THE DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
BEFORE THE ADMINISTRATIVE LAW JUDGE

DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY,

Complainant,

v.

OTIS STEWART, JR.,

Respondent.

HUDOHA No. 22-AF-0186-OD-001
(Complaint No. 2022-00001)

June 8, 2023

NOTICE

On April 20, 2023, the Court issued the *Order Granting Complainant's Motion for Summary Adjudication*. Errors existed in the April 20, 2023 Certificate of Service. This new Certificate of Service corrects those errors.

/s/ Cinthia Matos

Cinthia Matos, Docket Clerk
HUD Office of Hearings and Appeals

THE DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY, Complainant, v. OTIS STEWART, JR., Respondent.	HUDOHA No. 22-AF-0186-OD-001 (Complaint No. 2022-00001) April 20, 2023

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY ADJUDICATION

This matter arises from a disciplinary complaint ("*Complaint*") filed by the Acting Director of the Office of Professional Responsibility ("Complainant") for the Internal Revenue Service ("IRS") against Otis Stewart, Jr. ("Respondent") pursuant to 31 U.S.C. § 330 as implemented by 31 C.F.R. part 10. The matter is currently before the Court upon Complainant's *Motion for Summary Adjudication* and Respondent's *Motion to Confess Liability and for Limited Discovery as to Appropriate Sanctions*.

I. PROCEDURAL HISTORY

The *Complaint* in this matter charges Respondent with three counts of violating the rules of conduct for IRS practitioners at 31 C.F.R. § 10.51(a)(4) (2014), § 10.34(b)(1) (2014), and § 10.22(a)(1) (2014) and asks the Court to disbar Respondent from practice before the IRS pursuant to 31 C.F.R. §§ 10.50 and 10.52. The *Complaint* was received by this Court on July 25, 2022, and assigned to the undersigned for hearing.

On August 2, 2022, the Court issued a *Notice of Hearing and Order* scheduling a hearing to commence on January 9, 2023. The Court also ordered Respondent to file an Answer by August 22, 2022.

On September 19, 2022, Respondent filed his *Answer*. In his *Answer*, Respondent made three general denials. Under a caption of "Answer" Respondent stated for each count: "Respondent denies all allegations." However, the *Answer* did not comport with the rules governing the proper contents of an Answer for an IRS disciplinary proceeding. See 31 C.F.R. § 10.64(b).

On September 29, 2022, Complainant, through counsel, filed the *Complainant's Motion For a Decision By Default* ("*Motion for Default*") with this Court. Complainant asked the Court to issue a default decision disbarring Respondent from practice before the IRS, because Respondent's *Answer* did not contain the required elements set forth in 31 C.F.R. § 10.64. On October 3, 2022, the Court issued an Order instructing Respondent to respond to Complainant's *Motion for Default* and to file a revised Answer that conformed to the rule governing the content of an Answer.

On October 12, 2022, Respondent's newly retained attorney filed a notice of appearance and in a separate motion requested an extension of time to file a response to Complainant's *Motion for Default* due to his being newly retained. The Court issued an Order that granted an extension making Respondent's response and amended Answer due on November 4, 2022. In that Order, the Court also ordered Complainant to respond to Respondent's previously filed *Motion for Additional Time for Discovery* and Respondent's request for a settlement judge.

On October 25, 2022, Respondent filed his amended *Answer*. While his amended *Answer* still did not comply with the rule governing the content of an Answer, it was clear that Respondent denied all Counts in the *Complaint*. Complainant filed his response to Respondent's request for a settlement judge opposing the appointment of a settlement judge, because previous settlement discussions were not fruitful. Additionally, Complainant opposed Respondent's discovery request primarily due to Respondent's failure to file a written motion demonstrating the relevance, materiality, and reasonableness of such discovery as required under 31 C.F.R. § 10.71. The Court then issued an Order denying Respondent's motion for an extension of time to conduct discovery and denying the request for a settlement judge. On November 9, 2022, the Court denied Complainant's *Motion for Default* finding that although Respondent's *Answer* and amended *Answer* did not meet with all of the substantive requirements, it was clear that Respondent intended to defend the charges against him.

On December 2, 2022, Complainant filed a *Complainant's Motion for Summary Adjudication* ("*Motion*"). Respondent did not respond to Complainant's *Motion*, so the Court issued an *Order to Show Cause* ordering Respondent to file a response and explain why Complainant's *Motion* should not be granted.

On December 21, 2022, Respondent filed a response to the Show Cause Order stating that he had not received a copy of Complainant's *Motion*. Respondent promised a more thorough response once he received a copy of the *Motion*, but at that time he resubmitted his previously filed amended *Answer* and attachment as a partial response. After receiving a copy of Complainant's *Motion*, on January 4, 2023, Respondent filed a *Response to Motion for Summary Adjudication* ("*Response*") opposing summary judgment.

On January 5, 2023, Complainant filed *Complainant's Reply to Respondent's Response to Motion for Summary Adjudication*. In that response, Complainant challenged Respondent's response to the *Motion* wherein Respondent only asserted that he did not advise his clients to not file their taxes. Complainant also emphasized that no allegation in the *Complaint* charges Respondent with his advising his clients not to file their taxes.

On March 7, 2023, Respondent filed Respondent's *Motion to Confess Liability and for Limited Discovery as to Appropriate Sanction*.[1] In that Motion, Respondent seeks to confess liability to making frivolous tax arguments in the City of Fairfield case. City of Fairfield, Ala. v. United States, No. 2:17-CV-1064-KOB, 2018 U.S. Dist. LEXIS 90410, 2018 WL 2445686, at *7 (N.D. Ala. May 31, 2018). He also sets forth mitigating factors that he claims should reduce any sanction imposed for his confessed liability. Finally, Respondent seeks to conduct limited discovery of precedential IRS/OPR cases as to the appropriate sanction if the Court is unsure of the appropriate sanction in the matter.

On March 20, 2023, Complainant filed a *Response to Respondent's Motion to Confess Liability*. Complainant points out that Respondent wishes to confess liability to violating the rules governing practice before the IRS when he filed a frivolous lawsuit in City of Fairfield. However, Complainant explains that the three counts in the *Complaint* actually allege that Respondent willfully submitted frivolous tax arguments during his representation of three taxpayers (b)(3)/26 USC 6103 filed with the IRS. Complainant also argues against the application of mitigating factors and instead contends that aggravating factors call for a heightened sanction, and that a five-year suspension or disbarment is appropriate in this case. Complainant also asserts that discovery is not necessary as all published disciplinary decisions dating from 2014 to the present are available on the IRS's website and these cases reflect the applicable precedent that support the appropriate sanction.

II. APPLICABLE LEGAL PRINCIPLES

IRS Disciplinary Proceedings. The Secretary of the Treasury is authorized by statute to "regulate the practice of representatives of persons before the Department of the Treasury," including those who represent taxpayers before the IRS. 31 U.S.C. § 330(a). The standards of conduct for such practitioners are set forth in 31 C.F.R. part 10, commonly known as Circular 230.[2] Complainant, as Acting Director of the Office of Professional Responsibility ("OPR"), is charged with enforcing these standards. See 31 C.F.R. § 10.1(a).

Complainant may suspend, disbar, censure, or impose a monetary penalty on any IRS practitioner who is incompetent or disreputable or who violates the Secretary's standards of conduct for IRS practitioners. 31 U.S.C. § 330(c); 31 C.F.R. § 10.50(a), (c). Specific examples of sanctionable "[i]ncompetence and disreputable conduct," as defined by the Secretary, are listed in 31 C.F.R. § 10.51(a). The Secretary's regulations in 31 C.F.R. part 10 further provide that a practitioner may be sanctioned for "willfully violat[ing] any of the regulations (other than § 10.33)" contained in 31 C.F.R. part 10. See 31 C.F.R. § 10.52(a)(1).

When Complainant determines that a practitioner has violated the Secretary's rules of conduct, including by engaging in any of the conduct listed under § 10.51(a) or by willfully

[1] On or before March 6, 2023, Respondent's new counsel filed an appearance. Therefore, Respondent's new counsel filed *Respondent's Response to Respondent's Motion to Confess Liability*.

[2] See Treasury Department Circular No. 230 (Rev. 6-2014), *available at* https://www.irs.gov/pub/irs-pdf/pcir230.pdf. The Department of the Treasury initially published these standards of conduct in department circulars, and later promulgated them in the Code of Federal Regulations as well.

violating other rules of conduct contained in 31 C.F.R. part 10, he may initiate a proceeding for sanctions after giving the practitioner notice and an opportunity to respond to the allegations against him. 31 C.F.R. § 10.60(a), (c). Such proceedings are conducted before an administrative law judge in accordance with the Administrative Procedure Act and the procedural rules set forth in 31 C.F.R. part 10, subpart D. Id. § 10.0, § 10.70, § 10.72(a)(1), (a)(3)(ii). The judge must enter a decision that includes a statement of his findings and conclusions, as well as the reasons and basis therefore, and an order of censure, suspension, disbarment, monetary penalty, or dismissal of the complaint. Id. § 10.76(a).

Standard of Proof. If the sanction is censure or a suspension of less than six months' duration, necessary facts need only be proven by a preponderance of the evidence. 31 C.F.R. § 10.76(b). However, if the sanction is a monetary penalty, disbarment, or a suspension of six months or longer, "an allegation of fact that is necessary for a finding against the practitioner must be proven by clear and convincing evidence in the record." Id.

Summary Adjudication. In IRS disciplinary proceedings, "[e]ither party may move for a summary adjudication upon all or any part of the legal issues in controversy." 31 C.F.R. § 10.68(a)(2). The Court may render summary adjudication 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." Id. § 10.76(a)(2).

(b)(3)/26 USC 6103

Thus, a motion for summary adjudication under § 10.68(a)(2) is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. OPR v. [redacted], Complaint No. 2012-00002 (IRS December 7, 2012).[3] Rule 56 permits summary judgment where the moving party demonstrates "lack of a genuine, triable issue of material fact" and where, "under the governing law, there can be but one reasonable conclusion as to the outcome." Fed. R. Civ. Pro. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). An issue is "genuine" only if the evidence is such that a reasonable fact finder could rule in favor of either party. Anderson, 477 U.S. at 248. A fact is "material" only if it is capable of affecting the outcome of the case under governing law. Id.

In considering a summary judgment motion, the court must view the evidence in the light most favorable to the nonmoving party. Tolan v. Cotton, 572 U.S. 650, 657 (2014). Summary judgment is not available where "material facts are at issue, or, though undisputed, are susceptible to divergent inferences." Tao v. Freeh, 27 F.3d 635, 637 (D.C. Cir. 1994); see Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970) (requiring consideration of "reasonable inferences" that can be drawn from the facts). However, summary judgment against a party is appropriate where he has failed to make a sufficient showing on an essential element as to which he has the burden of proof. Celotex, 477 U.S. at 322-23.

III. FACTUAL BACKGROUND

The following facts are material and not subject to reasonable dispute.

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[3] [redacted] (b)(3)/26 USC 6103

Respondent has engaged and continues to engage in practice before the IRS as an attorney, since September 28, 2007. Also, Respondent has engaged in practice before the IRS as a certified public accountant ("CPA") since July 30, 2001. In Respondent's capacity as attorney and CPA, he has engaged in practice before the IRS within the meaning of 31 C.F.R. § 10.2(a), subjecting him to Complainant's disciplinary authority under 31 U.S.C. § 330.

A. *City of Fairfield, Alabama v. United States*, Civil Action No. 2:17-CV-1064-KOB, United States District Court for the Northern District of Alabama.

Respondent represented the City of Fairfield, Alabama ("the City") in the case of City of Fairfield. During Respondent's representation of the City, he advanced arguments that a levy and summons issued by the IRS lacked valid Office of Management and Budget ("OMB") control numbers. Respondent contended that, by issuing the levy and summons without OMB control numbers, the IRS violated the Paperwork Reduction Act ("PRA"),[4] and, by extension, the Privacy Act[5] and the Fourth Amendment to the U.S. Constitution ("Fourth Amendment").[6]

On May 31, 2018, the District Court dismissed the City's complaint without leave to amend, because, among other things, the tax arguments that Respondent asserted in the complaint on behalf of the City were "patently frivolous." The District Court's ruling was based on applicable Federal case law, Revenue Ruling 2006-21,[7] and an exemption within the PRA which expressly provides that the PRA does not apply during the conduct of "an administrative action or investigation involving an agency against specific individuals or entities." 44 U.S.C. § 3518(c)(1)(B)(ii).

B. Count I.

On (b)(3)/26 USC 6103, (b)(3)/26 USC 6103 after the District Court rendered its ruling in City of Fairfield explaining why Respondent's arguments concerning OMB control numbers were "patently frivolous," Respondent filed (b)(3)/26 USC 6103 ("(b)(3)/26 USC 6103") with the IRS on behalf of Taxpayer A. This (b)(3)/26 USC 6103 contained (b)(3)/26 USC 6103 t. On (b)(3)/26 USC 6103, Respondent filed (b)(3)/26 USC 6103 with the IRS on behalf of Taxpayer A, which also contained the same arguments.

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[4] 44 U.S.C. §§ 3501-3521. Among other things, the PRA requires federal government agencies to obtain an OMB control number before requiring the general public to comply with a collection of information, meaning that documents collecting information from the public are generally required to bear an OMB number. Id. § 3512.

[5] 5 U.S.C. § 552a. The Privacy Act protects records about individuals retrieved by personal identifiers such as name, social security number, or other identifying number or symbol.

[6] The Fourth Amendment protects people from unreasonable searches and seizures without a warrant.

[7] 2006-1 C.B. 745.

C. Count II.

On (b)(3)/26 USC 6103, Respondent filed (b)(3)/26 USC 6103 with the IRS on behalf of Taxpayer B, which again argued that (b)(3)/26 USC 6103.

D. Count III.

Also on (b)(3)/26 USC 6103, Respondent filed (b)(3)/26 USC 6103 with the IRS on behalf of Taxpayer C, which again argued that (b)(3)/26 USC 6103.

IV. FINDINGS AND CONCLUSIONS

The Secretary of the Treasury and OPR have the authority to regulate the practice of attorneys and certified public accountants ("CPA") before the IRS. 31 U.S.C. § 330. Respondent practices before the IRS as both an attorney and CPA. Accordingly, Respondent is subject to the disciplinary authority of the Secretary of the Treasury and OPR in his practice before the IRS.

The *Complaint* and the *Complainant's Motion for Summary Adjudication* allege that Respondent committed three counts of "willfully submitting frivolous tax arguments to the IRS" in violation of the rules set forth in 31 C.F.R. §10.51(a)(4), which states that knowingly giving false or misleading information to the Department of Treasury constitutes sanctionable incompetence or disreputable conduct; id. § 10.34(b)(1), which prohibits an IRS practitioner from advising a client to take a frivolous position in documents filed with the IRS; and id. § 10.22(a)(1), which requires practitioners to exercise due diligence in preparing and filing documents relating to IRS matters.

Complainant contends that Respondent violated these rules when representing Taxpayer A, Taxpayer B, and Taxpayer C before the IRS in their tax matters, specifically their (b)(3)/26 USC 6103 filed with the IRS, wherein Respondent argued that (b)(3)/26 USC 6103. Complainant asserts that two readily available documents, IRS Revenue Ruling 2006-21 and "The Truth About Frivolous Tax Arguments," place the public on notice that (b)(3)/26 USC 6103 are frivolous.[8] Of course, Complainant also points to the case of City of Fairfield, wherein Respondent, on behalf of the City, made the same tax arguments that the District Court found to be "patently frivolous." Complainant concludes that Respondent should be sanctioned for willful misconduct.

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[8] Both of these IRS publications, Revenue Ruling 2006-21 and "The Truth About Frivolous Tax Arguments," are available to the public and can be found on the IRS website, www.irs.gov...the March 2018 version of "The Truth About Frivolous Tax Arguments" would have been available to Respondent upon his filing of (b)(3)/26 USC 6103. And, the 2014 version would also have been available: https://www.irs.gov/pub/irs-utl/friv_tax.pdf.

Respondent does not deny that he filed (b)(3)/26 USC 6103 on behalf of Taxpayer A, Taxpayer B, and Taxpayer C. In his first response to Complainant's *Motion*, he re-submitted his amended *Answer* and an attachment consisting of his response to OPR's March 22, 2021 letter of investigation. Therein, Respondent argued, among other things, that he did not have fair warning that his arguments raised in the City of Fairfield case would be deemed frivolous; that he should not be penalized for raising (b)(3)/26 USC 6103 because "there was no harm and no foul to the IRS Enforcement Process"; and that the defense of res judicata bars OPR from prosecuting him in this disciplinary matter. Specifically, he claimed that the District Court's Order in the City of Fairfield case, issued on May 31, 2018, bars Complainant from prosecuting him.

Respondent's January 4, 2023 *Response to Motion for Summary Adjudication* asserts as his sole defense that he did not advise his clients not to file their tax returns. He acknowledges as undisputed, and as published in Revenue Ruling 2006-21, that the PRA does not relieve a taxpayer from filing a tax return. Respondent attached his own Declaration and Affidavits of two clients all attesting that Respondent did not advise his clients not to file their tax returns.

However, Respondent was not charged with advising his clients not to file their tax returns. Rather, he was charged with making frivolous arguments (b)(3)/26 USC 6103 he filed on behalf of his clients (b)(3)/26 USC 6103 , (b)(3)/26 USC 6103 .

After reviewing the entire record and considering the parties' pleadings and motions, the Court concludes that Complainant has established he is entitled to summary judgment against Respondent, for the reasons discussed below. Those issues not discussed herein are not addressed because the Court finds they lack materiality or importance to this decision.

A. Respondent has admitted he is liable for misconduct in this matter.

On March 7, 2023, Respondent filed a *Motion to Confess Liability for Limited Discovery as to Appropriate Sanctions* ("Motion to Confess Liability"). Respondent maintains that he did not act in bad faith or with an improper motive when he asserted the frivolous OMB control number theory in the City of Fairfield case. Rather, he claims that, due to limited litigation experience, he simply misconstrued the PRA while proceeding in the honest belief that he was acting as a zealous advocate for his client. However, he now acknowledges that his arguments in City of Fairfield were meritless, and therefore asks the Court to allow him to confess liability.

Complainant, in response to the *Motion to Confess Liability*, points out that although Respondent now acknowledges making frivolous arguments in the City of Fairfield case, he fails to acknowledge the wrongful nature of his conduct in raising (b)(3)/26 USC 6103 .

The Court accepts Respondent's admission of liability in this matter. Notably, however, Respondent's *Motion to Confess Liability* does not discuss the factual allegations underlying

Counts I, II, and III—the misconduct with which he has actually been charged in this case. Rather, it addresses only the frivolous arguments Respondent raised in the City of Fairfield matter. Nonetheless, clear and convincing evidence confirms that he violated the rules of conduct for IRS practitioners as charged in Counts I, II, and III.

B. Respondent knew or should have known that the arguments he raised in the (b)(3)/26 USC 6103 he filed on behalf of Taxpayers A, B, and C were frivolous.

The *Complaint* and *Motion* allege that Respondent engaged in sanctionable misconduct—including knowingly giving false or misleading information to the IRS, advising clients to take a frivolous position before the IRS, and failing to exercise due diligence in preparing and filing documents—when he raised frivolous arguments (b)(3)/26 USC 6103 he filed with the IRS in (b)(3)/26 USC 6103.

Throughout this proceeding, Respondent has suggested he did not realize and could not have known the arguments he raised (b)(3)/26 USC 6103, which concerned (b)(3)/26 USC 6103, were frivolous. He acknowledges that the "OMB control number" theory is frivolous when deployed in support of an argument that a client need not file a Form 1040 tax return or pay income taxes, but insists that the relevant caselaw and IRS guidance do not make clear that this theory is frivolous in other contexts. Respondent notes that the IRS did not challenge his OMB control number argument as frivolous in the City of Fairfield case, and argues he therefore could not have been expected to recognize its frivolity, either. He contends he did not have fair notice that the IRS had expanded its definition of frivolous arguments to encompass documents other than tax return forms, and therefore, based on principles of lenity and lack of fair warning, he should not be held liable for misconduct.[9]

Respondent is mistaken in his characterization of the relevant caselaw and IRS guidance, which unambiguously convey that, just like tax return forms, other IRS documents such as (b)(3)/26 USC 6103. And even if the caselaw and guidance did not make clear to Respondent that his arguments about OMB control numbers held no merit, he personally received actual notice of the frivolity of his arguments when the District Court issued its ruling in the City of Fairfield case in May 2018.

1. Precedent and publicly available IRS guidance documents alert tax practitioners that it is a frivolous tax argument to claim that IRS forms lacking OMB control numbers are unauthorized.

Respondent's contention that (b)(3)/26 USC 6103 that he filed on behalf of his clients Taxpayer A, Taxpayer B, and Taxpayer C. Respondent claimed, on behalf of his clients, that (b)(3)/26 USC 6103

[9] It was not until Respondent filed his *Respondent's Motion to Confess Liability and for Limited Discovery as to Appropriate Sanction* on March 7, 2023, that he first admitted that he was mistaken in his belief that the IRS's failure to use OMB control numbers violated the PRA.

(b)(3)/26 USC 6103, alleging that the IRS (b)(3)/26 USC 6103 Yet these arguments are invalidated in the IRS's Revenue Ruling 2006-21 and "The Truth About Frivolous Tax Arguments," two publicly available resources that provide tax practitioners and the public generally with notice regarding tax theories that are frivolous and warn against their use.

a. Revenue Ruling 2006-21

Revenue Ruling 2006-21 is a public administrative ruling in which the IRS rejected the argument that a taxpayer can avoid his obligation to file federal income tax returns based on the PRA, and held that any such argument is frivolous. Respondent contends that Revenue Ruling 2006-21 solely prohibits the argument that taxpayers are not required to file an IRS Form 1040 income tax return because it lacks an OMB control number. He counters that his arguments pertain to (b)(3)/26 USC 6103, not 1040 forms. As such, Respondent maintains that he has not violated the IRS's standards of conduct, because he never counseled his clients not to file their 1040 forms.

Respondent is mistaken that Revenue Ruling 2006-21 stands only for the proposition that the IRS Form 1040 lacking OMB control numbers amounts to a frivolous tax argument. Rather, the Revenue Ruling does convey more broadly that the IRS will challenge the claims of individuals who attempt to avoid or evade their federal tax liabilities based on the frivolous argument that IRS forms lacking OMB control numbers are unauthorized, not just the IRS Form 1040. The Revenue Ruling includes a section at the end titled "Civil and Criminal Penalties" which expressly warns that taxpayers relying on frivolous positions involving the PRA may face criminal prosecution not just for failing to file a return, but also for "attempting to evade or defeat tax" or for "making false statements on a return, statement, or other document."

Further, the Revenue Ruling's "Law and Analysis" section cites a number of cases standing for the proposition that the PRA does not apply to (b)(3)/26 USC 6103. This section of the Revenue Ruling specifically cites to the Lonsdale case, in which taxpayers sought to prevent IRS levies on their wages and credit union account by making a number of frivolous tax arguments to support their allegations, in particular that the relevant IRS forms lacked OMB control numbers; therefore, they argued that the IRS's usage of these forms violated the PRA. See Lonsdale v. United States, 919 F.2d 1440 (10th Cir. 1990). The Lonsdale Court specifically rejected as meritless the argument that the IRS lacks authority to issue summonses or impose levies because those relevant IRS forms lack OMB control numbers. Id. at 1444. The Court held that "the [PRA] is inapplicable to 'information collection request' forms issued during an investigation against an individual to determine his or her tax liability." Id. at 1445.

The Lonsdale opinion cites a string of cases that stand for the proposition that the PRA does not apply to IRS summons and levy documents. For example, in the Neumann case, two taxpayers challenged tax liens that had been imposed against them rather than their underlying tax liability, arguing that the tax assessment violated the PRA because the assessment used IRS forms without OMB control numbers; those taxpayers concluded the tax lien was unenforceable. Neumann v. United States, 1990 U.S. Dist. LEXIS 8312, 1990 WL 209631, at *1 (W.D. Mich.

June 20, 1990). The Neumann court concluded that the taxpayers' argument "has facial appeal, but ignores the fact that published case law has repeatedly and without exception, rejected it…the control number requirement does not apply to the collection of information during the conduct of an administrative action or investigation against specific individuals." Id. at *3 (citations omitted).

In another case cited by Lonsdale, the IRS sought to enforce two summonses that the taxpayers claimed violated the PRA, because they lacked an OMB control number. United States v. Nat'l Commodity & Barter Assoc., 1990 U.S. Dist. LEXIS 5177, WL 85905, at *1 (D. Colo April 17, 1990), aff'd 1990 U.S. App. LEXIS 14191 (10th Cir.). The court found that the PRA excepts IRS summonses because the IRS's investigation concerned the determination of tax liability. Id. at *9. Summonses have also been enforced when a corporation challenged the use of summonses that did not contain OMB control numbers. At least one Court has rejected this argument, finding that the IRS "information collection request" falls within the PRA exception. United States v. Particle Data, Inc., 634 F. Supp. 272 (N.D. Ill. 1986).

In Snyder, yet another case cited by Lonsdale, the court held that IRS documents do not have to carry OMB numbers to be valid under 44 U.S.C. § 3512. Snyder v. Internal Revenue Service, 596 F. Supp. 240, 250 (N.D. Ind. 1984). Still another case held that the IRS's administrative action or investigation of specific individuals or entities falls under the exception to the PRA. Cameron v. Internal Revenue Service, 593 F. Supp. 1540, 1556 (N.D. Ind. 1984), aff'd 773 F.2d 126 (7th Cir. 1985).

Thus, Revenue Ruling 2006-21 and the caselaw cited within clearly notify the public that the IRS considers the "OMB control number" theory to be a frivolous argument when raised with the intent of (b)(3)/26 USC 6103.

b. "The Truth About Frivolous Tax Arguments"

The Revenue Ruling is not the only publication that was available to Respondent providing him with notice that (b)(3)/26 USC 6103 was frivolous. See The Truth About Frivolous Tax Arguments, pg. 36. Although the heading and first two paragraphs exclusively discuss the Form 1040 - OMB control number argument as being frivolous, the "Relevant Case Law" section contains a citation to Lonsdale. Id. at 37. The publication's citation to Lonsdale contains a parenthetical specifically stating that "the 10th Circuit held that the PRA does not apply to summonses and collection notices." Id.

2. The District Court's May 2018 decision in the City of Fairfield case placed Respondent on actual notice that his tax arguments concerning OMB control numbers were frivolous.

Even if the publicly available IRS guidance documents only provided him with constructive notice that his arguments regarding OMB control numbers were frivolous, Respondent was placed on actual notice of the frivolity of his arguments by the District Court's

May 2018 decision in the City of Fairfield case, (b)(3)/26 USC 6103 [redacted].

As explained prior, Respondent represented the City in a civil action against the United States in which he made "patently frivolous" tax arguments. City of Fairfield, supra, slip op. at 12. In an Order dated May 31, 2018, Chief United States District Judge Karen O. Bowdrie dismissed the City's complaint without leave to amend. Judge Bowdrie's decision considered all of Respondent's challenges to the IRS's summons and also the levy of the City's bank account. Respondent, on behalf of the City, challenged the IRS's notice of levy and summons as being unauthorized or fake because they lacked valid OMB control numbers; therefore, Respondent contended this violated the PRA, the Privacy Act, and Fourth Amendment. Id. at 5, 7. Judge Bowdrie found that Respondent's OMB control number argument was frivolous.

a. The District Court explained that lack of an OMB control number on an IRS summons or levy is not a violation of the Paperwork Reduction Act.

In the complaint filed by the City, Respondent alleged that "…the IRS used 'unauthorized' or 'fake' documents to collect the City's unpaid taxes" in violation of the PRA, the Privacy Act, and Fourth Amendment. Id. at 7. Respondent claimed that the PRA was violated because the levy and summons documents did not contain OMB control numbers. Respondent further contended that by using documents without OMB control numbers to collect the City's banking information, the IRS violated the Privacy Act. Respondent further claimed that the IRS violated the Fourth Amendment by using unauthorized documents to seize the City's funds from its bank account.

The District Court in the City of Fairfield determined that "the IRS did not need to put OMB control numbers on documents issued when collecting information relevant to its investigation into the City's tax liabilities" due to the PRA's exemption at 44 U.S.C. § 3518(c)(1)(B). Id. at 12-13. Additionally, the Court found that "[e]ven cursory research uncovers droves of cases rejecting the City's 'OMB control number' theory." Id. at 13. The Court cited numerous cases supporting that finding, including U.S. v. Hicks, wherein the Ninth Circuit stated that "Congress enacted the PRA to keep agencies, including the IRS, from deluging the public with needless paperwork. It did not do so to create a loophole in the tax code." United States v. Hicks, 947 F.2d 1356, 1359 (9th Cir. 1991). Yet another case, cited in City of Fairfield, explains that the lack of an OMB control number neither invalidates an IRS notice nor violates the PRA. Cargill v. C.I.R., 272 Fed. Appx. 831, 833 (11th Cir. 2008).

Respondent challenges Complainant's reliance on City of Fairfield, Revenue Ruling 2006-21, and the "Truth About Frivolous Tax Arguments" publication, because Respondent claims that each source concerns taxpayers asserting only that the lack of OMB control numbers on an IRS Form 1040 is unauthorized. Respondent maintains that his arguments on behalf of the City, Taxpayer A, Taxpayer B, and Taxpayer C pertained to (b)(3)/26 USC 6103 [redacted], not the IRS Form 1040, and therefore were not frivolous. In his letter to OPR during the disciplinary investigation, Respondent claimed that in the City of Fairfield, "none of the cases and authorities cited by the District Court made the specific determination that (b)(3)/26 USC 6103 [redacted] constituted a frivolous

argument." He further complained that this is a new inclusion that prohibits [redacted] (b)(3)/26 USC 6103 and did not provide him with fair notice of its frivolity.

This is incorrect. The Court in City of Fairfield cited three cases that [redacted] (b)(3)/26 USC 6103. First, James v. United States specifically states, "Plaintiff's claim that one irregularity in the procedures used by the IRS in the course of assessing [taxpayer's] tax deficiencies and levying on his wages consists of violations of the [PRA]…[w]e note, however, that lack of an OMB number on IRS notices and forms does not violate the statute." 970 F.2d 750, 753 n.6 (10th Cir. 1992) (citing Lonsdale, supra). Next, in the case of Woods v. Commissioner, I.R.S., the taxpayer received a Notice of Intent to Levy that lacked an OMB control number, and the taxpayer claimed that "the lack of OMB control number is tantamount to the IRS acting without authority; therefore, [the taxpayer] asserts that the resulting Notice of Intent to Levy is invalid." 8 F. Supp. 2d 1357 (M.D. Fla. 1998). The Woods Court found that "the absence of an OMB control number on the IRS's request for tax information is not tantamount to an illegal action taken by the IRS." Id. Finally, the City of Fairfield Court cited to United States v. Stoecklin, wherein the Court determined that the lack of an OMB control number on a summons Form 2039 issued by the IRS was not a "serious violation" of the PRA. 848 F. Supp. 1521, 1526 (M.D. Fla. 1994). Thus, the District Court decision in the City of Fairfield case did provide Respondent with notice that his arguments were patently frivolous as they pertained [redacted] (b)(3)/26 USC 6103 [redacted] he needed only to read the cited case law.

Furthermore, the Lonsdale case, also cited in City of Fairfield, sets forth very clearly why [redacted] (b)(3)/26 USC 6103. Lonsdale, supra, 919 F.2d at 1443-45. The Court in Lonsdale acknowledged that the PRA generally requires OMB control numbers on information collection requests. Id. at 1444. However, the Court explained that the PRA does not apply to the collection of information during an administrative action or investigation into individuals or entities. Id. at 1445.

Finally, the arguments Respondent raised in the City of Fairfield case pertained to [redacted] (b)(3)/26 USC 6103, not to the IRS Form 1040. The fact that the District Court rejected these arguments as "patently frivolous" placed Respondent on clear notice that such arguments are meritless.

b. The District Court explained that [redacted] (b)(3)/26 USC 6103 [redacted] does not violate the Privacy Act or Fourth Amendment.

In the City of Fairfield, Respondent also claimed that the IRS violated his clients' rights under the Privacy Act and the Fourth Amendment. The District Court explained that "[e]ssentially, the City argues that by using documents without OMB control numbers in violation of the [PRA], the [IRS] also violated the Privacy Act." City of Fairfield, supra, slip op. at 12. Respondent's arguments on behalf of the City's overall Privacy Act theory alleged that the IRS violated the Privacy Act by using "'unauthorized' or 'fake' documents to obtain the City's banking information from [its] bank." Id. Similarly, Respondent's Fourth Amendment argument hinged on the frivolous OMB control number theory that using documents without

OMB control numbers to levy funds from the City's bank account violates its Fourth Amendment rights pertaining to illegal seizure. Id. at 10-11. The District Court determined that the lack of OMB control numbers on levy and summons documents does not violate the Privacy Act or Fourth Amendment and any such arguments are frivolous. Id. at 7.

C. Respondent submitted frivolous tax arguments to the IRS and violated the rules of conduct for IRS practitioners.

All three counts in the *Complaint* concern Respondent's frivolous tax arguments made before the IRS. Each of the three counts deal with a separate taxpayer, but Respondent made the same frivolous tax arguments on behalf of each, and these arguments are alleged to have violated the same rules of conduct: 31 C.F.R. §§ 10.51(a)(4), 10.34(b)(1), and 10.22(a)(1). The alleged violations are addressed in turn below.

1. Respondent engaged in sanctionable misconduct under 31 C.F.R. § 10.51(a)(4).

Counts I, II, and III of the *Complaint* allege that Respondent submitted frivolous tax arguments to the IRS on behalf of his clients Taxpayer A, Taxpayer B, and Taxpayer C in violation of 31 C.F.R. § 10.51(a)(4). Under 31 C.F.R. § 10.51(a)(4), "[g]iving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of Treasury or any officer or employee thereof…in connection with any matter pending or likely to be pending before them…knowing the information to be false or misleading" constitutes "[i]ncompetence and disreputable conduct" for which an IRS practitioner may be sanctioned.[10]

On (b)(3)/26 USC 6103, Respondent filed (b)(3)/26 USC 6103 with the IRS on behalf of Taxpayer A, which contained arguments that (b)(3)/26 USC 6103. On (b)(3)/26 USC 6103, Respondent filed (b)(3)/26 USC 6103 on behalf of Taxpayer A containing these same arguments. On (b)(3)/26 USC 6103, Respondent filed (b)(3)/26 USC 6103 (b)(3)/26 USC 6103 with the IRS on behalf of Taxpayers B and C again raising the same arguments.

Respondent's arguments raised in (b)(3)/26 USC 6103 amounted to "false or misleading information" under § 10.51(a)(4), because, as explained above, the IRS's (b)(3)/26 USC 6103 did not violate the PRA, Privacy Act, or Constitution. (b)(3)/26 USC 6103. By repeatedly insisting otherwise in documents submitted to the IRS, Respondent provided false and misleading information. This constitutes sanctionable incompetence or disreputable conduct under § 10.51(a)(4).

[10] 31 C.F.R. § 10.51(a)(4) defines "information" as facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, and any other document or statement, written or oral.

2. Respondent engaged in sanctionable misconduct under 31 C.F.R. § 10.34(b)(1).

Under 31 C.F.R. § 10.34(b)(1), "a practitioner may not advise a client to take a position on a document, affidavit, or other paper submitted to the Internal Revenue Service unless that position is not frivolous." Respondent advised his clients to take a frivolous tax position (b)(3)/26 USC 6103, as (b)(3)/26 USC 6103. He then drafted, signed, and submitted (b)(3)/26 USC 6103 to the IRS on behalf of those clients.

Therefore, Respondent advised his clients to take a frivolous tax position (b)(3)/26 USC 6103 filed with the IRS. As a result, Respondent violated 31 C.F.R. § 10.34(b)(1) as alleged in Counts I, II, and III of the *Complaint*.

3. Respondent engaged in sanctionable misconduct under 31 C.F.R. § 10.22(a)(1).

Under 37 C.F.R. § 10.22(a)(1), "a practitioner must exercise due diligence in preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters." Due diligence means the care that a reasonable person exercises to avoid harm to other persons or their property.[11] When drafting and preparing (b)(3)/26 USC 6103 for Taxpayer A, Taxpayer B, and Taxpayer C, Respondent was required to exercise due diligence when advancing legal theories. Instead, he claimed that (b)(3)/26 USC 6103 – arguments that the IRS and numerous courts, including the U.S. District Court for the Northern District of Alabama in a case specifically involving Respondent, previously rejected as "patently frivolous."

Respondent raised his OMB control number theory in the City of Fairfield case, and in its May 31, 2018 decision, the District Court found those arguments to be frivolous, citing as authority federal case law and IRS publication Revenue Ruling 2006-21. Respondent unreasonably ignored all of this authority (b)(3)/26 USC 6103.

Respondent clearly lacked due diligence in representing his taxpayer clients before the IRS (b)(3)/26 USC 6103. Accordingly, Respondent violated 37 C.F.R. § 10.22(a)(1) as alleged in Counts I, II, and III of the *Complaint* by failing to exercise due diligence.

4. Respondent's conduct was willful.

Complainant alleges that Respondent's misconduct was willful. Willfulness is generally understood to refer to wrongful conduct that goes beyond mere negligence, meaning that the wrongdoer, at minimum, "either knew or showed reckless disregard for the matter of whether [his] conduct was prohibited." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988). Thus, where willfulness is a condition of civil liability, the Supreme Court has held that it

[11] Merriam-Webster, viewed on April 18, 2023, available at www.merriam-webster.com; Due diligence Definition & Meaning - Merriam-Webster.

encompasses both knowing and reckless violations of a given standard. See Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 (2007); see also Cheek v. United States, 498 U.S. 192, 200 (1991) (holding that, where willfulness is a condition of criminal liability for violating a tax law, the term connotes "a voluntary, intentional violation of a known legal duty"); OPR v. (b)(3)/26 USC 6103 Complaint No. 2008-12, slip op. at 5 (Treasury Sec'y Jan. 20, 2010) (Decision on Appeal)[12] (applying standard set forth in Cheek, but questioning whether criminal standard is appropriate in civil disciplinary proceedings); OPR v. (b)(3)/26 USC 6103, Complaint No. 2009-31, slip op. at 4 n.1 (also applying criminal standard, but noting that civil standard would yield same results in IRS disciplinary cases).[13]

Respondent's conduct was willful because he knew or was on notice, at least by the case law cited in the City of Fairfield, issued on May 31, 2018, that the OMB control number theory was frivolous. Even if Respondent did not "know" that his arguments were frivolous, he showed reckless disregard by not familiarizing himself with the case law cited in the City of Fairfield decision, Revenue Ruling 2006-21, and "The Truth About Frivolous Tax Arguments." All of these sources were available to Respondent prior to his submitting (b)(3)/26 USC 6103 to the IRS on behalf of his taxpayer clients, (b)(3)/26 USC 6103.

Accordingly, Respondent willfully violated the rules as set forth in Counts I, II, and III because he knew or acted with reckless disregard that the OMB control number theory was a frivolous tax argument.

D. Neither res judicata nor the doctrine of "no harm and no foul" provide a valid defense against the charges in this matter.

In a letter Respondent sent during the disciplinary investigation responding to OPR's March 22, 2021 "Allegations Letter," he argued, among other things, that he should not be penalized for filing (b)(3)/26 USC 6103 because "there was no harm and no foul to the IRS Enforcement Process" and that IRS's claims are barred by res judicata. Respondent re-submitted these arguments in response to Complainant's *Motion*.

Respondent argues that the IRS enforcement process was not harmed by his submission of frivolous arguments because (b)(3)/26 USC 6103 he filed were (b)(3)/26 USC 6103 before IRS had expended any significant effort to respond to them. In support of his argument that this should relieve him from liability for violating the rules of conduct for IRS practitioners, Respondent cites caselaw concerning the general principle that a plaintiff must demonstrate injury in fact in order to establish Article III standing. However, the instant case does not involve a claim for damages before an Article III court. Rather, this is an administrative disciplinary proceeding before an Article I tribunal. There is no requirement for IRS to prove damages or actual harm. Moreover, Respondent fails to recognize the inherent harm in repeatedly raising before IRS baseless arguments that divert the Government's time and energy

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[12] (b)(3)/26 USC 6103.

[13] (b)(3)/26 USC 6103.

from legitimate or more serious claims. Accordingly, the doctrine of "no harm and no foul" does not serve as a defense in this matter.

Respondent also claims that the doctrine of res judicata applies to this disciplinary matter, thereby barring it from going forward. In his letter responding to OPR's March 22, 2021 disciplinary investigation, Respondent contended first that the IRS could have imposed disciplinary action against him in the City of Fairfield case. Second, Respondent claimed that the IRS is barred from bringing this matter because the City of Fairfield case arose under the same operative facts, those being Respondent's frivolous tax arguments.

Respondent's characterization of the City of Fairfield case and this disciplinary proceeding as arising from the same operative facts, as well as his assertion that the disciplinary proceeding could have been brought in the City of Fairfield case, are misguided and incorrect. Under the doctrine of res judicata, also known as claim preclusion, a judgement on the merits in a prior suit bars a second suit involving the same parties based on the same cause of action. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 325 (1979). Thus, res judicata precludes parties from raising claims that could have been raised and decided in a prior action, whether those claims were litigated or not. Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., 590 U.S. _, 140 S. Ct. 1589, 1591, 206 L.Ed. 2d 893, 895 (2020).

For a prior judgment to bar a subsequent action under the doctrine of res judicata, the prior judgment must have been (a) a final judgment on its merits, (b) rendered by a court of competent jurisdiction; (c) the parties, or those in privity with them, must be identical in both suits; and (d) the same cause of action must be involved in both cases. Batchelor-Robjohns v. United States, 788 F.3d 1280, 1285 (11th Cir. 2015). Although the City of Fairfield case was a final judgment on the merits before a court of competent jurisdiction, the parties in both cases are not the same. The District Court case involved the City of Fairfield, Alabama and the United States. This case involves Respondent and the United States, specifically the Secretary of the Treasury, and the Director of OPR. Additionally, the cause of action is different. The City of Fairfield case involved the City's tax liability. This disciplinary proceeding seeks disciplinary action against Respondent because he made frivolous tax arguments when representing three separate taxpayers (b)(3)/26 USC 6103 before the IRS.

Respondent also claims that the disciplinary charges could have been brought in the earlier City of Fairfield case, rather than this separate disciplinary proceeding. However, Respondent's conduct at issue in this disciplinary proceeding happened after the City of Fairfield decision issued. Because Respondent had not yet engaged in the conduct at issue in this proceeding, obviously the alleged violations could not have been charged at that time.

However, even if Respondent had engaged in the alleged misconduct prior to the District Court case, an IRS attorney disciplinary proceeding is properly before this court pursuant to 31 C.F.R. § 10.70(a). Under § 10.70(a), proceedings on complaints for sanction of a practitioner will be conducted by an Administrative Law Judge. Therefore, Respondent's disciplinary proceeding pertaining to his practice before the IRS is properly before this Court and could not have been properly brought before the District Court in City of Fairfield. Accordingly, Respondent's res judicata argument must be rejected.

IV. CONCLUSION

For all the reasons discussed above, clear and convincing evidence establishes that Respondent has willfully violated 31 C.F.R. § 10.51(a)(4); § 10.34(b)(1); and § 10.22(a)(1).

V. SANCTION

As a sanction for three counts of willfully submitting frivolous tax arguments to the IRS, Complainant asks the Court to disbar Respondent from practice before the IRS pursuant to 31 C.F.R. § 10.50(a) and § 10.51. Respondent counters that the appropriate sanction is a six-month suspension or, at most, a twelve-month suspension.

Under 31 C.F.R. § 10.50(a) and § 10.51, 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, or fails to comply with the regulations in 31 C.F.R. part 10. Any sanction imposed on an IRS practitioner by this Court must "take into account all relevant facts and circumstances." 31 C.F.R. § 10.50(e). Other courts imposing sanctions in IRS disciplinary proceedings have considered factors such as the nature and seriousness of the misconduct; whether it involved dishonesty, fraud, or illegal acts; and any other aggravating or mitigating factors cited by the parties. See, e.g., OPR v. Christensen, Complaint No. 2012-00005, slip op. at 15-17 (ALJ July 23, 2013)[14]; OPR v. [redacted], supra, slip op. at 24-28. Furthermore, in order to impose a sanction of disbarment or a suspension of six months or longer, an allegation of fact that is necessary for such a finding must be proven by clear and convincing evidence in the record. 31 C.F.R. § 10.76(b).

(b)(3)/26 USC 6103

A. The "clear and convincing" standard is met.

Complainant asks this Court to impose a sanction disbarring Respondent, and Respondent concedes that a suspension of at least six months is appropriate. Under 31 C.F.R. § 10.76(b), if the sanction to be imposed is disbarment or a suspension of six months or longer in duration, the standard of proof required is clear and convincing evidence. The clear and convincing standard is such that there is a high degree of probability that the alleged misconduct is true. OPR v. Christensen, supra; *In re* Curtis, 908 P.2d 472, 477 (Ariz. 1995) (finding that state bar meets burden of clear and convincing evidence if it shows that it is "highly probable" allegations are true); *In re* Rumsey, 71 P.3d 1150, 1158-59 (Kan. 2003) ("[E]vidence is convincing 'if it is reasonable and persuasive enough to cause the trier of facts to believe it."); *In re* Gortmaker, 782 P.2d 421, 424 (Or. 1989) (defining "clear and convincing evidence" as evidence "sufficient to establishes [sic] that the truth of the facts asserted is highly probable").

All three counts in the Complaint charge Respondent with violating the rules of conduct by making frivolous tax arguments on behalf of three of his taxpayer clients. Among the evidence put forth by Complainant are [(b)(3)/26 USC 6103] that Respondent filed on behalf of his clients. These [(b)(3)/26 USC 6103] contain tax arguments that federal case law

[14] [(b)(6)]

and IRS publications deem frivolous. Because each of these writings contain these arguments, this evidence clearly and convincingly shows that Respondent engaged in the alleged misconduct. Accordingly, the standard is met to impose a sanction of disbarment or a suspension of six months or longer.

B. The material facts are not in dispute.

The Court has taken into account the relevant facts and circumstances set forth by the Complainant, Director of OPR, and by Respondent, and has determined that the material facts are not in dispute. Respondent has willfully submitted to the IRS frivolous tax arguments on behalf of his clients Taxpayer A, Taxpayer B, and Taxpayer C when he filed each of their respective (b)(3)/26 USC 6103 with the IRS. The core frivolous tax argument concerns the contention that (b)(3)/26 USC 6103 .

Respondent was put on notice by the District Court in the City of Fairfield decision that these arguments were patently frivolous. Additionally, a more than ten-year-old revenue ruling cited by the District Court, Revenue Ruling 2006-21, contains citations to authority holding as frivolous the position that (b)(3)/26 USC 6103 . Further, the IRS publication "The Truth About Frivolous Tax Arguments" similarly cites to cases that state the same. Yet, Respondent (b)(3)/26 USC 6103 the City of Fairfield decision was rendered, (b)(3)/26 USC 6103 he filed with the IRS for his taxpayer clients.

Thus, the nature of the misconduct and the facts and circumstances surrounding it are clear and not subject to reasonable dispute. The parties have had the opportunity to raise any potential aggravating and mitigating factors for the Court's consideration in determining the appropriate sanction. The parties have not identified any material disputes of fact pertaining to the alleged aggravating and mitigating factors they have raised, which are fully addressed below.

In his *Motion to Confess Liability*, Respondent asserts that, if the Court is unsure what sanction to impose, Respondent should be permitted to conduct discovery of prior similar IRS cases to ascertain what sanctions were imposed.[15] Such discovery is unnecessary. The relevant facts are undisputed, and the Court is capable of applying them to the available precedent and exercising its own discretion to determine the appropriate sanction under 31 C.F.R. §§ 10.50 and 10.76.

C. The appropriate sanction is a five-year suspension.

The basic purpose of attorney discipline is not to punish the attorney, but to protect the public, uphold the integrity of the legal system, and deter other attorneys from similar misconduct. *In re* Lath, 154 A.3d 1240, 1242 (N.H. 2017) (stating that the purpose of attorney discipline is to protect the public, maintain public confidence in the bar, preserve the integrity of

[15] Complainant argues that discovery is unnecessary because all published IRS disciplinary decisions dating from 2014 to the present are available on IRS's website. The Court notes that the web address provided by Complainant does *not* appear to contain all published IRS disciplinary decisions, nor is it searchable. However, the Court deems discovery unnecessary for other reasons.

the profession, and prevent similar misconduct in the future)); *In re* Buckalew, 731 P.2d 48 (Alaska 1986) (emphasizing that paramount concern is protection of the public, but also acknowledging concerns including deterrence of unethical conduct and education of other lawyers and the public).

Complainant claims that a sanction of disbarment is appropriate having considered all relevant factors to Respondent's fitness to practice. Complainant contends that the ultimate issue in disbarment proceedings is whether the practitioner in question is fit to practice. See Harary v. Blumethal, 555 F.2d 1113, 1116 (2nd Cir. 1977). Accordingly, Complainant reasons that, in the interest of protecting the public from practitioners who are unfit to represent taxpayers before the IRS, a decision to disbar Respondent should be sustained. As further support for his position, Complainant maintains that the record reflects that Respondent repeatedly failed to acknowledge that he advanced frivolous legal arguments in the course of his practice before the IRS. Complainant further claims that Respondent has refused to accept responsibility for his misconduct and as a result his continued practice before the IRS is not in the public interest.

Complainant also contends that as the Director of OPR, he is the Treasury Department official who has primary, day-to-day responsibility to investigate allegations of misconduct by practitioners and to enforce the regulations governing practice before the IRS. Therefore, he claims that he possesses substantial expertise in weighing the seriousness of a practitioner's misconduct, and as such, his proposed sanction is entitled to deference. See OPR v. (b)(3)/26 USC 6103, supra, slip op. at 6.

Respondent argues that the appropriate sanction is a six-month suspension, or at most a twelve-month suspension. In support, he asserts that he suffered illness and personal hardships at certain times, that he has taken responsibility for his misconduct and taken steps to ensure it will not recur, and that the City of Fairfield matter took place years ago.

The OPR Guide to Sanctions[16] sets forth eleven mitigating and thirteen aggravating factors to be considered when determining the appropriate sanction for a practitioner who has violated the rules set forth in the regulations governing practice before the IRS. Both Respondent and Complainant addressed the mitigating factors, while Complainant alone addressed the aggravating factors.

1. Mitigating factors for reduction of sanction.

Respondent claims that mitigating factors 4 and 5 apply to his matter and should be considered when determining the appropriate sanction.[17] These mitigating factors state:

> (4) Illness, incapacitation, or personal hardships directly correlating to the action or inaction violating Circular 230.

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[16] Available at: https://www.irs.gov/pub/irs-utl/newly_revised_final_tax_non_compliance_sanction_guidelines_3.pdf.

[17] Respondent details the mitigating factors with letters a through k, but the OPR Guide to Sanctions lists them with numerals, which the Court will adopt here.

> (5) Illness, incapacitation, or personal hardships of the family or others close to the practitioner directly correlating to the action or inaction violating Circular 230.

Respondent claims that both of these mitigating factors apply to him and his violation of Circular 230. First, his daughter (b)(6) . According to Respondent, this required numerous trips to attend to her illness. Respondent explained that his daughter's illness occurred during the time that Respondent filed and prosecuted the City of Fairfield case against the IRS. Additionally, Respondent explained that he was (b)(6) and claims that it had an "overwhelming negative effect on him and his practice." Respondent did not provide the timing of his (b)(6) , but he did state that (b)(6) .

Complainant contends that factors 4 and 5 do not apply to Respondent because they do not directly correlate to Respondent's violation of the IRS rules of practice. Complainant claims that during the time of both he and his daughter's illnesses Respondent continued to provide his accounting and legal services. Complainant further states that there is no evidence that these illnesses prevented Respondent from complying with Circular 230.

These mitigating factors do not apply to Respondent and do not serve to reduce a sanction in this matter. Respondent does not provide a convincing causal connection between his daughter's (b)(6) , along with his (b)(6) , juxtaposed with his drafting and filing of the (b)(3)/26 USC 6103 containing frivolous tax arguments on (b)(3)/26 USC 6103 and (b)(3)/26 USC 6103 , the subject of the Complaint.

Next Respondent claims that mitigating factor 8 also applies to him and should be considered in lowering any sanction imposed. Mitigating factor 8 states:

> (8) Recognition of action or inaction violating Circular 230 and commitment to future compliance.

In claiming this mitigating factor Respondent contends that he takes full responsibility for his actions and is committed to future compliance. Complainant counters that Respondent has not taken responsibility for his actions because his confession of liability is to the frivolous arguments he made in the Fairfield lawsuit, whereas this disciplinary matter concerns the (b)(3)/26 USC 6103 filed with the IRS containing frivolous arguments. Mitigating factor 8 does not apply to Respondent, because, as pointed out by Complainant, he has not taken responsibility for the misconduct set forth in Counts I, II, III of the Complaint. In this disciplinary proceeding, he is not charged with misconduct in the City of Fairfield case.

Respondent claims that mitigating factors 9 and 10 also apply to him and should reduce any sanction imposed. These mitigating factors state:

> (9) For firms, commitment to establishing internal controls to prevent recurrences of the violation.
>
> (10) Preventative measures in effect prior to the misconduct/ and or measures put in place after the misconduct to prevent future violations.

Respondent states that he has established internal controls in his practice to prevent recurrence of further violations that includes agreeing not to file any lawsuits against the IRS for five years. Respondent further asserts that after five years, if he decides to litigate against the IRS, Respondent's current counsel will serve as a practice monitor. He further explains that he took two continuing legal education (CLE) classes to better understand his responsibilities under Circular 230.

Complainant interprets Respondent's offer to cease filing lawsuits against the IRS as an agreement to a five-year suspension from practice before the IRS and indicates it would accept such an offer in place of a disbarment. Nonetheless, Complainant also points out that Respondent provides no details of the internal controls that he has implemented to ensure his compliance with the rules.

Indeed, Respondent does not clearly explain the internal controls and measures he has put in place to prevent future violations. Additionally, although Respondent's counsel is a litigation attorney, he does not provide any information as to whether he has tax experience, in particular experience litigating against the IRS that reasonably might be necessary in being an effective practice monitor for Respondent. Therefore, Respondent cannot have mitigating credit for factors 9 and 10. However, Respondent did take the initiative to complete two CLE classes and this provides minor mitigation in his favor.

Finally, Respondent claims that mitigating factor 11 applies and should reduce any sanction. Mitigating factor 11 is the age of the action. Respondent claims that the City of Fairfield case took place 3 to 4 years ago, without further explanation as to how this applies to the present disciplinary matter. Complainant points out that the *Complaint* in this matter was filed on or about July 20, 2022, and that is within the applicable statute of limitations. The City of Fairfield case does not apply to the age of this disciplinary action; therefore, it is not a mitigating factor.

2. Aggravating factors to increase the applicable sanction.

Complainant contends that four aggravating factors apply to Respondent's misconduct and should serve to increase the applicable sanction in this case. Complainant begins with aggravating factor 7, that would increase the sanction for a pattern of action or inaction violating the rules governing practice. Complainant contends that Respondent established a pattern of making frivolous tax arguments when he represented three separate clients and made frivolous tax arguments on behalf of each. Aggravating factor 7 does apply to Respondent as he did engage in a pattern of making frivolous tax arguments when representing three separate clients in

(b)(3)/26 USC 6103 filed with the IRS. Therefore, this aggravating factor serves to heighten the sanction imposed.

Complainant next claims that aggravating factor 8 applies to Respondent. This factor is applicable when a practitioner asserts legal arguments previously ruled frivolous by courts of law. Complainant cites to Judge Bowdrie's decision in the City of Fairfield, wherein the Judge explained that droves of cases reject Respondent's frivolous tax arguments. Aggravating factor 8 does apply to Respondent. Numerous courts have found that Respondent's OMB control number theory is frivolous. Therefore, this aggravating factor applies and weighs in favor of a heightened sanction.

Complainant also asserts that aggravating factor 11 applies to Respondent because this aggravating factor pertains to there being a number of offenses. Complainant points to the four (b)(3)/26 USC 6103 that Respondent filed on behalf of three of his taxpayer clients as his number of offenses. Complainant also claims that Respondent is not exercising due diligence in violation of § 10.22(a), because he repeatedly advanced frivolous tax arguments and did not exercise due diligence to determine the correctness of his representations. As a result, Complainant claims that Respondent does not possess the necessary competence to engage in practice before the IRS, as required by § 10.35(a). The Complaint charges Respondent with three counts of willfully submitting frivolous tax arguments to the IRS. Thus, Respondent engaged in a number of offenses when he filed four (b)(3)/26 USC 6103 with the IRS on behalf of three taxpayer clients containing frivolous tax arguments. As a result, aggravating factor 11 weighs in favor of an increased sanction.

Another aggravating factor that Complainant contends applies to Respondent is aggravating factor 12, which applies to a practitioner who fails to understand or recognize that their actions constituted a violation of the rules of practice. Complainant maintains that Respondent does not understand or recognize that the filing of the four (b)(3)/26 USC 6103 with the IRS violated his duties under the regulations governing practice before the IRS. This is evidenced most recently by his *Motion to Confess Liability* wherein he admits only to violations pertaining to his conduct in the City of Fairfield case, not the misconduct charged in the Complaint. Respondent has not admitted to liability for the three counts contained in the Complaint. Rather, he confesses to liability in the City of Fairfield case for which he is not charged with violations. As a result, aggravating factor 12 applies to Respondent because he has not confessed liability to the counts in the Complaint; therefore, it appears that Respondent fails to understand or recognize his actions that violated the rules governing practice. Aggravating factor 12 applies to Respondent and weighs in favor of a stricter sanction.

Finally, Complainant claims that aggravating factor 13 applies to Respondent. That aggravating factor concerns the negative effect Respondent's misconduct had on tax administration. Complainant contends that Respondent advanced frivolous tax arguments on behalf of his clients in an attempt (b)(3)/26 USC 6103 and that his clients were relying on him for sound legal advice, but such (b)(3)/26 USC 6103 advice exposed his clients to both civil and criminal penalties. Respondent's misconduct clogged the IRS's tax system with (b)(3)/26 USC 6103 containing frivolous tax arguments that both IRS publications and federal case law explained are improper. As a result, aggravating factor 13

applies to Respondent as his frivolous arguments either did have, or potentially had, a negative effect on tax administration.

ORDER

In Respondent's *Motion to Confess Liability*, he seeks to confess liability to conduct that occurred in the City of Fairfield case, which is not charged in any of the three counts of the *Complaint*. However, to the extent that Respondent is accepting liability more broadly for making improper OMB control number theory arguments, the Court will accept Respondent's confession of liability for making such frivolous tax arguments. The Court does not need additional evidence to determine the appropriate sanction. Therefore, Respondent's request for discovery is **DENIED**.

Complainant's motion for summary judgment is hereby **GRANTED**. Respondent Otis Stewart, Jr. shall be **SUSPENDED** from practice before the IRS for a period of five years, with reinstatement conditioned upon compliance with the requirements of 31 C.F.R. § 10.81.

So **ORDERED**,

ALEXANDER FERNANDEZ-PONS

Digitally signed by: ALEXANDER FERNANDEZ-PONS
DN: CN = ALEXANDER FERNANDEZ-PONS C = US O = U.S. Government OU = Department of Housing and Urban Development, Office of the Secretary
Date: 2023.04.20 10:48:39 -04'00'

Alexander Fernández-Pons
United States Administrative Law Judge

Notice of Appeal Rights. Pursuant to 31 C.F.R. § 10.77, this decision may be appealed by any party by filing a Notice of Appeal within thirty (30) days of the date this decision is served on the party. The Notice of Appeal must be filed with the Secretary of the Treasury, or delegate deciding appeals, and must include a brief that states exceptions to the decision of the Administrative Law Judge and supporting reasons for such exceptions. The Notice of Appeal must be filed in duplicate with the OPR Director, and a copy of the Notice of Appeal and supporting brief must be served on any non-appealing party's representative.

CERTIFICATE OF SERVICE

I hereby certify those copies of the foregoing **ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY ADJUDICATION** issued Alexander Fernandez-Pons, Administrative Law Judge, in IRS-2022-00001, were sent to the following parties on this 8th day of June, in the manner indicated:

/s/ Cinthia Matos

Cinthia Matos, Docket Clerk
HUD Office of Hearings and Appeals

VIA E-MAIL

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