

## SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement ("Agreement") is made as of this 4th day of June, 2013, by, between, and among the following undersigned parties:

The Plaintiff Federal Deposit Insurance Corporation, as receiver of BankUnited, FSB ("FDIC"), and Heritage Title & Escrow, Inc. f/k/a Countrywide Title & Escrow, Inc. ("Heritage") and Fidelity National Title Insurance Company ("Fidelity") (collectively the "Settling Defendants")(the FDIC and the Settling Defendants may be referred to herein as "Party" and collectively as the "Parties").

### RECITALS

WHEREAS, Prior to May 21, 2009, BankUnited, F.S.B. ("Bank") was a federal savings bank organized under the laws of the United States.

WHEREAS, On May 21, 2009, the Bank was closed by the Office of Thrift Supervision ("OTS") and pursuant to 12 U.S.C. § 1821(c), the FDIC was appointed receiver. In accordance with 12 U.S.C. § 1821(d), the FDIC as receiver succeeded to all rights, titles, powers and privileges of the Bank, including those with respect to its assets.

WHEREAS, On May 18, 2012, the FDIC filed a complaint for money damages against the Settling Defendants. Those claims for damages are now pending in the United States District Court for the Southern District of Florida in the matter of *FDIC-R BankUnited, FSB v. Heritage Title & Escrow, Inc. f/k/a Countrywide Title & Escrow, Inc., and Fidelity National Title Ins. Co.*, Case No. 12-cv-60944-RNS (the "Action"). The Settling Defendants have denied liability for the FDIC's claims.

The Settling Defendants deem it in their best interests to enter into this Agreement to avoid the uncertainty, trouble, 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**

A. As an essential covenant and condition to this Agreement, the Settling Defendants, collectively, agree to pay the FDIC the sum of Six Hundred Twenty Five Thousand Dollars (\$625,000) ("the Settlement Amount") to Welbaum Guernsey's Trust Account on or before July 22, 2013 (the "Payment Due Date"), in settlement of the Action. The Settlement Amount shall be paid as follows: Heritage shall cause to be paid three hundred eighty seven thousand five hundred dollars ("387,500") and Fidelity shall cause to be paid two hundred thirty seven thousand five hundred dollars ("237,500").

B. In addition, and without waiving any other rights that the FDIC may have, in the event that all Settlement Amount is not received by the FDIC on or before the Payment Due Date, then, with respect only to the Party, or Parties, who fail to deliver their share of the Settlement Amount, the FDIC, in its sole discretion, shall have the right at any time prior to receipt of the entire Settlement Amount to declare this Agreement null and void, shall have the right to extend the Payment Due Date for any period of time until it receives the entire Settlement Amount, and/or shall have the right to enforce this Agreement against the Party or Parties failing to deliver their share of the Settlement Amount, in which event the non-delivering Party, or Parties, agree to jurisdiction in United States District Court for the Southern District of Florida and agree that the non-prevailing party shall pay the prevailing party's reasonable attorney's fees expended in enforcing the terms of this Agreement. Any decision by the FDIC to extend the Payment Due Date or accept a portion of the Settlement Amount shall not prejudice its rights to declare this Agreement null and void with respect to the non-delivering Party, or Parties, at any time prior to receipt of the entire amount of Settlement Funds or to enforce the terms of this Settlement Agreement; provided however, that in the event the FDIC declares this Agreement null and void, the FDIC shall return all partial amounts paid to it under this Agreement by the non-delivering Party or Parties. In no event shall the FDIC declare this Agreement null and void with respect to any Party that has delivered its share of the Settlement

Amount on or before The Payment Due Date. The failure of one Party to deliver its share of the Settlement Amount shall not affect the validity of this Agreement with respect to a Party that has delivered its share of the Settlement Funds.

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

Upon execution of this Agreement by each of the undersigned Parties, and receipt of the Settlement Amount, the FDIC shall dismiss the Action. The undersigned parties agree to enter stipulation(s) providing that the dismissal(s) set forth above shall be with prejudice, with each party to bear its own attorney's fees and costs as these were originally incurred.

### **SECTION III: Releases**

#### **A. Release of Individual Settling Defendants by FDIC.**

Effective upon receipt in full of the settlement funds and dismissal described in SECTION(S) I and II above, the FDIC, for itself, its predecessors, successors and assigns, hereby releases and discharges each of the Settling Defendants and their respective heirs, executors, 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, known or unknown, whether accrued or unaccrued, and whether sounding in contract, tort, statute or otherwise, belonging to the FDIC, that arise from or relate to the performance, nonperformance, or manner of performance of the Settling Defendants' respective functions, duties and actions as closing agents and/or title insurers and/or under the closing protection letters issued to the Bank including without limitation the causes of action alleged in the Action.

**B. Fidelity's Release of FDIC and Heritage.** Fidelity, for itself, its predecessors, successors, assigns, all current and former employees and personnel, attorneys, officers, directors, stockholders, parent corporations, subsidiary corporations, affiliates, agents, and representatives, hereby remises, releases, acquits, satisfies, and forever discharges Heritage and FDIC and their respective predecessors, successors, assigns, all current and former employees and personnel, attorneys, officers, directors, stockholders, parent corporations, subsidiary corporations, affiliates, agents, insurers and representatives, from any and all liability and from

any and all causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands of whatever name or nature in any manner arisen, in law or in equity, whether known or unknown, whether accrued or unaccrued, and whether sounding in contract, tort, statute or otherwise, derived from, based upon, or arising out of the claims and allegations set forth in the Action.

C. Heritage's Release of FDIC and Fidelity. Heritage, for itself, its predecessors, successors, assigns, all current and former employees and personnel, attorneys, officers, directors, stockholders, parent corporations, subsidiary corporations, affiliates, agents, and representatives, hereby remises, releases, acquits, satisfies, and forever discharges FDIC and Fidelity and their respective predecessors, successors, assigns, all current and former employees and personnel, attorneys, officers, directors, stockholders, parent corporations, subsidiary corporations, affiliates, agents, insurers and representatives, from any and all liability and from any and all causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands of whatever name or nature in any manner arisen, in law or in equity, whether known or unknown, whether accrued or unaccrued, and whether sounding in contract, tort, statute or otherwise, derived from, based upon, or arising out of the claims and allegations set forth in the Action.

D. Express Reservations From Releases By FDIC.

1. Notwithstanding any other provision, by this Agreement, the FDIC does not release, and expressly preserves fully and to the same extent as if the Agreement had not been executed, any claims or causes of action:

a. against the Settling Defendants 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, the Bank, other financial institutions, or any other person or

entity, including without limitation any claims acquired by FDIC as successor in interest to the Bank or any person or entity other than Bank;

- b. against any person or entity not expressly released in this Agreement; and
- c. which are not expressly released in Paragraphs III.A, above.

2. Notwithstanding any other provision, nothing in this Agreement shall be construed or interpreted as limiting, waiving, releasing or compromising the jurisdiction and authority of the FDIC in the exercise of its supervisory or regulatory authority or to diminish its ability to institute administrative enforcement proceedings seeking removal, prohibition or any other administrative enforcement action which may arise by operation of law, rule or regulation.

3. Notwithstanding any other provision, this 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, the United States Attorney's Office for the Southern District of Florida or any other federal judicial district.

#### **SECTION V: Representations and Acknowledgements**

A. No Admission of Liability. The Parties each acknowledge and agree that the matters set forth in this Agreement constitute the settlement and compromise of disputed claims, and that this Agreement is not an admission or evidence of liability by any of them regarding any claim.

B. Execution in Counterparts. This Agreement may be executed in counterparts by one or more of the Parties named herein and all such counterparts when so executed shall together constitute the final Agreement, as if one document had been signed by all Parties hereto; and each such counterpart, upon execution and delivery, shall be deemed a complete original, binding the Party or Parties subscribed thereto upon the execution by all Parties to this Agreement.

C. Binding Effect. Each of the undersigned persons represents and warrants that they are a Party hereto or are authorized to sign this Agreement on behalf of the Party they are signing for, 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 Parties and their respective heirs, executors, administrators, representatives, predecessors, successors and assigns.

D. 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 Florida.

E. 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.

F. Authority to Act. FDIC, Heritage and Fidelity represent and warrant that their respective signatories have full authority to execute this Agreement.

G. Advice of Counsel. Each Party hereby acknowledges that 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 its counsel.

H. Entire Agreement and Amendments. This Agreement constitutes the entire agreement and understanding between and among the undersigned parties concerning the matters set forth herein. This Agreement may not be amended or modified except by another written instrument signed by the Party or Parties to be bound thereby, or by their respective authorized attorney(s) or other representative(s).

H. Paragraph Headings. Paragraph headings contained in this Agreement are inserted solely as reference aids for the ease and convenience of the reader; they shall not be deemed to define or limit the scope or substance of the provisions they introduce, nor shall they be used in construing the intent or effect of such provisions or any other aspect of this Agreement.

I. Singular and Plural. As used in this Agreement, the singular or plural shall be deemed to include the other whenever the context so indicates or requires.

J. Invalid Provisions. If any provision of this Agreement shall for any reason be held invalid or unenforceable, such invalidity or unenforceability shall not affect any other provision of this Agreement, but shall be construed as if such provision had never been 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

(b)(6)

Date: 6/4/13

BY:

TITLE: Senior Attorney

PRINT NAME: Maryann M. Bullion

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

HERITAGE TITLE & ESCROW, INC.

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

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

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

Date: 6/5/13

(b)(6)

FIDELITY NATIONAL TITLE INSURANCE  
COMPANY

BY:

TITLE: Senior Vice President

PRINT NAME: Charles S. McCall

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FEDERAL DEPOSIT INSURANCE CORPORATION

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

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

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

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

Date: 6/4/83

HERITAGE TITLE & ESCROW, INC.

(b)(6)

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

TITLE: President

PRINT NAME: Andrew S. Lee

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

FIDELITY NATIONAL TITLE INSURANCE COMPANY

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

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

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