



WHEREAS, Gibraltar and First Texas were savings associations, as that term is now defined by Section 3(b)(1) of the Federal Deposit Insurance Act ("FDIA"), as amended by FIRREA, 12 U.S.C. § 1813(b)(1), and were also insured-institutions, as that term was defined by Section 401(a) of the National Housing Act ("NHA"), repealed by FIRREA, formerly 12 U.S.C. § 1724(a), whose accounts were insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"); and

WHEREAS, Gibraltar and First Texas were placed in receivership with the FSLIC on December 28, 1988; and

WHEREAS, upon FSLIC's acceptance of the appointment as receiver, possession of and title to certain assets of Gibraltar/First Texas, including claims against Gibraltar/First Texas' former officers and directors, passed to the FSLIC; and

WHEREAS, pursuant to Section 215 of FIRREA, 12 U.S.C. § 1821a, the FSLIC was abolished and the Federal Deposit Insurance Corporation ("FDIC") in its corporate capacity became the transferee of all of the assets and liabilities of the FSLIC. These assets and liabilities were transferred to the FSLIC Resolution Fund (the "Fund"), which is managed and separately maintained by the FDIC; and

WHEREAS, in the opinion of the OTS, Respondent Mark J. Brookner ("RESPONDENT" or "BROOKNER") engaged in unsafe and unsound practices and conflicts of interest that resulted in unjust enrichment to RESPONDENT and substantial damage to

Gibraltar/First Texas and harm to the Fund, as set forth in the Notice of Charges ("NOTICE"), attached hereto, incorporated by reference herein and issued concurrently herewith pursuant to 12 U.S.C. §§ 1818(b) and 1818(e); and

WHEREAS, RESPONDENT, through his CONSENT filed concurrently herewith and incorporated by reference herein, has consented to the entry of this ORDER without admitting or denying the allegations set forth herein or in the NOTICE; and

WHEREAS, subject to the terms and conditions hereof, the issuance of this ORDER resolves the regulatory and enforcement concerns of the OTS as to RESPONDENT for his participation and conduct in the affairs of Gibraltar/First Texas as set forth herein;

WHEREAS, concurrently with the execution of the CONSENT, RESPONDENT is entering into a Settlement Agreement with the FDIC (the "FDIC Settlement") settling all disputes between the FDIC and RESPONDENT as to Gibraltar/First Texas as set forth therein;

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NOW, THEREFORE, based upon the facts set forth in the NOTICE, in accordance with FDIA sections 8(b) and 8(e), 12 U.S.C. §§ 1818(b) and 1818(e), the Director of the Office of Thrift Supervision finds that proper grounds exist for the imposition of

the relief set forth herein, and with the CONSENT of the RESPONDENT Mark J. Brookner also filed herewith, hereby enters the following Cease and Desist Order against RESPONDENT as set forth herein.

As provided in the FDIC Settlement, BROOKNER shall make the following payments to the FDIC in settlement of all FDIC claims against RESPONDENT as to Gibraltar/First Texas and as complete restitution for any and all claims asserted by the OTS or that could have been asserted by the OTS as of the date of this ORDER, provided that nothing herein shall be deemed a waiver of OTS' rights to enforce the payment obligations of RESPONDENT as set forth herein:

1. On the Closing Date (as defined in numbered paragraph 4 hereof), BROOKNER shall make a \$30,000.00 cash payment to the FDIC and on the Funding Date (as defined in numbered paragraph 5 hereof), BROOKNER shall make an additional \$70,000 cash payment to the FDIC.

2. (a) At the Closing, BROOKNER shall execute and deliver to the FDIC an assignment of his interest in the net proceeds, to the extent of the first \$100,000 derived therefrom, from sales of certain real property located in Conroe, Montgomery County, Texas held by Robert Kaplan, Trustee, as to which BROOKNER holds a 9.6% undivided interest. A legal description of such property is set forth on Annex 1 hereto and is incorporated herein by reference. As used herein, the term "net proceeds" means gross proceeds from

sales of the property less expenses of sale, taxes and insurance and less reserves for taxes and other expenses retained by the Trustee who holds the property.

(b) The assignment of net proceeds of \$100,000 by BROOKNER, referenced in paragraph 2(a) above, shall be secured by a letter of credit in favor of the FDIC so that the FDIC is assured of receiving an installment of \$20,000 by the second anniversary of the Funding Date and installments of \$20,000 by each of the next succeeding four anniversaries of the Funding Date (each such anniversary date, an "Anniversary Date"). The letter of credit, which shall be in usual and customary form and reasonably satisfactory to the FDIC, shall be obtained by BROOKNER as of the Closing at his expense. The initial letter of credit would be for \$100,000, covering a two-year period ending on the second Anniversary Date, and would be renewed at BROOKNER's expense annually thereafter on a declining balance basis (giving effect for this purpose to the reduced aggregate amount remaining to be paid in years three, four, five and six). In years three through six, the letter of credit also shall cover the maximum amount of interest payable at the end of each such year, as provided below. In the event BROOKNER shall be unable to renew the initial letter of credit, the FDIC shall have the right to draw upon the full amount of the letter of credit at any time before the expiration of the letter of credit. No later than thirty (30) days before any Anniversary Date BROOKNER shall

provide the OTS and the FDIC prior written notice of any inability to renew the letter of credit so that the FDIC shall have ample time to draw from the letter of credit an amount equal to the balance of BROOKNER's payment obligation under this paragraph 2.

(c) The initial installment of \$20,000 payable by BROOKNER by the second Anniversary Date shall not bear interest. However, the unpaid portion of the subsequent installments of \$20,000 payable by BROOKNER by the third, fourth, fifth and sixth Anniversary Dates shall bear interest, commencing on the day after the second Anniversary Date through the date such payment is made, at an annual rate equal to the one-year U.S. Treasury note plus 100 basis points, such rate to be adjusted annually based upon the one-year U.S. Treasury note rate in effect on the first business day after the second, third, fourth, fifth and sixth Anniversary Dates. Interest shall be payable by BROOKNER on the applicable Anniversary Date, except that any interest period less than a full year shall be based on the actual number of days elapsed.

(d) If any Anniversary Date shall fall on a day which is not a business day, then any payments due on such date shall be payable on the next succeeding business day. Net proceeds from real estate sales in excess of the current installment and applicable interest shall be applied to the next annual installment(s) due. Amounts due pursuant to this paragraph 2 may also be prepaid, in whole or in part, at the option of BROOKNER from his personal funds at any time and from time to time. Any such prepayments shall be applied to installments due hereunder in the order of their maturity. In view of the letter of credit

guaranteeing BROOKNER's obligation under this paragraph 2, unless BROOKNER fails to provide the required notice that he is unable to renew the letter of credit, BROOKNER shall have no personal liability (contingent or otherwise) as to the payment obligations provided hereunder.

3. At Closing, BROOKNER shall transfer and deliver to J. Livingston Kosberg ("Kosberg") the stock option to purchase 10,000 shares of Class B common stock of Affiliated Computer Systems, Inc. ("ACSI") previously granted to BROOKNER ("ACSI Option"). BROOKNER shall receive no consideration from KOSBERG or any other person or entity (other than the release of claims by the OTS and the FDIC) for such transfer of the options.

4. For purposes of this ORDER, the Closing Date shall mean the date which is 30 days from the date hereof (or, if such day is not a business day, the next succeeding business day), or on such earlier date as BROOKNER may elect. On the Closing Date, a closing ("Closing") shall occur, which Closing shall occur concurrently with the closing under the Cease and Desist Order against Kosberg. The Closing shall take place at 10:00 a.m. on the Closing Date at the Office of Thrift Supervision, 1700 G Street, N.W., Washington, D.C. 20552, or at such other time and place as the parties may mutually agree. At the Closing, BROOKNER shall make the cash payment referred to in paragraph 1 hereof, shall execute and deliver the assignment and letter of credit referred to in numbered paragraph 2 hereof and shall transfer and deliver the ACSI options as provided in numbered paragraph 3 hereof.

5. As used herein, the Funding Date ("Funding Date") shall mean the date 60 days from the date of this ORDER or , if such date is not a business day, the next succeeding business day. On or before the Funding Date, BROOKNER shall pay to the FDIC the additional \$70,000 cash payment required by paragraph 1 of this ORDER.

6. If the Closing hereunder shall not have occurred on the 30th calendar day from the date hereof (other than as a result of the failure or unwillingness by the OTS and/or the FDIC to close), or if BROOKNER shall fail to make the \$70,000 cash payment to the FDIC on or before the Funding Date, or if BROOKNER shall fail to transfer and deliver the ACSI options under paragraph 3 of this ORDER, the OTS may elect either to (a) enforce, through administrative or judicial process, the provisions of paragraphs 1 through 3, as applicable, of this ORDER, including the filing of a notice of assessment of civil money penalties under 12 U.S.C. § 1818(i); or (b) proceed against BROOKNER on all claims, including those covered by this ORDER, as if this ORDER had not issued. Any amounts paid by BROOKNER to the FDIC pursuant to the FDIC Settlement and paragraphs 1 through 3 above shall be treated as an offset to any liability on the part of BROOKNER as to any such claims.

7(a) Prior to the issuance of this ORDER, RESPONDENT provided the OTS with a financial statement dated October 31, 1992, which financial disclosure the OTS expressly relied upon in agreeing to enter into the CONSENT and in issuance of this ORDER.

(b) Concurrent with the execution of the CONSENT, RESPONDENT shall submit an affidavit, executed under oath by RESPONDENT and subject to the penalties for false statements and perjury under 18 U.S.C. §§ 1001 and 1621, stating, to the best of his knowledge and belief after due inquiry, that the financial statement of October 31, 1992 was true and correct when made and that since October 31, 1992 no material change in RESPONDENT's financial condition as set forth in the October 31, 1992 financial statement has occurred.

(c) If, after notice, the OTS determines after the Closing that the financial disclosures submitted by BROOKNER pursuant to paragraph 7(b) herein materially understate RESPONDENT'S net worth as of October 31, 1992 because of an intentional or reckless (i) omission of one or more assets; (ii) undervaluation of one or more listed assets; or (iii) overvaluation of one or more listed liabilities, RESPONDENT shall (i) forfeit such undisclosed asset to the OTS or the FDIC, either by transferring such undisclosed asset to the OTS or FDIC or by compensating the OTS or the FDIC for the full value of the undisclosed asset (including interest or other income generated by the asset) as if such asset had been transferred as of the date of this ORDER; (ii) pay to the OTS or the FDIC the cash equivalent of the undervaluation of any undervalued assets; or (iii) pay to the OTS or the FDIC the cash equivalent of any overvaluation of any overvalued liability. OTS further reserves its rights to enforce through any administrative or civil actions, or to make any criminal referrals, against

RESPONDENT, including, but not limited to, an administrative action against RESPONDENT for civil money penalties under 12 U.S.C. § 1818(i) for violation of this paragraph 7(c) of the ORDER. In any proceeding to enforce this paragraph 7(c) of the ORDER, RESPONDENT shall be entitled to contest on the merits through administrative or judicial process, as appropriate depending upon the forum selected by OTS, any determination by the OTS of an intentional or reckless material understatement of his net worth.

8. Solely in any bankruptcy proceeding in which RESPONDENT's obligation to make the payment of restitution provided for in paragraphs 1, 2 and 3 of this ORDER is subject to an assertion that such obligation is dischargeable in bankruptcy, the RESPONDENT shall not contest the assertions of the OTS, or the FDIC as applicable, that (a) the obligation of RESPONDENT is for and (b) the ORDER arises out of conduct by RESPONDENT while acting in a fiduciary capacity and therefore that the obligation to make the payment of restitution is nondischargeable under 11 U.S.C. §§ 523(a)(4) and (11). This provision is solely for the purpose of ensuring, in the event that prior to completing the restitution payments provided for in paragraphs 1 through 3 of this ORDER, RESPONDENT becomes the subject of a bankruptcy proceeding under the U.S. Bankruptcy Code, that RESPONDENT will not contest the assertion that his obligation to make such payments is a non-dischargeable debt under 11 U.S.C. §§ 533(a)(4) and/or (a)(11). Such agreement shall not for any other purpose or in any other context whatsoever constitute or be construed an admission or

an administrative or judicial determination to such effect.

9. RESPONDENT, at the OTS's request, on reasonable written notice and without service of a subpoena, shall cooperate fully by providing documents and other discovery relating to Gibraltar/First Texas and shall testify completely and truthfully at any deposition, judicial or administrative proceeding relating to the facts and matters set forth in the NOTICE or otherwise covered by paragraph 10 of the ORDER. RESPONDENT waives his attorney-client privilege for the matters covered by paragraph 10 of the ORDER, but does not waive his attorney-client privilege relating to the negotiation and settlement of the matters covered by this ORDER or his attorney-client privilege for those matters not covered by paragraph 10 of the ORDER. Advice rendered by law firms to Gibraltar/First Texas shall not be considered to fall within RESPONDENT's attorney-client privilege for purposes of this paragraph. Notwithstanding the foregoing, RESPONDENT does not waive his privilege against self-incrimination under the Fifth Amendment of the United States Constitution, the spousal privilege or any other privilege provided by the United States Constitution. Further, OTS agrees that it will not use any information or testimony obtained pursuant to the provisions of this paragraph 9 against RESPONDENT in the event the OTS were to elect to reinstitute claims against RESPONDENT under the circumstances set forth in clause (b) of paragraph 6 of this ORDER. For purposes of this paragraph, written notice to RESPONDENT's counsel of record herein shall constitute reasonable written notice.

10. In consideration of RESPONDENT's agreement to comply with this ORDER, and, inter alia, the recitals set forth in the Consent, unless RESPONDENT violates paragraphs 1 through 3 of this ORDER, the OTS agrees to forebear from bringing any further enforcement proceedings against the RESPONDENT pursuant to 12 U.S.C. § 1818(b)(6) or other applicable law or regulation in connection with BROOKNER having served as an institution-affiliated party of Gibraltar/First Texas, their parent holding company, affiliates or subsidiaries based upon any claims asserted or that could have been asserted by the OTS as of the date of this ORDER, which claims include but are not limited to the following: (a) any claim relating to or arising out of the NOTICE; and (b) the following loans made by First Texas: (1) Loan No. 496 ("Park/Park"), (2) Loan No. 723 ("Park/Park JV/JV"), (3) Loan No. 581 ("Riverchase"), (4) Loan No. 619 ("720 Limited Partnership (RMB Land Loans)"), (5) Loan No. 24-40644 ("South Lakeview (RMB Land Loans)"), and (6) Loan No. 582 ("The Concourse"); (c) the following loans made by Gibraltar: (1) Loan No. 301-853909 ("Wilcrest Green"), (2) Loan No. 301-873006 ("Clayton Oaks"); (3) Loan No. 301-872628 ("Deerbrook Crossing"), (4) Loan No. 301-872834 ("Westpark Lakes"), (5) Loan No. 240-872941 ("Nine Bar"), (6) Loan No. 325601-155390 ("Circle C Ranch Personal Loan") and (7) Loan No. 301-861-506 ("LYMARCO"); and (d) the following loan made by First Texas and Gibraltar: Loan No. 40610 ("Hardy Toll Road").

11. Except as provided in the Consent and paragraph 10 of this ORDER, the Consent, this ORDER, and the payment by the RESPONDENT of any monies or providing any other financial relief as contemplated by the ORDER, does not compromise, settle, dismiss, resolve, or in any way affect any civil actions, charges against, or liability of the RESPONDENT 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. This ORDER resolves only the OTS's regulatory and enforcement concerns as to RESPONDENT for the matters raised in the NOTICE or covered by the ORDER, and does not relinquish the OTS's right to take additional action against RESPONDENT of a regulatory or other nature based on facts other than those alleged in the NOTICE or covered by the ORDER.

12. This ORDER may be amended only by written instrument executed by the parties hereto or their duly authorized representatives. The terms of this ORDER shall be binding upon, and inure to the benefit of, the parties hereto, their successors and assigns and, in the case of natural persons, their heirs.

\* \* \* \* \*

Entered this 29<sup>th</sup> day of December, 1992.

OFFICE OF THRIFT SUPERVISION,  
U.S. DEPARTMENT OF THE TREASURY,

/s/

~~Jonathan L. Flechter~~  
Acting Director