

## SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is made as of this 26<sup>th</sup> day of February, 2014, by, between, and among the Plaintiff Federal Deposit Insurance Corporation as Receiver for BankFirst ("FDIC-R") and Bob D. Hutchins (the "Settling Defendant"). The FDIC-R and the Settling Defendant may be referred to herein individually as "Party" and collectively as the "Parties").

### RECITALS

#### WHEREAS:

1. Prior to July 17, 2009, BankFirst ("Bank") was a state-chartered, Federal Reserve-member depository institution organized and existing under the laws of the State of South Dakota;
2. On July 17, 2009, the State of South Dakota, Department of Revenue and Regulation, Division of Banking, closed the Bank and appointed the FDIC-R as its receiver. The FDIC-R accepted its appointment as receiver for BankFirst that same day. In accordance with 12 U.S.C. § 1821(d)(2)(A)(i), the FDIC-R as receiver succeeded to all rights, titles, powers and privileges of the Bank, including those with respect to its assets;
3. The Bank's assets now belonging to the FDIC-R include any and all of the Bank's claims, demands, and causes of actions against Settling Defendants;
4. On December 29, 2006, BankFirst filed a petition seeking money damages against numerous parties, including without limitation the Settling Defendant. On February 18, 2011, the FDIC-R was substituted for the Bank as the Plaintiff. The claims asserted in the Bank's petition were removed from the Superior Court of Fulton County to the United States District

Court for the Northern District of Georgia, Civil Action No. 1:11-cv-01622-AT (the "Action").  
The Settling Defendant denies liability.

5. The undersigned Parties deem it in their best interests to enter into this Agreement to avoid the uncertainty, distraction, 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, on or before thirty (30) calendar days following the date the FDIC-R executes this Agreement (the "Payment Due Date"), the Settling Defendant agrees to pay the FDIC-R the sum of Three Hundred Fifty Thousand Dollars (\$350,000.00) (the "Settlement Payment").

B. The Settling Defendant shall deliver the Settlement Payment to the FDIC-R by certified or cashier's check payable to "FDIC as Receiver for BankFirst" drawn upon a depository institution acceptable to the FDIC-R and delivered to its outside counsel, George P. Shingler.

C. In the event that the Settlement Payment is not delivered to the FDIC-R on or before the date determined by PARAGRAPH I.A above, interest shall accrue from the date of execution of this Agreement by the FDIC-R through the date payment is received by the FDIC-R at a rate of five (5) per cent per annum. In addition, and without waiving any other rights the FDIC-R may have, in the event that the Settlement Payment is not received by the Payment Due Date, 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 thereon) to (i) extend this Agreement

for any period of time until it receives the Settlement Payment in full (including all accrued interest thereon); (ii) enforce this Agreement and, in such event, the Settling Defendant agrees to jurisdiction in the United States District Court for the Northern District of Georgia and to pay all of the FDIC-R's reasonable attorney's fees and costs expended in enforcing the terms of this Agreement; (iii) declare this Agreement null and void and move to vacate any dismissal order, to which the Settling Defendant shall consent, and re-institute the Action (or institute a new action) on the FDIC-R's claims, to which the Settling Defendant shall consent; and/or (iv) seek any other relief available to it in law or equity. Any extension of time for delivery of the Settlement Payment shall not prejudice the FDIC-R's right to take other action or seek any relief during or after such period of extension, including the right to terminate this Agreement or to bring an action to enforce the Agreement.

**SECTION II: Stipulation and Dismissal.**

Within ten days after the latter of full execution of this Agreement by each of the Parties, or receipt of the Settlement Payment in full (including any interest accrued thereon), 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 A.

**SECTION III: Releases.**

A. The FDIC-R's Release of Settling Defendant.

Upon receipt of the Settlement Payment in full (including any accrued interest thereon) and dismissal of the Action, and except as provided in PARAGRAPHS III.C., the FDIC-R, for itself and its employees, officers, directors, representatives, successors and assigns, hereby releases and discharges the Settling Defendant, and his respective employees, officers, directors, representatives, heirs, executors, administrators, successors and assigns, from any and all claims,

demands, contracts, 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 allegations asserted in the Action.

B. The Settling Defendant's Release of the FDIC-R.

Effective simultaneously with the release in PARAGRAPH III.A above, the Settling Defendant, on behalf of himself individually, and his respective employees, officers, directors, representatives, heirs, executors, administrators, successors and assigns, hereby release and discharge FDIC-R and its employees, officers, directors, representatives, successors and assigns, from any and all claims, demands, contracts, obligations, damages, actions, and causes of action, direct or indirect, in law or in equity, that arise from or relate to, the Bank.

C. Express Reservations from Releases by FDIC-R.

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

a. against the 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 (i) the FDIC-R, (ii) the Bank, (iii) other financial institutions, or (iv) 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 the Bank;

b. against any person or entity not expressly released by the FDIC-R in this Agreement; and

c. which are not expressly released in PARAGRAPH III.A.

2. Notwithstanding any other provision of this Agreement, nothing in this Agreement limits, waives, releases, diminishes or compromises the jurisdiction and authority of the Federal Deposit Insurance Corporation in the exercise of its supervisory or regulatory authority to institute administrative enforcement or other proceedings seeking removal, prohibition, civil penalties, restitution or other relief it is authorized to seek pursuant to its supervisory or regulatory authority against any person.

3. Notwithstanding any other provision, this Agreement does not waive, or intend to waive, any claims which could be brought by the United States through the Department of Justice, the United States Attorney's Office for any federal judicial district, or any other department or agency of the United States as defined by 18 U.S.C. § 6. 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 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 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 United States government or any agency or department thereof in connection with the Bank, its conservatorship or receivership, Settling Defendant hereby knowingly assigns to the FDIC-R any and all rights, title and interest in and to any and all such dividends, payments or other distributions, or proceeds.

**SECTION V: Termination.**

In the event the FDIC-R exercises its right to terminate this Agreement as provided herein, then, for the purposes of any statute of limitations or other time-based defense to any of the claims of the FDIC-R, the Parties to this Agreement shall be deemed to have reverted to their respective status as of 5:00 p.m. Eastern Time, November 21, 2013.

**SECTION VI: Notices.**

Any notices required hereunder shall be sent by registered mail, first class, return receipt requested, and may also be sent by email, to the following:

If to the FDIC-R:

George P. Shingler, Esq.  
Shingler Lewis LLC  
1230 Peachtree Street, N.E.  
Suite 1075  
Atlanta, GA 30309  
404-907-1999

(b)(6)

If to the Settling Defendant:

William W. Horlock, Jr.  
Scudder, Bass, Quillian, Horlock, Taylor & Lazarus, LLP  
900 Circle 75 Parkway, Suite 850  
Atlanta, Georgia 30339-3084  
770-612-9200

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**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 defenses, that this Agreement is not an admission or evidence of liability or infirmity by any of them regarding any

claim or defense, and that the Agreement shall not be offered or received in evidence by or against any Party hereto except to enforce its terms.

B. Execution in Counterparts.

This Agreement may be executed in counterparts by one or both 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 both 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 both Parties to this Agreement.

C. Binding Effect.

Both of the undersigned persons represent and warrant 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, attorneys, successors and assigns.

D. Entire Agreement.

This Agreement constitutes the entire agreement and understanding between the undersigned Parties concerning the matters set forth herein and supersedes any prior agreements or understandings. No representations, warranties or inducements have been made to or relied on by either Party concerning this Agreement and its exhibits other than those contained therein.

E. Amendments.

This Agreement may not be amended or modified, nor may any of its provisions be waived, except in writing by the Party or Parties bound thereby, or by their respective authorized attorney(s) or other representative(s).

F. Reasonable Cooperation.

1. The undersigned 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 perform the terms of this Agreement.

2. The Settling Defendant agrees to cooperate fully with the FDIC-R in connection with any action required under this Agreement.

G. 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 Georgia, without regard to its conflicts of laws.

H. Forum.

Any legal action brought to enforce this Agreement shall be brought in the United States District Court for the Northern District of Georgia, unless that Court lacks jurisdiction, in which event, or upon a final order determining a lack of jurisdiction, the Parties agree to jurisdiction in the Superior Court of Fulton County, Georgia.

I. Advice of Counsel.

The Parties severally acknowledge that they consulted with and obtained the advice of counsel prior to executing this Agreement, and that this Agreement has been explained by counsel.

J. Severability.

If any provision of this Agreement is held unenforceable, then such provision will, if possible, be modified to be enforceable but still reflect the Parties' intentions. In any event, the remaining provisions of this Agreement shall remain in full force and effect.

K. Title and Captions.

All section titles and captions contained in this Agreement are for convenience only and shall not affect the interpretation of this Agreement.

L. Authorship/Construction.

This Agreement sets forth terms and agreements jointly negotiated by the Parties. It is expressly agreed that this Agreement shall not be construed for or against any Party by reason of which Party drafted it.

M. Attorneys' Fees and Expenses.

Both Parties to this release are severally responsible for their own costs and attorneys' fees associated with the Action. Neither Party to this Agreement shall be considered the prevailing party in the Action and no Party shall seek an award of attorneys' fees or costs arising from the Action.

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 BankFirst

(b)(6)

Date: 2/26/2014

BY:

TITLE: COUNSEL, FDIC

PRINT NAME: THOMAS J. O'BRIEN

(b)(6)

Date: 2/24/2014

BOB D. HUTCHINS