

## 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 Irwin Union Bank and Trust Company and Irwin Union Bank, F.S.B. ("FDIC-R"), Duncan Burdette, Bradley J. Kime, Kimberly Roerig, and Michael Waters, (collectively the "Settling Defendants") (individually, the FDIC- R and the Settling Defendants may be referred to herein as "Party" and collectively as the "Parties").

### RECITALS

#### WHEREAS:

Prior to September 18, 2009, Irwin Union Bank and Trust Company ("IUBT") was a depository institution organized and existing under the laws of Indiana, and Irwin Union Bank, F.S.B. ("FSB") was a depository institution organized and existing under the laws of the United States (IUBT and FSB are collectively referred to herein as the "Banks");

On September 18, 2009, the Indiana Department of Financial Institutions closed IUBT and pursuant to 12 U.S.C. § 1821(c), the Federal Deposit Insurance Corporation was appointed Receiver. Also on September 18, 2009, the Office of Thrift Supervision closed FSB 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 Banks, including those with respect to its assets;

Among the assets to which the FDIC-R succeeded were all of the Banks' 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 Banks;

On May 13, 2013, the FDIC-R filed a Complaint for money damages against the Settling Defendants, each of whom served at various times as an officer of the Banks. Those claims for damages are now pending in the United States District Court for the Southern District of Indiana in *FDIC as Receiver for Irwin Union Bank and Trust Co. and Irwin Union Bank, F.S.B. v. Kime, et al*, Case No. 1:13-cv-00782-TWP-DML (S.D. Ind.) (the "D&O Action"). The Settling Defendants have denied liability in the D&O Action;

The Parties wish to resolve all issues with respect to the D&O Action, without an admission of liability on the part of any Party, to avoid the uncertainty and expense of further litigation and the FDIC-R and the Settling Defendants have agreed to enter into this Agreement for that purpose.

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, on or before twenty (20) business days following the date on which (i) all Parties have executed this Agreement; and (ii) the FDIC-R has provided the Settling Defendants with a completed and signed W-9 tax ID form ("Payment Due Date"), the Settling Defendants shall cause their insurers to pay by check to the FDIC-R the sum of \$15,000,000 (the "Settlement Payment").

B. If the FDIC-R does not receive the Settlement Payment in full on or before the Payment Due 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)(2); or

2. Enforce this Agreement, in which event the Settling Defendants and any of their insurers who have not paid the Settlement Payment agree to jurisdiction in United States District Court in the Southern District of Indiana 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 Defendants agree to consent, and reinstate the D&O Action. The Settling Defendants further agree 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.B.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.B.2 through I.B.4 at any time prior to receipt of Settlement Payment (including all accrued interest) in full.

## **SECTION II: Stipulation and Dismissal**

Within ten business days after the latter of (1) full execution of this Agreement by all of the Parties, and (2) receipt of the Settlement Payment, plus accrued interest, if any, the FDIC-R shall file a stipulation of dismissal with prejudice and with each Party to bear its own attorneys'

fees and costs, executed by the attorneys for all Parties hereto, in the form attached hereto as Exhibit A, in the D&O Action.

### **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:

1. The Settling Defendants and their respective heirs, executors, trustees, 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, 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 Banks, including without limitation the causes of action alleged in the D&O Action.

**B. The Settling Defendants' Releases.**

Effective simultaneously with the release granted in Section III.A. above, the Settling Defendants, on behalf of themselves individually, and their respective heirs, executors, trustees, 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, in law or in equity, that arise from or relate to, the Banks 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 Banks, including without limitation the causes of action alleged in the D&O Action.

C. Exceptions from Releases by 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 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 FDIC-R, the Banks, other financial institutions, or any other person or entity, including without limitation any such claims acquired by FDIC-R as successor in interest to the Banks or any person or entity other than the Banks; 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.

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

To the extent, if any, that Settling Defendants are or were shareholders of the Banks; or its holding company and by virtue thereof are or may be entitled to a dividend, payment, or other distribution upon resolution of the receivership of the Banks 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 Banks, 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 Banks, its conservatorship, or receivership, Settling Defendants 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 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 or her counsel.

C. Financial Disclosure Representation. Each Settling Defendant has submitted financial information to the FDIC-R including personal financial statements and herein affirms that his/her financial information is true and accurate as of the date of this agreement. Each

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 Defendants. 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 a Settling Defendant failed to disclose any material interest, legal, equitable, or beneficial, in any asset, that 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 that 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 Defendants agree 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 Banks;
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 Banks;

3. Testifying as requested by the FDIC-R, without the necessity of a subpoena, in any matter relevant to the Banks, 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 Banks.

#### 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, including counterparts received by facsimile or email 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. Delivery of such counterparts by facsimile or electronic mail (in PDF or .tiff format) shall be deemed effective as manual delivery and may be used in lieu of originals for any purpose.

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 State of Indiana.

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: Susan Valentine, Esquire  
Robinson Curley & Clayton, P.C,  
300 South Wacker Drive  
Suite 1700  
Chicago, Illinois 60606

If to Duncan Burdette: R. Pete Smith, Esquire  
McDowell, Rice, Smith & Buchanan, P.C.  
605 W. 47<sup>th</sup> Street, Suite 350  
Kansas City, MO 64112

If to Bradley J. Kime: James A. Knauer, Esquire  
Kroger Gardis & Regas, LLP  
111 Monument Circle, Suite 900  
Indianapolis, IN 46204-5125

If to Kimberly Roerig: Jennifer M. McHugh, Esquire  
Cozen O'Connor  
1650 Market Street, Suite 2800  
Philadelphia, PA 19103  
Phone: 610-941-2366  
Fax: 215-665-2165

(b)(6) \_\_\_\_\_ Email:

If to Michael Waters: Kevin Stolworthy, Esquire  
Armstrong Teasdale LLP  
3770 Howard Hughes Parkway  
Suite 200  
Las Vegas, NV 89169

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 IRWIN UNION BANK AND TRUST  
COMPANY AND FOR IRWIN UNION BANK, F.S.B.

(b)(6) \_\_\_\_\_ Date: 3.18.16 BY:

TITLE: Counsel

PRINT NAME: Ben Krowicki

Date: \_\_\_\_\_  
Duncan Burdette

Date: \_\_\_\_\_  
Bradley J. Kime

Date: \_\_\_\_\_  
Kimberly Roerig

Date: \_\_\_\_\_  
Michael Waters

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COMPANY AND FOR IRWIN UNION BANK, F.S.B.

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

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

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

(b)(6)

Date: 3-16-2016

[Redacted Signature]

Duncan Burdette

Date:

Bradley J. Kime

Date:

Kimberly Roerig

Date:

Michael Waters

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COMPANY AND FOR IRWIN UNION BANK, F.S.B.

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

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

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

Date: \_\_\_\_\_  
Duncan Burdette

(b)(6) \_\_\_\_\_  
Date: 3-18-16 \_\_\_\_\_  
Bradley J. Kimbrell

Date: \_\_\_\_\_  
Kimberly Roerig

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

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

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

Date: \_\_\_\_\_  
Duncan Burdette

Date: \_\_\_\_\_  
Bradley J. Kime

(b)(6) \_\_\_\_\_  
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Kimberly Roering

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COMPANY AND FOR IRWIN UNION BANK, F.S.B.

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

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

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

Date: \_\_\_\_\_  
Duncan Burdette

Date: \_\_\_\_\_  
Bradley J. Kime

Date: \_\_\_\_\_  
Kimberly Roerig

(b)(6) \_\_\_\_\_  
Date: *March 16, 2016* \_\_\_\_\_  
Michael Waters