

## **SETTLEMENT AND RELEASE AGREEMENT**

This Settlement and Release Agreement ("Agreement") is made as of this 21<sup>st</sup> day of August, 2014 by, between, and among the following undersigned parties:

The Federal Deposit Insurance Corporation as Receiver for Bank of the Commonwealth ("FDIC-R"), Robert M. Reed ("Reed"), Richard J. Tavss ("Tavss"), Tavss, Fletcher, Maiden & Reed, P.C., including all specified or unspecified attorneys employed by Tavss, Fletcher, Maiden & Reed, P.C. (collectively "Tavss Fletcher"), and Minnesota Lawyers Mutual Insurance Company ("MLM"). Each of the parties hereto may be referred to herein as "Party" and collectively as the "Parties."

### **RECITALS**

#### **WHEREAS:**

Prior to September 23, 2011, Bank of the Commonwealth (the "Bank") was a depository institution organized and existing under the laws of Virginia.

On September 23, 2011, the Bank was closed by the Virginia State Corporation Commission and pursuant to 12 U.S.C. § 1821(c), the FDIC was appointed 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 law firms and lawyers arising from the performance, nonperformance, and manner of performance of legal services for the Bank.

The FDIC-R has asserted claims, including any and all claims made by the FDIC-R in its Notice of Potential Damages dated February 22, 2013, and follow up communications of August

6, 2013, October 29, 2013, and June 19, 2014, against Tavss Fletcher, Tavss, and Reed, each of whom at various times provided legal advice and representation to the Bank (the "Claims").

Tavss Fletcher, Tavss, and Reed have denied and continue to deny liability for the Claims.

Tavss Fletcher, Tavss, and Reed are insured by Lawyers Professional Liability Policy

(b)(4) Number  (the "Policy"), issued by MLM, which insured Tavss Fletcher, Tavss, and Reed according to the terms, provisions, and conditions of the Policy. Tavss Fletcher, Tavss, and Reed have asserted claims for coverage under the Policy.

On or about November 21, 2013, MLM instituted a coverage action, captioned *Minnesota Lawyers Mutual Insurance Company v. Richard J. Tavss, Robert M. Reed, and Tavss, Fletcher, Maiden & Reed, P.C.*, Civil Action No. 2:13-cv-00654-AWA-DEM, currently pending in the United States District Court for the Eastern District of Virginia (the "Declaratory Judgment Action").

The undersigned Parties deem it in their best interests to enter into this Agreement to avoid the uncertainty 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 the FDIC-R**

A. As an essential covenant and condition to this Agreement, within ten (10) days of the execution by the Parties of, and an exchange in counterpart of executed copies of this Agreement, Tavss Fletcher, Tavss, Reed, and MLM agree to pay the FDIC-R their respective portions of the sum of \$1.0 million ("the Settlement Payment"). Tavss, Reed, and Tavss Fletcher consent to MLM's payment of its respective portion of the Settlement Payment and MLM

consents to the payment of the Settlement Payment made by Tavss, Reed, and Tavss Fletcher representing their respective portion of the Settlement Payment.

B. Tavss Fletcher, Tavss, Reed, and MLM shall deliver, as soon as practicable, the Settlement Payment to Cooper, Spong & Davis, P.C., counsel for Tavss Fletcher, to hold in escrow until the Agreement is fully executed, at which time the Settlement Payment shall be delivered to the FDIC-R by direct wire transfer into an account designated by the FDIC-R by notice to the attorneys for Tavss Fletcher, Tavss, Reed, and MLM or by certified or cashier's check drawn upon a depository institution acceptable to the FDIC-R.

C. In the event that the Settlement Payment is not delivered to the FDIC-R (or its counsel) on or before ten (10) calendar days following the date the Parties execute this Agreement, interest shall accrue on all unpaid amounts at the rate of 5% per annum from that date until the date of payment.

D. If the FDIC-R does not receive the Settlement Payment in full on or before the date determined by Section I.A. 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 Section I.A. 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 Tavss Fletcher, Tavss, Reed, and MLM agree to jurisdiction in the United States District Court for the Eastern District of Virginia 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 Tavss Fletcher, Tavss, Reed, and MLM agree to consent, and institute an action on the FDIC-R's claims. Tavss Fletcher, Tavss, Reed, and MLM further agree to waive all objections, defenses, claims, or counterclaims based on any statute of limitations that would bar any of the FDIC-R's claims, and covenant and agree not to assert any objections, defenses, claims, or counterclaims 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.

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

#### **SECTION II: Dismissal of Claims**

Upon execution of this Agreement by each of the undersigned Parties, and receipt of the Settlement Payment, the Parties to the Declaratory Judgment Action shall file therein a stipulation of dismissal with prejudice, with each party to bear its own attorney's fees and costs.

#### **SECTION III: Releases**

##### **A. The FDIC-R's Releases.**

Upon receipt of the Settlement Payment in full and except as provided in Section III.D., the FDIC-R, for itself and its successors and assigns, hereby releases and discharges:

1. Tavss Fletcher and its members, employees, officers, 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, belonging to the FDIC-R, that

arise from or relate to (a) the Claims and/or (b) the performance, nonperformance, or manner of performance of Tavss Fletcher's respective functions, duties, and actions as legal counsel to or as a fiduciary of the Bank.

2. Tavss and his 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 (a) the Claims and/or (b) the performance, nonperformance, or manner of performance of Tavss' respective functions, duties, and actions as legal counsel to or as a fiduciary of the Bank.

3. Reed and his 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 (a) the Claims and/or (b) the performance, nonperformance, or manner of performance of Reed's respective functions, duties, and actions as legal counsel to or as a fiduciary of the Bank.

4. MLM and its parents, subsidiaries, affiliates, and reinsurers, 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, belonging to the FDIC-R, that arise from or relate to the Policy.

**B. Tavss Fletcher, Tavss, and Reed's Releases.**

1. Effective simultaneously with the release granted in Section III.A. above, Tavss Fletcher, on behalf of itself and its members, employees, officers, directors, representatives, successors, and assigns, hereby releases and discharges the 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 (a) the Claims, (b) the Bank, and/or (c) the performance, nonperformance, or manner of performance of Tavss Fletcher's respective functions, duties, and actions as legal counsel to or as a fiduciary of the Bank.

2. Effective simultaneously with the release granted in Section III.A. above, Tavss, on behalf of himself and his heirs, executors, trustees, administrators, representatives, successors, and assigns, hereby releases and discharges the 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 (a) the Claims, (b) the Bank, and/or (c) the performance, nonperformance, or manner of performance of Tavss' respective functions, duties, and actions as legal counsel or as a fiduciary of the Bank.

3. Effective simultaneously with the release granted in Section III.A. above, Reed, on behalf of himself and his heirs, executors, trustees, administrators, representatives, successors, and assigns, hereby releases and discharges the 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 (a) the Claims, (b) the Bank, and/or (c) the performance, nonperformance, or manner of performance of Reed's respective functions, duties, and actions as legal counsel or as a fiduciary of the Bank.

4. Effective simultaneously with the release granted in Section III.C. below, Tavss Fletcher, on behalf of itself and its members, employees, officers, directors,

representatives, successors, and assigns, hereby releases and discharges MLM and its parents, subsidiaries, affiliates, and reinsurers, 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 coverage under the Policy for the FDIC-R's Claims.

5. Effective simultaneously with the release granted in Section III.C. below, Tavss, on behalf of himself and his heirs, executors, trustees, administrators, representatives, successors, and assigns, hereby releases and discharges the MLM and its parents, subsidiaries, affiliates, and reinsurers, 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 coverage under the Policy for the FDIC-R's Claims.

6. Effective simultaneously with the release granted in Section III.C. below, Reed, on behalf of himself and his heirs, executors, trustees, administrators, representatives, successors, and assigns, hereby releases and discharges the MLM and its parents, subsidiaries, affiliates, and reinsurers, 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 coverage under the Policy for the FDIC-R's Claims.

C. MLM's Releases.

1. Effective simultaneously with the release granted in Section III.A. above, MLM, on behalf of itself and its parents, subsidiaries, affiliates, and reinsurers, and their respective employees, officers, directors, agents, representatives, successors, and assigns, hereby

releases and discharges the 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 Policy.

2. Effective simultaneously with the release granted in Section III.B. above, MLM, on behalf of itself and its parents, subsidiaries, affiliates, and reinsurers, and their respective employees, officers, directors, agents, representatives, successors, and assigns, hereby releases and discharges Tavss Fletcher and its members, employees, officers, 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 coverage under the Policy for the FDIC-R's Claims.

3. Effective simultaneously with the release granted in Section III.B. above, MLM, on behalf of itself and its parents, subsidiaries, affiliates, and reinsurers, and their respective employees, officers, directors, agents, representatives, successors, and assigns, hereby releases and discharges Tavss and his 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, that arise from or relate to coverage under the Policy for the FDIC-R's Claims.

4. Effective simultaneously with the release granted in Section III.B. above, MLM, on behalf of itself and its parents, subsidiaries, affiliates, and reinsurers, and their respective employees, officers, directors, agents, representatives, successors, and assigns, hereby releases and discharges Reed and his 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, that arise from or relate to coverage under the Policy for the FDIC-R's Claims.

D. Exceptions from Releases by the 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 Tavss Fletcher, Tavss, Reed, 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 the FDIC-R, the Bank, other financial institutions, or any other person or entity, including without limitation any such 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 Section III.A. above.

2. Notwithstanding any other provision of this Agreement, 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 or other proceedings seeking removal, prohibition, or any other relief it is authorized to seek pursuant to its supervisory or regulatory authority against any person.

3. Notwithstanding any other provision of this Agreement, this Agreement does not purport to waive, or intend to waive, any claims that 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 Mandatory Victims Restitution Act, 18 U.S.C. §§ 3322 and 3663 et seq., if appropriate.

#### **SECTION IV: Waiver of Dividends**

To the extent, if any, that Tavss Fletcher, Tavss, Reed, or MLM are or were shareholders of the Bank or its holding company, Commonwealth Bankshares, 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, Tavss Fletcher, Tavss, Reed, and MLM hereby knowingly assign to the FDIC-R any and all rights, titles, and interest in and to any and all such dividends, payments, 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 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 its counsel.

C. 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 except to enforce its terms.

D. Execution in Counterparts. This Agreement may be executed in counterparts by one or more of the Parties and all such counterparts when so executed shall together constitute the final Agreement, as if one document had been signed by all Parties; and each such counterpart, upon execution and delivery, shall be deemed a complete original, binding the Parties subscribed thereto upon the execution by all Parties to this Agreement.

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

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

G. 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 agents and attorneys to do whatever is reasonably necessary to effectuate the signing, delivery, execution, filing, recording, and entry of any documents necessary to conclude the Action and to otherwise perform the terms of this Agreement.

H. 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.

I. No Confidentiality. The undersigned Parties acknowledge that this Agreement shall not be confidential by the Federal Deposit Insurance Corporation, and can and will be disclosed pursuant to the Federal Deposit Insurance Corporation's applicable policies, procedures, and other legal requirements. Nothing herein shall preclude a separate agreement between MLM and Tavss Fletcher concerning confidentiality, to which the FDIC-R is not a party.

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 BANK OF THE COMMONWEALTH

(b)(6) \_\_\_\_\_  
Date: 8/28/14

BY:

TITLE: Counsel

PRINT NAME: Christine Hsu

TAVSS, FLETCHER, MAIDEN & REED, P.C.

(b)(6)

Date: 8-28-14

BY:

TITLE: Vice President

PRINT NAME: JOHN R. FLETCHER

RICHARD J. TAVSS

(b)(6)

Date: 9-28-14

BY:

ROBERT M. REED

(b)(6)

Date: 8/19/14

BY:

MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY

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

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

TITLE: \_\_\_\_\_

PRINT NAME: \_\_\_\_\_

TAVSS, FLETCHER, MAIDEN & REED, P.C.

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

TITLE: \_\_\_\_\_

PRINT NAME: \_\_\_\_\_

RICHARD J. TAVSS

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

ROBERT M. REED

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

MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY

Date: 9/29/14 BY:

TITLE: VP CLAIM

PRINT NAME: Timothy J. Gephart

(b)(6)