

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

In the Matter of)

ROBERT J. KIELTY)

Former Director of American Continental)
Corporation, the Savings and Loan)
Holding Company of Lincoln Savings)
and Loan Association,)
Irvine, California)

OTS Order No. AP 92-100

Dated: September 22, 1992

TEMPORARY ORDER TO CEASE AND DESIST

The Office of Thrift Supervision of the United States Department of the Treasury ("OTS") issued a Notice of Charges and Hearing to Direct Restitution and Notice of Intention to Remove and Prohibit Respondents from Participation in the Affairs of Federally-Insured Depository Institutions against, among others, Robert J. Kielty ("Kielty" or "Respondent") on August 9, 1990 and as amended on January 29, 1991 (the "Amended Notice") pursuant to Sections 8(b) and 8(e) 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. §§ 1818(b) and 1818(e).

Upon review of the entire record herein, the OTS has determined that there is prima facie evidence to support the charges that Kielty was unjustly enriched through violations of law or regulations or unsafe or unsound practices relating to the charges specified in the Amended Notice and that Lincoln Savings and Loan Association of Irvine, California ("Lincoln") was

injured as a result of these violations and practices.

Accordingly, the OTS has concluded that there is a substantial basis for seeking, inter alia, an order directing Kielty to correct the conditions resulting from these violations and practices and make appropriate restitution pursuant to 12 U.S.C. § 1818(b)(6). The interests of Lincoln, the depositors and the Deposit Insurance Fund (the "Fund") are likely to be prejudiced if Kielty is allowed to dissipate his assets prior to the completion of the proceedings conducted pursuant to FDIA Section 8(b) and 8(e), as amended, 12 U.S.C. §§ 1818(b) and 1818(e).

I. BACKGROUND

1. The purpose of this Temporary Order to Cease and Desist ("Temporary Order") is to prevent the further dissipation of assets rightfully belonging to Lincoln, its depositors, or the Fund prior to the completion of the proceedings conducted pursuant to FDIA Sections 8(b) and 8(e), as amended, 12 U.S.C. §§ 1818(b) and 1818(e).

2. The Amended Notice seeks restitution totalling approximately \$135 million representing losses suffered by Lincoln as a result of unlawful and unsafe or unsound practices relating to four transactions. The Amended Notice seeks, among other relief, \$24,186,000 in restitution representing the loss incurred by Lincoln as a result of Kielty's and others' unlawful conduct in connection with the granting of a \$20 million line-of-credit by a wholly-owned subsidiary of Lincoln to the Hotel Pontchartrain Limited Partnership ("HPLP"). The Amended Notice

alleges the following facts. HPLP was a "tax shelter" in which Kielty was a limited partner. Lincoln's records do not show any loan underwriting or financial analysis prior to granting the line-of-credit. It was unsecured, did not require repayment of principal and interest for five years, and its interest rate was submarket. The line-of-credit was granted to support the continuing losses of the partnership's asset, the Hotel Pontchartrain in Detroit, Michigan. The transaction was an affiliated transaction and involved prohibited self-dealing, as well as constituted an unsafe or unsound banking transaction and breach of fiduciary duty by Kielty and others. In January, 1990 the Hotel Pontchartrain was taken over by another savings association in foreclosure proceedings. HPLP had drawn \$19,473,000 on its line-of-credit, which has not been repaid and has accrued interest of \$4,713,000. Hence, Lincoln has lost \$24,186,000 from the granting of the line-of-credit to HPLP. The line-of-credit to HPLP was participated in by Kielty with a reckless disregard for the law and resulted in his unjust enrichment.

3. The Amended Notice seeks \$12,300,000 of restitution representing the loss incurred by Lincoln as a result of Kielty's and others' unlawful conduct in connection with Lincoln's \$15 million guarantee and provision of collateral to Bankers Trust Company ("BT") to secure a \$20 million loan to the American Continental Corporation and Affiliates Employee Stock Ownership Plan ("ESOP"). The Amended Notice alleges the following facts.

The proceeds of this loan were used by the ESOP to purchase American Continental Corporation ("ACC") stock from Kielty and others in 1985. The transaction was an affiliated transaction and involved prohibited self-dealing, as well as constituted an unsafe or unsound banking transaction and breach of fiduciary duty by Kielty and others. Following ACC's bankruptcy, the ESOP defaulted on this loan causing BT to seize the collateral. As a result, Lincoln incurred losses of \$11.2 million in collateral and an additional \$1.1 million in fees and interest payments made on the loan to ESOP. The guarantee of the ESOP loan was participated in by Kielty with a reckless disregard for the law and resulted in his unjust enrichment.

4. The Amended Notice and record are the product of extensive examinations of Lincoln. Lincoln, under the direction of Kielty and others, frequently sought to frustrate these examination efforts.

5. An evidentiary hearing in the administrative proceeding was held before Administrative Law Judge Paul J. Clerman ("ALJ") concerning the OTS charges against Kielty and others in two parts: the first part of the hearing was held in Los Angeles, California, from July 1-3 and July 8-12, 1991; and the second part was held in Phoenix, Arizona, from April 27 through May 1, 1992. The evidentiary hearing pertained to the charges alleged in connection with the Hotel Pontchartrain and ESOP transactions. The other charges set forth in the Amended Notice were severed from those charges presented at the evidentiary hearing pursuant

to an order issued by the ALJ on March 24, 1992, due to pending Federal criminal charges based upon those same transactions.

6. At the evidentiary hearing, Kielty and others asserted their Fifth Amendment right against self-incrimination and refused to give testimony about their participation in the Hotel Pontchartrain and ESOP transactions. Furthermore, Kielty failed to put on a defense during the hearing.

7. The Amended Notice and the facts alleged therein demonstrate that Kielty has personally enriched himself at the expense of Lincoln and ultimately the United States. Kielty has shown a willingness to violate law and regulation and his fiduciary duty of loyalty and care in order to enrich himself while causing Lincoln to fail.

8. In the course of settlement discussions between Kielty and OTS which concluded on August 20, 1992, Kielty informed the OTS that he transferred his entire interest in community property of substantial value to his wife, Elizabeth Kielty, pursuant to a property separation agreement entered into between him and his wife on April 6, 1989 -- precisely one week prior to ACC filing for bankruptcy and Lincoln being placed into conservatorship.

9. Pursuant to the property separation agreement, Kielty retained an exclusive interest in assets valued at approximately \$100,000, which included shares of ACC common stock, Phoenix Housing Bonds, US Savings Bonds, MCI stock, limited partnership interests, and a Citibank account containing nearly \$82,000. On the other hand, Mrs. Kielty received a separate interest in

assets worth over \$800,000, including bank accounts containing approximately \$230,000 in cash, the family residence located in Paradise Valley, AZ, and various common stock securities.

10. Kielty's April 6, 1989 transfer of assets of substantial value to his spouse for less than adequate consideration and with the express knowledge that ACC would file for bankruptcy one week later, thereby, likely subjecting him to incur debts beyond his ability to pay was a thinly veiled attempt to avoid future claims and judgments of legitimate creditors, including the United States Government.

11. On July 27, 1992, the OTS, pursuant to its investigative authority, subpoenaed Kielty and his wife, Elizabeth Kielty, to testify and produce all documents pertaining to the April 6, 1989 property separation agreement. Both Kielty and his wife refused to produce the subpoenaed documents and advised the OTS that they would invoke their Fifth Amendment right against self-incrimination if required to appear and testify pursuant to the subpoena.

12. In recent communications with Kielty and his counsel, the OTS has learned that the Kieltys have had their personal residence, which Kielty values at approximately \$585,000 and which has approximately \$308,000 in encumbrances, on the market for sale. If the residence is successfully sold, the OTS may lose the major asset from which it might seek to satisfy any possible judgment of restitution as a result of the ongoing administrative proceeding.

13. In the course of further conversations with Kielty's counsel, it has also come to the attention of the OTS that Kielty and his wife have dissipated approximately \$93,000 in stocks and bonds since April 1992.

14. Lincoln and its depositors were the victim of a severe case of insider abuse. Based upon the events described above, when viewed in light of the substantial charges contained in the Amended Notice, there exists a reasonable possibility that Kielty may dissipate assets prior to the conclusion of the proceedings to be conducted pursuant to FDIA Section 8(b), as amended, 12 U.S.C. § 1818(b). Because the abuses cited in the Amended Notice constitute a continuing injury, the appropriate and necessary means to prevent further injury to the interests of Lincoln, its depositors, and the Fund, is through this Temporary Order as authorized under relevant statutory provisions. See 12 U.S.C. § 1818(b)(6) and (c)(1). The Temporary Order is framed to correct the conditions resulting from the violations and practices found in the Amended Notice, as well as to prevent further injury.

II. CEASE AND DESIST ORDER

THEREFORE, by the authority under FDIA Section 8(c), as amended, 12 U.S.C. § 1818(b)(6), (b)(7), and (c)(1) it is hereby ordered that:

1. Posting of Security.

(a) Within 24 hours of the service of this Temporary Order, Kielty shall provide adequate security in an amount aggregating \$500,000. This sum is a portion of the amount of restitution and

reimbursement (exclusive of interest) sought by the OTS as a result of the violations of laws and regulations and unsafe or unsound practices engaged in by Kielty, as alleged in the Amended Notice.

(b) Kielty shall comply with the security requirements of this paragraph by one or a combination of any of the following means:

- (1) by paying cash (or its equivalent) in the required amount to the undersigned Director (the "Director");
- (2) by establishing and maintaining an escrow account in the required amount for the benefit of the RTC, as receiver of Lincoln, at an FDIC-insured depository institution and with an escrow agent deemed acceptable (in writing) by the Director;
- (3) by providing an irrevocable letter of credit or bond in the required amount in favor of the RTC, as receiver of Lincoln, from an FDIC-insured depository institution or an insurer approved by the Director, and subject to terms and conditions as approved by the Director; or
- (4) in the event Kielty contends that his assets are inadequate to permit him to comply with the security requirements of this paragraph, by providing OTS with a mortgage (or similar) lien on the property located at 8714 North 65th Street,

Paradise Valley, AZ 85253 and any proceeds therefrom (the "collateral"). Kielty shall provide the required lien by executing and delivering documents in the form and substance satisfactory to the OTS, in its sole discretion, thereby giving the OTS a valid, effective and enforceable lien on the collateral, subject only to such liens, pledges, security interests, encumbrances or charges existing as of the date of this Temporary Order.

2. Required Disclosures.

(a) No later than 12:00 (noon) Eastern Standard Time on the third day following service of this Temporary Order, Kielty shall submit to the Director (as provided by paragraph II(5) hereof):

- (1) true and complete copies of signed United States and state income tax returns for 1988, 1989, 1990 and 1991 (collectively the "Tax Returns"), including all schedules and attachments thereto, or signed authorizations permitting the OTS to obtain the Tax Returns from the appropriate federal and state agencies; and
- (2) a written statement, signed under penalty of perjury, identifying with specificity all accounts or other assets currently located outside of the continental United States in which he or any member of his immediate family has any legal or

beneficial interest; and

- (3) a written statement, signed under penalty of perjury, describing all judgments and legal proceedings pending against Kielty and his immediate family.

(b) No later than 5:00 p.m. Eastern Standard Time on the fifth day following service of this Temporary Order, Kielty shall submit to the Director:

- (1) a written statement, signed under penalty of perjury, identifying each occasion since February 1984, in which he or any member of his immediate family has transferred funds or otherwise removed assets from the United States; and
- (2) a financial statement, signed with a certification under penalty of perjury that the information is true and accurate to the best of his information and belief after diligent inquiry, showing assets and liabilities as of August 31, 1992 in which he, his immediate family members, partnerships and corporations (or other entities) owned or controlled by them, directly or indirectly, have a legal or beneficial interest (collectively "Kielty Entities"), all judgments and legal proceedings pending against them and all encumbrances, liens or other secured interests in assets. If assets or liabilities shown on the financial statement

are held through a corporation, partnership, trust, or other entity, then the financial statement shall disclose the name and nature of the entity, as well as the percentage of the person's ownership interest in the entity, and shall have attached thereto all documents sufficient to show the nature of the entity and to identify all other persons having an interest therein. Similar updated financial statements shall be submitted to the OTS no later than 15 days following the close of each calendar quarter, i.e., 15 days after March 31, June 30, September 30, and December 31; and

- (3) a written statement, signed under penalty of perjury, identifying with specificity all assets transferred directly or indirectly to any family member by Kielty, or his wife, including corporation, partnership or trusts for the benefit of that family member, from February 1984 to the present; and
- (4) Any documents detailing or related to the transfer of assets of any nature whatsoever between Kielty and his wife pursuant to any property separation arrangement entered into between Kielty and his wife anytime between February 1984 and the date of this Temporary Order.

(c) Upon written request of Kielty, the financial information and tax returns submitted pursuant to this paragraph will not be made public to persons or entities other than employees and agents of governmental authorities.

3. Limitations on Asset Transfer

(a) Kielty shall cease and desist from, directly or indirectly, causing, permitting, aiding or abetting in the sale, transfer, or encumbrance of funds or other assets having a value in excess of Five Thousand Dollars (\$5,000), including any real property, in which he, his spouse or any member of his immediate family, has a legal, equitable or beneficial interest, whether directly or through any other person or entity, specifically including the property located at 8714 North 65th Street, Paradise Valley, AZ 85253, except with prior written consent of the Director of OTS or as otherwise permitted by this Temporary Order.

(b) The restrictions set forth in the preceding subparagraph (a) do not prevent the disposition of funds or other assets used to pay ordinary and reasonable living expenses which have a value singly or through related transactions of less than Five Thousand Dollars (\$5,000). For proposed expenditures of \$5,000 or more, whether singly or through related transactions, Respondent shall submit a description of the proposed expenditure to the Director and shall make no such expenditure until the Director consents in writing.

(c) Kielty shall provide the Director of OTS with immediate notice of any attempt by third parties to execute on a judgment, foreclose on a lien, or otherwise encumber the title or obtain a transfer of the property located at 8714 North 65th Street, Paradise Valley, AZ 85253, any asset transferred to Elizabeth Kielty pursuant to the April 6, 1989 property separation agreement, and any asset in which Respondent has an interest, actual or beneficial, when the value of the asset exceeds Five Thousand Dollars (\$5,000).

4. Opportunity for Administrative Relief

If Kielty contends that compliance with this Temporary Order would cause undue hardship to him or his dependents, or cause him to be unable to hire legal counsel for the enforcement proceeding, he may make application to the Director of OTS requesting relief from this Temporary Order. Any such application shall be filed and served in the manner provided by paragraph II(5) hereof. Any such application shall not be deemed complete and appropriate for action by the Director of OTS until the application is supported by the following:

- (1) current, complete, and accurate financial statements (as of December 31, 1989, December 31, 1990, December 31, 1991, and the end of the most recent calendar quarter) signed by the applicant with a certification under penalty of perjury that the information therein is true and accurate to the best of his knowledge and belief following diligent inquiry;

- (2) true, accurate, and complete copies of signed Tax Returns (within the meaning of paragraph II(2) hereof, which means for the years specified therein) or a signed written authorization permitting the OTS to obtain the Tax Returns from the appropriate Federal and State agencies;
- (3) written statements accurately and completely describing arrangements, funds, or trusts established for the benefit of the payment of their legal or other fees or other expenses, whether directly or indirectly, along with a written statement of fees or other expenses advanced but not exhausted; and
- (4) affidavits setting forth the hardship that Respondent believes would be caused and such other facts as thought to be pertinent.

5. Compliance Procedures; Notices

(a) All notices and other submissions required or permitted to be made pursuant to this Temporary Order shall be made in writing.

(b) A copy of each such notice or submission, and any responses thereto, shall be filed with the Office of Financial Institution Adjudication ("OFIA") for the purpose of maintaining a complete record of all documents submitted to the OTS with

respect to the above-captioned adjudicatory proceeding. The address of OFIA is as follows:

Office of Financial Institution Adjudication
1700 G Street, N.W.
Washington, D.C. 20552

(c) If any notices or other submissions are required or permitted to be submitted to the Director of OTS pursuant to this Temporary Order, then such notices or other submissions shall be sent to:

Director
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552
Attention: Margaret Hill, Acting Secretary

(d) Respondent shall serve a copy of all such notices and other submissions required or permitted by this Temporary Order on:

Bruce F. Rinaldi
Deputy Chief Counsel
Special Trial Division
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552
Fax Number: (202) 906-7494

(e) All notices and other submissions required or permitted to be made pursuant to this Temporary Order shall be deemed to be a filing in the above-captioned adjudicatory proceeding, and should contain the title and docket number of the proceeding. Except as may otherwise be ordered by the Director of OTS, matters submitted to the Director shall be acted upon by the Director or his designee.

6. Construction. The cease-and-desist provisions set forth in this Temporary Order shall be construed in their broadest and most inclusive senses with a view of their remedial purpose of protecting the financial interest of Lincoln (and its subrogee), the Fund, and the United States.

7. Definitions. All technical words or terms used in this Temporary Order, for which meanings are not specified or otherwise provided by the provisions of this Temporary Order, shall, insofar as applicable, have meaning as defined in the Code of Federal Regulations, Title 12, Chapter V; or as defined in FIRREA, the FDIA, or the Home Owners Loan Act of 1933 ("HOLA") and any such words or terms undefined in the foregoing shall have meanings that accord with the best custom and usage in the savings association industry.

8. Date of Effectiveness. This Temporary Order shall be and is effective upon service to Respondent and shall remain effective and enforceable until: (a) the completion of the administrative enforcement proceedings initiated by the Amended Notice, incorporated herein by reference; or (b) until such time as the OTS shall dismiss the charges specified in such Amended Notice; or (c) if a final enforcement order is issued at the completion at the proceeding, until the effective date of such

final order; or (d) until stayed or enjoined by a court of competent jurisdiction.

IT IS SO ORDERED on this 22 day of September, 1992.

OFFICE OF THRIFT SUPERVISION
By:

/S/

Timothy Ryan
Director