

## SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement (“Agreement”) is made as of the effective date of the \_\_th day of August, 2014, by, between, and among the following undersigned parties:

The Plaintiff, the Federal Deposit Insurance Corporation as Receiver for Michigan Heritage Bank (“FDIC-R”); Timothy J. Cuttle (“Settling Defendant”); and Progressive Insurance Company (the “Insurance Company”) (individually, the FDIC-R, the Settling Defendant and the Insurance Company may be referred to herein as “Party” and collectively as the “Parties”).

### RECITALS

#### **WHEREAS:**

Prior to April 24, 2009, Michigan Heritage Bank (“Bank”) was a depository institution organized and existing under the laws of the state of Michigan;

On April 24, 2009, the Bank was closed by the Michigan Office of Financial and Insurance Regulation and, pursuant to 12 U.S.C. § 1821(c), the FDIC-R was appointed as the Bank’s 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;

Among the assets to which the FDIC-R succeeded were all of the Bank’s claims, demands, and causes of action against its former directors, officers, and employees arising from the performance, nonperformance, and manner of performance of their respective functions, duties and acts as directors, officers, and employees of the Bank;

On August 8, 2011, the FDIC-R filed a complaint for money damages against the Settling Defendant who served as an officer of the Bank. Those claims for damages are now pending in the United States District Court for the Eastern District of Michigan in the action styled *Federal Deposit Insurance Corporation as Receiver for Michigan Heritage Bank v. Cuttle*, Case No.

2:11-cv-13442 (“D&O Action”), which action remains pending. The Settling Defendant has denied liability in the D&O Action;

The Insurance Company issued liability policy numbers [redacted] and [redacted] (B)(4) (the “Policies”), which insured Settling Defendant according to the terms, provisions and conditions of the Policies. Settling Defendant asserted claims for coverage under the Policies. Insurance Company has reserved its rights to deny coverage under the Policies for claims asserted by FDIC-R against Settling Defendant. Additionally, on November 1, 2011, Insurance Company filed a declaratory judgment action against the FDIC-R and Settling Defendant seeking a declaration of its rights and obligations under the Policies with regard to the claims asserted by the FDIC-R in the D&O Action styled *Progressive Casualty Insurance Company v. FDIC as Receiver for Michigan Heritage Bank, et al* (“Coverage Action”). That action is now pending in the United States District Court for the Eastern District of Michigan, being Case No. 2:11-cv-14816;

The undersigned 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 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, Settling Defendant and Insurance Company agree to pay the FDIC-R the total sum of Two Million Nine Hundred Thousand Dollars (\$2,900,000.00) (“the Settlement Payment”). The Settlement Payment shall be paid to the FDIC-R by the Insurance Company on behalf of the Settling Defendant.

B. On or before thirty (30) calendar days following the execution of an original, or originals in counterpart, of this Agreement by each of the undersigned Parties to this Agreement, Insurance Company shall deliver the Settlement Payment to the FDIC-R by direct wire transfer into an account designated by FDIC-R by notice to the attorneys for the Settling Defendant and Insurance Company. No less than ten (10) days before payment is due, the FDIC-R shall provide Insurance Company with full wiring instructions and an executed Form W-9 for the designated account.

C. If the FDIC-R does not receive the Settlement Payment in full on or before the date determined by subsection B 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 B 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 and Insurance Company agree to jurisdiction in United States District Court in Michigan and to pay all of the FDIC-R's reasonable attorney's fees and costs expended in enforcing the terms of this Agreement; or

3. Terminate the Agreement, move to vacate any dismissal order, to which the Settling Defendant and Insurance Company agree to consent, and re-institute an action on the FDIC-R's claims. The Settling Defendant and Insurance Company further agree to waive and not assert objections, defenses, claims or counterclaims, including any defense based on any statute of limitations that would bar any of the FDIC-R's claims, that did not exist or were otherwise unavailable as of the date this Agreement was fully executed; and/or

4. Seek any other relief available to it in law or equity.

D. Any extension of time under Section I.C.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.C.2 through I.C.4 at any time prior to receipt of Settlement Payment (including all accrued interest) in full.

## **SECTION II: STIPULATION AND DISMISSAL**

Within ten business days after the latter of (1) full execution of this Agreement by all of the Parties, and (2) receipt of the Settlement Payment, plus any accrued interest, the FDIC-R shall file a stipulation of dismissal with prejudice, executed by the attorneys for all Parties hereto, in the form attached hereto as Exhibit B, in the D&O Action. Within ten days after full execution of this Agreement by each of the Parties, Insurance Company shall file a stipulation of dismissal with prejudice, executed by the attorneys for all Parties hereto, in the form attached hereto as Exhibit A, in the Coverage Action.

## **SECTION III: RELEASES**

### **A. FDIC-R Releases**

Effective upon receipt in full of the Settlement Funds plus any accrued interest described above, and except as provided in Paragraph III.D. below, the FDIC-R, for itself and its successors and assigns, hereby releases and discharges:

1. Settling Defendant and his 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-R, that arise from or relate to, the performance, nonperformance, or manner of performance of Settling Defendant's functions, duties and actions as an officer or employee of the Bank, or that arise

from or relate to the Policies, including, without limitation, the causes of action alleged in the D&O Action.

2. Insurance Company, its parents, subsidiaries, affiliates and reinsurers, and its and their respective employees, officers, directors, agents, 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 Policies. The FDIC-R agrees that any interest it may have under the Policies is extinguished.

3. All other former directors, officers, and employees of the Bank (collectively, the "Covered Persons") and their respective heirs, executors, trustees, 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-R, that arise from or relate to, the performance, nonperformance, or manner of performance of the Covered Persons' respective functions, duties and actions as directors, officers and/or employees of the Bank including without limitation the causes of action alleged in the D&O Action. This release shall be null and void as to any Covered Person if such Covered Person asserts any claim against the FDIC-R.

B. Releases by Settling Defendant

Effective simultaneously with the release granted in Paragraph III.A. above, Settling Defendant, on behalf of himself individually, and his respective heirs, executors, administrators, agents, representatives, successors and assigns, hereby releases and discharges:

1. FDIC-R, 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 Bank or to the

performance, nonperformance, or manner of performance of the Settling Defendant's respective functions, duties and actions as an officer of the Bank including, without limitation, the causes of action alleged in the D&O Action.

2. Insurance Company, its parents, subsidiaries, affiliates and reinsurers, and its and their respective employees, officers, directors, agents, 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 Policies except for breaches of this Agreement. Settling Defendant agrees that any interest he may have under the Policies is extinguished.

C. Releases by Insurance Company

Effective simultaneously with the release granted in Paragraph III.A. and III.B above, Insurance Company, for itself and its successors and assigns, and on behalf of its parents, subsidiaries, affiliates and reinsurers, and its successors and assigns, hereby releases and discharges:

1. FDIC-R, and its employees, officers, directors, agents, 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 Policies.

2. Settling Defendant his respective heirs, executors, administrators, agents, 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 Policies.

Nothing in these releases shall affect any defense to coverage Insurer may have with respect to any claim that may be asserted against it in the future, if any, connection with the Policies or otherwise.

D. Express Reservations From Releases By FDIC-R

1. Notwithstanding any other provision, by this Agreement, the FDIC-R 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 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 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 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 Federal Deposit Insurance Corporation 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 Eastern District or Western District of Michigan or any other federal judicial district. In addition, the FDIC-R 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 AND PROCEEDS FROM LITIGATION**

To the extent, if any, that Settling Defendant is or was a shareholder of the Bank or its holding company, Michigan Heritage Bancorp, Inc., and by virtue thereof are or may be entitled to a dividend, payment, or other distribution upon resolution of the receivership of the Bank or proceeds in any litigation that has been or could be brought against the Federal Deposit Insurance Corporation in any capacity or against the United States based on or arising out of, in whole or in part, the closing of the Bank, or any alleged acts or omissions by the Federal Deposit Insurance Corporation in any capacity, the United States government, or any agency or department of the United States government in connection with the Bank, its conservatorship, or receivership, Settling Defendants hereby knowingly assign to the FDIC-R any and all rights, titles, and interest in and to any and all such dividends, payments, or other distributions, or proceeds.

#### **SECTION V: 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.

C. Financial Disclosure Representation. The Settling Defendant has submitted financial information to the FDIC-R including signed Financial Disclosure Form (FDIC-R form 7600/01), and herein affirms that his financial information was true and accurate as of the date submitted. The Settling Defendant expressly acknowledges that, in determining to settle the claims released herein, the FDIC-R has reasonably and justifiably relied upon the accuracy of the financial information submitted. The FDIC-R has no obligation to independently verify the completeness or accuracy of that financial information.

#### **SECTION VI: 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 conclude the D&O Action, the Coverage Action, and to otherwise perform the terms of this Agreement.

#### **SECTION VII: 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 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 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.

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 Michigan.

E. 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: Aaron M. Forester  
FDIC 3501 N. Fairfax Dr., Room VS-B-7066  
Arlington, VA, 22226  
(703) 516-5056

(b)(6) \_\_\_\_\_ [Redacted]

If to the Settling Defendant: Ronn S. Nadis  
Couzens, Lansky, Fealk, Ellis, Roeder & Lazar  
Country Club Office Centre, 39395 West Twelve Mile Rd.,  
Suite 200,  
Farmington Hills, MI 48331  
(248) 489-8600

(b)(6) \_\_\_\_\_ [Redacted]

If to Insurance Company: Lewis K. Loss  
Loss Judge & Ward, LLP  
Two Lafayette Centre, 1133 21st Street, NW, Suite 450  
Washington, DC 20036  
(202) 778-4063

(b)(6) \_\_\_\_\_ [Redacted]

F. 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).

G. 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.

H. 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.

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 MICHIGAN HERITAGE BANK**

(b)(6) \_\_\_\_\_  
Date: 8/13/14

BY: \_\_\_\_\_  
TITLE: Counsel - FDIC-R  
PRINT NAME: Aaron Forester

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

\_\_\_\_\_  
Timothy J. Cuttle

**PROGRESSIVE INSURANCE COMPANY**

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

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

instrument signed by the Party or Parties to be bound thereby, or by their respective authorized attorney(s) or other representative(s).

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**FEDERAL DEPOSIT INSURANCE CORPORATION  
AS RECEIVER FOR MICHIGAN HERITAGE BANK**

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

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

TITLE:

PRINT NAME:

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

\_\_\_\_\_  
Timothy J. Cuttle

**PROGRESSIVE INSURANCE COMPANY**

Date: 8/13/14

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

TITLE: Claims Specialist Sr. / Attorney

PRINT NAME: Lawrence D Leeders

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attorney(s) or other representative(s)

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**FEDERAL DEPOSIT INSURANCE CORPORATION  
AS RECEIVER FOR MICHIGAN HERITAGE BANK**

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

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

TITLE:

PRINT NAME:

(b)(6)  
Date: 8/12/14

[Redacted Signature Box]

Timothy J. Cuttle

**PROGRESSIVE INSURANCE COMPANY**

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

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

TITLE:

PRINT NAME:

(b)(6) [Redacted]