

**UNITED STATES OF AMERICA**  
**Before The**  
**OFFICE OF THRIFT SUPERVISION**

\_\_\_\_\_  
In the Matter of: )

**JOHN R. NIESER** )

Former Officer of: )  
Guardian Savings and Loan )  
Association<sup>1</sup> )  
Houston, Texas )  
OTS Docket No. 05128 )  
\_\_\_\_\_ )

OTS Order No.: MWR-04-6

Dated: April 19, 2004

**ORDER TO CEASE AND DESIST FOR AFFIRMATIVE RELIEF**

**WHEREAS**, John R. Nieser (Nieser), a former officer of Guardian Savings and Loan Association, Houston, Texas, OTS Docket No. 05128, now operating under the corporate title of Encore Bank (Institution or Guardian), has executed a Stipulation and Consent to Entry of an Order to Cease and Desist for Affirmative Relief (Stipulation);

**WHEREAS**, Nieser, by his execution of the Stipulation, has consented and agreed to the issuance of this Order to Cease and Desist for Affirmative Relief (Order) by the Office of Thrift Supervision (OTS), pursuant to Section 8(b) of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 1818(b)<sup>2</sup>; and

**WHEREAS**, the Deputy Director of OTS, pursuant to delegated authority, has delegated to the Regional Directors of OTS the authority to issue Orders to Cease and Desist for Affirmative Relief on behalf of OTS where the institution-affiliated party who is the subject of the Order has consented to the issuance of the Order.

<sup>1</sup> Guardian Savings and Loan Association, Houston, Texas (OTS Docket No. 05128) changed its corporate title to Encore Bank, effective September 1, 2001.

<sup>2</sup> All references to the United States Code (U.S.C.) are as amended.

**NOW THEREFORE, IT IS ORDERED**, pursuant to Section 8(b) of the FDIA, 12 U.S.C. § 1818(b), Nieser shall cease and desist from any action (either alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding and abetting, any unsafe and unsound practice, conflict of interest, violation of any written agreement with OTS, or violation of any laws or regulations, including, but not limited to:

(a) Sections 562.1 and 562.2 of the OTS Regulations, 12 C.F.R. §§ 562.1 and 562.2; relating to the maintenance of accurate books and records and the filing of accurate thrift financial reports to OTS; and

(b) Section 563.170(c) of the OTS Regulations, 12 C.F.R. § 563.170(c), relating to adequate recordkeeping.

**IT IS FURTHER ORDERED THAT:**

**CORRECTIVE PROVISIONS:**

1. Nieser shall not participate in any manner in the conduct of the affairs of, or hold any office in any Entity or subsidiary thereof as an officer, director, employee, or independent contractor (as defined in Section 2(b) below) until he:

(a) Provides a copy of this Order to the prospective Entity; and

(b) Provides written notice 30 days in advance of the proposed employment with, or participation in the conduct of, the Entity to the Regional Director and any other appropriate Federal banking agency with authority over the Entity, as defined by 12 U.S.C. § 1813(q).

**MISCELLANEOUS PROVISIONS**

2. **Definitions.**

(a) All technical words or terms used in this Order and the Stipulation for which meanings are not specified or otherwise provided by the provisions of this Order shall, insofar as applicable, have meanings as defined in Chapter V of Title 12 of the Code of Federal Regulations, the Home Owners' Loan Act (HOLA), the FDIA, or OTS Publications. Any such

technical words or terms used in this Order and the Stipulation and undefined in said Code of Federal Regulations, HOLA, FDIA, or OTS Publications shall have meanings that are in accordance with the best custom and usage in the savings and loan industry.

(b) For purposes of this Order and its enforcement, the phrase "Entity" shall mean any insured depository institution under 12 U.S.C. § 1813(c); any institution treated as an insured bank under 12 U.S.C. § 1818(b)(3), (4); any institution treated as a savings association under 12 U.S.C. § 1818(b)(9); any insured credit union under the Federal Credit Union Act, 12 U.S.C. §§ 1781 et seq.; any institution chartered under the Farm Credit Act of 1971, 12 U.S.C. §§ 2001 et seq.; any bank holding company as defined in 12 U.S.C. § 1813(w)(2); or any savings and loan holding company as defined in 12 U.S.C. § 1813(w)(3).

(c) For purposes of this Order, the phrase "Effective Date" shall mean the date upon which the OTS, acting through its authorized representative, signs this Order as noted in the caption above.

3. **Successor Statutes, Regulations, Guidance, and Amendments.**

Reference in this Order and the Stipulation to provisions of statutes, regulations, and OTS Publications shall be deemed to include references to all amendments to such provisions as have been made as of the effective date of this Order, and references to successor provisions as they become applicable.

4. **Notices.**

(a) Except as otherwise provided herein, any request, demand, authorization, direction, notice, consent, waiver, or other document provided or permitted by the Order to be made upon, given or furnished to, delivered to, or filed with:

(i) OTS, by Nieser, shall be sufficient for every purpose hereunder if in writing and mailed, first class, postage prepaid or sent via overnight delivery service or physically delivered, in each case addressed to the Regional Director, Office of Thrift Supervision,

Department of the Treasury, 225 E. John Carpenter Freeway, Suite 500, Irving, Texas 75062-2326 or telecopied to 972-277-9501 and confirmed by first class mail, postage prepaid, overnight delivery service or physically delivered, in each case to the above address.

(ii) Nieser by OTS, shall be sufficient for every purpose hereunder if in writing and mailed, first class, postage prepaid, or sent via overnight delivery service or physically delivered, in each case addressed to Nieser at 30 Martin's Way, Sugar Land, Texas 77479 and confirmed by first class mail, postage prepaid, overnight delivery service or physically delivered, in each case to the above address.

(b) Notices hereunder shall be effective upon receipt, if by mail, overnight delivery service, or telecopy, and upon delivery, if by physical delivery. If there is a dispute about the date on which a written notice has been received by a party to this Order, then, in the event such notice was sent by the United States mail, there shall be a presumption that the notice was received two business days after the date of the postmark on the envelope in which the notice was enclosed.

5. **Construction of Order.**

(a) In case any provision in this Order and the Stipulation is ruled to be invalid, illegal, or unenforceable by the decision of any Court of competent jurisdiction, the validity, legality, and enforceability of the remaining provisions hereof shall not in any way be affected or impaired thereby, unless the Regional Director in his or her sole discretion determines otherwise.

(b) Nothing in this Order and the Stipulation shall be construed as: (i) allowing Nieser to violate any law, rule, regulation, or policy statement to which he is subject; or (ii) restricting or estopping OTS from taking any action(s) that it believes are appropriate in fulfilling the responsibilities placed upon it by law.

6. **Costs and Expenses.**

All costs and expenses incurred by Nieser in connection with compliance with this Order

shall be borne by Nieser and in no event by Guardian or its holding company.

7. **Successors in Interest.**

The terms and provisions of this Order and the Stipulation shall be binding upon, and inure to the benefit of, the parties hereto and their successors in interest.

8. **Incorporation.**

The Stipulation is made a part hereof and is incorporated herein by reference.

9. **Duration, Termination or Suspension of Order.**

This Order is and shall become effective on the date it is issued, as shown in the caption hereof. The Stipulation and the Order shall remain in effect until the earlier of (i) five (5) years from the date of issuance of the Order or (ii) until terminated, modified, or suspended in writing by OTS, acting through its Director, Deputy Director, Regional Director, or other authorized representative.

10. **Time Limits.**

Time limitation for compliance with the terms of this Order run from the Effective Date, unless otherwise noted.

**THE OFFICE OF THRIFT SUPERVISION**

By:   
Frederick R. Casteel  
Midwest Regional Director

**UNITED STATES OF AMERICA**  
**Before The**  
**OFFICE OF THRIFT SUPERVISION**

**In the Matter of:** )  
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**JOHN R. NIESER** )  
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**Former Officer of:** )  
**Guardian Savings and Loan** )  
**Association<sup>1</sup>** )  
**Houston, Texas** )  
**OTS Docket No. 05128** )

**OTS Order No.: MWR-04-6**

**Dated: April 19, 2004**

**STIPULATION AND CONSENT TO THE ISSUANCE OF  
AN ORDER TO CEASE AND DESIST FOR AFFIRMATIVE RELIEF**

**WHEREAS**, the Office of Thrift Supervision (OTS), based upon information derived from the exercise of its regulatory responsibilities, has informed John R. Nieser (Nieser), a former officer of Guardian Savings and Loan Association, Houston, Texas (OTS No. 5128), now operating under the corporate title of Encore Bank (Guardian or Institution), that OTS is of the opinion that grounds exist to initiate an administrative cease and desist proceeding against Nieser pursuant to Section 8(b) of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 1818(b).<sup>2</sup>

**WHEREAS**, Nieser desires to cooperate with OTS and to avoid the time and expense of such administrative enforcement proceedings. Without any adjudication on the merits, Nieser neither admits nor denies that grounds exist for an administrative enforcement proceeding and neither admits nor denies the Findings of Fact or opinions and conclusions of OTS, as set forth in Paragraph 2, below. Nieser admits the jurisdiction of OTS set forth in Paragraph 1 below.

<sup>1</sup> Guardian Savings and Loan Association, Houston, Texas (OTS Docket No. 05128). changed its corporate title to Encore Bank, effective September 1, 2001.

<sup>2</sup> All references to the United States Code (U.S.C.) are as amended.

Nieser hereby stipulates and agrees to the following:

1. **Jurisdiction.**

(a) Guardian, at all times relevant hereto, was a "savings association" within the meaning of Section 3(b) of the FDIA, 12 U.S.C. § 1813(b), and Section 2(4) of the Home Owners' Loan Act, 12 U.S.C. § 1462(4). Accordingly, Guardian was an "insured depository institution" as that term is defined in Section 3(c) of the FDIA, 12 U.S.C. § 1813(c).

(b) Nieser, as a former officer of the Institution, is deemed to be an "institution-affiliated party" as that term is defined in Section 3(u) of the FDIA, 12 U.S.C. § 1813(u), having served in such capacities within six (6) years of the date hereof (see 12 U.S.C. § 1818(i)(3)).

(c) Pursuant to Section 3(q) of the FDIA, U.S.C. § 1813(q), OTS is the "appropriate Federal banking agency" with jurisdiction to maintain an enforcement proceeding against institution-affiliated parties of a savings association. Therefore, Nieser is subject to the authority of OTS to initiate and maintain cease and desist proceedings against him pursuant to Section 8(b) of the FDIA, 12 U.S.C. § 1818(b). The Deputy Director of OTS, pursuant to delegated authority, has delegated to the Regional Director of the Midwest Region of OTS (Regional Director) the authority to issue Orders where the individual subject to the Order has consented to its issuance.

2. **OTS Findings of Fact.** OTS finds that:

Nieser was at all relevant times an officer, director, and controlling shareholder of the Institution who caused, brought about, and participated in violations of laws and OTS regulations, specifically:

(a) Sections 562.1 and 562.2 of the OTS Regulations, 12 C.F.R. §§ 562.1 and 562.2, regarding the maintenance of accurate books and records and the filing of accurate thrift financial reports to OTS; and

(b) Section 563.170(c) of the OTS Regulations, 12 C.F.R. § 563.170(c), regarding adequate recordkeeping.

3. **Consent.**

Nieser consents to the issuance by OTS of the accompanying Order to Cease and Desist for Affirmative Relief (Order). Nieser further agrees to comply with the terms of the Order upon issuance and stipulates that the Order complies with all requirements of law.

4. **Finality.**

The Order is issued by OTS under the authority of Section 8(b) of the FDIA, 12 U.S.C. § 1818(b). Upon its issuance by the Regional Director, it shall be a final order, effective and fully enforceable by OTS under the provisions of Section 8(i) of the FDIA, 12 U.S.C. § 1818(i).

5. **Waivers.**

Nieser waives the following:

- (a) the right to be served with a written notice of OTS's charges against him (referred to as a Notice of Charges) (see Section 8(b) of the FDIA, 12 U.S.C. § 1818(b));
- (b) the right to an administrative hearing of OTS's charges against him (see Section 8(b) of the FDIA, 12 U.S.C. § 1818(b));
- (c) the right to seek judicial review of the Order, including, without limitation, any such right provided by Section 8(h) of the FDIA, 12 U.S.C. § 1818(h), or otherwise to challenge the validity of the Order;
- (d) the right to assert this proceeding, this consent to issuance of the Order, and/or the issuance of the Order, the payment of any monies, or the provision of any other financial relief as contemplated by the Order, as the basis for a claim of double jeopardy in any pending or future proceeding brought by the United States Department of Justice or any other governmental entity; and
- (e) any and all claims against OTS, including its employees and agents, and any other governmental entity for the award of fees, costs, or expenses related to this OTS enforcement matter and/or the Order, whether arising under common law, the Equal Access to Justice Act, 5

U.S.C. § 504, or 28 U.S.C. § 2412.

**6. Indemnification Limitations.**

Nieser represents that he has not received, directly or indirectly, any sums from Institution, or any service corporation or subsidiaries thereof, or its holding company, for the purpose of indemnifying or reimbursing him for any expenses incurred by him relating to the issuance of the Order. Nieser shall neither cause nor permit the Institution or its holding company (or any successor institution, company, subsidiary, or service corporation thereof) to incur, directly or indirectly, any expense for any legal or other professional services rendered to Nieser relative to the negotiation and issuance of the Order, nor obtain any indemnification (or other reimbursement) from the Institution or its holding company (or any successor institution, company, subsidiary, or service corporation thereof) with respect to such expenses. In the event that any such payments are received by or on behalf of Nieser in connection with this administrative proceeding, Nieser agrees to notify promptly OTS of the receipt of such payments and to return such payments without delay to the Institution or its holding company (or any successor institution, company, subsidiary, or service corporation thereof).

**7. Scope of Release; Other Government Actions Not Affected.**

(a) Upon OTS's issuance of the accompanying Order, following OTS's acceptance of this Stipulation executed by Nieser, OTS does release and discharge Nieser from all potential claims and charges that have been or might have been asserted by OTS, based on the alleged violations described in the Findings of Fact set forth in Paragraph 2 of this Stipulation, to the extent known to OTS as of the effective date of the accompanying Order. This release shall not preclude or affect any right of the OTS to determine and ensure compliance with the terms and provisions of this Stipulation and the accompanying Order.

(b) Nieser acknowledges and agrees that his consent to the issuance of the accompanying Order is solely for the purpose of resolving certain potential OTS administrative

enforcement charges as provided by Paragraph 7(a) above, and does not otherwise release, discharge, compromise, settle, dismiss, resolve, or in any way affect any actions, charges against, liability, or other administrative, civil, or criminal proceeding that arise pursuant to this action or otherwise, and that may be or have been brought by another governmental entity.

**8. Reservation of Rights**

Nothing in this Stipulation or the accompanying Order shall in any way limit or restrict OTS or any other federal banking agency, in its sole discretion, from bringing additional actions, charges, or proceedings against Nieser for violation of the aforementioned statutory or regulatory violations that occurred after the Effective Date of this Order.

**9. Agreement for Continuing Cooperation.**

Nieser agrees that, on reasonable notice and without service of a subpoena, he will promptly respond to any written request from OTS for documents that OTS reasonably requests to demonstrate compliance with the Order.

**10. Miscellaneous.**

(a) The construction and validity of this Stipulation and the Order shall be governed by the laws of the United States of America;

(b) In case any provision of this Stipulation and the Order is ruled to be invalid, illegal, or unenforceable by the decision of any Court of competent jurisdiction, the validity, legality, and enforceability of the remaining provisions hereof shall not in any way be affected or impaired thereby, unless the Regional Director in his or her sole discretion determines otherwise;

(c) All references to OTS and Guardian in this Stipulation and the Order shall also mean any of OTS's predecessors, successors, and assigns;

(d) The section and paragraph headings in this Stipulation and the Order are for convenience only, and such headings shall not affect the interpretation of this Stipulation or the Orders;

(e) The terms of this Stipulation and the Order represent the final agreement of the parties with respect to the subject matters hereof and constitute the sole agreement of the parties with respect to such subject matters as set forth in Paragraph 7(a). and

(f) This Stipulation and the Order shall remain in effect until terminated, modified, or suspended in writing by OTS, acting through its Director, Deputy Director, Regional Director, or other authorized representative.

**WHEREFORE**, Nieser executes this Stipulation and Consent to Entry of an Order to Cease and Desist for Affirmative Relief, intending to be legally bound hereby.

By:

Accepted by:  
**OFFICE OF THRIFT SUPERVISION**

*John R. Nieser*  
**JOHN R. NIESER**

*F. R. Casteel*  
Frederick R. Casteel  
Midwest Regional Director

Dated: 4-15-2004

Dated: 4-19-04

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ACKNOWLEDGMENT

State of TEXAS

County of HARRIS

On this 15 day of APRIL, 2004, before me, the undersigned notary public, personally appeared John R. Nieser and acknowledged his execution of the foregoing Stipulation and Consent to Entry of an Order to Cease and Desist for Affirmative Relief.

Annette Eakes Brewer

Notary Public

My Commission expires:

2 - 7 - 2007

