

**UNITED STATES OF AMERICA
BEFORE THE
OFFICE OF THRIFT SUPERVISION**

In the Matter of:)

MICHAEL PAUL KIRSCHNER,)

Former Outside Counsel for)
Oak Tree Savings Bank, S.S.B.)
New Orleans, Louisiana)

OTS Order No.: MWR-99-1

Date: January 26, 1999

**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 **Michael Paul Kirschner ("KIRSCHNER")**, former outside counsel representing Oak Tree Savings Bank, S.S.B., New Orleans, Louisiana ("Oak Tree" or the "Institution"), that grounds exist to initiate an administrative cease and desist proceeding against him pursuant to 12 U.S.C. § 1818(b);¹ and

WHEREAS, **KIRSCHNER** desires to cooperate with the OTS and to avoid the time and expense of such administrative proceeding and, without any adjudication on the merits and solely for the purposes of settlement in accord with Federal Rule of Evidence 408 and, ~~without admitting or denying that such grounds exist, and further~~ without admitting or denying the Findings of Fact or opinions and conclusions of the OTS stated herein, except as to Jurisdiction, paragraph 1, below, which is admitted,

¹ All references to the United States Code ("U.S.C.") are as amended, unless otherwise indicated.

hereby stipulates and agrees to the following:

1. **Jurisdiction.**

(a) Oak Tree was a "savings association" within the meaning of 12 U.S.C. § 1813(b) and 12 U.S.C. § 1462(4). Accordingly, it is an "insured depository institution" as that term is defined in 12 U.S.C. § 1813(c);

(b) **KIRSCHNER**, an attorney who was a partner and shareholder with the law firm of Hastie and Kirschner, a professional corporation ("the Firm"), during the period in which the Firm provided legal services to and on behalf of Oak Tree, is an "institution-affiliated party" as that term is defined in 12 U.S.C. § 1813(u), having served in such capacity within 6 years of the date hereof (see 12 U.S.C. § 1818(i)(3)); and

(c) Pursuant to 12 U.S.C. § 1813(q), the Director of the OTS is the "appropriate Federal banking agency" to maintain an enforcement proceeding against such a savings association or its institution-affiliated parties. Therefore, **KIRSCHNER** is subject to the jurisdiction of the OTS to initiate and maintain a cease and desist proceeding against him pursuant to 12 U.S.C. § 1818(b). The Director of the OTS has delegated to the Regional Director of the Midwest Region of the OTS or his designee ("Regional Director"), the authority to issue cease and desist orders where the respondent has consented to the issuance of the order.

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

(a) At least as early as March, 1990, and continuously thereafter, the Firm provided legal representation to Oak Tree concerning a number of different matters. At all relevant times, **KIRSCHNER** was a partner and shareholder of the Firm.

(b) At all relevant times, Clock Tower Place Investments, Ltd. ("Clock Tower") was a first-tier service corporation which was wholly owned by Oak Tree. Clock Tower, in turn, was the 100% owner of the following second-tier subsidiaries of Oak Tree: Landmark Land Co. of California, Inc., Landmark Land Co. of Carolina, Inc.,

Landmark Land Co. of Oklahoma, Inc., Landmark Land Co. of Florida, Inc. and Landmark Land Co. of Louisiana, Inc. These subsidiaries, together with Clock Tower, will hereinafter be referred to collectively as the "Bankrupt Subsidiaries".

(c) The primary assets of the Bankrupt Subsidiaries were extensive real estate and resort properties. These properties were acquired primarily with funds obtained through loans from Oak Tree to the Bankrupt Subsidiaries. The Bankrupt Subsidiaries filed bankruptcy on October 11, 1991. At that time, the Bankrupt Subsidiaries owed over \$950,000,000 to Oak Tree.

(d) At the same time the Firm was representing Oak Tree, the Firm, including KIRSCHNER, was counseling, advising and facilitating the Bankrupt Subsidiaries in filing their petitions for bankruptcy. KIRSCHNER either knew or should have known that none of the debt owed by the Bankrupt Subsidiaries to Oak Tree was secured against the claims of third parties. Neither KIRSCHNER nor anyone else at the Firm ever informed the President/Chief Executive Officer, or any of the other directors of Oak Tree, that bankruptcy proceedings were being contemplated until after the bankruptcy proceedings were filed. KIRSCHNER subsequently participated in the preparation and filing of an adversary complaint against Oak Tree in the bankruptcy proceedings seeking, among other things, an injunction preventing Oak Tree from exercising control over the Bankrupt Subsidiaries. The injunction issued by the bankruptcy court was later vacated and reversed by the United States Court of Appeals for the Fourth Circuit.

(e) The Firm and KIRSCHNER also participated in, counseled, or otherwise aided and abetted in the violation of a written agreement with the OTS. On January 15, 1991, Oak Tree and its subsidiaries entered into a written consent agreement with the OTS ("Consent Agreement"). The Consent Agreement provided, in relevant part, that Oak Tree "shall not and shall not allow any wholly-owned or majority

owned subsidiary or affiliate to ... enter into any material transaction" without the written consent of the District Director of the OTS. The bankruptcy filings by the Bankrupt Subsidiaries constituted a material transaction which violated the Consent Agreement, because the written consent of the OTS was never obtained. **KIRSCHNER** knew or should have known of the existence of the Consent Agreement prior to the filing of the bankruptcy petitions.

(f) The above-described actions by **KIRSCHNER** and the Firm constituted a conflict of interest, knowing or reckless unsafe and unsound practices, breaches of fiduciary duty and/or violations of a written agreement with the OTS. These actions caused Oak Tree to incur substantial losses as an unsecured creditor in the bankruptcy proceedings of the Bankrupt Subsidiaries. As a result of these actions, the Firm and its members or partners were also unjustly enriched in an amount in excess of \$1,800,000. **KIRSCHNER** personally billed approximately \$400,000, at \$225.00 per hour, in the above-described matters.

3. **Consent.** **KIRSCHNER** consents to the issuance by the OTS of the accompanying Order to Cease and Desist For Affirmative Relief ("Order"). **KIRSCHNER** 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 under 12 U.S.C. § 1818(b). Upon its issuance by the OTS, it shall be a final order, effective and fully enforceable by the OTS under the provisions of 12 U.S.C. § 1818(i).

5. **Waivers.** **KIRSCHNER** waives the following:

(a) the right to be served with a written notice of the OTS's charges against the Firm as provided by 12 U.S.C. § 1818(b);

(b) the right to an administrative hearing of the OTS's charges against the Firm as provided by 12 U.S.C. § 1818(b);

(c) the right to seek judicial review of the Order, including, without limitation, any such right provided by 12 U.S.C. § 1818(h), or otherwise to challenge the validity of the Order;

(d) any and all claims against the 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;

(e) the right to assert this proceeding, his consent to the issuance of the Order, 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

(f) KIRSCHNER acknowledges and agrees that pursuant to 11 U.S.C. § 523(a)(11), his restitution obligation under the Order is not a dischargeable debt, and he waives any right to seek discharge of such obligation in any bankruptcy proceeding.

6. **Other Governmental Actions Not Affected.** KIRSCHNER acknowledges and agrees that the consent to the issuance of the Order is for the purpose of resolving this OTS enforcement matter only as it relates to KIRSCHNER's involvement in the matters set forth above in Paragraph 2, and does not release, discharge, compromise, settle, dismiss, resolve, or in any way affect any actions, charges against, or liability of KIRSCHNER that arise pursuant to this action, or otherwise, and that may be or have been brought by another governmental entity.

7. **Agreement for Continuing Cooperation.** KIRSCHNER agrees that, at the OTS's written request, on reasonable notice and without service of a subpoena, he will provide discovery and testify truthfully at any judicial or administrative proceeding related to any investigation, litigation, or other proceeding maintained by the OTS

relating to Oak Tree, its holding company, service corporation or subsidiaries or its institution-affiliated parties, except that KIRSCHNER does not waive any privilege against self-incrimination under the Fifth Amendment of the United States constitution or any attorney-client privilege. If KIRSCHNER invokes his privilege against self-incrimination under the Fifth Amendment of the United States Constitution and the OTS obtains a grant of immunity pursuant to 18 U.S.C. § 6001 et seq., KIRSCHNER agrees, consistent with any such grant of immunity, to provide discovery and testify truthfully at any judicial, administrative, or investigative proceeding on the matter for which immunity is given.

8. **Representation as to Financial Condition.** It is understood that, as part of this settlement, the OTS has relied in part on KIRSCHNER's representations concerning his current financial condition, as set forth in a written statement of financial condition dated October 27, 1998 (on OTS Form 1571, "Statement of Financial Condition"), which has been signed by KIRSCHNER. If any information in the Statement of Financial Condition is found to be false or misleading with respect to any material fact (including but not limited to the failure to properly identify and/or value any material asset or liability), the OTS reserves the right to take any action authorized by law, in the exercise of its discretion, including assessing civil money penalties under 12 U.S.C. Section 1818(l), or to void this Stipulation and the Order, or to take any other legal action.

9. **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) All references to the OTS in this Stipulation and the Order shall also mean any of the OTS's predecessors, successors, and assigns;

(c) 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 Order;

(d) The terms of this Stipulation and the Order represent the final written 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; and

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

WHEREFORE, Michael Paul Kirschner, executes this Stipulation and Consent to the Issuance of an Order to Cease and Desist for Affirmative Relief, intending to be legally bound hereby.

Accepted by:

OFFICE OF THRIFT SUPERVISION


Michael Paul Kirschner


Frederick R. Casteel
Regional Director
Midwest Region

Dated: January 22, 1999

Dated: 1-26-99

UNITED STATES OF AMERICA
BEFORE THE
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In the Matter of:

MICHAEL PAUL KIRSCHNER,

Former Outside Counsel for
Oak Tree Savings Bank, S.S.B.,
New Orleans, Louisiana

OTS Order No.: MWR-99-1

Date: January 26, 1999

CONSENT ORDER TO
CEASE AND DESIST FOR AFFIRMATIVE RELIEF

WHEREAS, Michael Paul Kirschner ("KIRSCHNER"), has executed a Stipulation and Consent to the Issuance of an Order to Cease and Desist for Affirmative Relief ("Stipulation"); and

WHEREAS, KIRSCHNER, by his execution of the Stipulation, has consented and agreed to the issuance of this Consent Order to Cease and Desist for Affirmative Relief ("Order") pursuant to 12 U.S.C. § 1818(b);¹ and

WHEREAS, the Director of the Office of Thrift Supervision ("OTS") has delegated to the Regional Directors of the OTS the authority to issue Orders to Cease and Desist on behalf of the OTS where the respondent has consented to the issuance of the Order.

NOW, THEREFORE, IT IS ORDERED THAT:

1. For purposes of this Order, the phrase "insured depository institution" shall mean any savings and loan association, savings bank, commercial bank, credit union, or

¹ All references to the United States Code ("U.S.C.") are as amended, unless otherwise indicated.

any other depository institution that holds federally insured deposits, any non-diversified holding company of such institution, and a diversified holding company of such institution to the extent that the services provided directly relate to a subsidiary federally insured institution.

2. **KIRSCHNER** 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 the OTS, or violation of any OTS regulations.

3. (a) **KIRSCHNER** shall not represent in the same matter or transaction both (a) an insured depository institution and (b) any other person or entity, including a subsidiary of an insured depository institution (as that term is defined in 12 U.S.C. § 1813(w)(4)) or another insured depository institution, with respect to a matter in which the interests of the insured depository institution and the other person or entity are adverse unless: (i) each such client (if a corporate entity, by an appropriate officer who has no conflicting duty to the other party) consents to such representation in such matter after full disclosure concerning the nature of any such conflict in that matter, which disclosure and consent shall be appropriately documented by **KIRSCHNER**; and (ii) such representation is permitted by the applicable standards of professional conduct.

(b) Whenever **KIRSCHNER** knows or has reason to know that a person or entity that he represents is acting or threatens to act in violation of such person's or entity's fiduciary duty to an insured depository institution, **KIRSCHNER** shall consider whether the applicable ethical rules, including Rules 1.2, 1.13 and 1.16 of the American Bar Association Rules of Professional Conduct, and other applicable rules of professional conduct, require his resignation from the engagement or some other action, and he shall act in accordance with such ethical rules and shall document his actions.

4. During the course of KIRSCHNER's representation of any insured depository institution, he shall retain all documentation and files concerning or relating to any conflicts checks on any new or proposed matters relating to any such insured depository institution.

5. KIRSCHNER shall pay restitution in the total amount of Forty-two Thousand dollars (\$42,000) in accordance with the following schedule:

<u>Amount</u>	<u>Date Due</u>
\$4,000	Within 10 days of Order
\$8,000	January 31, 2000
\$10,000	January 31, 2001
\$10,000	January 31, 2002
\$10,000	January 31, 2003

The full remaining balance of this obligation shall become immediately due and payable upon Kirschner's failure to make any payment specified above within twenty (20) days after the date required by this Order. These restitution payments shall be made by tendering a certified check or bank draft payable to the Federal Deposit Insurance Corporation, as Receiver for Oak Tree. The payments shall be delivered together with a cover letter explaining that it pertains to the restitution required by this Order, referencing the Order, to Joseph F. Griffin, Senior Attorney, Office of Thrift Supervision, 200 West Madison Street, Suite 1300, Chicago, Illinois 60606.

6. All technical words or terms used in this Order, for which meanings are not specified or otherwise provided for 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 or as such definition is amended after the execution of this Order, and any such technical words or terms used in this Order and undefined in said Code of Federal

Regulations, shall have meanings that accord with their best custom and usage in the savings and loan industry.

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

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

9. KIRSCHNER shall promptly respond to any request from the OTS for documents that the OTS reasonably requests to demonstrate compliance with this Order.

10. 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 terminated, modified or suspended, in writing by the OTS, acting through its Director, Regional Director or other authorized representative.

OFFICE OF THRIFT SUPERVISION

By: 
Frederick R. Casteel
Regional Director
Midwest Region