commission closed the Bank and pursuant to 12 U.S.C. § 1821(c), the Federal Deposit Insurance Corporation was appointed 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;

Among the assets to which the FDIC-R succeeded were all of the Bank’s claims, demands, and causes of action against its former directors, officers, and employees arising from the performance, nonperformance, and manner of performance of their respective functions, duties, and acts as directors, officers, and employees of the Bank;

On September 19, 2014, the FDIC-R filed a complaint for money damages against, among others, the Settling Defendant, who served as a director of the Bank. Those claims for damages are now pending in the United States District Court for the Eastern District of Virginia in an action captioned *The Federal Deposit Insurance Corporation as Receiver for Bank of the*

Commonwealth v. Edward J. Woodard, Jr., et al., No. 2:14-cv-00471-RGD-DEM (“D&O Action”). The Settling Defendant has denied liability in the D&O Action;

The undersigned Parties deem it in their best interests to enter into this Agreement to avoid the uncertainty 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 the FDIC-R

A. As an essential covenant and condition to this Agreement, the Settling Defendant agrees to pay the FDIC-R the sum of Sixty Thousand Dollars (\$60,000.00) (“the Settlement Payment”) as follows:

1. On or before September 15, 2015, Twenty Thousand Dollars (\$20,000.00);
2. On or before January 15, 2016, Twenty Thousand Dollars (\$20,000.00);
3. On or before May 15, 2016, Twenty Thousand Dollars (\$20,000.00).

B. The Settling Defendant shall deliver the Settlement Payment to the FDIC-R by direct wire transfers into an account designated by the FDIC-R by notice to the attorneys for the Settling Defendant or by certified or cashier’s checks drawn upon a depository institution acceptable to the FDIC-R.

C. If the FDIC-R does not receive the Settlement Payment in full on or before the dates determined by Section I.A. above, then the FDIC-R, in its sole discretion, shall have the right at any time prior to receipt of the Settlement Payment in full (including all accrued interest) to:

1. Extend the period of time for the Settlement Payment, including interest accruing from the date determined by Section I.A. above, through the date of payment at a rate calculated in accordance with 26 U.S.C. § 6621(a)(2); or
2. Enforce this Agreement, in which event the Settling Defendant agrees to

jurisdiction in the courts of the Commonwealth of Virginia or the United States District Court for the Eastern District of Virginia and to pay all of the FDIC-R's reasonable attorney's fees and costs expended in enforcing the terms of this Agreement; or

3. Terminate the Agreement, move to vacate any dismissal order, to which the Settling Defendant agrees to consent, and re-institute an action on the FDIC-R's claims. The Settling Defendant further agrees to waive any defense based on any statute of limitations that would bar any of the FDIC-R's claims and waive all objections, defenses, claims, or counterclaims, and covenant and agree not to assert any objections, defenses, claims, or counterclaims that did not exist or were otherwise unavailable as of the date this Agreement was fully executed; and/or

4. Seek any other relief available to it in law or equity.

Any extension of time under Section I.C.1 for delivery of the Settlement Payment or acceptance of a portion of the Settlement Payment shall not prejudice the FDIC-R's rights to take any of the actions set forth in Section I.C.2 through I.C.4 at any time prior to receipt of the Settlement Payment (including all accrued interest) in full.

D. The Settling Defendant has executed a Confessed Judgment Promissory Note, pursuant to Virginia Code Ann. Sections 8.01-431 through 8.01-441. This Confessed Judgment Promissory Note shall be held in escrow by the FDIC-R's counsel. In the event that the Settling Defendant fails to make any of the foregoing payments set forth in Section I.A. above as and when due, the Settling Defendant hereby authorizes the FDIC-R: (a) to file and effectuate the Settling Defendant's Confessed Judgment Promissory Note or Confession of Judgment in the Circuit Court of Augusta County, Virginia, or in any other Circuit Court in Virginia where the Settling Defendant or his assets may be found, for (1) the full Settlement Payment due and owing to the FDIC-R, less any part thereof which has already been delivered to the FDIC-R; (2) interest in the amount of eighteen percent (18%), accruing from the date of default of the Confessed Judgment Promissory Note; and (3) Seventy Five Hundred Dollars (\$7,500.00), representing the reasonable attorneys' fees and costs incurred by the FDIC-R in the collection of the Settlement

Payment; however, in the event that actual attorneys' fees and costs incurred are in excess of Seventy Five Hundred Dollars (\$7,500.00), the FDIC-R shall be entitled to such additional reasonable attorneys' fees and costs as may be incurred; and/or (b) to take such other and further steps as may be requested and/or necessary to secure entry of a judgment against the Settling Defendant for the full Settlement Payment plus accrued interest, costs, and attorneys' fees. A default under the Confessed Judgment Promissory Note shall further be deemed a default under this Agreement, pursuant to which the FDIC-R may take any of the actions set forth in Section I.C.2 through I.C.4 at any time.

SECTION II: Stipulation and Dismissal

Within ten business days after full execution of this Agreement by all of the Parties the FDIC-R shall file a stipulation of dismissal without prejudice as against the Settling Defendant, executed by the attorneys for all Parties hereto, in the form attached hereto as Exhibit A, in the D&O Action. Upon receipt of the full and complete Settlement Payment, the FDIC-R agrees that the dismissal against the Settling Defendant will be treated as a stipulation of dismissal with prejudice.

SECTION III: Releases

A. The FDIC-R's Releases.

Upon receipt of the Settlement Payment in full and except as provided in Section III.C., the FDIC-R, for itself and its successors and assigns, hereby releases and discharges the Settling Defendant and his respective heirs, executors, trustees, 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, the performance, nonperformance, or manner of performance of the Settling Defendant's respective functions, duties, and actions as a director of the Bank, including without limitation the causes of action alleged in the D&O Action.

B. The Settling Defendant's Release.

Effective simultaneously with the release granted in Section III.A. above, the Settling

Defendant, on behalf of himself individually, and his respective heirs, executors, trustees, administrators, agents, representatives, attorneys, successors, and assigns, hereby releases and discharges the FDIC-R, and its employees, officers, directors, representatives, attorneys, 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 Settling Defendant's respective functions, duties, and actions as a director of the Bank, including without limitation the causes of action alleged in the D&O Action.

C. Exceptions from Releases by the FDIC-R.

1. 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:

a. Against the Settling Defendant 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 the FDIC-R, the Bank, other financial institutions, or any other person or entity, including without limitation any such claims acquired by the FDIC-R as successor in interest to the Bank or any person or entity other than the Bank; and

b. Against any person or entity not expressly released by the FDIC-R in this Agreement.

2. Notwithstanding any other provision of this Agreement, nothing in this Agreement shall be construed or interpreted as limiting, waiving, releasing, or compromising the jurisdiction and authority of the Federal Deposit Insurance Corporation in the exercise of its supervisory or regulatory authority or to diminish its ability to institute administrative enforcement or other proceedings seeking removal, prohibition, or any other relief it is authorized to seek pursuant to its supervisory or regulatory authority against any person.

3. Notwithstanding any other provision of this Agreement, this Agreement does not purport to waive, or intend to waive, any claims that could be brought by the United

States through the Department of Justice, the United States Attorney's Office for any federal judicial district, or any other department or agency of the United States as defined by 18 U.S.C.

§ 6. In addition, the FDIC-R specifically reserves the right to seek court-ordered restitution pursuant to the relevant provisions of the Mandatory Victims Restitution Act, 18 U.S.C. §§ 3322 and 3663 et. seq., if appropriate.

D. Express Reservation of Rights of Bond Carrier.

1. Notwithstanding any other provision of this Agreement, nothing in this Agreement shall release or prejudice the rights of Fidelity and Deposit Company of Maryland or any other underwriter of any financial institution bond, fidelity bond, or banker's blanket bond on which the Bank is an insured, to bring any claims by way of subrogation to the claims of the FDIC-R, against (a) any directors, officers, or employees of the Bank, including but not limited to the Settling Defendant, in their capacities as directors, officers, or employees of the Bank or in any other capacity, or (b) any other individual or entity.

2. Nothing herein shall be construed to admit the existence of, or to establish, any claim or cause of action on the part of Fidelity and Deposit Company of Maryland or any other bond underwriter by way of subrogation to claims of the FDIC-R, that would not exist had this Agreement not been executed.

SECTION IV: Waiver of Dividends and Proceeds from Litigation

To the extent, if any, that the Settling Defendant is or was a shareholder of the Bank or its holding company and by virtue thereof is or may be entitled to a dividend, payment, or other distribution upon resolution of the receivership of the Bank or proceeds in any litigation that has been or could be brought against the Federal Deposit Insurance Corporation in any capacity or against the United States based on or arising out of, in whole or in part, the closing of the Bank, or any alleged acts or omissions by the Federal Deposit Insurance Corporation in any capacity, the United States government, or any agency or department of the United States government in connection with the Bank, its conservatorship, or receivership, the Settling Defendant hereby knowingly assigns to the FDIC-R any and all rights, titles, and interest in and to any and all such

dividends, payments, or other distributions, or proceeds.

SECTION V: Representations and Acknowledgements

A. Authorized Signatories. All of the undersigned persons represent and warrant that they are Parties 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, trustees, administrators, representatives, successors, and assigns.

B. Advice of Counsel. Each Party hereby acknowledges that he, she, 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, her, or its counsel.

C. Financial Disclosure Representation. The Settling Defendant has submitted financial information to the FDIC-R including a signed Financial Disclosure Form and herein affirms that his financial information is true and accurate as of the date of this agreement. The Settling Defendant expressly acknowledges that, in determining to settle the claims released herein, the FDIC-R has reasonably and justifiably relied upon the accuracy of the financial information submitted by the Settling Defendant. The FDIC-R has no obligation to independently verify the completeness or accuracy of that financial information. If the FDIC-R establishes via a final adjudication in an appropriate judicial forum that the Settling Defendant failed to disclose any material interest, legal, equitable, or beneficial, in any asset, the Settling Defendant agrees to cooperate fully with the FDIC-R to provide updated financial information and to pay to the FDIC-R the lesser of (1) the value of the Settling Defendant's undisclosed material interest in such asset(s); or (2) the amount of unpaid damages alleged against the Settling Defendant.

SECTION VI: Reasonable Cooperation

A. The 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 D&O Action and to otherwise perform the terms of this Agreement.

B. The Settling Defendant agrees to cooperate fully with the FDIC-R in connection with any action required under this Agreement. Such cooperation shall consist of:

1. 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;
2. Appearing as requested 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;
3. Testifying as requested by the FDIC-R, without the necessity of a subpoena, in any matter relevant to the Bank, as determined by the FDIC-R;
4. Signing truthful affidavits, regarding any matter, as determined by the FDIC-R in its sole discretion, to be relevant to the Bank.

SECTION VII: 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 except to enforce its terms.

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

C. Choice of Law. This Agreement shall be interpreted, construed, and enforced according to applicable federal law, or in its absence, the laws of the Commonwealth of Virginia.

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

If to the FDIC-R:

Christine P. Hsu
Counsel
FDIC – Legal Division
3501 Fairfax Drive VS-B-7054
Arlington, Virginia 22226-3500

(b)(6)

[Redacted]

With a copy to:

Kathleen M. Balderston
Nixon Peabody LLP
437 Madison Avenue
New York, New York 10022

(b)(6)

[Redacted]

If to the Settling Defendant:

Christopher Swecker
1506 Hugh Forest Road
Charlotte, North Carolina 28270

(b)(6)

[Redacted]

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

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

G. No Confidentiality. The undersigned Parties acknowledge that this Agreement shall not be confidential and will be disclosed pursuant to the Federal Deposit Insurance Corporation's applicable policies, procedures, and other legal requirements.

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.

//

//

FEDERAL DEPOSIT INSURANCE CORPORATION AS
RECEIVER FOR BANK OF THE COMMONWEALTH

(b)(6)

Date: 5/25/15

BY:

TITLE:

Counsel

PRINT NAME: Christine P. Hsu

Date: 5/15/15

(b)(6)

WILLIAM D. PAYNE

TITLE:

PRINT NAME: William D. Payne