

SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement (“Agreement”) is made as of this 3rd day of February, 2014, by, between, and among the following undersigned parties:

The Federal Deposit Insurance Corporation as Receiver for TierOne Bank (the “FDIC-R”), Gilbert G. Lundstrom, David L. Hartman, James A. Laphen, Randall B. Kidd, Delmar E. Williams, Charles W. Hoskins, Campbell R. McConnell and Ann L. Spence (collectively, the “Settling Defendants”), and Arch Insurance Company (“Arch”) and Hudson Insurance Company (“Hudson”) (collectively, the “Insurers”). Individually, the FDIC-R, the Settling Defendants, Arch, and Hudson may be referred to herein as a “Party” and collectively as the “Parties.”

RECITALS

WHEREAS:

Prior to June 4, 2010, TierOne Bank (“Bank”) was a depository institution organized and existing under the laws of the State of Nebraska.

On June 4, 2010, the Bank was closed by the Office of Thrift Supervision and pursuant to 12 U.S.C. § 1821(c), the Federal Deposit Insurance Corporation was appointed as 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 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 May 31, 2013, 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 District of Nebraska in *FDIC as Receiver for TierOne Bank v. Lundstrom, et al.*, Case No. 8:13-CV-00168 (D. Neb.) (the “D&O Action”). The Settling Defendants have denied liability in the D&O Action.

Arch issued directors and officers liability insurance policies numbers [redacted] (b)(4)

(b)(4) and [redacted] (the "Arch Policies"), which insured the directors and officers of the Bank according to the terms, provisions and conditions of the Arch Policies. Notwithstanding the fact that there may have been notices submitted by or on behalf of the Settling Defendants and the (b)(4) FDIC-R under Policy No. [redacted] Arch has asserted that coverage for the D&O (b)(4) Action is only available under Policy No. [redacted] as the claims of the FDIC-R are interrelated with a shareholder derivative demand first made on March 5, 2009 during Policy No.

(b)(4) [redacted]

Hudson issued directors and officers liability insurance policies numbers [redacted] (b)(4)

(b)(4) [redacted] and [redacted] (the "Hudson Policies"), which insured the directors and officers of the Bank according to the terms, provisions and conditions of the Hudson Policies. Notwithstanding the fact that there may have been notices submitted by or on behalf of the Settling Defendants and the FDIC-R under Policy No. [redacted] Hudson has (b)(4) asserted that coverage for the D&O Action is only available under Policy No. [redacted] (b)(4)

(b)(4) [redacted] as the claims of the FDIC-R are interrelated with a shareholder derivative demand first (b)(4) made on March 5, 2009 during Policy No. [redacted]

The Arch Policies and the Hudson Policies are collectively referred to as the "Policies."

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 Insurers, on behalf of the Settling Defendants, collectively, agree to pay the FDIC-R the sum of SIX MILLION FIVE HUNDRED THOUSAND DOLLARS (\$6,500,000.00) (the "Settlement Funds"). Arch agrees to pay \$1,630,156.66 and Hudson agrees to pay \$4,869,843.34 of the Settlement Funds.

The Settlement Funds shall be received by the FDIC-R no later than March 5, 2014 (the "Payment Date"). None of the Settling Defendants shall be obligated to make any payment under this Agreement if the Insurers fail to make any payment due under this Agreement.

B. Upon the execution of an original, or originals in counterpart, of this Agreement by each of the undersigned Parties to this Agreement and upon the Payment Date, the Settlement Funds shall be delivered to FDIC-R by direct wire transfer into an account to be designated by the FDIC-R.

C. In the event that the Settlement Funds are not received by the FDIC-R on the Payment Date, interest shall accrue on all unpaid amounts at the rate of 5 percent per annum from the Payment Date until such date when payment is delivered to the FDIC-R. However, if said Settlement Funds are not delivered to the FDIC-R by the Payment Date as a result of the FDIC-R's failure to execute this Agreement, no interest shall accrue until five business days after the FDIC-R executes and delivers the Agreement.

D. If the FDIC-R does not receive the Settlement Payment in full 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 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 subsection A above, through the date of payment at a rate calculated in accordance with 26 U.S.C. § 6621(a)(3); or

2. Enforce this Agreement, in which event the Settling Defendants and the Insurers agree to jurisdiction in the United States District Court for the District of Nebraska and Insurers agree to pay, subject to available insurance proceeds, 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 Defendants and the Insurers agree to consent, and re-institute an action on the FDIC-R's claims. The Settling Defendants and the Insurers further agree to waive 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 of the Agreement; and/or

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

Any extension of time under Section I.D.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.D.2 through I.D.4 at any time prior to receipt of Settlement Payment (including all accrued interest) in full.

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 a stipulation providing that the dismissal 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 Settling Defendants by FDIC-R.

Effective upon receipt in full of the Settlement Funds plus any accrued interest and the dismissal described in Sections I. and II. above, and except as provided in Section III.F. below, the FDIC-R, for itself and its successors and assigns, hereby releases and discharges:

1. each of the Settling Defendants and their 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, known or unknown, 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 Defendants' respective functions, duties and actions as officers and/or directors of the Bank, including without limitation, the causes of action alleged in the D&O Action; and
2. all former directors, officers, and employees of the Bank (collectively, the "Covered Persons") and their 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, known or unknown, 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 Covered Persons' respective functions, duties and actions as directors, officers and employees of the Bank, including without limitation, the causes of action alleged in the D&O Action. This release shall be null and void as to any Covered Person if such Covered Person asserts any claim against the FDIC-R.

B. Release of 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, 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, known or unknown, 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 Defendants' respective functions, duties and actions as officers and/or directors of the Bank, including, without limitation, the causes of action alleged in the D&O Action.

C. Release by Settling Defendants of Each Other.

Effective simultaneously with the release granted in Section III.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, known or unknown, in law or in equity, known or unknown, that arise from the causes of action alleged in the D&O Action.

D. Release of Arch and Hudson by FDIC-R.

Effective simultaneously with the releases granted in Sections III.A. and III.B. above, the FDIC-R, for itself and its successors and assigns, hereby releases and discharges Arch and Hudson, their parents, subsidiaries, affiliates and reinsurers, and their respective employees,

officers, directors, agents, representatives, successors and assigns, from any and all claims, demands, obligations, damages, actions and causes of action, direct or indirect, known or unknown, in law or in equity, that arise from or relate to the Policies. The FDIC-R agrees that any interest it may have under the Policies is extinguished upon payment in full of the Settlement Funds.

E. Release of FDIC-R by Arch and Hudson.

Effective simultaneously with the release granted in Section III.D. above, Arch and Hudson, for itself and its successors and assigns, and on behalf of its parents, subsidiaries, affiliates and reinsurers, and their successors and assigns, hereby releases and discharges the FDIC-R, and its employees, officers, directors, agents, representatives, successors and assigns, from any and all claims, demands, obligations, damages, actions, and causes of action, direct or indirect, known or unknown, in law or in equity, that arise from or relate to the Policies.

F. 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 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 Bank related to such promissory note or indebtedness;

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

c. which are not expressly released in Sections III.A. or III.D. 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 Federal Deposit Insurance Corporation in the exercise of its supervisory and/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 District of Nebraska 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

To the extent, if any, that Settling Defendants are or were shareholders of the Bank and/or TierOne Corporation and by virtue thereof are or may have been entitled to a dividend, payment, or other 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 distributions.

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

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.**

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. 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.

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 its 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
AS RECEIVER FOR TIERONE BANK**

Date: 02/28/14

BY: (b)(6)
TITLE: Counsel
PRINT NAME: Gregory K. Conway

(b)(6) **SETTLING DEFENDANTS:**

Date: 1/29/14
Gibbert G. Lundstrom

Date: _____
David L. Hartman

Date: _____
James A. Laphon

Date: _____
Randall B. Kidd

Date: _____
Delmar E. Williams

Date: _____
Charles W. Hoskins

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 TIERONE BANK**

Date: _____

BY: _____

TITLE: Counsel

PRINT NAME: Gregory K. Conway

(b)(6) **SETTLING DEFENDANTS:**

Date: 1/29/14


Gilbert G. Lundstrom

Date: _____

David L. Hartman

Date: _____

James A. Laphen

Date: _____

Randall B. Kidd

Date: _____

Delmar E. Williams

Date: _____

Charles W. Hoskins

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 TIERONE BANK**

Date: _____

BY: _____

TITLE: Counsel

PRINT NAME: Gregory K. Conway

SETTLING DEFENDANTS:

Date: _____

Gilbert G. Lundstrom

Date: 11/30/14

David L. Hartman

Date: _____

James A. Laphen

Date: _____

Randall B. Kidd

Date: _____

Delmar E. Williams

Date: _____

Charles W. Hoskins

(b)(6)

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 TIERONE BANK**

Date: _____

BY: _____

TITLE: Counsel

PRINT NAME: Gregory K. Conway

SETTLING DEFENDANTS:


Date: _____

Gilbert G. Lundstrom

Date: _____

David L. Hartman

(b)(6) Date: 1-30-14



James A. Lapen

Date: _____

Randall B. Kidd

Date: _____

Delmar E. Williams

Date: _____

Charles W. Hoskins

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 TIERONE BANK**

Date: _____

BY: _____

TITLE: Counsel

PRINT NAME: Gregory K. Conway

SETTLING DEFENDANTS:

Date: _____

Gilbert G. Lundstrom

Date: _____

David L. Hartman

Date: _____

James A. Laphen

(b)(6)

Date: *31 Jan 14*

Randall B. Kidd

Date: _____

Delmar E. Williams

Date: _____

Charles W. Hoskins

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 TIERONE BANK**

Date: _____

BY: _____

TITLE: Counsel

PRINT NAME: Gregory K. Conway

SETTLING DEFENDANTS:

Date: _____

Gilbert G. Lundstrom

Date: _____

David L. Hartman

Date: _____

James A. Laphen

Date: _____

Randall B. Kidd

(b)(6)

Date: JANUARY 31, 2014

Delmar E. Williams

Date: _____

Charles W. Hoskins

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 TIERONE BANK**

Date: _____

BY: _____

TITLE: Counsel

PRINT NAME: Gregory K. Conway

SETTLING DEFENDANTS:

Date: _____

Gilbert G. Lundstrom

Date: _____

David L. Hartman

Date: _____

James A. Laphen

Date: _____

Randall B. Kidd

Date: _____

Delmar E. Williams

(b)(6)

Date: 10-29-14

Charles W. Hoskins

(b)(6)

Date: 1/29/14



Campbell R. McConnell

Date: _____

Ann L. Spence

ARCH INSURANCE COMPANY

Date: _____

BY: _____

TITLE: _____

PRINT NAME: _____

HUDSON INSURANCE COMPANY

Date: _____

BY: _____

TITLE: _____

PRINT NAME: _____

Date: _____

Campbell R. McConnell

(b)(6)

Date: 1-29-14



Ann L. Spence

ARCH INSURANCE COMPANY

Date: _____

BY: _____

TITLE: _____

PRINT NAME: _____

HUDSON INSURANCE COMPANY

Date: _____

BY: _____

TITLE: _____

PRINT NAME: _____

Date: _____

Campbell R. McConnell

Date: _____

Ann L. Spence

ARCH INSURANCE COMPANY

Date: 02/28/14

BY: _____



(b)(6)

TITLE: AVP EA Claims

PRINT NAME: Jeremy Moen

HUDSON INSURANCE COMPANY

Date: _____

BY: _____

TITLE: _____

PRINT NAME: _____

Date: _____

Campbell R. McConnell

Date: _____

Ann L. Spence

ARCH INSURANCE COMPANY

Date: _____

BY: _____

TITLE: _____

PRINT NAME: _____

HUDSON INSURANCE COMPANY

(b)(6)

Date: 1-31-14

BY:

TITLE: AVP, Claims

PRINT NAME: Kristin Comstock