

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF SECURITIES
COLUMBUS, OHIO 43215-6131

Order No. 12-026

IN THE MATTER OF:

MARK ALAN PANTENBURG
CRD NO. 2540858

**FINAL ORDER SUSPENDING INVESTMENT ADVISER REPRESENTATIVE
LICENSE AND SALESPERSON LICENSES OF MARK ALAN PANTENBURG
(CRD NO. 2540858)**

WHEREAS, the Ohio Division of Securities (“Division”) is charged with the responsibility of protecting investors and finds that this Order is necessary or appropriate in the public interest or for the protection of investors, and that it is consistent with the purposes fairly intended by the policy and provisions of the Ohio Securities Act, Revised Code Chapter 1707; and

WHEREAS, on April 4, 2012, the Division issued Order No. 12-008 (“Order”) against Respondent Mark Alan Pantenburg (CRD Number 2540858) (“Respondent”), giving Respondent notice of the Division’s intent to suspend or revoke the Respondents’ investment adviser representative license and salesman license pursuant to R.C. 1707.19 and R.C. 1707.44 (M); and

WHEREAS, subsequent to issuing this Order, the following events occurred:

1. The Order was sent to Respondents by certified mail, return receipt requested, with service perfected on April 7, 2012;
2. The Order informed Respondent of his opportunity for an adjudicative hearing within 30 days from the mailing of the Order;
3. Respondent timely requested a hearing from the Division in a letter received on April 30, 2012;
4. A notice scheduling the hearing for July 9, 2012 was sent to Respondents on May 2, 2012;
5. Respondent requested and was granted a continuance of the hearing to July 17, 2012;
6. The hearing convened on July 17, 2010 with all parties in attendance;
7. The record of the hearing was supplemented by written Closing Arguments and Memoranda of Law (“post-hearing briefs”) submitted by both parties with the record

deemed closed on August 15, 2012.

8. Administrative Hearing Officer, Frank A. Cellura, Esq., after reviewing the record, transcript and exhibits of the hearing, and post-hearing briefs submitted the Hearing Officer's Report and Recommendation on August 22, 2012;
9. The Hearing Officer concluded in his Report and Recommendation that Respondent violated R.C. 1707.44 (M), R.C. 1707.19(A)(1) and (A)(4), and O.A.C. 1301:6-3-19 (D)(8) and (D)(9) and, as a consequence of these violations, recommended that the Division issue a final order suspending Respondent's investment adviser representative and salesperson licenses for a period of two months (or the equivalent of sixty days);
10. On August 23, 2012, the Division sent a copy of the Hearing Officer's Report and Recommendation via certified mail to Respondent, return receipt acknowledged on August 27, 2012; and
11. Upon Respondent's request, the Division extended the time in which Respondent had to file objections to the Hearing Officer's Report and Recommendation, from September 6, 2012 to September 17, 2012; and
12. Respondent timely filed his Objections to the Hearing Officer's Report and Recommendation on September 14, 2012.

WHEREAS, pursuant to R.C. 119.09, the Division may approve, modify or disapprove the recommendation of the Hearing Officer based upon the report, recommendation, transcript of testimony, evidence, the objections of the parties, and any additional testimony and evidence permitted; and

WHEREAS, the Division has considered the applicable provisions of the Ohio Revised Code and the Ohio Administrative Code, the report, recommendation, transcript of testimony, the exhibits, post-hearing briefs, the objections submitted on behalf of the Respondent; and

WHEREAS, the Division approves and adopts the Hearing Officer's ultimate finding and conclusion that Respondent has violated R.C. 1707.19(A)(1) and O.A.C. 1301:6-3-19 (D)(9), but, for reasons set forth in the Attached Memorandum in Support of the Final Order, disapproves of the Hearing Officer's finding and conclusion that Respondent violated R.C. 1707.19 (A)(4), 1707.44 (M), and O.A.C. 1301:6-3-19 (D)(8); and

WHEREAS, the Division modifies and supplements the Hearing Officer's Findings of Fact and Conclusions of Law as set forth in the attached Memorandum in Support of the Final Order; and

WHEREAS, the Division approves and adopts the Hearing Officer's recommendation that the Division suspend Respondent's investment adviser representative license and salesperson license for a period of sixty days;

THEREFORE, IT IS ORDERED THAT, pursuant to Section 1707.19 (A)(1) of the Revised Code and Ohio Administrative Code Section 1301:6-3-19 (D)(9), Respondent Mark Alan Pantenburg's investment adviser representative license and salesperson license are hereby **SUSPENDED FOR A PERIOD OF SIXTY DAYS** from the date of this Final Order.

TIME AND METHOD TO FILE AN APPEAL: ANY PARTY DESIRING TO APPEAL SHALL FILE A NOTICE OF APPEAL WITH THE OHIO DIVISION OF SECURITIES, 77 SOUTH HIGH STREET, 22ND FLOOR, COLUMBUS, OHIO 43215, SETTING FORTH THE ORDER APPEALED FROM AND STATING THAT THE AGENCY'S ORDER IS NOT SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE AND IS NOT IN ACCORDANCE WITH LAW. THE NOTICE OF APPEAL MAY, BUT NEED NOT, SET FORTH THE SPECIFIC GROUNDS OF THE PARTY'S APPEAL BEYOND THE STATEMENT THAT THE AGENCY'S ORDER IS NOT SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE AND IS NOT IN ACCORDANCE WITH LAW. THE NOTICE OF APPEAL SHALL ALSO BE FILED BY THE PARTY WITH THE COURT OF COMMON PLEAS OF THE COUNTY IN WHICH THE PLACE OF BUSINESS OF THE PARTY IS LOCATED OR THE COUNTY IN WHICH THE PARTY IS A RESIDENT. IF ANY PARTY APPEALING FROM THE ORDER IS NOT A RESIDENT OF AND HAS NO PLACE OF BUSINESS IN THIS STATE, THE PARTY MAY APPEAL TO THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY. SUCH NOTICES OF APPEAL SHALL BE FILED WITHIN FIFTEEN (15) DAYS AFTER THE MAILING OF THE NOTICE OF THE OHIO DIVISION OF SECURITIES' ORDER AS PROVIDED IN SECTION 119.12 OF THE OHIO REVISED CODE.

WITNESS MY HAND AND THE OFFICIAL SEAL OF THIS DIVISION at
Columbus, Ohio this 30th day of November, 2012.



Andrea L Seidt

Andrea L. Seidt, Commissioner of Securities

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF SECURITIES
COLUMBUS, OHIO 43215-6131

IN THE MATTER OF:

MARK ALAN PANTENBURG
CRD NO. 2540858

MEMORANDUM IN SUPPORT OF THE FINAL ORDER

I. FINDINGS OF FACT

The Division hereby accepts all of the Findings of Fact set forth in the Hearing Officer's Report and Recommendation (hereinafter cited as "R&R") issued August 22, 2012, except for those findings set forth in paragraphs 2, 5-6, 8, 16, and 18 therein, which the Division disapproves in whole or in part and therefore clarifies or rejects for the reasons set forth below.¹

Based on a review of the transcripts and exhibits admitted into the record in this case, the parties' post-hearing briefs, and the September 14, 2012 Objections of Respondent Mark Alan Pantenburg ("Respondent") to the R&R, the Division hereby supplements and modifies the Hearing Officer's Findings of Fact as follows:

A. Background

1. The Division clarifies the finding set forth in paragraph 2 of the Findings of Fact by noting that Respondent's securities salesperson license was with LPL Financial Corporation rather than LPL Financial Group.
2. Footnote 5 to paragraph 2 of the Findings of Fact cites the wrong evidentiary exhibit. Respondent's securities salesperson records are set forth in State's Exh. E and Respondent's Exh. 6. Respondent's investment adviser representative records are set forth in Respondent's Exh. 5.
3. The Division supplements the information set forth in paragraph 2 of the Findings of Fact by noting that Respondent's CRD record indicates his termination from the Cambridge firm was also influenced by his alleged failure to pay licensing and/or administrative fees to the firm. (State's Exh. E.)

¹ The Report and Recommendation is misnumbered at various points. There are duplicate paragraph numbers appearing in the Findings of Fact (two paragraphs 13 appearing on pages 13 and 14 as well as two paragraphs 15 appearing on pages 16 and 19). There are also "missing" paragraphs in both the Findings of Fact and Conclusions of Law by virtue of the sequencing used therein, *i.e.*, the Findings of Fact skip from paragraph 20 to 28 and the Conclusions of Law skip from paragraph 10 to 13. Where necessary, this Memorandum refers to page number to minimize confusion.

B. The MAS Investment

4. Respondent objected to the Hearing Officer's various characterizations of Mr. Stamm's payment as an "investment contribution," "good faith commitment," or "pledge" throughout the Findings of Fact. (See Findings of Fact ¶¶ 4-6, Respondent's objections at 3.) The Division overrules the objections. Mr. and Mrs. Stamm's testimony evinced their common understanding that the \$16,000 payment was Mr. Stamm's investment contribution in MAS and that the commitment or pledge was necessary for Mr. Stamm to obtain a job. (Mr. Stamm, Tr. at 25-33; Mrs. Stamm, Tr. at 125-29.)
5. Respondent also objected to the misidentification of Respondent in the place of Mr. Stamm in paragraph 5 of the Findings of Fact and in other findings. (E.g., Findings of Fact at ¶¶ 5, 7, 18.) That objection is sustained and the Findings of Fact are hereby revised to identify the proper party.
6. The Division rejects the finding set forth in paragraph 6 of the Findings of Fact that no one from Sandru Financial Group ever attended any of the MAS recruitment sessions. MAS CFO Rex Culver testified that some Sandru Financial brokers were present during at least one of the investor sessions hosted by MAS at the Belmont Country Club. (Culver, Tr. at 183 (stating Eric Douglas and Rick Sandru were present at the meeting).)
7. Respondent objected to the Hearing Officer's characterizations throughout the Findings of Fact of LPL as a "sponsor" or, alternatively, the "exclusive broker-dealer" of the MAS investment. (Respondent's Objections at 4, 6; Findings of Fact at ¶¶ 8 n. 11, 13, 15.) The Division sustains the objections to the extent the characterizations connote exclusivity and could be construed as a joint underwriting between LPL and MAS.
8. The Division further clarifies the findings set forth in paragraph 8 of the Findings of Fact by stating that Sandru Financial Group, comprised of LPL registered salespersons and investment adviser representatives, was MAS's recommended securities firm in that:
 - a. Sandru Financial Group was the only firm identified and recommended by MAS in their August 8, 2011 solicitation letter to Mr. Stamm and other former Ford employees, entered into the record as State's Exh. M.;
 - b. In the MAS solicitation letter, potential investors were instructed to go to Sandru Financial Group offices to gather information about the investment and see whether the firm believed it was a suitable opportunity for the investors. (Id.) The letter included materials from the Sandru firm as well as directions to the firm's offices. (Id.); and
 - c. The Chief Financial Officer for MAS, Rex Culvers, testified to his recollection that MAS had entered into a written agreement with Sandru Financial Group that outlined the scope of Sandru's involvement. (Culver, Tr. at 180.) No copy of a written agreement was produced as an exhibit by either party or otherwise entered into the record.
9. The Division supplements the findings regarding Mr. Stamm's New Account Application and Agreement with LPL (Respondent's Exh. 3), by noting that Mr. Stamm indicated he

was 61 years of age, listed savings as his sole source of income and wealth, and had a total liquid net worth of less than \$25,000 (*Id.*).

10. The Division rejects the finding set forth in paragraph 8 of the Findings of Fact that Mr. Stamm had come to a pretty fair understanding of the risks associated with the investment before proceeding with the investment. Respondent did not disclose and Mr. Stamm did not understand the greatest risk regarding the investment, *i.e.*, that the \$16,000 investment would not yield Mr. Stamm a full time job. Mr. Stamm did not know or understand that the MAS subscription agreement that Respondent would later leave for his signature was entirely different than the investment opportunity that Respondent described in recommending the investment to him on September 9, 2008.

C. September 9, 2008 Meeting Between the Respondent and the Stamms

11. At the hearing, the parties offered conflicting descriptions of the meeting held in Respondent's office on September 9, 2008. Respondent testified that he met briefly with Mr. Stamm to complete the initial account paperwork and to take Mr. Stamm's \$16,000 deposit. (Respondent, Tr. at 256-306.) Respondent did not recall Mrs. Stamm being present at the meeting. (*Id.* at 326.) Mr. and Mrs. Stamm testified that they had a long meeting with Respondent in which they both asked a lot of questions about the MAS investment, particularly the employment feature of that investment. (Mr. Stamm, Tr. at 25-34; Mrs. Stamm, Tr. at 125-29.) According to Mr. and Mrs. Stamm, they made the investment based on Respondent's recommendation and related assurances at that meeting. (Mr. Stamm, Tr. at 28-31; Mrs. Stamm, Tr. at 128-29.)
12. The Hearing Officer found Mr. and Mrs. Stamm's account of the meeting to be truthful and rejected Respondent's account as not credible regarding these facts. (Findings of Fact at ¶¶ 13-15.) Respondent made multiple objections to the Hearing Officer's credibility determinations, arguing Mr. and Mrs. Stamm were biased against Respondent and not credible in their testimony. (Respondent's Objections at 6-7.)
13. The Division accepts the Hearing Officer's assessment of the witnesses' credibility based on his independent and objective observations at the hearing and the apparent inconsistencies and gaps in Respondent's testimony. Respondent's objections regarding witness credibility findings are hereby overruled.
14. Respondent admitted during the hearing that he had no independent basis on which to recommend an investment in MAS to Mr. Stamm at the September 9 meeting. Respondent admitted he had not seen the subscription agreement and had not performed nor reviewed any due diligence on the MAS investment when he sat down to discuss the MAS investment with Mr. Stamm on September 8. (Respondent Testimony, Tr. at 273-76, 296-300.)
15. Notwithstanding his lack of knowledge regarding the investment and Mr. and Mrs. Stamm's numerous questions and concerns regarding the investment's employment benefit, liquidity, security, and cancellation rights thereunder, Respondent affirmatively assumed the position of Mr. Stamm's Financial Advisor and responded to the couple's

questions regarding the MAS investment at the September 9, 2008 meeting. (LPL Account Agreement, Respondent's Exh. 3; Mr. Stamm, Tr. at 28-31.)

16. While Respondent denies and, therefore, objects to findings that he actually recommended or otherwise influenced the MAS investment by Mr. Stamm, Mr. and Mrs. Stamms' testimony is credible and clear that Respondent did in fact recommend and influence Mr. Stamm's investment based on deceptive statements and assurances regarding the terms and security of the deal:
 - a. Mr. Stamm testified that Respondent assured him and his wife that the \$16,000 investment in MAS would yield him a job, a benefit that was never included in the subscription agreement: "Well, when we first went in there [Respondent's office] we talked about MAS's company. I asked him a whole bunch of questions. My main concern was that my 16,000 would never be used unless I was hired into the company and he said that's exactly how it states. He said, you know, you have to show 16,000 before they'll hire you. (Mr. Stamm, Tr. at 28; *see also id.* ("And I said – both my wife and I both mentioned a number of times is this going to give me a job with this \$16,000 before, you know, I mean, this 16,000 is for my job. And he said yes, that's how it's presented, you have to pay 16,000, they'll give you a job for that money."))
 - b. With respect to liquidity and cancellation rights, Mr. Stamm testified that Respondent also assured him that he could get his money back if the job did not materialize as promised, another term or benefit that was never included in the subscription agreement: "And I said what happens if they hire me and I don't pass the physical, I'm 60 years old, you know, and they said, well, he said, you'll get all your money back. I said, I also asked him, I said what happens if they don't like me after a couple of weeks, they decide that, you know, I'm not the person for that job. You will get your money back, you know, as long as it's not you quitting or anything. (*Id.*)
 - c. Regarding the strength and security of the investment, Mr. Stamm testified that he was influenced by Respondent's use of testimonials suggesting "it was a very good opportunity." (*Id.* at 29 (referring to alleged views of area business men and even the Mayor of Toledo).)
17. The record is clear that both Mr. and Mrs. Stamm believed and trusted Respondent and based their investment decision on Respondent's recommendation and associated statements at the September 9, 2008 meeting:
 - a. Mr. Stamm testified unequivocally that he would not have proceeded with the investment if he had known Respondent's assurances regarding the job were false. Mr. Stamm, Tr. at 31 (responding "No way" to the question of whether he would have made the investment if he did not think he would get a job); *see also* Mrs. Stamm, Tr. at 125, 129 (confirming they would not have proceeded with the investment absent Respondent's assurances regarding the job.)

- b. When asked whether he made the investment based on what Respondent in particular stated about the job, Mr. Stamm responded: “A lot had to do with his bringing the fact that he said that he thought it was a great ground opportunity for me and anybody that was investing.” (*Id.* at 30; *see also* Mrs. Stamm at 128 (confirming that Respondent’s statements and assurances did in fact influence her and her husband’s investment decision).)
- c. “I went to his office with my checkbook. I had no idea I was going to write the check out until I had to hear what was said and then I wrote the check, yes.” (Mr. Stamm, Tr. at 111-12; *see also* Mrs. Stamm, Tr. at 126-27.)
18. The Division rejects the finding set forth in paragraph 16 of the Findings of Fact that Respondent never met with Mr. Stamm again after the September 9 meeting. Mr. Stamm testified that he did entertain another brief meeting with the Respondent to discuss other potential investment opportunities, but ultimately did not proceed with any further transactions. (Mr. Stamm, Tr. at 34-35.)

D. Respondent’s Conduct following the September 9, 2008 Meeting

19. After turning his \$16,000 investment contribution over to Respondent on September 9, 2008, Mr. Stamm received a conditional offer of employment from MAS. (Mr. Stamm, Tr. at 36.) The investment is identified in the letter as an explicit “term” and “contingency” upon which the offer was conditioned. (*See* MAS Letter dated October 17, 2008, State’s Exh. H at 4, 8c.)
20. On October 17, 2008, Mr. and Mrs. Stamm went to Respondent’s office to continue with the MAS investment. (Mr. Stamm, Tr. at 36-37.) When they arrived, Respondent did not meet with them to further discuss the investment, but rather left documents for Mr. Stamm’s signature that would effectuate the transaction. (*Id.* at 37-41.) The documents included a copy of the MAS Subscription Agreement and a Wired Funds Authorization form that would automatically transfer the \$16,000 from Mr. Stamm’s LPL account to the MAS checking account held at the Bank of Maumee. (*See id.*; *see also* MAS Subscription Agreement, State’s Exh. H; Wired Funds Authorization; State’s Exh. I.)
21. The job that Respondent promised Mr. Stamm would be provided to him and other MAS investors was not included among the terms or benefits of the MAS subscription that Respondent had Mr. Stamm sign. (*See* MAS Subscription Agreement, State’s Exh. H.)
22. Knowing that the MAS subscription agreement did not offer Mr. Stamm the rights and benefits that Respondent had previously assured him would be included in recommending the investment on September 9, 2008, Respondent should have alerted Mr. Stamm to these critical changes to allow him to make an informed investment decision. Respondent also could have given Mr. Stamm his money back to allow him to proceed with MAS on his own. Respondent did neither of those things. (Respondent, Tr. at 281-82, 300-02; Mr. Stamm, Tr. at 37-41.)
23. Respondent chose to offer the MAS investment to Mr. Stamm at the Sandru Financial Group office and had Mr. Stamm’s money wired away without providing a single corrective or additional disclosure. (*Id.*) Mr. Stamm left Respondent’s office falsely

believing everything was as originally represented by Respondent. (Mr. Stamm, Tr. at 41-42.)

24. Mr. Stamm did not receive any share certificates evidencing his purchase or ownership in MAS until March 31, 2009, months after he tendered his \$16,000 payment to MAS via a wire transfer occurring on October 22, 2008. (Mr. Stamm, Tr. at 43-45; *see also* MAS letter dated March 31, 2009 attaching MAS Stock Certificate, State's Exh. L.)
25. A few weeks after Mr. Stamm tendered his payment but several months prior to their receipt of shares, Respondent obtained his investment adviser representative license with LPL. (*See* Respondent's Investment Adviser Representative Record, Respondent's Exh. 5 at 4.)
26. There is no evidence in the record when Respondent terminated his client relationship with Mr. Stamm. Account statements that Respondent entered into the record indicate that he remained the advisor on Mr. Stamm's LPL account at least through January 31, 2009. (Respondent's Exh. 4.)

II. CONCLUSIONS OF LAW

The Division accepts all of the Conclusions of Law set forth in the R&R except for the Conclusions set forth in paragraphs 1-3, 7, 9-10 (page 38), 13(a)-(b), and final paragraph 10 (page 41), which the Division rejects in whole or in part, and, based on applicable law and a review of the transcripts, exhibits, closing arguments admitted into the record as well as Respondent's Objections to the R&R, the Division hereby supplements and modifies as follows:

A. Bases of the Division's Charges – R.C. 1707.19 and R. C. 1707.44 (M)

27. As set forth in the Division's order and charging document providing Respondent with notice of opportunity for hearing in this matter, this administrative action is based on two statutory provisions set forth in the Ohio Securities Act, R.C. 1707.19 and R.C. 1707.44 (M), and one administrative rule, O.A.C. 1301:6-3-19. (*See* April 4, 2012 Order No. 12-008 ("NOH"), State's Exh. A.)
28. Pursuant to R.C. 1707.19, the Division may deny, suspend or revoke an original license of a securities salesperson or an investment adviser representative if the Division determines the licensee meets any of the ten criteria set forth in statute. R.C. 1707.19.
29. In this case, the Division determined that two criteria applied, namely those set forth in subsections (A)(1) and (A)(4), which refer to situations where the licensee "is not of good business repute" or "has knowingly violated any provision of 1707.01 to 1707.45 of the Revised Code, or any regulation or order thereunder." (NOH, State's Exh. A. at ¶ 10.)
30. The Division considers the factors set forth in O.A.C. 1301:6-3-19 to determine whether a licensee is "of good business repute." In this case, the Division cited the two factors set forth in subsections (D)(8) and (D)(9) of the rule as applicable to Respondent's business repute. (*Id.* at ¶ 11.)

31. Subsection (D)(8) of O.A.C. 1301:6-3-19 directs the Division to consider whether the licensee has violated any provision of Chapter 1707; whereas Section (D)(9) directs the Division to consider whether the licensee has engaged in any conduct which would reflect on reputation for integrity and competence in business, including any manipulative or deceptive practices. O.A.C. 1301:6-3-19 (D)(8) and (9).
32. The Division also considered whether Respondent introduced any mitigating evidence that would establish a good reputation for honesty, integrity, and competence in business and personal dealings in accordance with subsection (D)(12) of O.A.C. 1301:6-3-19. The record suggests the Respondent does not have an established practice or book of clientele available to vouch for his business reputation. (Respondent, Tr. at 253; *see also* Respondent Closing Brief at 6.) Even if he did, Respondent called no such clients or other witnesses to testify in support of his reputation at the hearing.
33. Pursuant to R.C. 107.44 (M), investment adviser representatives are prohibited from engaging in any act, practice, or course of business that is deceptive or manipulative.
34. “[I]t is entirely within the province of the Division to evaluate its peers” and “Ohio courts accord due deference to the Division’s interpretation of the technical and ethical requirements of the securities profession.” *Connors v. Ohio Dept. of Commerce*, No. 99CVF08-6664, slip op. at 2-3 (Franklin County C.P. Aug. 29, 2000) (citing *Pons v. Ohio St. Med. Bd.*, 66 Ohio St. 3d 619 (1993)); *accord Atlantic Advisors v. Ohio Dept. of Commerce*, No. 01CVF04-3874, slip op. at 13-14 (Franklin County C.P. Mar. 18, 2001).
35. Contrary to the assertions by the Respondent and various conclusions of the Hearing Officer, the Division’s charges do not turn on whether Respondent was acting as an investment adviser representative on September 9, 2008. (Respondents Objections at 13-15; Conclusions of Law at ¶ 1.) Rather, the Division’s case turns on whether Respondent, in any capacity, has engaged in any conduct that would negatively reflect on his reputation for honesty, integrity, and competence in business and personal dealings. If proven, the Division can suspend or revoke Respondent’s licenses as both a securities salesperson and investment adviser representative for lack of good business repute pursuant to R.C. 1707.19 (A)(1) and O.A.C. 1301-6-3-19 (D)(9).
36. If, however, the Division further proves that Respondent engaged in fraudulent, manipulative and deceptive conduct while serving as an investment adviser representative, the Division would have additional independent grounds to suspend or revoke Respondent’s licenses pursuant to R.C. 1707.44 (M), R.C. 1707.19 (A)(4), and O.A.C. 1301:6-3-19 (D)(8).

1. Conduct Reflecting on Respondent’s Reputation for Honesty, Integrity, and Competence in Business and Personal Dealings

37. Respondent objects throughout his Objections to findings regarding statements he made to Mr. and Mrs. Stamm on September 9, 2008 and thereafter based on his argument that the Division did not put him on notice of such charges in its NOH. The Objections are overruled.

38. The Division specifically charged Respondent under subsection (D)(9) of O.A.C. 1301:6-3-19, which specifically includes any conduct that reflects on his reputation for honesty, integrity, and competence, specifically misstatement of material facts as well as forgery, embezzlement, nondisclosure, incomplete disclosure, and manipulative or deceptive practices. (NOH, State's Exh. A at ¶¶ 10-11.)
39. The Division's NOH specifically identified Respondent's deceptive conduct starting in or about September of 2008 in establishing Mr. Stamm's account with LPL and effecting Mr. Stamm's investment in MAS. (*Id.* at ¶¶5-8.) More specifically, the Division's NOH refers to Respondent's false assurances that the investment was secure and that Mr. Stamm's money would not be taken by MAS until he was hired. (*Id.*) The NOH also identified Respondent's deceptive conduct in recommending an investment for which he had neither reviewed nor conducted any due diligence. (*Id.*) Finally, the NOH also referred to Respondent's deceptive conduct in effectuating the transaction without fair disclosure as to how the investment would ultimately be handled. (*Id.*)
40. Respondent's misstatements, nondisclosures, incomplete disclosures, and other manipulative or deceptive conduct toward Mr. Stamm while serving as his Financial Adviser on September 9, 2008 and thereafter strike directly at the heart of the Division's charges regarding Respondent's reputation for honesty, integrity and competence in business and personal dealings.
41. The Division rejects the finding set forth in footnote 10 of the R&R, which assigns fault to MAS alone for the misleading statement that Mr. Stamm would obtain full time employment in his former position by making the \$16,000 investment in MAS. Mr. and Mrs. Stamm testified they both asked Respondent whether Mr. Stamm would get a job by making the investment and received assurances directly from the Respondent that Mr. Stamm would indeed receive a job. (Mr. Stamm, Tr. at 28-31; Mrs. Stamm, Tr. at 125-29.)
42. Respondent had no basis for giving Mr. Stamm false assurances regarding employment; to do so was deceptive. Taking Mr. Stamm's money based on the false assurances was also deceptive. Respondent's failure to correct his previous misstatements prior to effectuating the transaction and wiring away Mr. Stamm's money to MAS was likewise deceptive. Respondent's acts, practices and conduct toward Mr. Stamm in September and October of 2008 were deceptive and negatively reflect on Respondent's reputation for honesty, integrity and competence in business and personal dealings.

2. Respondent's Actions and Conduct While Serving As An Investment Adviser Representative

43. As set forth in the R&R and supplemental Findings of Fact above, Respondent assumed the position of Mr. Stamm's financial advisor and recommended an investment in MAS on September 9, 2008. On that date, Respondent held only as a securities salesperson license, not an investment adviser representative license. (Respondent's Securities Salesperson and Investment Adviser Representative Records, Respondent's Exh. 5 and 6.)

44. Although Respondent may have offered investment advice to the Stammers regarding the MAS investment during the September 9 meeting, Respondent did not meet the statutory definition of an "investment adviser representative" based on the evidence in the record. See R.C. 1707.01 (CC)(1) (definition limited to supervised persons of an investment adviser provided the supervised person has more than five natural person clients).
45. The record contains no conclusive evidence regarding the number of clients Respondent had during the relevant timeframe. The Division, therefore, rejects and disapproves any Findings of Fact or Conclusions of Law set forth in the R&R stating Respondent was an investment adviser representative on that date and sustains Respondent's Objections on this point. (Respondent's Objections at 8-10.)
46. While Respondent was not an investment adviser representative on the date in question, he did assume the position of and took affirmative acts as Mr. Stamm's broker that reflect on his reputation for honesty, integrity, and competence in business and personal dealings.
47. Ohio has an expansive view of the relationship between a broker and a client that is regarded by the courts as a fiduciary one that implies trust and confidence. *Burns v. Prudential Secs., Inc.*, 167 Ohio App. 3d 809, 828 (Ohio Ct. App. 2006) (citing 10 Ohio Jurisprudence 3d 96, Brokers at ¶ 116 (1995)); *see also Ed Schory & Sons, Inc. v. Society Natl. Bank*, 75 Ohio St. 3d 433, 442 (1994) (a fiduciary relationship is a relationship in which one party places a special confidence and trust in the integrity and fidelity of the other party to the relationship, resulting in a position of superiority or influence).
48. There is a general agreement in Ohio that the relationship between a financial advisor and his or clients, in particular, is fiduciary in nature. *Mathias v. Rosser*, 2002-Ohio-2772, No. 01AP-768 at ¶ 28 (Ohio Ct. App., 10th Jud. Dist., May 30, 2002) (citing *Byrley v. Nationwide Life Ins.*, 94 Ohio App.3d 1, 18 (1994); *Silverberg v. Thomson, Mckinnon Secs., Inc.*, Cuyahoga App. No. 48545 (1985); *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1026 (6th Cir. 1979)).
49. While financial advisors generally have increased duties when managing discretionary accounts, even a broker handling a nondiscretionary account owes its client basic fiduciary duties, including but not limited to: (1) the duty to recommend an investment only after studying it sufficiently to become informed as to its nature, price, and financial prognosis; (2) the duty to inform clients of the material risks involved in the investment decision; (3) the duty to not misrepresent any fact material to the transaction; and (4) the duty to transact business only after receiving prior authorization from the client. *Burns*, 167 Ohio App.3d at 828 (citing *Leib v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951, 953 (E.D. Mich. 1978)).
50. The sole case that Respondent cites in support of his argument that he was not acting in a fiduciary capacity is a New York federal case, *Bissell v. Merrill Lynch Co.*, 937 F. Supp. 237, 246 (S.D.N.Y. 1996), that explores New York state law and, therefore, has no precedential value in this Ohio administrative agency action. The Division overrules Respondent's Objections to the findings that he was acting in a fiduciary capacity.

51. Respondent did not meet his legal duties when recommending the MAS investment to Mr. Stamm without performing or having access to proper due diligence on the terms of the deal and by assuring Mr. Stamm he would receive benefits neither guaranteed nor even contemplated in the subscription agreement. Respondent's conduct in breaching his duties as Mr. Stamm's securities salesman on September 9, 2008 was deceptive and negatively reflects on his reputation for honesty, integrity, and competence in business and personal dealings.
52. As a trusted fiduciary and advisor to Mr. Stamm, Respondent had a duty to protect his client's funds and inform his interest in the subsequent purchase of MAS stock. Respondent's failure to correct his misstatements regarding the true terms of the MAS investment prior to and including the date that Mr. Stamm signed the subscription agreement and wire transfer authorization in Respondent's office on October 17, 2008 was also deceptive and negatively reflects on his reputation for honesty, integrity, and competence in business and personal dealings.
53. While Mr. Stamm remained Respondent's client at least until the end of January 2009, it does not appear that Respondent handled any additional transactions for Mr. Stamm after Respondent received his investment adviser representative license in November of 2008. There is, therefore, insufficient evidence to support the Division's additional charges pursuant to R.C. 1707.44 (M), R.C. 1707.19 (A)(4), and O.A.C. 1301:6-3-19 (D)(8).

B. Discussion

The Ohio Securities Act, also known as Ohio's Blue Sky Law, was adopted in 1929 to prevent the fraudulent exploitation of the investing public through the sale of securities. *Holderman v. Columbus Skyline Sec.*, 74 Ohio St. 3d 495, 498 (1996) (citing *United States v. Tehan*, 365 F.2d 191, 194 (6th Cir. 1966)). Many parts of the Act are remedial in nature and are therefore broadly construed "to protect the investing public from its own imprudence as well as the chicanery of unscrupulous securities dealers." *Id.* (citing *Bronaugh v. R. & E. Dredging Co.*, 16 Ohio St. 2d 35 (1968)).

The specific provisions of the Ohio Securities Act at issue in this matter are sections R.C. 1707.19 and R.C. 1707.44 (M). R.C. 1707.19 outlines the grounds and procedures for the Division's refusal, suspension, or revocation of a securities license whereas R.C. 1707.44 (M) prohibits investment adviser representatives from engaging in manipulative and deceptive acts. The Respondent's conduct as it relates to both sections is discussed in detail in the R&R and Findings of Fact and Conclusions of Law, as modified herein.

Under R.C. 1707.19, the record contains reliable, probative, and substantial evidence that Respondent engaged in conduct that negatively reflects on his reputation for honesty, integrity, and competence in business and personal dealings. Respondent's false assurances regarding the MAS investment's employment benefit, liquidity, security, and cancellation rights in the September 9, 2008 meeting with Mr. and Mrs. Stamm were deceptive in nature and fall within the ambit of R.C. 1707.19 (A)(1) and O.A.C. 1301:6-3-19 (D)(9). Respondent's failure to correct the misinformation prior to effectuating the MAS investment on October 17, 2008 was also deceptive and damaging to his business repute within the meaning of the statute and applicable rule.

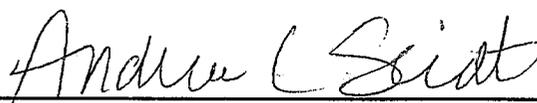
Respondent's conduct occurred while he was licensed as a securities salesman only. He did not obtain his investment adviser representative license until after he effectuated the MAS investment. While it might have been possible for Respondent, while later licensed as an investment adviser representative and still serving as Mr. Stamm's LPL financial advisor, to subsequently prevent or perhaps reduce Mr. Stamm's loss by correcting the misinformation prior to Mr. Stamm's receipt of shares and/or expenditure by MAS, the possibility is too remote and speculative to support the Division's charges under R.C. 1707.44 (M). Thus, the Division's charges under R.C. 1707.44 (M) and the corresponding charges set forth in R.C. 1707.19 (A)(4) and O.A.C. 1301:6-3-19 (D)(8) are hereby rejected.

Based on the Division's business repute findings under R.C. 1707.19 (A)(1) and O.A.C. 1301:6-3-19 (D)(9) as set forth above, the Division has a sufficient evidentiary basis to suspend Respondent's securities salesperson and investment adviser representative licenses and has concluded that a sixty day suspension is the appropriate sanction based on the evidence in this case.

III. CONCLUSION

The Division accepts the sanction recommended by the Hearing Officer and concludes that, pursuant to R.C. 1707.19(A)(1) and O.A.C. 1301:6-3-19 (D)(9), the securities salesperson license and investment adviser representative license of Mark Alan Pantenburg (CRD No. 2540858) should be and are hereby **SUSPENDED** for a period of sixty days from the date of this Final Order.

WITNESS MY HAND AND THE OFFICIAL SEAL OF THIS DIVISION at
Columbus, Ohio this 30th day of November, 2012.



Andrea L. Seidt, Commissioner of Securities