

SETTLEMENT AND ASSIGNMENT AGREEMENT

This Settlement and Assignment Agreement ("Agreement") is entered into as of October 1, 2013, between and among, the Federal Deposit Insurance Corporation ("FDIC"), in its capacity as Receiver of Omni National Bank (hereinafter, "FDIC-R"); Progressive Casualty Insurance Company, Inc. ("Progressive"); and Irwin M. Berman ("Berman"), Jules N. Greenblatt ("Greenblatt"), Stephen M. Klein ("Klein"), Eugene F. Lawson, III ("Lawson"), Jeffrey L. Levine ("Levine"), Shannon C. Livengood ("Livengood"), and Gregory W. Patten ("Patten"), each of whom is a former director and/or officer or employee of Omni National Bank (collectively, "Settling Defendants"). FDIC-R, Progressive, and the Settling Defendants are sometimes collectively referred to herein as the "Parties" and singularly as a "Party."

RECITALS

WHEREAS, prior to March 27, 2009, Omni National Bank ("Omni" or "Bank") was a depository institution organized and existing under the laws of the United States of America; and

WHEREAS, on March 27, 2009, the Bank was closed by the Office of the Comptroller of the Currency and, pursuant to 12 U.S.C. § 1821(c), the FDIC-R was appointed receiver. At that time, the FDIC-R as receiver succeeded to all rights, titles, powers, and privileges of the Bank, and its depositors, account holders, and stockholders pursuant to 12 U.S.C. § 1821(d)(2)(A)(i), and, the FDIC-R asserts, acts on behalf of creditors; and

WHEREAS, on March 16, 2012, the FDIC-R filed a complaint against the Settling Defendants in the United States District Court for the Northern District of Georgia captioned: "*Federal Deposit Insurance Corporation, as Receiver of Omni National Bank v. Stephen M. Klein, et al.*" Civil Action No. 1:12-cv-00896-RLV ("FDIC-R Action"). The Settling Defendants have each filed an answer in the FDIC-R Action denying liability and asserting additional affirmative defenses; and

WHEREAS, the FDIC-R has asserted negligence and gross negligence claims in the FDIC-R Action against each of the Settling Defendants and others relating to lending and oversight involving Omni's Community Development Lending Division ("CDLD") occurring before June 9, 2008 and as more fully set forth in Counts I, II, and III (only to the extent of claims relating to supervision of Levine and/or CDLD lending) of the Complaint filed in the FDIC-R Action, (hereinafter referred to as the "FDIC-R Claims"). For purposes of this Agreement only, the term FDIC-R Claims excludes that part of Count III relating to supervision involving ORLO repairs and expenditures occurring on or after 12:01 AM June 9, 2008, and Count IV and Count V of the Complaint filed in the FDIC-R Action ("Excluded Claims"); and

WHEREAS, Benjamin J. Cohen ("Cohen"), Karim W. Lawrence ("Lawrence"), and Constance E. Perrine ("Perrine") were named defendants in the FDIC-R Action and declined

to be part of this Agreement, the FDIC-R has determined that it will dismiss the FDIC-R Claims against Cohen and Lawrence (such claims were not asserted against Perrine), with prejudice, but in doing so, FDIC-R fully reserves its rights to pursue the Excluded Claims against Cohen, Lawrence, and Perrine; and

(b)(4) WHEREAS, Omni purchased Directors and Officers / Company Liability Insurance Policy for Financial Institutions, No. [REDACTED] from Progressive, with a policy period of 12:01 AM June 9, 2007 to 12:01 AM June 9, 2008, with an extended reporting period until 12:01 AM July 9, 2009, as issued to the Bank, as a Named Insured and under which the Settling Defendants are "Insureds" ("D&O Policy"); and

WHEREAS, FDIC-R asserted the FDIC-R Claims against the Settling Defendants, and Progressive has agreed to advance the Settling Defendants' defense fees and costs in connection with the FDIC-R Claims in the FDIC-R Action subject to a reservation of rights; and

WHEREAS, Progressive filed a declaratory judgment action in the United States District Court for the Northern District of Georgia, captioned as *Progressive Casualty Insurance Company v. FDIC, as Receiver of Omni National Bank, et al.*, Case No. 01:12-CV-01103-RLV ("Coverage Action") seeking, *inter alia*, a declaration that the D&O Policy does not provide coverage for the FDIC-R Claims based upon the "Insured vs. Insured" Exclusion in Section V.J (as amended by endorsement Form No. 5093 (01/95)) and the carve out from the definition of "Loss" in Section IV.N.(3) of the D&O Policy. The FDIC-R and the Settling Defendants have each filed answers to the Coverage Action asserting that the FDIC-R Claims are covered under the D&O Policy; and Stephen M. Klein ("Klein") has filed a counterclaim; and

WHEREAS, Settling Defendants represent and warrant that they have not transferred, assigned or otherwise impaired their rights, title, or interests with respect to any claims, rights, and/or causes of action against Progressive for coverage relating to, or arising out of, the D&O Policy, the FDIC-R Claims, the FDIC-R Action, and/or the Coverage Action; and

WHEREAS, the FDIC-R alleges damages in the FDIC-R Action that far exceed the policy limits of the D&O Policy; and

NOW, THEREFORE, in consideration of and in reliance upon the recitals, mutual covenants, promises, obligations and understandings contained in this Agreement, and other good and valuable consideration, and intending to be legally bound thereby, the FDIC-R, Progressive, and the Settling Defendants mutually agree as follows:

1. **Purpose.** The purposes of this Agreement are to establish a procedure to resolve the Coverage Action that has been filed by Progressive and also to settle the FDIC-R Claims against the Settling Defendants without the need for costly and time-consuming litigation of the FDIC-R Claims on the merits and without concessions or admissions by any Party as to the strengths or weaknesses of the Parties' claims or defenses. As described more fully in the following paragraphs of this Agreement, the FDIC-R Claims are settled for what is defined hereafter as the Settlement Amount, the collection of which shall come solely from

Progressive, but only in the event the FDIC-R, for itself and as assignee, prevails in the Coverage Action. These terms are described more fully below.

2. **Recitals.** The Recitals to this Agreement are incorporated into and made a part of this Agreement; titles of paragraphs are for convenience only and are not to be considered a part of this Agreement.

3. **The FDIC-R Claims Will Not Be Litigated and Only Two Issues in the Coverage Action Will Be Litigated.**

- a. The Coverage Action will be narrowed as follows. Progressive will not assert or litigate any defense to coverage in connection with the settlement of the FDIC-R Claims described in this Agreement except those presently set forth in Counts I and II of the Complaint in the Coverage Action. The court in the Coverage Action previously granted summary judgment to Progressive on Count IV of the Complaint. The FDIC-R, for itself and as assignee, and the Settling Defendants will not oppose Progressive's effort to secure the entry of a final judgment in Progressive's favor on that Count and agree not to take any action inconsistent with the court's grant of summary judgment regardless whether Progressive secures entry of final judgment. Other than the foregoing, Progressive waives all challenges, objections to, and coverage defenses with respect to the FDIC-R Claims or any element of the FDIC-R Claims as to any of the Settling Defendants. Progressive stipulates, covenants, and agrees that: (1) The FDIC-R's covenants to dismiss claims and causes of action in the FDIC-R Action (as set forth below) shall not bar FDIC-R's, for itself and as assignee, recovery of the Settlement Amount from Progressive in the Coverage Action; (2) the FDIC-R Action alleges that the Settling Defendants each committed a Wrongful Act (as used and defined in the D&O Policy) arising out of or related to the FDIC-R Claims; (3) the FDIC-R Action alleges damages against the Settling Defendants for the FDIC-R Claims that are in excess of the Settlement Amount; (4) the Settling Defendants are legally obligated to pay the Settlement Amount pursuant to Section I.A and IV.N in the Policy; and (5) the covenants in this Agreement are not a defense to coverage, except as expressly provided otherwise herein. Progressive further agrees that neither the FDIC-R Claims nor any element of the FDIC-R Claims will be litigated, disputed, or interposed as or in support of any coverage defense in the Coverage Action or in any other action or proceeding, except as otherwise stated herein. Any requirement of judgment or adjudication against the Settling Defendants establishing an obligation to pay before an action is taken against Progressive is hereby waived by the Parties. As a result, there is no need for the FDIC-R and the Settling Defendants to litigate the FDIC-R Claims in the FDIC-R Action. Progressive hereby expressly acknowledges that Section XVI.F of the D&O Policy shall not be asserted as a defense to coverage and also expressly acknowledges that, if the FDIC-R, for itself or as assignee, prevails in the Coverage Action or if the FDIC-R, for itself or as assignee, and Progressive settle the Coverage Action, the shall not be required to obtain a judgment in the FDIC-R Action or to otherwise establish any liability against the Settling Defendants in order to obtain the Settlement Amount.

- b. The FDIC-R and Progressive agree for purposes of the Coverage Action that the damages claimed by the FDIC-R in the FDIC-R Claims, and that are at issue in the Coverage Action, are amounts to which the FDIC-R claims to be entitled for tortious claims of gross negligence, negligence, and breaches of duty by the Settling Defendants in connection with making or approving loans from the Bank to Bank customers or failure to supervise and those damages are measured by the entire amount of those loans plus interest minus any recovery, such recovery to include but not be limited to any payments, sales recovery, or salvage. The initial Settlement Amount, defined below, comprises such claimed damages.
- c. Within 10 days of the Effective Date, as set forth in paragraph 13 of this Agreement, the FDIC-R and the Settling Defendants shall jointly stipulate to dismiss, with prejudice and in the form attached hereto as Exhibit A, the FDIC-R Claims as against all defendants against whom they were asserted, with each Party to bear its own attorneys' fees and costs as these were originally incurred; **provided, however, that the Court shall retain jurisdiction to specifically enforce the terms of this Agreement.** The FDIC-R shall not dismiss the Excluded Claims. All claims arising out of actions before June 9, 2008 shall be dismissed. The FDIC-R, for itself and as assignee, and the Settling Defendants hereby stipulate and agree that it/they will not seek, directly or indirectly, to recover against Progressive for any settlement, judgment, or other amounts in any way arising from or incurred in connection with the Excluded Claims.
- d. **No Reimbursement of Advanced Defense Costs or the Settlement Amount from the Settling Defendants.** Progressive hereby fully and finally relinquishes and waives any right to recover, claim or seek reimbursement from the Settling Defendants or the FDIC-R, for itself and as assignee, for, any amounts advanced to or for the benefit of any of the Settling Defendants for Defense Costs (as defined in the Policy), even if Progressive prevails in the Coverage Action, and Progressive further covenants and agrees not to seek to recover, claim or seek reimbursement for, any portion of the Settlement Amount from any of the Settling Defendants.
- e. **Express Reservation.** The dismissal in subparagraph c. above shall not be deemed a release or waiver of, and the Parties agree the following are expressly preserved fully and to the same extent as if the Agreement had not been executed, 1) any claims or causes of action 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, FDIC-R, the Bank, other financial institutions, or any other person or entity, including without limitation any claims acquired by the FDIC-R as successor in interest to the Bank or any person or entity other than Bank; 2) the FDIC's 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; 3) any claims which could be brought by the United States through either the Department of Justice, the United States Attorney's Office for any federal judicial district, including 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; 4) any and all rights that the FDIC has to restitution from Levine under the Judgment in a Criminal Case entered against Levine on May 5, 2011 (as modified on June 8, 2011) in the case captioned *United States v. Levine*, Case No. 1:09-cr-00554-JOF-1, United States District Court for the Northern District of Georgia, Atlanta Division; 5) any and all rights that the FDIC has to restitution from Lawrence under the Judgment in a Criminal Case entered against Lawrence on June 3, 2011 in the case captioned *United States v. Lawrence*, Case No. 1:10-cr-00476-WBH-1, United States District Court for the Northern District of Georgia, Atlanta Division; and 6) the FDIC-R Claims against the Settling Defendants solely to the extent necessary to perfect the assignment referenced in Paragraph 4 and to litigate and resolve the Coverage Action.

4. Settling Defendants Assignment to the FDIC-R, Release of Progressive, and Covenant Not to Sue FDIC and FDIC-R

- a. For valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Settling Defendants, the Settling Defendants, upon the Effective Date as set forth in paragraph 13 of this Agreement, solely to the extent necessary to enable the FDIC-R to pursue recovery in the Coverage Action of the Settlement Amount on the terms described herein, irrevocably assign to the FDIC-R any and all of their rights, title, and interest with respect to any claims, rights, and/or causes of action against Progressive for coverage relating to or arising out of the D&O Policy, the FDIC-R Claims, the FDIC-R Action and/or the Coverage Action including but not limited to all statutory rights, contractual rights, and rights arising in tort or otherwise relating to Progressive's duties to defend, pay defense costs or indemnify the Settling Defendants for the FDIC-R Claims in the FDIC-R Action and to settle and pay the FDIC-R Claims on behalf of the Settling Defendants, and to settle and pay for the settlement of the FDIC-R Action on behalf of the Settling Defendants ("The Settling Defendants' Claims and Rights Under the D&O Policy"). Nothing in this paragraph shall entitle the FDIC-R, for itself or as assignee, to recover or to seek to recover from Progressive any amounts in addition to the Settlement Amount, except as provided in paragraph 7, and the FDIC-R, for itself and as assignee, shall not assert any claim for "bad faith," breach of the covenant of good faith and fair dealing, or any claim based on Progressive's handling of the Settling Defendants' claim for coverage under the D&O Policy in the Coverage Action or any other action.
- b. Except to the extent assigned to the FDIC-R in Paragraphs 4.a and 4.b, upon dismissal of the FDIC's Claims, the Settling Defendants on behalf of themselves individually, and their respective heirs, executors, administrators, trustees, receivers, and successors, hereby release, acquit, and forever discharge Progressive and its parents, subsidiaries, affiliates, and reinsurers, and their respective owners, officers, directors, shareholders, employees, attorneys, managing general agents, agents, representatives, successors, and assigns from any and all actions, causes of action, suits, claims for sums of money, contracts, controversies, agreements, promises, liabilities, costs, attorneys' fees, expenses, interest, recoupment of defense costs, damages, settlements, judgments, awards, and demands whatsoever, direct or indirect, at law or in equity, known or unknown, foreseen or unforeseen, asserted or

unasserted, whether now existing or hereafter arising, in connection with, that arise from or relate to the Settling Defendants' Claims and Rights Under the D&O Policy.

- c. The FDIC-R, upon the Effective Date as set forth in paragraph 13 of this Agreement, assumes all rights, title and interest with respect to the Settling Defendants' Claims and Rights Under the D&O Policy assigned in paragraph 4.a. The Parties hereby waive the requirement established in Section XVI.B and/or any other applicable provision of the D&O Policy that any consent to assignment be physically endorsed to the D&O Policy. The Parties stipulate that the assignment set forth herein satisfies the requirement that Progressive consent in writing to this assignment as required by Section XVI.B and/or any other provision of the D&O Policy. No Party shall challenge or object to this assignment in any manner or for any reason whatsoever. **This assignment shall be effective upon the Effective Date as set forth in paragraph 13 of this Agreement.**
 - d. The Parties agree that the Settling Defendants and the FDIC-R have fully satisfied Section XVI.F and any other applicable provision of the D&O Policy and that this Settlement Agreement constitutes a written agreement among the Parties pursuant to which Progressive's obligation to pay "Loss" as defined under the D&O Policy shall be finally determined in accordance with this Settlement Agreement and the D&O Policy, subject only to the coverage defenses set forth in Counts I, II and IV of the Coverage Action. The Parties agree that the Settling Defendants are legally obligated to pay the Settlement Amount pursuant to Section I.A and IV.N in the Policy, but that FDIC-R, for itself and as assignee, may only seek to recover any funds contemplated by this Agreement and available to the Settling Defendants under the Policy through the Coverage Action, which will be litigated as described herein. Progressive waives, and will not assert, any argument that the Settling Defendants, by entering into this Settlement Agreement, are not legally obligated to pay any sums pursuant to Section I.A and IV.N in the Policy.
 - e. Upon the Effective Date of this Agreement as set forth in Paragraph 13, the Settling Defendants stipulate, promise and covenant not to sue under any legal theory whatsoever, the FDIC or the FDIC-R and its representatives, agents, successors, and assigns. The Settling Defendants further stipulate, promise and covenant not to sue Progressive under any legal theory whatsoever relating to the Settling Defendants' Claims and Rights Under the D&O Policy.
- 5. Lloyds Coverage Action.** The Parties agree that nothing in this Agreement shall be deemed to waive or modify any claims or defenses which the Parties may have (whether or not currently asserted) in the declaratory judgment action now pending in the United States District Court for the Northern District of Georgia in the matter styled as *Certain Underwriters at Lloyd's, London v. Federal Deposit Insurance Corporation, as Receiver of Omni National Bank, et. al.*, Civil Action No. 1:12-cv-01740-RLV (the "Lloyd's Coverage Action"). Provided that nothing in this paragraph shall be deemed to allow any recovery by FDIC-R, for itself or as assignee, from Progressive beyond the Settlement Amount as defined herein. Any resolution of the Lloyd's Coverage Action and/or the

Excluded Claims shall not include or purport to create or assign any right of recovery by FDIC-R, Klein, Lawrence, Cohen or Perrine, against Progressive.

- 6. Partial Dismissal of Coverage Action.** Within 10 days of the Effective Date of this Agreement as set forth in paragraph 13, (a) Progressive shall dismiss Counts III and V through X of the Complaint in the Coverage Action against the FDIC-R and the Settling Defendants, with prejudice, each party to bear its own fees and costs, (b) Progressive shall move for the entry of final judgment in Progressive's favor on Count IV of the Complaint, and FDIC-R, for itself and as assignee, and Settling Defendants shall not oppose, each party to bear its own fees and costs; and (c) Klein shall move to dismiss his counterclaim against Progressive without prejudice, each party to bear its own fees and costs, and FDIC-R and Progressive shall not oppose; and (d) the Parties shall jointly stipulate and move to substitute the FDIC-R as Assignee of Berman, Greenblatt, Klein, Lawson, Levinc, Livengood, and Patten for the Settling Defendants in the Coverage Action and move to amend the caption to reflect this change in the form attached hereto as Exhibit B. Progressive further agrees it shall not seek leave to amend the Complaint in the Coverage Action without written consent from the FDIC-R to be provided at the sole discretion of the FDIC-R. The FDIC-R further agrees it shall not seek leave to amend its answer in the coverage action without the written consent from Progressive, to be provided at the sole discretion of Progressive. The FDIC-R, for itself and as assignee, will not file any Counterclaim in the Coverage Action. Provided, however, that nothing in this paragraph shall be construed to frustrate the FDIC-R's and Progressive's intention to litigate Counts I and II of the complaint on the merits.
- 7. The Settlement Amount.** Within 20 calendar days of the Effective Date of this Agreement as set forth in paragraph 13, Progressive will seek a court order to place the original amount of Seven Million Five Hundred Thousand Dollars (\$7,500,000) (the "Initial Settlement Amount") into the Court Registry fund, pursuant to Local Rule 67 of the Northern District of Georgia. The Initial Settlement Amount will be held for the benefit of the FDIC-R, for itself and as assignee, and Progressive in accordance with paragraph 8 below. For purposes of this Agreement, the "Settlement Amount" shall mean the Initial Settlement Amount, *plus* all interest accrued thereon. The Settlement Amount shall not include, and no Party shall seek from any other Party, any other amounts of any kind or character, including, but not limited to pre and post judgment interest, fees or costs. Other than the Settlement Amount, the FDIC-R, for itself and as assignee, shall not seek to collect any other amounts against Progressive in connection with the FDIC-R Action. All costs and fees payable to the Court or as required by the Local Rules shall be handled as provided in Local Rule 67.
- 8. Release of the Settlement Amount from the Registry Upon Final Coverage Judgment.** The Parties agree that the Party that prevails by final judgment in the Coverage Action, after exhaustion of all rights of appeal or review ("Final Coverage Judgment"), is entitled to receive the Settlement Amount from the Registry and each Party shall cooperate in the motion for the disbursement of the Settlement Amount from the Registry to the prevailing Party in the Coverage Action. Progressive shall be deemed the prevailing party if in the Final Coverage Judgment with respect to Count I of the Complaint in the Coverage Action (addressing § V.J of the D&O Policy) the Court rules

that the Insured v. Insured exclusion precludes all coverage under the Policy for the FDIC-R Claims or, with respect to Count II (addressing § IV.N of the D&O Policy), the Court rules the carveout from the definition of "Loss" precludes coverage under the Policy for the damages claimed by the FDIC-R in the FDIC-R Claims, which the Parties have defined in paragraph 3.b. FDIC-R, for itself and as assignee, shall be deemed the prevailing party if in the Final Coverage Judgment Progressive does not prevail on either of those counts.

9. Settlement of the Coverage Action and Release of the Settlement Amount.

Progressive may settle the Coverage Action at any time prior to a Final Coverage Judgment by dismissing the Coverage Action with prejudice and filing a motion and obtaining an order for the disbursement of the full Settlement Amount from the Registry payable to the FDIC-R. The FDIC-R, for itself and as assignee, and Progressive shall cooperate in making any filings necessary to effectuate this provision. Upon such a settlement, each party will bear its own attorney's fees and costs.

10. No Contribution. The Parties acknowledge and agree that the Settling Defendants shall not under any circumstances be required to contribute to any settlement, judgment, or other form of payment, including payment for indemnification or reimbursement of amounts advanced for Defense Costs under the Policy, to the FDIC-R, Progressive, or to any related party, arising from or in any way related to the FDIC-R Claims.

11. Representations and Acknowledgements.

- a. **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 and delivered 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.
- b. **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 undersigned Parties and their respective heirs, executors, administrators, representatives, successors, and assigns.
- c. **Choice of Law and Interpretation.** This Agreement shall be interpreted, construed and enforced according to applicable federal law or, in its absence, the laws of the State of Georgia. The Parties each acknowledge that this Agreement was drafted jointly by them and, therefore, if any court of competent jurisdiction finds a portion or portions of this Agreement ambiguous, this Agreement shall not be construed for one party and against another.
- d. **Severability and Survival.** If any portion of this Agreement is held by a court of competent jurisdiction to conflict with any federal, state, or local law, and as a result

such portion is declared to be invalid and of no force and effect in such jurisdiction, all remaining provisions of this Agreement shall otherwise remain in full force and effect and shall be construed as if such invalid portion or portions has not been included herein. All rights and obligations survive termination of the Agreement and a Final Coverage Judgment.

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. 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). A waiver of any right under this agreement is only effective if it is in writing and it applies only to the party to whom the waiver is addressed and to the circumstances for which it is given.

f. **Specific Representations, Warranties, and Disclaimer Relating to Financial Information.**

i. Each Settling Defendant has submitted to the FDIC-R an affidavit of financial information or sworn/certified financial information. Each Settling Defendant expressly acknowledges that, in determining to settle the claims herein, the FDIC-R has reasonably and justifiably relied upon the accuracy of the financial information submitted by that Settling Defendant to the FDIC-R. The Settling Defendants severally, but not jointly, swear and affirm that all financial information in the affidavits provided to the FDIC-R was true and accurate at the time of submission and that no material change has occurred since the affidavit was provided to the FDIC-R. The FDIC-R has no obligation to independently verify the completeness and accuracy of that financial information. The Settling Defendants expressly acknowledge that in determining to enter this Agreement, the FDIC-R has reasonably and justifiably relied upon the accuracy of financial information in the affidavits submitted.

ii. If, in their affidavits or sworn/certified financial information, a Settling Defendant has failed to disclose any material interest, legal, equitable, or beneficial, in any asset, then that Settling Defendant agrees to cooperate fully with the FDIC-R to transfer his/her interest in the asset(s) to the FDIC-R and to sign any and all documents necessary to transfer that interest in the asset to the FDIC-R.

12. Reasonable Cooperation.

i. The Parties agree to cooperate in good faith to effectuate all the terms and conditions of this Settlement 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 perform the terms of this Settlement Agreement.

ii. Further, the Settling Defendants agree to cooperate fully with the FDIC-R and Progressive in connection with any action required under this Agreement. Any such cooperation that involves any out of pocket costs is subject to reasonable

reimbursement by the FDIC-R and/or Progressive pursuant to its internal guidelines and policy for such reimbursement. Such cooperation shall consist of:

- 1) producing all documents requested by the FDIC-R or Progressive, without the necessity of subpoena, as determined by the FDIC-R and Progressive to be relevant to the Coverage Action;
- 2) making themselves available upon request by the FDIC-R or Progressive at reasonable times and places for interviews regarding facts, as determined by the FDIC-R or Progressive, to be relevant to the Bank;
- 3) appearing to testify upon request by the FDIC-R or Progressive in the Coverage Action without the necessity of subpoena;
- 4) signing truthful affidavits upon request by the FDIC-R or Progressive regarding any matter, as determined by the FDIC-R or Progressive, to be relevant to the Coverage Action.

13. Effective Date. This Agreement will not be fully executed and effective until after the Excluded Claims are resolved with Klein by written settlement or judgment; provided, however, that resolution of the Excluded Claims against Cohen and Perrine shall not delay the effective date of this Agreement.

14. Attorney Fees. Other than as set forth in this Agreement, the Parties shall be responsible for the payment of their own attorney's fees and costs, if any. If litigation, arbitration, or any other proceeding is instituted to interpret or enforce this Agreement, the party prevailing in that litigation, arbitration, or proceeding shall be entitled to reasonable attorney's fees and costs, in addition to any other relief granted.

15. Notice. All notices required to be given under this Settlement Agreement shall be in writing and delivered to the **email addresses** set forth below.

If to FDIC-R: Andrew Reidy
Dickstein Shapiro LLP
1825 Eye Street NW
Washington, DC, 20006

(b)(6)

If to Progressive: Lewis K. Loss
Loss, Judge & Ward LLP
1133 21st Street, NW, Suite 450
Washington, DC 20036

(b)(6)

If to the Settling Defendants: **See Exhibit C attached**

16. **Advice of Counsel.** Each Party hereby acknowledges that it has consulted with and obtained the advice of its counsel prior to executing this Agreement, and that this Agreement has been explained to that Party by its counsel.

17. **Authority to Settle.** The undersigned each warrant and represent that they have the full right, power, and specific authority to enter into, execute and consummate this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement, by and through their counsel, as of the Effective Date stated above.

**FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER FOR
OMNI NATIONAL BANK**

(b)(6)

Date: _____, 2013

By:

[Redacted Signature]

Its: _____

**PROGRESSIVE CASUALTY INSURANCE
COMPANY**

(b)(6)

Date: *Nov 11*, 2013

By:

[Redacted Signature]

Its: *Casualty Specialist Sr.*

Date: _____, 2013

By:

IRWIN M. BERMAN

Date: _____, 2013

By:

JULES N. GREENBLATT

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**FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER FOR
OMNI NATIONAL BANK**

Date: _____, 2013

By: _____

Its _____

**PROGRESSIVE CASUALTY INSURANCE
COMPANY**

Date: _____, 2013

By: _____

Its _____

(b)(6)

Date: Oct 24, 2013

By:



IRWIN M. BERMAN

Date: _____, 2013

By: _____

JULES N. GREENBLATT

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FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER FOR
OMNI NATIONAL BANK

Date: _____, 2013

By: _____

Its: _____

PROGRESSIVE CASUALTY INSURANCE
COMPANY

Date: _____, 2013

By: _____

Its: _____

Date: _____, 2013

By: _____

IRWIN M. BERMAN

(b)(6)

Date: 10 / 23, 2013

By: 

JULES N. GREENBLATT

(b)(6)

Date: 10/23, 2013

By:

[Redacted Signature]

STEPHEN M. KLEIN

Date: _____, 2013

By:

EUGENE F. LAWSON, III

Date: _____, 2013

By:

JEFFREY L. LEVINE

Date: _____, 2013

By:

SHANNON C. LIVENGOOD

Date: _____, 2013

By:

GREGORY W. PATTON

Date: _____, 2013

By: _____
JULES N. GREENBLATT

Date: _____, 2013

By: _____
STEPHEN M. KLEIN

(b)(6)

Date: Oct 23, 2013

By:
EUGENE F. LAWSON, III

Date: _____, 2013

By: _____
JEFFREY L. LEVINE

Date: _____, 2013

By: _____
SHANNON C. LIVENGOOD

Date: _____, 2013

By: _____
GREGORY W. PATTON

Date: _____, 2013


By: _____
STEPHEN M. KLEIN

Date: _____, 2013

By: _____
EUGENE F. LAWSON, III

(b)(6)

Date: *10/31*, 2013

By: 
JEFFREY L. LEVINE

Date: _____, 2013

By: _____
SHANNON C. LIVENGOOD

Date: _____, 2013

By: _____
GREGORY W. PATTON

Date: _____, 2013

By: _____
STEPHEN M. KLEIN

Date: _____, 2013

By: _____
EUGENE F. LAWSON, III

Date: _____, 2013

By: _____
JEFFREY L. LEVINE

Date: Oct. 29, 2013

By: (b)(6)
~~**SHANNON C. LEVINGOOD**~~

Date: _____, 2013

By: _____
GREGORY W. PATTON

Date: _____, 2013

By: _____
JULES N. GREENBLATT

Date: _____, 2013

By: _____
STEPHEN M. KLEIN

Date: _____, 2013

By: _____
EUGENE F. LAWSON, III

Date: _____, 2013

By: _____
JEFFREY L. LEVINE

Date: _____, 2013

By: _____
SHANNON C. LIVENGOOD

(b)(6)

Date: 10-25-, 2013

By: 
GREGORY W. TATTON

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER
OF OMNI NATIONAL BANK

Plaintiff,

v.

STEPHEN M. KLEIN, IRWN W.
BERMAN, BENJAMIN J. COHEN,
JULES N. GREENBLATT, KARIM
W. LAWRENCE, EUGENE F.
LAWSON, III, JEFFREY L.
LEVINE, SHANNON C.
LIVENGOOD, GREGORY W.
PATTEN, AND CONSTANCE E.
PERRINE

Defendants

CIVIL ACTION NO. 1:12-cv-00896-
RLV

JURY TRIAL DEMANDED

**JOINT STIPULATION AND MOTION FOR DISMISSAL AND
REQUEST TO RETAIN JURISDICTION**

Plaintiff, Federal Deposit Insurance Corporation as Receiver of Omni National Bank ("FDIC-R") and Defendants Stephen M. Klein ("Klein"), Irwin M. Berman ("Berman"), Jules N. Greenblatt ("Greenblatt"), Eugene F. Lawson, III ("Lawson"), Jeffrey L. Levine ("Levine"), Shannon C. Livengood ("Livengood"), and Gregory W. Patten ("Patten") (collectively, the "CDLD Defendants") by

settlement agreement and pursuant to Federal Rule of Civil Procedure 41(a)(2) hereby stipulate to the dismissal with prejudice of Counts I and II and Count III (only to the extent of claims relating to supervision of Levine and/or CDLD lending) of the Complaint. The parties shall bear their own attorneys' fees and costs.

The FDIC-R and Defendant Klein (the "OREO Defendant") have entered into a settlement agreement as to Counts III (only to the extent of claims relating to OREO supervision), IV, and V of the Complaint (collectively, the CDLD Defendants and the OREO Defendant are referred to as the "Settling Defendants").

The FDIC-R and the Settling Defendants jointly move this Court to retain jurisdiction solely to enforce the terms of the Settlement and Assignment Agreements, attached as Exhibits A and B, pursuant to *Kokkonen v. Guardian Life Insurance Company*, 511 U.S. 375 (1994).

The Court's entry of the attached order will significantly streamline this matter to claims against Defendants Benjamin J. Cohen, Karim W. Lawrence, and Constance E. Perrine on Counts III (only to the extent of claims relating to OREO supervision occurring after June 9, 2008), IV, and V of the Complaint.

For the foregoing reasons, the FDIC-R and the Settling Defendants jointly request that the Court enter the proposed order attached hereto as Exhibit C.

Respectfully submitted this __ day of October, 2013.

*Counsel for Federal Deposit Insurance
Company as Receiver of Omni National
Bank*

James A. Brown (LA Bar #14101) (PHV)
George Denegre, Jr. (LA Bar #8387) (PHV)
Carey L. Menasco (LA Bar #28131) (PHV)
Elisabeth L. Baer (LA Bar #31844) (PHV)

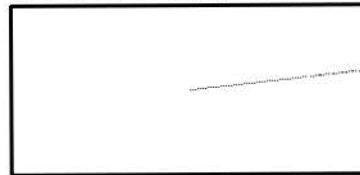
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-and-

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[[OTHER SIGNATURE BLOCKS]]

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

**FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER
OF OMNI NATIONAL BANK**

Plaintiff,

v.

**STEPHEN M. KLEIN, IRWN W.
BERMAN, BENJAMIN J. COHEN,
JULES N. GREENBLATT, KARIM
W. LAWRENCE, EUGENE F.
LAWSON, III, JEFFREY L.
LEVINE, SHANNON C.
LIVENGOOD, GREGORY W.
PATTEN, AND CONSTANCE E.
PERRINE**

Defendants

**CIVIL ACTION NO. 1:12-cv-00896-
RLV**

JURY TRIAL DEMANDED

ORDER

The Court has considered the Joint Stipulation and Motion for Dismissal and Request to Retain Jurisdiction to Enforce Settlement Agreements (“Stipulation and Motion”) jointly submitted by Plaintiff, Federal Deposit Insurance Corporation as Receiver of Omni National Bank (“FDIC-R”) and Defendants Stephen M. Klein (“Klein”), Irwin M. Berman (“Berman”), Jules N. Greenblatt (“Greenblatt”), Eugene F. Lawson, III (“Lawson”), Jeffrey L. Levine (“Levine”), Shannon C.

Livengood ("Livengood"), and Gregory W. Patten ("Patten") filed on October __, 2013. In the Stipulation and Motion, the moving parties advised the Court that they have entered Settlement and Assignment Agreements and have agreed to dismiss certain claims in this matter with prejudice. For the reasons presented in the Stipulation and Motion, it is hereby ORDERED that:

1. FDIC-R's Complaint against Defendants Berman, Greenblatt, Lawson, Levine, Livengood, and Patten is DISMISSED WITH PREJUDICE;
2. Counts I, II, and III (only to the extent of claims relating to supervision of Levine and/or CDLD lending) of the Complaint against Defendants Klein, Karim W. Lawrence ("Lawrence"), and Benjamin J. Cohen ("Cohen") are DISMISSED WITH PREJUDICE;
3. Each party shall bear its own attorneys' fees and costs; and
4. The Court retains jurisdiction over the Settlement and Assignment Agreements attached as Exhibits A and B to the parties' Stipulation and Motion solely to enforce the terms of those agreements, under *Kokkonen v. Guardian Life Insurance Company*, 511 U.S. 375 (1994).

DATED, this ____ day of October, 2013.

Honorable Robert L. Vining
District Judge, Northern District of
Georgia

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

**PROGRESSIVE CASUALTY
INSURANCE COMPANY,
Plaintiff**

v.

**FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER
OF OMNI NATIONAL BANK;
STEPHEN M. KLEIN; EUGENE F.
LAWSON III; IRWIN W. BERMAN;
CONSTANCE E. PERRINE;
BENJAMIN J. COHEN; GREGORY
W. PATTEN; JULES N.
GREENBLATT; SHANNON C.
LIVENGOOD; KARIM W.
LAWRENCE; and JEFFREY L.
LEVINE
Defendants.**

**CIVIL ACTION NO.
1:12-cv-01103-RLV**

**JOINT MOTION AND MEMORANDUM OF FEDERAL DEPOSIT
INSURANCE CORPORATION AS RECEIVER OF OMNI NATIONAL
BANK ("FDIC-R") AND PROGRESSIVE CASUALTY INSURANCE
COMPANY TO SUBSTITUTE AND AMEND CASE CAPTION**

Plaintiff Progressive Casualty Insurance Company ("Progressive") and Defendant FDIC-R, pursuant to a settlement agreement and Federal Rules of Civil Procedure 10 and 25(c), jointly move to amend the caption and to substitute the FDIC-R as Assignee of Defendants Stephen M. Klein ("Klein"), Eugene F. Lawson, III ("Lawson"), Irwin M. Berman ("Berman"), Gregory W. Patten ("Patten"), Jules N. Greenblatt ("Greenblatt"), Shannon C. Livengood

("Livengood"), and Jeffrey L. Levine ("Levine") (collectively, the "Assignor Defendants") as a party in this action.

I. ARGUMENT

A. Substitution of FDIC-R as Assignee

Pursuant to the Settlement and Assignment Agreement, attached hereto as Exhibit 1, between and among the Assignor Defendants, FDIC-R, and Progressive, the Assignor Defendants assigned to FDIC-R all of their rights, title, and interest with respect to any claims, rights, or causes of action against Progressive for coverage relating to or arising out of (i) the Directors and Officers / Company Liability Insurance Policy for Financial Institutions, No. issued by ~~_____~~ (b)(4) Progressive (the "Progressive Policy"), (ii) the FDIC-R's claims against the Assignor Defendants relating to lending and oversight involving Omni National Bank's Community Development Lending Division occurring before June 9, 2008, (iii) the lawsuit captioned "*Federal Deposit Insurance Corporation, as Receiver of Omni National Bank v. Stephen M. Klein, et al.*," Civil Action No. 1:12-cv-00896-RLV, and (iv) this action. As a result of this assignment, Progressive, the FDIC-R, and the Assignor Defendants now jointly move this Court to substitute the FDIC-R as the assignee of Klein, Lawson, Berman, Patten, Greenblatt, Livengood, and Levine.

Federal Rule of Civil Procedure 25(c) states: “If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party.” Although substitution under Rule 25(c) is permissive and the Court may continue this action in the name of the original parties, *State Federal Sav. & Loan Ass'n of Lubbock v. Campbell*, 848 F.2d 1186, 1188-89 (11th Cir. 1988), substitution should be permitted in this instance to clarify the FDIC-R's roles and rights in this action and to make clear that the Assignor Defendants are no longer the real parties in interest in this action.

The interest in the claims against which Progressive seeks a declaratory judgment has been transferred to the FDIC-R with respect to all but three of the Defendants. The FDIC-R as the transferee of the rights of the Assignor Defendants now has the exclusive interest in defending this action as to those individuals and should therefore be substituted as a party. Benjamin J. Cohen, Karim W. Lawrence, and Constance E. Perrine and have not assigned any rights related to Progressive or the Progressive Policy to the FDIC-R and would therefore remain as parties in this action.

B. Amendment of Caption

Upon the Court's grant of relief requested under Rule 25(c), the undersigned parties further request that the Court amend the caption of this matter as follows:

PROGRESSIVE CASUALTY INSURANCE
COMPANY,

Plaintiff

v.

FEDERAL DEPOSIT INSURANCE
CORPORATION as Receiver of Omni National
Bank; FEDERAL DEPOSIT INSURANCE
CORPORATION as Receiver of Omni National
Bank as Assignee of Stephen M. Klein, Eugene F.
Lawson, III, Irwin M. Berman, Gregory W. Patten,
Jules N. Greenblatt, Shannon C. Livengood, Karim
W. Lawrence, and Jeffrey L. Levine;
CONSTANCE E. PERRINE; BENJAMIN J.
COHEN; and KARIM W. LAWRENCE,

Defendants.

Federal Rule of Civil Procedure 10 states that “[e]very pleading must have a caption with the court’s name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties.” Fed. R. Civ. P. 10(a). If substitution is permitted here, the caption should be amended to reflect that change.

C. Retention of Jurisdiction

The Settlement and Assignment Agreement (Exhibit 1) confers certain rights and obligations on the Assignor Defendants, the FDIC-R, and Progressive, which are applicable to, among other things, this action. The parties respectfully request the Court to retain jurisdiction over the parties, including the Assignor Defendants,

to enforce the terms of the Settlement and Assignment Agreement. *See Kokkonen v. Guardian Life Insurance Company*, 511 U.S. 375 (1994).

II. CONCLUSION

For the reasons set forth above, Progressive, FDIC-R, and the Assignor Defendants respectfully request that the Court grant this Motion.

Respectfully submitted,

James A. Brown (LA Bar #14101) (PHV)

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*Attorneys for the Federal Deposit Insurance
Corporation, as Receiver of Omni National
Bank*

[[OTHER SIGNATURE BLOCKS]]

CERTIFICATION PURSUANT TO LOCAL RULES

Pursuant to the Local Rules this certifies that this document was prepared using the New Times Roman font in 14 point. These font and point selections are approved by L.R.5.1.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PROGRESSIVE CASUALTY
INSURANCE COMPANY,
Plaintiff

v.

FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER
OF OMNI NATIONAL BANK;
STEPHEN M. KLEIN; EUGENE F.
LAWSON III; IRWIN W. BERMAN;
CONSTANCE E. PERRINE;
BENJAMIN J. COHEN; GREGORY
W. PATTEN; JULES N.
GREENBLATT; SHANNON C.
LIVENGOOD; KARIM W.
LAWRENCE; and JEFFREY L.
LEVINE
Defendants.

CIVIL ACTION NO.
1:12-cv-01103-RLV

ORDER

The Court has considered the joint motion and memorandum (“Motion”) of Plaintiff Progressive Casualty Insurance Company (“Progressive”) and Defendant Federal Deposit Insurance Corporation as Receiver of Omni National Bank (“FDIC-R”) to Amend the Case Caption and Substitute FDIC-R as assignee of Defendants Stephen M. Klein (“Klein”), Eugene F. Lawson, III (“Lawson”), Irwin M. Berman (“Berman”), Gregory W. Patten (“Patten”), Jules N. Greenblatt (“Greenblatt”), Shannon C. Livengood (“Livengood”), and Jeffrey L. Levine

("Levine") (collectively, the "Assignor Defendants"). For the reasons stated in the Motion, it is hereby ORDERED that:

1. FDIC-R as the Assignee of Klein, Lawson, Berman, Patten, Greenblatt, Livengood, and Levine shall be substituted pursuant to Federal Rule of Civil Procedure 25(c) as a party for the individual Assignor Defendants;
2. The caption in this matter is amended to read-

PROGRESSIVE CASUALTY INSURANCE
COMPANY,
Plaintiff
v.

FEDERAL DEPOSIT INSURANCE
CORPORATION as Receiver of Omni National
Bank; FEDERAL DEPOSIT INSURANCE
CORPORATION as Receiver of Omni National
Bank as Assignee of Stephen M. Klein, Eugene F.
Lawson, III, Irwin M. Berman, Gregory W. Patten,
Jules N. Greenblatt, Shannon C. Livengood, and
Jeffrey L. Levine; CONSTANCE E. PERRINE;
BENJAMIN J. COHEN; and KARIM W.
LAWRENCE,
Defendants.

3. The Court retains jurisdiction over the Settlement and Assignment Agreement attached as Exhibit 1 to the Motion solely to enforce the terms of that agreement pursuant to *Kokkonen v. Guardian Life Insurance Company*, 511 U.S. 375 (1994).

DATED, this ____ day of October, 2013.

Honorable Robert L. Vining
District Judge, Northern District of
Georgia

**EXHIBIT "C" TO SETTLEMENT AND ASSIGNMENT AGREEMENT
DATED DECEMBER 6, 2013
NOTICE TO SETTLING DEFENDANTS**

1. To Berman:

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Tracy Klingler
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(404) 572-5138 (fax)

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2. To Greenblatt:

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Chris Adams
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(b)(6) Email:
Email:

AND

Jules Greenblatt
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3. To Klein and/or Lawson:

Theodore J. Sawicki
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, GA 30309-3424

(b)(6)

4. To Levine:

THOMAS B. BOSCH
Georgia Bar No. 068740
NATALIE D. SACHA
Georgia Bar No. 558276
TROUTMAN SANDERS LLP
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5. To Livengood:

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6. To Patten:

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