

FINDINGS OF FACT

The Director **FINDS** that:

1. At all relevant times herein, Respondent Thomas Dale Kienlen ("Kienlen") was a resident of the State of Oregon. Kienlen's current address and telephone number are 71 Peach Palm Lane; Naples, FL 34114; (941) 774-5121.

2. At all relevant times, Kienlen was the president and sole owner of the Thomas D. Kienlen Corporation ("TDK"), an Oregon Corporation.

3. At all relevant times herein, both Kienlen and TDK did business as Market Momentum, S&P Option Trader, and S&P Option Trader Daily Fax Service.

4. From December 1, 1980 to December 31, 1990, TDK was continuously licensed as an investment adviser in the State of Oregon. From October of 1980 to March of 1992, TDK was registered with the United States Securities and Exchange Commission ("SEC") as an investment adviser pursuant to the provisions of the Investment Advisers Act of 1940. From July 18, 1986 to December 31, 1990, Kienlen was continuously licensed as a salesperson to TDK in the State of Oregon. From July 5, 1988 to December 31, 1990, Aerostar Securities Corporation ("Aerostar"), a broker-dealer wholly owned by Kienlen, was licensed with the State of Oregon as a broker-dealer.

5. In 1988, Kienlen established the Christos Fund, a capital appreciation mutual fund. Kienlen, through TDK, acted as manager and investment advisor, and through Aerostar, acted as its broker-dealer. Under Kienlen's management, the Christos fund lost most of its assets and wound up ranked in the bottom ten capital appreciation mutual funds in the country.

6. In 1989, Kienlen was sued for misrepresentation, negligence, securities law violations, and unlawful trade practices. Later that same year, Kienlen settled the case, agreeing to pay over \$20,000.00 in damages.



1 7. On September 17, 1990, the SEC filed a Complaint for Permanent Injunction
2 in the United States District Court for the District of Oregon, based upon Kienlen's
3 management of the Christos Fund. The SEC's complaint alleged, among other charges,
4 the unregistered offer to sell securities in violation of Section 5(c) of the Securities Act
5 and fraud in connection with the offer and sale of securities in violation of Section 10(b)
6 of the Exchange Act and Section 17(a)(2) and (3) of the Securities Act.

7 8. On October 4, 1991, the National Association of Securities Dealers ("NASD")
8 fined Kienlen \$10,500.00 and required him to re-qualify based on findings that he had
9 made unsuitable investment recommendations to a client.

10 9. On January 28, 1992, TDK and Kienlen entered into an Offer of Settlement
11 with the SEC in anticipation of administrative proceedings to be instituted by the SEC to
12 determine whether allegations of violations of the Securities Act of 1940 were true. The
13 SEC alleged the offer and sale of unregistered securities and material misrepresentations
14 of facts in connection with the sale of securities, specifically in connection with Kienlen's
15 involvement with the Christos Fund, a now defunct mutual fund. On January 31, 1992,
16 the United States District Court for the District of Oregon entered a Final Judgment of
17 Permanent Injunction ("Permanent Injunction") against TDK and Kienlen, permanently
18 enjoining them from engaging in various practices which formed the basis of the SEC's
19 allegations of violations of the federal securities laws.

20 10. On March 4, 1992, the SEC entered an Order Making Findings and Imposing
21 Remedial Sanctions ("SEC Order") revoking TDK's registration with the SEC as an
22 investment adviser and barring Kienlen from association with any investment adviser,
23 broker-dealer, etc. for a period of twelve months with leave thereafter to reapply for a
24 non-supervisory, non-principal, non-proprietary position upon a showing
25 that he would be adequately supervised. On June 16, the Division of Finance and
26 Corporate Securities for the State of Oregon ("DFCS") issued a Final Order Revoking

Division of Finance and Corporate Securities
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97310
Telephone: (503) 378-4387



1 License ("DFCS Order"), revoking TDK's and Kienlen's licenses to provide investment
2 adviser services in Oregon, effective May 19, 1992.

3 11. On January 7, 1994, the Certified Financial Planner Board of Standards
4 Financial Planning Board of Ethics revoked Kienlen's license. Under the terms of the
5 revocation, Kienlen is no longer allowed to use the CFP and Certified Financial Planner
6 designations.

7 12. On or around March of 1996, Kienlen developed an options trading system
8 and fax service involving the Standard and Poor's 100 Index ("S&P 100") and Standard
9 and Poor's 500 Index ("S&P 500"). Kienlen, Individually and through TDK, started
10 doing business as Market Momentum, S&P Option Trader, and S&P Option Trader Daily
11 Fax Service.

12 13. Purchasers of Kienlen's fax service were required to open a brokerage
13 account and to provide their broker with an instruction letter authorizing Kienlen to order
14 trades on their accounts. This instruction letter allowed Kienlen direct trading control
15 over his fax service clients' accounts.

16 14. After a client opened a brokerage account and provided his broker with
17 Kienlen's instruction letter, Kienlen faxed daily recommendations to the client's broker.
18 The broker, pursuant to the instruction letter, then traded the client's account based upon
19 those recommendations.

20 15. On or about March 28, 1996, Anna Mae Box, a 64 year old widow of modest
21 means and net worth, paid Kienlen \$300.00 for his fax service.

22 16. Prior to purchasing Kienlen's service, Kienlen provided Box, an Oregon
23 resident, with material promoting his fax service, including a short personal biography
24 entitled "Tom Kienlen." The biography included references to Kienlen's position as a
25 "portfolio manager for a mutual fund that traded options" and Kienlen's "16+ year
26 track record of enviable market timing." The promotional material did not mention,



1 however, that the fund Kienlen managed, the Christos Fund, was among the bottom ten
2 performers of capital appreciation mutual funds for the 12 month period ending May 31,
3 1990 and was eventually liquidated because its net asset value dropped significantly.
4 Kienlen also failed to mention that the SEC filed a complaint and obtained a permanent
5 injunction against him for activities involving fraud in connection with the offer and sale
6 of shares in the Christos fund.

7 17. In addition to providing Box with promotional material for his Fax Service,
8 Kienlen advised Box that she could substantially increase her IRA balance using his fax
9 service. Kienlen stated that by being in the stock market and using his fax service, Box
10 could turn \$25,000.00 into \$100,000.00. Kienlen, however, did not inform Box of the
11 speculative nature of and extreme risk involved with options trading, nor of the
12 following:

13 (a) Kienlen was sued in 1989 for misrepresentation, negligence, securities law
14 violations, and unlawful trade practices and settled the case out of court, agreeing to pay
15 over \$20,000.00 in damages.

16 (b) On October 4, 1991, the NASD fined Kienlen \$10,500.00 and required him to
17 re-qualify as an investment adviser because of unsuitable investment recommendations
18 he made to a client.

19 (c) The United States District Court of Oregon entered a permanent injunction
20 against TDK and Kienlen on January 31, 1992 enjoining them from violating the
21 securities laws and distributing advertising which contains material omissions of fact.

22 (d) On March 4, 1992, for the offer and sale of unregistered securities and the
23 material misrepresentation of fact in connection with these sales, the SEC revoked TDK's
24 investment adviser registration and barred Kienlen from association with any investment
25 adviser, broker-dealer, etc. for a period of twelve (12) months with leave
26 thereafter to reapply for a non-supervisory, non-principal, non-proprietary position



upon a showing that he would be adequately supervised.

1 (e) The State of Oregon issued an Order revoking TDK's and Kienlen's
2 investment adviser licenses on June 19, 1992, requiring them to discontinue providing
3 others with investment advisory services.

4 (f) The Financial Planning Board of Ethics of the Certified Financial Planner
5 Board of Standards revoked his license on January 7, 1994 for violating the CFP Board
6 Code of Ethics and Standards of Practice.

7 18. Kienlen not only failed to inform Box of the above, but he also failed to
8 provide her with a form ADV or the equivalent information contained therein in a
9 different written format.

10 19. After Box agreed to purchase Kienlen's fax service, Kienlen provided her
11 with a brokerage account form which, upon Kienlen's prompting, Box signed in blank.
12 Kienlen completed Box's brokerage account application but overstated her investment
13 experience, net worth, and income and misrepresented her investment objectives.

14 20. Thereafter, Box provided her broker with an instruction letter, directing her to
15 trade Box's account according to Kienlen's faxed recommendations. Box's account was
16 traded according to Kienlen's recommendations for several months.

17 21. On or about March 12, 1996, Delmar Peake, an Oregon resident, purchased
18 Kienlen's fax service for \$300.00. Prior to purchasing Kienlen's service, Kienlen provided
19 Peake with material promoting his fax service, including a short personal biography
20 entitled "Tom Kienlen." The biography included references to Kienlen's position as a
21 "portfolio manager for a mutual fund that traded options" and Kienlen's "16+ year track
22 record of enviable market timing." The promotional material did not mention, however,
23 that the fund Kienlen managed, the Christos Fund,
24 was among the bottom ten performers of capital appreciation mutual funds for the 12
25 month period ending May 31, 1990 and was eventually liquidated because its net asset
26



1 value dropped significantly. It also failed to mention that the SEC filed a complaint and
2 obtained a permanent injunction against Kienlen and TDK for activities involving fraud
3 in connection with the offer and sale of shares in the Christos fund.

4 22. In addition to providing Peake with promotional material for his Fax
5 Service, Kienlen advised Peake that the fax service could substantially increase his
6 retirement savings. Kienlen, however, did not inform Box of the speculative nature of
7 and extreme risk involved with options trading, nor of the following:

8 (a) Kienlen was sued in 1989 for misrepresentation, negligence, securities law
9 violations, and unlawful trade practices and settled the case out of court, agreeing to pay
10 over \$20,000.00 in damages.

11 (b) On October 4, 1991, the NASD fined Kienlen \$10,500.00 and required him to
12 re-qualify as an investment adviser because of unsuitable investment recommendations
13 he made to a client.

14 (c) The United States District Court of Oregon entered a permanent injunction
15 against TDK and Kienlen on January 31, 1992 enjoining them from violating the
16 securities laws and distributing advertising which contains material omissions of fact.

17 (d) On March 4, 1992, for the offer and sale of unregistered securities and the
18 material misrepresentation of fact in connection with these sales, the SEC revoked TDK's
19 investment adviser registration and barred Kienlen from association with any investment
20 adviser, broker-dealer, etc. for a period of twelve (12) months with leave thereafter to
21 reapply for a non-supervisory, non-principal, non-proprietary position upon a showing
22 that he would be adequately supervised.

23 (e) The State of Oregon issued an Order revoking TDK's and Kienlen's
24 investment adviser licenses on June 19, 1992, requiring them to discontinue providing
25 others with investment advisory services.

26 (f) The Financial Planning Board of Ethics of the Certified Financial Planner



1 Board of Standards revoked his license on January 7, 1994 for violating the CFP Board
2 Code of Ethics and Standards of Practice.

3 23. Kienlen not only failed to inform Peake of the above, but he also failed to
4 provide him with a form ADV or the equivalent information contained therein in a
5 different written format.

6 24. Thereafter, Peake provided his broker with an instruction letter, directing her
7 to trade his account according to Kienlen's faxed recommendations. Peake's account was
8 traded according to Kienlen's recommendations for several months.

9 CONCLUSIONS OF LAW

10 Based upon the above **FINDINGS OF FACT**, the Director **CONCLUDES**, that:

11 1. S&P Index Options are securities as defined in ORS 59.015(19)(a).

12 2. TDK d.b.a. Market Momentum, S&P Option Trader, and S&P Option Trader
13 Daily Fax Service through Kienlen, conducted business as an investment adviser as
14 defined in ORS 59.015(20)(a) in the State of Oregon without a license in violation of
15 ORS 59.165(6).

16 3. TDK d.b.a. Market Momentum, S&P Option Trader, and S&P Option Trader
17 Daily Fax Service through Kienlen employed an unlicensed investment adviser
18 representative in the State of Oregon in violation of ORS 59.165(3).

19 4. TDK d.b.a. Market Momentum, S&P Option Trader, and S&P Option Trader
20 Daily Fax Service through Kienlen failed to provide Box and Peake with a copy of Part II
21 of TDK's Form ADV or a written document containing at least the information contained
22 therein in violation of OAR 441-205-0165(1).

23 5. Kienlen and TDK, d.b.a. Market Momentum, S&P Option Trader, and S&P
24 Option Trader Daily Fax Service received consideration primarily for advising Box and
25 Peake as to the purchase or sale of securities.

26 6. In connection with the activities described in Paragraph 5 above, Kienlen,



1 Kienlen d.b.a. Market Momentum, S&P Option Trader, and S&P Option Trader Daily
2 Fax Service, TDK, and TDK d.b.a. Market Momentum, S&P Option Trader, and S&P
3 Option Trader Daily Fax Service omitted to state material facts necessary in order to
4 make the statements made, in the light of the circumstances under which they were made,
5 not misleading in violation of ORS 59.135(2).

6 **ORDER**

7 The Director, pursuant to ORS 59.245 hereby **ORDERS** that Respondents
8 Kienlen, Kienlen d.b.a. Market Momentum, S&P Option Trader, and S&P Option Trader
9 Daily Fax Service, TDK, and TDK d.b.a. Market Momentum, S&P Option Trader, and
10 S&P Option Trader Daily Fax Service shall, and Respondents agree to, **CEASE AND**
11 **DESIST** from:

- 12 1. Transacting business involving securities in the State of Oregon in violation of
13 ORS 59.135, 59.165, and 441-205-0165(1).
- 14 2. Violating any of the provisions of Oregon Revised Statutes Chapter 59 or the
15 Oregon Administrative Rules Chapter 441.

16 The Director, pursuant to ORS 59.995 **HEREBY ORDERS** Respondents, and
17 Respondents agree, to pay a **CIVIL PENALTY** as follows:

- 18 1. Kienlen, Kienlen d.b.a. Market Momentum, S&P Option Trader, and S&P
19 Option Trader Daily Fax Service, TDK, and TDK d.b.a. Market Momentum, S&P Option
20 Trader, and S&P Option Trader Daily Fax Service shall agree to, and are jointly and
21 severally **ORDERED TO PAY** the sum of \$10,000.00 for violations of ORS 59.135(2).
22 The Director further Orders and Respondents agree that said fine shall be suspended
23 upon the following conditions:

- 24 (a) Respondents and every successor, affiliate, agent, control person, servant,
25 employee of each, and every entity owned, operated, or directly or indirectly controlled
26 or hereinafter organized by or on their behalf conduct no further business in the State of



1 Oregon related to securities, including, but not limited to, providing investment advice,
2 acting as a broker-dealer, broker-dealer salesperson, issuer salesperson, investment
3 adviser, or investment adviser representative, registering securities for sale in Oregon, or
4 advising others on doing so;

5 (b) Respondents abide by all provisions of this Order; and

6 (c) Respondents lawfully obey all provisions of Oregon Revised Statutes Chapter
7 59 and Oregon Administrative Rules chapter 441.

8 2. Kienlen and TDK, d.b.a. Market Momentum, S&P Option Trader, and S&P
9 Option Trader Daily Fax Service shall agree to, and are jointly and severally ORDERED
10 TO PAY the sum of \$10,000.00 for violations of ORS 59.165 and OAR 441-205-
11 0165(1). The Director further Orders and Respondents agree that said fine shall be
12 suspended upon the following conditions:

13 (a) Respondents and every successor, affiliate, agent, control person, servant,
14 employee of each, and every entity owned, operated, or directly or indirectly controlled
15 or hereinafter organized by or on their behalf conduct no further business in the State of
16 Oregon related to securities, including, but not limited to, providing investment advice,
17 acting as a broker-dealer, broker-dealer salesperson, issuer salesperson, investment
18 adviser, or investment adviser representative, registering securities for sale in Oregon, or
19 advising other on doing so;

20 (b) Respondents abide by all provisions of this Order; and

21 (c) Respondents lawfully obey all provisions of Oregon Revised Statutes Chapter
22 59 and Oregon Administrative Rules chapter 441.

23 Pursuant to ORS 59.045, 59.205, 59.215, 59.245 and other applicable authority
24 the Director **FURTHER ORDERS**, and Respondents agree to the following:

25 1. Based upon the Director's belief that Respondent has engaged in acts
26 constituting violations of Oregon Securities Law, the Respondent's use of any exemptions



1 to registration authorized by ORS Chapter 59 and OAR Chapter 441 are hereby
2 **WITHDRAWN** and **DENIED** until further Order of the Director.

3 2. Failure of Respondents to comply with any terms of this Order shall constitute
4 a violation of this Order and the violations which gave rise to this Order may be used by
5 the Director in any other enforcement action against Respondents.

6 3. The entry of this Order in no way limits further remedies, sanctions, or actions
7 which may be available to the Director under Oregon law to enforce this Order, for
8 violations of this Order, for conduct or actions of Respondents which are not covered by
9 this Order, or against any party not covered by this Order.

10 Dated this _____ day of _____, 2000, at Salem, Oregon.

11 **DEBORAH LINCOLN, ACTING DIRECTOR**
12 **DEPT. OF CONSUMER & BUSINESS SERVICES**
13 **STATE OF OREGON**

14 **CORPORATE CONSENT TO ENTRY OF ORDER**

15 I, Thomas Dale Kienlen, state that I am the President of Respondent Thomas D.
16 Kienlen Corporation, and I am authorized to act on its behalf; that I have read the
17 foregoing Order and that I know and fully understand the contents thereof; that the
18 factual allegations contained herein are true and correct; that Respondent has been
19 advised of its right to a hearing; and that Respondent voluntarily consents to the entry of
20 this Order without any force or duress; that Respondent understands that the Director
21 reserves the right to take further action to enforce this Order or to take appropriate action
22 upon discovery to enforce other violations of the Oregon Securities Law; and that
23 Respondent will fully comply with the terms and conditions stated herein.

24 The Thomas D. Kienlen Corporation and Thomas Dale Kienlen further assure the

25
26 Director that the Thomas D. Kienlen Corporation will not transact any securities related



1 business in the State of Oregon. I understand that this Consent Order is a public
2 document.

3 Dated this _____ day of _____, 2000.

4 _____
5 Thomas Dale Kienlen, President
6 Thomas D. Kienlen Corporation

7 **CORPORATE ACKNOWLEDGMENT**

8 There appeared before me this _____ day of _____, 2000 Thomas Dale
9 Kienlen, whose signature appears on the Corporate Consent to Entry of Order, who was
10 first duly sworn on oath, and stated that he was and is the President of the Thomas D.
11 Kienlen Corporation., and that he is authorized and empowered to sign this Consent to
12 Entry of Order and to bind the Thomas D. Kienlen Corporation to the terms hereof.

13 SUBSCRIBED to before me this _____ day of _____, 2000.

14 _____
15 Notary Public for _____

16 _____
17 Printed Name of Notary Public
18 My commission expires: _____

19 **CONSENT TO ENTRY OF ORDER BY THOMAS DALE KIENLEN**

20 I, Thomas Dale Kienlen, state that I am a Respondent herein; that I have read
21 the foregoing order and that I know and fully understand the contents thereof; that the
22 factual allegations contained herein are true and correct; that I have been advised of my
23 right to a hearing; that I consent to the entry of this Order voluntarily; and without any
24 force or duress; that I understand that the Director reserves the right to take further
25 actions to enforce this Order, or, upon discovery, to enforce other violations of the
26 Oregon Securities Law by me; that I will fully comply with the terms and conditions



1 stated herein.

2 I further assure the Director that I will not transact securities related business in
3 the State of Oregon. I understand that this Consent Order is a public document.

4 Dated this _____ day of _____, 2000

5 _____
6 Thomas Dale Kienlen

7 SUBSCRIBED TO BEFORE ME this _____ day of _____, 2000

8 _____
9 Notary Public for _____

10 _____
11 Printed Name of Notary Public
12 My commission expires: _____

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Division of Finance and Corporate Securities
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