

**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 Mid City Bank, Inc. (“FDIC-R”), Patricia M. Fitl, Personal Representative of the Estate of James G. Fitl and the Estate of James G. Fitl, deceased (collectively the “Settling Defendant”), and Continental Casualty Company (“Insurer”). Individually, the FDIC-R, the Settling Defendant, and Insurer may be referred to herein as “Party” and collectively as the “Parties”.

**RECITALS**

**WHEREAS:**

Prior to November 4, 2011, Mid City Bank, Inc. (“Bank”) was a depository institution organized and existing under the laws of the state of Nebraska.

On November 4, 2011, the Nebraska Department of Banking and Finance closed the Bank 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 Bank, including those with respect to its assets.

Among the assets to which the FDIC-R succeeded were all of the Bank’s claims, demands, and causes of action against the Bank’s 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 Bank.

On November 3, 2014, the FDIC-R filed a complaint for money damages against James G. Fitl (“Mr. Fitl”), who was the former President and Chairman of the Board of the Bank. Upon discovering that Mr. Fitl had died on October 30, 2014, the complaint was amended on November 4, 2014, to name a special administrator that was appointed to represent Mr. Fitl’s estate. On November 26, 2014, the Settling Defendant petitioned to be substituted as the

defendant in the action. That motion was granted on March 30, 2015. The complaint is now pending in the United States District Court for the District of Nebraska in *FDIC as Receiver for Mid City Bank, Inc. v. Fitl*, Case No. 8:14-cv-00346-LSC-FG3 (“D&O Action”). The Settling Defendant has denied liability and has asserted certain affirmative defenses in the D&O Action. In addition, on March 14, 2017, the FDIC-R filed a Motion to Continue in *The Matter of the Estate of James G. Fitl, Deceased* (Douglas County Ct. No. PR 14-1516), asking the Court to continue the Disposition of Probate of the Fitl Estate pending resolution of the D&O Action on the ground that the FDIC-R was an “interested person” with respect to the Fitl Estate under the Nebraska Probate Code, Neb. Rev. Stat. § 30-2209(21) (Reissue 2016). The Probate Court granted the FDIC-R Motion to Continue on March 15, 2017.

Insurer issued a director and officer liability policy numbered  for the period (b)(4)  
December 15, 2010 to December 15, 2011 (“Policy”), by which the Insurer insured the directors and officers of the Bank according to the terms, provisions, and conditions of the Policy. The Settling Defendant asserted claims for coverage under the Policy. Insurer has reserved its rights, remedies, and defenses under the Policy and applicable law for claims asserted by the FDIC-R against the Settling Defendant.

The undersigned Parties deem it in their best interests to enter into this Agreement to avoid the uncertainty 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, on or before thirty (30) calendar days following the date on which all Parties have executed this Agreement, the Insurer

agrees to pay the FDIC-R the sum of \$3,225,000 (the "Settlement Payment").

B. The Settlement Payment to the FDIC-R shall be made by direct wire transfer into an account designated by the FDIC-R by notice to the Settling Defendant and Insurer. The FDIC-R shall provide all necessary payment instructions no later than five days after full execution of this Agreement by all Parties.

C. Subject to and without waiving the requirements set forth in Section I.A above, if the FDIC-R does not receive the Settlement Payment on or before the date determined by Section I.A above, then the FDIC-R, in its sole discretion, shall have the right at any time prior to receipt of the Settlement Payment to:

1. Extend the period of time for the Settlement Payment; or
2. Enforce this Agreement, in which event the Settling Defendant and the Insurer agree to jurisdiction in the United States District Court for the District of Nebraska; or
3. Terminate the Agreement, and proceed with the D&O Action; and/or
4. Seek any other relief available to it in law or equity.

Any extension of time under Section I.C.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.C.2 through I.C.4 at any time prior to receipt of the Settlement Payment in full, provided that if the FDIC-R elects to terminate the Agreement and proceed with the D&O Action pursuant to Section I.C.3, it shall refund any partial payment made by the Insurer.

## **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, the FDIC-R shall: (1) file a stipulation of dismissal with prejudice, with each party to bear its own costs, executed by the attorneys for the

FDIC-R and the Settling Defendant in the D&O Action; and (2) file a notice in the probate action captioned *In the Matter of the Estate of James G. Fitl, Deceased*, Case No. PR 14-1516, indicating that the D&O Action has been resolved resulting in a full release and satisfaction of the claims asserted by the FDIC-R against the deceased, that the FDIC-R is therefore no longer an “interested person” under the Nebraska Probate Code, Neb. Rev. Stat. § 30-2209(21) (Reissue 2016), in the probate action, and that the FDIC-R withdraws its request that the Estate remain open.

### SECTION III: Releases

#### A. The FDIC-R’s Releases.

Upon receipt of the Settlement Payment in full as provided in Section I, and except as provided in Section III.D, the FDIC-R, for itself and its successors and assigns, hereby releases and discharges:

1. The Settling Defendant and the respective heirs, executors, trustees, administrators, representatives, successors, and assigns of the Estate of James G. Fitl, 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 Mr. Fitl’s respective functions, duties, and actions as an employee, officer and/or director of the Bank, including without limitation the causes of action alleged in the D&O Action.

2. Insurer, its parents, subsidiaries, affiliates, and reinsurers, and their respective employees, officer, directors, agents, 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 Policy. As part of this release of the Insurer, the FDIC-R agrees that any interest it may have under the Policy is extinguished.

B. The Settling Defendant's Release.

Effective simultaneously with the release granted in Section III.A above, the Settling Defendant, on behalf of itself individually, and its respective heirs, executors, trustees, administrators, agents, representatives, attorneys, successors, and assigns, hereby releases and discharges:

1. 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 Bank or to the performance, nonperformance, or manner of performance of the Mr. Fitl's respective functions, duties, and actions as an employee, officer and/or director of the Bank, including without limitation the causes of action and affirmative defenses alleged in the D&O Action.

2. Insurer, its 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, in law or in equity belonging to the FDIC-R, that arise from or relate to, the performance, nonperformance, or manner of performance of Mr. Fitl's functions, duties and actions as an officer and/or director of the Bank, but only to the extent such claims, demands, obligations, damages, actions and causes of action are effectively released by FDIC-R. Notwithstanding any other provision hereof, Settling Defendant reserves all claims, demands, obligations, damages, actions and causes of action, not expressly released herein.

C. The Insurer's Release.

Effective simultaneously with the release granted in Section III.A above, the Insurer, for itself and its successors and assigns, and on behalf of its parents, subsidiaries, affiliates, and reinsurers, and their respective employees, officers, directors, agents, representatives, successors

and assigns, hereby releases and discharges:

1. 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, in law or in equity, that arise from or relate to the Policy.

2. The Settling Defendant and its respective heirs, executors, trustees, administrators, personal 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-R, that arise from or relate to, the performance, nonperformance, or manner of performance of Mr. Fitl's functions, duties and actions as an officer and/or director of the Bank, but only to the extent such claims, demands, obligations, damages, actions and causes of action are effectively released by FDIC-R.

D. Exceptions from Releases by the 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 Defendant 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 such claims acquired by the FDIC-R as successor in interest to the Bank or any person or entity other than Bank; 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 diminishing 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 Defendant is or was a shareholder of the Bank 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 Bank 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 Bank, 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 Bank, its conservatorship, or receivership, the Settling Defendant hereby knowingly assigns to the FDIC-R any and all rights, titles, and interest in and to any and all such dividends, payments, other distributions, and 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, her, or its counsel.

#### **SECTION VI: Reasonable Cooperation**

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.

#### **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 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.

C. Choice of Law. This Agreement shall be interpreted, construed, and enforced according to the laws of the State of Nebraska.

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:

Christine P. Hsu  
Counsel, Federal Deposit Insurance Corporation  
3501 Fairfax Drive, VS-B-7054  
Arlington, Virginia 22226

(b)(6)

and

Randall Lehner  
Kelley Drye and Warren LLP  
333 West Wacker Drive, Suite 2600  
Chicago, IL 60606

(b)(6)

If to the Settling Defendant:

John M. George, Jr.  
Katten & Temple LLP  
542 South Dearborn Street, 14<sup>th</sup> Floor  
Chicago, IL 60605

(b)(6)

Michael S. Degan  
Kutak Rock LLP  
1650 Farnham Street  
Omaha, NE 68102

(b)(6)

If to the Insurer:

Jennifer B. Groszek  
CNA Special Claim

333 South Wabash Avenue  
Chicago, IL 60604

(b)(6) \_\_\_\_\_

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 nothing in this Agreement prohibits the FDIC-R, the Insurer, or the Settling Defendant from disclosing its terms.

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 MID CITY BANK, INC.

(b)(6) \_\_\_\_\_  
Date: 6/30/17

\_\_\_\_\_

TITLE: Counsel  
PRINT NAME: Christine P. Hsu

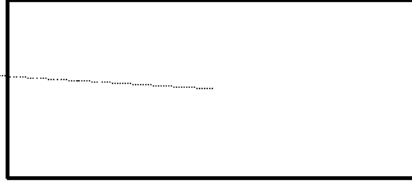
(b)(6) \_\_\_\_\_  
Date: June 27, 2017

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Patricia M. Fitl  
Personal Representative of the Estate of James G. Fitl

CONTINENTAL CASUALTY COMPANY

(b)(6)



Date: June 30, 2017

BY:

TITLE: by and as Claims Consultant for Continental  
Casualty Company

PRINT NAME: Jennifer Groszek