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4-7-04

Merger

LFS

4-7-04

FILED  
SECRETARY OF STATE  
DIVISION OF CORPORATIONS  
2004 APR -6 AM 9:49

**INTEROFFICE  
COMMUNICATION**



**OFFICE OF FINANCIAL  
REGULATION**

Don B. Saxon  
Director

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**DATE:** April 5, 2004

**TO:** Louise Jackson, Department of State  
Division of Corporations

**FROM:** Bruce Ricca, Office of Financial Regulation

**SUBJECT:** Merger of First Western Bank with and into 1<sup>st</sup> United Bank  
and under the title of 1<sup>st</sup> United Bank

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Please file the attached "Merger Documents" for the above-referenced institutions, using APRIL 7, 2004, as the effective date.

Please make the following distribution of certified copies:

- (1) One copy to: Bruce Ricca  
Office of Financial Regulation  
200 East Gaines Street  
Fletcher Building, Suite 636  
Tallahassee, Florida 32399-0371
- (2) Two copies to: Mr. John P. Greeley  
Smith Mackinnon, P. A.  
Post Office Box 2254  
Orlando, Florida 32802-2254
- (3) One copy to: Ms. Gretchen Womble  
(uncertified) Federal Reserve Bank of Atlanta  
1000 Peachtree Street, N. E.  
Atlanta, Georgia 30309-4470


Also attached is a check that represents payment of the filing fees, charter tax and certified copies. If you have any questions, please call 410-9528.

# OFFICE OF FINANCIAL REGULATION



Having been approved by the Director of the Office of Financial Regulation on April 6, 2004, to merge First Western Bank, Cooper City, Broward County, Florida, and 1<sup>st</sup> United Bank, Boca Raton, Palm Beach County, Florida, and being satisfied that the conditions of approval have been met, I hereby approve for filing with the Department of State, the attached "Acquisition Agreement," which contains the Articles of Incorporation of 1<sup>st</sup> United Bank (the resulting bank), so that on April 7, 2004, they shall read as stated herein.

Signed on this 6th day of  
April 2004.

  
Deputy Director

ACQUISITION

AGREEMENT

by and between

1<sup>ST</sup> UNITED BANCORP, INC.

1<sup>ST</sup> UNITED BANK

and

FIRST WESTERN BANK

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Dated: December 10, 2003

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**EFFECTIVE DATE**

4-7-04

FILED  
SECRETARY OF STATE  
DIVISION OF CORPORATIONS

2004 APR -6 AM 9:49

**ACQUISITION AGREEMENT**

THIS ACQUISITION AGREEMENT, dated as of December 10, 2003 (this "Agreement"), by and between 1<sup>st</sup> United Bancorp, Inc., a Florida banking holding company (the "Company"), 1<sup>st</sup> United Bank, a Florida chartered bank (the "1<sup>st</sup> United") and First Western Bank, a Florida chartered bank (the "Bank").

**RECITALS:**

WHEREAS, the Company, 1<sup>st</sup> United and the Bank have concluded that the acquisition of all of the equity interest in the Bank would be in the best interest of all parties and their shareholders and have agreed that the purchase price will be based on the Tier 1 Capital of the Bank at the end of the month prior to the date of closing.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein and for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto agree as follows:

**ARTICLE I**  
**DEFINITIONS**

1.1 Definitions. As used in this Agreement, and unless the context requires a different meaning, the following terms have the meanings indicated:

"1<sup>st</sup> United Common Stock" means the common stock of 1<sup>st</sup> United outstanding on the date hereof and the date of Closing.

"Acquirors" has the meaning set forth in Article V.

"Affiliate" shall mean any Person who is an "affiliate" as defined in Rule 12b-2 of the General Rules and Regulations under the Exchange Act.

"Agreement" means this Agreement as the same may be amended, supplemented or modified in accordance with the terms hereof.

"Articles of Incorporation" means the Articles of Incorporation, as amended, of the Company, 1<sup>st</sup> United or the Bank in effect on the Closing Date, as the same may be amended from time to time.

"Assets" has the meaning set forth in Section 5.18.

"Asset Classification" has the meaning set forth in Section 5.30.

"Bank Plans" has the meaning set forth in Section 5.17 of this Agreement.

"Board of Directors" means the Board of Directors of the Company, 1<sup>st</sup> United or the Bank as the context dictates.

“Breakup Fee” has the meaning set forth in Section 6.2.

“Business Day” means any day other than a Saturday, Sunday or other day on which commercial banks in the State of Florida are authorized or required by law or executive order to close.

“Bylaws” means the Bylaws of the Company, 1<sup>st</sup> United or the Bank in effect on the Closing Date, as the same may be amended from time to time.

“Claims” has the meaning set forth in Section 5.6.

“Closing” has the meaning set forth in Section 2.2.

“Closing Date” has the meaning set forth in Section 2.2.

“Code” means the Internal Revenue Code of 1986, as amended, or any successor statute thereto.

“Commission” means the United States Securities and Exchange Commission or any similar agency then having jurisdiction to enforce the Securities Act.

“Common Stock” means the common stock, par value \$5.00 per share of the Bank, outstanding as of the date of this Agreement.

“Company” has the meaning set forth in the preamble to this Agreement.

“Condition of the Bank” means the assets, business, properties, prospects, operations or condition (financial or otherwise) of the Bank.

“Contingent Obligation” means, as applied to any Person, any direct or indirect liability of that Person with respect to any Indebtedness, lease, dividend, guaranty, letter of credit or other obligation, contractual or otherwise (the “primary obligation”) of another Person (the “primary obligor”), whether or not contingent, (a) to purchase, repurchase or otherwise acquire such primary obligations or any property constituting direct or indirect security therefor, (b) to advance or provide funds (i) for the payment or discharge of any such primary obligation, or (ii) to maintain working capital or equity capital of the primary obligor or otherwise to maintain the net worth or solvency or any balance sheet item, level of income or financial condition of the primary obligor, (c) to purchase property, securities or services primarily for the purpose of assuring the owner of any such primary obligation of the ability of the primary obligor to make payment of such primary obligation, or (d) otherwise to assure or hold harmless the owner of any such primary obligation against loss or failure or inability to perform in respect thereof. The amount of any Contingent Obligation shall be deemed to be an amount equal to the stated or determinable amount of the primary obligation in respect of which such Contingent Obligation is made or, if not stated or determinable, the maximum reasonably anticipated liability in respect thereof.

“Contractual Obligations” means, as to any Person, any provision of any security issued by such Person or of any agreement, undertaking, contract, indenture, mortgage, deed of trust or other instrument to which such Person is a party or by which it or any of its property is bound.

“Dissenting Shares” has the meaning set forth in Section 4.5.

“Dollar” and “\$” mean United States Dollars.

“Effective Date” means the date on which the Effective Time occurs.

“Effective Time” means the effective time of the Merger, as provided for in Section 3.2.

“Exchange Agent” has the meaning set forth in Section 4.03.

“Employment Agreement” has the meaning set forth in Section 8.7.

“Environmental Laws” means federal, state, local and foreign laws, principles of common laws, civil laws, regulations and codes, as well as orders, decrees, judgments or injunctions, issued, promulgated, approved or entered thereunder relating to pollution, protection of the environment or public health and safety.

“ERISA” means the United States Employee Retirement Income Security Act of 1974, as amended.

“Escrow Agent” means The Law Offices of Russell T. Kamradt, P.A. acting as escrow agent of the funds of the Company.

“Exchange Act” means the United States Securities Exchange Act of 1934, as amended, and the rules and regulations of the Commission thereunder.

“Existing Shareholders” means the shareholders of the Bank on the Closing Date.

“Financial Statements” has the meaning set forth in Section 5.12.

“GAAP” means United States generally accepted accounting principles in effect from time to time.

“Governmental Authority” means the government of any nation, state, city, locality or other political subdivision thereof, any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, and any corporation or other entity owned or controlled, through stock or capital ownership or otherwise, by any of the foregoing.

“Indebtedness” means, as to any Person, (a) all obligations of such Person for borrowed money (including, without limitation, reimbursement and all other obligations with respect to surety bonds, letters of credit and bankers’ acceptances, whether or not matured), (b) all obligations of such Person to pay the deferred purchase price of property or services, except trade accounts payable and accrued commercial or trade liabilities arising in the ordinary course of business, (c) all interest rate

and currency swaps, caps, collars and similar agreements or hedging devices under which payments are obligated to be made by such Person, whether periodically or upon the happening of a contingency, (d) all indebtedness created or arising under any conditional sale or other title retention agreement with respect to property acquired by such Person (even though the rights and remedies of the seller or lender under such agreement in the event of default are limited to repossession or sale of such property), (e) all obligations of such Person under leases which have been or should be, in accordance with GAAP, recorded as capital leases, (f) all indebtedness secured by any Lien (other than Liens in favor of lessors under leases other than leases included in clause (e)) on any property or asset owned or held by that Person regardless of whether the indebtedness secured thereby shall have been assumed by that Person or is non-recourse to the credit of that Person, and (g) any Contingent Obligation of such Person.

"Indemnified Party" has the meaning set forth in Section 11.1.

"Indemnifying Party" has the meaning set forth in Section 11.1.

"Knowledge" means the actual knowledge of the Bank, its officers or employees or that of its Subsidiaries, their officers or employees.

"Liabilities" has the meaning set forth in Section 5.19.

"Lien" means any mortgage, deed of trust, pledge, hypothecation, assignment, encumbrance, lien (statutory or other) or preference, priority, right or other security interest or preferential arrangement of any kind or nature whatsoever (excluding preferred stock and equity related preferences).

"Losses" has the meaning set forth in Section 11.1.

"Material Adverse Change" means, with respect to the Bank, any effect that (i) is material and adverse to the financial position, results of operations or business of the Bank and its Subsidiaries taken as a whole, or (ii) would materially impair the ability of the Bank to perform its obligations under this Agreement or otherwise materially threaten or materially impede the consummation of the transaction contemplated by this Agreement and the other transactions contemplated by this Agreement; *provided, however*, that Material Adverse Change shall not be deemed to include the impact of (a) changes in banking and similar laws of general applicability or interpretations thereof by courts or governmental authorities, (b) changes in generally accepted accounting principles or regulatory accounting requirements applicable to banks and their holding companies generally, (c) any modifications or changes to valuation policies and practices in connection with the transaction contemplated by this Agreement or restructuring charges taken in connection with the transaction contemplated by this Agreement, in each case in accordance with generally accepted accounting principles, (d) effects of any action taken by Bank with the prior written consent of Company and 1<sup>st</sup> United, and (e) changes in conditions or circumstances that affect the banking industry generally. A Material Adverse Change with respect to the Bank also will be deemed to have occurred if the average of the Bank's total deposits for the sixty (60) day period ending on the last day of the calendar month immediately prior to the Closing is less than 90% of the Bank's average deposits for the ninety (90) day period ending September 30, 2003.



“Material Contracts” has the meaning set forth in Section 6.1(l).

“Orders” has the meaning set forth in Section 5.3.

“Options” mean the options to purchase Common Stock currently outstanding under the Bank’s option plans.

“Permits” has the meaning set forth in Section 5.7.

“Person” means any individual, firm, corporation, partnership, trust, incorporated or unincorporated association, joint venture, joint stock company, limited liability company, Governmental Authority or other entity of any kind, and shall include any successor (by merger or otherwise) of such entity.

“Plan” means any employee benefit plan, arrangement, policy, program, agreement or commitment (whether or not an employee plan within the meaning of Section 3(3) of ERISA), including, without limitation, any employment, consulting or deferred compensation agreement, executive compensation, bonus, incentive, pension, profit-sharing, savings, retirement, stock option, stock purchase or severance pay plan, any life, health, disability or accident insurance plan, whether oral or written, whether or not subject to ERISA, as to which the Bank or any Subsidiary has or in the future could have any direct or indirect, actual or contingent liability.

“Purchase Price” has the meaning set forth in Section 2.1.

“Requirements of Law” means, as to any Person, any law, statute, treaty, rule, regulation, right, privilege, qualification, license or franchise or determination of an arbitrator or a court or other Governmental Authority or stock exchange, in each case applicable or binding upon such Person or any of its property or to which such Person or any of its property is subject or pertaining to any or all of the transactions contemplated or referred to herein.

“Retiree Welfare Plan” means any welfare plan (as defined in Section 3(1) of ERISA) that provides benefits to current or former employees beyond their retirement or other termination of service (other than coverage mandated by Section 4980A of the Code, commonly referred to as “COBRA,” the cost of which is fully paid by the current or former employee or his or her dependents).

“Securities Act” means the United States Securities Act of 1933, as amended, and the rules and regulations of the Commission thereunder.

“Software” means any computer software programs, source code, object code, data and documentation.

“Stock Equivalents” means any security or obligation which is by its terms convertible into or exchangeable or exercisable for shares of Common Stock or other capital stock of the Bank, and any option, warrant or other subscription or purchase right with respect to Common Stock or such other capital stock.

“Stock Option Plan” means options to purchase shares of Common Stock of the Bank.

“Subsidiary” means an entity in which a person or entity owns a controlling interest (i.e. more than 50% of the voting rights or control of the management of the entity).

“Takeover Laws” has the meaning set forth in Section 5.28.

“Taxes” means any federal, state, provincial, county, local, foreign and other taxes (including, without limitation, income, profits, windfall profits, alternative, minimum, accumulated earnings, personal holding company, capital stock, premium, estimated, excise, sales, use, occupancy, gross receipts, franchise, ad valorem, severance, capital levy, production, transfer, withholding, employment, unemployment compensation, payroll and property taxes, import duties and other governmental charges and assessments), whether or not measured in whole or in part by net income, and including deficiencies, interest, additions to tax or interest, and penalties with respect thereto, and including expenses associated with contesting any proposed adjustments related to any of the foregoing.

“Tier 1 Capital” means the Tier 1 Capital of the Bank at the end of the month prior to Closing calculated in accordance with Appendix A of 12 CFR Part 208, less all severance benefits to Bank employees that the Bank Board has approved whether or not then paid (other than: (a) \$62,500 of the compensation paid to David E. Malinoff under Section 8.3; and (b) \$10,000 of any severance compensation or termination benefits paid to Robert Ogonowski), and all costs incurred by the Bank in completing the transactions contemplated by this Agreement.

“Trade Secrets” means any trade secrets, research records, processes, procedures, technical know-how, technology, designs, plans, inventions (whether patentable and whether reduced to practice), customer lists and improvements thereto.

“Trademarks” means any foreign or United States trademarks, service marks, trade dress, trade names, brand names, designs and logos, corporate names, product or service identifiers, whether registered or unregistered, and all registrations and applications for registration thereof.

“Transaction Documents” means, collectively, this Agreement, the Employment Agreement and any other document executed in connection with this Agreement and the transaction contemplated herein.

“Value of the Options” means (i) the Purchase Price, (ii) divided by the sum of the number of shares of Common Stock plus the number of Options outstanding, (iii) less the average strike price of the Options, and (iv) multiplied by the number of outstanding Options. For purposes of this Agreement, the average strike price of the options held by David E. Malinoff shall be \$7.39 per share.

**ARTICLE II**  
**PURCHASE AND SALE OF COMMON STOCK**

2.1 Purchase and Sale of Common Stock. Subject to the terms and conditions herein set forth, 1<sup>st</sup> United or the Company shall pay for each share of Common Stock an amount equal to the quotient obtained by dividing (i)(a) the product of the Bank's Tier 1 Capital multiplied by one point seven eight (1.78) (the "Purchase Price"), less (b) the Value of the Options, by (ii) the number of shares of the Bank's Common Stock outstanding without taking into account any unexercised Options. Based on September 30, 2003 Tier 1 Capital of Three Million Seven Hundred Eleven Thousand and no/100 Dollars (\$3,711,000.00) the Purchase Price would be Six Million Five Hundred Eighty-Eight Thousand and no/100 Dollars (\$6,588,000.00).

2.2 Closing. The closing of the sale and purchase of the Common Stock (the "Closing") shall take place at the offices of The Law Offices of Russell T. Kamradt, P.A., at 10:00 a.m., local time, on the earlier of: (i) April 30, 2004 (subject to extension as set forth in Section 2.3), or (ii) five (5) days after the date all necessary regulatory approvals from the Florida Office of Financial Regulation, the Federal Deposit Insurance Corporation, the Federal Reserve and any other Governmental Authority having jurisdiction over the transactions contemplated, or at such other time, place and date that the Company and the Bank may agree in writing (the "Closing Date"). On the Closing Date, all holders of Common Stock of the Bank shall surrender their certificates which thereafter shall be null and void and have no voting or other power whatsoever.

2.3 Deposit. 1<sup>st</sup> United will escrow One Hundred Twenty-Five Thousand and no/100 Dollars (\$125,000.00) with the Escrow Agent within two (2) business days after execution of this Agreement which shall be held in an interest bearing account. If the Merger has not closed by April 30, 2004 (or July 31, 2004, if extended as set forth below), the Bank may terminate this Agreement and shall be entitled to all amounts deposited by 1<sup>st</sup> United pursuant to this Section 2.3, unless the failure to close is as a result of the failure to occur of one or more of the conditions to the Company's performance as set forth in Article VIII, except for condition 8.4. Otherwise, all amounts deposited by 1<sup>st</sup> United pursuant to this Section 2.3 shall be promptly returned to it. Notwithstanding the foregoing, the Company shall have the option exercisable on or before April 30, 2004 to extend the time for Closing for an additional ninety (90) days by depositing an additional One Hundred Twenty-Five Thousand and no/100 Dollars (\$125,000.00) with the Escrow Agent. All accrued interest on the deposit shall be paid to 1<sup>st</sup> United.

### **ARTICLE III**

### **THE MERGER**

#### **3.1 The Merger.**

(a) At the Effective Time, the Bank shall merge with and into 1<sup>st</sup> United or, at the Company's election, a wholly-owned successor subsidiary bank of the Company (the "Merger"), the separate corporate existence of the Bank shall cease and 1<sup>st</sup> United, or such successor bank (as the case may be), shall survive and continue to exist as a Florida corporation (1<sup>st</sup> United, or such successor bank (as the case may be), as the surviving corporation in the Merger, sometimes being referred to herein as the "Surviving Corporation").

(b) Effective Time. Subject to the satisfaction or waiver of the conditions set forth in this Agreement, the Merger shall become effective upon the occurrence of the filing in the office of the Florida Department of State of articles of merger in accordance with Section 607.1105 of the FBCA or such later date and time as may be set forth in such articles. The Merger shall have the effects prescribed in the FBCA.

(c) Articles of Incorporation and Bylaws. The articles of incorporation and Bylaws of the Surviving Corporation immediately after the Merger shall be those of 1<sup>st</sup> United as in effect immediately prior to the Effective Time.

(d) Directors and Officers of Company and 1<sup>st</sup> United. The directors and officers of the Surviving Corporation immediately after the Merger shall be the directors and officers of 1<sup>st</sup> United immediately prior to the Effective Time, until such time as their successors shall be duly elected and qualified. The name and address of each director of the Surviving Corporation is set forth on Exhibit A. The directors and officers of the Company immediately after the Merger shall be the directors and officers of the Company immediately prior to the Effective Time, until such time as their successors shall be duly elected and qualified.

(e) Executive Officers. Executive officers of the Surviving Corporation immediately after the Merger shall be the executive officers of 1<sup>st</sup> United immediately prior to the Effective Time. The name and address of each executive officer is set forth on Exhibit A.

(f) Banking Offices. The main office of 1<sup>st</sup> United, is located at One North Federal Highway, Boca Raton, FL 33432. In addition, the branch offices of the Surviving Corporation immediately after the Merger shall consist of the 1<sup>st</sup> United banking office at 741 U.S. Highway One, North Palm Beach, FL 33408, the Bank's banking office at 5854 South Flamingo Road, Cooper City, FL 33330, and any branch offices opened by 1<sup>st</sup> United after the date of this Agreement and prior to the Effective Time. The main office of the Surviving Corporation immediately after the Merger shall be the office designated by 1<sup>st</sup> United as its main office immediately prior to the Effective Time.

(g) Capitalization of Surviving Corporation. As of the Effective Time, the Surviving Corporation shall have 3,000,000 shares of Common Stock, par value \$5.00 per share, authorized of which 620,000 shares shall be issued and outstanding, all of which shall be owned by the Company. The Surviving Corporation shall have no other classes of capital stock authorized or outstanding. Immediately after the Merger, the capital, surplus and retained earnings of the Surviving Corporation shall consist of the capital, surplus and retained earnings of 1<sup>st</sup> United and the Bank as of the Effective Time.

(h) Absence of Trust Powers. The Surviving Corporation shall not have trust powers.

(i) Other Information. Additional information relating to the Surviving Corporation and the parties is set forth on Exhibit A.

3.2 Effective Date and Effective Time. Subject to the satisfaction or waiver of the conditions set forth in this Agreement, the Merger shall become effective on the date (the "Effective Date") and the time (the "Effective Time") set forth in the Certificate of Merger related to the Merger issued by the Florida Office of Financial Regulation.

#### **ARTICLE IV**

#### **CONSIDERATION; EXCHANGE PROCEDURES**

4.1 Merger Consideration. Subject to the provisions of this Agreement, at the Effective Time, automatically by virtue of the Merger and without any action on the part of any Person:

(a) Payment of Purchase Price. The Company or 1<sup>st</sup> United shall cause the Purchase Price payable to each of the Bank's holders of Common Stock to be distributed to such shareholders subject to and upon surrender of their certificates for shares of Common Stock.

(b) Outstanding Bank Common Stock. Each share of Bank Common Stock and Stock Equivalents, issued and outstanding immediately prior to the Effective Time shall become null and void as of the Effective Time and shall represent thereafter only the right to receive the payment set forth in Section 2.1 (unless such shares represent Dissenting Shares). No bank shareholder or employee shall have the right to acquire any Company or 1<sup>st</sup> United Common Stock.

4.2 Rights as Stockholders; Stock Transfers. At the Effective Time, holders of Bank Stock shall cease to be, and shall have no rights as, stockholders of Bank, other than to receive the consideration provided under this Agreement. After the Effective Time, there shall be no transfers on the stock transfer books of Bank or the Surviving Corporation of shares of Bank Stock.

4.3 Exchange Procedures.

(a) As promptly as practicable after the Effective Date and in any event within 10 business days thereof, the Company, 1<sup>st</sup> United or an entity selected by the Company (in

such capacity, the "Exchange Agent"), shall send or cause to be sent to each former holder of record of shares of Bank Common Stock immediately prior to the Effective Time transmittal materials for use in exchanging such stockholder's certificates formerly representing shares of Common Stock ("Old Certificates") for the consideration set forth in Section 2.1 of this Agreement. Company shall cause the certificates representing the shares of Bank Common Stock to be retired in exchange for the cash consideration set forth Section 2.1 of this Agreement on the Effective Date.

(b) Notwithstanding the foregoing, neither the Exchange Agent nor any party hereto shall be liable to any former holder of Common Stock for any amount properly delivered to a public official pursuant to applicable abandoned property, escheat or similar laws.

4.4 Options. At the Effective Time, each then outstanding Options whether or not vested, shall be canceled and the Optionee shall be entitled to receive an amount of cash equal to the Value of the Options ("Option Consideration"). The Option Consideration shall be paid by 1<sup>st</sup> United promptly following the Effective Time. Prior to the Effective Time, Bank shall take such actions as may be necessary to effectuate the foregoing, including obtaining all applicable consents from the holders of the Bank Stock Options.

4.5 Dissenting Shares. Each outstanding share of Common Stock, the holder of which has perfected dissenters' rights in accordance with the provisions of Section 658.44 of the Florida Financial Institutions Codes (the "Dissent Provisions") and has not effectively withdrawn or lost such holder's right to such dissent (the "Dissenting Shares"), shall not be converted into or represent a right to receive the consideration issuable in the Merger under Section 2.1 but, rather, the holder thereof shall be entitled to only to such rights as are granted by the Dissent Provisions. The Bank shall give 1<sup>st</sup> United prompt notice upon receipt by the Bank of any written objection to the Merger and any written demands for payment of the fair market value of the Common Stock, and of withdrawals of such demands, and any other instruments provided to the Bank pursuant to the Dissent Provisions. Each holder of Dissenting Shares who becomes entitled, pursuant to the Dissent Provisions, to payment of the fair market value of any Common Stock held by such shareholder shall receive the amount therefor from the Surviving Bank and all such holder's Common Stock shall be cancelled. If any holder of Dissenting Shares shall have failed to perfect or shall have effectively withdrawn or lost such right to demand payment of the fair market value, the Common Stock held by such shareholder shall thereupon be deemed to have been converted into the right to receive the consideration to be issued in the Merger as provided by this Agreement.

**ARTICLE V**  
**REPRESENTATIONS AND WARRANTIES OF THE BANK**

The Bank represents in this Article and warrants to the Company and 1<sup>st</sup> United (the "Acquirors") as follows:

5.1 Corporate Existence and Power. The Bank (a) is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation; (b) has all requisite power and authority to own and operate its property, to lease the property it operates as lessee and to conduct the business in which it is currently, or is proposed to be, engaged; (c) is duly qualified as a bank, licensed and in good standing under the laws of each jurisdiction in which its ownership, lease or operation of property or the conduct of its business requires such qualification, or in which any such failure to so qualify would not have a material adverse affect on the Bank, and (d) has the corporate power and authority to execute, deliver and perform its obligations under the Transaction Documents. No jurisdiction, other than those referred to in clause (c) above, has claimed, in writing or otherwise, that the Bank is required to qualify as a foreign corporation or other entity therein, and the Bank does not file any franchise, income or other tax returns in any other jurisdiction based upon the ownership or use of property therein or the derivation of income therefrom. The Bank does not own or lease property in any jurisdiction other than its jurisdiction of incorporation and the jurisdictions referred to in clause (c) above.

5.2 Subsidiaries. (i)(A) the Bank has attached a list of all of its subsidiaries together with the jurisdiction of organization of each such Subsidiary as Schedule 5.2, (B) except as disclosed, it owns, directly or indirectly, all the issued and outstanding equity securities of each of its Subsidiaries, (C) no equity securities of any of its Subsidiaries are or may become required to be issued (other than to it) by reason of any right or otherwise, (D) there are no contracts, commitments, understandings or arrangements by which any of such Subsidiaries is or may be bound to sell or otherwise transfer any equity securities of any such Subsidiaries (other than to it), (E) there are no contracts, commitments, understandings, or arrangements relating to its rights to vote or to dispose of such securities, and (F) all the equity securities of each Subsidiary held by the Bank or its Subsidiaries are fully paid and nonassessable and are owned by the Bank free and clear of any Liens.

(i) The Bank does not own beneficially, directly or indirectly, any equity securities or similar interests of any Person, or any interest in a partnership or joint venture of any kind, other than its Subsidiaries except as listed on Schedule 5.2(ii).

(ii) Each of the Bank's Subsidiaries has been duly organized and is validly existing in good standing under the laws of the jurisdiction of its organization, and is duly qualified to do business and in good standing in the jurisdictions where its ownership or leasing of property or the conduct of its business requires it to be so qualified.

5.3 Authorization; No Contravention. The execution, delivery and performance by the Bank of this Agreement and each of the other Transaction Documents and the transactions contemplated hereby and thereby (a) have been duly authorized by all necessary corporate action

of the Bank and each Subsidiary; (b) do not contravene the terms of the Articles of Incorporation or the Bylaws of the Bank or any of its Subsidiaries; (c) do not violate, conflict with or result in any breach, default or contravention of (or with due notice or lapse of time or both would result in any breach, default or contravention of), or the creation of any Lien under, any Contractual Obligation of the Bank or any of its Subsidiaries or any Requirement of Law applicable to the Bank or any of its Subsidiaries; and (d) do not violate any judgment, injunction, writ, award, decree or order of any nature (collectively, "Orders") of any Governmental Authority against, or binding upon, the Bank or any of its Subsidiaries.

5.4 Governmental Authorization; Third Party Consents. Except as set forth in Schedule 5.4 and except for any requirements under state and federal banking law, no approval, consent, compliance, exemption, authorization or other action by, or notice to, or filing with, any Governmental Authority or any other Person, and no lapse of a waiting period under a Requirement of Law, is necessary or required in connection with the execution, delivery or performance by, or enforcement against, the Bank of this Agreement and the other Transaction Documents or the transactions contemplated hereby and thereby.

5.5 Binding Effect. This Agreement and each of the other Transaction Documents have been duly executed and delivered by the Bank, and constitute the legal, valid and binding obligations of the Bank, enforceable against the Bank in accordance with their terms, except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, fraudulent conveyance or transfer, moratorium or similar laws affecting the enforcement of creditors' rights generally and by general principles of equity relating to enforceability (regardless of whether considered in a proceeding at law or in equity).

5.6 Litigation. Except as set forth on Schedule 5.6, there are no actions, suits, proceedings, claims, complaints, disputes, arbitrations or investigations (collectively, "Claims") pending or, to the knowledge of the Bank, threatened, at law, in equity, in arbitration or before any Governmental Authority against the Bank or any of its Subsidiaries nor is the Bank aware that there is any basis for any of the foregoing which could have a material effect on the financial condition of the Bank. The foregoing includes, without limitation, Claims pending or, to the Knowledge of the Bank or any Subsidiary, threatened or any basis therefor known by the Bank or any Subsidiary involving the prior employment of any of the Bank's or any Subsidiary's employees, their use in connection with the Bank's or any Subsidiary's business of any information or techniques allegedly proprietary to any of their former employers or their obligations under any agreements with prior employers. Except as set forth on Schedule 5.6, no Order has been issued by any court or other Governmental Authority against the Bank or any of its Subsidiaries or any of their directors, officers, shareholders or agents purporting to enjoin or restrain the execution, delivery or performance of this Agreement or any of the other Transaction Documents.

5.7 Compliance with Laws.

(a) Except as set forth on Schedule 5.7, the Bank and each of its Subsidiaries is in material compliance with all Requirements of Law and all Orders issued by any court or Governmental Authority relating to the Bank or any of its Subsidiaries. To the Bank's and



each of its Subsidiaries' Knowledge, there is no existing or proposed Requirement of Law which could reasonably be expected to prohibit or restrict the Bank or any of its Subsidiaries from, or otherwise materially adversely affect the Bank or any of its Subsidiaries in, conducting its business in any jurisdiction in which it now conducts or proposes to conduct, its business.

(b) To the Bank's and any of its Subsidiaries' Knowledge, (i) the Bank and each of its Subsidiaries has all licenses, permits and approvals of any Governmental Authority (collectively, "Permits") that are necessary for the conduct of its business; (ii) such Permits are in full force and effect; and (iii) no violations are or have been asserted in respect of any Permit.

(c) To the Bank's Knowledge, no material expenditure is presently required by the Bank or any of its Subsidiaries to comply with any existing Requirement of Law or Order.

#### 5.8 Capitalization.

(a) On the date hereof and at all times through the Closing Date, prior to giving effect to the transactions contemplated by this Agreement, the authorized capital stock of the Bank shall consist of (i) 1,000,000 shares of Common Stock, of which 380,571 shares are issued and outstanding. Schedule 5.8(a) sets forth, as of the Closing Date, a true and complete list of (x) the stockholders of the Bank (including any trust or escrow agent arrangement created in connection with any employee stock option plan) and, opposite the name of each stockholder, the amount of all outstanding capital stock and Stock Equivalents owned by such stockholder and (y) the holders of Stock Equivalents, including, without limitation, the warrants and options outstanding and shown on Schedule 5.8 attached hereto and, opposite the name of each such holder, the amount of all Stock Equivalents owned by such holder and the exercise price thereof. As of the date of this Agreement, the aggregate number of shares of Common Stock and options to purchase shares of Common Stock which may be issued under the Stock Option Plan is 21,000, of which all are currently vested. Except as set forth on Schedule 5.8(a), there are no options, warrants, conversion privileges, subscription or purchase rights or other rights presently outstanding to purchase or otherwise acquire (i) any authorized but unissued, unauthorized or treasury shares of the Bank's capital stock, (ii) any Stock Equivalents or (iii) other securities of the Bank and there are no commitments, contracts, agreements, arrangements or understandings by the Bank to issue any shares of the Bank's capital stock or any Stock Equivalents or other securities of the Bank. All of the issued and outstanding shares of Common Stock are all duly authorized, validly issued, fully paid and non-assessable, and were issued in compliance with the registration and qualification requirements of all applicable federal and state securities laws.

(b) The Bank does not directly or indirectly own or have any investment in any of the capital stock of, or any other proprietary interest in, any Person except as set forth on Schedule 5.2 hereto.

(c) The shares to be purchased by the Company hereunder represent, in the aggregate, on the Closing Date, not less than one hundred percent (100%) of the outstanding shares of Common Stock and the Stock Equivalents.

5.9 No Default or Breach; Contractual Obligations. Except as disclosed on Schedule 5.9, neither the Bank nor any of its Subsidiaries has received notice of a default and is not in material default under, or with respect to, any Contractual Obligation nor does any condition exist that with notice or lapse of time or both would constitute a material default thereunder. Schedule 5.9 lists all of the Contractual Obligations to which the Bank or any of its Subsidiaries is a party, whether written or oral, which involve an amount in excess of \$25,000. All of such Contractual Obligations are valid, subsisting, in full force and effect and binding upon the Bank (or one of its Subsidiaries) and the other parties thereto, and the Bank and each of its Subsidiaries has paid in full or accrued all current amounts due thereunder and has satisfied in full or provided for all of its liabilities and obligations thereunder. To the Knowledge of the Bank and each of its Subsidiaries, no other party to any such Contractual Obligation is in material default thereunder, nor does any condition exist that with notice or lapse of time or both would constitute a material default by such other party thereunder.

5.10 Title to Properties. The Bank and each of its Subsidiaries have good, record and marketable title in fee simple to, or holds interests as lessee under leases in full force and effect in, all real property used in connection with its business or otherwise owned or leased by it.

5.11 FIRPTA. Neither the Bank nor any Subsidiary is a "foreign person" within the meaning of Section 1445 of the Code.

5.12 Financial Statements. The Bank has delivered to the Company the audited financial statements of the Bank and each of its Subsidiaries (consolidated balance sheet and statements of operations) for the fiscal year ended December 31, 2002 and the unaudited financial statements as of and for the nine (9) months ended September 30, 2003 (collectively, the "Financial Statements"). The Financial Statements are complete and correct in all respects and have been prepared in accordance with GAAP applied on a consistent basis throughout the periods indicated and with each other. The Financial Statements fairly present the financial condition, and operating results of the Bank and each of its Subsidiaries as of the respective dates and for the respective periods indicated in accordance with GAAP.

5.13 Taxes. (a) The Bank and each of its Subsidiaries have paid all Taxes which have come due and are required to be paid by it through the date hereof, and all deficiencies or other additions to Tax, interest and penalties owed by it in connection with any such Taxes, other than Taxes being disputed by the Bank or any of its Subsidiaries in good faith for which adequate reserves have been made in accordance with GAAP; (b) the Bank and each of its Subsidiaries has timely filed or caused to be filed all returns for Taxes that it is required to file on and through the date hereof (including all applicable extensions), and all such Tax returns are accurate and complete; (c) with respect to all Tax returns of the Bank and each of its Subsidiaries, (i) there is no unassessed Tax deficiency proposed or, to the Knowledge of the Bank and each of its Subsidiaries, threatened against the Bank or any of its Subsidiaries and (ii) no audit is in progress with respect to any return

for Taxes, no extension of time is in force with respect to any date on which any return for Taxes was or is to be filed and no waiver or agreement is in force for the extension of time for the assessment or payment of any Tax; (d) all provisions for Tax liabilities of the Bank and each of its Subsidiaries with respect to the Financial Statements have been made in accordance with GAAP consistently applied, and all liabilities for Taxes of the Bank and each of its Subsidiaries attributable to periods prior to or ending on the Closing Date have been adequately provided for on the Financial Statements; and (e) there are no Liens for Taxes on the assets of the Bank or any of its Subsidiaries.

5.14 No Material Adverse Change; Ordinary Course of Business. Since September 30, 2003, (a) there has not been any Material Adverse Change, nor is any such change reasonably expected, in the Condition of the Bank or any of its Subsidiaries, (b) neither the Bank nor any of its Subsidiaries has participated in any transaction material to the Condition of the Bank or any such Subsidiary or otherwise acted outside the ordinary course of business (except for the transactions contemplated hereunder), including, without limitation, declaring or paying any dividend or declaring or making any distribution to its stockholders, (c) neither the Bank nor any of its Subsidiaries have increased the compensation of any of its officers or the rate of pay of any of its employees, except as part of regular compensation increases in the ordinary course of business, (d) neither the Bank nor any of its Subsidiaries has created or assumed any Lien on an asset of the Bank; (e) neither the Bank nor any of its Subsidiaries has entered into any Contractual Obligation, other than in the ordinary course of business, (f) there has not occurred a material change in the Bank's nor any of its Subsidiaries' accounting principles or practice except as required by reason of a change in GAAP, and (g) neither the Bank nor any of its Subsidiaries has issued and will not issue any dividends, change any employment agreements or benefit plans, acquire or dispose of any significant assets, incur any additional indebtedness or issue or commit itself to issue any Common Stock or Stock Equivalents.

5.15 Investment Company. The Bank is not and is not controlled by or affiliated with an "investment company" within the meaning of the Investment Company Act of 1940, as amended.

5.16 Labor Relations. (a) Except as set forth on Schedule 5.16, neither the Bank nor any of its Subsidiaries is engaged in any unfair labor practice; (b) there is (i) no grievance or arbitration proceeding arising out of or under collective bargaining agreements pending or, to the Knowledge of the Bank, threatened against the Bank or any of its Subsidiaries, and (ii) no strike, labor dispute, slowdown or stoppage is pending or, to the Knowledge of the Bank, threatened against the Bank or any of its Subsidiaries; (c) neither the Bank nor any of its Subsidiaries is a party to any collective bargaining agreement or contract; (d) there is no union representation question existing with respect to the employees of the Bank or any of its Subsidiaries; and (e) no union organizing activities are taking place. To the Knowledge of the Bank, no officer or key employee of the Bank or any of its Subsidiaries, or any group of key employees, intends to terminate their employment with the Bank or any of its Subsidiaries. Neither the Bank nor any of its Subsidiaries have discussed or taken any steps to terminate the employment of any officer, key employee or group of key employees. None of the Bank's or any of its Subsidiaries' employees is resident in the United States in violation of any Requirement of Law.

5.17 Employee Benefit Plans. (a) Schedule 5.17 hereto lists each Plan that the Bank or any of its Subsidiaries maintains or to which the Bank or any of its Subsidiaries contributes (the "Bank Plans"). The Bank and each of its Subsidiaries has no liability under any Plans other than the Bank Plans. Except as set forth on Schedule 5.17, neither the Bank nor any of its Subsidiaries maintains or contributes to, or has within the preceding six years maintained or contributed to, or may have any liability with respect to any Plan subject to Title IV of ERISA or Section 412 of the Code or any "multiple employer plan" within the meaning of the Code or ERISA. Each Bank Plan (and related trust, insurance contract or fund) has been established and administered in accordance with its terms, and complies in form and in operation with the applicable requirements of ERISA and the Code and other applicable Requirements of Law. All contributions (including all employer contributions and employee salary reduction contributions) which are due have been paid to each Bank Plan. (b) No Claim with respect to the administration or the investment of the assets of any Bank Plan (other than routine claims for benefits) is pending or threatened. (c) Each Bank Plan that is intended to be qualified under Section 401(a) of the Code is so qualified and has been so qualified during the period since its adoption; each trust created under any such Plan is exempt from tax under Section 501(a) of the Code and has been so exempt since its creation. (d) No Bank Plan is a Retiree Welfare Plan. (e) Neither the consummation of the transactions contemplated by this Agreement nor any termination of employment following such transactions will accelerate the time of the payment or vesting of, or increase the amount of, compensation due to any employee or former employee whether or not such payment would constitute an "excess parachute payment" under Section 280G of the Code. (f) There are no unfunded obligations under any Bank Plan which are not fully reflected on the Financial Statements. (g) To the Knowledge of the Bank, neither the Bank nor any of its Subsidiaries has any liability, whether absolute or contingent, including any obligations under any Bank Plan, with respect to any misclassification of any person as an independent contractor rather than as an employee.

5.18 Title to Assets. The Bank and each of its Subsidiaries owns and has good, valid, and marketable title to all of its properties and assets used in its business and reflected as owned on the Financial Statements or so described in any Schedule hereto (collectively, the "Assets"), in each case free and clear of all Liens, except for Liens specifically described on Schedule 5.18.

5.19 Liabilities. Neither the Bank nor any of its Subsidiaries has any direct or indirect obligation or liability (the "Liabilities") other than (a) Liabilities fully and adequately reflected or reserved against on the Financial Statements, (b) Liabilities incurred since September 30, 2003 in the ordinary course of business consistent with past practice, and (c) customer deposits as set forth on the Financial Statement. The Bank has no Knowledge of any circumstance, condition, event or arrangement that could reasonably be expected to give rise hereafter to any Liabilities of the Bank or any of its Subsidiaries except in the ordinary course of business.

5.20 Privacy of Customer Information. Neither the Bank nor any of its Subsidiaries use any customer information it receives in an unlawful manner, or in a manner in violation of the Bank's or such the Subsidiary's privacy policy or the privacy rights of its customers. Neither the Bank nor any of its Subsidiaries has collected any customer information in an unlawful manner or in violation of its privacy policy. The Bank and each of its Subsidiaries has adequate security measures in place to protect the customer information it receives and which it stores in its computer

systems from illegal use by third parties or use by third parties in a manner violative of the rights of privacy of its customers. The Bank and each of its Subsidiaries represents to its customers that it complies with applicable law as to the security of the customer information it receives.

**5.21 Potential Conflicts of Interest.** Except as set forth on Schedule 5.21, no officer or director of the Bank or any of its Subsidiaries and, to the Knowledge of the Bank, no stockholder or relative of any officer, director or stockholder and no Affiliate of any of the foregoing (a) owns, directly or indirectly, any interest in (excepting less than one percent (1%) stock holdings for investment purposes in securities of publicly held and traded companies), or is an officer, director, employee or consultant of, any Person which is, or is engaged in business as, a competitor, lessor, lessee, supplier, distributor, sales agent or customer of, or lender to or borrower from, the Bank or any of its Subsidiaries; (b) owns, directly or indirectly, in whole or in part, any tangible or intangible property that the Bank or any of its Subsidiaries have used, or that the Bank or such a Subsidiary will use, in the conduct of business; or (c) has any cause of action or other claim whatsoever against, or owes or has advanced any amount to (except as described hereunder), the Bank or any of its Subsidiaries, except for claims in the ordinary course of business such as for accrued vacation pay, accrued benefits under employee benefit plans, and similar matters and agreements existing on the date hereof.

**5.22 Trade Relations.** There exists no actual or, to the Knowledge of the Bank, threatened termination, cancellation or limitation of, or any adverse modification or change in, the business relationship of the Bank or any of its Subsidiaries, or the business of the Bank or any of its Subsidiaries, with any customer or supplier or any group of customers or suppliers whose purchases or inventories provided to the Bank's or any of its Subsidiaries business are individually or in the aggregate material to the Condition of the Bank or any of its Subsidiaries, and there exists no present condition or state of fact or circumstances that would adversely affect the Condition of the Bank or any of its Subsidiaries or prevent the Bank or such a Subsidiary from conducting such business relationships or such business with any such customer, supplier or group of customers or suppliers in the same manner as heretofore conducted by the Bank or any of its Subsidiaries.

**5.23 Outstanding Borrowing.** Schedule 5.23 sets forth the amount of all Indebtedness of the Bank and its Subsidiaries as of the date hereof (excluding customer deposits as set forth on the Financial Statements), the Liens that relate to such Indebtedness and that encumber the Assets and the name of each lender thereof. No Indebtedness is entitled to any voting rights in any matters voted upon by the holders of the Common Stock.

**5.24 Insurance.** Schedule 5.24 lists all of the insurance policies held by or on behalf of the Bank and its Subsidiaries, with the effective date and coverage amounts indicated thereon. Such policies and binders are valid and enforceable in accordance with their terms and are in full force and effect. None of such policies will be affected by, or terminate or lapse by reason of, any transaction contemplated by this Agreement or any of the other Transaction Documents.

**5.25 Environmental Matters.** The Bank and each of its Subsidiaries is in compliance with all applicable Environmental Laws. There is no civil, criminal or administrative judgment, action, suit, demand, claim, hearing, notice of violation, investigation, proceeding, notice or demand letter

pending or, to the Knowledge of the Bank, threatened against the Bank or any of its Subsidiaries pursuant to Environmental Laws; and, to the Knowledge of the Bank, there are no past or present events, conditions, circumstances, activities, practices, incidents, agreements, actions or plans which could reasonably be expected to prevent compliance with, or which have given rise to or will give rise to liability under, Environmental Laws.

5.26 Broker's, Finder's or Similar Fees. There are no brokerage commissions, finder's fees or similar fees or commissions payable by the Bank in connection with the transactions contemplated by the Transaction Documents based on any agreement, arrangement or understanding with the Bank or any of its Subsidiaries or any action taken by the Bank or any of its Subsidiaries or any of their respective directors, officers, employees or agents.

5.27 Disclosure.

(a) Agreement and Other Documents. To the Knowledge of the Bank, this Agreement and the documents and certificates furnished to the Company by the Bank do not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements contained herein or therein, in the light of the circumstances under which they were made, not misleading.

(b) Material Adverse Effects. Except as set forth in Schedule 5.27(b), there is no fact that the Bank has not disclosed to the Company in writing which materially adversely affects, or insofar as the Bank can reasonably foresee could materially adversely affect, the Condition of the Bank or the ability of the Bank to perform its obligations under this Agreement, any of the other Transaction Documents or any document contemplated hereby or thereby.

5.28 Takeover Laws. The Bank has taken all action required to be taken by it in order to exempt this Agreement and the other Transaction Documents contemplated hereby and thereby from, and this Agreement and the Transaction Documents contemplated hereby and thereby are exempt from, the requirements of any "moratorium", "control share", "fair price", "affiliate transaction", "business combination" or other anti-takeover laws and regulations of any state (collectively, "Takeover Laws"), including, without limitation, the State of Florida, and including, without limitation, Sections 607.0901 and 607.0902 of the FBCA.

5.29 Regulatory Approvals. As of the date hereof, the Bank is not aware of any reason why the approvals set forth herein will not be received without the imposition of a condition, restriction or requirement from the state or federal regulatory authorities except as to a condition, restriction or requirement as to capital.

5.30 Asset Classification. Schedule 5.30 sets forth the aggregate amounts of loans, extensions of credit or other assets of it and its Subsidiaries that have been classified by the Bank as of September 30, 2003 (the "Asset Classification"); and no amounts of loans, extensions of credit or other assets that have been classified as of September 30, 2003 by any Regulatory Authority as "Other Loans Specially Mentioned", "Substandard", "Doubtful", "Loss", or words of similar import are excluded from the amounts disclosed in the Asset Classification, other than amounts of loans,

extensions of credit or other assets that were charged off by it or a Subsidiary prior to September 30, 2003.

## **ARTICLE VI**

### **NEGATIVE COVENANTS**

6.1 Forbearances of the Bank. Until the Closing Date (or, if earlier, the termination of this Agreement), the Bank agrees, except as expressly provided in this Agreement, without the prior written consent of the Company and 1<sup>st</sup> United as set forth herein, which consent will not be unreasonably withheld, the Bank will not, and will cause each of its Subsidiaries not to:

(a) Ordinary Course. Conduct the business of the Bank and its Subsidiaries other than in the ordinary and usual course consistent with past practice or, to the extent consistent therewith, fail to use reasonable efforts to preserve intact their business organizations and assets and maintain their rights, franchises and existing relations with customers, suppliers, employees and business associates; or take any action that would reasonably be expected to have a material adverse effect upon the Bank's ability to perform its obligations under this Agreement.

(b) New Activities. Engage in any material new activities or lines of business or make any material changes to its existing activities or lines of business.

(c) Capital Stock. Other than pursuant to the Stock Equivalents previously disclosed and outstanding on the date hereof, (1) issue, sell or otherwise permit to become outstanding, or authorize the creation of, any additional shares of Common Stock or any Stock Equivalents, (2) permit any additional shares of Common Stock to become subject to new grants of employee or director stock options, or stock-based employee rights or arrangements, (3) repurchase, redeem or otherwise acquire, directly or indirectly, any shares of Common Stock, (4) effect any recapitalization, reclassification, stock split or like change in capitalization or (5) enter into, or take any action to cause any holders of Common Stock to enter into, any agreement, understanding or commitment relating to the right of holders of Common Stock to vote any shares of Common Stock, or cooperate in any formation of any voting trust or similar arrangement relating to such shares.

(d) Subsidiaries. Issue, sell or otherwise permit to become outstanding, transfer, mortgage, encumber or otherwise dispose of or permit the creation of any Lien in respect of, or amend or modify the terms of, any equity interests held in a Subsidiary of the Bank.

(e) Dividends, Etc. Make, declare, pay or set aside for payment any dividend, other than dividends from wholly owned Subsidiaries to the Bank or to another wholly owned Subsidiary of the Bank on or in respect of, or declare or make any distribution on any shares of its capital stock or split, combine, redeem, reclassify, purchase or otherwise acquire, any shares of its capital stock.

(f) Compensation; Employment Contracts; Etc. Other than as provided in Section 5.17, enter into, amend, modify, renew or terminate any employment, consulting, severance, change in control or similar Contracts with any directors, officers, employees of, or independent contractors with respect to, the Bank or its Subsidiaries, or grant any salary, wage or other increase or increase any employee benefit (including incentive or bonus payments), except (1) for changes that are required by applicable law, (2) for merit-based or annual salary increases in the ordinary course of business and in accordance with past practice (including with respect to timing and amount) to employees (in each case as set forth on Schedule 5.17, (3) terminate employees on severance terms consistent with the terms of the Bank's existing severance policies, or (4) for employment arrangements for newly hired non-executive employees in the ordinary and usual course of business consistent with past practice, PROVIDED that total annual guaranteed compensation for any such newly hired non-executive employee shall not exceed \$50,000 and any such Contractual Obligation shall not include any provision providing for payments to, or the conferring of other benefits on, the person arising from a change of control of the Bank.

(g) Benefit Plans. Except as Previously Disclosed, enter into, establish, adopt, amend, modify or terminate any Bank Plan in respect of any current or former directors, officers, employees, former employees of, or independent contractors with respect to, the Bank or its Subsidiaries (or any dependent or beneficiary of any of the foregoing persons), including taking any action that accelerates the vesting or exercisability of or the payment or distribution with respect to, stock options, restricted stock or other compensation or benefits payable thereunder, except, in each such case, as may be required by applicable law.

(h) Dispositions. Except for sales of Loans, debt securities or similar investments in the ordinary and usual course of business consistent with past practice sell, transfer, mortgage, lease, encumber or otherwise dispose of or permit the creation of any Lien (except for a Lien for Taxes not yet due and payable) in respect of, or discontinue any material portion of, its assets, deposits, business or properties.

(i) Acquisitions. Except by way of foreclosures in satisfaction of debts previously contracted in good faith, in each case in the ordinary and usual course of business consistent with past practice, acquire any material amount, taken individually or in the aggregate, of assets, business, properties or deposits of another Person in any one transaction or a series of related transactions.

(j) Constitutive Documents. Amend (or suffer to be amended) the articles of incorporation or bylaws of the Bank or any of its Subsidiaries.

(k) Accounting Methods. Implement or adopt any change in the accounting principles, practices or methods used by the Bank and its Subsidiaries, other than as may be required by generally accepted accounting principles.

(l) Contracts. Except in the ordinary course of business consistent with past practice and except as to the existing employment contract with Robert Ogonowski (the



Bank acknowledging that any severance and/or termination benefits in excess of \$10,000 shall reduce the Tier 1 Capital), (1) enter into, amend, renew or terminate any material contract or any agreement that provides for either (A) aggregate payments of \$25,000 or more or (B) a term exceeding 30 days or (2) amend or modify in any material respect any of its existing material contracts. Material Contract is one which has aggregate payments in excess of \$25,000 or which otherwise has a material impact on the day to day operation of the Bank or its Subsidiaries.

(m) Claims. Settle any claim, action or proceeding, except for any claim, action or proceeding involving solely money damages in an amount, individually and in the aggregate for all such settlements, not more than \$40,000 and that would not reasonably be expected to establish an adverse precedent or basis for subsequent settlements or require material changes in business practices.

(n) Risk Management. Except as required by applicable law or regulation: (1) implement or adopt any material change in its credit risk and interest rate risk management and hedging policies, procedures or practices; (2) fail to follow its existing policies or practices with respect to managing its exposure to credit and interest rate risk; or (3) fail to use commercially reasonable means to avoid any material increase in its aggregate exposure to interest rate risk.

(o) Indebtedness. Other than in the ordinary course of business (including by way of creation of deposit liabilities, enter into repurchase agreements, purchases or sales of federal funds, and sales of certificates of deposit) consistent with past practice, (1) incur any indebtedness for borrowed money, (2) assume, guarantee, endorse or otherwise as an accommodation become responsible for the obligations of any other person or (3) cancel, release, assign or modify any material amount of indebtedness of any other person.

(p) Loans. (1) Make any Loan other than in the ordinary course of business consistent with lending policies as in effect on the date hereof; or (2) make any Loan in excess of \$100,000; or (3) make forward rate commitments (that is, commitments for a period in excess of three months) with respect to the interest rate on any Loan; or (4) make any Loan (other than a residential real estate mortgage loan) with a term greater than five years; PROVIDED that the Bank or any of its Subsidiaries may make any such Loan in the event (A) the Bank or any of its Subsidiaries has delivered to the Company and 1<sup>st</sup> United or a representative to be designated by the Company and 1<sup>st</sup> United a notice of its intention to make such Loan or advance and such additional information as the Company and 1<sup>st</sup> United or its designated representative may reasonably require and (B) the Company and 1<sup>st</sup> United or their designated representative shall not have reasonably objected to such Loan or advance by giving notice of such objection within two (2) business days following the actual receipt by the Company and 1<sup>st</sup> United of the applicable notice of intention; or (5) mortgage, encumber or permit the creation of, any Lien in respect of Loans made by the Bank or any Subsidiary of the Bank.

(q) Adverse Actions. (1) Take any action that is intended or would reasonably be expected to result in (A) any of its representations and warranties set forth in this Agreement being or becoming untrue in any material respect at any time at or prior to the Closing Date, (B) any of the conditions to the Merger set forth in Article VIII not being satisfied or (C) a material breach of any provision of this Agreement; EXCEPT, in each case, as may be required by applicable law, or (2) engage in any new line of business or that would subject the Company, the Bank or any Subsidiary of either to material regulation by a Governmental Authority that does not presently regulate such company or to regulation by a Governmental Authority that is materially different from current regulation.

(r) Taxes. Make or change any election with respect to Taxes, settle any material Tax audit or proceeding, enter into any Tax closing agreement, or request any Tax private letter or similar ruling.

(s) Affiliate Transactions. Make any payment of cash or other consideration to, or make any Loan to or on behalf of, or enter into, amend or grant a consent or waiver under, or fail to enforce, any Contractual Obligation with, any Affiliate.

(t) Capital Expenditures. Except as set forth on Schedule 6.1(t), make any capital expenditures in excess of \$10,000 in any one case or \$50,000 in the aggregate or enter into any agreement contemplating capital expenditures in excess of \$50,000 for any twelve (12) month period, the initial twelve month period, commencing on October 1, 2003; *provided, however*, that the Bank may pay in excess of \$50,000 for repairs from a casualty event so long as the proceeds of insurance are sufficient to effect the repairs.

(u) Commitments. Agree or commit to do, or enter into any Contractual Obligation regarding, anything that would be precluded by clauses (a) through (t) without first obtaining the Company's consent, which consent will not be unreasonably withheld.

6.2 Acquisition Proposal. The Bank agrees that neither it nor any of its Subsidiaries nor any of the respective officers and directors of the Bank or its Subsidiaries shall, and the Bank shall direct and use its reasonable best efforts to cause its employees, agents and representatives (including, without limitation, any investment banker, attorney or accountant retained by it or any of its Subsidiaries) not to, initiate, solicit or encourage, directly or indirectly, any inquiries or the making of any proposal or offer (including, without limitation, any proposal or offer to stockholders of the Bank) with respect to a merger, consolidation or similar transaction involving, or any purchase of all or any significant portion of the assets or any equity securities of, the Bank or its Subsidiaries (any such proposal or offer being hereinafter referred to as an "Acquisition Proposal") or engage in any negotiations concerning, or provide any confidential information or data to, or have any discussions with, any person relating to an Acquisition Proposal, or otherwise facilitate any effort or attempt to implement an Acquisition Proposal. The Bank shall immediately cease and cause to be terminated any activities, discussions or negotiations conducted prior to the date of this Agreement with any parties other than the Acquirors with respect to any of the foregoing and shall use its reasonable best efforts to enforce any confidentiality or similar agreement relating to an Acquisition Proposal. Nothing contained in this Agreement shall prevent the Bank Board from (i)

making any disclosure to its stockholders if, in the good faith judgment of the Bank Board, failure so to disclose would be inconsistent with its obligations under applicable law; (ii) before the date of the shareholders' meeting to approve the transactions contemplated under this Agreement, providing (or authorizing the provision of) information to, or engaging in (or authorizing) such discussions or negotiations with, any person who has made a bona fide written Acquisition Proposal received after the date hereof which did not result from a breach of this Section; or (iii) recommending such an Acquisition Proposal to its stockholders if and only to the extent that, in the case of actions referred to in clause (ii) or (iii), (x) such Acquisition Proposal is a Superior Proposal, or (y) the Bank Board, after having consulted with and considered the advice of outside counsel to the Bank Board, determines in good faith that providing such information or engaging in such negotiations or discussions, or making such recommendation is required in order to discharge the directors' fiduciary duties to the Bank and its stockholders. The Bank shall promptly (within 24 hours) advise the Acquirors following the receipt by the Bank of any Acquisition Proposal and the substance thereof (including the identity of the person making such Acquisition Proposal), and advise the Acquirors of any developments with respect to such Acquisition Proposal immediately upon the occurrence thereof. For purposes of this Agreement, a "Superior Proposal" means any Acquisition Proposal by a third party on terms that the Bank Board determines in its good faith judgment, after receiving the advice of its financial advisors, to be materially more favorable from a financial point of view to the Bank and its stockholders than the transaction contemplated hereby, after taking into account the likelihood of consummation of such transaction on the terms set forth therein, taking into account all legal, financial (including the financing terms of any such proposal), regulatory and other aspects of such proposal and any other relevant factors permitted under applicable law, after giving the Acquirors at least two business days to respond to such third-party Acquisition Proposal once the Board has notified the Acquirors that in the absence of any further action by the Acquirors it would consider such Acquisition Proposal to be a Superior Proposal, and then taking into account any amendment or modification to this Agreement proposed by the Acquirors. In the event the Board of Directors of the Bank accepts such a proposal, the Bank shall promptly pay to 1<sup>st</sup> United all costs incurred by the Acquirors in connection with this Agreement (up to a maximum of \$25,000) a break up fee of One Hundred Twenty-Five Thousand and no/100 Dollars (\$125,000.00) (the "Break Up Fee"). The Break Up Fee shall be paid immediately at the time the notice terminating this Agreement is delivered to the Acquirors.

**ARTICLE VII**  
**REPRESENTATIONS AND WARRANTIES**  
**OF THE COMPANY AND 1<sup>ST</sup> UNITED**

The Company and 1<sup>st</sup> United hereby represent and warrant to the Bank as follows:

7.1 Existence and Power. The Company is a Florida bank holding company and 1<sup>st</sup> United is a Florida chartered bank, each duly organized and validly existing under the laws of the jurisdiction of its formation and each has the requisite power and authority to execute, deliver and perform its obligations under this Agreement and each of the other Transaction Documents to which it is.

7.2 Authorization; No Contravention. The execution, delivery and performance by the Company and 1<sup>st</sup> United of this Agreement and each of the other Transaction Documents to which they are a party and the transactions contemplated hereby and thereby, (a) have been duly authorized by all necessary action of the Company and 1<sup>st</sup> United, (b) do not contravene the terms of the Company's or 1<sup>st</sup> United's organizational documents, or any amendment thereof, (c) do not violate, conflict with or result in any breach, default or contravention of (or with due notice or lapse of time or both would result in any breach, default, contravention of), or the creation of any Lien under, any Contractual Obligation of the Company or 1<sup>st</sup> United or any Requirement of Law applicable to the Company or 1<sup>st</sup> United, and (d) do not violate any Laws or any Orders of any Governmental Authority against, or binding upon, the Company or 1<sup>st</sup> United.

7.3 Governmental Authorization; Third Party Consents. Except as set forth in Article V, no approval, consent, compliance, exemption, authorization or other action by, or notice to, or filing with, any Governmental Authority or any other Person, and no lapse of a waiting period under any Requirement of Law, is necessary or required in connection with the execution, delivery or performance (including, without limitation, the sale, purchase, issuance and/or delivery of the Purchased Shares) by, or enforcement against, the Company and 1<sup>st</sup> United of this Agreement and each of the other Transaction Documents to which it is a party or the transactions contemplated hereby and thereby.

7.4 Binding Effect. This Agreement and each of the other Transaction Documents to which it is a party have been duly executed and delivered by the Company and 1<sup>st</sup> United and constitutes the legal, valid and binding obligations of the Company and 1<sup>st</sup> United, enforceable against it in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, fraudulent conveyance or transfer, moratorium or similar laws affecting the enforcement of creditors' rights generally and by general principles of equity relating to enforceability (regardless of whether considered in a proceeding at law or in equity).

7.5 Broker's, Finder's or Similar Fees. There are no brokerage commissions, finder's fees or similar fees or commissions payable by the Company or 1<sup>st</sup> United in connection with the transactions contemplated hereby based on any agreement, arrangement or understanding with the Company or 1<sup>st</sup> United or any action taken by the Company or 1<sup>st</sup> United.

7.6 Regulatory Approvals. As of the date hereof: (i) the Company is not aware of any reason why the approvals set forth herein will not be received without the imposition of a condition, restriction or requirement from the state or federal regulatory authorities except a condition, restriction or requirement relating to capital; and (ii) subject to receipt of the regulatory approvals referred to in the preceding paragraph and expiration of the related waiting periods, and required filings or satisfaction of the requirements for exemptions from filing under federal and state securities laws, the execution, delivery and performance of this Agreement and the consummation of the transactions contemplated hereby do not and will not (A) constitute a breach or violation of, or a default under, or give rise to any Lien, any acceleration of remedies or any right of termination under, any law, rule or regulation or any judgment, decree, order, governmental permit or license, or agreement, indenture or instrument of the Company or of any of its Subsidiaries or to which the Company or any of its Subsidiaries or properties is subject or bound, (B) constitute a breach or

violation of, or a default under, the certificate of incorporation or Bylaws (or similar governing documents) of the Company or any of its Subsidiaries, or (C) require any consent or approval under any such law, rule, regulation, judgment, decree, order, governmental permit or license, agreement, indenture or instrument.

**ARTICLE VIII**  
**CONDITIONS TO THE OBLIGATION**  
**OF THE COMPANY AND 1<sup>st</sup> UNITED TO CLOSE**

The obligation of the Company and 1<sup>st</sup> United to pay the Purchase Price at the Closing and to perform any obligations hereunder, shall be subject to the satisfaction as determined by, or waiver by the Company and 1<sup>st</sup> United, the following conditions on or before the Closing Date.

8.1 Secretary's Certificate. The Company and 1<sup>st</sup> United shall have received a certificate from the Bank, in form and substance satisfactory to the Company and 1<sup>st</sup> United, dated the Closing Date and signed by the President and the Secretary or an Assistant Secretary of the Bank, certifying (a) that the Bank is in good standing with the Secretary of State of the State of Florida, (b) that the attached copies of the Articles of Incorporation, the Bylaws, and resolutions of the Board of Directors of the Bank approving this Agreement and each of the other Transaction Documents and the transactions contemplated hereby and thereby, are all true, complete and correct and remain unamended and in full force and effect, (c) as to the incumbency and specimen signature of each officer of the Bank executing this Agreement and each other Transaction Document delivered to the Company and 1<sup>st</sup> United on behalf of the Bank, and (d) that all of the representations and warranties are in full force and effect and unchanged except for those matters which are relevant only to the time given.

8.2 Dissenting Shares. The number of Dissenting Shares, if any, shall not exceed 10% of the outstanding shares of Common Stock.

8.3 [Reserved].

8.4 Regulatory Approvals. All approvals, authorizations and consents of the Florida Office of Financial Regulation, the Federal Deposit Insurance Company, the Federal Reserve Bank and any other Governmental Authority having jurisdiction over the transactions contemplated herein shall have been procured.

8.5 Litigation. No action, suit, or proceeding shall be pending or threatened before any court or administrative agency of any federal, state, local, or foreign jurisdiction wherein an unfavorable judgment, order, decree, stipulation, injunction or charge could (a) prevent consummation of the transactions contemplated by this Agreement, (b) cause any of the transactions contemplated by this Agreement to be rescinded following consummation or (c) affect adversely the right after the Effective Time of the Surviving Bank to own, operate, or control substantially all of the assets and operations of the Bank (and no such judgment, order, decree, stipulation, injunction or charge shall be in effect).

8.6 No Material Adverse Change. Since the date hereof, there shall have been no Material Adverse Change in the Condition of the Bank, which Material Adverse Change cannot be or has not been cured within 30 days after the giving of written notice to the Bank of the Material Adverse Change.

8.7 Performance of Obligations of the Bank. The Bank shall have performed in all material respects all obligations required to be performed by it under this Agreement at or prior to the Effective Time, and the Company and 1<sup>st</sup> United shall have received a certificate, dated the Closing Date, signed on behalf of the Bank by the Chief Executive Officer and the Chief Financial Officer of the Bank to such effect.

8.8 Shareholder Approval. This Agreement and the Merger shall have received the requisite approval of the shareholders of the Bank in accordance with the Requirements of Law.

8.9 Third Party Approvals. The Bank shall have procured all of the third party approvals, authorizations and consents necessary for consummation of the transactions contemplated by this Agreement, including those required under lease agreements, and such consents shall not contain provisions which unduly impair or restrict the operations, or would have a material adverse effect on the condition of the Surviving Bank, or render consummation of the Merger unduly burdensome, in each case as determined in the reasonable discretion of the Company and 1<sup>st</sup> United.

## **ARTICLE IX**

### **CONDITIONS TO THE OBLIGATION**

### **OF THE BANK TO CLOSE**

The obligation of the Bank to perform its obligations hereunder shall be subject to the satisfaction as determined by, or waiver by, the Bank of the following conditions on or before the Closing Date:

9.1 Payment of Purchase Price. The aggregate purchase price for the Purchased Shares to be purchased by the Company shall be available for disbursement from escrow by the Exchange Agent to the Bank's shareholders.

9.2 Secretary's Certificate. The Bank shall have received a certificate from the Company and 1<sup>st</sup> United, in form and substance satisfactory to the Bank, dated the Closing Date and signed by the Secretary or an Assistant Secretary of the Company and 1<sup>st</sup> United, certifying (a) that the Company and 1<sup>st</sup> United are in good standing under the laws of the State of Florida, (b) that the attached copies of the organizational documents of the Company and 1<sup>st</sup> United, and resolutions of the Board of Directors of the Company and 1<sup>st</sup> United approving this Agreement and the transactions contemplated hereby and thereby, are all true, complete and correct and remain unamended and in full force and effect and (c) as to the incumbency and specimen signature of each officer of the Company and 1<sup>st</sup> United executing this Agreement and any other document delivered in connection herewith on behalf of the Company and 1<sup>st</sup> United.

**ARTICLE X**  
**BREACH, TERMINATION AND REMEDIES**

10.1 Termination. This Agreement may be terminated by written notice as provided below whereupon the party giving notice shall have the remedies provided in subsection (b) below:

(a) Mutual Consent. At any time prior to the Closing Date, by the mutual consent of the Bank, 1<sup>st</sup> United and the Company, if the Board of Directors of the Company and 1<sup>st</sup> United so determines by vote of a majority of the members of their entire Boards and the Board of Directors of the Bank so determines.

(b) Breach. At any time prior to the Closing Date, by the Bank if its Board of Directors so determines or the Company or 1<sup>st</sup> United, if their Boards of Directors so determines by vote of a majority of the members of their entire Boards, in the event of either: (i) a material breach by the other party of any representation or warranty contained herein, which breach cannot be or has not been cured within fifteen (15) days after the giving of written notice to the breaching party of such breach; or (ii) a material breach by the other party of any of the covenants or agreements contained herein, which breach cannot be or has not been cured within 30 days after the giving of written notice to the breaching party of such breach; or (iii) the Bank fails to obtain shareholder approval; or (iv) the Bank does not cooperate in the approval process; or (v) an uncured Material Adverse Change occurs regarding the Bank or its subsidiaries. In addition to the right to terminate the Company's and 1<sup>st</sup> United's sole and exclusive remedy shall be to receive from the Escrow Agent all amounts deposited with it plus from the Bank the Break Up Fee, and the Company and 1<sup>st</sup> United shall have no other recourse whatsoever. The Bank's sole and exclusive remedy shall be to receive the Break Up Fee and the Bank shall have no other recourse whatsoever.

(c) Delay. At any time prior to the Closing Date, by the Bank if its Board of Directors, 1<sup>st</sup> United, if its board of Directors, or the Company, if its Board of Directors, in each case by a vote of a majority of the members of its entire Board so determines, in the event that the purchase is not consummated by April 30, 2004 (subject to extension as provided in Section 2.3), except to the extent that the failure of the Closing to occur arises out of or results from the knowing action or inaction of the party seeking to terminate.

**ARTICLE XI**  
**AFFIRMATIVE COVENANTS**

11.1 Preservation of Existence. Each of the Bank, the Company and 1<sup>st</sup> United shall, and shall cause each of their Subsidiaries to:

(a) preserve and maintain in full force and effect its existence and good standing under the laws of its jurisdiction of formation or organization;

(b) preserve and maintain in full force and effect all material rights, privileges, qualifications, applications, licenses and franchises necessary in the normal conduct of its business;

- (c) use its reasonable best efforts to preserve its business organization;
- (d) conduct its business in the ordinary course in accordance with sound business practices, keep its properties in good working order and condition (normal wear and tear excepted), and from time to time make all needed repairs to, renewals of or replacements of its properties so that the efficiency of its business operation shall be reasonably maintained and preserved;
- (e) comply with all Requirements of Law and with the directions of any Governmental Authority having jurisdiction over the Bank or its business or property;
- (f) file or cause to be filed in a timely manner all reports, applications, estimates and licenses that shall be required by a Governmental Authority; and
- (g) use their best efforts to obtain all consents or approvals of all persons, other than Governmental Authorities, required for or in connection with the execution, delivery and performance of this Agreement and the consummation of the purchase and such consents or approvals shall be in full force and effect, unless the failure to obtain any such consent or approval is not reasonably likely to have, individually or in the aggregate, a Material Adverse Change on the Bank and the surviving entity.

11.2 Books and Records. The Bank shall keep proper books of record and account, in which full and correct entries shall be made of all financial transactions and the assets and business of the Bank in accordance with GAAP consistently applied, except as required by applicable regulation or law.

11.3 Back-ups of Computer Software. The Bank shall make back-ups of all material computer software programs and databases and shall maintain such software programs and databases at a secure off-site location.

11.4 Regulatory Applications. Within ten (10) days after the exit conference to be conducted by the Federal Reserve Bank of Atlanta and the Florida Office of Financial Regulation in connection with their examination of 1<sup>st</sup> United scheduled to be held in January, 2004, 1<sup>st</sup> United and the Company and their respective Subsidiaries shall effect all filings necessary to obtain all permits, consents, approvals and authorizations of all third parties and Governmental Authorities necessary to consummate the transactions contemplated by this Agreement. The Company or 1<sup>st</sup> United will promptly file any additional information requested as soon as practicable after receipt of request thereof. The Company or 1<sup>st</sup> United shall have the right to review in advance, subject to applicable laws relating to the exchange of information, with respect to, all material written information submitted to any third party or any Governmental Authority in connection with the transactions contemplated by this Agreement. Each party filing an application will provide a copy to the other promptly after filing and will share copies of all correspondence regarding those applications with the other party. In exercising the foregoing right, the parties agree to act reasonably and as promptly as practicable.



11.5 Information. Each of the Bank, 1<sup>st</sup> United and the Company agrees, upon request, to furnish the other party with all information concerning itself, its Subsidiaries, directors, officers and stockholders and such other matters as may be reasonably necessary or advisable in connection with any filing, notice or application made by or on behalf of such other party or any of its Subsidiaries to any third party or Governmental Authority or in connection with any other action required to be taken in connection with the transaction contemplated by this Agreement. 1<sup>st</sup> United and the Company shall have full and complete access to all records, books and other information kept by the Bank through the date of closing or termination of this Agreement, and shall have the right to send a representative to all meetings of the Board of Directors of the Bank.

11.6 Employees. 1<sup>st</sup> United shall work with the Bank in an effort to provide continued employment for employees of the Bank; *provided, however*, that 1<sup>st</sup> United shall not be required to negotiate with or hire any such employees. If 1<sup>st</sup> United elects to hire an employee, 1<sup>st</sup> United shall, for purposes of determining eligibility for 1<sup>st</sup> United retirement and benefit plans, consider the employee's initial date of service with the Bank to be the employee's initial date of service with 1<sup>st</sup> United. Neither 1<sup>st</sup> United nor the Company shall speak to any employee of the Bank concerning the employee's employment status after the Closing without the express permission of the Bank. Nothing herein shall be construed to give rise to any third party rights on behalf of any person.

11.7 Stay Bonus Payments. 1<sup>st</sup> United shall have the right to enter into agreements with employees of the Bank as 1<sup>st</sup> United in its sole discretion shall determine which may provide such employees an amount (not to exceed \$30,000 in the aggregate) as payment for their continued employment with the Successor Bank for such period of time as 1<sup>st</sup> United shall determined following the Closing, such payments to be made by 1<sup>st</sup> United to such employees upon the termination of their employment following the Closing.

11.8 Shareholder Approvals. The Bank shall call a meeting of its shareholders and mail to them definitive proxy materials relating to such meeting in order that the Bank shareholders may consider and vote upon approval of this Agreement and the Merger in accordance with applicable law on or before February 29, 2004. The Bank proxy materials shall contain the affirmative recommendation of the Board of Directors of the Bank in favor of the approval of this Agreement and the Merger. The Company and 1<sup>st</sup> United shall provide to the Bank such information and assistance in connection with the preparation of the proxy materials as the Bank may reasonably request. The Company, as the sole shareholder of 1<sup>st</sup> United, agrees to vote in favor of approval of this Agreement and the Merger.

11.9 Severance Payments. Prior to the Closing, the Bank, 1<sup>st</sup> United and the Company shall agree upon the severance benefits to be paid by the Bank and the recipient employees.

## **ARTICLE XII** **MISCELLANEOUS**

12.1 Notices. All notices, demands and other communications provided for or permitted hereunder shall be made in writing and shall be by registered or certified first-class mail, return receipt requested, telecopier, courier service or personal delivery:

If to the Company: 1<sup>st</sup> United Bancorp, Inc.  
One North Federal Highway  
Boca Raton, FL 33432  
Attn: John Marino

If to the 1<sup>st</sup> United: 1<sup>st</sup> United Bank  
One North Federal Highway  
Boca Raton, FL 33432  
Attn: Rudy Schupp

with a copy to: The Law Offices of Russell T. Kamradt, P.A.  
11641 Kew Gardens Avenue, Suite 207  
Palm Beach Gardens, FL 33410  
Telephone: (561) 622-2822  
Facsimile: (561) 622-9799  
Attn: Russell T. Kamradt

If to the Bank: First Western Bank  
5854 South Flamingo Road  
Cooper City, FL 33330  
Attn: David E. Malinoff

with a copy to: Stroock Stroock & Lavan LLP  
First Union Financial Center  
200 South Biscayne Blvd.  
Miami, FL 33132-2219  
Attn: Michael Basile

All such notices, demands and other communications shall be deemed to have been duly given when delivered by hand, if personally delivered; when delivered by courier, if delivered by commercial courier service; five (5) Business Days after being deposited in the mail, return receipt requested, postage prepaid, if mailed; and when receipt is mechanically acknowledged, if telecopied. Any party may by notice given in accordance with this Section 12.1 designate another address or Person for receipt of notices hereunder.

12.2 Successors and Assigns; Third Party Beneficiaries. This Agreement shall inure to the benefit of and be binding upon the successors and permitted assigns of the parties hereto. No party may assign any of its rights under this Agreement without the written consent of the other party hereto. No Person other than the parties hereto and their successors and permitted assigns is intended to be a beneficiary of this Agreement.

12.3 Amendment and Waiver.

(a) No failure or delay on the part of the Company, 1<sup>st</sup> United or the Bank in exercising any right, power or remedy hereunder shall operate as a waiver thereof, nor shall

any single or partial exercise of any such right, power or remedy preclude any other or further exercise thereof or the exercise of any other right, power or remedy. The remedies provided for herein are cumulative and are not exclusive of any remedies that may be available to the Company and 1<sup>st</sup> United at law, in equity or otherwise.

(b) Any amendment, supplement or modification of or to any provision of this Agreement, any waiver of any provision of this Agreement, and any consent to any departure by the Company, 1<sup>st</sup> United or the Bank from the terms of any provision of this Agreement, shall be effective (i) only if it is made or given in writing and signed by the Company, 1<sup>st</sup> United and the Bank, and (ii) only in the specific instance and for the specific purpose for which made or given. Except where notice is specifically required by this Agreement, no notice to or demand on the Company or 1<sup>st</sup> United in any case shall entitle the Company or 1<sup>st</sup> United to any other or further notice or demand in similar or other circumstances.

12.4 Counterparts. This Agreement may be executed by the parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement.

12.5 Headings. The headings in this Agreement are for convenience of reference only and shall not limit or otherwise affect the meaning hereof.

12.6 GOVERNING LAW. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF FLORIDA, WITHOUT REGARD TO THE PRINCIPLES OF CONFLICTS OF LAW THEREOF.

12.7 Severability. If any one or more of the provisions contained herein, or the application thereof in any circumstance, is held invalid, illegal or unenforceable in any respect for any reason, the validity, legality and enforceability of any such provision in every other respect and of the remaining provisions hereof shall not be in any way impaired, unless the provisions held invalid, illegal or unenforceable shall substantially impair the benefits of the remaining provisions hereof.

12.8 Rules of Construction. Unless the context otherwise requires, references to sections or subsections refer to sections or subsections of this Agreement.

12.9 Entire Agreement. This Agreement, together with the exhibits and schedules hereto, and the other Transaction Documents are intended by the parties as a final expression of their agreement and intended to be a complete and exclusive statement of the agreement and understanding of the parties hereto in respect of the subject matter contained herein and therein. There are no restrictions, promises, representations, warranties or undertakings, other than those set forth herein or therein. This Agreement, together with the exhibits and schedules hereto, and the other Transaction Documents supersede all prior agreements and understandings between the parties with respect to such subject matter.

12.10 Publicity, Confidentiality. Except as may be required by applicable Requirements of Law, none of the parties hereto shall issue a publicity release or public announcement concerning

this Agreement or the transactions contemplated hereby without the prior written consent by the other party hereto, which consent shall not be unreasonably withheld by any party.

12.11 Further Assurances. Each of the parties shall execute such documents and perform such further acts (including, without limitation, obtaining any consents, exemptions, authorizations or other actions by, or giving any notices to, or making any filings with, any Governmental Authority or any other Person) as may be reasonably required or desirable to carry out or to perform the provisions of this Agreement.

12.12 Expenses. Each party hereto will bear all expenses incurred by it in connection with this Agreement and the transactions contemplated hereby.

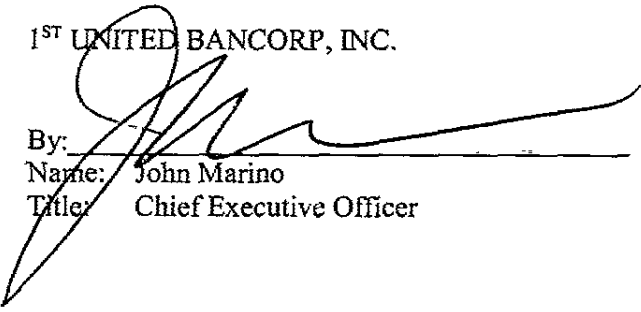
12.13 Notification of Certain Matters.

(a) Each of the Company, 1<sup>st</sup> United and the Bank shall give prompt notice to the other of any fact, event or circumstance known to it that would reasonably be expected, individually or taken together with all other facts, events and circumstances known to it, (1) to result in any Material Adverse Effect with respect to it or (2) to cause or constitute a material breach of any of its representations, warranties, covenants or agreements contained herein.

(b) The Company shall promptly notify the Bank of any written notice or other bona fide communication from any Person alleging that the consent of such Person is or may be required as a condition to the purchase.

IN WITNESS WHEREOF, the undersigned have executed, or have caused to be executed, this Agreement on the date first written above.


1<sup>ST</sup> UNITED BANCORP, INC.

By:   
Name: John Marino  
Title: Chief Executive Officer

1<sup>ST</sup> UNITED BANK

By:   
Name: Rudy Schupp  
Title: Chief Executive Officer

FIRST WESTERN BANK

By:   
Name: David E. Malinoff  
Title: President and Chief Executive Officer

## EXHIBIT A

### DIRECTORS AND EXECUTIVE OFFICERS OF THE SURVIVING CORPORATION

#### Directors:

Paula Berliner  
2600 Island Boulevard, #806  
Aventura, FL 33160

Jeffery L. Carrier  
5887 Barclay Lane  
Naples, FL 34110

Anthony Comparato  
144 Coconut Palm Road  
Boca Raton, FL 33432

Ronald A. David, Esquire  
1130 S.W. 14<sup>th</sup> Drive  
Boca Raton, FL 33486

Lawrence P. Deziel, M.D.  
781 Harbour Isles Court  
North Palm Beach, FL 33410

David A. Friedman  
7069 Brunswick Circle  
Boynton Beach, FL 33437

Herman Jeffer  
19950 Beach Road  
Tequesta, FL 33469

Thomas E. Lynch  
28 Country Road  
Village of Golf, FL 33436

John Marino  
14662 Rolling Rock Place  
Wellington, FL 33414

Warren S. Orlando  
21731 Frontenac Court  
Boca Raton, FL 33433

#### Executive Officers

Warren S. Orlando  
21731 Frontenac Court  
Boca Raton, FL 33433  
Chairman of the Board

Rudy E. Schupp  
11874 Lakeshore Place  
North Palm Beach, FL 33408  
President and Chief Executive Officer

John Marino  
14662 Rolling Rock Place  
Wellington, FL 33414  
Chief Operating Officer and Chief  
Financial Officer

Rudy E. Schupp  
11874 Lakeshore Place  
North Palm Beach, FL 33408

Young Song  
3401 Embassy Drive  
West Palm Beach, FL 33401

Allen Tucker  
3440 S. Ocean Blvd., #502 S  
Palm Beach, FL 33480

Donald Vinik  
21641 Frontenac Court  
Boca Raton, FL 33433

**RESTATED ARTICLES OF INCORPORATION  
OF  
1ST UNITED BANK**

1<sup>st</sup> United Bank, whose Articles of Incorporation were originally filed on March 7, 2000 under the name Advantage Bank, does hereby set forth herein its Restated Articles of Incorporation, under and by virtue of the laws of the State of Florida.

**ARTICLE I**

The name of the corporation shall be 1st United Bank and its place of business shall be One North Federal Highway, Boca Raton, FL 33432.

**ARTICLE II**

The general nature of the business to be transacted by this corporation shall be that of a general commercial banking business with all the rights, powers, and privileges granted and conferred by the Florida Financial Institutions Codes, regulating the organization, powers, and management of banking corporations.

**ARTICLE III**

The total number of shares authorized to be issued by the corporation shall be 3,000,000. Such shares shall be of a single class and shall have a par value of \$5.00 per share.

**ARTICLE IV**

The term for which said corporation shall exist shall be perpetual unless terminated pursuant to the Florida Financial Institutions Codes.

**ARTICLE V**

The number of directors shall not be fewer than five (5). A majority of the full board of directors may, at any time during the years following the annual meeting of shareholders, increase the number of directors by not more than two and appoint persons to fill resulting vacancies. The names and street addresses of the directors of the corporation as of the date hereof are:

<u>Name</u>	<u>Street Address</u>
Paula Berliner	2600 Island Boulevard, #806, Aventura, FL 33160
Jeffery L. Carrier	5887 Barclay Lane, Naples, FL 34110
Anthony Comparato	144 Coconut Palm Road, Boca Raton, FL 33432
Ronald A. David, Esquire	1130 S.W. 14 <sup>th</sup> Drive, Boca Raton, FL 33486
Lawrence P. Deziel, M.D.	781 Harbour Isles Court, North Palm Beach, FL 33410



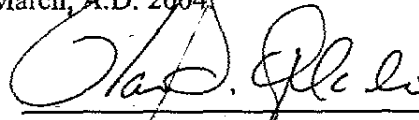
David A. Friedman  
Herman Jeffer  
Thomas E. Lynch  
John Marino  
Warren S. Orlando  
Rudy E. Schupp  
Young Song  
Allen Tucker  
Donald Vinik

7069 Brunswick Circle, Boynton Beach, FL 33437  
19950 Beach Road, Tequesta, FL 33469  
28 Country Road, Village of Golf, FL 33436  
14662 Rolling Rock Place, Wellington, FL 33414  
21731 Frontenac Court, Boca Raton, FL 33433  
11874 Lakeshore Place, North Palm Beach, FL 33408  
3401 Embassy Drive, West Palm Beach, FL 33401  
3440 S. Ocean Blvd., #502 S, Palm Beach, FL 33480  
21641 Frontenac Court, Boca Raton, FL 33433

#### ARTICLE VI

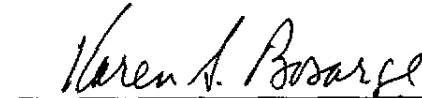
The name and street address of the person signing these Restated Articles of Incorporation is Warren S. Orlando, One North Federal Highway, Boca Raton, FL 33432.

In witness of the foregoing, the undersigned has executed these Articles of Incorporation declaring and certifying that the facts stated herein are true, and hereby subscribe thereto and hereunto set his hand and seal this 15<sup>th</sup> day of March, A.D. 2004.

  
Warren S. Orlando

STATE OF FLORIDA                     )  
COUNTY OF PALM BEACH         )

The foregoing instrument was acknowledged before me this 15<sup>th</sup> day of March, 2004, by Warren S. Orlando.

  
Printed Name: KAREN S. BOSARGE  
Notary Public - State of Florida at Large

Personally known ☒ or Produced Identification ☐  
Type of Identification Produced \_\_\_\_\_

**CERTIFICATE OF PRESIDENT AND CHIEF OPERATING OFFICER**

The undersigned, President and Chief Executive Officer of 1<sup>st</sup> United Bancorp, Inc. ("Bancorp"), does hereby certify that on January 23, 2004 Bancorp, as the sole shareholder of 1<sup>st</sup> United Bank ("Bank"), approved the Acquisition Agreement dated December 10, 2003 between Bancorp, the Bank and First Western Bank, and the merger of First Western Bank with and into the Bank thereunder, and there were no dissenting shareholders.

IN WITNESS WHEREOF, this Certificate is signed as of March 15, 2004.

1<sup>ST</sup> UNITED BANCORP, INC.

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

John Marino

President and Chief Operating Officer

## **CERTIFICATE OF PRESIDENT AND CHIEF OPERATING OFFICER**

The undersigned, President and Chief Executive Officer of First Western Bank, does hereby certify that on February 23, 2004 the shareholders of First Western Bank, approved the Acquisition Agreement dated December 10, 2003 between 1<sup>st</sup> United Bancorp, 1<sup>st</sup> United Bank and First Western Bank, and the merger of First Western Bank with and into 1<sup>st</sup> United Bank thereunder, and there were no dissenting shareholders.

IN WITNESS WHEREOF, this Certificate is signed as of March 15, 2004.

FIRST WESTERN BANK

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

David E. Malinoff

President and Chief Executive Officer