UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

December 7, 2012

DECISION

KAREN L. HAWKINS, DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY, U.S. DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE (IRS),	)	Complaint No. 2012-00002
Complainant	)	
v.	)	
(b)(3)/26 USC 6103,	)	
Respondent	)	

Motion for Decision by Default Denied as Moot;
Motion for Summary Adjudication Granted In Part;
Order Imposing Sanction of Disbarment

I. Introduction

On May 30, 2012, Complainant Karen L. Hawkins, Director, Office of Professional Responsibility ("OPR"), U.S. Department of the Treasury, Internal Revenue Service ("IRS"), initiated this proceeding by filing a Complaint against Respondent (b)(3)/26 USC 6103. Now pending before this tribunal[1] are two motions filed by Complainant requesting: (1) a decision by default and (2) a summary

[1] Under the authority granted by an interagency agreement between the Department of the Interior's Office of Hearings and Appeals and the IRS, the undersigned administrative law judge ("ALJ") has been assigned to preside over proceedings related to this Complaint.

adjudication. Having reviewed the complete administrative record, and for the reasons set forth in detail herein, the Motion for Decision by Default is denied as moot and the Motion for Summary Adjudication is granted in part. Furthermore, as a sanction for the disreputable conduct established herein as a matter of law by clear and convincing evidence, the Respondent is hereby ordered disbarred from practice before the IRS.

II. Procedural Background

The Complaint issued pursuant to statutory and regulatory authority set forth in 31 U.S.C. § 330 and 31 C.F.R. §§ 10.60-10.82.[2] It alleges that Respondent was engaged in practice before the IRS at all relevant times and is subject to the disciplinary authority of OPR. In particular, the Complaint charges Respondent with ten specific counts of misconduct:

Count I	Alleges that Respondent's disbarment from practice as a Certified Public Accountant ("CPA") by the Oregon Board of Accountancy on or about May 19, 2010, constitutes incompetence and disreputable conduct pursuant to 31 C.F.R. §10.51(a)(10) (2008).
Count II	Alleges that Respondent's conviction in the U.S. District Court for the District of Oregon on or about April 12, 2010, for the federal criminal offense of bank fraud involved dishonesty or breach of trust that constitutes incompetence and disreputable conduct pursuant to 31 C.F.R. § 10.51(a)(2) (2008).
Count III	Alleges that Respondent's conviction for bank fraud, based in part upon the submission of fabricated federal tax returns, constitutes incompetence and disreputable conduct rendering

[2] The 2011 revisions to the procedural rules governing disciplinary proceedings set forth at 31 C.F.R. §§ 10.60-10.82, apply to administration of this Complaint which was filed on May 30, 2012. *See also* Treasury Department Circular No. 230 (Rev. 8-2011) (available online at www.irs.gov). As such, citation will be to the 2011 version of the procedural rules unless otherwise specified. Because past conduct is governed by the regulatory provisions in effect at the time the conduct occurred, citations to those non-procedural regulations will include reference to the applicable version of the code of federal regulations ("C.F.R.")

Respondent unfit to practice before the IRS pursuant to 31 C.F.R. § 10.51(a)(3) (2008).

Count IV Alleges that Respondent's conviction in the U.S. District Court for the District of Oregon on or about April 12, 2010, for the federal criminal offense of money laundering involved dishonesty or breach of trust that constitutes incompetence or disreputable conduct pursuant to 31 C.F.R. § 10.51(a)(2) (2008).

Count V Alleges that Respondent's voicemail message to an IRS agent on or about July 19, 2007, attempted to influence the official action of an IRS employee by the use of threats, false accusations, duress, or coercion in a manner that constitutes incompetence and disreputable conduct pursuant to 31 C.F.R. § 10.51(h) (2005).

Count VI Alleges that Respondent's voicemail message to an IRS agent on or about July 19, 2007, included profane language and the making of false accusations that constitutes contemptuous conduct in connection with practice before the IRS pursuant to 31 C.F.R. § 10.51(k) (2005).

Count VII Alleges that Respondent falsely identified himself as a CPA or a retired CPA on documents submitted to the IRS in or around September 2009, during a time when the Oregon Board of Accountancy had suspended his CPA license and that conduct constitutes incompetence and disreputable conduct pursuant to 31 C.F.R. § 10.51(a)(4) (2008).

Count VIII Alleges that Respondent [redacted (b)(3)/26 USC 6103], which constitutes incompetence and disreputable conduct pursuant to 31 C.F.R. [redacted (b)(3)/26 USC 6103] (2008).

Count IX Alleges that Respondent [redacted (b)(3)/26 USC 6103], which constitutes incompetence and disreputable conduct pursuant to 31 C.F.R. [redacted (b)(3)/26 USC 6103] (2008).

Count X Alleges that Respondent [redacted] which constitutes incompetence and disreputable conduct pursuant to 31 C.F.R. [redacted] (2008).

Based upon the alleged violations of 31 C.F.R. § 10.51 (2005 & 2008) described in these counts, as well as the aggravating factors set forth in the Complaint, the Complainant requests that Respondent be disbarred from practice before the IRS.

In response to the Complaint, Respondent, appearing *pro se*, filed a document on July 18, 2012, entitled "Complaint by Respondent and Response to Allegations" ("July 18 filing"). According to his cover letter, the enclosed document represented a "partially completed Retort to the Complaint" and Respondent intended to have a "completed response" mailed by July 20, 2012. More than a month later, on August 24, 2012, Respondent filed a "completed Rebuttal to the Complaint," along with lengthy attachments ("August 24 filing").

Thereafter, on September 7, 2012, Complainant filed two dispositive motions: (1) a Motion for Decision by Default, and (2) a Motion for Summary Adjudication. In accordance with 31 C.F.R. § 10.68, Respondent was provided with an opportunity to file responses within 30 days following his receipt of these motions. *See* Amended Scheduling Order (dated Sept. 10, 2012).

Respondent subsequently wrote two letters to this tribunal, filed on September 21, 2012 ("September 21 filing") and October 9, 2012 ("October 9 filing"). However, neither of his letters responded to any of the arguments or analysis contained in the respective motions. In his October 9 filing, Respondent wrote that he could not afford to hire the attorney he had consulted and described his appeal as being at a "dead-end." He explained that he was "not educated in your legalese" and could not meet the "time constraints" set forth, but thanked this tribunal for the opportunity to do so. *See* October 9 filing. The deadline for responding to Complainant's motions expired the next day, on October 10, 2010. *See* Amended Scheduling Order (dated Sept. 10, 2012).

About a month later, Respondent filed a copy of a letter sent to Counsel for Complainant, dated November 7, 2012, and received on November 13, 2012, ("November 13 filing"), purporting to dispute allegations in the Complainant's exhibits and attaching various newspaper clippings related to Countrywide mortgages and other political issues. On November 16 and 23, 2012, this tribunal

received additional newspaper clippings related to vacancies in President Obama's administration and deficit reduction efforts along with handwritten commentary by Respondent.

Throughout this process, Respondent has been provided with ample time and sufficient opportunity to respond to the motions requesting a decision by default and a summary adjudication. Respondent has failed to respond directly to those motions in a timely manner. Given that the deadline for responding has expired, the motions are now ripe for consideration.

III. Motion for Decision by Default Denied as Moot

Complainant has moved for a decision by default pursuant to 31 C.F.R. §§10.64(d), 10.68(a)(1). Complainant alleges that Respondent failed to file a timely answer that specifically admitted or denied the allegations of the Complaint as required by the applicable procedural regulations. It requests, therefore, that this tribunal enter a decision by default finding, by clear and convincing evidence, that Respondent engaged in disreputable conduct within the meaning of 31 C.F.R. §10.51 (2005 & 2008) for which he may be sanctioned. Respondent has not filed any response specific to the arguments and analysis contained in Complainant's Motion for Decision by Default.

In the Complaint, served on June 20, 2012, Respondent was notified of his responsibility to file an answer within thirty (30) calendar days from the date of service. The Complaint explained that failure to do so could result in a decision by default. *See* Complaint at 1-2. As noted in the regulations, an answer must be filed within the time frame specified in the Complaint, 31 C.F.R. § 10.64(a), and failure to file an answer within the time prescribed constitutes an admission of the allegations in the Complaint and a waiver of hearing. *Id*. § 10.64(d); *see also Dir., Office of Prof'l Responsibility v.* (b)(3)/26 USC 6103, Complaint No. 2008-19 (Decision on Appeal, May 16, 2010) (concurring in ALJ's default decision entered after striking an untimely answer). [3]

Not only must an answer be filed within the time frame specified in the Complaint, it must also comply with the requirements set forth in 31 C.F.R. §10.64(b). In particular, "the respondent must specifically admit or deny each

[3] Copies of final agency decisions in disciplinary cases are available on the internet at: http://www.irs.gov/Tax-Professionals/Enrolled-Agents/Final-Agency-Decisions-in-Disciplinary-Cases.

allegation set forth in the complaint" or "state that the respondent is without sufficient information to admit or deny a specific allegation." *Id*. Every allegation that is not denied in the answer "is deemed admitted and will be considered proved." *Id*. § 10.64(c). The regulations also require that the answer be signed by the Respondent or his representative and include "a statement directly above the signature acknowledging that the statements made in the answer are true and correct and that knowing and willful false statements may be punishable under 18 U.S.C. 1001." *Id*. § 10.61(e).

Given that the Complaint was served on June 20, 2012, the deadline for filing an answer was July 20, 2012 (30 days after service). Respondent's July 18 filing was the only timely response to the Complaint, and that filing did not meet the requirements to affirmatively admit or deny the allegations in the Complaint nor did it contain the requisite signed acknowledgement. 31 C.F.R. § 10.64(b), (e). However, the filing did contain a partial, but incomplete, discussion of some of the issues raised by the Complaint and offered reasoning that could be construed as affirmative defenses.

On August 24, 2012, Respondent filed a "completed Rebuttal to the Complaint" along with numerous enclosures totaling more than 200 pages (many of which contained handwritten comments and explanations). This filing did not cure the deficiencies in the July 18 filing because it was not filed within 30 days of service, it lacked the requisite acknowledgement, and it failed to specifically admit or deny each allegation in the Complaint.

Following receipt of Complainant's motion for a decision by default on September 7, 2012, this tribunal informed Respondent that he had 30 days within which to respond. *See* Amended Scheduling Order (dated Sept. 10, 2012). Respondent failed to file any document responsive to this motion, and therefore, is deemed not to oppose it. *See* 31 C.F.R. § 10.68(b).

Even though Respondent has provided no opposition to the Motion for Decision by Default and his letters fail to meet the regulatory requirements set forth in 31 C.F.R. § 10.64, Complainant has also filed a Motion for Summary Adjudication on the same issues. Given that this will allow for a decision on the merits, the Motion for Decision by Default is hereby denied as moot. Nevertheless, to the extent that allegations in the Complaint have not been specifically denied (nor directly opposed by Respondent) they will be deemed admitted and considered

proved for purposes of the Motion for Summary Adjudication. *See* 31 C.F.R. §10.64(c).

IV. Motion for Summary Adjudication Granted In Part

Contemporaneously with its Motion for Decision by Default, Complainant also filed a Motion for Summary Adjudication in accordance with 31 C.F.R. §10.68(a)(2). Complainant alleges that Respondent failed to dispute the substance of the material facts contained in the Complaint and that this tribunal should enter a summary decision finding, by clear and convincing evidence, that Respondent engaged in disreputable conduct within the meaning of 31 C.F.R. § 10.51 (2005 & 2008) for which he may be sanctioned. Respondent has not filed any response specifically addressing the arguments and analysis contained in Complainant's Motion for Summary Adjudication.

A. Standards for Summary Adjudication

The procedural rules provide that "[e]ither party may move for summary adjudication upon all or any part of the legal issues in controversy." 31 C.F.R. §10.68(a)(2). If the non-moving party desires to oppose a motion for summary adjudication, a response must be filed within 30 days or in accordance with the time frame prescribed by the ALJ. *Id*. However, the rules also provide that:

> Unless otherwise ordered by the [ALJ], the nonmoving party is not required to file a response to a motion. If the [ALJ] does not order the nonmoving party to file a response, and the nonmoving party files no response, the nonmoving party is deemed to oppose the motion.

Id. at § 10.68(b). A summary adjudication may be rendered if "the pleadings, depositions, admissions, and any other admissible evidence show that there is no genuine issue of material fact and that a decision may be rendered as a matter of law." 31 C.F.R. § 10.76(a)(2).

A motion for summary adjudication is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"); therefore, federal court rulings provide additional guidance when ruling on motions for summary adjudication in administrative proceedings. *Dir., Office of Prof'l Responsibility v.* (b)(3)/26 USC 6103, Complaint No. 2010-12 at 4 (Decision and Order on Motion for Summary Judgment, Jan. 13, 2011) (citing *Puerto Rico Aqueduct and Sewer Auth. v.*

Envtl. Prot. Agency ("EPA"), 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995)), *sanction modified by* (Decision on Appeal, Oct. 12, 2011). Federal courts recognize that the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party has met its burden, the burden then shifts to the non-moving party to establish the presence of a genuine issue of material fact or that legally, the moving party is not entitled to judgment. *T.W. Elec. Serv. Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). In making this showing, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "An issue is 'genuine' only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party." *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001). "A fact is 'material' if the fact may affect the outcome of the case." *Id*. When evaluating a motion for summary judgment, all factual inferences must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587.

A failure to respond to a summary judgment motion does not mean that the motion will automatically be granted. *Mullen v. St. Paul Fire and Marine Ins.*, 972 F.2d 446, 452 (1st Cir. 1992); *see also Champion v. Artuz*, 76 F.3d 483, 486 (2nd Cir. 1996). Rather, this tribunal must still review the motion and the record to ascertain whether the moving party has demonstrated the absence of any genuine issues of material fact and that a decision may be rendered as a matter of law. 31 C.F.R. § 10.76(a)(2); *see also Mullen*, 972 F.2d at 452.

B. <u>Applicable Treasury Department Statutes and Regulations</u>

Pursuant to 31 U.S.C. § 330, the Secretary of the Treasury may regulate the practice of representatives appearing before the Department of the Treasury. *See* 31 U.S.C. § 330(a). In addition,

> [a]fter notice and opportunity for a proceeding, the Secretary may suspend or disbar from practice before the Department, or censure, a representative who –
>
> (1) is incompetent;
> (2) is disreputable;

> (3) violates regulations prescribed under this section; or
> (4) with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented.

Id. § 330(b). The regulatory provisions governing practice before the IRS similarly provide that:

> The Secretary of the Treasury, or delegate, after notice and an opportunity for a proceeding, may censure, suspend, or disbar any practitioner from practice before the [IRS], if the practitioner is shown to be incompetent or disreputable (within the meaning of § 10.51), fails to comply with any regulations in this part (under the prohibited conduct standards of § 10.52), or with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client.

31 C.F.R. § 10.50(a) (2008 & 2011); *see also* 31 C.F.R. § 10.50(a) (2005). Incompetent and disreputable conduct for which a practitioner may be sanctioned is described in 31 C.F.R. § 10.51.

Although the current version of the procedural rules, 31 C.F.R. §§ 10.60-10.82, governs proceedings before this tribunal, an evaluation of past conduct, including whether a practitioner has engaged in incompetent and disreputable conduct which may be sanctioned, must be reviewed in accordance with the regulations in effect at the time the conduct occurred. *See* 31 C.F.R. § 10.91; 31 C.F.R. § 10.51(b) (2008 & 2011). Respondent's conduct, as alleged in Counts I-X, occurred prior to the most recent 2011 regulatory revisions. Therefore, Respondent's conduct is judged in accordance with the regulations applicable during the relevant time period.

According to the Complaint, Counts I-IV and Counts VII-X relate to conduct that allegedly occurred after the Department last amended § 10.51 on September 26, 2007. *See* 72 Fed. Reg. 54540, 54550-54551 (Sept. 26, 2007). The September 26, 2007, revisions to § 10.51 remained in effect until the 2011 amendments became effective on August 2, 2011. *See* 76 Fed. Reg. 32286, 32308 (June 3, 2011). Thus, all discussions relating to conduct under Counts I-IV and Counts VII-X will cite the 2007 regulatory amendments as codified in the 2008 code of federal regulations.

Counts V-VI involve conduct that allegedly occurred in July of 2007, about two months before the 2007 regulatory amendments. At that time, § 10.51 had been

last amended in 2002. *See* 67 Fed. Reg. 48760, 48774-48775 (July 26, 2002). Although § 10.51 remained unchanged between July 26, 2002, and September 26, 2007, surrounding regulatory provisions governing practice before the IRS were modified again in 2004. 69 Fed. Reg. 75839 (Dec. 20, 2004). Thus, to avoid confusion, all discussions relating to conduct under Counts V-VI will contain citations to the pre-2007 version of § 10.51 codified in the 2005 code of federal regulations.

C. Standard of Proof

When issuing a disciplinary decision, the standard of proof required depends upon the nature of the sanction.

> If the sanction is censure or a suspension of less than six months' duration, the [ALJ], in rendering findings and conclusions, will consider an allegation of fact to be proven if it is established by the party who is alleging that fact by a preponderance of the evidence in the record. If the sanction is a monetary penalty, disbarment or a suspension of six months or longer duration, an allegation of fact that is necessary for a finding against the petitioner must be proven by clear and convincing evidence in the record. . . .

31 C.F.R. § 10.76(b). The clear and convincing standard is an intermediate standard generally requiring proof that a factual contention is "highly probable." *See Career Training Concepts v. United States*, 83 Fed. Cl. 215, 218 (2008); *Colorado v. New Mexico*, 467 U.S. 310, 316-17 (1984); *United States v. Owens*, 854 F.2d 432, 436 n.8 (11th Cir. 1988); *see also Addington v. Texas*, 441 U.S. 418 (1979) (explaining that the clear and convincing evidence standard lies somewhere between proof by a preponderance of the evidence and proof beyond a reasonable doubt).

D. Analysis

According to the Complaint and supporting documentation, Respondent was engaged in practice before the IRS at all relevant times and is subject to the disciplinary authority of OPR. Complaint at 2. Based upon a review of the documents submitted by Respondent, there is nothing to indicate that Respondent specifically denies or otherwise disputes that he was engaged in practice before the IRS during the relevant time periods encompassed by the Complaint. *See* 31 C.F.R. §10.2(d) (2005), 31 C.F.R. §§ 10.2(a)(4) (2008 & 2011). Nor does Respondent deny that he is subject to the disciplinary authority of OPR under 31 U.S.C. § 330. Therefore,

under 31 C.F.R. § 10.64, these allegations are deemed admitted and considered proved without the need for further evidence.

Having established jurisdiction, this analysis next turns to the ten separate counts of misconduct set forth in the Complaint. For the reasons discussed in detail below, Complainant has demonstrated, based upon the undisputed evidence of record, that Respondent engaged in disreputable conduct within the meaning of 31 C.F.R. § 10.51 (2005 & 2008) by clear and convincing evidence as alleged in Counts I, II, VII, VIII, IX, and X of the Complaint. As there are no genuine issues of material fact related to these six counts, Complainant's Motion for Summary Adjudication is granted, in part, as to Counts I, II, VII, VIII, IX, and X.

(1) Count I – Disbarment from Practice by Oregon Board of Accountancy

According to the undisputed facts set forth in the record, the Oregon Board of Accountancy granted Respondent a CPA license beginning in 1994. Complaint Exs. 5-6. On May 18, 2009, the Oregon Board of Accountancy voted to suspend Respondent's CPA license for a term of three years based upon: (1) use of his CPA designation while on inactive status; (2) lack of fitness; and (3) professional misconduct. Complaint Ex. 8 at 6. After learning of Respondent's guilty plea in the U.S. District Court for bank fraud and money laundering, the Oregon Board of Accountancy issued a notice of intent to revoke Respondent's CPA license, followed by a revocation on or about May 19, 2010. Complaint Exs. 12-14.

As set forth in the applicable regulation, incompetence and disreputable conduct for which a practitioner may be sanctioned includes:

> (10) Disbarment or suspension from practice as an attorney, certified public accountant, public accountant or actuary by any duly constituted authority of any State, territory, or possession of the United States, including a Commonwealth, or the District of Columbia, any Federal court of record or any Federal agency, body or board.

31 C.F.R. § 10.51(a)(10) (2008). A license revocation by the state licensing authority is the functional equivalent of disbarment.

Respondent's initial July 18 filing makes no mention of the suspension or revocation of his CPA license in Oregon. Respondent's August 24 filing, received

after the time for filing an answer had expired, does appear to challenge some of the conduct leading to his initial suspension by the Oregon Board of Accountancy. *See* August 24 filing at 7, 11-14. However, none of his arguments dispute or otherwise contradict the evidence showing that his CPA license was suspended and ultimately revoked in Oregon by the Oregon Board of Accountancy.

Thus, Complainant has established the fact of Respondent's disbarment from practice as a CPA in Oregon by clear and convincing evidence based upon the undisputed record. Disbarment by a state authority constitutes incompetent and disreputable conduct under 31 C.F.R. § 10.51(a)(10) (2008). On this basis, Respondent is subject to disciplinary sanction under Count I. *See, e.g., Dir., Office of Prof'l Responsibility v.* (b)(3)/26 USC 6103, Complaint No. 2011-01 at 7 (Order Granting Complainant's Motion for Summary Judgment, June 7, 2011) (finding that a suspension of a CPA certificate by the state board constituted disreputable conduct warranting discipline).

(2) Counts II, III, and IV – Federal Convictions for Bank Fraud and Money Laundering

Based upon the undisputed facts set forth in the record, a federal grand jury indicted Respondent on March 25, 2009, in the U.S. District Court for the District of Oregon on 12 criminal counts, including bank fraud, making false statements on a loan application, and money laundering. Complaint Ex. 17. On January 16, 2010, Respondent entered a plea of guilty on Counts Two and Nine of the Indictment, involving the crimes of bank fraud under 18 U.S.C. § 1344 and money laundering under 18 U.S.C. § 1957. Complaint Exs. 18, 21. According to the minutes from the plea hearing: the plea petition and plea agreement were signed and submitted, the Respondent was sworn and examined, he was found competent to enter a guilty plea, and the court accepted the plea as knowing and voluntary. Complaint Ex. 18 at 5. Judgment and sentencing occurred on April 6, 2010, at which time Respondent was sentenced to imprisonment for a term of twelve months and one day for each count (to be served concurrently) and ordered to pay restitution. Complaint Exs. 18, 22. Respondent does not deny that he pled guilty, that the District Court convicted him of bank fraud and money laundering, and that a Federal judge imposed a sentence involving incarceration and restitution.

In his July 18 and August 24 filings, Respondent attempts to re-argue the circumstances of his conviction. According to the Indictment, Respondent fraudulently misrepresented his income to obtain a bank loan by fabricating and

submitting a false income tax return to the bank that reflected inflated income figures. Complaint Ex. 17 at 3 (Indictment related to Counts 2-6). Respondent disagrees, explaining that he filed the paperwork with Countrywide Financial using

> the **Stated Income Method, today called a Liar's Loan**, from which each lender charged a minimum of fees, commission, and one years interest in advance. **All** of their loan officers highly recommended that I use the national gross earnings average for a CPA as posted on the Web-site "Salaries.com" I was an active Certified Public Accountant, not a professional mortgage broker. I don't tell them how to prepare a mortgage loan application; and, they don't tell me how to prepare a financial statement or a tax return. I then, at their recommendation, prepared a **Pro Forma tax return** reflecting the same national average income. This Pro Forma 2005 Personal Income Tax Return was used by the Prosecutor to indict me on a one charge of Fraud and a one charge of Money Laundering. . . .

July 18 filing at 2 (emphasis in original). Respondent further maintains that the bank committed "contributory negligence" because it did not obtain his return directly from the IRS. *Id*. at 3. According to Respondent, he only pled guilty to avoid the potential for a less-favorable jury verdict. *Id*. at 2.

However, this is not the forum to re-litigate the earlier conviction. According to the applicable regulations, incompetence and disreputable conduct for which a practitioner may be sanctioned includes:

> (2) Conviction of any criminal offense involving dishonesty or breach of trust.
> (3) Conviction of any felony under Federal or State law for which the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service.

31 C.F.R. § 10.51(a)(2), (3) (2008). To establish disreputable conduct under subparagraph (2), Complainant need only prove the fact of the conviction and that the crime involves dishonesty or breach of trust. It does not require any examination of the underlying conduct to ascertain fitness to practice as would be required under subparagraph (3).

Complainant has proven, based upon the undisputed evidence, that Respondent entered a voluntary guilty plea and was convicted of bank fraud and money laundering. Thus, the only outstanding question is whether the criminal offenses underlying those convictions involved dishonesty or breach of trust.

According to the statutory language, the Federal crime of bank fraud, for which Respondent pled guilty, requires a finding of fraud. And fraud, by definition, involves dishonesty.

The U.S. Code defines the crime of bank fraud and the applicable penalties as follows:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud a financial institution; or
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344. The First Circuit, interpreting the requisite statutory intent, held that: "the intent element of bank fraud under either subsection is ***an intent to deceive*** the bank in order to obtain from it money or other property. 'Intent to harm' is not required." *U.S. v. Kenrick*, 221 F.3d 19, 29 (1st Cir. 2000), *cert denied*, 531 U.S. 961 (2000), and *cert. denied*, 531 U.S. 1042 (2000) (emphasis added).

Moreover, "defraud" means "to cause injury or loss to (a person) by deceit." Black's Law Dictionary (9th ed. 2009). The term "fraud" includes:

> 1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment . . . 2. A misrepresentation made recklessly without belief in its truth to induce another person to act. . . . 3. A tort arising from a knowing misrepresentation, concealment of a material fact, or reckless misrepresentation to induce another to act to his or her detriment. . . .

Black's Law Dictionary (9th ed. 2009). An earlier edition of Black's Law even noted that "dishonesty" is a synonym for "fraud," explaining that: "Bad faith" and "fraud" are synonymous, and also synonyms of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc." Black's Law Dictionary 594 (5th ed. 1979).

Thus, according to the undisputed facts, Respondent was convicted of bank fraud which is a criminal offense that inherently involves dishonesty. This showing, by clear and convincing evidence, establishes disreputable conduct under 31 C.F.R. §10.51(a)(2) (2008) as alleged in Count II for which Respondent may be sanctioned. Complainant's additional arguments under Counts III and IV, alleging that the bank fraud and related money laundering convictions also constitute disreputable conduct under 31 C.F.R. § 10.51(a)(2), (3) (2008), are rendered moot by this determination as well as the other findings of misconduct made as part of this decision which support the sanction imposed. Consequently, Complainant's additional allegations under Counts III and IV need not be considered further.

(3) Counts V and VI – Dealings With Treasury Personnel

Counts V and VI of the Complaint relate to Respondent's dealings with Treasury Personnel and, in particular, a voicemail message left by Respondent on or about July 19, 2007, at the telephone number for Special Agent ("SA") Clint Kindred. Complaint at 4, 16-18; *see also id*. Ex. 4. As transcribed, the message stated:

> Yeah Clint, this is (b)(3)/26 USC 6103, Certified Public Accountant, representing [Criminal Investigation Subject] *[sic]*. Um, I'm calling on his behalf to find out why you are knocking on his door and harassing him, when anything can be done by, by correspondence through the mail, and if you do it again, I'll have the police come out there and arrest your ass as quickly as I possibly can. You can call me at [phone number] *[sic]* and I want to know who your managing supervisor is too, so don't call me unless you have that information available and a detailed explanation of why you were there. Okay? Bye bye.

Complaint Ex. 4.

The Complaint alleges that this voicemail message violates 31 C.F.R. §§10.51(h), 10.51(k) (2005) which defines incompetence and disreputable conduct to include:

> (h) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the Internal Revenue Service by the use of threats, false accusations, duress or coercion . . .
> . . . .
> (k) Contemptuous conduct in connection with practice before the Internal Revenue Service, including the use of abusive language, making false accusations and statements, knowing them to be false, or circulating or publishing malicious or libelous matter.

In particular, the Complaint alleges that Respondent's message was an improper attempt to dictate the manner of the investigation by the use of threats, false accusations, duress, or coercion and that the message's profane language and false accusations of harassment constituted contemptuous conduct in connection with his practice before the IRS. *See* Complaint at 16-18.

In his letters responding to the Complaint, Respondent makes a number of statements about Mr. Kindred, presumably by way of defense, including the following:

> . . . The **word UNPROFESSIONAL can ONLY fit the majority of the IRS personnel** within the Audit and Collection Departments. Example of Unprofessional: Clint Kindred, and employee of your Criminal Investigation Department, the cesspool of the IRS.
> 5) **Incompetence**: Lack of sufficient ability, incapability, ineffectuality. This looks like Unprofessionalism. Like the IRS audit department. The antonym is efficient, strength and talent. This describes me exactly. So far, I have described your having used your letter to paint my Character Assassination through unfounded, spurious assumptions and allegations.
> 8. Clint Kindred, Criminal Investigation Department, an immature, new agent, who at the time, October 27, 2007, was put in charge of investigating my involvement with a client due to his 3 corporations and voluminous number of auto/truck loans. Kindred had only 16 months of training and limited experience in the field with questionable Department comprehension, objectives or discipline. This description fits the definition of "UNPROFESSIONAL" (see above paragraph under Incompetence.)

July 18 filing at 6 (emphasis in original).

In a subsequent letter, filed after the deadline for answering, Respondent wrote:

> 10. The next few paragraphs are loaded with key words, i.e. "**attempted** to dictate; **threaten** the agent; contemptuous conduct; **could be** interpreted as a threat against the agent's physical safety, job security and reputation; use of profane language; false accusation; false represented; etc. This usage of these terms is dramatic and designed to represent a character that does not exist. These representations are interpretations made by a person who lacks maturity, is overly sensitive to criticism, and obviously has a very low self esteem. These terms also fit the Attorney computerized Template.
>
> . . . .
>
> 2. Section #4 is a compilation of recorded telephone calls between me and C. Kindred a young, immature, Criminal Investigation Department employee. First, the Criminal Investigation Department, by its' own admission, is not a tax or tax audit group, and has little knowledge of tax law or its regulations; Second, the Department assumed, after two years of document research, that I had understated my gross annual, business income by over $500,000. After I introduced them to witnesses and some more objective information, in the third year of their investigation, they issued a letter, to me, stating that **the IRS has accepted my tax returns as originally filed**. It was obvious to all concerned that *Clint Kindred had made numerous fundamental errors in judgment, unproven assumptions, and numerous allegations that were fundamentally inaccurate.*

August 24 filing at 7-8 (emphasis in original).

Finally, in a letter filed more than 30 days after the time for responding to Complainant's motions, Respondent wrote:

> Another argument resurrected by you, the Clint Kindred events, of the criminal investigation. C. Kindred, who has no personality, who had

> graduated from college with a B.S., and had only 8 months training as an IRS investigator just prior to being assigned to my case. He admitted to me, up front, that he knew little or next to nothing both about auditing (one course in college) and the IRS Code. But, he passed the course of rummaging through trash cans, miscellaneous garbage containers and mailboxes. He also specialized in misinterpreting any and all documents that relate to any semblance of a tax return. **Example**: after reviewing 3 years of my tax returns, Kindred estimated that I had that I had (sic.) understated my gross income, each year, by about $500,000 (years 2004-2006). **Two years later**, I received a letter from the IRS stating that my year 2005 tax return was accepted as filed. I had, after all that time, proved that the assumptions made by the Criminal Investigation Department were completely INCORRECT. This type of review happens quite often, and, once again proves that the IRS makes demands upon the T/P for documentation within 15 days from the date of their announcement that they are going to perform an audit, but cares less about the length of time they consume to fulfill their responsibilities under the "Taxpayer Bill of Rights."

November 13 filing at 2-3 (emphasis in original).

Nowhere among those various submissions does Respondent deny leaving the voicemail message nor does he dispute the content of his message. As Complainant correctly points out as part of the Motion for Summary Adjudication, Respondent has not specifically denied the allegations set forth in Count V.

However, whether Respondent was attempting to influence SA Kindred through the use of threats under 31 C.F.R. § 10.51(h) (2005) requires further information not available in the record. Respondent's letters can be construed as raising genuine issues about SA Kindred's interactions with Respondent such that it is not possible to rule as a matter of law how this voicemail should be interpreted absent additional context about the surrounding circumstances.

In regards to the allegations of contemptuous conduct in connection with practice before the IRS, 31 C.F.R. § 10.51(k) (2005), the excerpts from Respondent's letters exhibit a level of disrespect for IRS agents, and SA Kindred in particular, which raise doubts about Respondent's professionalism. Nevertheless, the charge in the Complaint relates solely to the July 2007 voicemail message. According to the

Complaint, Count VI rests on Respondent's use of profane language and a false accusation that SA Kindred was "harassing" his client. Absent information about SA Kindred's interactions with that client, which have not been fully developed as part of the record, it is not possible to reach a decision as a matter of law that Respondent demonstrated contemptuous conduct by making a false accusation.

Thus, genuine issues of material fact preclude entry of a summary adjudication with respect to Counts V and VI.

(4) Count VII – False Identification as a CPA

As previously discussed with respect to Count I, the Oregon Board of Accountancy voted to suspend Respondent's CPA license for a term of three years on May 18, 2009. Complaint Ex. 8 at 5-6; *see also id*. Ex. 9.[4] Although Respondent has offered arguments appearing to challenge the basis for that suspension, he does not dispute that he was in fact suspended.

The Complaint alleges that after this suspension, on September 17, 2009, and then again on September 24, 2009, Respondent submitted forms to the IRS, including (b)(3)/26 USC 6103. Complaint Ex. 15-16. He signed the (b)(3)/26 USC 6103 which listed Respondent under the preparer block as "(b)(3)/26 USC 6103, CPA" and listed his firm name as "(b)(3)/26 USC 6103, CPA Retired." Complaint Ex. 16. The Complaint further alleges that at the time he submitted these forms, Respondent knew, or should reasonably have known, that the Oregon Board of Accountancy had suspended his license. Complaint at 19. In doing so, the Complaint alleges that Respondent falsely represented to the IRS that he was a CPA in good standing. *Id*.

According to the applicable regulations, incompetence and disreputable conduct for which a practitioner may be sanctioned includes:

> (4) Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing the information to be false or misleading. Facts or other matters contained

[4] Although Respondent also held a CPA license in California at one time, the undisputed evidence of record shows that it expired in 1994. Complaint Ex. 10.

> in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, and any other document or statement, written or oral, are included in the term "information."

31 C.F.R. § 10.51(a)(4) (2008).

Respondent's initial response to the Complaint made no mention of the license suspension. *See generally* July 18 filing. Later, Respondent offered a confused explanation for his actions:

> As to my alleged license suspension (page 19, paragraph 59 and 60), I had attempted to renew it for the 10th year, and I had no expectations of a decline. I had asked for a restricted license due to my lack of any reoccurring Audit Clients, my objective being to focus on my tax and consulting practice. Thirty days later, May 18, 2009, I received a letter of suspension for the Oregon Board of Accountancy. Forty-five days thereafter, I received my renewed license. During the interim, a representative of the Board, complained that I still had the designation, CPA, listed on both the office building directory and on the door to my office. I am now, and will always be, a Retired CPA. (age 73). As to the remark about "falsely representing my client," they were my clients for many years and I was given the Power of Attorney by them a few years prior to this incident. Knowing full well that any suspension would be only momentary and not having expected a delay in the reversal, I continued to represent the client as he requested.

August 24 filing at 7. This response is problematic in that it appears Respondent has confused the period of time when his license was inactive but reinstated (between August 26, 2008, and December 16, 2008) with his later three-year suspension (beginning on or about May 18, 2009). *Compare* Complaint Exs. 6 & 7 *with* Exs. 8 & 9. Even though Respondent's response reflects some confusion about the exact time period at issue, his response acknowledges using his CPA credentials during a time when he knew his license had been suspended.

According to the Oregon Board of Accountancy meeting minutes, Respondent attended the meeting when the Board voted to suspend his license for three years on May 18, 2009. Complaint Ex. 8 at 6. As such, Respondent had knowledge of his suspension and he offered no evidence or argument to suggest

otherwise. Even so, Respondent continued to cite his CPA credentials (albeit with the qualification that he was "retired") on official forms submitted to the IRS. In fact, Respondent has continued to use the "Retired CPA" designation on documents submitted to this tribunal even after his CPA license was revoked. *See* July 18 filing at 1; *see also* August 24 filing at 1.

Thus, the undisputed facts establish that Respondent gave false or misleading information to the IRS regarding his CPA status during a time when he knew his license had been suspended. This showing establishes disreputable conduct under 31 C.F.R. § 10.51(a)(4) (2008) by clear and convincing evidence as alleged in Count VII for which Respondent may be sanctioned.

(5) Counts VIII, IX, and X – (b)(3)/26 USC 6103

The Complaint alleges that Respondent (b)(3)/26 USC 6103 . *See* Complaint at 3, 20-21. In support of these allegations, Complainant provided (b)(3)/26 USC 6103 :

(b)(3)/26 USC 6103	(b)(3)/26 USC 6103	(b)(3)/26 USC 6103
(b)(3)/26 USC 6103	(b)(3)/26 USC 6103	(b)(3)/26 USC 6103
SAME	(b)(3)/26 USC 6103	(b)(3)/26 USC 6103
SAME	(b)(3)/26 USC 6103	(b)(3)/26 USC 6103

Complaint Exs. 1-3. Respondent does not dispute or otherwise deny that (b)(3)/26 USC 6103 as set forth in (b)(3)/26 USC 6103 . Instead, he argues:

> There is no law in this nation that states that all taxpayers (b)(3)/26 USC 6103 . As a CPA, I made every attempt to file all clients' returns (b)(3)/26 USC 6103 , while (b)(3)/26 USC 6103 . I may have been (b)(3)/26 USC 6103 , but in most cases I (b)(3)/26 USC 6103 .

July 18 filing at 3.

Under the applicable regulation, incompetence and disreputable conduct includes:

> (6) Willfully failing to make a Federal tax return in violation of the Federal tax laws . . . .

31 C.F.R. § 10.51(a)(6) (2008). (b)(3)/26 USC 6103 . *See Dir. Office of Prof'l Responsibility v.* (b)(3)/26 USC 6103, Compliant No. 2010-08 (Order Granting Decision by Default, June 15, 2010), *sanction modified by* (Decision on Appeal, June 2, 2011). (b)(3)/26 USC 6103 . *See* Complaint Exs. 1-3. Respondent's assertion that (b)(3)/26 USC 6103

Having demonstrated that Respondent (b)(3)/26 USC 6103 , Complainant must also show that Respondent's actions were "willful" in order to warrant discipline. Case law has defined "willful" to mean "a voluntary, intentional violation of a known duty." *Dir., Office of Prof'l Responsibility v.* (b)(3)/26 USC 6103, Complaint No. 2007-10 at 5 (Decision on Appeal, June 2008); *see also Cheek v. U.S.*, 498 U.S. 192, 201 (1990). As a CPA engaged in practice before the IRS, Respondent (b)(3)/26 USC 6103 . As noted by the appellate decision-maker in (b)(3)/26 USC 6103:

> Given that the (b)(3)/26 USC 6103 since I began practicing tax law (in 1971) have clearly set forth (b)(3)/26 USC 6103 .

(b)(3)/26 USC 6103 at 6 (Decision on Appeal, June 2008). Respondent's (b)(3)/26 USC 6103

None of the arguments propounded by Respondent raise genuine issues of material fact that would excuse (b)(3)/26 USC 6103 . Specifically, Respondent's claim that he attempted to file client returns (b)(3)/26 USC 6103 while

[redacted], only further demonstrates [redacted] Respondent's additional comments in his November 13 filing also fail to provide any legal justification for [redacted].[5] In that letter he noted that [redacted] and argued that over 22 million taxpayers [redacted]. Whether or not other taxpayers [redacted] does not excuse or justify [redacted]. In addition, Respondent never submitted any documentation or other evidence showing that [redacted] nor does the record reflect that [redacted]. These types of unsupported assertions are insufficient to overcome a properly supported motion for summary adjudication. *See Podobnik v. U.S. Postal Serv.*, 409 F.3d 584, 594 (3d Cir. 2005) (noting that a party cannot rely on bare assertions or conclusory allegations to show the existence of a genuine issue).

Accordingly, Respondent's [redacted] has been established by clear and convincing evidence based upon the undisputed factual record. These actions demonstrate disreputable conduct under [redacted] (2008) as alleged in Counts VII, IX, and X for which Respondent may be sanctioned.

E. Conclusion

In sum, Complainant has demonstrated, based upon the undisputed evidence of record, that Respondent engaged in disreputable conduct within the meaning of 31 C.F.R. § 10.51 (2008) by clear and convincing evidence as alleged in Counts I, II, VII, VIII, IX, and X of the Complaint. As there are no genuine issues of material fact related to these six counts, Complainant's Motion for Summary Adjudication is granted, in part, as to Counts I, II, VII, VIII, IX, and X.

V. Sanction

The issue in an IRS disciplinary proceeding is essentially whether the practitioner in question is fit to practice. *See Harary v. Blumenthal*, 555 F.2d 1113, 1116 (2d Cir. 1977). "Practice before the IRS is a privilege, and one cannot partake of

[5] Notably, this letter, received more than a month after the deadline for responding to Complainant's motions, is itself untimely and indicative of Respondent's lack of concern for deadlines.

that privilege without also taking on the responsibilities of complying with the regulations that govern such practice." *Dir., Office of Prof'l Responsibility v.* (b)(3)/26 USC 6103, Complaint No. 2011-01 at 7 (Order Granting Complainant's Motion for Summary Judgment, June 7, 2011). Discipline, including disbarment and suspension, is "imposed in furtherance of the IRS' regulatory duty to protect the public interest and the Department by conducting business with the responsible persons only." *Id*.

When determining the sanction to be imposed, "all relevant facts and circumstances" shall be taken into account. 31 C.F.R. § 10.50(d) (2008), 31 C.F.R. §10.50(e) (2011). Although the regulations do not provide any more specific standards for determining when to impose one particular sanction (censure, suspension, or disbarment) as opposed to another, prior adjudications in other disciplinary proceedings offer useful guidance. In addition, this tribunal may consider any mitigating factors proven by the Respondent or aggravating factors proven by Complainant.

A. <u>Adjudications in Other Disciplinary Proceedings</u>

When considering an appropriate sanction, the discipline imposed by the state licensing authority warrants consideration. For instance, in *Dir., Office of Prof'l Responsibility v.* (b)(3)/26 USC 6103, Complaint No. 2011-01 at 7-8 (Order Granting Complainant's Motion for Summary Judgment, June 7, 2011), the ALJ suspended a CPA from practice before the IRS until his license was restored, or he became otherwise qualified to practice, as a sanction for the suspension of his certificate by the North Carolina Board of CPA Examiners. In (b)(3)/26 USC 6103, as in this case, the CPA failed to respond to the motion for summary adjudication with any facts that would mitigate his sanction and the ALJ found that he could not rest merely on allegations or denials to establish a genuine issue of material fact. Although the ALJ determined that the regulations governing practice before the IRS did not dictate actions in the disciplinary process, *see* 31 C.F.R. §§ 10.2(a)(2), 10.3(b) (2008), 31 C.F.R. §§ 10.2(a)(2), 10.3(b) (2011), the ALJ noted that the length of a state suspension would guide any attempt to re-apply to practice before the IRS. *See* (b)(3)/26 USC 6103 at 7 n.3 (Order Granting Complainant's Motion for Summary Judgment, June 7, 2011).

Under the circumstances presented here, the Oregon Board of Accountancy revoked Respondent's CPA license after previously issuing a three-year suspension based upon a pattern of professional misconduct. Complaint Exs. 8, 9, 12, 13, 14. Revocation is a more severe state agency penalty than suspension and reflects upon the seriousness of Respondent's actions. Consequently, the revocation of

Respondent's CPA license by the Oregon Board of Accountancy supports imposition of the sanction of disbarment from practice before the IRS.

When considering Respondent's criminal conviction, both the seriousness of the offense as well as the fraudulent nature of his crime warrant a more severe sanction. *See, e.g., Dir., Office of Prof'l Responsibility v. Everett*, Complaint No. 2009-27 at 4-8 (Order on Complainant's Renewed Motion for Summary Adjudication Regarding Sanctions, July 22, 2010). In *Everett*, the ALJ imposed the sanction of disbarment on an attorney who had been convicted of the felony crimes of making a false declaration, bankruptcy fraud, and money laundering and concealment for which he was disbarred from the practice of law in Arizona. *Id*. at 7-8. Respondent's criminal conviction for bank fraud is similarly serious and likewise involved dishonesty. Thus, Respondent's conviction, coupled with his license revocation, lends further support to the sanction of disbarment from practice before the IRS.

The (b)(3)/26 USC 6103 has been characterized as a serious offense by other ALJs who have adjudicated similar conduct. According to the U.S. Supreme Court, tax deadlines are essential to the proper functioning of government:

> Deadlines are inherently arbitrary; fixed dates, however, are often essential to accomplish necessary results. The Government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one of strict filing standards. Any less rigid standard would risk encouraging a lax attitude toward filing dates. Prompt payment of taxes is imperative to the Government, which should not have to assume the burden of unnecessary ad hoc determinations.

United States v. Boyle, 469 U.S. 241, 249 (1985). Citing *Boyle*, the appellate decision-maker in (b)(3)/26 USC 6103 concluded that (b)(3)/26 USC 6103 imposes a considerable cost, in terms of time and expense, that is born *[sic]* by the IRS and fellow citizens who comply with the tax laws and as such constitutes a serious offense for a tax professional. *See Dir., Office of Prof'l Responsibility v.* (b)(3)/26 USC 6103, Complaint No. 2007-10 at 9 (Decision on Appeal, June 2008). In addition to costs, Respondent's (b)(3)/26 USC 6103 demonstrates a disregard for the tax laws that all tax preparers, including CPAs, must follow.

The appropriate sanction for [redacted] varies depending upon the circumstances. *See, e.g., Dir., Office of Prof'l Responsibility v.* [redacted], Complaint No. 2007-10 at 9 (Decision on Appeal, June 2008) (suspension of 48 months for [redacted]); *Dir., Office of Prof'l Responsibility v.* [redacted], Complaint No. 2010-08 (Decision on Appeal, June 2, 2011) (suspension of 24 months for [redacted]); *Dir., Office of Prof'l Responsibility v.* [redacted], Compliant No. 2009-07 (Decision on Motion for Default Judgment, July 1, 2009) (disbarment imposed for [redacted]); *Dir., Office of Prof'l Responsibility v.* [redacted], Complaint No. 2007-20 (Decision on Motion for Summary Judgment, May 9, 2008) (suspension for 48 months for [redacted]); *Dir. Office of Prof'l Responsibility v.* [redacted], Complaint No. 2009-09 (Decision on Appeal, June 16, 2011) (suspension of 40 months for [redacted]). Thus, Respondent's [redacted] would warrant a significant period of suspension even absent any other incidents of disreputable conduct.

As discussed herein, Complainant's Motion for Summary Adjudication has been granted with respect to six separate counts of disreputable conduct. His criminal conviction for bank fraud and the revocation of his state CPA license alone would warrant the sanction of disbarment. In addition, Respondent also made false and misleading statements about his status as a CPA during a time when he knew his license had been suspended and [redacted]. Based upon the adjudications in other similar proceedings, this conduct collectively warrants the sanction of disbarment.

B. <u>Mitigating and Aggravating Factors</u>

Even though other adjudications involving similar instances of disreputable conduct justify imposition of the sanction of disbarment, mitigating and aggravating factors are also appropriately considered. As noted, Respondent failed to provide any response specific to the motions filed by Complainant and none directly discussing the sanction that should be imposed.

Nevertheless, his letters could be construed as requesting a lesser sanction based upon several alleged factors, including: (1) his age ([redacted] or [redacted] years of age), (2) his health conditions ([redacted]), (3) his competent representation of tax payers for over 37 years, (4) the fact that he has already served his allotted period of incarceration for the crimes he

(b)(6)

committed; and (5) the instability in the economy. *See generally* July 18 filing; August 24 filing; September 21 filing; October 9 filing. Upon a thorough review of the entire record, these unsupported allegations do not warrant mitigation of the sanction of disbarment.

As to age and health, Respondent failed to submit any evidence documenting the described medical conditions. Assuming his health problems are as reported, those conditions as well as his age could potentially be mitigating factors. However, Respondent has not alleged or demonstrated in any way how those conditions (or his age) led to, resulted in, or should excuse any of the disreputable conduct proven herein. While this tribunal is not unsympathetic, merely claiming poor health and advanced age, without supporting evidence or argument, does not raise a genuine issue of material fact regarding the appropriate level of sanction to be imposed.

With respect to his representation of clients over the last 37 years, Respondent also failed to submit any evidence or documentation to substantiate the quality of his representation. Instead, he relies solely on his own general assertions which are conclusory and generally inadequate to overcome a properly supported motion for summary adjudication. *See, e.g., Podobnik*, 409 F.3d at 594 (noting that a party cannot rely on bare assertions or conclusory allegations to show the existence of a genuine issue). Moreover, Respondent's disreputable conduct, as established by clear and convincing evidence, relates to recent behavior over the last several years showing a pattern of misconduct. Absent any supporting evidence, Respondent has not demonstrated a genuine issue of material fact about the appropriate type or length of the sanction that should be imposed based upon his prior history of client representation.

Respondent also argues that a disciplinary sanction in this proceeding will punish him yet again for a crime that has already resulted in his incarceration. However, IRS proceedings do not exist solely to punish. Sanctions also serve to protect the public interest and to deter future incompetent and disreputable conduct. Respondent's incarceration reflects the seriousness of his crime and the conviction for bank fraud demonstrates his dishonesty in dealings with others. Assuming that Respondent's previous incarceration is an appropriate mitigating factor, Respondent has failed to raise a genuine issue showing how his incarceration is material to the sanction imposed in this disciplinary proceeding – a sanction that rests upon multiple counts of disreputable conduct of which only one count relates directly to his incarceration.

Finally, Respondent has argued generally about the state of the economy and the actions of various financial institutions as reported in the national media. While he supplied numerous newspaper clippings with handwritten comments and analysis, he has failed to raise a genuine issue showing how the state of the economy or the actions of large financial institutions are material to any of the issues in this disciplinary proceeding which is necessarily focused on the individual actions of Respondent.

Respondent had ample opportunity to respond directly to Complainant's motions which requested the sanction of disbarment, and he chose not do so. The unsupported assertions contained in Respondent's letters fail to raise genuine issues of material fact that would justify modification of the sanction of disbarment.

In further support of its request for disbarment, Complainant offers evidence of other aggravating factors, including Respondent's (b)(3)/26 USC 6103 and a report prepared by the U.S. Treasury Inspector General for Tax Administration ("TIGTA report"). *See* Complaint Exs. 30-32. Events preceding the counts set forth in the Complaint may be considered as aggravating factors if substantiated by clear and convincing evidence. *See generally Dir., Office of Prof'l Responsibility v.* (b)(3)/26 USC 6103, Complaint 2010-19 at 7 (Decision on Appeal, Oct. 14, 2011). However, based upon Respondent's failure to raise a genuine issue of material fact that would mitigate the sanction of disbarment, it is unnecessary to consider Complainant's assertions regarding aggravating factors or Respondent's arguments related thereto.

C. <u>Conclusion</u>

The Complainant has demonstrated, based upon the undisputed factual record and by clear and convincing evidence, that Respondent engaged in disreputable conduct within the meaning of 31 C.F.R. § 10.51 (2008) as alleged in Counts I, II, VII, VIII, IX, and X of the Complaint. Given the sanctions imposed in other adjudications involving similar disreputable conduct and the lack of any supporting evidence or argument by Respondent raising a genuine issue with respect to any mitigating factors, the sanction of disbarment is deemed commensurate with the seriousness of Respondent's conduct. *See* 31 C.F.R. §§ 10.79, 10.81 (describing effect of disbarment).

VI. Order

For the foregoing reasons, it is hereby ORDERED that:

1. Complainant's Motion for Decision by Default is denied as moot;

2. Complainant's Motion for Summary Adjudication is granted in part. Specifically, Respondent is found to have engaged in disreputable conduct within the meaning of 31 C.F.R. § 10.51 (2008) as alleged in Counts I, II, VII, VIII, IX, and X of the Complaint; and

3. Based upon that disreputable conduct, Respondent is disbarred from practice before the Internal Revenue Service.

/s/
Harvey C. Sweitzer
Administrative Law Judge

Appeal Information

Pursuant to 31 C.F.R. § 10.77, this Decision may be appealed by filing a Notice of Appeal within thirty (30) days from the date that this Decision is served on the party. The Notice of Appeal must be filed in duplicate with the Director of the Office of Professional Responsibility and shall include a brief that states the exceptions to the Decision of the Administrative Law Judge and supporting reasons. A copy of the Notice of Appeal and supporting brief must be served on any non-appealing party's representative.

See page 30 for distribution.

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