

**SETTLEMENT AND RELEASE AGREEMENT**

This Settlement and Release Agreement ("Agreement") is made as of this 27th day of June, 2011 (the "Effective Date"), by, between, and among the following undersigned parties: The Plaintiff, Federal Deposit Insurance Corporation, as Receiver of Guaranty Bank, Austin, Texas ("FDIC"), and Defendant, Certain Underwriters at Lloyd's London Subscribing to Mortgage Banker's Bond No. [REDACTED] ("Underwriters") (individually, the FDIC and Underwriters may be referred to herein as "Party" and collectively as the "Parties").

(b)(4)

**RECITALS**

WHEREAS:

Prior to August 21, 2009, Guaranty Bank, Austin, Texas ("Bank") was a depository institution organized and existing under the laws of the United States.

On August 21, 2009, the Bank was closed by the Office of Thrift Supervision ("OTS") and pursuant to 12 U.S.C. § 1821(c), the FDIC 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 its assets.

Among the assets to which the FDIC as Receiver succeeded were any and all of the Bank's claims, demands, and causes of actions against Underwriters relating to Mortgage Banker's Bond [REDACTED] (the "Bond").

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On January 17, 2011, the FDIC filed a complaint for money damages against Underwriters. The claim for damages is now pending in the United States District Court for the Western District of Texas, and is styled *Federal Deposit Insurance Corporation, in its capacity as Receiver for Guaranty Bank of Austin, Texas v. Certain Underwriters at Lloyd's London Subscribing to Mortgage Banker's Bond Number MBB-06-00040*, Cause No. 1:11-CV-44 (the "Bond Action").

In the Bond Action, the FDIC has sued Underwriters in order to recover under the Bond which insured the Bank for, among other things, the dishonest acts of its employees.

Specifically, the FDIC alleges that two of the Bank's former employees, Cheryl Carlini ("Carlini") and Anthony Faithauer ("Faithauer"), independent from one another, committed dishonest acts that resulted in direct financial loss to the Bank. The FDIC alleges that the direct financial loss caused by Carlini's dishonest acts is \$507,185.93, plus interest, costs and attorneys' fees (the "Carlini Claim"); the direct financial loss caused by Faithauer's dishonest acts, as alleged by the FDIC, is \$1,362,957.55, plus interest, costs and attorneys' fees (the "Faithauer Claim"). Underwriters have denied liability in the Bond Action for both the Carlini Claim and the Faithauer Claim.

Underwriters and the FDIC settled the Carlini Claim on April 28, 2011. The undersigned parties deem it in their best interests to enter into this Agreement to settle the Faithauer Claim in order 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**

A. As an essential covenant and condition to this Agreement, Underwriters agrees to pay the FDIC the sum of \$865,000.00 (the "Settlement Funds").

B. Upon the execution of an original, or originals in counterpart, of this Agreement by each of the undersigned Parties to this Agreement (defined above as the "Effective Date"), but no later than thirty (30) days after the Effective Date (the "Final Due Date"), the Settlement Funds shall be delivered to FDIC by direct wire transfer into an account designated by FDIC or by certified or cashier's check drawn upon a depository institution acceptable to FDIC. In the event that the Settlement Funds are not delivered to the FDIC (or its counsel) by the Final Due Date, interest shall accrue on all unpaid amounts at the rate of 5% per annum from the Effective Date until the date of payment. No later than ten (10) business days after the receipt of the Settlement Funds by the FDIC in the manner described in this paragraph, the FDIC shall file a dismissal of the Bond Action with prejudice, with each party to bear its own costs as those were

originally incurred.

C. In addition, and without waiving any other rights that the FDIC may have, in the event that all Settlement Funds (including all accrued interest) are not received by the FDIC on or before the Final Due Date, then the FDIC, 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, in which event Underwriters agrees to jurisdiction in the United States District Court for the Western District Court of Texas and agrees to pay all of the FDIC's reasonable attorney's fees expended in enforcing the terms of this Agreement. Any decision by the FDIC 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 Underwriters, 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 declares this Agreement null and void, the FDIC will return all amounts paid to it under this Agreement by Underwriters within ten (10) days of the FDIC's act of declaring this Agreement null and void.

## **SECTION II: Releases**

### **A. Release of Underwriters by FDIC.**

Effective upon receipt in full of the Settlement Funds plus any accrued interest described in SECTION I above, and except as provided in PARAGRAPH II.C., the FDIC, for itself and its successors and assigns, hereby release and discharge Underwriters and their 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, that arise from or relate to the Faithauer Claim.

### **B. Release of FDIC by Underwriters.**

Effective simultaneously with the release granted in PARAGRAPH II.A. above,

Underwriters, on behalf of themselves, and their respective heirs, executors, administrators, agents, representatives, successors and assigns, hereby release and discharge FDIC, 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 Faithauer Claim.

C. Express Reservations From Releases By FDIC.

1. Notwithstanding any other provision, by this Agreement, the FDIC 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 Underwriters 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, the Bank, other financial institutions, or any other person or entity, including without limitation any claims acquired by FDIC 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 II.A.

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 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.

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 Western District of Texas or any other federal judicial district. In addition, the FDIC 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 III: 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. The undersigned parties further acknowledge that they may not base any claim of waiver or estoppel in any other matter upon the execution of this Agreement or payment of consideration described herein.

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 Texas.

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 any documents necessary to 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.

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.

(b)(6)

Date: June 27, 2011

BY

FEDERAL DEPOSIT INSURANCE CORPORATION  
[Redacted Signature]

TITLE: Counsel, Professional Liability Unit

PRINT NAME: Barry H. Gottfried

Date: June 27, 2011

(b)(6)

CERTAIN UNDERWRITERS AT LLOYD'S LONDON  
SUBSCRIBING TO MORTGAGE BANKER'S BOND  
NO. MBB-06-00040

BY

[Redacted Signature]

TITLE: Counsel, Sedgwick, LLP

PRINT NAME: Todd D. McCormick