

R 8/25/09

LIMS Mr [Redacted]
DIF/ Mortgage Fraud

ENTERED

8/25/09

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE

("Settlement Agreement") is entered into and made effective as of the 14 day of August, 2009 ("Effective Date"), by and between the Federal Deposit Insurance Corporation as Receiver of IndyMac Bank, FSB ("FDIC") and AKT American Capital, Inc. aka American Capital Corporation ("AKT"). The FDIC and AKT may hereinafter be referred to individually as a "Party" or collectively as the "Parties".

(b)(2)



RECITALS

1.1 AKT sold and/or delivered mortgage loans to IndyMac Bank, FSB, pursuant to various written agreements. A dispute has arisen between the Parties with respect to outstanding demands for repurchase and/or indemnity. Specifically, IndyMac Bank, FSB and IndyMac Federal Bank, FSB made demands to AKT for repurchase and/or indemnification based upon a finding of a breach of the representations and warranties or an Early Payment Default as set forth in the written agreements.

1.2 Without admitting liability, the Parties desire to and have agreed to settle all repurchase and indemnification claims relating to the mortgage loans which were sold directly by AKT to IndyMac Bank, FSB (the "LOANS") upon the terms and conditions hereinafter set forth.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and promises set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties, the Parties, intending to be legally bound, agree as follows:

1.3 **Recitals.** The Recitals set forth above are incorporated into the body of this Settlement Agreement as though fully set forth herein.

1.4 **Payment of the Settlement Agreement.** AKT shall pay the total sum of \$500,000.00 (five hundred thousand dollars) (the "Settlement Funds"). Payment of the Settlement Funds shall be made as follows:

Beginning August 15, 2009, the sum of \$166,666.67 (one hundred sixteen thousand six hundred sixty-six dollars and sixty-seven cents) per month shall be made for three (3) consecutive months until the sum of \$500,000.00 (five hundred thousand dollars) is paid in full.

Payments are due on the 15th day of the month, shall be made by wire transfer made payable to "Mortgage Recovery Law Group Trust Account," Account Number: [redacted] Routing Number: [redacted] Reference: AKT Settlement.

(b)(4)

(b)(4)

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

1.5 In the event AKT defaults by failing to make a timely payment as set forth in this Settlement Agreement, the FDIC shall give written notice via email or fax of the default to AKT, c/o Kent Kirkpatrick at [redacted]

1.6 AKT shall have five (5) calendar days from date of the notice to cure the default. In the event that AKT fails to cure the default within five (5) calendar days, the remaining balance of the Settlement Funds will be immediately due and payable, and the FDIC may pursue the immediate payment in full of all sums remaining due without further demand and may invoke all remedies permitted by applicable law. The FDIC shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph, including, but not limited to, attorneys' fees and costs incurred in collecting all sums owing.

RELEASE

1.7 **Unknown Claims.** Each Party acknowledges that this executed settlement and release applies to all claims for injuries, damages, or losses of any type or nature (whether those injuries, damages, or losses are known or unknown, foreseen or unforeseen, patent or latent) which that Party may have against the other Party arising from the LOANS. Each Party hereby expressly waives application of *California Civil Code §1542* and any other similar statute or rule.

1.8 Each Party certifies that they have read and understood the following provisions of *California Civil Code §1542*, which states in pertinent part 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."

1.9 Each Party understands and acknowledges that the significance and consequence of its waiver of *California Civil Code §1542* is that even if any Party should eventually suffer additional damages arising out of the LOANS, the claims and causes of action that were or could have been asserted relating to the LOANS, or any facts or circumstances related to the repurchase of and/or indemnification of losses associated with the LOANS, that Party will not be able to make any claim against the other Party for those damages. Furthermore, each acknowledges that they consciously intend these consequences even as to claims for damages that may exist as of the date of this release

but which that Party does not know exists, and which, if known, would materially affect that Party's decision to execute this release, regardless of whether that Party's lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

1.10 Each Party hereby fully, finally, and forever release and discharge the other Parties, and any and all of its respective past, present, and future affiliates, employees, members, partners, joint venturers, independent contractors, attorneys, insurers, investors, successors, assigns, representatives, officers, directors, shareholders, independent contractors, predecessors, successors and assigns, and any corporation, partnership or limited liability company which was or is at any time the parent or wholly owned subsidiary of such entity, and any such corporation's, partnership's or limited liability company's officers, directors, employees, or any corporation, partnership or limited liability company which was or is an affiliate of such entity by virtue of common ownership or control, and any such corporation's, partnership's or limited liability company's, officers, directors, and/or employees of and from any and all actions, causes of action, claims, demands, damages, debts, losses, costs, expenses, attorney fees or other liabilities of every kind and nature whatsoever, whether legal or equitable and whether known or unknown, arising out of, resulting from, or relating to, in any manner, the LOANS, the claims and causes of action that were or could have been asserted relating to the LOANS, or any facts or circumstances related to the repurchase of and/or indemnification of losses associated with the LOANS, except that the FDIC retains any and all actions, causes of action, claims, demands, damages, debts, losses, costs, expenses, attorney fees or other liabilities of every kind and nature against THIRD PARTIES (closing agents, settlement agents, title companies, insurance companies, appraisers, appraisal companies, third party originators, or insurance companies for any of the foregoing, as collectively referred to as "THIRD PARTIES") arising out of or related to the LOANS.

1.11 Notwithstanding any other provision in this Settlement Agreement, AKT immediately, exclusively, and irrevocably assigns to the FDIC any and all claims, rights, title, or interest for injuries, damages, or losses of any type or nature (whether those injuries, damages, or losses are known or unknown, foreseen or unforeseen, patent or latent) which AKT has or may have against any and all THIRD PARTIES arising out of or related to the LOANS.

1.12 Notwithstanding any other provision in this Settlement Agreement, the FDIC does not release, and expressly preserves fully and to the same extent as if the Settlement Agreement had not been executed any action taken by any other federal agency. In addition, this Settlement 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 or the United States Attorney's Office for any 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.

1.13 Conditions of Execution. Each Party acknowledges and warrants that its execution of this Settlement Agreement is free and voluntary.

1.14 No Admission. It is agreed that no Party hereto admits liability or wrongdoing of any nature, and that this Settlement Agreement is made as a compromise of disputed claims.

1.15 Fair Meaning. The Parties hereto further agree that the language of all parts of this Settlement Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the Parties.

1.16 Governing Law. The Parties agree to submit to the Courts of the City and County of Los Angeles, California, for any dispute arising out of this Settlement Agreement, or related thereto, and consent to the jurisdiction of said Courts and further agree that any and all matters of dispute shall be adjudicated, governed and controlled under California law.

1.17 Attorneys' Fees. Should any action be commenced to enforce, interpret, or seek damages, injunctive relief, or specific performance for violation of this Settlement Agreement, the prevailing party shall, in addition to any other available relief, be entitled to an award of reasonable attorney's fees and litigation expenses incurred in the prosecution or defense of the action, including any appeal.

1.18 Severability. The Parties hereto agree that if any provision of this Settlement Agreement is declared by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby, and such illegal or invalid part, term or provision shall be deemed not to be part of this Settlement Agreement.

1.19 Binding Effect. This Settlement Agreement shall be binding upon and inure to the benefit of the Parties and their respective heirs, personal representatives, successors, and assigns.

1.20 Review and Understanding. The Parties have entered into this Settlement Agreement voluntarily, having fully read and fully understanding the meaning and effect of all of its terms and provisions, and fully understanding its and their costs and risks. Each of the Parties has consulted with legal counsel concerning this Settlement Agreement and has conducted such inquiry as they deem necessary and advisable prior to entering into this Settlement Agreement. The Parties enter into this Settlement Agreement understanding that facts or other circumstances may exist which are presently

unknown or undisclosed, or which are different from or other than those which they believe to be the case, and the Parties voluntarily assume all risks attendant to such unknown, undisclosed, different, or additional facts or other circumstances.

1.21 Approval and Authority. The Parties represent and warrant to one another that the approval of this Settlement Agreement has been undertaken in a proper and lawful manner and that they have the requisite power and authority to enter into and to perform their obligations under this Settlement Agreement.

1.22 Number. Whenever applicable, the singular shall include the plural, and the plural shall include the singular.

1.23 Counterparts/Execution. This Settlement Agreement may be executed in one or more counterparts, all of which shall form a single agreement. A Party's signature on this Settlement Agreement by facsimile shall be valid and effective for all purposes as an original signature, provided, however, that the original signature shall be produced upon request.

1.24 Waiver. No term or condition of this Settlement Agreement shall be deemed to have been waived, nor shall there be an estoppel against the enforcement of any provision of this Settlement Agreement, except by written instruments signed by the Party charged with the waiver or estoppel. No written waiver shall be deemed a continuing waiver unless specifically stated therein, and the written waiver shall operate only as to the specific term or condition waived, and not for the future or as to any other act than that specifically waived.

1.25 Headings. The headings of paragraphs herein are intended solely for the convenience of reference and shall not control the meaning or interpretation of any of the provisions of this Settlement Agreement.

1.26 Subsequent Agreements. The Parties agree that, upon the reasonable request of the other Party, they shall execute, acknowledge, and deliver any additional instruments or documents that may reasonably be required to carry out the intentions of this Settlement Agreement, including such instruments as may be required by the laws of any jurisdiction, now in effect or hereinafter enacted, that may affect the rights of the Parties as between themselves or others with respect to their rights and obligations created by this Settlement Agreement.

1.27 Entire Agreement. The Parties hereto further agree and promise that this Settlement Agreement sets forth the entire agreement between and among the Parties and fully supersedes any and all prior negotiations, agreements or understandings made between or among the Parties. This Settlement Agreement shall not be modified except in a writing signed by the Parties or their authorized representatives.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the Parties have executed this Settlement Agreement as of the date set forth in the opening paragraph of this Settlement Agreement.

For: The FDIC as Receiver of
IndyMac Bank, FSB

For: AKT American Capital, Inc. aka
American Capital Corporation

(b)(6)

By:

By: _____

Name: Richard S. Gell

Name: _____

Title: Co-counsel

Title: _____

Date: 8-14-09

Date: _____

between or among the Parties. This Settlement Agreement shall not be modified except in a writing signed by the Parties or their authorized representatives.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the Parties have executed this Settlement Agreement as of the date set forth in the opening paragraph of this Settlement Agreement.

For: **The FDIC as Receiver of
IndyMac Bank, FSB**

By: _____

Name: _____

Title: _____

Date: _____

For: **AKT American Capital, Inc. aka
American Capital Corporation**

By: (b)(6)

Name: KENT C KIRKPATRICK

Title: VP/SEC

Date: 8/12/09