

SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement ("Agreement") is made by, between, and among the following undersigned parties:

The Federal Deposit Insurance Corporation as Receiver for Bank of the Commonwealth ("FDIC-R") and Witt Mares, PLC ("Witt Mares") (individually, the FDIC-R and Witt Mares may be referred to herein as "Party" and collectively as the "Parties").

RECITALS

WHEREAS:

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

On September 23, 2011, the Virginia State Corporation Commission closed the Bank and pursuant to 12 U.S.C. § 1821(c), the Federal Deposit Insurance Corporation 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 accountants and auditors arising from the performance, nonperformance, and manner of performance of their respective functions, duties and acts as accountants and/or auditors of the Bank;

The FDIC-R has asserted claims against Witt Mares, which served at various times as an independent auditor of the Bank. Witt Mares denies that it has any liability for any claims by the FDIC-R and further denies that the FDIC-R has any factual or legal basis for any claims against Witt Mares.

Each party deems it in its own best interests to enter into this Agreement to avoid the uncertainty and burdens and expense of 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 ten (10) calendar days following the date on which (i) all Parties have fully executed this Agreement and (ii) the FDIC-R has provided to Witt Mares all necessary payment instructions and a completed Form W-9, Witt Mares agrees to pay the FDIC-R the sum of two million, two hundred and fifty thousand dollars (\$2,250,000) ("the Settlement Payment").

B. Witt Mares shall deliver the Settlement Payment to the FDIC-R by either direct wire transfer into an account designated by FDIC-R or by check issued by its professional liability insurer payable to FDIC as receiver for Bank of the Commonwealth and delivered to Christine Hsu, Federal Deposit Insurance Corporation, 3501 Fairfax Drive, Room VS-B-7054, Arlington, VA 22226-3500.

C. Subject to and without waving the requirements set forth in Section I.A. above, if the Settlement Payment is not delivered to the FDIC-R on the date determined by Section I.A., the FDIC-R, in its sole discretion, shall have the right at any time prior to receipt of the Settlement Payment 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 of 3.55%; or

2. Enforce this Agreement, in which event Witt Mares agrees to jurisdiction in United States District Court for the Eastern District of Virginia, Norfolk Division; or

3. Terminate the Agreement and institute an action on the FDIC-R's claims. Witt Mares agrees to waive any defense based on any statute of limitations that would bar any of the FDIC-R's claims and waive all objections, defenses, claims or counterclaims, 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.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: Releases

A. The FDIC-R's Releases.

Upon receipt of the Settlement Payment in full and except as provided in Section II.C., the FDIC-R, for itself and its successors and assigns, hereby releases and discharges Witt Mares, PB Mares and their respective members, employees, officers, directors, agents, representatives, insurers, 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 Witt Mares' functions, duties and actions as an independent auditor of the Bank.

B. Witt Mares' Release.

Effective simultaneously with the release granted in Section II.A. above, Witt Mares, on behalf of itself and its members, employees, officers, directors, agents, representatives, insurers, successors and assigns, hereby release and discharge the FDIC-R and its employees, officers, directors, representatives, attorneys, agents, 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 Witt Mares' functions, duties and actions as an independent auditor of the Bank.

C. Exceptions 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 Witt Mares or any person or other 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 such 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 by the FDIC-R in this Agreement.

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 III: Representations and Acknowledgements

A. Authorized Signatories. All of the undersigned persons represent and warrant that they 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 its counsel.

C. 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 to perform the terms of this Agreement.

D. 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.

E. 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.

F. 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.

G. 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).

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 Parties acknowledge that this Agreement is not confidential and may 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 BANK OF THE COMMONWEALTH

(b)(6)

Date: 11/11/15

BY: 

TITLE: Counsel

PRINT NAME: Christine P. Tsu

Date: 11/30/15

WITT MARES PLC 

TITLE: CEO

PRINT NAME: ALAN S. WITT

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