

**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 AmTrust Bank (“FDIC-R”) and Kaye Financial Corporation (the “Settling Defendant”) (individually, the FDIC-R and the Settling Defendant may be referred to herein as “Party” and collectively as the “Parties”).

**RECITALS**

WHEREAS:

Prior to December 4, 2009, AmTrust Bank (“Bank”) was a depository institution organized and existing under the laws of the United States;

On December 4, 2009, the Office of Thrift Supervision 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 the Bank’s claims, demands, and causes of action that are the subject of this Agreement.

On December 2, 2015, the FDIC-R filed a complaint for money damages against the Settling Defendant (“Complaint”). This claim for damages is now pending in the United States District Court for the Northern District of Ohio in *Federal Deposit Insurance Corporation as Receiver for AmTrust Bank v. Kaye Financial Corp.*, Case No. 1:15-cv-02483-CAB (“Action”). In the Action, the FDIC-R has asserted claims against Settling Defendant arising out of the loans identified in the Complaint (the “Claims”). The Settling Defendant has denied liability in the Action.

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, the Settling Defendant agrees to pay the FDIC-R the sum of three hundred twenty thousand dollars (\$320,000) (“the Settlement Payment”), as follows:

1. Fifty thousand dollars (\$50,000), to be paid on or before March 15, 2017;
2. One hundred fifty thousand dollars (\$150,000) payable in twenty-four (24) installments of six thousand two hundred fifty dollars (\$6,250), with the first \$6,250 payment to be paid on or before March 28, 2017, and the remaining 23 installments of \$6,250 payments due on the 28th day of each month, commencing April 28, 2017, and continuing on the 28th day of each month thereafter;
3. An additional payment of forty thousand (\$40,000) shall be due on June 28, 2018;
4. An additional payment of eighty thousand (\$80,000) shall be due on December 28, 2018.

The amount of the Settlement Payment attributable to each of the loans identified in the Complaint in the Action is set forth in Exhibit A.

B. The Settling Defendant shall deliver the Settlement Payment to the FDIC-R by wire transfer into an account designated by FDIC-R by notice to the attorneys for the Settling Defendant or by certified or cashier’s check drawn upon a depository institution acceptable to FDIC-R.

In the event that any installment of the Settlement Payment is not delivered to the FDIC-R (or its counsel) by the due dates set forth in Section I.A, above, interest shall accrue on all

unpaid amounts at the rate of 5% per annum from the date that payment was required by Section I.A until the date of payment.

C. If the FDIC-R does not receive any installment of the Settlement Payment in full on or before the dates 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 in full (including all accrued interest) to:

1. Extend the period of time for the Settlement Payment, including interest accruing from the dates determined by Section I.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 Defendant agrees to jurisdiction in United States District Court for the Northern District of Ohio 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 and move to vacate any dismissal order, to which the Settling Defendant agrees to consent and re-institute an action on the FDIC-R's claims. The Settling Defendant further agrees to waive any defense based on any statute of limitations that would bar any of the FDIC-R's claims and waives all objections, defenses, claims or counterclaims, and covenants and agrees 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; or

4. Enforce the Consent Judgment pursuant to Section I.D below; and/or

5. 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.5 at any time prior to receipt of Settlement Payment (including all accrued interest) in full.

D. Within ten business days after the full execution of this Agreement by all of the Parties, the Parties agree to execute the Consent Judgment. If Settling Defendant defaults on any payment due under the Settlement Payment, Plaintiff may seek to enforce the Consent Judgment in the United States District Court for the Northern District of Ohio on an *ex parte* basis, subject to the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Northern District of Ohio; provided, however, that prior to seeking to enforce the Consent Judgment, the FDIC-R shall provide Settling Defendant with notice of a default of a payment due under the Settlement Payment and allow Settling Defendant a ten (10) day opportunity to cure the default. Notice of default is required solely to enforce the Consent Judgment and shall not otherwise impact any of the FDIC-R's rights and/or remedies under this Agreement in any way. If any portions of the Settlement Payment are received prior to default, the FDIC-R shall file a Notice of Partial Satisfaction of Judgment concurrently with the Consent Judgment, to set forth the amount of the Settlement Payment already paid. FDIC-R shall be entitled to recover reasonable attorneys' fees and costs incurred in connection with enforcing the Consent Judgment.

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

Within ten business days after the latter of: (1) full execution of this Agreement and the Consent Judgment by all of the Parties, and (2) receipt of the initial \$50,000 installment payment towards the Settlement Payment, the FDIC-R shall file a stipulation of dismissal with prejudice in the Action, whereby the Court shall retain jurisdiction to hear and determine all matters related to the Action and to enforce this Agreement, executed by the attorneys for all Parties hereto.

### **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 the Settling Defendant and its heirs, executors, trustees, 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-R, that arise from the Claims.

B. The Settling Defendant's Releases.

Effective simultaneously with the release granted in Section III.A above, the Settling Defendant, on behalf of itself and its heirs, executors, trustees, administrators, representatives, attorneys, successors, and assigns, hereby releases and discharges the FDIC-R, and its employees, officers, directors, representatives, attorneys, 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 the Claims.

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 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 FDIC-R, the Bank, 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 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 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: 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.

#### **SECTION V: 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 Action and to otherwise perform the terms of this Agreement.

#### **SECTION VI: 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 applicable federal law, or in its absence, the laws of the State of Ohio.

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: Michael Delbick; Mortgage Recovery Law Group, 700 N. Brand Blvd., Suite 830, Glendale, CA 91203; Telephone: (818) 630-7900; Email:

(b)(6)

If to the Settling Defendant: David L. Van Slyke; Plunkett Cooney, 300 East Broad Street, Suite 590, Columbus, Ohio 43215; Telephone: (614) 629-3000; Email:

(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 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 AMTRUST BANK

Date: 3/7/2017

BY:

[Redacted Signature Box]

(b)(6)

TITLE:

Counsel, Legal Division

PRINT NAME:

Samuel B. Lutz

KAYE FINANCIAL CORPORATION

Date: 1/10/17

BY:

[Redacted Signature Box]

(b)(6)

TITLE:

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PRINT NAME:

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Exhibit A

(b)(4),  
(b)(6)

