

**SETTLEMENT AND RELEASE AGREEMENT**

This Settlement and Release Agreement (the "**Agreement**") is made as of this 19th day of July, 2012, by, between, and among the following undersigned parties: (1) the Federal Deposit Insurance Corporation, in its capacity as Receiver of America West Bank, L. C. ("**FDIC-R**"), and (2) Douglas M. Durhano, Blake N. Hazen, Ron H. Richins, Greg W. Haws and Todd Morgan (collectively, the "**Settling Defendants**"), (individually, the FDIC-R and the Settling Defendants may be referred to herein as "**Party**" and collectively as the "**Parties**"). The effective date of this Agreement (the "**Effective Date**") shall be the date on which the last of the Parties' signatures is obtained on this Agreement.

**RECITALS**

**WHEREAS:**

Prior to May 1, 2009, America West Bank, L. C. (the "**Bank**") was a depository institution organized and existing under the laws of Utah;

On May 1, 2009, the Bank was closed by the Utah Department of Financial Institutions, and, pursuant to 12 U.S.C. § 1821(c), the FDIC-R was appointed receiver; 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;

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

The FDIC-R has asserted claims against the Settling Defendants, who had each served at various times as directors and/or officers of the Bank;

Illinois National Insurance Company, a division or subsidiary of AIG ("**Insurance**

Company") issued directors' and officers' liability policy number [redacted] (the "Policy"), (b)(4)

which insured the directors and officers of the Bank according to the terms, provisions and conditions of the Policy and the Settling Defendants have made claims under the Policy;

The undersigned parties deem it in their best interests to enter into this Agreement to avoid the uncertainty, trouble, and expense of litigation;

On June 29, 2012, the Parties reached agreement on, and outlined certain terms of, the settlement in a Settlement Terms Sheet, executed by the Parties and made effective that day (the "Settlement Terms Sheet");

The parties now wish to execute this more formal, detailed Agreement to replace Settlement Terms Sheet, as contemplated in the Settlement Terms Sheet; and

Upon the Effective Date of this Agreement, the Agreement will supersede the Settlement Terms Sheet.

**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. The Insurance Company shall pay on behalf of the Settling Defendants to the FDIC-R the sum of ONE MILLION SIX HUNDRED THOUSAND DOLLARS (\$1,600,000.00) (the "Settlement Funds") within thirty (30) calendar days following the Effective Date of this Agreement (the "Payment Date"). The Settlement Funds shall be delivered to FDIC-R by way of direct wire transfer to the FDIC-R in accordance with wire instructions received from the FDIC-R.

B. In the event that the Settlement Funds are not delivered to the FDIC-R, in full, on or before the Payment Date, interest shall accrue on all unpaid amounts at the rate of 10% per

annum until the date of full and final payment of the Settlement Funds.

C. In addition, and without waiving any other rights that the FDIC-R may have, in the event that the Settlement Funds are not delivered to the FDIC-R, in full, on or before the Payment Date, the FDIC-R, in its sole discretion, shall have the right at any time prior to receipt of all Settlement Funds (including any accrued interest) to: (1) declare this Agreement null and void, except for the agreed upon extension of the Tolling Period set forth in paragraph I.D. below, and prosecute its claims to the fullest; (2) agree in writing to extend the Payment Date; or (3) enforce this Agreement, in which event the non-delivering Party, or Parties, agree to jurisdiction in Federal District Court in Utah.

D. The Parties recognize that the Tolling Agreement executed by the Parties, effective as of April 30, 2012, was amended in the Settlement Terms Sheet, and that amendment is restated herein, such that the "Tolling Period," as defined on page one, paragraph No. 3 of the Tolling Agreement, shall hereby be extended until the close of business on the fourteenth business day that falls after the Payment Date. This provision shall survive and be enforceable against any Party notwithstanding any voiding of this Agreement by the FDIC-R for nonpayment of the Settlement Funds.

## **SECTION II: Releases**

### **A. Release of Individual Settling Defendants by FDIC-R.**

Effective upon receipt in full of the Settlement Funds plus any accrued interest described in Section I above, and except as provided in Paragraph II.C below, the FDIC-R, for itself and its successors and assigns, hereby waives, releases and discharges each of the Settling Defendants, and their respective spouses, beneficiaries, personal trusts or personal entities, agents, 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, whether known or unknown, belonging to the FDIC-R, that arise from or relate to, the performance, nonperformance, or manner of performance of their respective functions, duties and actions in any capacity, including but not limited to advisors, accountants, attorneys, agents, employees and as officers and/or directors of the Bank. The Professional Liability & Financial Crimes Section of the FDIC affirmatively states that, after having received the Settlement Funds in full plus any accrued interest described in Section I above, it will close this matter and following closure of the matters at issue herein, it will have closed all professional liability claim areas (i.e., director and officer, accountant, and attorney malpractice/liability) related to the Bank.

B. Release of FDIC-R by the Settling Defendants.

Effective simultaneously with the release granted in Paragraph II.A. above, the Settling Defendants, on behalf of themselves individually, and their respective heirs, executors, administrators, agents, representatives, successors and assigns, hereby waive, release and discharge 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 Defendants' respective functions, duties and actions as officers and/or directors of the Bank or that arise from or relate to the Policy.

C. 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 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 or any of 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.

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

c. which are not expressly released in Paragraphs II.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 FDIC in the exercise of its supervisory or regulatory authority or to diminish its ability to institute administrative enforcement proceedings seeking removal, prohibition or any other administrative enforcement action which may arise by operation of law, rule or regulation.

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 District of Utah 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 III: Waiver of Dividends**

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

**SECTION IV: Representations and Acknowledgements**

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 and any and all liability is expressly denied.

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 Utah.

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).

F. Reasonable Cooperation. The undersigned Parties agree to cooperate in good faith to effectuate all the terms and conditions of this Agreement.

G. Advice of Counsel. Each Party hereby acknowledges that it has consulted with and obtained the advice of counsel prior to executing this Agreement, and that this Agreement has been explained to that Party by his or her counsel.

H. Severability. If any portion or portions of this Agreement are determined to be in conflict with federal, state, or local law or are otherwise held unenforceable in accord with their terms, all remaining provisions of this Agreement shall otherwise remain in full force and effect and be construed as if such invalid portion or portions had not been included herein.

I. Attorneys' Fees. Except as set forth herein, the Parties shall each bear their own attorneys' fees and costs incurred in this matter, including the preparation and execution of this Agreement. However, in the event any of the Parties brings any legal proceeding of any kind arising out of, relating to, or to enforce any term of this Agreement, the prevailing party in any such legal proceeding shall be entitled to its reasonable attorneys' fees and costs.

J. Representation of Authority. The Parties represent and warrant that they are the owner of and have full authority to settle and compromise the released claims, that they have not sold, transferred or otherwise encumbered the released claims, and that they will not take any action to frustrate or impair the purpose of this Settlement Agreement which is intended to fully and finally settle and resolve the released claims. In addition, nothing in this Settlement Agreement shall impair or be construed to impair any right or defense of the Settling Defendants under applicable law, including any defense based on proportionate fault, against any third party claim relating to the released claims.

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 AMERICA WEST BANK, L.C.**

(b)(6)

Date: 7/19/12

By

Printed Name: David T. Bartels

Its: Senior Attorney, Professional Liability & Financial Crimes Section

**BLAKE N. HAZEN**

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

**RON H. RICHINS**

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

**GREG W. HAWS**

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

**TODD MORGAN**

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

**DOUGLAS M. DURBANO**

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

Approved and Consented to by the Insurance Company:

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



(b)(6)

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By: \_\_\_\_\_

Printed Name: David T. Bartels

Its: Senior Attorney, Professional Liability & Financial Crimes Section

**BLAKE N. HAZEN**

(b)(6)

Date: 7-19-12

[Redacted Signature]

**RON H. RICHINS**

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

**GREG W. HAWS**

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

**TODD MORGAN**

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

**DOUGLAS M. DURBANO**

(b)(6)

Date: 7/19/12

[Redacted Signature]

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Date: \_\_\_\_\_ By: \_\_\_\_\_  
Printed Name: David T. Bartels  
Its: Senior Attorney, Professional Liability & Financial Crimes Section

**BLAKE N. HAZEN**

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

**RON H. RICHINS**

Date: July 14, 2012   
**GREG W. HAWES**

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

**TODD MORGAN**

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

**DOUGLAS M. DURBANO**

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

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By: \_\_\_\_\_

Printed Name: David T. Bartels

Its: Senior Attorney, Professional Liability & Financial Crimes Section

**BLAKE N. HAZEN**

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

\_\_\_\_\_

**RON H. RICHINS**

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

\_\_\_\_\_

**GREG W. HAWS**

(b)(6)

Date: 7/20/00

[Redacted Signature]

**TODD MORGAN**

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

\_\_\_\_\_

**DOUGLAS M. DURBANO**

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

\_\_\_\_\_

Approved and Consented to by the Insurance Company:

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

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Date: \_\_\_\_\_ By: \_\_\_\_\_  
Printed Name: David T. Bartels  
Its: Senior Attorney, Professional Liability & Financial Crimes Section

BLAKE N. HAZEN

Date: \_\_\_\_\_  
RON H. RICHINS

Date: \_\_\_\_\_  
GREG W. HAWS

Date: \_\_\_\_\_  
TODD MORGAN

(b)(6) Date: 7/19/12 [Redacted Signature]

(b)(6) Date: 7/19/12 [Redacted Signature]

Approved and Consented to by the Insurance Company:

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

(b)(6)