

UNITED STATES OF AMERICA
Before the
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

In the Matter of
JAMES S. FLEISCHER

OTS AP No. 92-53

Date: May 21, 1992

ORDER TO CEASE AND DESIST FOR AFFIRMATIVE RELIEF FROM
JAMES S. FLEISCHER

I.

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:

James S. Fleischer ("Fleischer") and his firm, Silver, Freedman & Taff, were retained by the law firm of Kaye, Scholer, Fierman, Hays & Handler ("Kaye Scholer") in October 1985 as special regulatory counsel to advise Lincoln Savings and Loan Association of Irvine, California ("Lincoln") about compliance with Federal Home Loan Bank Board ("FHLBB") regulations in connection with Lincoln's proposed guaranty of a loan of the Employee Stock Ownership Plan (the "ESOP") of American Continental Corporation, Lincoln's holding company ("ACC").

In November 1985, Lincoln guaranteed and provided collateral for letters of credit which secured so-called floating-rate ESOP, or FRESOP, notes issued by the ESOP. Fleischer provided a legal opinion that Lincoln's participation in the ESOP financing did not violate FHLBB regulations. If Fleischer had not provided this opinion, the ESOP financing would not have closed. The FRESOP notes subsequently went into default in 1989 after ACC went into bankruptcy, and the letters of credit were drawn upon to repay the FRESOP noteholders. As a consequence, the collateral provided by Lincoln was sold to cover the draws on the letters of credit, thereby causing a loss to Lincoln in the sum of approximately \$12.3 million.

Lincoln's guaranty and provision of collateral violated Section 584.3 of the FSLIC holding company regulations administered by the FHLBB, 12 C.F.R. § 584.3 (1986) (the "Holding Company Regulations") because the ESOP was an affiliate of Lincoln for purposes of such regulations. These regulations, without exception, prohibited Lincoln from guarantying the debt of an affiliate.

At the outset, Fleischer understood that there was a concern among those participating in the transaction whether Lincoln's proposed participation in the ESOP financing would violate the Holding Company Regulations.

Kaye Scholer requested that Fleischer render an opinion as to whether Lincoln or a service corporation of Lincoln could pledge assets and provide a guaranty to secure the FRESOP notes. After researching the issue and making inquiry of a FHLBB staff attorney, Fleischer initially recommended that a service corporation be substituted, in place of Lincoln, to provide the guaranty and collateral therefor, in order to avoid the affiliate transaction issues raised by the Holding Company Regulations.

Notwithstanding this initial recommendation, Lincoln decided to directly guaranty the letters of credit and provide the collateral therefor. In order to satisfy the condition to closing of the transaction imposed by counsel for Bankers Trust Company, the issuer of the letters of credit, Fleischer provided an unqualified legal opinion that the pledge of collateral and guaranty by Lincoln did not violate any FHLBB regulations.

At the time Fleischer rendered the opinion, he understood that, under Section 584.3 of the Holding Company Regulations, the ESOP would be deemed to be under the control of ACC and, therefore, an affiliate of Lincoln if ACC had the power to appoint or remove the ESOP trustee. Fleischer also knew that it was almost universally true that ESOP sponsors had such appointment and removal powers. Therefore, Fleischer knew or should

have known the ESOP was an affiliate of Lincoln, and that the guaranty would result in a violation of the Holding Company Regulations.

Instead, for purposes of rendering his opinion, Fleischer concluded that it was not likely that Section 584.3 of the Holding Company Regulations would be interpreted as written -- i.e., that they would not be applied literally if the trustee were "independent." The principal basis for taking this position was a single conversation Fleischer had with a FHLBB staff attorney. However, the FHLBB staff attorney contacted by Fleischer stated that the Holding Company Regulations would be applied to dealings between insured institutions and ESOP affiliates, and that, in response to the thrift industry's interest in ESOPs, the FHLBB was in the process of preparing a written interpretation setting forth how the regulations would be applied to ESOPs. Fleischer never specifically discussed with the FHLBB staff attorney whether or not ACC's having the power to appoint or remove the ESOP trustee would cause the ESOP to be deemed a Lincoln affiliate and thus prohibit Lincoln's guaranty.

In rendering his opinion, Fleischer assumed the relevant legal conclusion that the ESOP was not controlled by ACC or Lincoln based upon a certification by a Lincoln officer that the ESOP trustee was

"independent." He did so even though he knew or should have know that because of the language of the regulations the ESOP would be deemed to be under the control of Lincoln's holding company and, therefore, not independent of Lincoln.

WHEREAS, the OTS has determined that Fleischer participated in the affairs of Lincoln and proper grounds exist, pursuant to FDIA Section 8(b), 12 U.S.C. § 1818(b), for the imposition of the relief set forth herein;

WHEREAS, Fleischer's representation of Lincoln lasted for approximately one month in 1985, for a fee of approximately \$14,500 and only involved the preparation of the legal opinion regarding compliance with FHLBB regulations in connection with Lincoln's participation in the ESOP financing;

WHEREAS, Fleischer has cooperated fully with the OTS' investigation of this matter and other investigations and proceedings related to the conduct of the affairs of Lincoln; and

WHEREAS, Fleischer, without admitting or denying the conclusions reached by the OTS and in the interest of avoiding potentially lengthy and expensive litigation, has executed an Offer of and Consent to Settlement ("Offer and Consent") which is accepted by and approved by the OTS acting by and through its Director, Timothy Ryan;

NOW THEREFORE, IT IS ORDERED that:

DEFINITIONS

1. For purposes of this Order, the following definitions shall apply:

(a) "Insured Institution" shall mean any savings and loan association, savings bank, commercial bank, credit union or any other depository institution that holds federally insured deposits; any non-diversified holding company of such an institution; and any diversified holding company of such an institution that is registered or that the attorney rendering the opinion has reason to believe should be registered; and

(b) "Regulatory Opinion" shall mean any written legal opinion signed for the firm, rendered to a client or to a third party on behalf of a client, which addresses application or the non-contravention of any provision of the federal banking statutes or any regulations promulgated thereunder to a specific transaction or practice involving an Insured Institution.

COMPLIANCE WITH FIRM POLICIES

2. When preparing any Regulatory Opinion, Fleischer shall comply with the following practices and procedures which have been adopted by his firm as applicable to all attorneys in that firm and furnished to the OTS:

(a) In the event that any attorney is requested to prepare a Regulatory Opinion, and the attorney has reason to believe that any legal conclusion necessary to render such Regulatory Opinion is not reasonably predictable (e.g., because of the lack of reasonably

analogous judicial or publicly available agency authority or precedent or the presence of conflicting publicly available authority or precedent), then the attorney shall only prepare such Regulatory Opinion on a "qualified" or "reasoned" basis with an explanation of the uncertainty involved;

(b) When rendering such a "qualified" or "reasoned" Regulatory Opinion, the attorney shall provide to the Insured Institution client a written statement of the fiduciary responsibility of its directors and officers to consider the effects which the contemplated matter could have on the safety and soundness of the Insured Institution;

(c) When preparing any Regulatory Opinion where a legal conclusion depends on a factual predicate or a factual assumption ("facts"), the attorney shall comply with applicable professional standards for reliance upon others in ascertaining those facts (the current standards for which are set forth in the Third-Party Legal Opinion Report of the Business Law Section of the American Bar Association); and

(d) No attorney shall render any "qualified" or "reasoned" Regulatory Opinion, pursuant to paragraph (a) above, without first having the legal conclusion or conclusions in respect of which the opinion is "qualified" or "reasoned" reviewed and approved by a partner of the firm otherwise not principally involved with the matter, who regularly advises clients on application of the federal banking statutes and the regulations promulgated thereunder.

RESTITUTION

3. Fleischer shall pay restitution to the Resolution Trust Corporation ("RTC") as receiver for Lincoln Savings and Loan Association in the amount of \$600,000, which may be provided through insurance coverage. Such payment shall be made by electronic transfer to the United States Department of the Treasury, ABA #021030004, ALC #20740001, "FOR CREDIT TO OTS," along with an accompanying written statement to Debbie Holland, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552 showing the date of the transfer, the amount of payment, the payor, and the purpose of the payment, no later than May 28, 1992. Prompt notice thereof shall also be given to the OTS by letter delivered to: Bruce F. Rinaldi, Deputy Chief Counsel, Special Trial Division, Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552.

MISCELLANEOUS

4. Fleischer shall promptly deliver to the OTS any documents which the OTS may request for purposes of determining compliance with this Order. Nothing contained herein shall require Fleischer to divulge information to the extent that it is protected by an applicable attorney-client privilege or the privilege that protects work product prepared in anticipation of litigation unless waived by the holder of the privilege.

5. Fleischer shall, at OTS' request, on reasonable notice and without service of a subpoena, testify at any administrative proceeding brought by the OTS that relates in any way to

Fleischer's service as special regulatory counsel for Lincoln.

6. The Offer and Consent is made a part hereof and is incorporated by reference.

7. This Order and the Offer and Consent 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 and Consent or the relief consented to by virtue of the Offer and Consent for any other purpose.

8. This Order constitutes the final disposition of all claims made or that could be made by the OTS against Fleischer or any of the present or former partners, associates or employees of his law firm, Silver, Freedman & Taff, in connection with his or their representation of Lincoln or its affiliates. It is further the understanding of OTS that the Resolution Trust Corporation will provide a covenant not to sue Fleischer or his firm in connection with such representation. This paragraph shall be of no force or effect in the event Fleischer fails to make the payment required by paragraph 3 hereof.

9. This Order shall be effective as of the date hereof, and shall terminate on May 21, 1995.

A copy of this Order shall be served upon Fleischer in accordance with the general regulations of the OTS.

/S/

Timothy Ryan
Director
Office of Thrift Supervision