

SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement (“Agreement”) with an effective date of September 27, 2013 (“Effective Date”), by, between, and among the following Parties: the Plaintiff Federal Deposit Insurance Corporation, in its capacity as receiver for NetBank, FSB (“FDIC”), and Kittelmann, Silva & Associates LLC and Thomas M. Kittelmann (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 September 27, 2007, NetBank (“Bank”) was a depository institution organized and existing under the laws of Georgia. On September 27, 2007, the Bank was closed by the Office of Thrift Supervision, 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.

Among the assets to which the FDIC as receiver succeeded was the subject matter of this case because, as Receiver of NetBank and by express operation of law, FDIC-Receiver assumes all rights, titles, powers, privileges, and operations of NetBank. *See* 12 U.S.C. § 1821(d)(2).

On September 17, 2010, FDIC filed a complaint for money damages against certain persons, including the Settling Defendants, who were involved in preparing an appraisal supporting a mortgage loan transaction funded by Meritage Mortgage Corporation on June 7, 2006, for the purchase of residential property at

Those claims for damages are now pending in the United States District Court for the District of Arizona, Case: 4:10-cv-00562-FRZ, for a mortgage loan recovery action (“MLR Action”). The Settling Defendants have denied liability for the FDIC's claims in the MLR Action.

The Parties 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 Parties agree, each with the other, as follows:

SECTION I: Payment to FDIC

- 1) The FDIC shall receive one (1) lump sum payment of \$80,000.00 on or before thirty days from the date this Agreement is fully executed, hereinafter, the Payment Date. All funds due under this Agreement are called collectively, "Settlement Funds."
- 2) The general terms of settlement regarding the following Parties are identified as follows:
 - a) Unless specifically otherwise noted in this Agreement, upon the execution of an original, or originals in counterpart, of this Agreement by each of the undersigned Parties to this Agreement, but no later than the Payment Date, the Settlement Funds shall be delivered to FDIC by direct wire transfer into an account designated by FDIC, by certified or cashier's check, or trust account check drawn upon a depository institution acceptable to FDIC.
 - b) In addition, and without waiving any other rights that the FDIC may have, in the event that all Settlement Funds are not received by the FDIC on or before the Payment Date, then, with respect to the Party, or Parties, that fail to deliver their share of the Settlement Funds only, the FDIC, in its sole discretion, shall have the right at any time prior to receipt of all Settlement Funds to declare this Agreement null and void, shall have the right to extend this Agreement for any period of time until it receives all Settlement Funds, and/or shall have the right to enforce this Agreement against the Party or Parties failing to deliver their share of the Settlement Funds, in which event the non-delivering Party, or Parties, agree to jurisdiction in Federal District Court in District of Arizona and agree to pay all of the FDIC's reasonable attorney's fees expended in enforcing the terms of this Agreement. Any decision by the FDIC to extend the terms of this Agreement or to

accept a portion of the Settlement Funds shall not prejudice its rights to enforce the terms of this Settlement Agreement. The failure of one Party to deliver its share of the Settlement Funds 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 Funds, the FDIC shall move to dismiss Settling Defendants from the MLR 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 costs as these were originally incurred.

SECTION III: Releases

1) Release of Individual Settling Defendants by FDIC.

Effective upon payment of the Settlement Funds plus any accrued interest and dismissal described in SECTION(S) I and II above, and except as provided in PARAGRAPH(S) 4) and SECTION IV: below, the FDIC, for itself and its 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, belonging to the FDIC, that arise from or relate to the acts of the Settling Defendants pled in the MLR Action complaint, as amended or the defense of the same.

2) Release of FDIC by the Settling Defendants.

Effective simultaneously with the release granted in PARAGRAPH III.1) above, the Settling Defendants, on behalf of themselves individually, and their respective heirs, executors, administrators, agents, representatives, successors and assigns, hereby release and discharge FDIC, and its employees, officers, directors, 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, that arise from or relate to the acts pled in the MLR Action complaint, as amended arise from or relate to MLR Action or the prosecution of the same.

3) Release by Settling Defendants of Each Other.

Effective simultaneously with the releases granted in Paragraph III.2). above, the Settling Defendants, and their respective heirs, executors, administrators, representatives, successors and assigns, hereby release and discharge each other 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 acts pled in the MLR Action complaint, as amended arise from or relate to MLR Action or the defense of the same.

4) Express Reservations From Releases By FDIC.

- a) 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:
 - i) 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;
 - ii) against any person or entity not expressly released in this Agreement; and
 - iii) which are not expressly released in Paragraph III.1), above.
- b) 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.

- c) 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 State of Arizona or any other 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.

SECTION IV: Waiver of Dividends

To the extent, if any, that Settling Defendants are or were shareholders of the Bank and by virtue thereof are or may have been entitled to a dividend, payment, or other pro rata distribution upon resolution of the receivership of the Bank, they hereby knowingly assign to the FDIC any and all rights, titles and interest in and to any and all such dividends, payments or other pro rata distributions.

SECTION V: Representations and Acknowledgements

- 1) 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.
- 2) 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 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.
- 3) 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 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 Parties and their respective heirs, executors, administrators, representatives, successors and assigns.

- 4) 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 Arizona.
- 5) 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).
- 6) Specific Representations Warranties and Disclaimer. Intentionally Left Blank.
- 7) 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 MLR Action as to the Settling Parties and to otherwise perform the terms of this Agreement.
 - b) Further, the Settling Defendants agree to cooperate fully with the FDIC in connection with any action required under this Agreement, including without limitation, the FDIC's further prosecution of the MLR Action. Any such cooperation that involves any out of pocket costs is subject to reasonable reimbursement by the FDIC pursuant to its internal guidelines and policy for such reimbursement. Such cooperation shall consist of:
 - i) producing all documents requested by the FDIC, without the necessity of subpoena, as determined by the FDIC, in its sole discretion, to be relevant to the Bank;
 - ii) making themselves available upon request by the FDIC at reasonable times and places for interviews regarding facts, as determined by the FDIC in its sole discretion,

to be relevant to the Bank;

- iii) appearing to testify, upon request by the FDIC, in any matter determined by the FDIC in its sole discretion, to be related to the Bank, without the necessity of subpoena; and
- iv) signing truthful affidavits upon request by the FDIC, regarding any matter, as determined by the FDIC in its sole discretion, to be relevant to the Bank.

8) 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 his or her counsel.

9) FDIC Agreement Enforcement. The FDIC may use specific performance to enforce this agreement.

10) Legal Fees. The FDIC shall be entitled to actual legal fees in the enforcement of this Agreement.

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

Witness/Attest

(b)(6)

Date: October 10, 2013

BY:

[Redacted Signature Box]

Robert J. DeHenzel, Jr.
Counsel, Legal Division

Date

Thomas M. Kittelmann

Kittelmann, Silva & Associates LLC

Date

by: _____

to be relevant to the Bank;

iii) appearing to testify, upon request by the FDIC, in any matter determined by the FDIC in its sole discretion, to be related to the Bank, without the necessity of subpoena; and

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Witness/Attest

Date: _____, 2013

BY: _____

Robert J. DeHenzel, Jr.,
Counsel, Legal Division

(b)(6)

10/14/2013
Date

Thomas M. Kittelmann

Kittelmann, Silva & Associates LLC

(b)(6)

10/14/2013
Date

by: _____