

UNITED STATES OF AMERICA BEFORE THE  
OFFICE OF THRIFT SUPERVISION

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In the Matter of: )

MICHAEL R. GARDNER )

Former Counsel and Consultant )  
of Lincoln Savings )  
and Loan Association, )  
Irvine, California and its )  
Holding Company, American )  
Continental Corporation )

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Order No.: AP 93-62  
Dated: July 16, 1993

OFFER OF AND CONSENT TO SETTLEMENT

Michael R. Gardner ("Gardner") hereby submits the following offer to settle:

1. Consideration. The OTS is of the opinion that grounds exist to initiate an administrative cease and desist proceeding against Gardner pursuant to Section 8(b) of the Federal Deposit Insurance Act ("FDIA"), as amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ("FIRREA"), 12 U.S.C. Section 1818(b). Gardner desires to cooperate with the OTS to avoid the time and expense of such administrative litigation, and without admitting or denying that such grounds exist, solely for the purpose of effectuating this Offer and Consent to Settlement ("Offer"), hereby stipulates and agrees to the following terms in consideration of the forbearance by the OTS from initiating such administrative cease-and-desist litigation against Gardner with respect to the matters covered in the accompanying Order to Cease and Desist for Affirmative Relief (the "Order") attached hereto and incorporated

by reference.

2. Jurisdiction

(a) Gardner, a communications lawyer, who represented American Continental Corporation ("ACC") and served as a broadcast consultant to its subsidiary Lincoln Savings and Loan Association ("Lincoln") and its subsidiary, Lincoln Communication Company ("Lincom") participated in the conduct of the affairs of Lincoln and was an "institution-affiliated party" with respect to Lincoln as that term is defined in Section 3(u)(3) of the FDIA, as amended by FIRREA, 12 U.S.C. §1818(u)(3).

(b) Lincoln was a "saving association" within the meaning of Section 2(4) of the Home Owners' Loan Act of 1933, as amended by FIRREA, 12 U.S.C. §1813(b). Accordingly, it is an "insured depository institution" as that term is defined in Section 3(c) of the FDIA, as amended by FIRREA, 12 U.S.C. §1813(c).

(c) Pursuant to Section 3(q) of the FDIA, as amended by FIRREA, 12 U.S.C. §1813(q), the Director of OTS is the "appropriate Federal banking agency" to maintain an enforcement proceeding against such a savings association or its institution-affiliated parties. Therefore, Gardner is subject to the jurisdiction and authority of the OTS to initiate and maintain a cease-and-desist proceeding against him pursuant to Section 8(b) of the FDIA, as amended by FIRREA, 12 U.S.C. §1818(b).

3. Consent. Gardner without admitting or denying that grounds exist for instituting a cease and desist proceeding consents to the issuance by the OTS of the Order and stipulates



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DEPARTMENT OF THE TREASURY

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ORDER TO CEASE AND DESIST

**WHEREAS**, the Office of Thrift Supervision (the "OTS") has conducted a formal examination proceeding pursuant to section 5(d)(1)(B) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1464(d)(1)(B);

**WHEREAS**, as the result of that examination, the OTS has concluded that:

1. In or about 1983, Michael R. Gardner ("Gardner") and his law firm became legal counsel to American Continental Corporation ("ACC"), the parent of Lincoln Savings and Loan Association ("Lincoln"), and the subsidiaries of ACC.
2. In or about the summer of 1984, shortly after ACC had acquired Lincoln, Gardner gave ACC and its principal shareholder, Charles H. Keating, Jr. ("Keating"), general advice concerning the advantages of ACC, and/or its various subsidiaries, which would

include Lincoln and its subsidiary, Lincoln Communications Company ("LinCom"), making investments in the broadcast industry.

3. In the latter part of 1984, ACC decided to try to acquire a controlling interest in Gulf Broadcasting Company ("Gulf") through one of its subsidiaries.

4. In or about September, 1984, Gardner entered into an oral consulting agreement with Keating whereby he agreed to make himself available to serve as an officer of Gulf, serve as a member on its Board of Directors, and to manage the company's operations in the event ACC or one of its subsidiaries successfully acquired a controlling interest in Gulf or any other broadcast group that might be acquired.

5. On or about October through December, 1984, LinCom purchased a substantial number of shares of stock in Gulf, but was unsuccessful in its attempt to acquire a controlling interest in Gulf. LinCom liquidated its interests in Gulf between June 1985 and December 1986 and realized a net profit in the approximate amount of \$50 million on the liquidation.

6. No payments pursuant to the original oral consultant arrangement were made to Gardner by ACC, Lincoln or LinCom before the takeover attempt of Gulf.

7. Sometime in the spring of 1985, Keating and Gardner modified the terms of the oral agreement

described in paragraph 4 above. ACC was pleased with the profit that had been made on the sale by Lincoln and LinCom of the Gulf shares, and continued in its desire to acquire a broadcasting company as well as to have Gardner play a management role in whatever broadcasting entity ACC and/or its subsidiaries should acquire in the future.

8. The terms of the modified agreement contemplated that Gardner be exclusively available to manage any broadcasting company that ACC or its subsidiaries might acquire and serve as a consultant providing investment advice to ACC and its subsidiaries on future acquisitions in the broadcast industry. The modified agreement contemplated that Gardner would receive an additional premium for the profits to Lincoln and Lincom resulting from the Gulf transaction which neither Lincoln nor Lincom had any legal obligation to pay.

9. Although the modified agreement did not have a date certain defining the time it was to remain in effect, it expired in early 1987. Gardner provided investment advice to ACC throughout 1985, 1986, and up to early 1987 and remained available during that time to run and manage any broadcasting company, which ACC, Lincoln and its subsidiaries might acquire.

10. Neither the original nor the modified agreement was reduced to writing. Neither Lincoln's Board of Directors nor the Board of Directors of LinCom considered or approved the terms of the original oral agreement or the modified agreement.

11. Neither ACC, Lincoln nor its subsidiaries obtained independent legal advice from any other legal counsel before entering into the agreements with Gardner. Moreover, Gardner did not advise ACC, Lincoln or its subsidiaries to seek independent legal advice regarding either agreement.

12. After the terms of the modified agreement were finalized, and for a period of one and one-half years thereafter, and during the same period that LinCom received payment on account of its liquidation of its Gulf stock, Gardner through his professional corporation, Michael Gardner, P.C., received seven checks from Lincoln and/or Lincom totalling \$1.5 million.

13. Neither Gardner nor his professional corporation submitted a bill or statement of services to Lincoln, LinCom or Keating for these payments and there is no corporate minute or other record evidencing that any of the above-referenced seven payments were authorized or approved by Lincoln's or LinCom's Boards of Directors;

**WHEREAS**, the OTS has further concluded as a result of its investigation that Lincoln and its subsidiary, LinCom, engaged in unsafe and unsound practices by permitting Gardner to be compensated under a consulting contract which (i) was never approved by the Board of Directors, (ii) was entered into by Keating who was neither an officer or director of Lincoln and without authority to bind Lincoln, (iii) was not reduced to a written agreement specifying the services to be provided and the manner and amount of compensation, and (iv) resulted in Gardner receiving a premium from Lincoln and LinCom for profits resulting from the investment advice to ACC and its subsidiaries which premium neither Lincoln nor LinCom had any legal obligation to pay.

**WHEREAS**, the OTS has further concluded that Gardner, did not advise Lincoln and LinCom to seek independent legal advice regarding the modified agreement before he entered into the modified agreement and accepted a premium which neither entity had any legal obligation to pay, thereby engaged in actions to cause, bring about, participate in, and/or counsel the unsafe and unsound practices of Lincoln and LinCom, and that grounds therefore exist pursuant to FDIA Section 8(b), 12 U.S.C. § 1818(b), for the imposition of the relief set forth herein;

**WHEREAS**, GARDNER has agreed through a monetary settlement with the Resolution Trust Corporation ("RTC") to settle certain claims arising out of his receipt of the payments from LinCom and Lincoln described above that were asserted by the RTC in RTC v.

Gardner, Civ. Action No. 91-2226-CRR (D.D.C.) and the OTS has determined that Gardner's settlement with the RTC is reasonable and in the best interests of the United States Government.

**WHEREAS**, GARDNER and the OTS wish to avoid any further time and expense of litigating any claims the OTS might assert against him based upon the conclusions reached by the OTS in its investigation;

**WHEREAS**, GARDNER has executed an Offer and Consent to Settlement ("OFFER"), which was accepted and approved by the OTS, acting by and through its Acting Director, Jonathan L. Fiechter, (the "Acting Director"); and

**WHEREAS**, without any adjudication on the merits, GARDNER in the OFFER has agreed and consented to the issuance of this Order to Cease and Desist ("ORDER"), pursuant to Section 8(b) of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1818(b); and

**WHEREAS**, GARDNER neither admits nor denies the allegations, assertions, facts, unsafe and unsound practices, and violations of law, rules, and regulations set forth above as such pertain and apply to him;

**NOW THEREFORE, IT IS ORDERED THAT:**

1. GARDNER shall not:

a. Commit or take any action for or toward, causing, bringing about, participating in, counseling, or facilitating in any way the commitment of, unsafe and unsound practices and violations of laws, rules and regulations set forth above; and

b. Commit or take any action for or toward, causing, bringing about, participating in, counseling, or facilitating in any way the commitment of, any unsafe and unsound practice or any violation of any law, rule, regulation or condition imposed in writing by a Federal regulatory banking agency in connection with the conduct of the business of any federally insured financial institution set forth in Section 8(e)(7)(A) of the FDIA, 12 U.S.C. § 1818(e)(7)(A); and

c. Enter into any contract or arrangement with an insured depository institution, as defined under Section 3(c) of the FDIA, as amended by FIRREA, 12 U.S.C. § 1813(c), to serve as an officer, consultant, agent, service provider or employee, unless: (1) the terms of such contract or arrangement are in writing and specifically approved by the insured depository institution's board of directors, (2) such contract or arrangement provides for the total amount of compensation to be paid, the manner in which such compensation shall be computed, a detailed description of the services to be provided, the method and terms of payment and the period of time such contract shall remain in force and effect and (3) Gardner notifies the OTS in writing within fifteen (15) days that he has entered into such a contract or arrangement.

2. GARDNER shall, at the OTS's request, on reasonable notice and without service of a subpoena, provide discovery and testify truthfully at any deposition and at any judicial or administrative proceeding brought by the OTS and, if requested,

provide sworn statements in connection with any formal examination or investigation initiated by the OTS that relates in any way to the affairs of Lincoln Savings and Loan Association, Irvine, California ("Lincoln") and any continuing litigation or proceeding brought by the OTS as a result of its examination relating to Lincoln and its institution-affiliated parties.

3. For good and valuable consideration, the receipt of which is hereby acknowledged, the OTS in all of its capacities on behalf of itself, and its representatives, predecessors, successors and assigns does hereby release and forever discharge GARDNER from any and all claims, rights, damages, demands or causes of action which the OTS has had, now has, or may have, but only to the extent that such claims, rights, damages, demands, or causes of action arise from or are based upon matters described herein; provided, however, that nothing in this ORDER and the OFFER shall release or discharge any claims, the OTS has or may have against any person or entity other than GARDNER.

This ORDER and the OFFER does not release, discharge, compromise, settle, dismiss or resolve, or in any way affect any civil actions, charges against, or liability of GARDNER that arise pursuant to this action or otherwise, and that may be or have been brought by the Resolution Trust Corporation or any other governmental entity other than the OTS.

The construction and validity of this ORDER and the OFFER shall be governed by the laws of the United States of America.

4. Prior to the issuance of this ORDER, GARDNER provided

the OTS with sworn financial disclosure which was relied upon by the OTS in agreeing to the terms and conditions of this ORDER.

5. This ORDER and the OFFER may be used in any proceeding brought by the OTS to enforce this ORDER; provided, however, that OTS shall not use the ORDER, the OFFER or the relief consented to by virtue of this ORDER and the OFFER for any other purpose in proceedings before the OTS or any other administrative or judicial tribunal.

6. Any notice required pursuant to this ORDER shall be sent to the following address:

Regional Director  
Office of Thrift Supervision  
1 Montgomery Street, Suite 400  
San Francisco, CA 94104

7. This ORDER shall be effective as of the date hereof.

APPROVED AS TO FORM

OFFICE OF THRIFT SUPERVISION  
By:

/S/

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Andrew L. Lipps  
Counsel For  
Michael R. Gardner

/S/

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Jonathan L. Fiechten  
Acting Director