

AGREEMENT OF SETTLEMENT AND MUTUAL RELEASE

THIS AGREEMENT OF SETTLEMENT AND MUTUAL RELEASE (**agreement**) is made and entered into by and between FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for IndyMac Bank, FSB (**IndyMac**) (collectively, **Plaintiff**) and ECONO APPRAISAL INC. (**Econo Appraisal**). Plaintiff and Econo Appraisal may be referred to herein individually as "Party" and collectively as the "Parties."

RECITALS

This agreement is made with reference to the following facts:

A. On or about April 14, 2010, Plaintiff filed a complaint for money damages alleging causes of action against, amongst others, Econo Appraisal, Roberto Rodriguez (**Rodriguez**) and Lance Moyse (**Moyse**) for negligent misrepresentation, negligence and breach of fiduciary duty, and against Econo Appraisal for breach of third-party beneficiary contract (the **Complaint**), in connection with a first mortgage loan funded by IndyMac in the principal amount of \$660,000 and a second mortgage loan funded by IndyMac in the principal amount of (b)(6) \$165,000, made to a borrower named [redacted] collectively, the **Loan**) and which was secured by a residential condominium located at Unit [redacted] in the "Mark on Brickell" at 1155 (b)(6) Brickell Bay Drive, Miami; FL 33131 (the **Property**). The pending action which the Complaint initiated is entitled *Federal Deposit Insurance Corporation as Receiver for IndyMac Bank, FSB v. Miguel F. Mirabal, et al.*, is pending in the United States District Court for the Southern District of Florida, Miami Division (the **Court**), Case No. 10-21197-CIV- HUCK/BANDSTRA (the **Action**).

B. Econo Appraisal and Rodriguez answered and asserted affirmative defenses to the

Complaint on June 9, 2010. Moyses filed an answer and affirmative defenses on August 3, 2010.

C. A trial in this Action commenced on June 27, 2011. The jury rendered a verdict in favor of Plaintiff on Plaintiff's claims of negligence, negligent misrepresentation and breach of contract, calculating Plaintiff's total damages as \$496,500.00 on June 30, 2011, finding Plaintiff seventy percent (70%) at fault and liable for \$347,550.00; Econo Appraisal fourteen percent (14%) at fault and liable to Plaintiff for \$69,510.00; Rodriguez ten percent (10%) at fault and liable to Plaintiff for \$49,650.00; and Moyses six percent (6%) at fault and liable to Plaintiff for \$29,790.00.

D. The Parties deem it in their best interests to enter into this agreement to avoid the uncertainty, trouble, and expense of further litigation regarding the final judgment amounts and related post trial issues. By this agreement, the Parties intend to memorialize the terms of their compromise and settlement of the Action.

AGREEMENT AND MUTUAL RELEASE

NOW, THEREFORE, in consideration of the undertakings contained in this agreement, and other good, valuable and sufficient consideration, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Preamble, Recitals and Exhibits. The foregoing preamble and recitals are true and correct and, along with the attached exhibit, are integral parts of this agreement.

2. Settlement Payment to Plaintiff. Econo Appraisal shall pay Plaintiff a total sum of One Hundred Fifty Thousand Dollars and No Cents (\$150,000.00) (the **Settlement Payment**), delivery of which has been made to Plaintiff's counsel of record in the Action.

(a) Econo Appraisal's Representation and Warranty as to Insurance Coverage. Econo Appraisal hereby represents and warrants to Plaintiff that the Settlement Payment

has been made by Econo Appraisal's insurance company and that Econo Appraisal is a covered party under the subject policy for any acts, errors or omissions committed by Econo Appraisal, Rodriguez and/or Moyse arising from or related to the Action.

3. Dismissal of the Action. Together with the execution of this agreement, counsel for Plaintiff shall execute a Stipulation of Dismissal of the Action with prejudice in the form attached hereto as **EXHIBIT A**. Within five (5) business days after Plaintiff's receipt and clearing of the Settlement Payment from Econo Appraisal, so that good and clear funds in the amount agreed to herein are actually received by Plaintiff, counsel for Plaintiff shall file the executed Stipulation of Dismissal with the Court. If Plaintiff does not receive good and clear funds from Econo Appraisal, Plaintiff has no obligation to dismiss Econo Appraisal, Rodriguez and/or Moyse from the Action.

4. Court to Retain Jurisdiction. The Parties agree that the Court shall have continuing jurisdiction to enforce the provisions of this agreement to the fullest extent permitted by law.

5. Release by Plaintiff. Subject to full performance of the obligations and representations and warranties set forth in this agreement, and effective upon the receipt and clearing of the Settlement Payment, so that good and clear funds in the amount agreed to herein are actually received by Plaintiff, and except as provided in paragraph 7, below, Plaintiff, for itself and for each and every one of its current and former officers, directors, joint venturers, partners, employees, agents, servants, administrators, executors, predecessors, successors, subsidiaries, parents, affiliates, attorneys, insurers, representatives and assigns, conservators, and all persons or entities acting by, through, under, for, on behalf of, or in concert with them, past or

present, fully and forever releases, acquits and discharges Econo Appraisal, past or present, jointly and severally, from and against any and all rights, claims, debts, demands, acts, agreements, liabilities, obligations, damages, costs, fees (including, without limitation, those of attorneys), expenses, actions and/or causes of action of every nature, character and description, or causes of liability, rights and offset rights, whether at law or in equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, including without limitation injunctive or equitable relief, any award of actual, consequential, incidental, liquidated, or other types or categories of damages, any award of punitive or exemplary damages, any claims for attorneys' fees, costs or expenses of litigation and any other type of relief which Plaintiff has, may have or might have against Econo Appraisal pertaining to the Loan, the Property, the Complaint, and any and all facts, occurrences and transactions alleged in the Action, provided, however, that this release is not a general release but is expressly and specifically limited to the Loan, the Property, the Complaint, and any and all facts, occurrences and transactions alleged in the Action, and is not intended nor shall it be deemed to release any other claims, demands, causes of actions, debts, obligations, losses damages, liabilities, costs, expenses, attorneys' fees, penalties, compensation, right to indemnity and/or demands as to any other loans or matters that Plaintiff may have or might have against Econo Appraisal, including without limitation any other claims, demands or actions regarding any other matters.

6. Release by Econo Appraisal. Subject to full performance of the obligations and representations and warranties set forth in this agreement, and effective simultaneously with the release granted in paragraph 5, above, Econo Appraisal, on behalf of itself and for each and every one of its respective current and former officers, directors, joint venturers, partners, employees, agents, servants, administrators, executors, predecessors, successors, subsidiaries,

parents, affiliates, attorneys, insurers, representatives and assigns, conservators and/or receivers, and all persons or entities acting by, through, under, for, on behalf of, or in concert with them, past or present (the **Econo Appraisal Releasors**), fully and forever release, acquit and discharge Plaintiff and its current and former officers, directors, joint venturers, partners, employees, agents, servants, administrators, executors, predecessors, successors, subsidiaries, parents, affiliates, attorneys, insurers, representatives and assigns, conservators, and all persons or entities acting by, through, under, for, on behalf of, or in concert with them, past or present, jointly and severally, from and against any and all rights, claims, debts, demands, acts, agreements, liabilities, obligations, damages, costs, fees (including, without limitation, those of attorneys), expenses, actions and/or causes of action of every nature, character and description, or causes of liability, rights and offset rights, whether at law or in equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, including without limitation injunctive or equitable relief, any award of actual, consequential, incidental, liquidated, or other types or categories of damages, any award of punitive or exemplary damages, any claims for attorneys' fees, costs or expenses of litigation and any other type of relief which the Econo Appraisal Releasors may have or might have against Plaintiff pertaining to the Loan, the Property, the Complaint, and any and all facts, occurrences and transactions alleged in the Action, provided, however, that this release is not a general release but is expressly and specifically limited to the Loan, the Property, the Complaint, and any and all facts, occurrences and transactions alleged in the Action, and is not intended nor shall it be deemed to release any other claims, demands, causes of actions, debts, obligations, losses damages, liabilities, costs, expenses, attorneys' fees, penalties, compensation, right to indemnity and/or demands as to any other loans or matters that Econo Appraisal may have or might have against Plaintiff, including without limitation any other

claims, demands or actions regarding any other matter.

7. Express Reservations from Releases by Plaintiff. Notwithstanding any other provision contained herein, by this agreement, Plaintiff does not release, and expressly preserves fully and to the same extent as if the agreement had not been executed (a) any claims or causes of action that do not arise from or relate to (i) the Loan, (ii) the Property, or (iii) any and all facts, occurrences and transactions alleged in the Action, (b) any action taken by or any claims that may be asserted by any other federal agency as to any matters, including without limitation any matters that may be based upon or arise out of the acts alleged in the Action, and (c) claims arising from the closing of the Loan against any other transaction participant concerning the

Loan, including but not limited to,

(b)(4) [Redacted]

[Redacted]

Additionally, this agreement does not waive or release any claim Plaintiff may have relating to or arising from any loan other than the Loan at issue in the Action. In addition, this agreement does not purport to waive, nor is it intended 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 State of California, Central District, or any other federal judicial district, including any rights, if appropriate, to court ordered restitution pursuant to the relevant provisions of the Victim and Witness Protection Act, 18 U.S.C. § 3663, *et seq.*

8. No Admission of Liability. Plaintiff acknowledges that this agreement does not constitute an admission by Econo Appraisal as to the merits of any claim that Plaintiff or its predecessors in interest, including IndyMac Bank, FSB, has asserted, or could have asserted, in the Action. Likewise, Econo Appraisal acknowledges that this agreement does not constitute an

admission by Plaintiff that any asserted claim is or was in any way lacking in merit, and Econo Appraisal also acknowledges that this agreement does not constitute an admission by Plaintiff as to the merits of any claim that Econo Appraisal has asserted, or could have asserted, in the Action. Nevertheless, Plaintiff and Econo Appraisal have concluded that continued litigation would be expensive and protracted and that it is desirable that the Action be settled fully and finally as between Plaintiff and Econo Appraisal in the manner and upon the terms and conditions set forth in this agreement.

9. Waiver under Section 1542 of California Civil Code. Subject to the limitations contained therein and in paragraph 7, above, the releases as set forth in paragraphs 5 and 6 are intended by the Parties to be read and interpreted as broadly as possible to affect the releases set forth therein regardless of whether the claims are presently known or unknown to the Parties. This agreement is made by the Plaintiff and Econo Appraisal freely and with independent legal advice and counsel, and Plaintiff and Econo Appraisal are fully aware of the provisions of Section 1542 of the Civil Code of the State of California, which reads as follows:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

However, this is a limited release and not a general release and is only intended to release those claims specifically identified in paragraphs 5 and 6 of the agreement and is specifically limited by the limitations contained in those paragraphs and in paragraph 7 of this agreement. Nevertheless, to the extent Civil Code section 1542 (as well as any other or successor law of similar effect) applies to the agreement, Plaintiff and Econo Appraisal waive any rights, benefits

and protections they may have under section Civil Code 1542 to the extent necessary to effectuate the Releases set forth herein in paragraphs 5 through 7, inclusive, herein.

10. Non-Disparagement. Econo Appraisal will not, directly or indirectly, make any disparaging statements (*i.e.*, statements harmful to business interests, reputation or good will) in any form (orally, in writing, etc.) against Plaintiff or any of Plaintiff's affiliates relating to the Loan, Property or Action.

11. Representations and Warranties. The Parties represent and warrant to and agree with each other as follows:

- a. Econo Appraisal represents, warrants and admits for all purposes that Rodriguez and Moyse at all times acted as Econo Appraisal's agents and within the scope of their employment at Econo Appraisal when conducting any appraisal arising from or related to the Action.
- b. The Plaintiff and Econo Appraisal have received independent legal advice from attorneys of their choice with respect to the advisability of entering into this agreement and of giving the releases provided herein.
- c. In connection with the execution of this agreement and the making of the settlement provided for herein, no Party to this agreement has relied upon any statement, representation or promise of any other Party not expressly contained herein.
- d. This agreement is fully integrated and contains the entire agreement of the Parties hereto. There are no agreements or understandings between the Parties hereto relating to the matters and releases referred to in this agreement other than as set forth in this agreement, and this agreement supersedes and replaces any and all

prior negotiations and agreements between the Parties hereto, whether written or oral.

- e. Plaintiff and Econo Appraisal have made such investigation of the facts pertaining to the releases contained herein as they deem necessary.
- f. The terms of this agreement are contractual and are the result of negotiation among the parties. Each Party has cooperated in the drafting and preparation of this agreement. Hence, in any construction to be made of this agreement, the role of the Party in drafting and preparation of the agreement shall not be referred to in order to construe the agreement against that Party, and the canon of contractual interpretation shall not be applied.
- g. This agreement has been carefully read by each of the Parties and the contents thereof are known and understood by each of the Parties. This agreement is signed freely by each party executing it.
- h. The Parties have not assigned or transferred any of their claims being released herein.

12. Consideration. The consideration received in connection with this agreement is fair, adequate and substantial and consists only of the terms set forth in this agreement.

13. Modifications. This agreement may not be amended, canceled, revoked or otherwise modified except by written agreement subscribed by all of the Parties to be charged with such modification.

14. Agreement Binding on Successors and Assigns. This agreement shall be binding upon, and shall inure to the benefit of, the Parties hereto and their respective officers, directors, joint venturers, partners, employees, agents, servants, heirs, administrators, executors,

successors, representatives and assigns.

15. Applicable Law. This agreement has been negotiated and exchanged in the State of Florida. As such, this agreement and all matters relating thereto shall be governed by the laws of the State of Florida without regard to its principles of conflicts of law. In addition, in the event of any disputes arising between the Parties out of this agreement, the parties agree that the exclusive venue in which all disputes shall be resolved shall be by way of an action filed in the United States District Court for the Southern District of Florida (but only if such court has subject matter jurisdiction over the disputes).

16. Execution and Delivery Required -- Effective Date. This instrument shall not be considered to be the agreement (defined above) or an enforceable contract, nor shall it create any obligation whatsoever on the part of any or all of the Parties, nor shall it or any of its terms constitute an undertaking by any of the Parties unless and until the date on which counterparts of it have been signed by and exchanged amongst all Parties (via facsimile, e-mail or otherwise) (the **Effective Date**). Until the Effective Date, any Party who may already have signed and exchanged one or more counterparts of this agreement with other Parties shall have the right to revoke such signature. On the Effective Date, this instrument shall become the agreement and shall become a binding and enforceable contract. Transmittal of a counterpart signature page signed by a Party (or by his or its attorney-in-fact pursuant to a duly executed power of attorney authorizing the same) via facsimile or e-mail shall be one way in which this agreement may be transmitted and formed, but in that event, the Party so transmitting it shall also forward the original, signed counterpart to the other via overnight delivery. All counterparts shall be construed together as the agreement.

17. Construction. Each of the masculine, feminine and neuter genders shall include the others. The singular shall include the plural and vice-versa. This agreement is the product of negotiation between parties and as such, shall not be construed as though all or any part of it was drafted by any particular Party.

18. Severability. In the event any provision of this agreement shall be held to be void, voidable or unenforceable, the remaining provisions shall remain in full force and effect.

19. Warranty of Authority. Each Party or attorney whose signature is affixed hereto in a representative capacity represents and warrants that he or she is authorized to execute this agreement on behalf of and to bind the entity on whose behalf his or her signature is affixed and that he or she is acting in the scope of such agency and authority. Each Party specifically represents and warrants that no signatures other than those made on this agreement are necessary to bind the Parties to all of the obligations imposed by the agreement.

20. Attorneys' Fees and Costs. Plaintiff and Econo Appraisal each agree to pay their own costs, attorneys' fees and expenses incurred in connection with the Action. In the event that any action, suit or other proceeding is instituted to remedy, prevent or obtain relief from a breach of this agreement, arising out of a breach of this agreement, involving claims within the scope of the release contained in this agreement or pertaining to a declaration of rights under this agreement, the prevailing Party shall recover its reasonable attorneys' fees incurred in each and every such action, suit or other proceeding, including any and all appeals or petitions therefrom.

21. Counterparts. This agreement may be executed in one or more counterparts, each of which when executed and delivered shall be an original, and all of which when executed shall constitute one and the same instrument. Signatures on this agreement, or any counterpart of this agreement, transmitted by facsimile machine or electronic mail in pdf format shall have the same

force and effect as original signatures.

22. Captions and Headings. The captions, paragraph numbers and paragraph headings appearing in this agreement are inserted only as a matter of convenience and in no way define, limit, construe or describe the scope or intent of this agreement, nor in any way affect this agreement.

23. Further Assurances. The Parties shall execute such other documents as may be reasonably necessary to carry out the terms and conditions of this agreement.

24. Survival. All warranties, representations, covenants, and agreements set forth herein shall survive the Effective Date.

25. Compliance Dates. In the event that any date specified in this agreement shall be on a Saturday, Sunday, or a nationally-declared holiday, then the date so specified shall be deemed to be the next business day following such date, and compliance by such business day hereunder shall not be deemed a default by either of the Parties under this agreement.

26. Waiver. The waiver by one Party of the performance of any covenant or condition herein shall not invalidate this agreement, nor shall it be considered to be a waiver by such Party of any other covenant or condition or of any later instance of the previously waived covenant or condition. The waiver by any Parties of the time for performing any act shall not constitute a waiver at the time for performing any other act or an identical act required to be performed at a later time.

27. Jury Trial Waiver. The Parties hereby waive any and all rights that they may otherwise have to a trial by jury in any action, proceeding, claim, counterclaim or third party complaint, whether in contract or tort, at law or in equity, arising out of or in any way related to this agreement.

28. Entire Agreement. This agreement contains the complete agreement of the Parties concerning the subjects of this agreement and supersedes all prior drafts of this agreement and all other prior agreements, promises, acknowledgements, representations and warranties, if any, that may have been made between or among the Parties concerning that subject of this agreement, whether in connection with the negotiation of this agreement or otherwise. This agreement has been the product of negotiation. The Parties have had the opportunity to obtain independent advice from counsel. Prior draft documents were prepared, exchanged and discussed by some or all of the Parties before finally reaching and entering into this agreement. In any number of instances, words used in prior drafts may have been changed or removed from the language ultimately agreed to in this agreement. In the event of a dispute over the meaning of any of the provisions or requirements of this agreement, the fact that other words may have been used or deleted from earlier draft documents or provisions in such draft documents that were modified before being included herein, shall not be used to aid in the construction of the meaning and legal effect of this agreement. This agreement may not be modified or changed except by a written instrument executed by all of the Parties and no rights under it may be waived except by a writing signed by the waiving Party. No promises, representations, warranties, agreements or other understandings exist between the parties with respect to the subject matter of this agreement, and this agreement supersedes and discharges any and all prior promises, acknowledgements, representations, warranties, agreements or other understandings that existed or may have existed between the Parties.

[SIGNATURES CONTAINED ON NEXT PAGE]

IN WITNESS WHEREOF, the Parties hereto have executed this agreement on the dates set forth below.

Dated: 9/26/, 2011

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR INDYMAC BANK, F.S.B.

(b)(6)

By:

Richard S. Gill

Its: Counsel

Dated: _____, 2011

ECONO APPRAISAL, INC.

By: _____

Its: _____

IN WITNESS WHEREOF, the Parties hereto have executed this agreement on the dates set forth below.

Dated: _____, 2011

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR INDYMAC BANK, F.S.B.

By: _____

Its: _____

Dated: 9/26, 2011

ECONO APPRAISAL, INC.

By: _____ (b)(6)

Its: EWA

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO. 10-21197-CIV- HUCK/BANDSTRA

**FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER FOR
INDYMAC BANK, FSB,**

Plaintiff,

v.

**ECONO APPRAISAL INC., ROBERTO
RODRIGUEZ, and LANCE MOYSE,**

Defendants.

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

Plaintiff Federal Deposit Insurance Corporation, as Receiver for IndyMac Bank, FSB (**Plaintiff**), and defendants Econo Appraisal, Inc., Roberto Rodriguez, and Lance Moyse (the **Appraiser Defendants**), pursuant to Federal Rule of Civil Procedure 41(a), stipulate that this Court may enter an order without further notice or hearing to dismiss this case **with prejudice**, with each party to bear its own costs and attorneys' fees. In stipulating to dismiss this action with prejudice, Plaintiff and the Appraiser Defendants represent, warrant and agree that no party owes any other party attorneys' fees or costs under any contract, statute, law, offer of judgment, proposal of settlement, or otherwise.

Roberto Rodriguez and Lance Moyse stipulate that this Court may enter an order without further notice or hearing to dismiss all claims, defenses, affirmative defenses, counterclaims and cross-claims arising from or related to this action with prejudice, including but not limited to any and all claims for attorneys' fees and/or costs.

Date: _____, 2011

William P. Heller
Florida Bar No. 987263

(b)(6) _____
Justin E. Hekkanen
Florida Bar No. 33712

(b)(6) _____
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*Attorneys for Federal Deposit Insurance
Corporation, as receiver for IndyMac Bank,
FSB*

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Florida Bar No. 516325

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(954) 474-9959 (Fax)

*Counsel for Econo Appraisal, Inc., Roberto
Rodriguez and Lance Moyse*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by transmission of Notices of Electronic Filing generated by CM/ECF on September __, 2011, on all counsel or parties of record on the Service List below.

/s/ Justin E. Hekkanen

Attorney

SERVICE LIST

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Rodriguez and Lance Moyse*

/s/ Justin E. Hekkanen

Attorney