

SETTLEMENT AGREEMENT

This Agreement dated as of the ~~7th~~ ^{July 11th} day of ~~July~~ ^{July} 2009, between the Federal Deposit Insurance Corporation, in the capacity as Receiver of IndyMac Bank, FSB ("Plaintiff") and Douglas Schmieder, residing at [REDACTED] and Douglas Construction and Development Corporation, a New York corporation, with its principal place of business also at 45 Douglas Court, Hampton Bays, New York 11946 (jointly and severally, and hereinafter collectively, "Schmieder").

(b)(6)

WITNESSETH:

WHEREAS, IndyMac Bank, F.S.B. made claims against Schmieder in a pending litigation in the Supreme Court of the State of New York, County of Suffolk, entitled *IndyMac Bank, F.S.B. v. Equity Settlement Services, Inc., et al.* (Index No. 04/15833) (the "Civil Action");

WHEREAS, on July 11, 2008, the United States Office of Thrift Supervision closed IndyMac Bank, F.S.B., appointed the Federal Deposit Insurance Corporation as Receiver, and authorized the charter of a successor institution, IndyMac Federal Bank, FSB, to which the Federal Deposit Insurance Corporation was appointed Conservator;

WHEREAS, Federal Deposit Insurance Corporation, as Receiver, pursuant to 12 U.S.C. § 1821(d), has succeeded to all rights, titles, powers, and privileges of the closed bank;

WHEREAS, under a certain Purchase and Assumption Agreement between Federal Deposit Insurance Corporation as Receiver of the closed bank and the same Corporation as Conservator of IndyMac Federal Bank, F.S.B., Plaintiff, being the former Receiver, owns those claims against Schmieder in the Civil Action;

WHEREAS, Douglas Schmieder is a defendant in a pending criminal action in the United States District Court for the Eastern District of New York entitled *United States v. Shannon Ferguson, et al.* (2:04-cr-00989-DRH) (the "Criminal Action");

WHEREAS, Douglas Schmieder deposited cash of \$100,000.00 as an appearance bail bond in the Criminal Action (the "Cash Bail");

WHEREAS, to induce this Agreement, Schmieder represents that the Cash Bail was made out of Douglas Schmieder's own pocket, that title, ownership and interest in the Cash Bail presently belong solely to him, and that the Cash Bail is not subject to any lien, asserted claim, or other encumbrances;

WHEREAS, it is expected that Douglas Schmieder will soon be sentenced in the Criminal Action for an undetermined term of imprisonment;

WHEREAS, Plaintiff and Schmieder desire to settle and discontinue the Civil Action as to Schmieder, without intending that this Agreement shall cover or inure to the benefit of any other defendants in the Civil Action; and

WHEREAS, as inducement to enter into this Agreement, [REDACTED] (b)(6) is willing to provide [REDACTED] personal guaranty of (b)(6) Schmieder's payment obligations under this Agreement and grant a mortgage on the (b)(6) home [REDACTED] at [REDACTED] to secure her guaranty obligations;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties, intending to be legally bound, agree as follows:

Section 1. Settlement.

(1) Schmieder shall pay \$200,000.00 to Plaintiff (the "Settlement Amount") in a manner provided in Section 2 below.

(2) Douglas Schmieder shall make himself available for a discussion with Plaintiff's counsel and a representative of Plaintiff, at counsel's office at 420 Lexington Avenue, New York, New York 10170, immediately after Closing provided in Section 7 herein ("Closing"). At such time, Schmieder shall provide Plaintiff with (i) full cooperation in Plaintiff's efforts to discover the facts in the Civil Action, (ii) full disclosure of all relevant facts known to him in response to counsel's examination, and (iii) all documents in his possession, custody or control. Schmieder's obligations in this subsection are conditions subsequent to this Agreement. If Schmieder fails to provide his cooperation in good faith, this Agreement shall become null and void upon prompt notice by Plaintiff to Schmieder's counsel.

(3) Upon Closing, the Civil Action will be discontinued as to against Schmieder without prejudice and without costs to any party by filing a Stipulation of Dismissal in the form attached hereto as Exhibit A.

(4) Upon full payment of the Settlement Amount, the parties will exchange Mutual Releases in the forms attached hereto as Exhibit B. Plaintiff's counsel (the firm Feldman Weinstein & Smith LLP) will keep the executed original Releases in escrow and release them to the parties upon Plaintiff's receipt of the full payment.

Section 2. Payment of Settlement Amount.

(1) Subject to subsection (2) below, and Plaintiff's compliance with Section 3, *infra*, Schmieder hereby assigns and transfers his title, ownership and interests in the Cash Bail to Plaintiff. Schmieder shall provide full cooperation to Plaintiff in obtaining the court's release of the Cash Bail to Plaintiff, including, but not limited to, execution of

all documents and taking all actions that may be necessary to carry out the assignment and obtain the court's release to Plaintiff. All resulting cash proceeds of the Cash Bail will be credited against the Settlement Amount to the extent of the amount of such proceeds paid to Plaintiff.

(2) The parties understand that, notwithstanding the assignment of the Cash Bail under Section 2(1) above, the court in the Criminal Action may order that the Cash Bail be paid over to the United States Attorney to be applied to the payment of any assessment, fine, restitution, or penalty imposed upon Schmieder. Any resulting payment to Plaintiff out of the Cash Bail pursuant to such order will be deemed payment under subsection (1) above and will be credited against the Settlement Amount. Nevertheless, this subsection shall not be construed as a waiver of Plaintiff's entitlement to restitution as a victim and any cancellation or termination of this Agreement will not affect Plaintiff's ownership of the payments resulting from the court's restitution order.

(3) Schmieder shall pay an additional \$100,000.00 in 25 (twenty five) monthly installments in the amount of \$4,000.00 due on or before the 1st day of each and every month for the 25-month contiguous period, starting from the fourth month after the month when Douglas Schmieder receives a sentence of no imprisonment in the Criminal Action or when, if he receives an imprisonment sentence, he is released from prison. Schmieder will have a 15-day grace period each month in which to make the monthly payments.

(4) Any remaining outstanding balance of the Settlement Amount, whether any credit in whatsoever amount is realized or not under subsections (1) and (2) for whatever reasons, shall be due and payable on or before the 1st day of the month immediately following the 25-month period provided in subsection (3).

(5) All payments to Plaintiff shall be made to "[FDIC in care of FWS]."

Section 3. Submission to Sentencing Court.

(1) At Douglas Schmieder's request which will be made prior to his being sentenced in the Criminal Action but will be made only after the occurrence of closing as provided in section 7 hereof, plaintiff will submit a letter to the Hon. Denis Hurley, United States District Judge in the Criminal Action, setting forth the following and making the following requests of the sentencing Court:

- (a) Advising the Court that Plaintiff and Schmieder have settled all claims made against them in the Civil Action;
- (b) Advising the Court that the settlement agreement is for full satisfaction of all claims asserted against Schmieder, and that Plaintiff seeks restitution from Schmieder out of the Cash Bail, the title to and ownership of which Schmieder assigned and transferred to Plaintiff, and seeks no other restitution; and

(c) Requesting that the Court impose a non-custodial sentence upon Douglas Schmieder, in view of Schmieder's and monetary settlement with Plaintiff in the Civil Action.

(2) Plaintiff's failure to make the submission in a timely manner (within ten days after a written request) shall make this agreement null and void in its entirety. However, plaintiff shall be given a reasonable opportunity to cure.

Section 4. Waiver of Statute of Limitations. In the event of Default, Schmieder agrees that Plaintiff may reinstate or commence an action for the same claims that Plaintiff made against Schmieder in the Civil Action, provided that such action may be brought within three years of the date of this Agreement. **Schmieder HEREBY WAIVES THEIR RESPECTIVE RIGHTS TO RAISE THE DEFENSE OF STATUTE OF LIMITATIONS IN SUCH ACTION BROUGHT BY PLAINTIFF WITHIN THE THREE-YEAR PERIOD.** The three-year period will be extended in a circumstance which constitutes an event of tolling the statute of limitations as a matter of statute or common law.

Section 5. Security. As conditions subsequent to this Agreement, Schmieder shall provide the following to secure their obligations to pay the Settlement Amount and any default interest under this Agreement:

(1) An absolute and unconditional guaranty by [redacted] in the form (b)(6) attached hereto as Exhibit C; and

(2) A mortgage (the "Mortgage") on the property at [redacted] (b)(6) [redacted] (the "Property"), executed in the form attached as Exhibit D, to secure her obligations as the guarantor.

(3) Plaintiff shall first seek to exhaust its remedies on the Mortgage, before seeking to enforce the guarantee against [redacted] for any deficiency.

Section 6. Title Insurance.

(1) Schmieder represents that the title to the Property is vested solely in [redacted] (b)(4),(b)(6)

(2) At Closing, Schmieder, at their own cost, shall provide a clean policy of a title insurance issued to Plaintiff [redacted] which will insure, among others, the Mortgage as a valid lien in the amount of \$200,000.00.

(3) Schmieder shall have the insurance carrier provide a title commitment to Plaintiff no later than five business days prior to Closing.

(4) Immediately after Closing, Schmieder, at their own cost, shall duly record the Mortgage.

Section 7. Closing. Closing shall take place at the office of Plaintiff's counsel at 420 Lexington Avenue, New York, New York 10170 on or about June 1, 2009, but no later than June 30, 2009, where the following documents will be executed and/or delivered:

(1) The parties will execute or deliver:

(a) A Stipulation of Dismissal, as provided in Section 1(3); and

(b) Mutual Releases, as provided in Section 1(4);

(b)(6) ~~(2)~~ will execute and deliver:

(a) Personal guaranty, as provided in Section 5(1);

(b) A mortgage, as provided in Section 5(2);

(3) A title policy, as provided in Section 6(2).

(4) All costs, expenses, taxes and fees related to the issuance of the title policy and the recordation of the Mortgage shall be borne by Schmieder. Each party shall bear fees of their own counsel for counsel's services in connection with the Closing.

(5) Closing by June 30, 2009 is a condition limitation. If closing does not take place for any reasons, this Agreement shall be deemed automatically terminated at the end of the business hours of that day.

Section 8. Event of Default. The occurrence of any of the following shall constitute an "Event of Default" under this Agreement:

(1) If any of the representations and warranties made by Schmieder in this Agreement or in any other documents or instrument executed in connection with this Agreement are or become materially untrue, incorrect or misleading;

(2) The failure of Schmieder to comply with, or breach by Schmieder of, any terms, covenants or conditions contained in this Agreement or in any other document or instrument executed in connection with this Agreement;

(3) The occurrence of any filing by Schmieder or an involuntary filing against Schmieder under Title 11 of the U.S. Code, as amended, or seeking any reorganization, arrangement, composition, readjustment, liquidation or similar relief under state laws; and

(4) If any payment under this Agreement is determined by a court or other tribunal having jurisdiction to have been a voidable preferential transfer or payment or a fraudulent transfer or conveyance under federal or state law and if any portion of the payments of the Settlement Amount is undone and all or any part thereof must be returned to Schmieder.

Section 9. Remedies. In the event of Default Plaintiff will provide Schmieder with written notice of his default. If the default is not cured within five days of the date of the notice, the entire amount owing under this Agreement will become immediately due and payable to Plaintiff and Plaintiff will have the right to pursue any and all remedies to collect those amounts including without limitation the remedies set forth in the Mortgage. Plaintiff shall be entitled to collect attorney fees and costs incurred in collection, regardless of whether it institutes formal legal proceedings to enforce its right to payment under this Agreement. Plaintiff will further be entitled to interest on from the date of default on the entire remaining unpaid amounts at a default interest rate of 12%. Each right, power and remedy of Plaintiff provided for in this Agreement shall be cumulative and shall be in addition to any other right, power or remedy existing at law or in equity or by statute. Exercise by Plaintiff of any right, power or remedy shall not preclude the simultaneous or later exercise by Plaintiff of any other rights, powers or remedies.

Section 10. Notices. By fax and mail to the attorneys:

Attorney for IndyMac Bank

Eric Weinstein
Feldman Weinstein & Smith LLP
420 Lexington Avenue
New York, New York 1170
Tel; 212 931 8701

Attorney for Douglas Schmieder

Michael L. Macklowitz
299 Broadway, Suite 1405
New York, New York 10007
Tel: 212 227 6655
Fax: 212 732 6972

Section 11. Subrogation and Indemnity. Schmieder will not assert and hereby waives subrogation rights or indemnity claims against any other party related to the claims or to the payments made under the terms of this Agreement.

Section 12. Legal Advice; Construction; Governing Law. The Parties acknowledge that they have sought and obtained independent legal advice, to the extent they deemed necessary, prior to the execution of this Agreement. Further, the Parties acknowledge that they have read this Agreement in its entirety, understand fully its consequences, and agree freely and voluntarily with its contents prior to the execution of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting Party, shall not apply to the interpretation of this Agreement. This

Agreement shall be construed as a whole in accordance with its fair meaning and in accordance with the laws of the United States of America, and to the extent that state law would apply the state of New York. The language of this Agreement shall not be construed for or against any particular Party.

Section 13. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto, their respective heirs, legal representatives, successors and assigns. Each party hereto and the persons signing below warrant that the person signing below on such party's behalf is authorized to do so and to bind such party to the terms of this Agreement.

Section 14. Separate Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original document, and all of which, when taken together, shall be deemed to constitute a single document. Fax signatures and electronically transmitted signatures (for example: pdf files) shall constitute original signatures for the purpose of this Agreement.

IN WITNESS WHEREOF, the undersigned have executed this Settlement Agreement as of the day and year first above written.

Douglas Schmieder (b)(6)

(b)(6)

Date: MAY 13, 2009

The Federal Deposit Insurance Corporation,
as Conservator for IndyMac Federal Bank,
FSB.

By: (b)(6)

Douglas Construction and Development
Corporation (b)(6)

(b)(6)

Printed Name: Richard S. Gilv

Title: Counsel

(b)(6) / BY: DOUGLAS E. SCHMIEDER
Date: MAY 13, 2009

Date: 6-9-09