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COMMISSIONERS OFFICE

COMMONWEALTH OF KENTUCKY
PUBLIC PROTECTION CABINET
DEPARTMENT OF FINANCIAL INSTITUTIONS
AGENCY CASE NO. 2019-0015

DEPARTMENT OF FINANCIAL INSTITUTIONS

COMPLAINANT

v.

MARK THOMAS LAMKIN

RESPONDENT

**COMMISSIONER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND FINAL ORDER**

* * * * *

An Administrative Hearing was held in this matter on October 9, 2019, at the offices of the Public Protection Cabinet, Office of Administrative Hearings, 128 Brighton Park Boulevard, Frankfort, Kentucky. The Complainant, Department of Financial Institutions (“DFI” or “Department”), was represented by Catherine Falconer. The Respondent, Mark Thomas Lamkin (“Respondent” or “Lamkin”) was represented by David Guarnieri, Attorney at Law. Patrick Flannery, Hearing Officer, Public Protection Cabinet, presided over the hearing and issued a Recommended Order on March 5, 2020. The case was remanded for further findings on June 3, 2020. Jim Howard, Hearing Officer, Public Protection Cabinet, (“Hearing Officer Howard”) issued the Findings of Fact, Conclusions of Law, and Recommended Order on March 5, 2021.¹

The subject of the hearing was DFI’s May 28, 2019 Notice and Order of Revocation of Registration against Respondent, based on various violations of KRS Chapter 292, the Securities Act of Kentucky. On March 5, 2021, Hearing Officer Howard, having reviewed the record,

¹ At the time of the remand, Patrick Flannery was no longer employed by the Public Protection Cabinet.

including all exhibits and written submissions by the parties, issued a Recommended Findings of Fact, Conclusions of Law, and Recommended Order (“Recommended Order”).

For the reasons set forth herein, the Commissioner hereby enters this **Findings of Fact, Conclusions of Law, and Final Order** adopting, in part and as modified herein, the Findings of Fact, Conclusions of Law, and Recommended Order issued by the Hearing Officer.

FINDINGS OF FACTS

Respondent Mark Lamkin worked as an independent contractor of LPL Financial, LLC (“LPL”) from 2000 to 2018, through Lamkin Wealth Management (“LWM”), a company solely owned and operated by Lamkin. During the time of this arrangement, Lamkin was registered as a broker-dealer agent and investment adviser representative. LWM, Lamkin’s company, also employed several dual registered, broker dealer agents and investment adviser representatives, which included Douglas Obradovich (“Obradovich”) and Christopher Watkins (“Watkins”), who had similar independent contractor relationships with LPL.

Lamkin’s contract with LPL was terminated on August 17, 2018. Prior to the termination, all commissions and advisory fees earned by Lamkin and the other employees of LWM were paid to Lamkin personally, who would then deposit the proceeds into a LWM business account in which Lamkin was the sole signatory. Lamkin paid salaries and expenses with the business account. As a result of the termination, Lamkin was no longer registered as an investment adviser representative or broker dealer agent.

On August 17, 2018, Lamkin met with Obradovich and Watkins to transfer his accounts. According to the arrangement, the advisory accounts would go to Watkins and the brokerage accounts would go to Obradovich. Under the advisement of Mr. Lamkin, Obradovich and Watkins also established new individual bank accounts to continue receiving payments from LPL. An

employee of LPL initially approved the change, but the approval took place before the actual accounts were set up to receive the payments. (Hearing Transcript, p. 175). When the bank accounts were officially established, the first was a joint account between Obradovich and Jennifer Lamkin, Mark Lamkin's wife and the bookkeeper for LWM. The second was a joint account between Watkins and Jennifer Lamkin. Money going into both accounts was immediately passed through to the LWM account controlled solely by Mark Lamkin. Lamkin's account continued to receive these payments, despite the fact that neither Lamkin nor LWM were licensed in Kentucky. During the times in question, Lamkin continued to be the sole managing member and the only signatory on the business account where all payments from LPL ultimately ended up.

On page 13 of the Recommended Order, Hearing Officer Howard stated that there was no evidence "that Mr. Lamkin personally received any of the money placed in the LWM business account". As stated above, Lamkin was the sole managing member and sole signatory on the account. The Commissioner disagrees with Hearing Officer Howard's finding that Lamkin did not receive any of the money placed in the account. Therefore, this finding is rejected. The Commissioner modifies the findings of fact to indicate that Lamkin received funds from the pass-through accounts controlled by Obradovich, Watkins, and Jennifer Lamkin, while Lamkin was not registered in Kentucky.

CONCLUSIONS OF LAW

In the Recommended Order, Hearing Officer Howard addressed the allegations against Lamkin in two parts, starting with the KRS 292.320 allegations. While the Hearing Officer chose to address the KRS 292.320 allegations first, the Commissioner believes the unregistered activity is essential to the findings, and should be addressed before the fraud allegations. Hearing Officer

Howard correctly concluded that Lamkin acted as an investment adviser representative in violation of KRS 292.330(8) and (11). This finding is adopted with slight modifications as detailed below.

The Hearing Officer, while ultimately reaching the correct conclusion, unnecessarily complicated the question of whether Lamkin acted as an unregistered investment adviser representative. KRS 292.330 is not ambiguous as to whether a person is acting as an investment adviser or investment adviser representative. Under KRS 292.330(8), it is unlawful to act as an investment adviser without being registered pursuant to KRS 292.330(8). Under KRS 292.330(11), it is unlawful to act as an investment adviser representative in Kentucky without being registered. KRS 292.310(12) defines "Investment adviser representative" as:

an individual employed by or associated with an investment adviser or covered adviser and who makes any recommendations or otherwise gives investment advice regarding securities, manages accounts or portfolios of clients, determines which recommendations or advice regarding securities should be given, provides investment advice or holds himself or herself out as providing investment advice, receives compensation to solicit, offer, or negotiate for the sale of or for selling investment advice, or supervises employees who perform any of the foregoing... (Emphasis added)

On page 11 of the Recommended Order, the Hearing Officer found that Lamkin owned and operated LWM and employed several other investment adviser representatives. These investment adviser representatives included Obradovich and Watkins, who continued acting as investment adviser representatives during the period of Lamkin's unlicensed status. Lamkin also described them as his "employees" during his testimony at the hearing. (Hearing Transcript, p. 243). As a supervisor of employees acting as investment adviser representatives, Lamkin also acted as an investment adviser representative.

In addition to the unlicensed activity based on supervision of other investment adviser representatives, Lamkin transacted business as an unregistered investment adviser by receiving funds into an account legally controlled by Lamkin. Hearing Officer Howard correctly found this

to be a violation and the Commissioner adopts this finding and incorporates the finding into this Final Order.

As for the KRS 292.320 allegations, Howard determined in two paragraphs that there was no evidence of fraud or deceit. As part of this finding, Howard reasoned that DFI was aware of Lamkin and LWM using pass-through accounts in the past and had no problems with the arrangement, so therefore, the use of the pass-through accounts could not be fraud in the current case. This reasoning fails, however, because the past use of the pass-through accounts occurred while Lamkin was registered in Kentucky. There is an important difference, however, in the circumstances. The Hearing Officer cited an examination from 2003, which the Hearing Officer found relevant to show the same type of pass-through accounts. The major difference is that Lamkin was registered during the 2003 examination. Likewise, Hearing Officer Howard's finding that "many businesses use pass-through accounts, for many legitimate reasons" also misses the point. What is acceptable for a registered person is not the same as what is acceptable for an unregistered person.

Lamkin's hearing testimony indicates that he knew he was not entitled to receive funds. Lamkin testified that he knew the money could not pass through an account with his name on it, but had to go through a registered person. (Hearing Transcript, p. 225). Based on this limitation, Lamkin devised a plan to have money flow to LWM's business account by passing through accounts operated by Obradovich and Watkins, who were registered. As indicated previously, the money was then immediately transferred to an LWM account operated solely by Lamkin.

It is clear that Lamkin was aware that he could not receive advisory fees nor brokerage commissions directly from LPL. By his own testimony, that is the reason he set up the system

whereby Obradovich and Watkins received the fees to pass through to the LWM account. Under KRS 292.320(2):

It is unlawful for any person who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise:

- (a) To employ any device, scheme, or artifice to defraud the other person; or
- (b) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon the other person.

As found by the Hearing Officer and adopted in this Final Order, Lamkin transacted business as an unregistered investment adviser and investment adviser representative after his termination from LPL. As an unregistered person, Lamkin was not entitled to receive advisory fees, but he continued to do so through a scheme involving pass-through accounts operated by registered persons. The Commissioner finds this practice to be an act of deception to continue receiving fees, which is a violation of KRS 292.320. Accordingly, the Recommended Order is modified to find a violation of KRS 292.320(2).

RECOMMENDED SANCTION

Hearing Officer Howard found one violation of KRS 292.330 and recommended a \$1,000 fine. The Commissioner does not agree that this proposed penalty addresses the seriousness of Lamkin's misconduct, particularly based on the modified finding of a violation of KRS 292.320(2) as detailed above. Lamkin, despite being unregistered, continued acting as an investment adviser and investment adviser representative from August 17, 2018 to December 7, 2018. Also, during that time, he devised a plan to continue receiving advisory fees through other registered investment adviser representatives.

The Commissioner finds that the recommended fine is not sufficient to deter future violations of the law by Lamkin or others who might commit similar violations in the future. Further, a \$1,000 fine is inconsistent with past DFI penalties for unregistered activity and dishonest

practices. To reflect the seriousness of the conduct and in keeping with past DFI practices, the Commissioner feels a suspension of Lamkin's registration is appropriate. The violations appear to be more than technical in nature and the penalty deserves to be more than a minimal fine. Therefore, the recommended civil penalty of \$1,000 is rejected and modified as reflected in the Final Order below.

FINAL ORDER

THEREFORE, based upon the foregoing findings of fact and conclusions of law and pursuant to KRS 292.500 and KRS 13B.120, IT IS HEREBY **ORDERED** AS FOLLOWS:

1. Except as modified herein, the Findings of Fact, Conclusions of Law, and Recommended Order issued by the Hearing Officer on March 5, 2021, and attached hereto, are adopted in full and incorporated by reference into this Final Order;

2. Respondent's investment adviser representative registration is suspended for a period of five (5) months beginning with the entry of this Order; and

3. Respondent, Lamkin, shall pay a fine of \$7,500 for violations of the statutes as described herein. Payment of the fine shall be due on or before November 1, 2021.

This is a **FINAL AND APPEALABLE ORDER**. The **EFFECTIVE DATE** of this order shall be the date reflected on the certificate of service attached to this order.

NOTICE OF APPEAL RIGHTS

Pursuant to KRS 292.490, you are hereby notified that any person aggrieved by this Final Order of the Commissioner may obtain a review of the Order by the Franklin Circuit Court. If you chose to appeal, you must file a written petition asking that the order be modified or set aside in whole or in part in the Franklin Circuit Court within thirty (30) days after the date reflected on the certificate of service attached to this Final Order. A copy of the petition must be served upon the Commissioner.

SO ORDERED this 28th day of May, 2021.

 /s/ Charles A. Vice
CHARLES A. VICE
COMMISSIONER

**Charles A.
Vice**

Digitally signed by: Charles A. Vice
DN: CN = Charles A. Vice email =
Charles.Vice@ky.gov C = US O =
KY DFI OU = Commissioner's Office
Date: 2021.05.28 12:40:39 -04'00'

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Final Order was entered by the Commissioner and sent by certified mail, return receipt requested, on this the 1st day of June, 2021, to:

David J. Guarnieri, Esq.
Thomas D. Flanigan, Esq.
Trevor M. Nichols, Esq.
c/o McBrayer PLLC
201 E. Main Street, Suite 900
Lexington, KY 40507
(859) 231-8780
dguarnieri@mcbayerfirm.com
tflanigan@mcbayerfirm.com
tnichols@mcbayerfirm.com
Counsel for Respondent

Mr. Mark Thomas Lamkin
702 Rugby Place
Louisville, KY 40222
Respondent

And by hand-delivery to:

Hon. Catherine Falconer
Department of Financial Institutions
500 Mero Street 2SW19
Frankfort, KY 40601
Counsel for Complainant

And by messenger mail to:

Hon. James I. Howard
Division of Administrative Hearings
Public Protection Cabinet
500 Mero Street 218NC
Frankfort, KY 40601

Kentucky Department of Financial Institutions

Name: Alison Keld

Title: Executive Staff Advisor