

Copy of Reply to Response

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

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JUL 27 2011

Utah Department of Commerce
Division of Securities

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

**Response to Division's Reply
on Motion to Dismiss
BRIAN HORNE, KEVIN
KUNZ, Et Al**

Docket No. SC-11-0017
Et Al

Respondent's Reply

Respondents Brian Y. Horne, Kevin D. Kunz, Deseret Financial Services, Twin K Investments, Investment Management Corporation, and Horne Financial Inc. (collectively "Respondents") submit a Response to the Division's Reply on the Motion for summary judgment as follows:

Introduction

The Division's "Reply" to the Respondent's motion to dismiss raises issues that Respondents assert are false and misleading. It is axiomatic in American Law that statute of limitations exists for just about every action save murder or sexual acts perpetrated against a child. The courts have repeatedly ruled that administrative proceedings are subject to time limits even when no limits are stated in the code. In addition, the Division has already tried Respondents vicariously on these matters and is precluded from bringing a second action against them for the same offense. There are no

customer complaints against Respondents and there is no likelihood of reoccurrence as Respondents have already been barred in Utah.

STATEMENT OF FACTS

I. The Respondents Have Already Been Tried and Barred in Utah

- a. On or about July 2004 the Division of Securities, led by Sheila Thomas, performed an On-Premises investigation of the Respondents. Over 7 years ago.
- b. The Division discovered what they felt were violations by Respondents of the Utah Act and/or securities regulations.
- c. The Division had a choice to bring an administrative proceeding on their own or turn the matter over to the SEC or the NASD absolving themselves from taking action.
- d. The Division chose to defer to the SEC and not take their own action. This in turn put the SEC in charge of the matter. The Division had the opportunity to work with the SEC jointly but did not.
- e. In May 2005 the SEC performed their own On-Premises investigation. They noted some violations of securities rules but nothing criminal.
- f. In January 2006 the matter was remanded to the NASD, the national securities governing body, and was now out of the hands of the Division and the SEC.
- g. In November 2006 the Division performed another on-premises investigation. Again they chose not to take any action or make a complaint.
- h. The NASD has jurisdiction over all securities licensed individuals and firms nationwide. No one can be licensed in any state unless first approved by the NASD (now FINRA). Utah cannot license anyone who has not already been approved by the NASD. Utah Division of Securities is secondary, to FINRA, in licensing and barring of individuals and firms.

- i. In December 2007 Respondents were barred from the securities business in all 50 states. Respondents were barred in Utah from selling securities, offering securities, or associating with any firm that is securities licensed. There is no other bar in Utah that is available. This is the maximum non-monetary penalty that can be imposed. The Division is seeking a 2nd identical bar against Respondents for the same identical actions that took place over 7 years ago. This action should be denied as respondents are already barred.

II. The Division is subject to Statute of Limitations

- a. **The courts have repeatedly ruled that administrative proceedings are subject to time limits even if one is not specifically stated in the state or federal code.**
- b. The statute of limitations period under Rule 10b-5 of the Securities Exchange Act of 1934 is two years from the discovery of the facts constituting the fraud, or a maximum of five years from the date of the alleged violation. The courts have held that the statute of limitations applies to administrative proceedings concerning alleged violations against registered individuals as well as in civil matters.
 - i. See 3M Company v. Browner 17 F 3d 1453 (D.C. Cir. 1994),
 - ii. Johnson vs the Securities and Exchange Commission (SEC), 87 F.3d 484 (D.C. Cir. 1996),
 - iii. SEC v. Jones and Daidone 05 Civ. 7044 (RCC) S.D.N.Y. Feb. 26, 2007, SEC v. Jones, 476 F.Supp. 2nd 374 (S.D.NY, 2007),
 - iv. SEC v. Tambone, 550 F.3d 106 (1st Cir., 2008)
- c. There is certain criterion that must be met for the statute of limitations to apply in administrative proceedings concerning securities fraud and other securities violations.

The statute of limitations applies if:

- i. **The administrative matter involves a punishment such as a fine or a bar that could have civil ramifications, and**

ii. The administrative matter does not involve a disgorgement of commissions which is not time barred.

- d. The Division meets both of these criteria and is therefore subject to the statute of limitations.
- e. Federal Securities Law, which supersedes Utah securities law, and upon which the Utah code is based, reads:
- i. The Securities Act contains a statute of limitations with two “triggers.” See 15 U.S.C. Section 77m “No action shall be maintained to enforce any liability created under [section 11] or [section 12(a)(2)] unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under [section 12(a)(1)], unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under [section 11] or [section 12(a)(1)] more than three years after the security was bona fide offered to the public, or under [section 12(a)(2)] more than three years after the sale.” This matter take place over 5 years since any securities offerings.
 - ii. As to when the limitations periods begin to run, for example, one decision is of particular note. *P. Stolz Family P’ship, L.P. v. Daum*, 355 F.3d 92 (2d Cir. 2004), addressed, in the Second Circuit, whether the Securities Act’s three-year statute of repose begins to run when the security was first offered to the public or last bona fide offered to the public. Adopting the view of the majority of the courts to examine the issue, the Second Circuit held that the statute of repose begins to run when the security is first offered to the public. *Id.* at 106.

iii. Section 804(a) of Sarbanes-Oxley amends 28 USC § 1658(b) to provide a statute of limitations concerning securities of:

1. a. 2 years after the discovery of the facts constituting the violation; or
b. 5 years after such violation.
2. Section 804(b) provides:
“The limitations period provided by section 1658(b) of title 28, United States Code, as added by this section, shall apply to all proceedings
3. Courts have held that the new statute of limitations does not apply to ‘33 Act claims. Rather, those claims continue to be governed by the statute of limitations in the Securities Act itself which is a maximum of 5 years

ARGUMENT

A. The Statute of Limitations Applies to Administrative Proceedings

The Division argues that the statute of limitations does not apply to them. They believe they are a law unto themselves with no checks and balances. Their argument is that they are not subject to Federal securities laws or the Securities Act of 1933 or 1934 and that they have unlimited time to bring a cause of action. They add that the Utah Code does not specify a specific statute of limitations and therefore none applies to them by default.

1. The Division is seeking fines from the Respondents that can result in civil judgments and can be collected through civil means. Therefore, they are seeking civil remedies and are by definition subject to the statute of limitations. **Administrative fines are non dischargeable and they can be taken to a civil court to seek a civil judgment for purposes of garnishment of civil wages or civil foreclosure.**
2. **The courts have held that when the Act does not specify a specific statute of limitations then a reasonable time period is to be applied.**
 - a. In SCDOR vs. Midnight Pass. L.P., et al. 96-ALJ-17-0405-CC the administrative law judge upheld the Respondent’s request for dismissal of an administrative hearing. The State argued that the statute of limitation did not apply to Administrative Hearings. The court reasoned, “Regardless of the inapplicability

of a statute of limitations, disciplinary proceedings should be held without unnecessary delay.” *See Citrano v. Department of Registration and Education of the State of Illinois*, 414 N.E.2d 74 (Ill. App. 1980); 53 C.J.S. *Licenses* § 56 (1987).

i. The court ruled, “Department failed to notify the Respondents of the alleged October 10, 1994 violation, until September 26, 1996, nearly two years after the alleged violation. **There is no justification for the Department waiting nearly two years to issue an administrative determination of a violation after an on-premises inspection. Without regard for the merits of the violation report, the delay in its issuance is unreasonable.** Remedy:

Dismissal of all claims

ii. Here the administrative law judge ruled that although there was no specific statute of limitations in the state Act, a reasonable time period still applied. The judge ruled that two years following an on-premises visit was excessive and granted the petition to dismiss.

iii. In the matter at hand, it has been seven years from the on-premises visit made by the Division. Clearly this is extremely excessive and beyond any reasonable period of time.

b. Case #2 Background: the EPA is governed by the EPCRA code. The code does not specify a statute of limitations for administrative proceedings. The respondent made a motion for dismissal stating the EPA was past their statute of limitations. The EPA countered that the code does not make mention of a statute of limitations and therefore the intent is there is no limitation. (The same argument the Division is using.) The court ruled that, “EPCRA itself contains no statute of limitations for measuring the timeliness of EPA's prosecution. Accordingly, the five-year federal statute of limitations contained in 28 U.S.C. § 2462 applies to this administrative

proceeding. *See 3M Co. (Minnesota Min. And Mfg.) v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994); *Lazarus, Inc.*, TSCA Appeal No. 95-2 (September 30, 1997)(EAB)

- i. In this second case the administrative law judge ruled that when a statute of limitations isn't specifically stated then the statute that is applied is the one with the longest time period. In the EPCRA this was 5 years. In Utah Code this is four years for securities violations. In Federal Securities Law this is five years for securities violations. In any event, the Division is well beyond any statute of limitation regardless of which time period is used. Seven years is well beyond any stated time period or any period a reasonable person would consider sufficient time to bring action – particularly following two on-premise visits starting in 2004.
- c. **The SEC also made the same argument that the Division is making and was denied.** The SEC's claim was that there was no time period mentioned in securities law or the Securities Acts of 1933 and 1934 for administrative hearings. They argued that they could bring an administrative action against registered brokers or dealers without a statute of limitations. The Division is reiterating the SEC's argument precisely. As the situations are identical, the cases clearly apply. In every case the judge ruled in favor of the defendants and against the SEC.
- d. 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.**
- e. **The courts found that fines subject Respondent to civil penalties and therefore the statute of limitations applies.** Judge Casey 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 civil penalty and, as such, is subject to the five-year limitations period.**

- f. The Division is absolutely seeking a civil penalty in the form a fine and this proceeding is therefore subject to the statute of limitations. The Division argues that civil statutes of limitations are inapplicable to administrative hearings. This may be true if they do not involve a civil matter, such as only a suspension or retesting. In this case the Division is seeking a fine which they can take to a civil court and seek a judgment against respondents. With that judgment they could look for civil remedies such as garnishment of wages, property seizure, and so forth – all of which are civil matters. **By definition this is not just an administrative hearing but a civil matter as well and is therefore time barred.**

Double Jeopardy

1. It is true that in its purest form Double Jeopardy only applies to criminal matters.
2. Nevertheless, the Respondents are already barred from all securities business in Utah and from association with any securities dealer, registered investment advisor, or selling securities in Utah. The Division’s actions are a form of violation of Double Jeopardy standards.
3. Following an on-site visit in 2004, the Division turned over all their “findings” to a higher securities regulation power: the SEC and the NASD. The NASD has authority or bar, suspend, and fine individuals and firms in all states, including Utah.

4. The NASD brought the same allegations against Respondents that the Division is using in this complaint.
5. Respondents were barred in Utah in December 2007.
6. Seeking a second bar in Utah for identical allegations is beyond unreasonable. It is harassment.
This would be the similar to the Utah Bar barring Scott Davis for violations.
Then having the city of Nephi institute an action against Mr. Davis on identical charges seeking a bar in the city of Nephi. Mr. Davis would already be barred in Nephi by definition as he is barred in all of Utah. He would have already been tried on those allegations. The actions by the Nephi City would be considered incompetent and a form of Double Jeopardy by a reasonable person.
7. Respondents are currently barred from any and all securities business or association with securities dealers or agents in Utah and have been since 2007. Seeking an additional bar for one who has already suffered and administrative bar is not only harassment and meaningless, it violates the Respondent's rights. Respondents should not have to be tried twice for the same actions in which the Division is seeking an identical punishment. The Division has already sought a bar against Respondents vicariously through the SEC and the NASD - and this occurred. Respondents are currently barred under Utah Code 61-1-6 and 61-1-20(1). The bar shows on the Division's records and on the National Securities CRD system. Barring someone twice is not possible and this action therefore must be dismissed.

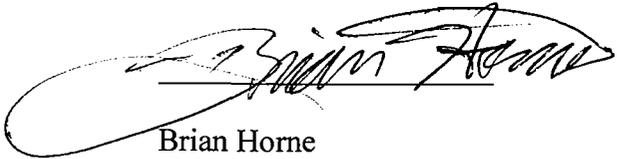
CONCLUSION

Respondents' Motion to Dismiss is supported by numerous cases, both state and national. All cases pertain to administrative hearings. They specifically state that even in the absence of a formal statute of limitations administrative hearings are subject to time statutes either under the reasonable time theory or based on similar time statutes. Clearly the Division has crossed both lines and this

matter by waiting 7 years to bring a complaint after an on-premises investigation and this matter must be dismissed as untimely.

Respondents have already been barred in Utah and a second bar for the same allegations would be akin to Double Jeopardy, completely meaningless as a 2nd bar accomplishes nothing, and would clearly violate Respondents' rights. Therefore this remedy must be dismissed.

DATED this 23 day of July, 2011.



Brian Horne

CERTIFICATE OF SERVICE

I hereby certify that on this 26 day of July, 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

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