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

Order No. 16-012

IN THE MATTER OF:

TIMOTHY K. FIFE
CRD NO. 2437888

FINAL ORDER REVOKING OHIO INVESTMENT ADVISER REPRESENTATIVE LICENSE OF TIMOTHY K. FIFE

FINAL ORDER

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, Ohio Revised Code Chapter 1707; and

WHEREAS, on June 19, 2014, the Division issued Division Order No. 14-018 ("Order") against Timothy K. Fife, CRD No. 2437888 ("Respondent"), which provided Respondent with notice of the opportunity for a hearing and notice of the Division's intent to suspend or revoke his Ohio investment adviser representative license; and

WHEREAS, the Division sent the Order via certified mail, return receipt requested to Respondent at the last known address of record with the Division on June 19, 2014; mailing returned to the Division unclaimed on July 18, 2014; and

WHEREAS, the first notice attaching the Order sent to Respondent Fife was returned to the Division unclaimed, the Division, in accordance with R.C. § 199.07, resent the Order to Respondent Fife via certificate of mailing dated July 22, 2014; and

WHEREAS, on August 13, 2014 the Respondent, through counsel, requested a hearing pursuant to the Order; and

WHEREAS, the hearing was initially set for Tuesday, August 26, 2014, but continued on the Division's motion until Tuesday, November 18, 2014. Respondent was served notice of the hearing via certified mail, return receipt requested, on August 19, 2014; mailing returned to the Division unclaimed by Respondent on August 23, 2014. Counsel for Respondent was also

provided notice of the hearing by certified mail, return receipt requested, on August 19, 2014; service accepted on August 21, 2014; and

WHEREAS, upon Respondent's November 5, 2014 motion with agreement by Division's Counsel, the hearing was continued a second time to January 20, 2015, as reflected in the Hearing Officer's Order dated November 5, 2014, with copies served on all parties via email on the same date; and

WHEREAS, on December 8, 2014, the Division issued Amended Order 14-028 ("Amended Order") with a Notice of Opportunity for Hearing and Intent to Suspend or Revoke Ohio Investment Adviser Representative License of Respondent in accordance with R.C. § 1707.19 (A)(1), (4), and (9) based on R.C. § 1707.23 and violations of R.C. §§ 1707.19(A) (2), 1707.44 (B)(5), 1707.44 (M)(1)(b) and (d), as well as violations of Ohio Administrative Code 1301:6-3-16.1 (C); and

WHEREAS, The Amended Order was sent to Respondent via certified mail, return receipt requested; mailing returned to the Division unclaimed by Respondent on December 16, 2014. The Amended Order was also sent via certified mail, return receipt requested, to counsel for Respondent on December 8, 2014; service accepted on December 10, 2014; and

WHEREAS, upon Respondent's January 5, 2015 motion with agreement by Division's counsel, the hearing was continued a third time to March 18, 2015, as reflected in the Hearing Officer's Order dated January 9, 2015, with copies served on all parties via email on the same date; and

WHEREAS, upon Respondent's March 4, 2015 motion with agreement by Division's counsel, the hearing was continued a fourth time to May 19, 2015 as reflected in the Hearing Officer's Order dated March 12, 2015, with copies served on all parties via email on the same date; and

WHEREAS, a Motion of the Division to Seal or Otherwise Restrict the Release of Confidential and Nonpublic Information Contained in Documents Introduced at Hearing dated May 18, 2015 was served on Counsel for Respondent, via email, on May 18, 2015; and

WHEREAS, an Agreed Confidentiality Order was entered into the record on or about May 19, 2015; and

WHEREAS, the hearing commenced on May 19, 2015 with all parties in attendance, Administrative Hearing Officer Robert J. Walter presiding;

WHEREAS, the hearing continued through but was not completed on May 20, 2015, the Hearing Officer entered a Scheduling Order dated June 24, 2015 (with agreement by and service on all parties) setting out the remaining dates and location of the hearing to August 4 through 5, September 8 through 11, October 13, 26 through 30 of 2015; and

WHEREAS, the Hearing Officer admitted State's Exhibits A through AA and CC through NN at the close of the Division's case-in-chief on September 10, 2105 and admitted Respondent's Exhibits 1 through 61 as well as State's rebuttal Exhibits OO and PP at the close of the hearing on October 29, 2015 with supplemental State's Exhibits QQ and RR entered into the record by Certificate of the Division on November 2, 2015; and

WHEREAS, the parties each submitted to the Hearing Officer Post-Hearing Memoranda in lieu of live closing argument on December 14, 2015 and, further, submitted responsive Reply Memoranda on December 23, 2015; and

WHEREAS, the Hearing Officer issued his Report and Recommendation on February 2, 2016, finding in the Division's favor on all of the charges and recommending revocation of Respondent's Investment Adviser Representative license; and

WHEREAS, a copy of the Report and Recommendation was sent via certified mail, return receipt requested, to Respondent and Respondent's counsel on February 3, 2016; service accepted on February 5 and 6, 2016, respectively; and

WHEREAS, Respondent timely filed Objections to the Hearing Officer's Report and Recommendation on February 15, 2016; and

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 and evidence, and 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 memoranda, and the Objections submitted on behalf of the Respondent; and

WHEREAS, the Division approves and adopts the Hearing Officer's Findings of Fact and Conclusions of Law except for those set forth in paragraphs 21, 84-85, and 105-06 of the Report and Recommendation, which the Division disapproves, rejects, clarifies, or modifies for the reasons discussed in the Attached Memorandum in Support; and

WHEREAS, the Division modifies and supplements the Hearing Officer's Findings of Fact and Conclusions of Law pursuant to the attached Memorandum in Support of the Final Order to Revoke the Investment Adviser Representative License of Timothy K. Fife; and

WHEREAS, the Division accepts the Hearing Officer's findings and conclusions that the Division has a sufficient evidentiary basis to revoke Respondent's investment adviser representative license pursuant to R.C. § 1707.19(A) and Ohio Administrative Code 1301:6-3-19(D); and

WHEREAS, the Division accepts the Hearing Officer's recommendation to revoke Respondent's investment adviser representative license; and

THEREFORE, IT IS ORDERED THAT, the Respondent Timothy K. Fife's Ohio investment adviser representative license is hereby **REVOKED**.

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 appellant with the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee 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 7th day of April, 2016.

Andrea L. Seidt

Andrea L. Seidt, Commissioner of Securities

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

Memorandum in Support of the Final Order to Revoke the Investment Adviser Representative License of Timothy K. Fife (CRD No. 2437888)

Exhibit A
April 7, 2016

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Division hereby accepts all of the Findings set forth in the Introduction, Summary of Division Order, Statement on Jurisdiction and Burden of Proof, and Findings of Fact and Conclusions of Law set forth in the Hearing Officer's Report and Recommendation (hereinafter "R&R") in this administrative matter against Respondent Timothy K. Fife ("Respondent"), except for those set forth in paragraphs 21, 84-85, and 105-06 therein, which the Division disapproves and hereby rejects, clarifies, or modifies for the reasons set forth below as well as any other findings specifically disapproved, rejected, or clarified as referenced and discussed below.

Based on a review of the hearing transcripts, exhibits, arguments, post-hearing briefs, and the February 15, 2016 Objections of Respondent ("Objections") admitted into the record in this case, the Division hereby supplements and modifies the Hearing Officer's Findings of Fact and Conclusions of Law by making the following Findings of Fact and Conclusions of Law.

A. Respondent's Role at Ron Camirand & Associates, LLC

1. One of the chief points of contention in this administrative proceeding is what role Respondent served upon his transition from Wells Fargo to Ron Camirand & Associates, LLC ("RCA") in September of 2009. The Division's December 8, 2014 Amended Notice of Opportunity for Hearing ("Amended NOH") alleged – and the Hearing Officer affirmatively found – that Respondent was acting as an investment adviser representative ("IAR") for RCA.

2. Respondent argued in the hearing, in his Post-Hearing Memorandum, and in his Objections that he did not act as an IAR because all investment decisions purportedly were made by his colleague Ron Camirand.[1] As a result, he denies purchasing, selling, trading, placing, or initiating securities transactions for complainants while at RCA during the times alleged in the Amended NOH.

3. An "investment adviser representative" or IAR is "a supervised person of an investment adviser." R.C. § 1707.01(CC)(1). In addition to officers, directors, and employees of the

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[1] *E.g.*, Respondent Testimony, Tr. Vol. VIII at 148, 159-60, 238; Tr. Vol. IX at 235; Respondent's Post-Hearing Mem. at 27-29; Objections at 2, 46-49; Oct. 22, 2015 Aff. of Ronald Camirand, Respondent's Exh. 61.

firm, the term "supervised person" extends to other natural persons who provide investment advisory services on behalf of the investment adviser while subject to the supervision and control of the investment adviser. R.C. § 1707.01(DD). Advisory services are described as engaging in the business of "advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities" for compensation. R.C. § 1707.01(X)(1). Advisory services also include issuing or promulgating analyses or reports concerning securities for compensation as part of a regular business. *Id.*

4. The Hearing Officer found that Respondent met the definition of an IAR based on his delivery of and compensation for investment advisory services to RCA clients while under the supervision and control of RCA. (R&R ¶¶ 20, 22, 51, 54, 56, 59-60, 62, 69, 72, 87, 119, 130, 184.) The Hearing Officer supported this finding with evidence from a variety of independent sources,[2] including Respondent's own sworn testimony to the Division during its investigative hearing. (*E.g.*, *id.* at 56, 62, 69 (citing Respondent's September 7, 2011 Testimony in Division's Investigatory Examination ("Respondent's § 1707.23 Tr.") (State's Exh. C) at 53; Respondent Testimony, Tr. Vol. VIII at 188-231).)

5. Respondent is the only IAR from RCA who was ever registered to do business with Ohio clients on RCA's behalf; the other IAR at the firm – Mr. Camirand – was not licensed in Ohio. (R&R ¶ 51 & n.59.)

6. The Division supplements the Hearing Officer's citations to the record with additional admissions that Respondent made during the Division's investigatory examination. These admissions are further evidence of his role as an IAR for complainant RM while at RCA. Under penalty of perjury, Respondent stated:

   a. "[W]e were going to initiate the strategy."[3]
   b. "We all did. I did, Ron did, we all went over the trade with him."[4]
   c. Affirming Respondent was the one purchasing these 4000 shares on RM's behalf.[5]
   d. "We go through the trades with them."[6]
   e. "[W]e told him that he was selling out at the wrong time, and we sold him out."[7]
   f. "[RM] followed me from Wells Fargo. I said clearly, 'Doctor, I cannot trade these ETFs any longer at Wells Fargo. This is what I'm going to do. Would you like to come with me?' 'Yes, I would like to be a client of yours.'"[8]

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[2] R&R ¶¶ 51, 72 & supporting citations at notes 60-61; *see also id.* ¶¶ 50, 54, 59, 60 & supporting citations at notes 58, 65 (other findings that Respondent had "initiat[ed] improper trades;" "advised his clients;" "initiated the improper purchase of leveraged and inverse ETFs;" "performed investment advisor representative services for his clients at a time that he was not licensed;" "recommended that [RM] not sell the positions;" and "placed" [JM] in unsuitable investments.)

[3] Respondent's § 1707.23 Hearing Tr. (State's Exh. C) at 55 (emphasis added).

[4] *Id.* at 56 (emphasis added).

[5] *Id.* at 57 (emphasis added).

[6] *Id.* at 62 (emphasis added).

[7] *Id.* at 80 (emphasis added).

7. The Division also supplements the Hearing Officer's citations with admissions that Respondent verified on September 29, 2011 in his Answer to a civil complaint brought by RM against Respondent and RCA, further evidencing his role as an IAR at RCA. (State's Exh. DD.) Under penalty of perjury, Respondent and RCA (referred to collectively as "Defendants" in the pleading) admitted in their Answer (emphasis added below) that:

   a. Respondent requested transfer "so that [Respondent] could continue to manage the account." (¶ 14)
   b. Respondent purchased shares for [RM] in October and November of 2009. (¶ 19)
   c. Respondent met with [RM] to discuss the plan to divide assets and to discuss the "investment strategy" in place. (¶¶ 26-27)
   d. Respondent and Camirand advised [RM] not to sell his investments. (¶¶ 29-30)
   e. Respondent received fees for his professional services. (¶ 35)
   f. Respondent reviewed allocations with client. (¶ 45)
   g. Defendants advised [RM] that he should not sell his exchange-traded funds ("ETFs"). (¶ 88)
   h. Plaintiffs refused to listen to Defendants. (¶ 88)
   i. Defendants sold the ETFs. (¶ 90)

8. The Division also supplements the Hearing Officer's citations with admissions that Respondent made in his deposition testimony on July 24, 2012 ("Respondent's Dep. Tr.") in civil litigation brought by RM, further evidencing his role as an IAR at RCA. Under penalty of perjury, Respondent stated:

   a. "They're handed prospectuses in terms of the ETFs that we trade."[9]
   b. "We use our work using cycles and all the systems that my partners use in their investment philosophies and we invest his money."[10]
   c. "[W]e trade the S&P ETF, that's what we trade."[11]
   d. "The agreement with the client was one year. You can't have a – you can't set investments in place and have a guy call you up and say, "I don't want" – you have to have some type of a gentleman agreement. You have to have an understanding with the client. This is investing."[12]
   e. "Everybody has a different way of setting them and doing them and initiating them."[13]
   f. "We wanted to do a hedge fund, and they couldn't accommodate us. And we wanted to place the trades with eight brokers, not just one, so we parted ways."[14]

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8 *Id.* at 90 (emphasis added).
9 Respondent's Dep. Tr. (State's Exh. CC) at 32 (emphasis added).
10 *Id.* at 50 (emphasis added).
11 *Id.* at 57 (emphasis added).
12 *Id.* at 143 (emphasis added).
13 *Id.* at 147-48 (emphasis added).
14 *Id.* at 183 (emphasis added).

9. The Hearing Officer correctly rejected the portions of Respondent's hearing testimony and the affidavit of Respondent's colleague, Mr. Camirand, which attempt to disavow Respondent's IAR status. (R&R ¶¶ 50-60.) Respondent and Mr. Camirand both gave sworn statements on three separate occasions prior to the hearing that consistently and firmly established Respondent's delivery of investment advisory services, individually and as part of the larger RCA team: (1) their 2011 verified Answer in the civil action brought by RM as discussed above;[15] (2) their 2012 deposition testimony in the foregoing civil action;[16] and (3) their 2011 and 2013 testimony in the Division's investigative 1707.23 hearings.[17]

10. It was only after the Division charged Respondent in 2014 with unlicensed activity and other violations while serving as an IAR at RCA that Respondent changed his story and tried to attribute all investment decision-making and advice to Mr. Camirand.

11. The hearing transcript evidences Respondent's struggle to keep his new story straight. Respondent repeatedly utilized the terminology of "my team," "I," and "we" in identifying the actor or actors who "traded," "purchased," "sold," "placed" and "initiated" transactions in complainants' RCA accounts, [18] all consistent with his earlier sworn statements. Respondent even boasted at one point that: "The only expert in this stuff, besides the one I'm bringing in Thursday, is me, because I'm sitting there trading live accounts." (Respondent's Testimony, Tr. Vol. X at 169.)

12. Notwithstanding his counsel's effort on occasion to clarify that Respondent really meant the firm or Mr. Camirand, not himself, when he said "we,"[19] the record speaks for itself.

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[15] Answer (State's Exh. DD) ¶¶ 14, 19, 26-27, 29-30, 35, 45, 88, 90.

[16] R&R ¶¶ 50-60; Respondent's Dep. Tr. (State's Exh. CC) at 32, 50, 57, 143, 147-48, 183; Camirand's Dec. 11, 2012 Dep. Tr. (State's Exh. OO) at 19, 25, 39.

[17] R&R ¶¶ 50-60; Respondent's § 1707.23 Hearing Tr. (State's Exh. C) at 55-57, 62, 80, 90; Camirand's Jan. 10, 2013 § 1707.23 Hearing Tr. (State's Exh. PP) at 26-28, 34, 56.

[18] Respondent Testimony, Tr. Vol. VIII at 107 ("I wanted to put together a team of my own "); 156 ("we'd trade SDS" and "we'd trade SSO"); 159 ("we're not going to charge you" and "we traded the SSO and the SDS"); 168-69 ("I explain to my clients" and "I wanted to be able to tell or show them something that they could relate to" in the 2009 time frame); 175-76 ("this is a sample of what we would do, and I would walk them through, you know, the system"); 183 ("this is the reason that I built these systems"); 249 ("we were clicked off the account" and "we couldn't see the account"); Vol. IX at 56 ("I needed to build a team); 108 ("I'm like, 'Hold on here. You know, we have got to wait for this correction that we think is coming, and then we get out of these positions."); 111 ("he knew what we were doing wasn't the buy and hold" and "I met with him. We talked."); 129 ("I said, 'You know, all that money we're trading in your profit sharing plan, those are leveraged ETFs. . . .' 'That's SSO, SDS, we've talked about it. I've given you presentations on it.'"); 130 ("he puts in our presentation of exactly what I presented to him in terms of what he was going to be doing"); 132 ("we were probably doing like nine trades a year or more in that account"); 133 ("we didn't charge him the 20 percent performance fee;" "Because I wanted to help the guy out;" "I'll charge you the lesser than management fee;" "I'm making whatever 2 percent of that gain was that year" referring to the "whole period he had an account with us"); 136 ("I didn't have time to do that. I mean, we were much busier, you know, in 2011, '12, '13."); Vol. X at 19 ("We've run a two-sided strategy, we've had very good returns. That's why these people like [TM] followed me and invested with me for 214--" and "I've used them in trend trading, and I've been using leveraged products since 2001, and I look for a trend and I take a client's money and I say, "Look, what do you feel comfortable putting in this strategy?"); 58 ("It's a team that I put together to get the research that I needed" and "I couldn't do it all alone").

[19] *E.g.*, Respondent Testimony, Tr. Vol. VIII at 156, 183; Tr. Vol. IX at 131-34.

Neither the Hearing Officer nor the Division could reasonably find Respondent's denials credible.

13. It should also be noted that, admissions aside, Respondent's attempt to narrowly construe the Division's allegations that Respondent purchased, placed, sold, and initiated trades as limited to the physical act of keying in trades cannot stand in light of the broad statutory and common definitions of those terms.

    a. "Purchase" and "sell" are defined terms in the Ohio Securities Act and broadly extend to "any act" by which a purchase or sale is made and both broadly include direct and indirect attempts, options, offers, and solicitations to purchase or sell. R.C. § 1707.01(GG) and (C). "Any act" is obviously not limited to the physical act of entering orders into a computer.

    b. "Placed" and "initiated" are not defined terms in the Ohio Securities Act so they are to be accorded their plain and ordinary meanings. The Hearing Officer utilized a common online dictionary to define the term "initiate" in the R&R, which definition and analysis the Division accepts. (R&R ¶ 54 (citing *Merriam-Webster Online Dictionary*).) Utilizing the same online dictionary, "place" when used as a verb in relation to investors means "to put in or as if in a particular place or position."

14. The purchases and sales made in complainants' accounts were not initiated or placed by Mr. Camirand alone. Respondent's actions support the Hearing Officer's finding and the Division's allegation that he purchased, sold, initiated, and placed the securities at issue. For the reasons set forth in the R&R as supplemented herein, the Division accepts the Hearing Officer's finding that Respondent was acting as an IAR and rejects any and all Objections by Respondent to that finding.

B. <u>Suitability of ETFs for Complainants</u>

1. Suitability In General

15. The second major issue in contention in this administrative matter is the suitability of Respondent's investment advice to complainants while at RCA. The Division has written about and provided guidance to its registrants regarding the suitability doctrine. *See, e.g.*, 2-1 Howard M. Friedman, *Ohio Securities Law and Practice* §§ 26.06(C), 25.13, 27.10 (3rd ed. 2015) (attaching relevant *Ohio Securities Bulletin* ("*OSB*") article reprints marked as Appendix Items: 17.01, 17.20, 17.47, 23.23).

> The concept is simple: brokers are professionals who should understand the ins and outs of the securities markets. All too often individual investors have limited knowledge and little time to fully master the intricacies of the rapidly expanding and increasingly complex world of investments. Therefore, a legal and ethical burden is placed squarely on

> the shoulders of the broker to act in the best interests of the investor in making and executing investment recommendations.

Friedman, *supra*, at App. 1-354 (quoting "Investor Suitability," *OSB* 1988:2); *see also* Lewis D. Lowenfels and Alan R. Bromberg, *Suitability in Securities Transactions*, 54 Bus. Law. 1557 (Aug. 1999) ("The suitability doctrine entails the matching of two elements: (i) the investment objectives, peculiar needs, and other investments of the particular customer with (ii) the characteristics of the security which is being recommended.").

16. Knowing one's customer is one of the key elements of the suitability doctrine. The investment professional must know the customer's financial condition and investment objectives before recommending or advising any security as suitable for the customer. The professional has a "positive duty to obtain enough customer information to allow it to render the expert advice which it represents itself as being capable of giving." Friedman, *supra*, at App. 1-312 (quoting "Broker-Dealer Section: 'Churning' and 'Suitability,'" *OSB* 20 (1973)).

17. "If a customer has improper investment objectives, this should be disclosed to him." *Id.* It is the professional who has the responsibility of alerting a customer to the risks of a transaction and determining whether the investment is appropriate in light of the customer's financial condition and surrounding circumstances.

18. While the suitability doctrine and FINRA rules regarding the same are frequently discussed in the context of a broker's duties, the doctrine also applies to IARs who owe a fiduciary duty to their clients. Friedman, *supra*, at App. 1-436 (quoting "FINRA's New Suitability Rules and Their Impact on Ohio," *OSB* 2013:1).

19. An IAR's fiduciary duty includes: (1) a duty to employ reasonable care to avoid misleading clients; (2) a duty to have a reasonable independent basis for their investment advice; (3) a duty to ensure that their investment advice is suitable; and (4) a duty to avoid or disclose all conflicts of interest. *Id.*

20. The Division has directed investment advisers and IARs to the FINRA suitability rules as a "starting point" for carrying out their fiduciary obligations to their clients. *Id.*

2. Suitability Regarding Senior Investors

21. One of the most common complaints to the Division from aggrieved senior investors is the complaint that an investment professional – be it a broker or an IAR – recommended or advised the purchase of an unsuitable product that caused investment loss. Friedman, *supra*, at App. 1-645 (quoting Brian Peters, "Suitability," *OSB* 2015:1). Often, it is a consequence of the professional failing to tailor or adjust investment strategies to an investor's changed needs over time.

22. For many investors, the opportunity to recover from significant investment losses and the appetite or ability to return to full-time employment for purposes of generating steady income in the event of loss wane with age. As a result, many senior investors, particularly retirees, tend to gravitate toward more liquid, less risky products as they prepare for and live on fixed incomes. *See* FINRA Reg. Notice 07-43, *FINRA Reminds Firms of Their Obligations Relating to Senior Investors and Highlights Industry Practices to Serve these Customers*, available at http://www.finra.org/industry/notices/07-43#sthash.XieWpfPY.dpuf.

23. While a senior investor's life stage needs may counsel toward safer, more conservative products and investment strategies, the senior's wealth may be sufficient to accredit or qualify him or her for solicitation in riskier, less regulated securities under federal securities laws.

24. A sizeable net worth does not automatically translate into a correspondingly high degree of investor sophistication or high risk tolerance. Regulators routinely warn "that a customer's net worth alone is not determinative of whether a particular product is suitable for that investor . . . ." *Id.* "Simply put, eligibility does not equal suitability." *Id.*

25. Indeed, to the extent a senior investor is wholly reliant upon retirement assets to cover anticipated expenses or effect planned transfers to heirs and other beneficiaries, the investment professional must take all necessary steps to protect and preserve those assets in line with the investor's short- and long-term needs.

26. Investment professionals have been held accountable for recommending high risk, speculative investments to retirees (even those with significant net worth) where the retirees expressed conservative investment objectives and a need for liquidity.[20] Protecting senior investors is one of the Division's top regulatory priorities.

3. Suitability of Non-Traditional ETFs for Senior and Retired Investors

27. Within the larger suitability framework, states have taken a hard line on speculative investment strategies that push senior and retired investors into risky inverse and leveraged ETFs for extended periods of time and resulting loss. In each of the cases

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[20] *See, e.g., In the Matter of J.W. Barclay & Co., Inc.*, 2003 SEC LEXIS 2529, *78-79 (Oct. 23, 2003) ("Alacan's recommendations of high risk, speculative securities were unsuitable for Old because of his age, his status as a long-time retiree, and his need for liquid funds. Alacan's recommendations to Knopf were unsuitable because of his interest in sound investments and his lack of interest in speculation. Alacan's recommendations of high risk, speculative securities were unsuitable for the Beares because of their ages, their long-time retirement status, and their limited prior investment experience."); *In re A.G. Edwards & Sons, Inc.*, NYSE Disc. Action 2006-133, 2006 NYSE Disc. Action LEXIS 143, *2 (Jul. 10, 2006) (sanctioning firm for not consulting with retiree customers, many having a "conservative-growth" investment objective, regarding the unsuitable block orders and concentration of nearly all of the retiree customers in the same high-risk tech stocks); *In re Grigsby*, NYSE Disc. Action 97-21, 1997 NYSE Disc. Action LEXIS 107, *11 (Mar. 20, 1997) (sanctioning member for effecting low-grade bond purchases as they involved a potential risk to principal and/or income and were therefore unsuitable for retirees who wanted safety of principal and income).

below, the state securities regulators revoked a license, entered a permanent bar, or imposed significant monetary sanctions as the result of that misconduct.

- *In the Matter of Schneider*, Case No. 2011-5864, 2015 Kan. Sec. LEXIS 4, *12-13 (Kan. Sec. Comm'n May 1, 2015) (ordering IAR to pay restitution in excess of $94,000 and assessing $50,000 in civil penalties where adviser: "l) was not nearly as knowledgeable as he should have been regarding the [Non-Traditional ETF] product; 2) disregarded accepted industry practice in how the product was to be used; 3) ignored regulatory guidance; 4) failed to trade the product as intended; 5) failed to monitor the investments appropriately; and 6) lost a significant sum of money as a result").
- *In re Delphi Wealth Advisors, Inc.*, Case No. 12263, (Cal. Dept. of Bus. Oversight Oct. 12, 2014) (revoking investment adviser firm license and barring IAR where the "ETFs purchased were used in a strategic manner inconsistent with their directed use" for elderly and inexperienced investors).
- *In the Matter of Mullenax*, Case No. S-13-0104, 2013 Ark. Sec. LEXIS 45, *5-6 (Ark. Sec. Dept. Aug. 13, 2013) (consent order revoking IAR license where adviser "recommended that his clients buy these Non-traditional ETFs and hold them until the securities markets experience a significant downturn, *i.e.*, much longer than one day," contrary to "the regulatory notice produced by FINRA, the investor alert published by the SEC and the prospectuses produced by the issuers of these securities").
- *In the Matter of Rowe*, Case No. COM2011-0037, 2013 N.H. Sec. LEXIS 3, *1 (N.H. Bur. Sec. Reg. Mar. 12, 2013) (consent order by investment adviser firm and IAR entering permanent bar as to both respondents with companion order for restitution, fine, and costs of investigation) ("Rowe purchased inverse and leveraged ETFs for the NH Customers and in some instances held them for more than the recommended hold period for retail accounts. In some instances, Rowe exceeded these recommended hold periods by several days, weeks, and even months. Rowe completely ignored the NH Customers' individual and specific risk tolerances. Rowe's trading in NH Customers' accounts was reckless and grossly inconsistent with Focus Capital's own recorded investment profiles and risk tolerances.")

28. Notably, the ETFs were deemed unsuitable for the senior investors in all of the foregoing cases even though all of the investors had significant net worth, sufficient for most to meet the federal accredited investor definition.

29. In *Delphi Wealth*, for example, the investors had annual incomes ranging from $50,000 to $250,000 and net worth ranging from under $500,000 to as high as $4 million, but all were retired investors between the ages of 66 and 91 with moderate risk tolerances. The California Division held: "Investing any investor assets, much less all the assets of some investors, in these speculative and extremely risky ETFs was clearly unsuitable for Delphi Wealth's clients, and in breach of an investment adviser's fiduciary duty to his clients."

30. The Hearing Officer in the instant case provides a nice summary and analysis of the suitability issues in the R&R. (R&R ¶¶ 135-60.)[21] As in the other state cases highlighted above, the Hearing Officer found that the ETFs that Respondent recommended and purchased for complainants may have been suitable for some investors, but clearly were not suitable for complainants. (*Id.* ¶ 156).

31. In assessing the suitability of the ETFs at issue here, the Hearing Officer properly took note of the retirement status and age of the complainants and the fact that none were sophisticated investors. (*Id.* ¶¶ 9, 34.) Respondent did not lodge any objections to either of these findings.

32. Respondent critically failed to appreciate the effect that compounding would have on the daily rebalancing of the ETFs in a volatile market. (*Id.* ¶¶ 137-45, 152, 155.) His entire strategy was speculative, contrary to his clients' stated investment needs and objectives, contrary to regulatory guidance, and contrary to the design and intended use of the ETF products themselves. (*Id.* ¶ 138.)

33. The Hearing Officer correctly accepted and quoted extensively from the Division's expert witness, Dr. Craig McCann, who testified persuasively that the ETFs that Respondent placed in complainants' RCA accounts were completely unsuitable for them. (*Id.* ¶¶ 136-55.)

C. Fraud and Misrepresentation Charges

34. The third major set of allegations in this case involve the Division's fraud and misrepresentation charges against Respondent, namely, Respondent's violations of R.C. § 1707.44(B)(5) and R.C. § 1707.44(M)(1)(b) and (d). The Division alleged – and the Hearing Officer found – that Respondent violated those provisions by falsely stating complainants' money would be "safe;" falsely assuring them that his investment strategy was "low risk" and "foolproof;" deceptively claiming that nothing was lost and "everything was alright" in the face of mounting losses; and otherwise misrepresenting the risks and terms of the securities he purchased on their behalves. (R&R ¶¶ 186, 189.)

35. Respondent flatly denies the allegations. (Objections at 74-75.) He asks the Division to accept his denials and supporting hearing testimony as truthful, arguing that all of the

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[21] The only error the Division finds in the Hearing Officer's suitability analysis occurs in his discussion of complainant JM. In paragraph 105 of the R&R, the Hearing Officer stated JM "should bear some responsibility for the situation in which he found himself" because he could have avoided his losses. In paragraph 106, the Hearing Officer finds that allegations involving JM should not be used as grounds for revocation because JM "accepted the risks." This is not a civil tort action between JM and Respondent. The common law defenses of avoidance and assumption of the risk do not apply in administrative actions brought by the Division. The Division acts in the public interest and may revoke the license of any IAR who violates his or her fiduciary duty by recommending grossly unsuitable investments to clients.

complainants who testified consistently against him either lied or were confused.[22] The Division accepts the Hearing Officer's findings and overrules Respondent's Objections.

36. While the Division prevailed on all of the fraud and misrepresentation charges, the Hearing Officer did not accept two of the factual allegations underlying the R.C. § 1707.44(B)(5) charge. The first factual allegation was that Respondent misled two complainants into believing he was working for Charles Schwab and the second allegation was that Respondent misled three complainants to believe that a stop-loss feature would be in place. (R&R ¶¶ 11, 42, 79, 84, 121.) Modified findings and conclusions regarding each of these matters are addressed in turn below.

1. Charles Schwab

37. In support of the Division's charge that Respondent misled two complainants into thinking he was switching from Wells Fargo to Charles Schwab, the Division offered the testimony of complainants JM and JS. (JM Testimony, Tr. Vol. II at 292-94; JS Testimony, Tr. Vol. V. at 35-37, 45.)

    a. On direct and cross-examination, complainant JM expressed his belief that Respondent switched to Charles Schwab, but equivocated on why he believed that and whether that is what Respondent told him. (JM Testimony, Tr. Vol. II at 292-94.)

    b. Complainant JS, on the other hand, testified without reservation that Respondent told her that he was moving to Charles Schwab. (JS Testimony, Tr. Vol. V at 35-37, 45.) JS also testified that the size of the firm was important to her, indicating she never would have called RCA for services because they were a "small firm." (*Id.* at 200.) She further volunteered that she liked to work with large financial institutions because she perceived safety in size. (*Id.* at 200-01.)

38. In his testimony, Respondent acknowledged that complainants had a lot of questions regarding the Charles Schwab statements after his transfer from Wells Fargo, but denies telling them that he was moving to Charles Schwab. (Respondent Testimony, Tr. Vol. VIII at 138.) Later in his testimony, however, Respondent read from contemporaneous notes that he took following a meeting he had with another complainant in August of 2009. Those notes state that he "[m]et with [RM] to sign paperwork to move assets out of Wells Fargo <u>to Charles Schwab</u>" and was "transferring [his] book of business <u>to Charles Schwab</u>." (*Id.* at 222, 226 (discussing notes attached to State's Exh. CC) (emphasis added).)

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[22] The transcript of proceedings demonstrated a significant amount of hostility, aggression, and an overall lack of respect for the tribunal by Respondent during the hearing. Respondent interrupted witnesses and counsel, made faces, cursed, and persistently made disparaging remarks throughout the proceedings. (Respondent Testimony and stray comments, Tr. Vol. I at 125; Vol. III at 46, 93-94, 128, 164; 166; Vol. IV at 15; Vol. V at 86-88, 202; Vol. VI at 73, 110; Vol. VIII at 90, 92, 193; Vol. IX at 96, 174; Vol. X at 28.) The Division appreciates the Hearing Officer's efforts to reign in Respondent's behavior, but would have preferred to see Respondent's intimidation tactics shut down completely. If necessary, Respondent should have been instructed to leave the hearing room if he was unwilling or unable to comport himself in a professional manner.

39. Notwithstanding complainant JS's testimony and Respondent's own client notes from the relevant time frame tending to support the Division's allegation that Respondent led some complainants to believe he was moving to Charles Schwab, the Hearing Officer concluded that the evidence was insufficient to prove the allegation. (R&R ¶¶ 42, 84.) The Hearing Officer also agreed with Respondent's argument that even if Respondent had made misrepresentations regarding his employment at Charles Schwab, those statements would not be material within the meaning of *Basic v. Levinson.* (*Id.* ¶ 84 (citing Respondent's Post-Hearing Mem. at 13 (citing 485 U.S. 224 (1988)).)

40. Given the Hearing Officer's careful attention to detail and fair assessment of witness testimony in light of corroborating documents, the Division accepts his conclusion that the Division failed to prove its allegation that Respondent misled JS and JM into believing he was switching to Charles Schwab.

41. The Division rejects, however, the Hearing Officer's conclusion regarding materiality. Firm size, brand, and reputation are often very important considerations for investors when selecting a professional to handle their funds. If Respondent had misrepresented who his employing firm was to complainants JM and JS *and* those complainants had testified persuasively that this fact was important to them in allowing Respondent to move their accounts with him, that misrepresentation would indeed be considered material to the total mix of information as envisioned in *Basic v. Levinson.*

2. Stop-Loss

42. In support of the Division's charge that Respondent led complainants to falsely believe a stop-loss feature would be employed as part of his ETF trading strategy, the Division offered the testimony of RM and TM. (R&R ¶¶ 67, 71, 136; RM Testimony, Tr. Vol. I at 44; TM Testimony, Tr. Vol. I at 209-10.) Both investors testified at the hearing that Respondent promised to use this feature to cap the amount they could lose in their investments. (*Id.*) Both investors also testified that the feature was important to their decision-making because they could not afford to lose a significant portion of their principal. (*Id.*)

43. Respondent denied the stop-loss allegations, stating he never used that feature and would never have recommended it with his unique Notley shorting strategy in which significant swings, including the possibility of significant short-term losses, would be expected. (R&R ¶¶ 31, 71; Respondent's Testimony, Tr. Vol. VIII at 186-87, 111; Respondent's Post-Hearing Memorandum at 6-7.)

44. There was no contemporaneous written documentation or other evidence admitted to corroborate either side's recollection of what was said regarding use of a stop-loss feature. The record is clear, however, that all complainants received account statements showing significant losses that demonstrated the absence of stop-loss features. (R&R ¶ 78.)

45. The Hearing Officer did not find RM and TM's testimony compelling on this point and, thus, ruled that the Division's evidence was insufficient to prove the factual allegation. (*Id.* ¶¶ 79, 111, 121.) The Division accepts the Hearing Officer's credibility assessments and finding.

D. Business Repute

46. The Hearing Officer found that the Division proved that Respondent was not of good business repute based on three primary allegations falling under the Division's rule in O.A.C. 1301:6-3-19(D), as alleged in the Amended NOH:

(1) committing violations of the Ohio Securities Act and rules promulgated thereunder as charged in the Amended NOH [O.A.C. 1301:6-3-19(D)(8)];

(2) engaging in conduct negatively reflecting on his reputation for honesty, integrity, and competence in business and personal dealing as charged in the Amended NOH [O.A.C. 1301:6-3-19(D)(9)]; and

(3) settled customer complaints and other litigation appearing on his CRD/IARD record [O.A.C. 1301:6-3-19(D)(11)].

(R&R ¶¶ 194-95.)

47. Respondent challenges all of the bases advanced by the Division except for one underlying violation – his failure to update his Form U-4 as required by O.A.C. 1301:6-3-16.1(C) – which Respondents admits, but argues is not a ground for license revocation or a finding that he lacks good business repute. (Objections ¶ 69.)

48. "[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)).

49. The Division may deny or revoke a license based on relatively few and, indeed, a *single* wrongful act. *See, e.g., Tyla v. Ohio Dept. of Commerce*, No. CV2002-06-3377, slip op. at 2 (Summit County C.P. Mar. 11, 2003) (affirming denial based on single deceptive act of directing a third party to sign a signature on another client's document); *Geiger v. Dept. of Commerce*, No. 97CVF-09-8996, slip op. at 5 (Franklin County C.P. August, 18, 1998) (affirming denial based on single NASD sanction and specifically rejecting argument that sanction is disproportionate to the transgression); *Moseley v. Ohio Dept. of Commerce*, No. 97CVF12-11152, slip op. at 4 (Franklin County C.P. June 18, 1998) (affirming denial of license based on single NASD sanction); *see also Connors*, slip op.

at 7 ("the sanction imposed by the NYSE alone is sufficient to find that the Appellant was not 'of good business repute'") (refusing renewal).

50. It is the Division's administrative rule — O.A.C. 1301:6-3-19(D) — that specifies the conduct which enables the Division to deny or revoke a license for lack of good business repute. *In re Scott*, 69 Ohio App. 3d 585, 588 (10th Dist. Ct. App. 1990); *accord Moseley*, slip op. at 4.

51. The operative language in O.A.C. 1301:6-3-19(D) states that the Division shall consider whether the applicant was "the subject of" or "engaged in" the matters enumerated in subsections (1) through (12). The Rule does not state and no court has ever held that the Division must prove the underlying facts that give rise to the incidents or actions so enumerated.

52. As the Franklin County Court of Appeals explained in *Fehrman v. Ohio Department of Commerce*, the Division shall consider the matters set forth in the rule for purposes of making a good business repute finding even where there are no specific findings of wrongdoing made in the underlying action or incident. 141 Ohio App. 3d at 508-09 (10th Dist. Ct. App. 2001).

53. Registrants are afforded the opportunity to participate in a hearing and to counter with their own evidence as to an incident and overall business repute, an opportunity the Respondent here has taken.

1. The Division's Evidence Under O.A.C. 1301:6-3-19(D).

54. The Hearing Officer found that the Division's evidence of Respondent's misconduct toward complainants, the incidents appearing on his CRD/IARD record, and his failures to comply with his IAR obligations under the Ohio Securities Act and rules promulgated thereunder satisfied the Division's burden under O.A.C. 1301:6-3-19(D). (R&R ¶¶ 170, 195.)

55. The only allegation that the Division alleged in support of its business repute charge that the Hearing Officer challenged in any respect was the allegation of Respondent's failure to disclose to certain complainants that he was acting without a license for a period of time at RCA. The Hearing Officer found the allegation proven, but stated in the R&R that such failure is "not grounds for discipline." (R&R ¶¶ 21, 85.)

56. The Division finds the fact that Respondent continued to serve as complainant's IAR after his license lapsed without divulging that lapse in the circumstances present here is evidence of conduct negatively reflecting on his reputation for competence in business and personal dealings within the meaning of O.A.C. 1301:-3-19(D)(9). Therefore, the fact does serve as part of the support for the Division's finding that Respondent lacks good business repute. As such, the Division accepts the Hearing Officer's finding that the allegation was proven, but rejects the Hearing Officer's conclusion that the allegation is not grounds, at least in part, for discipline.

57. Respondent's record demonstrates a pattern of misconduct toward Ohio investors, particularly toward senior investors. Rather than accept responsibility for his actions, Respondent stayed on the offensive, mocking and intimidating complainants throughout the course of the proceedings. *See* Note 22, *supra*.

2. The Respondent's Evidence Under O.A.C. 1301:6-3-19(D).

58. In response to the Division's evidence indicating that he lacks a good business repute, Respondent disputes all of the underlying wrongdoing with respect to complainants, argued that the complaints and arbitrations appearing on his CRD/IARD record are not actionable because he disputes them, and called character witnesses to testify regarding their positive view of his honesty, integrity, and competence in business and personal dealings. (Respondent's Post-Hearing Mem. at 52-63; Objections ¶¶ 70-77.) The Hearing Officer gave full consideration to all of those arguments and evidence.

59. For the reasons already discussed, the Division accepts the Hearing Officer's findings of underlying misconduct by Respondent toward complainants as charged in the Amended NOH. The Division also accepts the Hearing Officer's rejection of Respondent's argument that the Division cannot consider or take action regarding customer complaints or arbitrations that he disputes or "denied."

60. O.A.C. 1301:6-3-19(D)(11) excludes "any complaint that has been denied or any arbitration or civil litigation that resulted in a judgment or an award against the party bringing the action." As Respondent knows, the CRD/IARD incidents cited in the Amended NOH were arbitrations and civil litigation that were settled, not denied. Indeed, well over a million dollars was paid to the plaintiffs to settle those cases over the course of the past five years alone. None resulted in a judgment or an award against the parties bringing the action.

61. The Division and Ohio courts have rejected the denial argument that Respondent attempts here, all recognizing that settlements are actionable and sufficient evidence regarding a licensee's business repute.[23]

62. The Division accepts as a finding of fact that some of Respondent's clients have a favorable opinion of Respondent's business repute notwithstanding the incidents appearing on his CRD/IARD record and allegations of the Amended NOH. (Nickum Testimony, Tr. Vol. IV at 57-102; DeSarro Testimony, Tr. Vol. IV at 103-55; Obert Testimony, Tr. Vol. X at 94-126; Dean Testimony, Tr. Vol. X at 127-52; Objections at 72.)

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[23] *E.g.*, *In re Lofton*, Order No. 10-044 at 32-35, 2010 Oh. Sec. LEXIS 46 (Ohio Dept. of Commerce May 28, 2010) (citing *Torchiana v. Ohio Dept. of Commerce*, slip op. at 10 (Franklin County C.P. May 1, 2008) ("Although settlements in lawsuits are always encouraged and the terms of such would be inadmissible in litigation, they are relevant in this administrative proceeding by virtue of the fact that they appear on the CRD report and Form U-4 and are used as an industry standard to judge conduct, honesty, integrity and competence.")); *see also Connors*, slip. op. at 4-5 (rejecting applicant's arguments that CRD contains nothing more than unsubstantiated complaints and hearsay from clients who were not contacted by the Division).

63. The Division has considered and given appropriate weight to the foregoing mitigating evidence as required by O.A.C. 1301:6-3-19(D)(12).

64. The Division agrees with the Franklin County Court of Appeals' assessment in *Geiger*, "the test of 'good business repute' is a multifaceted one" and "it falls to the Division, as the experts in this area, to make the determination of what impact a single transgression has on the applicant's overall reputation and business character." *Geiger*, slip op. at 4.

65. Based on all of the foregoing, the Division finds that Respondent lacks good business repute.

E. Evidentiary Matters

1. Respondent's Objections

66. Respondent lodged a significant number of evidentiary objections to the R&R findings, which the Division has grouped into the following seven categories: (1) objections that fall under the umbrella of references or inferences that he made investment decisions or otherwise served as an IAR for the complainants while at RCA;[24] (2) objections to findings or conclusions he deems contrary to the evidence or law;[25] (3) objections to findings that he believes mischaracterizes the pleadings and witness testimony;[26] (4) objections to the Hearing Officer's credibility determinations;[27] (5) objections to the Hearing Officer's weighing of the evidence, including evidence offered in mitigation of the Division's charges;[28] (6) objections to the Hearing Officer's consideration of evidence that Respondent deems improper;[29] and (7) claimed due process violations.[30] The Division has examined all of these objections and, finding none to have merit, overrules them all in their entirety.

67. The Division overrules the first set of objections based on its finding that Respondent did make investment decisions and act as an investment adviser representative, for the reasons already covered and discussed in Subsection I.A. above.

68. The Division overrules the second set of objections based on its review and determination that the challenged findings and conclusions were supported by substantial, reliable and probative evidence in the record and the law.

69. The third set of objections is overruled because the challenged findings were fair and appropriate characterizations of the pleadings and witness testimony. Indeed, many of

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24 Objections ¶¶ 1, 3-4, 6, 13-14, 16-21, 26, 28, 30-31, 45-46, 51-53, 56, 58-59, 61-62, 64, 66-68, and 73.
25 *Id.* ¶¶ 12, 14, 19, 22-23, 29, 33-34, 36-38, 43-44, 47-48, 50, 56-60, 65-66, 70, 74-75, 77.
26 *Id.* ¶¶ 2, 5, 7-10, 15, 17-18, 23, 30, 39-40, 49, 54-55, 64, 67, 69, 71-72, 76.
27 *Id.* ¶¶ 11, 24-25, 27-28, 31, 34-36, 41-42, 57, 63.
28 *Id.* ¶¶ 5, 11, 54, 69, 71-72, 76.
29 *Id.* ¶¶ 47, 50.
30 *Id.* ¶¶ 1, 3, 20-21, 26, 32, 46.

the findings that Respondent claims are mischaracterizations were exact quotations and excerpts of the relevant pleadings and transcripts, as illustrated and reinforced above.

70. The Division overrules the fourth and fifth sets of objections by accepting the Hearing Officer's credibility determinations and his weighing of the evidence. The Hearing Officer had ample time over the course of the eleven-day hearing to consider witness testimony and independent documentary evidence to draw his own conclusions regarding the truthfulness, accuracy, and probative value of the testimony and evidence admitted in this case. His findings reflect a balanced and careful assessment that neutrally credited and discredited various statements and allegations of both parties. The Hearing Officer's factual determinations stand.

71. The sixth set of objections is also overruled. There, Respondent takes issue with the Hearing Officer's findings that refer to material included in State's Exhibit M, M-1, and AA, which all pertain to investment losses suffered by complainants TM and CM. (Objections ¶ 47, 51; R&R ¶¶ 120, 129.) Although the material cited does in fact extend to a time period beyond that alleged in the Amended NOH, Respondent failed to object to admission of these exhibits at the hearing when tendered at the close of the State's case-in-chief. (Tr. Vol. VII at 185.) Respondent therefore waived the right to object to the Hearing Officer's use of that material in the R&R.

72. Moreover, even if the Hearing Officer had erred in citing the evidence, the error would be harmless as even Respondent agrees that all of the complainants experienced significant losses to their assets and the Division need not prove the exact amount for purposes of this administrative matter. (R&R ¶ 47 (subject to no Objection by Respondent).)

73. The seventh and final set of objections involve claimed due process violations against the Division and the Hearing Officer for purportedly basing arguments and findings on charges not contained in the Amended NOH. (Objections ¶¶ 1, 3, 20-21, 26, 32, 46). Respondent also couches the argument as a violation of Ohio Revised Code 119.07. It is another spin to Respondent's argument that he never initiated or placed the trades, purchases, and sales.[31]

74. Respondent argues that the Division's arguments and the Hearing Officer's findings that he was "responsible for" or "involved in" the RCA transactions is different and lesser

[31] Complaining that he never even had access to the dealer platform so as to manually effect a trade, Respondent at times appears to narrowly interpret the words trade, purchase, and sell to refer exclusively to the physical administrative task of entering or keying in an order into a computer. (R&R ¶¶ 1-3, 13-21; Respondent Testimony, Tr. Vol. VIII at 148, Vol. IX at 235; Respondent's Post-Hearing Mem. at 4-5, 46-49; Respondent's Exh. 61.) Other times, Respondent categorically states that it was Mr. Camirand, not him, who made all of the investment decisions. (Objections ¶¶ 1-3, 13-21). Regardless of which tact Respondent takes to support his due process claim, both fail for the reasons expressed in Subsection I.A. above: (1) the Division proved the full extent of its IAR allegations as set forth in the Amended NOH based on Respondent's own admissions; (2) the Division never alleged that Respondent keyed in orders or that he alone provided investment advisory services on RCA's behalf, to the exclusion of Mr. Camirand, so as to support Respondent's narrow reading; and (3) Respondent's arguments overlook the statutory definition of the terms "purchase" and "sale," which broadly extend to "any act" by which a purchase or sale is made. All of Respondent's acts that initiated or led to purchases and sales are, by definition, actionable and fall squarely within the scope of the notice of charges.

than the Division's allegation that he actually made the trades, purchases, or sales. (*Id.*) Respondent's attempt to create semantic conflicts between the Division's charges and Hearing Officer's findings does not rise to an actionable due process claim. The Amended NOH outlined the specific complainants and transactions involved in this matter, putting him on clear notice of the Division's claims against him. *See Althof v. Ohio State Bd. Of Psych.*, 2007 Ohio 1010, slip op. at 25-27, 2007 Ohio App. LEXIS, at *19 (10th Dist. Ct. App. Mar. 8, 2007) (rejecting due process claim based on differences in terminology used in notice and findings of fact where findings were consistent with a plain reading of the notice); [32]

75. Respondent's due process argument against the Division also fails because Respondent never objected to any of the Division's arguments or lines of questioning on this ground at the hearing. *See, e.g., Althof*, slip op. at 23 (rejecting due process argument premised on evidence of uncharged conduct where respondent failed to timely object to line of questioning at hearing).

76. In all events, Respondent had ample notice and opportunity to prepare his defense in this case. The Amended NOH was issued by the Division on December 8, 2014, five months before the start of the evidentiary hearing. Respondent also enjoyed multiple continuances over the course of the hearing, including a six-week continuance after the Division concluded its case-in-chief to review the transcript and all of the Division's evidence before putting on his own case. With continuances and the opportunity for post-hearing briefing, Respondent had three months to present his case-in-chief and prepare his closing arguments to the Hearing Officer.

77. The circumstances present here are strikingly similar to those in the *Johnson v. State Medical Board of Ohio* case in which the Franklin County Court of Appeals rejected a due process challenge:

> A review of the record does not substantiate appellant's contention that he was not afforded an opportunity to prepare and present his defense to the board's charges. The hearing did not commence for five months after appellant received the notice. In addition, he had a full three months after the presentation of the state's case-in-chief to prepare both his cross-

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[32] *See also Macharet v. State Med. Bd.*, 188 Ohio App. 3d 469, 477 (10th Dist. Ct. App. 2010) (rejecting due process claim based on evidence of uncharged conduct where agency disciplined registrant solely for the misconduct alleged in the notice of charges) (noting disciplinary body may consider uncharged conduct as an aggravating circumstance in determining the appropriate sanction); *Richmond v. Ohio Bd. of Nursing*, 2013 Ohio 110 at slip op. 11-14, 2013 Ohio App. LEXIS 77, *7-10 (10th Dist. Ct. App. Jan. 17, 2013) (the board's notice was reasonably calculated to apprise appellant of pendency of the board's action and to afford appellant with an opportunity for a hearing); *Johnson v. State Med. Bd. Of Ohio*, 1999 Ohio App. LEXIS 4487, *14-16 (10th Dist. Ct. App. Sept. 28, 1999) (notice was sufficient where it specified which patients were harmed and what prescriptions were involved); *Sohi v. Ohio State Dental Board*, 1997 Ohio App. LEXIS 2217, at *14 (Ohio Ct. App. May 20, 1997) ("Under R.C. 119.07, the administrative agency is required to give Appellants notice of the charges or other reasons for the proposed action. The purpose of such notice is to give the party charged with a violation adequate notice to enable the party to prepare a defense to the charges."); *Keaton v. Ohio Dept. of Commerce*, 2 Ohio App. 3d 480, 483 (10th Dist. Ct. App. 1981) (notice sent to appellant-broker by the real estate commission was adequate under R.C. §119.07 since it identified the transaction concerned and clearly set out the conduct of which appellant was accused).

> examination of the state's expert and his defense to the board's charges. During this time, he had access to both the transcript of the hearing and all of the state's exhibits.
>
> In addition, a review of the record indicates that appellant's counsel conducted a thorough cross-examination of the board's expert witness and presented a competent defense on behalf of appellant. There is no suggestion from the record that counsel was ill-prepared, and there has been no indication of anything additional counsel could or should have done or presented in connection with appellant's defense. Moreover, appellant has pointed to nothing additional that he would or could have done differently and nothing additional that he would or could have done either with respect to preparing a defense or presenting evidence in his defense. Appellant testified extensively on his own behalf and was given full opportunity to present an explanation for this treatment of the identified patients and/or rebut the state's evidence.
>
> Given the foregoing, we conclude that appellant's due process rights were not violated.

1999 Ohio App. LEXIS, at *17.

2. Other Rulings and Orders

78. At Respondent's request and on his own accord, the Hearing Officer directed all of the attendees at the 119 hearing to identify themselves for the record throughout the course of the proceedings. (*E.g.*, Tr. Vol. VII at 8.) At one point, counsel appearing from the Ohio Attorney General's Office objected to this, indicating it was not appropriate for a public hearing. (*Id.*) The Division agrees there was no proper basis for the Hearing Officer's request.

79. As the Division has previously explained, the Chapter 119 hearing process is "decidedly a 'public' process." Friedman, *supra*, App. 1-455 (quoting "Division's Publication of 'Show Cause' Orders Alleging Securities Violations," *OSB* 1986:3).

80. Section 119.01 itself defines "hearing" to mean "a public hearing by any agency in compliance with procedural safeguards afforded by sections 119.01 to 119.13 of the Revised Code." *Id.*

81. Asking members of the public to identify themselves on the record of Chapter 119 hearings could have an unwelcome chilling effect on public attendance in these administrative hearings. Although the ruling resulted in no material prejudice to either party, the Hearing Officer should have declined making the request.

82. The Hearing Officer also erred in entering a Confidentiality Order that prospectively and presumptively shielded all of the hearing exhibits from public disclosure, by stating "all

exhibits introduced or admitted at the hearing" will be treated as "confidential information" unless the parties agree that a specific exhibit or exhibits contain no confidential information.[33] The Confidentiality Order further directed the Division to keep all such exhibits "under seal or otherwise restricted from release subject to the provisions of the Confidentiality Order." The Confidentiality Order likewise directed the Division to treat the entire transcript of proceedings as confidential and keep that record under seal in the absence of supplemental designations that identify specific portions as confidential.

83. The record reflects no confidential stamping or markings, no agreement by the parties or counsel as to the confidentiality of any specific exhibit, and no supplemental designations regarding confidential testimony. A plain reading of the Confidentiality Order could be read to shield virtually the entire record of this administrative hearing from public view, contrary to both the letter and spirit of Chapter 119.

84. As the Ohio Attorney General has opined in examining the public nature of Chapter 119 administrative proceedings:

> Under R.C. 119.07, the agency proposing to conduct the hearing must provide the subject thereof with notice of his right to such hearing and his ability to appear at such a hearing, with counsel or other appropriate representative, to present his position, arguments, or contentions in writing, and notice that at the hearing he may present evidence and examine witnesses. Under R.C. 119.09, a stenographic record of the testimony and other evidence submitted at the hearings shall be taken at the expense of the agency. R.C. 119.12 provides a judicial review process from adjudication orders and requires the agency to certify a complete record of its proceedings to the reviewing court. <u>All of these administrative provisions indicate the public nature of the agency's proceedings. There is nothing in R.C. Chapter 119 to allow for a private or</u>

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[33] The Confidentiality Order is in the record and was discussed briefly as a preliminary matter at the very beginning of the hearing. (Tr. Vol. I at 6.) The Order is undated and signed by Respondent, his counsel, and Division's counsel. The Order is not signed by the Commissioner or other Division representative. The Confidentiality Order follows a motion for a protective order filed by Division's counsel, served via email, on May 18, 2015. While the motion served the proper purpose of protecting private information, the motion erroneously states that the public records exemptions set forth in Ohio Revised Code Section 149.43 apply to "documents that were received in the course of the Division's investigation." As the Ohio Supreme Court has held, Ohio Revised Code Section 149.43 does not apply to information collected by the Division in the course of its investigations. *State ex rel. Dublin Securities, Inc. v. Ohio Div. of Securities*, 68 Ohio St.3d 426, 431 (1994). Rather, "R.C. 1707.12 is the sole provision governing information collected by the Ohio Division of Securities." *Id.* When investigative information is compiled by the Division into an exhibit in support of its public charges, similar to investigative information that the Division compiles and releases as part of a public NOH itself, logic dictates that the information released in the hearing exhibit also becomes public as "procedural devices" for the accomplishment of the Division's administrative action. Friedman, *supra*, App. 1455-56 (citing 1980 Op. Ohio Atty. Gen. 096, 1980 Ohio AG LEXIS 15 (Dec. 23, 1980)). "To include these in the class of records that may be disclosed to neither the public at large, nor to the person who is the subject thereof, would be an anomaly in itself." *Id.* To the extent public disclosure would place the privacy or safety of a witness or Division personnel at risk, the procedural device can be redacted (just as an NOH can be carefully drafted) to avoid the problem. *See id.*

> closed hearing; R.C. 119.01(E) specifically defines "hearing" as a public hearing by any agency in compliance with the procedural safeguards afforded by R.C. Chapter 119. Nor are there any provisions in R.C. Chapter 119 allowing any agency such as the Board to seal or close its records pertaining to the hearing once the hearing is concluded and all appeals are exhausted.

1983 Ohio Op. Atty Gen. No. 100, 1983 Ohio AG LEXIS 8, *8-9 (Dec. 21, 1983) (emphasis added). Fortunately, the Confidentiality Order explicitly preserves the Commissioner's ability to terminate the obligations imposed by the order and expresses no intention to limit the Division's ability to comply with its statutory requirements or any other applicable state and federal laws.

85. The proper course for preserving confidentiality of information would have been for the Hearing Officer to direct the parties and their counsel to guard against improper disclosure of confidential information at the hearing by redacting that information – and only that information – from exhibits prior to introduction or admission at the hearing and striking, as necessary, testimonial disclosure of confidential information from the transcript.

86. The Division will heretofore redact the record to prevent public release of confidential information in accordance with state and federal law. The information that will be redacted includes social security numbers, bank and investment account numbers, and federal tax information that appear in the record.

87. As Respondent and his counsel both signed the Confidentiality Order and neither requested protection of any specific information by marking any records with a stamp of "CONFIDENTIAL PROTECTIVE ORDER" within ten days of the hearing being closed, as contemplated and allowed by the Confidentiality Order, and because no hearing exhibits or transcripts have been publicly shared or produced by the Division, the Division finds no prejudice to Respondent as a result of the flawed Confidentiality Order in light of the Division's corrective action as described herein.

II. 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 administrative matter are: (1) R.C. § 1707.19, which outlines the grounds and procedures for the Division's refusal, suspension, and revocation of a license, and (2) R.C. § 1707.44, which enumerates the Division's list of

prohibited conduct, including fraud offenses. The Division also alleges misconduct in relation to two rules promulgated by the Division in accordance with Chapter 1707 – O.A.C. 1301:6-3-16.1(C) and O.A.C. 1301:6-3-19(D). All lead to the penultimate recommendation by the Hearing Officer to revoke Respondent's IAR license. Each violation is addressed in turn below.

A. Unlicensed Activity (R.C. § 1707.44(A)(1) & (2))

The Division accepts the Hearing Officer's findings and conclusions that Respondent acted as an IAR without the proper license in violation of R.C. § 1707.44(A)(1) & (2). (R&R ¶¶ 51-60, 184.) The only defense Respondent asserted in regards to this violation was that Mr. Camirand made all of the investment decisions and that the Division purportedly failed to prove that he purchased, sold, traded, placed, or initiated securities transactions in complainants' RCA accounts. For the reasons discussed, *supra*, that defense and all related Objections are rejected.

B. False Representations for Purpose of Advising (R.C. § 1707.44(B)(5))

The Division accepts the Hearing Officer's findings and conclusions that Respondent made false representations of material fact for purposes of providing investment advice to complainants in violation of R.C. § 1707.44(B)(5). (*Id.* ¶ 186.) Respondent knew complainants were retirees who wanted and needed conservative, low-risk investment strategies to preserve their investment assets for living expenses and estate planning. He falsely told complainants that their investments would be "safe" with his "low risk" and "foolproof" strategy for making money using his technical charting analysis and the Notley system. (*E.g.*, *id.* ¶¶ 81, 110-11 (citing JS Hearing Testimony at Tr. Vol. V at 35; TM Hearing Testimony at Tr. Vol. I at 209-10).)

When it became clear that Respondent's strategy was neither safe nor foolproof, but rather was causing massive losses in the complainants' RCA accounts, Respondent falsely assured them that they "had not lost anything" and that "everything was alright." (R&R ¶ 78 (citing RM's Hearing Testimony, Tr. Vol. I at 92; JM's Hearing Testimony, Tr. Vol. II at 268, 375).) Respondent's false statements were material to his advice that complainants purchase and remain invested in high-risk, unsuitable ETFs. His statements are actionable under R.C. § 1707.44(B)(5).

C. Fraudulent, Manipulative, and Deceptive Acts, Practices and Course of Business By Investment Adviser Representative (R.C. § 1707.44 (M)(1)(b) and (d))

The Division accepts the Hearing Officer's findings and conclusions that Respondent, while acting as an IAR, engaged in acts that would operate as a fraud or deceit upon a person or otherwise served as fraudulent, manipulative, and deceptive acts, practices and course of business in violation of R.C. § 1707.44(M)(1)(b) and (d). (R&R ¶¶ 189.) Once more, Respondent's chief defense is that he never acted as an IAR at RCA, a defense the Division has already rejected.

Respondent's sale of unsuitable, high-risk ETFs to senior, retired investors under the false pretense that the investments were "safe" with his "foolproof" strategy and his false assurances

that "nothing had been lost" and "everything is alright" did operate as a fraud or deceit upon complainants and were fraudulent, manipulative and deceptive acts within the meaning of the Ohio Securities Act.

D. Failure To Update Form U-4 (O.A.C. 1301:6-3-16.1(C))

The Division accepts the Hearing Officer's findings and conclusions that Respondent failed to properly update his Form U-4 in violation of O.A.C. 1301:6-3-16.1(C). (R&R ¶¶ 161-72, 192.) Respondent admits he failed to properly update his Form U-4, but indicates he relied upon his counsel to take care of the paperwork as mitigating evidence to the charge. (Objections ¶¶ 69-71.)

Respondent did not call his counsel as a witness or offer any other form of corroborating evidence to substantiate his claim that counsel was asked but failed to discharge that duty for him. All that Respondent admitted along those lines was his own self-serving testimony, which offers very little mitigating value. Moreover, as the Hearing Officer indicated in paragraph 172 of the R&R, it was Respondent's responsibility as a licensee to make sure the form was timely updated. As such, Respondent's failure is a violation of O.A.C. 1301:6-3-16.1(C), a violation that serves as one of several underlying bases for the Division's charge regarding lack of good business repute.

E. Business Repute (O.A.C. 1301:6-3-19(D))

Although "good business repute" is not expressly defined in O.R.C. 1707.19, the Division adopted rules set forth in O.A.C. 1301:6-3-19(D) that define the term. O.A.C. 1301:6-3-19(D) enumerates a number of factors the Division shall consider in determining whether an applicant is of good business repute. The Division has considered all of the factors set forth in O.A.C. 1301:6-3-19(D) and determined that the following four factors are of particular relevance to the Respondent's business repute in this case, namely, whether he:

(1) has violated any provision of paragraph (A) or (B) of this rule, any provision of Chapter 1707 of the Revised Code or any rule promulgated thereunder [1301:6-3-9-19(D)(8)];

(2) has engaged in any conduct which would reflect on the reputation for honesty, integrity and competence in business and personal dealings of the applicant, investment adviser, investment adviser representative, dealer, salesperson or state retirement system officer or bureau of workers' compensation chief investment officer including, but not limited to, forgery, embezzlement, nondisclosure, incomplete disclosure, misstatement of material facts, and manipulative or deceptive practices [1301:6-3-19(D)(9)];

(3) has been the subject of any complaint, arbitration or civil litigation that alleges a violation of state or federal law, or the rules or code of ethics of any association of investment advisers, investment adviser representatives, securities salesperson or dealers, by any professional association granted disciplinary or regulatory

authority by state or federal law, or by any recognized securities exchange, excluding any complaint that has been denied or any arbitration or civil litigation that resulted in a judgment or an award against the party bringing the action [1301:6-3-19(D)(11)]; and

(4) has established a reputation for honesty, integrity, and competence in business and personal dealings [1301:6-3-19(D)(12)].

In regard to the first factor – 1301:6-3-19(D)(8) – the Division established that Respondent had violated other provisions of Chapter 1707 – most notably, violations of Revised Code 1707.44 – as well as Division rules, which cast a very dark shadow on his business repute. Standing alone, these violations are sufficient evidence that Respondent is not of good business repute.

As for the second factor – 1301:6-3-19(D)(9) – the Division established that Respondent had engaged in conduct that negatively reflected on his reputation for honesty, integrity, and competence in business and personal dealings. The fraudulent conduct alleged and proven in support of the Division's Revised Code 1707.44 charge and his unlicensed service to complainants, without divulging his lapse of licensure, all negatively reflect on his reputation for honesty, integrity, and competence. Standing alone, this conduct would also serve as sufficient evidence that Respondent is not of good business repute.

In regard to the third factor – 1301:6-3-19(D)(11) – the Division established that Respondent had been the subject of multiple senior investor complaints that culminated into reportable civil litigation and arbitration proceedings. None of the foregoing was denied or otherwise resulted in a judgment or an award against the party bringing the action, but rather all were settled for significant sums. Moreover, all five of those complaints and cases alleged losses stemming from unsuitable trading in ETFs, the same misconduct alleged and proven here. These incidents are sufficient for the Division to make a finding that Respondent is not of good business repute.

As for the fourth and final factor – 1301:6-3-19(D)(12) – the Division considered evidence admitted on behalf of the Respondent that a few of his existing clients have a favorable view of his business repute notwithstanding the foregoing incidents and Division's allegations. This evidence is simply outweighed by all of the countervailing evidence impugning Respondent's business repute. The Division accepts the Hearing Officer's findings and conclusions that Respondent lacks good business repute. (R&R ¶¶ 195.)

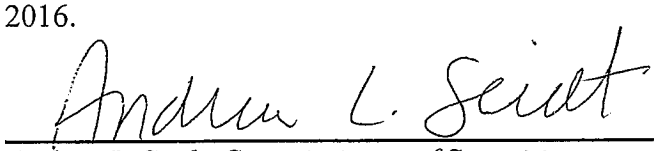
F. <u>Revocation of License (R.C. § 1707.19(A) (1), (4) & (9))</u>

Respondent's misconduct toward and breach of fiduciary duty to complainants, his failure to comply with his regulatory responsibilities, and his tarnished professional record – coupled with the aggravating factors of Respondent's propensity to blame others for his misconduct and callous disregard for the losses that he has caused senior investors – all demonstrate a lack of good business repute as well as overt violations of the rules that the Division has prescribed for the protection of investors, clients, and prospective clients. Respondent is unfit to serve as an IAR in Ohio. The Division accepts the Hearing Officer's recommendation to revoke Respondent's license. (R&R at 47, "Recommendation.")

III. CONCLUSION

Based on all of the charges set forth in the Division's Amended NOH as having been proven and documented in the Hearing Officer's Report and Recommendation, as supplemented and modified herein, the Division hereby concludes and orders that, pursuant to Sections 1707.19(A)(1), (4) and (9) of the Ohio Revised Code, the investment adviser representative license of Respondent Timothy Fife (CRD Number 2437888) is hereby revoked.

WITNESS MY HAND AND THE OFFICIAL SEAL OF THIS DIVISION at Columbus, Ohio this 7th day of April, 2016.



Andrea L. Seidt, Commissioner of Securities