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Utah Department of Commerce
Division of Securities

Brian Y. Horne, Kevin Kunz,
Deseret Financial Services, Inc.
Investment Management Corporation
Twin K Investments, and
Horne Financial, Inc.

BEFORE THE DIVISION OF SECURITIES
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF BRIAN Y HORNE, KEVIN KUNZ DESERET FINANCIAL SERVICES, INC HORNE FINANCIAL, INC INVESTMENT MANAGEMENT CORP TWIN K INVESTMENTS Respondents	**Motion For Summary Judgment To Dismiss BRIAN HORNE, KEVIN KUNZ, DESERET FINANCIAL SERVICES, INVESTMENT MANAGEMENT CORP, TWIN K INVESTMENTS, AND HORNE FINANCIAL, INC.** Docket No. SC-11-0017 Et Al

Motion to Dismiss

Respondents Brian Y. Horne, Kevin D. Kunz, Deseret Financial Services, Twin K Investments, Investment Management Corporation, and Horne Financial Inc. (collectively "Respondents") submit a motion for summary judgment as follows:

Motion to Dismiss with Prejudice Due To Statute of Limitations

1. Consumer Fraud statute of limitation under Utah law is 2 years. Section 13-11-19(8). The allegations state the violations occurred prior to 2006. Therefore, the statute of limitations is passed and the Division is barred from bringing action due to consumer fraud.

2. Securities Registration Violations under Utah statute of limitation is 4 years after the violation or 2 years after the discovery of facts constituting the violation, whichever expires first. Section 61-1-22(7)(a). The Division's allegations state the violations occurred prior to 2006. Thus, the Division is barred from bringing allegations of securities registration violations against the Respondents.
3. Securities Fraud violations under Utah code have a statute of limitation of 4 years after the violation or 2 years after the discovery of facts constituting the violation, whichever expires first. Section 61-1-22(7)(a). The Division's allegations state the violations occurred prior to 2006. Thus, the Division is barred from bringing allegations of securities fraud against the Respondents.
4. Securities Acts of 1933 and 1934 and the Investment Advisor's Act (federal law) have an all encompassing statute of limitation on any securities violations of 5 years from the date of the violation. The statute of limitations includes civil penalties against brokers and advisors in administrative proceedings. Generally, if the government is seeking a penalty (fine, bar, cease and desist, etc.) the matter is subject to the statute of limitation.
5. The Division's allegations state all alleged violations occurred prior to March 2006 (beyond the 5 year federal statutes) and the Division is seeking civil penalties. The civil penalties sought by the Division are 1) Respondents should be "found to have engaged in the violations of the Act alleged by the Division" which clearly have a 4 year statute of limitations. 2) Respondents should be "ordered permanently to cease and desist" which is a penalty and therefore subject to the 2, 4 and 5 year statutes of limitations. 3) Respondents should "be ordered to pay fines to the Division." Clearly this is a penalty and not a disgorgement of commission or some other non-penalty action. As such, any and all "penalties" are subject to the statutes of limitations as indicated below. 4) That the Respondents should be "barred" again – a second time for the same allegations. This is a violation of the Double Jeopardy laws as well as the 2, 4, and 5 year

statutes of limitation as a "bar" is a clearly a "penalty." Thus, the Division is precluded from bringing allegations of securities violations against the Respondents due to statute of limitation and therefore this matter must be dismissed as untimely.

6. Respondents have already been barred from the securities business on a state and national level and are subject to "statutory disqualification as that term is defined in Section 3(a)(39) of the Securities Exchange Act of 1934." FINRA, Financial Industry Regulatory Authority, barred respondents in March 2008. FINRA is the national organization that was set up by the SEC which governs all individuals and firms to be licensed to sell securities nationally and in Utah. FINRA has original jurisdiction. Once FINRA approves an individual and qualifies them, under the direction of the SEC, the state then has the option to allow that person to sell securities within their jurisdiction. If an individual or firm is barred nationally by FINRA under the 1934 Act however, they are by definition barred in every state. Respondents are currently, and permanently, barred from the securities business in Utah and all states.

    a. As indicated in the "Statement of Fact" paragraph 4, the Division admits that IMC, Horne, and Kunz were expelled from membership and have already been barred. The footnotes on pages 6-7 of the complaint for paragraphs 25, 26, 27, 28, and 29 all refer to the prior proceedings for which Respondents have already been tried and/or punished. In fact, the vast majority of the allegations in the Division complaint come directly from the NASD's (now FINRA) complaints against Respondents which resulted in the said sanctions or penalties. See Exhibit A.

    b. Additional penalties for the same offense are a violation of the Respondent's Fifth Amendment rights. The DOUBLE JEOPARDY clause in the Fifth Amendment to the U. S. Constitution prohibits individuals from being tried or punished more than one time for a single offense and from imposing more than one punishment for a single offense.

c. This Order to Show cause is a violation of the Double Jeopardy laws as it is making duplicate allegations, and a second prosecution, upon which Respondents have already been tried for identical alleged violations as admitted by the Division in their Order to Show Cause. See attached Exhibit A.

d. The requested penalties are a violation of the Double Jeopardy laws as the Division is seeking to punish Respondents for identical acts for which they have already been punished (imposing more than one punishment for the same offence).

e. The requested bar is a duplicate punishment for the same acts which Respondents have already be barred at the state and national level (imposing more than one punishment, an identical punishment –bar in this case, for the same act). Respondents have already been barred in the state of Utah for the identical reasons the Division is requesting another bar in violation of the 5th Amendment.

Court Precedence on Statutes of Limitation in Administrative Hearings

The court of appeals in 3M Company v. Browner 17 F 3d 1453 (D.C. Cir. 1994) held that the statute of limitations applies to administrative proceedings and was consistent with the Commission using administrative proceedings to protect the public interest. The court then suggested that an expansive reading of its own decision is a general statute of limitations applicable not just to EPA, but to the entire government in all civil penalty cases. ID at 1461.

In Johnson vs the Securities and Exchange Commission (SEC), 87 F.3d 484 (D.C. Cir. 1996), the court of appeals for the District of Columbia held the statute of limitation as outlined in the securities acts applies to administrative proceedings.

Patricia Johnson was a branch manager of PaineWebber. There were alleged allegations of wrongdoing which were reported to the SEC in June of 1988. More than 5 years later the SEC charged Johnson with securities violations. Ms. Johnson moved to dismiss and the SEC denied the motion on the basis that the statute of limitations did not apply to administrative hearings.

The court construed the term "penalty" in Section 2462 to mean "a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's actions." The court noted that a suspension or bar not only would restrict Ms. Johnson's ability to earn a living, but also would become a publicly available part of her record. Such "collateral consequences of the censure do suggest its punishment-like qualities." Further, the Court held that the "sanction less resemble punishment if the SEC had focused on Johnson's current competence of the degree of risk she posed to the public." But the Court found the SEC's inquiry had been retrospective, looking backward to Ms. Johnson's actions of more than 5 years prior. Thus, the Court concluded that the sanctions were punishments for a past action.

The Court next addressed the SEC's argument that the statute of limitations should not apply to actions designed to protect the public. The Court disagreed. Finally, the Court rejected the SEC's apocalyptic argument that imposing a statute of limitation on enforcement actions would "hobble efforts to prevent future harm to the public." The court reasoned that "Once the SEC has delayed more than five years in proceeding against a broker it considered a grave threat to the public, the bulk of the harm has already been done." The Court also found that if the SEC needed more time to bring actions that Congress may enact a longer limitations period. The Court then vacated Ms. Johnson's sanctions.

More recently on 2/26/2007, summary judgment against the SEC was granted in the dismissing of claims brought by the SEC, in SEC v. Jones and Daidone for civil penalties and an injunction, as time-barred. (05 Civ. 7044 (RCC) S.D.N.Y. Feb. 26, 2007)

The Court held that the government is required to "go beyond the mere facts of past violations and demonstrate a realistic likelihood of recurrence," and that the absence of such proof "would indicated that the requested injunction is not aimed at protecting the public from future harm, but

more likely aimed at punishing Defendants," and is therefore subject to the statute of limitations period.

In dismissing the SEC's action for civil penalties and an injunction, Judge Casey relied principally on the applicability of the statute of limitations period. He found, "to the extent the SEC's claims are subject to a statute of limitations, the catch-all limitations period in 28 U.S.C 2462 (five years) applies. Under 2462, any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise" is barred "unless commenced within five years from the date when the claim first accrued." The court found that the claim for money penalties such as a fine "is unquestionably a penalty and, as such, is subject to the five-year limitations period of 2462."

In addition to civil money penalties, the SEC also sought to enjoin Defendants from committing future violations through the use of a bar or cease and desist order. In opposing the motion for summary judgment, the SEC claimed that the injunction was not subject to the statute of limitations. The court held that, as stated above, 2462 makes clear that any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise" is barred "unless commenced within five years from the date when the claim first accrued."

In dismissing the SEC's claim the court clarified that "in light of the relevant case law, the ordinary meaning of 'penalty,' and the clear language of 2462, the Court holds that the limitations period in 2462 applies to civil penalties and equitable relief that seeks to punish." The court also pointed out the SEC "has adduced no positive proof aside from Defendant's past alleged wrongdoing to suggest 'some cognizable danger of recurrent violation.'" Past conduct, the court noted, was insufficient to demonstrate the need for a bar. Judge Casey also found that the passage of several years since the alleged misconduct, apparently without incident, "further undercuts the Commission's assertion that Defendants pose a continuing risk to the public."

In another case, SEC v. Kulak, the enforcement proceeding involving allegations of violation of the Act was also dismissed as time barred. (64 SEC Docket 1537, 1997 WL 259708 (May 20, 1997).

CONCLUSION

In the matter at hand, the Division's Statement of Facts against Respondents specifies all dates for alleged actions occurred prior to March 2006 and are therefore time barred on the four year limit as contained in the Utah Act as well as the catch-all five year limit as outlined in the federal laws.

The Division is seeking penalties and punishments of 1) finding the Respondents to have engaged in the violations of the Act, 2) Order Respondents to cease and desist, 3) Respondents should "pay fines" to "the Division", and 4) Respondents should be barred.

The rulings of Johnson, Kulak, Jones, Daidone, and others are unambiguous. The government (The SEC, FINRA, or the Utah Division of Securities) cannot impose a **penalty** for activities that occurred prior to the statute of limitation (in this case the shorter of 4 years from occurrence or 2 yrs from discovery) before the initiation of a proceeding. The Division's proceedings against Respondents commenced in March of 2011. Therefore, all allegations alleging violations that occurred prior to March of 2006 must be dismissed. Every alleged violation has in fact occurred prior to March of 2006, which the Division clearly points out in their Order, and therefore the entire Order to Show Cause and all allegations must be dismissed with prejudice.

As in the SEC v. Jones and Daidone matter, Respondents in this case have gone over six years without incident or other alleged violations which also undercut any reasoning behind the need for a bar or a cease and desist order. In addition, Respondents are no longer in the securities business having resigned on or before 12/31/2007. As in the SEC vs Jones & Daidone, SEC vs Johnson, and SEC vs Kulak, the Division has not shown any realistic likelihood of reoccurrence and the injunctions or proposed penalties are clearly not aimed at protecting the public from future harm.

The unquestionable aim or goal is to punish the Respondents and therefore the allegations or claims are subject to the four year statute of limitations.

The Respondent entities have all closed their doors and are out of business. Utah law allows a business to close down and then gives the entity three years, known as a wind-down period, to settle all its affairs. During this 3-year period it is to close all its bank accounts, file final tax returns, and settle all claims. Any claims against the organization must be brought during this three-year period. After the 3-year period has ended the company is defunct and no civil actions can be brought against the entity. Horne Financial, Inc., Deseret Financial Services, Inc., and Investment Management Corporation have all been closed for more than three years and are beyond their wind-down period and therefore no claims can be brought against the entities.

The Division cannot fine or penalize an entity that does not exist or that is dead. There is no possible way of collecting an award. Obviously a non-existent entity is not a risk to the public. A non-existent or dead entity has no reason to be barred, nor would a cease and desist order be of any use. The entities are dead and gone and are therefore have no means of acting as a broker dealer, underwriter, or in any other capacity. Thus, the only reason the Division is seeking a bar and a cease and desist order is to make it appear they are acting in the public interest with an attempt to justify their existence. This is a matter of showmanship, hoping to fool the public by putting out a notice that they were able get a judgment, a bar, and a cease and desist against 4 firms. This case is therefore fraudulent in nature as it is seeking to punish the dead firms in order to fool the public through deceptive tactics. Clearly this matter against the defunct entities should be dismissed.

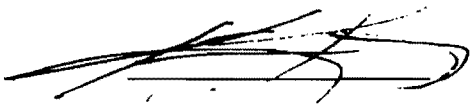
Investment Management Corp, Brian Horne and Kevin Kunz have been out of the securities business for over three years and have been barred for over three years. There is no possible way for them to act in a broker, dealer, registered investment adviser, or any other capacity in the securities business. They are not allowed to have a securities license in Utah or any other state. Obviously the barred individuals are not a risk to the public of an on-going or repeat offense. Thus,

the only reason the Division is seeking a bar and a cease and desist order is to make it appear they are acting in the public interest with an attempt to justify their existence. This is a matter of showmanship, hoping to fool the public by putting out a notice that they were able get a judgment, a bar, and a cease and desist against 2 individuals. This case is therefore fraudulent in nature as it is seeking to bar the already barred individuals in order to fool the public through deceptive tactics. Clearly this matter against the individuals should be dismissed.

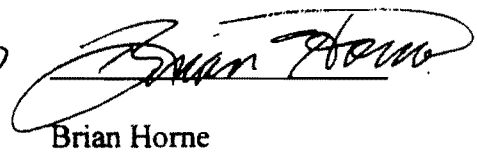
The requested relief by the Division, in all respects, can only be characterized as a penalty as noted above making all allegation subject to the statute of limitations in addition to violating the Respondent's Fifth Amendment rights (see Order to Show Cause paragraphs 25, 26, 27, 28, 29, 33, 34, 37, 43j, and the footnotes on pages 6 and 7 which specify the sanctions and penalties that have already been imposed by FINRA and others). Federal and state statutes require that administrative proceeding commence within five years and four years respectively, from the date the actions occurred if the request for relief involves penalties. The Division clearly stated in their Order to Show Cause the alleged violations occurred in 1994, 1998, 2001, 2003, and 2004 (see paragraphs 22, 23, 30, 31, 35, 36, 43k, 46, 47, and 50). There are no alleged violations in the last five years (since March 2006). All requested relief is "penalty" in nature: civil fine, bar, cease and desist. Respondents have already been tried and punished for these same allegations.

Accordingly, as demonstrated by numerous evidentiary case law decisions, federal laws and statutes, and state statutes all requested civil penalties are subject to the statute of limitations, are time barred, are barred by the Fifth Amendment, and must be dismissed as untimely or unlawful.

DATED this 27 day of June, 2011.



Kevin Kunz



Brian Horne

CERTIFICATE OF SERVICE

I hereby certify that on this 27 day of June, 2011, we caused a true and correct copy of the foregoing **MOTION TO DISMISS BY BRIAN HORNE, KEVIN KUNZ, INVESTMENT MANAGEMENT CORPORATION, TWIN K INVESTMENTS, DESERET FINANCIAL SERVICES, AND HORNE FINANCIAL, INC.** to be mailed, postage prepaid to:

Administrative Court Clerk
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Utah Division of Securities
Box 146760
Salt Lake City, UT 84114-6760

D. Scott Davis
Assistant Attorney General
Utah Division of Securities
160 E 300 S, 5th Floor
Salt Lake City, UT 84114-0872

EXHIBIT A

NASD
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, **COMPLAINANT,** **v.** **INVESTMENT MANAGEMENT CORPORATION** **CRD NO. 37196,** **KEVIN KUNZ** **CRD NO. 1274540,** **BRIAN HORNE** **CRD NO. 1830136** **RESPONDENTS.**	**DISCIPLINARY PROCEEDING** **NO. 2005000960301**

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. Investment Management Corporation (IMC or the Firm), acting through Kevin Kunz (Kunz), its former President, failed to comply with a sanction imposed in an NASD disciplinary proceeding that was affirmed by the Securities and Exchange Commission (SEC) and the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit). In July 1998, the National Adjudicatory Council affirmed a Decision of an NASD District Business Conduct Committee (DBCC) that imposed sanctions on IMC and Kunz for various violations of the federal securities laws and NASD rules. The sanctions included a

suspension of IMC from participating as primary placement or sales agent in securities offerings until the Firm had undertaken certain measures, including the retention of an independent consultant to review its policies and procedures relating to securities offerings. The disciplinary Decision also required IMC to provide the staff with a copy of the consultant's report and to demonstrate to the staff that it had implemented the recommendations of the consultant before participating in an offering. This Decision was subsequently affirmed by the SEC and ultimately by the Tenth Circuit on March 28, 2003. Kunz knowingly caused IMC's failure to comply with the terms of the suspension and the Firm's consequent violation of Conduct Rule 2110, by acting as the primary placement and sales agent in connection with four private placements from April 2003 through August 2004 without having retained an independent consultant. Moreover, Brian Horne (Horne), the Firm's President and Chief Compliance Officer, failed to supervise the activities of IMC and Kunz that were in violation of the terms of the Decision. As a result, Horne violated Conduct Rules 3010 and 2110.

2. From approximately January 2003 through December 2003, IMC, acting through Kunz and Horne, directed Vescor Capital Corporation (Vescor), an issuer, to pay commissions earned by IMC to a non-member mortgage company, Deseret Financial Services, Inc. (Deseret), which was owned and operated by Horne. IMC earned the commissions from its participation in four securities offerings, two of which are referenced in paragraph 1, above. Deseret, in turn, paid the commissions to IMC representatives. The payments were structured in this way to avoid NASD detection of the Firm's participation in securities offerings without having complied with the

independent consultant requirement set forth in the Decision. As a result, IMC, Kunz and Horne violated Conduct Rules 2420 and 2110.

3. The Decision also suspended Kunz from acting in a principal capacity for one year, commencing May 3, 2003. This suspension was extended through to August 16, 2004, as a result of a second NASD decision, issued on December 15, 2003, imposing a principal suspension of six months on Kunz beginning February 16, 2004. While suspended, nevertheless Kunz functioned in a principal capacity by actively engaging in the supervision, management and solicitation of the Firm's investment banking and securities business. As a result, Kunz violated NASD Membership and Registration Rule 1021 and NASD Conduct Rule 2110. Moreover, Horne failed reasonably to supervise Kunz by allowing him to act in such a capacity, in violation of NASD Conduct Rules 3010 and 2110.

RESPONDENTS

4. From December 1994 to the present, IMC, formerly known as Kunz and Cline Investment Management, Inc. (K&C) has been an NASD member. IMC is located in Bountiful, Utah. IMC is owned by Kunz and Horne. Kunz is the Firm's Chief Compliance Officer and Horne is the Firm's President and Chief Executive Officer.

5. Kunz entered the securities industry in or about May 1984, when he submitted a Form U-4 to become registered with a member firm. Kunz formed K&C with another individual and was registered with the Firm as a General Securities Representative and a General Securities Principal when K&C became a member of NASD in 1994. Since August 2004, Kunz has served as Chief Compliance Officer for the Firm. He is currently registered with IMC as a General Securities Representative and Principal and a

Municipal Securities Representative and Principal. Pursuant to Article V, Section 4 of NASD's By-Laws, he is subject to NASD jurisdiction for purposes of this Complaint.

6. Horne entered the securities industries in or about April 1988, when he submitted a Form U-4 to become registered with a member firm. In or about December 10, 1999, Horne became registered as a General Securities Representative with IMC and, during 2000 and 2001, he became the Firm's General Securities Principal, Financial and Operations Principal, and Registered Options Principal. Subsequently, in or about February 2001, Horne acquired an ownership interest in IMC. In or about April 2003, Horne became the Firm's President and Chief Compliance Officer and in or about June 2003, Horne became registered as a Municipal Securities Principal. He is currently IMC's President and Chief Executive Officer. Pursuant to Article V, Section 4 of NASD's By-Laws, he is subject to NASD jurisdiction for purposes of this Complaint.

FIRST CAUSE OF ACTION
IMC AND KUNZ
FAILURE TO COMPLY WITH SANCTIONS IMPOSED IN DISCIPLINARY DECISION
Conduct Rule 2110

7. On August 21, 1996, IMC, Kunz and another individual were named in *DBCC v. Kunz and Cline Investment Management, Inc.*, Complaint No. C3A960029, which alleged various violations related to an offering.. In November 1997, a District Business Conduct Committee (DBCC) found that, during the approximate period December 1994 through September 1995, the Firm, acting though Kunz, sold VesCor securities pursuant to private placement memoranda ("PPMs") containing material misrepresentations and omissions, in violation of Conduct Rule 2110; sold VesCor securities that were neither registered under the Securities Act of 1933 ("1933 Act") nor exempt from registration, in contravention of Section 5 of the 1933 Act and in violation

of Conduct Rule 2110; and made unsuitable recommendations to investors with respect to the VesCor securities. The DBCC also found that Kunz, as an individual, paid transaction-based compensation to an individual not registered with the Firm (the Decision).

8. Kunz and the Firm appealed the matter to the National Adjudicatory Counsel (NAC). On appeal, the NAC affirmed all but one of the DBCC's findings in July 1999, dismissing the suitability charge. With respect to sanctions, the NAC imposed upon the Firm a suspension

> ... from participation in any public or private offering of a security in the capacities of lead underwriter or primary placement or sales agent until such time as:
>
> (a) it retains an independent consultant acceptable to NASD Regulation District No. 3 staff to review the adequacy and completeness of the firm's operational, compliance and supervisory procedures pertaining to participation in such offerings in such capacities;
>
> (b) the independent consultant issues a report to the firm, with a copy to District No. 3 staff, setting forth his or her recommendations for changes and/or additions to such procedures in order to further compliance with all applicable laws, rules and regulations related to the securities industry; and
>
> (c) the firm implements, and demonstrates to District No. 3 staff that it has implemented the recommendations of the consultant.

The Decision, as affirmed by the NAC, further required that, for "two years from the date on which K&C receives notices from District No. 3 staff that it has complied with the independent consultant provisions listed above, K&C shall be required to retain independent counsel to review all offering documentation prepared for use in connection with any offering of securities in which it participates in the capacities of lead underwriter or primary sales or placement agent." *DBCC v. Kunz*, Complaint No. C3A960029, 1999 NASD Discip. LEXIS 20, at *76-77 (NAC July 7, 1999).

9. Kunz and the Firm appealed the NAC decision to the SEC and then to the Tenth Circuit. In decisions dated January 16, 2002 and March 28, 2003, respectively, the SEC and the Tenth Circuit affirmed the NAC's findings and the sanctions imposed, including the requirement to retain an independent consultant.

10. Kunz and the Firm received a copy of the DBCC, NAC, SEC and Tenth Circuit Decisions and Kunz was aware that IMC was suspended from participation in securities offerings as primary placement or sales agent until the Firm complied with the independent consultant requirement.

11. From at least March 28, 2003, through April 1, 2005, IMC was suspended from participation in securities offerings as primary placement or sales agent because it had not complied with the independent consultant requirement. Nevertheless, during this time period, Kunz knowingly and willfully caused the Firm to participate as primary placement or sales agent in four VesCor offerings.

a. From in or about April 2003 through December 2003, IMC sold approximately $1,549,600.00 of VesCorp [sic] Monthly Income Notes;

b. From in or about April 2003 through December 2003, IMC sold approximately $5,024,600.00 of VesCorp [sic] Monthly Accrual Notes;

c. From in or about May 2004 through August 2004, IMC sold approximately $3,669,300.00 of VesCorp [sic] IV Monthly Income Notes; and

d. From in or about May 2004 through August 2004, IMC sold approximately $6,295,400.00 of VesCorp [sic] IV Monthly Accrual Notes.

12. IMC also failed to comply with the requirement in the Decision to retain independent counsel to review the offering documentation prepared for use in connection

with the offering and sale of the VesCorp [sic] Monthly Income Notes or the VesCorp Monthly [sic] Accrual Notes.

13. Although IMC did retain an attorney to review certain disclosures in the offering documents for the VesCorp [sic] IV Monthly Income Notes and the VesCorp [sic] IV Monthly Accrual Notes, the scope of his review was inadequate to satisfy the requirements of the Decision. The attorney's review was limited to certain disclosures and did not include a determination whether the private placement memoranda complied with federal or state securities laws. Moreover, IMC did not first satisfy the independent consultant requirement before retaining the attorney, as required by the Decision.

14. IMC's participation in four VesCor offerings as primary placement or sales agent while suspended from participation in securities offerings as primary placement or sales agent, as more fully described in paragraphs 7-13, above, constituted conduct inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of Conduct Rule 2110 by the Firm.

15. Kunz's actions in causing IMC to participate in the VesCor offerings while IMC was suspended constituted conduct inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of Conduct Rule 2110 by Kunz.

SECOND CAUSE OF ACTION
IMC, Kunz and Horne
PAYMENTS TO A NON-MEMBER FIRM
Violations of Conduct Rules 2420 and 2110

16. The allegations set forth above in paragraphs 1 through 15, above, are realleged and incorporated for the purpose of this cause of action

17. From approximately January 2003 through December 2003, IMC, acting through Kunz and Horne, processed commissions earned by representatives of the Firm through a non-member mortgage company, Deseret, which is owned by Horne. From in or about April 2003, Horne served as IMC's President and Chief Compliance Officer.

18. Beginning in or about January 2003, the Firm, acting through Kunz and with the knowledge and implicit consent of Horne, directed VesCor to pay commissions to Deseret earned from IMC's sales of securities offered in four private placements. Those offerings were: Deer Valley Loan Participation Interests, Sienna Vista Office Park Loan Participation Interests, Vescorp [sic] Income Notes and VesCorp [sic] Accrual Notes. More specifically, for the approximate time period January 2003 through December 2003, VesCor paid Deseret approximately $1,616,183.00 in commissions in connection with the sales of these securities.

19. Deseret accepted payment from the issuer on behalf of IMC. Deseret, owned and operated by Horne, then paid the commissions to IMC's registered representatives.

20. During the approximate period from January 2003 through December 2003, Horne and Kunz each received compensation in the form of "overrides" from Deseret in excess of $100,000.00 in connection with the sales of the securities more fully set forth in paragraph 18, above.

21. Directing the payment of compensation for securities transactions to a non-member and causing the non-member to compensate registered persons of IMC, as more fully described in paragraphs 17-20 above constituted violations of Conduct Rule 2420 by IMC, Kunz and Horne. Further, such conduct was inconsistent with high standards of

commercial honor and just and equitable principles of trade and constituted violations of Conduct Rule 2110 by IMC, Kunz and Horne.

THIRD CAUSE OF ACTION
KUNZ
FUNCTIONING AS A PRINCIPAL WHILE SUSPENDED
NASD CONDUCT RULE 2110 AND MEMBERSHIP AND REGISTRATION RULE 1021

22. The allegations set forth above in paragraphs 1 through 21 are realleged and incorporated for the purpose of this cause of action.

23. As a result of the Decision referenced above in paragraphs 7 through 9, Kunz was suspended from associating with any member firm in all capacities for a total of 30 calendar days and in a principal capacity for a total of one year.

24. Kunz's all capacities suspension commenced on May 5, 2003, and ended on June 3, 2003. His principal suspension also commenced on May 5, 2003, and was to end on May 5, 2004. However, as a result of another disciplinary action, as set forth below in paragraphs 25 and 26, his principal suspension continued until August 16, 2004.

25. In August 2002, an NASD Hearing Panel found that IMC, acting through Kunz, had violated net capital rules; maintained inaccurate books and records; filed inaccurate FOCUS reports; submitted an incomplete and materially inaccurate notice of a possible net capital deficiency; failed to file required information concerning an NASD arbitration award and a settlement; allowed an unregistered person to function in a capacity that required registration; and failed to establish adequate written supervisory procedures with respect to the reporting of arbitration awards and settlements. Kunz and the Firm were fined $28,757, jointly and severally. Kunz was barred from serving as a Financial and Operations Principal and suspended from acting in any principal capacity

for six months, after which he was required to requalify in any principal capacity in which he sought to be registered. On appeal, the NAC affirmed the Hearing Panel's findings and sanctions in a Decision dated December 15, 2003. *DOE v. Investment Management Corp.*, Complaint No. C3A010045, 2003 NASD Discip. LEXIS 47 (NAC December 15, 2003).

26. Kunz's bar as Financial and Operations Principal became effective on December 15, 2003. His suspension in all principal capacities commenced on February 16, 2004, thus overlapping with his principal suspension resulting from the previous disciplinary action. Taken together, the two actions caused Kunz to be suspended from association with a member in any principal capacity from May 5, 2003 to August 16, 2004.

27. Notwithstanding the principal suspensions described above, Kunz functioned as a principal of IMC at various times between approximately May 5, 2003 and August 16, 2004. Kunz engaged in the day-to-day management of the firm's investment banking and securities business by initiating and directing the Firm's participation in the VesCor private placements described in paragraph 11 above. Further, Kunz was designated as the firm's Anti-Money Laundering contact and compliance officer and as the principal responsible for continuing education.

28. The foregoing conduct was inconsistent with high standards of commercial honor and just and equitable principles of trade and a violation of Conduct Rule 2110 by Kunz. Such conduct constituted functioning in a principal capacity without qualifying in the manner specified in the NASD Membership and Registration Rules and thus resulted in a violation of Membership and Registration Rule 1021 by Kunz.

FOURTH CAUSE OF ACTION
HORNE
FAILURE TO SUPERVISE
Violations of NASD Conduct Rules 3010 and 2110

29. The allegations set forth above in paragraphs 1 through 28 are realleged and incorporated for the purpose of this cause of action.

30. As discussed above in paragraphs 11 through 14 , IMC, acting through Kunz, failed to comply with sanctions imposed upon the Firm in the NASD Disciplinary Decision by participating in four private placements in the capacity of primary placement and sales agent without satisfying the requirement to first obtain an independent consultant.

31. Horne became aware in or about December 2002, of the SEC decision, which affirmed the requirement to retain an independent consultant. Moreover, in April 2003, Horne executed and filed, or caused to be filed, an amendment to IMC's Form BD disclosing the Tenth Circuit decision against Kunz and the Firm, that was issued on March 28, 2003. The Form BD amendments cited the case number and described the violations, monetary fines and the all-capacities and principal suspensions levied against either the Firm and/or Kunz.

32. Horne either knew of the independent consultant requirement as set forth in the Decision or acted with reckless disregard by failing to apprise himself of the sanctions imposed in the Decision. Moreover, Horne knew of the Firm's involvement in the VesCorp [sic] Monthly Income and Accrual Notes and the VesCorp [sic] IV Monthly Income and Accrual Notes. Horne, as the Firm's President and Chief Compliance Officer was responsible for ensuring that the Firm complied with the terms of the

Disciplinary Decision. Yet, he knowingly or recklessly permitted the Firm to participate in these four VesCor offerings, without satisfying the requirement to first hire an independent consultant. In so doing, Horne failed to supervise the activities of IMC and Kunz in a manner reasonably designed to cause the Firm to comply with the sanctions imposed in the Decision.

33. In addition Horne knew or should have known that Kunz was not permitted to act as a General Securities Principal from May 5, 2003, through August 15, 2004. Notwithstanding his knowledge that Kunz was suspended in all principal capacities, Horne failed to supervise Kunz in a manner reasonably designed to prevent Kunz from functioning in such capacities while suspended.

34. By reason of his failure to supervise the activities of IMC and Kunz, as described in paragraphs 31 through 33 above, Horne violated NASD Conduct Rule 3010. Further, by failing to supervise the activities of IMC and Kunz, Horne engaged in conduct that was inconsistent with high standards of commercial honor and just and equitable principles of trade, thereby violating Conduct Rule 2110.

PRAYER FOR RELIEF

WHEREFORE, the Department respectfully requests that the Panel:

A. order that one or more of the sanctions provided under NASD Rule 8310(a) be imposed, including that the Respondents be required to disgorge fully any and all ill-gotten gains