

## **SETTLEMENT AND RELEASE AGREEMENT**

This Settlement and Release Agreement (“Agreement”) is made as of this \_\_\_ day of \_\_\_, 2013, by, between, and among the following undersigned parties:

The Plaintiff Federal Deposit Insurance Corporation, as receiver for Cape Fear Bank (“FDIC-R”), on the one hand, and John Cameron Coburn, Larry Flowers, R. James MacLaren, Mark Tyler, Craig S. Relan, Jerry S. Sellers, and Walter O. Winter (collectively, the “Settling Defendants”) on the other hand. (Individually, the FDIC -R and the Settling Defendants may be referred to herein as “Party” and collectively as the “Parties”).

### **RECITALS**

#### **WHEREAS:**

Prior to April 10, 2009, Cape Fear Bank (“Cape Fear” or the “Bank”) was a depository institution organized and existing under the laws of North Carolina;.

On April 10, 2009, the Bank was closed by the North Carolina Office of Commissioner of Banks 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 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 any and all of the Bank’s claims, demands, and causes of actions 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 and/or officers of the Bank;.

On April 4, 2012, the FDIC-R filed a complaint for money damages against the Settling Defendants, who had each served at various times as directors and/or officers of the Bank. Those claims for damages are now pending in the United States District Court for the Eastern District of North Carolina Southern Division (the “D&O Action”). The Settling Defendants have 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, trouble, and expense of further litigation. Among other things, the Parties have agreed that the Agreement shall be a “global” settlement and release of all claims held by the FDIC-R, including its agents, successors, and assigns, for all claims now or hereafter held by the FDIC-R against all former officers, directors and/or employees of the Bank (collectively, the “Covered Persons”) that arise from or relate to the performance, non-performance or manner of performance of the Covered Persons’ respective functions, duties and/or actions as officers, directors, and/or employees of the Bank.

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 Defendants shall pay or cause their insurer to pay the FDIC-R the sum of \$2,400,000 (“the Settlement Funds”).

B. Within 30 days after the full execution of an original, or originals in counterpart, of this Agreement by each of the undersigned Parties to this Agreement (the “Payment Date”), the Settlement Funds shall be delivered to the FDIC-R by direct wire transfer into an account designated by the FDIC-R. The transfer should be made to:

**BANK:** Federal Home Loan Bank of New York

(b)(4) **ROUTING #:**

**FOR CREDIT TO:** FDIC National Liquidation Account

(b)(4) **ACCOUNT #:**

New York Main Office

101 Park Avenue

New York, NY 10178-0599

215-681-6000

212-441-6890 Fax

(b)(4) **FUND CODE:**

(b)(4) **ASSET NUMBER:**

**DESCRIPTION OF THE TRANSACTION:** Cape Fear DO Claim Settlement

In the event that the Settlement Funds are not delivered to the FDIC-R (or its counsel) by the Payment Date, interest shall accrue on all unpaid amounts at the rate of 5% per annum from the Payment Date until the date all unpaid amounts are received by the FDIC-R.

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, if any) are not received by the FDIC-R on or before the Payment Date, 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, if any) 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, if any), and/or shall have the right to enforce this Agreement against the Settling Defendants, in which event the non-delivering Party, or Parties, agree to jurisdiction in Federal District Court in North Carolina, and agree that the prevailing Party, or Parties, shall be entitled to its reasonable attorneys' fees expended in enforcing and/or defending 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, if any) 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 Funds (including any accrued interest) on or before the Payment Date. 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: Stipulation and Dismissal**

Upon execution of this Agreement by each of the undersigned Parties, and receipt of the Settlement Funds, plus any accrued interest, the FDIC-R shall dismiss the D&O Action. The undersigned Parties agree to enter stipulation(s) providing that the dismissal(s) set forth above shall be with prejudice, with each Party to bear its own costs as these were originally incurred.

## **SECTION III: Releases**

### **A. Release of Individual Settling Defendants and Covered Persons by the FDIC-R.**

Effective upon receipt in full of the Settlement Funds plus any accrued interest and dismissal described in SECTIONS I and II above, and except as provided in SECTION III.D. below, the FDIC-R, for itself and its successors and assigns, hereby releases and discharges each of the Settling Defendants and all Covered Persons and their respective heirs, executors, administrators, representatives, 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, or otherwise, belonging to the FDIC-R, including but not limited to any such claims that arise from or relate to, the performance, nonperformance, or manner of performance of the Settling Defendants' or the Covered Persons' respective functions, duties and actions as officers, directors and/or employees of the Bank, including without limitation the causes of action alleged in the D&O Action.

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

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

Defendants, on behalf of themselves individually, and their respective heirs, executors, administrators, agents, representatives, insurers, 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, whether in law or in equity, or otherwise, that arise from or relate to the Settling Defendants' positions as directors, officers, and/or employees of the Bank or to the performance, nonperformance, or manner of performance of the Settling Defendants' or the Covered Persons' respective functions, duties and actions as officers, directors and/or employees of the Bank.

C. Release by Settling Defendants of Each Other.

Effective simultaneously with the releases granted in SECTION III.B. above, the Settling Defendants, and their respective heirs, executors, administrators, representatives, insurers, 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, or otherwise, that arise from or relate to the performance, nonperformance, or manner of performance of their respective functions, duties and actions as officers, directors and/or employees of the Bank, including without limitation the causes of action alleged in the D&O Action.

D. Express Reservations From Releases By the 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 Settling Defendants 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 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 (or group of persons or entities, *e.g.* directors, officers and employees) not expressly released in this Agreement.

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 Eastern District of North Carolina or any other federal judicial district. In addition, the FDIC-R specifically 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.

#### **SECTION IV: Waiver of Dividends and Proceeds from Litigation**

To the extent, if any, that Settling Defendants are or were shareholders of the Cape Fear Bank or Cape Fear Corporation and by virtue thereof are or may be entitled to a dividend, payment, or other distribution upon resolution of the receivership of the Cape Fear Bank or proceeds in any litigation that has been or could be brought against the United States based on or arising out of, in whole or in part, the closing of Cape Fear Bank, or any alleged acts or omissions by the FHLBB, OTS, RTC, FDIC, the FSLIC Resolution Fund or the United States government in connection with Cape Fear Bank, its conservatorship or receivership; 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 distributions, or such proceeds.

## **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 the undersigned Parties regarding any claim. The Settling Defendants expressly deny any liability regarding the FDIC-R's claims, including without limitation the causes of action alleged in the D&O Action.

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 capacity and 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 North Carolina.

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 Parties 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 financial statements submitted. If, in his financial statement a Settling Defendant has intentionally or with gross negligence failed to disclose any interest, legal, equitable, or beneficial, in any significant 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 involved Settling Defendant as null and void; (b) the FDIC-R may retain the Settlement Funds; (c) the FDIC-R may sue the involved Settling Defendant 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 involved Settling Defendant. The Settling Defendants agree that if, in their financial statements, they have intentionally or with gross negligence failed to disclose any interest, legal, equitable, or beneficial, in any significant asset, the Settling Defendants consent to the reinstatement of the FDIC-R's claims against the involved Settling Defendant and waive any statute of limitations that would bar any of the FDIC-R's claims against him.

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 D&O 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;

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 or her 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.

FEDERAL DEPOSIT INSURANCE CORPORATION

(b)(6) \_\_\_\_\_  
Date: \_\_\_\_\_ BY:   
TITLE: \_\_\_\_\_  
PRINT NAME: \_\_\_\_\_

Date: \_\_\_\_\_ JOHN CAMERON COBURN

(b)(6) \_\_\_\_\_  
BY:   
TITLE: \_\_\_\_\_  
PRINT NAME: \_\_\_\_\_

Date: \_\_\_\_\_ LARRY FLOWERS

BY: \_\_\_\_\_  
TITLE: \_\_\_\_\_  
PRINT NAME: \_\_\_\_\_

Date: \_\_\_\_\_ R. JAMES MACLAREN

BY: \_\_\_\_\_  
TITLE: \_\_\_\_\_  
PRINT NAME: \_\_\_\_\_

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

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

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

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

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

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

JOHN CAMERON COBURN

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

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

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

Date: JANUARY 9, 2014

LARRY FLOWERS

(b)(6)

BY: 

TITLE: /

PRINT NAME: LARRY FLOWERS

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

R. JAMES MACLAREN

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

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

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

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

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

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

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

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

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

JOHN CAMERON COBURN

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

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

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

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

LARRY FLOWERS

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

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

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

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

R. JAMES MACLAREN

(b)(6)

BY:

TITLE: *Senior Vice President  
Credit Officer*

PRINT NAME: *R. James MacLaren*

Date: 11/9/14

MARK TYLER

(b)(6)

BY:



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

PRINT NAME: Mark Tyler

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

CRAIG S. RELAN

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

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

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

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

JERRY S. SELLERS

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

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

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

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

WALTER O. WINTER

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

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

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

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

MARK TYLER

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

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

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

Date: 9 January 2014

CRAIG S. RELAN

(b)(6)

BY:

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

PRINT NAME: Craig S. RELAN

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

JERRY S. SELLERS

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

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

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

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

WALTER O. WINTER

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

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

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

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

MARK TYLER

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

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

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

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

CRAIG S. RELAN

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

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

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

Date: 1-10-14

JERRY S. SELLERS

(b)(6)

BY:

TITLE: Director

PRINT NAME: Jerry O. Sellers

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

WALTER O. WINTER

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

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

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

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

MARK TYLER

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

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

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

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

CRAIG S. RELAN

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

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

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

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

JERRY S. SELLERS

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

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

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

Date: 1-9-14

WALTER O. WINTER

(b)(6)

BY:

TITLE: Director

PRINT NAME: WALTER O. WINTER