

## **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 IndyMac Bank, F.S.B. ("FDIC-R"), and Mortgage Capital Associates, Inc. (the "Settling Defendant"), (individually, the FDIC-R and Settling Defendant may be referred to herein as "Party" and collectively as the "Parties").

### **RECITALS**

#### **WHEREAS:**

Prior to July 11, 2008, IndyMac Bank, F.S.B. ("Bank") was a depository institution organized and existing under the laws of the United States;

On July 11, 2008, 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.

Settling Defendant and the Bank entered into a Seller Contract and e-MITS User Agreement dated September 27, 2004 ("Contract"). Pursuant to the terms of the Contract, Settling Defendant sold to the Bank various residential mortgage loans ("Loans").

On July 8, 2014, the FDIC-R filed a complaint for money damages against Settling Defendant relating to three loans sold by Settling Defendant to the Bank under the Contract. Those claims for damages are now pending in the United States District Court for the Central District of California in *Federal Deposit Insurance Corporation as Receiver for IndyMac Bank, FSB v. Mortgage Capital Associates, Inc.*, Case No. 2:14-cv-05277-GW-AJW ("Action"). 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 one hundred and eighty-eight thousand seven hundred dollars (\$188,700.00) (“the Settlement Payment”), in settlement of the Action, as follows:

1. Sixty thousand dollars (\$60,000) to be paid within sixty (60) days of April 20, 2015 (the “Initial Payment”). The check will be made payable to the Mortgage Recovery Law Group Client Trust Account; and

2. Eighteen (18) equal payments of seven thousand one hundred fifty dollars (\$7,150) every thirty (30) days thereafter. The eighteen (18) equal payments will be made payable to the Mortgage Recovery Law Group Client Trust Account.

B. In the event that any of the installments of the Settlement Payment are not delivered to the FDIC-R (or its counsel) by the due dates set forth in Section I.A, above, Settling Defendant shall have the opportunity to cure the missed payment if, within five (5) business days of notice pursuant to Section VI.D from the FDIC-R, the Settling Defendant makes the full missed payment. Settling Defendant shall only have the opportunity to cure once.

C. In the event that any of the installments of the Settlement Payment are not delivered to the FDIC-R (or its counsel) by the due dates set forth in Section I.A (unless subject to the one time cure period as set forth in Section 1.A.1), above, interest shall accrue on all unpaid amounts at the rate of 5% per annum from such due date until the date of payment. However, if said Settlement Funds are not delivered to the FDIC-R by the due date, as a result of the FDIC-R’s failure to execute this Agreement, no interest shall accrue until five days after the FDIC-R executes the Agreement.

D. If the FDIC-R does not receive the Settlement Payment in full on or before the date determined by subsection 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 date determined by subsection C above, through the date of payment at a rate calculated in accordance with 26 U.S.C. § 6621(a)(3); or

2. Enforce this Agreement, in which event the Settling Defendant agrees to jurisdiction before the Honorable Judge George Wu, United States District Court in the Central District of California and to pay all of the FDIC-R's reasonable attorneys' fees and costs expended in enforcing the terms of this Agreement; or

3. Enforce the Stipulation for Entry of Judgment, attached hereto as Exhibit A, for the full amount of the FDIC-R's damages claimed in this Action in the amount of three hundred and three thousand, eight hundred and fifty four dollars and eight cents (\$303,854.08).

Any extension of time under Section I.D.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.D.2 through I.D.3 at any time prior to receipt of Settlement Payment (including all accrued interest) in full.

## **SECTION II: Stipulations and Dismissal**

Within ten (10) business days of the execution of this Agreement, the Parties agree to execute a Stipulation for Entry of Judgment for the total Settlement Payment due, less any payments already made, if any. If Settling Defendant defaults on any installment payment(s), Plaintiff may enforce its rights pursuant to Section I.D above 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 Central District of California. However, the Parties agree that Settling Defendant shall have a one time cure period of five (5) days after written notice is given pursuant to Section I.B to cure the default.

### SECTION III: Releases

#### A. The FDIC-R's Releases.

Upon receipt of the Settlement Payment in full and except as provided in Section III.D., the FDIC-R, for itself and its successors and assigns, hereby releases and discharges the Settling Defendant and its respective owners, directors, officers, employees, partners, heirs, executors, trustees, administrators, representatives, agents, 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 causes of action alleged in the Action.

#### 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 owners, directors, officers, employees, partners, heirs, executors, trustees, administrators, representatives, agents, successors, attorneys, 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 or relate to the causes of action alleged in the 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 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

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 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 California.

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:

Paul A. Levin, Esq.  
Mortgage Recovery Law Group  
700 N. Brand Blvd., Suite 830  
Glendale, California 91203  
(818) 630-7901

If to the Settling Defendant:

Mark Charles, Esq.  
Martinez Charles LLP  
600 S. Lake Avenue, Suite 504  
Pasadena, CA 91106  
(626) 844-7710

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.

H. California Civil Code § 1542. Each party acknowledges that this Agreement 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 another Party arising from the Action ("Claims"). Each Party hereby expressly waives application of California Civil Code § 1542 and any other similar statute or rule.

Each Party certifies that it has 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.**

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 Claims, the claims and causes of action that were or could have been asserted relating to the Claims, or any facts or circumstances related to the Claims, that Party will not be able to make any claim against the other Party for damages. Furthermore, each Party acknowledges that it consciously intends 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.

J. Attorneys' Fees. The Parties to this Agreement shall each bear their own attorneys' fees and costs arising from the actions of their own counsel in connection with this Agreement and the matters and documents referred to herein, including the Action and all related matters. In the event that any Party shall institute any action or proceeding against another Party to enforce the provisions of this Agreement, the prevailing Party shall be entitled to recover its expenses, including reasonable attorneys' fees and costs in addition to any other relief to which the Party is found entitled.

K. Voluntary and Informed Execution. The Parties represent that: they have relied upon the advice of their attorneys, who are the attorneys of their own choice, concerning the legal and tax consequences of this Agreement; the terms of this Agreement have been completely read and explained to them by their attorneys; the terms of this Agreement are fully understood and voluntarily accepted by them; they knowingly and voluntarily intend to be legally bound by the same; and they are releasing Releasees from any and all claims they may have against them.



L. Entire Agreement. The Parties understand and agree that this Agreement constitutes the entire Agreement between the Parties concerning the scope of the settlement of the Action and the related release of claims and that this Agreement supersedes any and all prior oral or written agreements and understandings on such issues. No warranty, representation, condition, understanding or agreement of any kind with respect to the subject hereof shall be relied upon by the Parties unless incorporated herein. Notwithstanding any other provision contained herein, this Agreement may be pled as a thorough and complete defense to, and may be used as the basis for an injunction against, any action, suit or other proceeding that may be instituted, prosecuted or attempted in breach of the provisions contained herein.

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 INDYMAC BANK, F.S.B.

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

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


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

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

MORTGAGE CAPITAL ASSOCIATES, INC.

(b)(6)

Date: 4/28/15

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

TITLE: CEO

PRINT NAME: Tracy D. Stearns

L. Entire Agreement. The Parties understand and agree that this Agreement constitutes the entire Agreement between the Parties concerning the scope of the settlement of the Action and the related release of claims and that this Agreement supersedes any and all prior oral or written agreements and understandings on such issues. No warranty, representation, condition, understanding or agreement of any kind with respect to the subject hereof shall be relied upon by the Parties unless incorporated herein. Notwithstanding any other provision contained herein, this Agreement may be pled as a thorough and complete defense to, and may be used as the basis for an injunction against, any action, suit or other proceeding that may be instituted, prosecuted or attempted in breach of the provisions contained herein.

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FEDERAL DEPOSIT INSURANCE CORPORATION AS  
RECEIVER FOR INDYMAC BANK, F.S.B.

(b)(6) Date: 4/24/15

BY:   
TITLE: Counsel  
PRINT NAME: Richard S. Gill

MORTGAGE CAPITAL ASSOCIATES, INC.

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

BY: \_\_\_\_\_  
TITLE: \_\_\_\_\_  
PRINT NAME: \_\_\_\_\_