

## SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement ("Agreement") is made as of this 14<sup>th</sup> day of ~~April~~ <sup>May</sup>, 2013, by and between the following undersigned parties: The Federal Deposit Insurance Corporation as Receiver of Heritage Banking Group ("FDIC-R") and Progressive Casualty Insurance Company ("Progressive"). The FDIC-R and Progressive may be referred to herein individually as a "Party" or collectively as the "Parties".

### RECITALS

#### WHEREAS:

1. Prior to April 15, 2011, Heritage Banking Group ("HBG" or the "Bank") was a corporation organized and existing under the laws of the State of Mississippi.
2. On April 15, 2011 (a) the Commission of the Department of Banking and Consumer Finance of the State of Mississippi ("Commissioner") filed a Petition with the Chancery Court of Leake County, Mississippi, seeking a Court Order giving the Commissioner authority to revoke the Charter of the Bank due to insolvency, (b) the Chancery Court granted the Petition, giving authority to revoke the Charter, closing the Bank and appointing the Commissioner temporary receiver, and (c) the FDIC accepted the appointment of Receiver from the Commissioner. Said appointment was pursuant to 12 U.S.C. § 1821(c). In accordance with 12 U.S.C. § 1821(d), the FDIC-R, as receiver, succeeded to all rights, titles, powers and privileges of the Bank, including those with respect to its assets.
3. Among the assets to which FDIC-R succeeded were any and all claims, demands, and causes of actions against the Bank's financial institution bond insurer(s), including against Progressive, as issuer of the Bond, as that term is defined below.

4. Progressive issued a Financial Institution Bond (the "Bond"), bearing number (b)(4) [redacted], to the Bank. The Bond provided coverage from May 13, 2006 through May 13, 2009.

5. On December 13, 2006, the Bank sent Progressive a notice of claim under the Bond. On that same date, the Bank submitted a Proof of Loss seeking coverage under the Bond.

6. The claim was based on theft or embezzlement of \$381,604.49 by Bank employee Kathryn Denson ("Denson").

7. The Bank filed a complaint against Denson in the Chancery Court of Leake County, Mississippi, on November 13, 2007. Following receipt of Progressive's coverage position in December 2007, the Bank amended its complaint on January 23, 2008 to name Progressive in the state court lawsuit. The lawsuit was styled *Heritage Banking Group v. Kathryn Denson* and assigned action number CH07-0456. On June 8, 2011, the FDIC-R was substituted for the Bank as the plaintiff in the lawsuit. On August 8, 2011, the case was removed to the United States District Court for the Southern District of Mississippi, Case No. 3:11-cv-0498 (the "Pending Litigation"). The Pending Litigation is set for trial to commence on or about May 6, 2013.

9. 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 and receipt of which consideration is hereby acknowledged, the Parties agree as follows:

#### SECTION 1: Payment by Progressive to FDIC-R

A. The Recitals above are incorporated herein by reference.

B. As an essential covenant and condition to this Agreement, Progressive agrees to pay to the FDIC-R the sum of TWO HUNDRED SEVENTY SEVEN THOUSAND FIVE HUNDRED SIXTY TWO DOLLARS AND 69/100 (\$277,562.69 ) (the "Settlement Funds").

C. No later than fifteen days following the execution of a signed original, or signed originals in counterpart, of this Agreement by the undersigned Parties to this Agreement (the "Payment Due Date"), the Settlement Funds shall be delivered to counsel for FDIC-R.

D. In the event that the Settlement Funds are not delivered in full to the FDIC-R by the Payment Due Date, interest shall accrue on all unpaid accounts at the rate of 5% per annum from such date until the date of payment in full.

E. In addition, and without waiving any other rights that the FDIC-R may have, in the event that all Settlement Funds are not received by the FDIC-R on or before thirty days following the Payment Due Date, then the FDIC-R, in its sole discretion, shall have the right at any time prior to receipt of all Settlement Funds (including all accrued interest) 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 (including all accrued interest), and/or shall have the right to enforce this Agreement against Progressive, which agrees to jurisdiction in Federal District Court in the Southern District of Mississippi and further agrees to pay all of FDIC-R's reasonable attorneys' fees expended in enforcing Progressive's obligation to pay the Settlement Funds or any part of them. Any decision by the FDIC-R to extend the terms of this Agreement or to accept a portion of the Settlement Funds shall not prejudice the FDIC-R's rights to declare this Agreement null and void at any time prior to receipt of all Settlement Funds (including all accrued interest) or to enforce the terms of this Settlement Agreement; provided however, that in the event the FDIC-R declares this Agreement null and void, the FDIC-R will return all amounts

paid to it under this Agreement by Progressive. The Parties further agree to the jurisdiction of the Federal District Court in the Southern District of Mississippi to resolve any other disputes related to the enforcement of the terms of this Agreement (other than with respect to the matters addressed in Paragraph C of Section II below). In the event the FDIC-R declares the Agreement null and void, the Parties agree that all statutes of limitation or timing defenses with respect to claims under the Bond that the FDIC-R had against Progressive prior to the date of the Agreement, including those asserted in the Pending Litigation, are tolled from the date of the Agreement until fifteen days after the Agreement is declared null and void.

F. Upon receipt of all Settlement Funds and full compliance with the terms of the Agreement by Progressive, the FDIC-R and Progressive will jointly file a stipulation of voluntary dismissal under Fed. R. Civ. P. 41(a)(1)(A)(ii), as to Progressive only, that provides the dismissal of the Pending Litigation is with prejudice, and that each party is to bear its own costs and attorney's fees.

## **SECTION II: Releases**

A. Release of Progressive by FDIC-R. Effective upon payment by Progressive of the Settlement Funds, together with any accrued interest, the FDIC-R, for itself and its predecessors, successors and assigns, hereby releases and discharges Progressive, its parents, subsidiaries, affiliates and reinsurers, and their respective employees, officers, directors, agents, representatives, predecessors, successors and assigns, from claims under the Bond including but not limited to any and all claims, demands, obligations, damages, actions and causes of action, direct or indirect, in law or in equity, statutory, contractual, non-contractual, or in tort, that the FDIC-R alleged or could have alleged against Progressive in connection with the Proof of Loss, or the Pending Litigation, or the Bond, or which the FDIC-R did allege or could have alleged

against Progressive that arise from or relate to any claims asserted by the FDIC-R under the Bond or Progressive's adjusting of such claims, or otherwise arise from, relate to or concern the Bond, and agrees that any interest it may have under the Bond is extinguished, however, this release shall not extend to or affect any other Progressive policy of insurance, including but not limited to directors' and officers' liability insurance.

B. Release of FDIC-R by Progressive. Effective simultaneously with the release granted in paragraph A of this Section II above, Progressive, for itself and its predecessors, successors and assigns, and on behalf of its parents, subsidiaries, affiliates and reinsurers, and their successors and assigns, hereby releases and discharges FDIC-R and its employees, officers, directors, agents, attorneys, representatives, predecessors, successors and assigns, from any and all claims, demands, obligations, damages, actions and causes of actions, direct or indirect, in law or in equity, that arise from or relate to the Proof of Loss and/or the Bond including but not limited to any rights of subrogation, legal, equitable, or otherwise.

C. Waiver of Subrogation by Progressive. Progressive agrees to and hereby does irrevocably waive any rights of subrogation it may have relating to the claims under the Bond, including without limitation those arising from Progressive's payment of the Settlement Funds, or involving the underlying claims under the Bond and all rights to recovery thereof ("Rights of Recovery"). Progressive agrees that the FDIC-R may retain, sell, transfer, or otherwise dispose of such Rights of Recovery as it sees fit, in its sole discretion, and retain the proceeds (if any) thereof and any such present or future retention or disposition of such Rights of Recovery shall not serve to modify, alter, increase, decrease, or otherwise affect the consideration due under this Agreement or the monetary amount being paid by Progressive.

D. Express Reservations From Releases.

1. Notwithstanding any other provision contained in 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 any 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 the 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 the Bank;

b. against any person or entity not expressly released in this Agreement;

c. under or relating to any policy of insurance issued by Progressive (or any other insurer), other than the Bond; or

d. which are not expressly released in Paragraph A of Section II, above.

2. Notwithstanding any other provision, by this Agreement, Progressive 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 any 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 Progressive;

b. against any person or entity not expressly released in this Agreement;

c. under or relating to any policy of insurance issued by Progressive (or any other insurer), other than the Bond; or

d. which are not expressly released in Paragraph B of Section II, or waived in Paragraph C of Section II, above.

3. Notwithstanding any other provision, this Agreement does not waive any claims or actions that could be brought by any agency or instrumentality of the United States government other than the FDIC-R.

### **SECTION III: Representations and Acknowledgements**

A. Ownership of the Claims. The FDIC-R represents and warrants that, pursuant to 12 U.S.C. § 1821(d), the FDIC-R is the current lawful owner of, and that it has not assigned, sold, or transferred any interest in relation to, the Bond and any claims arising thereunder.

B. No Additional Actions. Progressive hereby agrees that it will not bring, file, or otherwise pursue any claims against any party in relation to the Bond, including any claims for indemnity or subrogation.

C. No Admission of Liability. The undersigned Parties each acknowledges and agrees that the matters set forth in this Agreement constitute the settlement and compromise of a disputed claim, and that this Agreement is not an admission or evidence of liability by either of them regarding any claim nor is it intended to be, nor shall it be construed as, an interpretation of the Bond or any other insurance policy. This Agreement shall not be used as evidence, or in any other manner, before any court or any proceeding to create, prove, or interpret the obligations or alleged obligations of Progressive under the Bond to any party or non-party to this Agreement. Except as provided above, the Parties may use the Agreement in any other proceeding to the extent deemed relevant and admissible by a court and may use this Agreement in any manner as may be necessary to enforce the terms of the Agreement.

D. Cooperative Drafting. The Parties to this Agreement have participated jointly in the negotiation and preparing of this Agreement. Accordingly, the Parties agree not to assert that any other party is the sole or principal drafter of the Agreement. The Parties also agree not to

assert that any canon of construction applicable to sole or principal drafters should be applied against any other party.

E. Execution in Counterparts. This Agreement may be executed in counterparts by 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.

F. Binding Effect. Each of the undersigned persons represents and warrants that he or she is authorized to sign this Agreement on behalf of the respective Party for which he or she is signing, with 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 insurers, agents, heirs, executors, administrators, representatives, attorneys, successors and assigns.

G. No Confidentiality. The Parties acknowledge and agree that this Agreement is a public document that will need to be disclosed pursuant to 12 U.S.C. § 1821(s) and other applicable laws and regulations.

H. Construction. The descriptive headings of this Agreement are for convenience only and shall not affect the construction or interpretation of this Agreement.

I. Notices. If any Party is required to give notice to another Party under this Agreement, such notice shall be (i) delivered personally, (ii) sent by Federal Express (or another recognized overnight or two-day carrier) requesting next or second business day delivery, (iii) sent by facsimile, (iv) sent by United States certified or registered mail, postage prepaid, return receipt requested, or (v) sent by email with a confirmation to be sent the same day by one of the



methods enumerated above. Any such notice shall be deemed given when (i) so delivered personally, (ii) if sent by express courier, one or two business days (as the case may be) following delivery to the courier, (iii) on the date sent by facsimile or email, with confirmation of transmission, if sent during normal business hours of the recipient, or, if not, then on the next business day, or (iv) if sent by certified or registered mail, five business days after the date of deposit in the United States mail to the respective address of the Party as set forth below, with copies sent to the persons indicated below:

To the FDIC:

Michael D. Simmons  
Cosmich, Simmons & Brown, PLLC  
Post Office Box 22626  
Jackson, MS 39225-2626

and

Federal Deposit Insurance Corporation  
3501 N. Fairfax Drive  
Arlington, VA 22226  
Attn: Geoffrey M. Long, Rm. B-7055

To Progressive Casualty Insurance Company:

Progressive Casualty Insurance Company  
747 Alpha Drive  
Highland Heights, OH 44143

or to such other address as the recipient Party has specified by prior written notice to the sending Party (or in the case of counsel, to such other readily ascertainable business address as such counsel may hereafter maintain). If more than one method for sending notice as set forth above is used, the earliest notice date established as set forth above shall control.

J. Choice of Law. This Agreement shall be interpreted, construed and enforced according to the applicable federal law, or in its absence, the laws of the State of Mississippi.

K. 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).

L. Reasonable Cooperation. The undersigned Parties agree to cooperate in good faith to effectuate all the terms and conditions of this Agreement, including doing or causing their respective 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 Agreement.

M. 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.

N. Authority to Settle. The FDIC-R, for itself and expressly in its capacity of having succeeded to all of HBG's claims against Progressive under the Bond, and Progressive, respectively, each warrants and represents that it is the entity that has collectively all of the interest in any of the matters set forth herein, that the Recitals set forth above are material, true and accurate, and that it has the full right, power, and specific authority to enter into, execute and consummate this Agreement.

O. Severability. If any provision of this Agreement or the application of any provision herein to any person or circumstance is held invalid or unenforceable, only that provision shall be affected, and the remainder of this Agreement (and the application of such provision to other persons or circumstances) shall remain in full force and effect.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed  
by their duly authorized representatives on the dates hereinafter subscribed.

**FEDERAL DEPOSIT INSURANCE CORPORATION**  
as Receiver of Heritage Banking Group

(b)(6)

By:

Print Name: Maaffrey M. Bond

Title: LOUISIANA, F.D.I.C.

Date: May 14, 2013

**PROGRESSIVE CASUALTY INSURANCE COMPANY**

(b)(6)

By:

Print Name: Lawrence D. Leeches

Title: Casualty Specialist Sr.

Date: May 6, 2013