BEFORE THE
BOARD OF ACCOUNTANCY
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	Case No. AC-2006-20
JAMES MARCUS MARIETTA, III 895 Dove Street, Suite 300 Newport Beach, CA 92660 Respondent.	OAH No. L2006120288

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 14, 2007, in San Diego, California.

Kathleen B.Y. Lam, Deputy Attorney General, represented complainant Carol Sigmann, the Executive Officer of the California Board of Accountancy, Department of Consumer Affairs, State of California.

Respondent James Marcus Marietta, III, C.P.A., J.D. represented himself and was present throughout the administrative hearing.

The matter was submitted on September 14, 2007.

FACTUAL FINDINGS

Jurisdictional Matters

1. On September 1, 2006, complainant Carol Sigmann, the Executive Officer of the California Board of Accountancy (the Board), Department of Consumer Affairs, State of California, signed the accusation in her official capacity. The accusation alleged grounds for license discipline as a result of Marietta's 2005 federal conviction of conspiring to defraud the United States and failing to notify the Board of that conviction.

The accusation and other required jurisdictional documents were served on respondent James Marcus Marietta, III, C.P.A., J.D. (Marietta or respondent), who timely filed a notice of defense.

On September 14, 2007, the administrative record was opened. Jurisdictional documents were presented, sworn testimony and documentary evidence was received, closing arguments were given, the record was closed, and the matter was submitted.

License History

2. On May 11, 1990, the Board issued Certified Public Accountant Certificate No. 56082 to Marietta, which was subject to renewal every two years. The certificate was renewed thereafter and expired on February 28, 2007. It is currently in a "delinquent" status.

There is no history of any discipline having been imposed by the Board against Certified Public Accountant Certificate No. 56082.

Marietta's Conviction

3. On December 12, 2005, Marietta was convicted on his plea of guilty of violating title 18, United States Code, section 371 (conspiracy to defraud the United States), a felony involving moral turpitude, in the United States District Court, Northern District of Ohio, Eastern Division in case no. CR 102CR 450 entitled *United States of America v. James M. Marietta, III.* The conviction is substantially related to the qualifications, functions, and duties of a certified public accountant.

4. On March 7, 2006, the court imposed judgment. Marietta was committed to the custody of the United States Bureau of Prisons to be imprisoned at the Federal Correctional Institute at Lompoc, California for 14 months. In addition, Marietta was fined $10,000, was ordered to make restitution to the Internal Revenue Service of $86,900, was prohibited from possessing a firearm or any other dangerous weapon, and was directed to cooperate in the collection of DNA as directed by the probation officer. Upon Marietta's release from custody, he placed on supervised release for a period of three years.

Failure to Disclose the Conviction

5. On December 13, 2005, the day after Marietta entered his plea of guilty, Jeffrey A. McLellan (McLellan), the last United States Attorney to attorney prosecute the federal criminal action against Marietta, forwarded a letter to the Board advising of the Board of the entry of Marietta's plea of guilty, together with documentation related to Marietta's guilty plea.

In light of the prolonged negotiations, the numerous disclosures required in connection with the entry of the guilty plea, and Marietta's candor throughout these proceedings, it is concluded that Marietta was likely aware that McLellan would send the letter to the Board advising of Marietta's conviction. Because of this circumstance, the clear and convincing evidence did not establish that Marietta failed to notify the Board of his conviction.

Circumstances of the Offense

6. In the December 12, 2005 plea agreement, Marietta stipulated to the following:

> "From in or about late 1994 to in or about early 1995, [Marietta] willfully and knowingly conspired with [L.E.R.] to provide [L.E.R.] with taxable income in such a way that the Internal Revenue Service would be unlikely to detect the transactions. Specifically, between September and December 1994, [L.E.R.] caused P.I.E. Mutual Insurance Company ("P.I.E.") to pay a total of $400,000 to Economic Research Institute & Consulting Association, Inc. ("ERICA"), a company owned by [Marietta]. Between October and December 1994, [Marietta] caused ERICA to pay $320,000 of these funds to P.I.E. to reduce [L.E.R.'s] loan account with P.I.E. As a result of the manner in which [Marietta] and [L.E.R.] arranged these transactions, [Marietta] caused the amount of [L.E.R.'s] taxable income reported to the Internal Revenue Service to be improperly understated by $320,000."

7. Marietta established that in March 1996, he became the CFO of the PIE Mutual Insurance Company (PIE), a nonprofit mutual insurance company primarily engaged in the offer of medical malpractice insurance; that he recommended the commutation of a reinsurance policy held by PIE to acquire additional capital and that he notified the State of Ohio and PIE's auditors of his recommendation and plan; that the Ohio Department of Insurance later reversed the transaction; that Marietta was a highly vocal opponent of that decision to reverse the transaction; that Marietta resigned as PIE's CFO in December 1997; that the United States Attorney's Office began an investigation in December 1997; that the Internal Revenue Service (IRS) also investigated the principals involved in PIE's operations; that PIE went into receivership in March 1998; that Marietta was indicted in October 2002 and was charged with, among other matters, filing false income tax documents and with wrongfully transferring $1.65 million in PIE funds to a reinsurance broker; that superseding indictments were filed; that on July 30, 2004, Assistant U.S. Attorney James Moroney (Moroney), who was then involved in the prosecution, offered a misdemeanor plea agreement to Marietta which included Marietta's waiver of any right to seek attorney fees or other sanctions from the United States government, which was conditioned upon IRS approval; that on October 28, 2004, Moroney offered another misdemeanor plea agreement to Marietta which included an agreed statement that the "$140,000 omitted from the corporate return was in fact paid on the defendant's personal return" and that "there is no computation of tax loss because the tax was 'otherwise paid'" and that Marietta would plead guilty to the willful failure to file an income tax return in violation of title 26, United States Code, section 7203; Marietta, his criminal defense attorney, and Moroney signed the aforementioned modified plea agreement on November 10, 2004; the IRS refused to accept the plea agreement; Moroney resigned from the prosecution of the matter and McLellan, who was a Washington, D.C. prosecutor with the U.S. Department of Justice Tax Division, was assigned to the prosecution; that the U.S. Department of Justice refused to offer Marietta a misdemeanor plea agreement and threatened Marietta with 10 to 12 years custody in federal

prison if he was convicted on the underlying charges; and that on December 12, 2005, Marietta entered the guilty plea described in Factual Findings 3 and 6.

8. Marietta's testimony in explanation was compelling, and he explained the circumstances resulting in his guilty plea. Marietta stated, "My plea to this [conspiracy to defraud the government] charge was coerced and occurred only because I had no other choice." Nevertheless, Marietta's conviction stands as conclusive evidence of his guilt of his conspiracy to defraud the United States and the factual statement Marietta provided to the United States District Court to support of that guilty plea must be considered factually based.

Marietta's Education, Training, and Experience

9. Marietta was born on February 2, 1947. He grew up in Cleveland, Ohio, and Southern California. He graduated from a private high school in Ohio in 1966. He received a bachelor's degree in business administration from Cleveland State University in 1972 and a juris doctorate from Capital University Law School in 1988.

10. Marietta was an auditing supervisor with a Big Eight accounting firm from 1972 through 1974; the controller and treasurer of a Midwest manufacturing company from 1975 through 1977; a vice president of finance of a Midwest manufacturing company from 1977 through 1988; a financial consultant to Ohio-based companies from 1978 through 1984; an executive vice president of a securities firm from 1984 through 1987; a faculty member at Ohio State University in 1988; a financial investigator with the Resolution Trust Corporation from 1990 through 1992; a litigation consultant to law firms and the insurance industry (primarily in the medical malpractice field) from 1979 through 1996; the CFO of PIE from 1996 through 1997; a consultant in commercial operations from 1998-2000; and the executive vice president of a California-based medical malpractice insurance company from 2000 through 2003. Marietta was imprisoned at the Lompoc federal correctional facility from April 2006 through March 2007, and he resided in a halfway house in Los Angles in following his release from Lompoc. Since then Marietta has worked as a staff accountant with a Newport Beach accounting firm and as the manager of a real estate office. He earns $20 per hour as a staff accountant, working about 20 hours a week, and $8 per hour as an office manager at the real estate brokerage.

11. Marietta is not married. He supports no one other than himself. As a consequence of the criminal proceedings, Marietta lost his life savings and retirement funds. He is virtually destitute. Marietta owes the Internal Revenue Service approximately $86,000 in restitution, and the United States about $10,000 in unpaid fines. Marietta's supervised release terminates in March 2009.

12. Marietta presented himself as a victim of a Kafkaesque prosecution. The written materials he provided corroborated much of his testimony that "They [the IRS and others] were not going to let me go until they got a little piece of my tail . . . because of my position in PIE." Marietta testified that one of the main things he learned from his unhappy experience was that "You cannot trust the Feds" and, referring to PIE's CEO (who was

convicted of tax evasion and violating campaign finance laws), that one should "be careful of who you stick around with."

13. Marietta testified that any wrongdoing was wholly unrelated to his duties as a certified public accountant, that any wrongdoing arose out of his relationship with PIE. But, it is uncontested that Marietta's long and successful career as a certified public accountant was one of the primary reasons he became involved in the management and operation of PIE.

14. Marietta has not held himself out to be a certified public accountant since his conviction.

Expert Testimony

15. John O'Connor, C.P.A. (O'Connor), has been an investigator with the Board for more than a decade. He is a registered certified public accountant. As a result of the Board's receipt of McLellan's letter (Factual Finding 5), O'Connor opened an investigation. O'Connor reviewed considerable documentation, relevant statutes, and regulations. O'Connor did not contact Marietta, McLellan, or anyone else involved in the prosecution of the underlying matter to obtain additional information.

16. O'Connor determined that following a formal disciplinary hearing occurring on August 10, 2007, the Accountancy Board of Ohio fined Marietta $1,000 and suspended Marietta's CPA certificate "for the duration of [Marietta's] court-ordered requirements, including completion of probation and payment of court-ordered restitution." Marietta is required to apply to the Accountancy Board of Ohio after he completes the court-ordered requirements. Marietta conceded that this Ohio disciplinary history was true.

17. Based on his review of relevant materials, O'Connor believed that Marietta's conviction was substantially related to the qualifications, functions, and duties of a registered certified public accountant, who is held to high standards when consulting in tax matters and engages in other financial transactions. In reaching this opinion, which was reasonable and supported, O'Connor was not required to determine if Marietta's misconduct was directly related to an engagement as a certified public accountant.

Disciplinary Guidelines

18. The Board published a manual of disciplinary guidelines (6th Ed., 2005) that are to be used by administrative law judges, attorneys, licensees, and others involved in the disciplinary process. The guidelines set forth recommended discipline for violations of current statutes and regulations and contain factors to be considered in aggravation and mitigation, as well as rehabilitation criteria. The Board's disciplinary guidelines were considered and applied in this matter.

The Measure of Discipline

19. The recommendation for a felony conviction is a maximum penalty of an outright revocation and a minimum penalty of a revocation, stayed, with an actual suspension from practice of 120 days and three years probation. Similar recommendations exist for conduct involving dishonesty, fraud, or gross negligence in the practice of accountancy.

20. Using the disciplinary guidelines, the following aggravating factors exist: the factual statement underlying the guilty plea and the nature of the conviction establish that Marietta knowingly violated the law, which resulted in a financial loss to the United States government. It was not established that Marietta had a prior history of discipline in California, that he misappropriated entrusted funds, or that he took advantage of any client for direct personal gain.

21. Using the disciplinary guidelines, the following mitigating factors exist: Marietta cooperated with the United States government throughout the prosecution; and, more than a decade has passed since Marietta's wrongdoing, during which Marietta was engaged in the work of a certified public accountant without recurrence of any wrongdoing. Marietta denied any wrongdoing and did not demonstrate remorse and, to that extent, he refused to become a false penitent.

22. Using the disciplinary guidelines for rehabilitation, Marietta was convicted of a serious felony for which he spent about a year in a federal correctional facility. There was no other evidence of any misconduct established. Marietta served his time, but due to his financial circumstances, the bulk of restitution and fines remain unpaid. Marietta remains on supervised release. There is no way by which a federal conviction may be expunged.

23. Under all the circumstances, an outright revocation of Marietta's certification will best protect the public. Even though Marietta made a fairly compelling presentation concerning his factual innocence and even though Marietta has an otherwise unblemished record as a certified public accountant, Marietta was convicted of a very serious offense related to the qualifications, functions, and duties of a certified public accountant. Marietta owes approximately $100,000 in restitution and fines, and there appears to be no way in which he can satisfy those financial obligations in the near future. He remains on supervised release. Marietta is encouraged to continue his rehabilitation and he is invited to reapply for reinstatement of his certification when he completes the period of supervised release.

Costs of Investigation and Prosecution

24. A certification of costs established that the Board's investigation included approximately 19 hours of investigation, which was billed at rates ranging from $82 to $86 per hour. The time involved in the investigation and these hourly rates were reasonable. The reasonable value of the Board's investigation is $2,400.

25. The certification of costs and the declaration of the deputy attorney general who prosecuted the mater established that the Office of the Attorney General billed about 37 hours in the prosecution of the matter, at rates ranging from $146 to $158 per hour. The case was complicated by the nature of respondent's factual defense. The deputy attorney general who prosecuted the matter was well prepared. The reasonable value of the Board's prosecution is $5,500.

26. Marietta did not contest the Board's costs of investigation and prosecution. He established that he is virtually destitute, that he holds two jobs that do not pay well, that the federal government is taking a substantial portion of his gross income in payment of restitution, and that he owes nearly $100,000 in restitution and fines.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The standard of proof in an administrative disciplinary action seeking the suspension or revocation of an accountant's certificate, including the substantial relationship between a conviction and the qualifications, functions, and duties of an accountant is "clear and convincing evidence." (*Clare v. California State Board of Accountancy* (1992) 10 Cal.App.4th 294, 305.)

The requirement of proof by clear and convincing evidence presents a heavy burden, far in excess of the preponderance sufficient for most civil litigation. Clear and convincing evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84.)

The clear and convincing standard of proof applies to the accusation.

Applicable Statutes

2. Business and Professions Code section 490 provides in part:

> "A board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. A conviction within the meaning of this section means a plea . . . of guilty . . . Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence . . ."

3. Business and Professions Code section 5100 provides in part:

"After notice and hearing the board may revoke, suspend, or refuse to renew any permit or certificate granted . . . or may censure the holder of that permit or certificate for unprofessional conduct that includes, but is not limited to, one or any combination of the following causes:

(a) Conviction of any crime substantially related to the qualifications, functions and duties of a certified public accountant or a public accountant . . ."

4. Business and Professions Code section 5063 provides in part:

"(a) A licensee shall report to the board in writing of the occurrence of any of the following events occurring on or after January 1, 1997, within 30 days of the date the licensee has knowledge of these events:

(1) The conviction of the licensee of any of the following:

(A) A felony.

(B) Any crime related to the qualifications, functions, or duties of a public accountant or certified public accountant, or to acts or activities in the course and scope of the practice of public accountancy.

(C) Any crime involving . . . the preparation, publication, or dissemination of false, fraudulent, or materially misleading financial statements, reports, or information.

As used in this section, a conviction includes the initial plea, verdict, or finding of guilt, pleas of no contest, or pronouncement of sentence by a trial court even though that conviction may not be final or sentence actually imposed until appeals are exhausted . . ."

Arneson v. Fox

5. An administrative agency may rely on a plea and the conviction based on that plea to establish a reasonable and substantial relationship to licensed activities in a disciplinary proceeding. An individual may introduce evidence of extenuating circumstances by way of mitigation or explanation, as well as any evidence of rehabilitation, but an inquiry into the circumstances surrounding the offense should not form the basis of impeaching a prior conviction. Regardless of the various motives which may have impelled the plea, the conviction based thereon stands as conclusive evidence of applicant's guilt of the offense charged. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 446-449.)

Moral Turpitude

6. Moral turpitude includes fraud and a crime in which an intent to defraud is an essential element is a crime involving moral turpitude. The universal application of this rule was stated by the United States Supreme Court in *Jordan v. De George* (1951) 341 U.S. 223. In determining that a conviction of conspiracy to defraud the government of liquor taxes was a crime involving moral turpitude, the court stated at 227-229: "Without exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude . . . In view of these decisions, it can be concluded that fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude." Thus, if the actual commission of an offense involves moral turpitude, then a conspiracy to commit such an offense involves moral turpitude. (*Otash v. Bureau of Private Investigators & Adjusters* (1964) 230 Cal.App.2d 568, 571.)

Good moral character includes traits of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the laws of the state and the nation and respect for the rights of others and for the judicial process. Persons of good character also do not commit acts or crimes involving moral turpitude – a concept that embraces a wide range of deceitful and depraved behavior. (*In re Lesansky* (2001) 25 Cal.4th 11, 15.)

Substantial Relationship

7. A statute can constitutionally bar a person from practicing a lawful profession only for reasons related to his fitness or competence to practice that profession. The state's power to regulate a profession cannot be used arbitrarily to penalize conduct having no bearing upon fitness for its practice. The requirement of such a relation is constitutionally mandated. Whether this requirement tying the conduct to the fitness or competence to practice a profession is termed a "nexus" or a "relationship," the inherent meaning is the same. There must be a logical connection between the conduct complained about and one's fitness or competence to practice the profession or to the qualifications, functions, or duties of the profession in question. (*Clare v. California State Boar of Accountancy* (1992) 10 Cal.App.4th 294, 302.)

8. California Code of Regulations, title 16, section 99 provides in part:

> "For the purposes of . . . suspension, or revocation of a certificate . . . a crime or act shall be considered to be substantially related to the qualifications, functions or duties of a certified public accountant . . . if to a substantial degree it evidences present or potential unfitness of a certified public accountant . . . to perform the functions authorized by his . . . certificate . . . in a manner consistent with the public health, safety, or welfare. Such crimes or acts shall include but not be limited to those involving the following:

(a) Dishonesty, fraud, or breach of fiduciary responsibility of any kind . . . "

9. Marietta's conviction of conspiracy to commit tax fraud involved moral turpitude, and it reflects poorly on the good moral character required of a certified public accountant. Based on the nature of Marietta's conviction, the factual statement he provided to the United States District Court to support that conviction, the expert testimony in this matter, and the applicable regulation, it is concluded that Marietta's December 2005 conspiracy conviction has a substantial relationship to the qualifications, functions, and duties of a certified public accountant.

This conclusion is based on Factual Findings 5, 6, and 8 and on Legal Conclusions 1-3 and 5-8.

Rehabilitation

10. California Code of Regulations, title 16, section 99.1 sets forth various rehabilitation criteria. Factual Finding 22 discussed these regulatory criteria.

11. Rehabilitation is a state of mind. The law looks with favor upon rewarding one who has achieved reformation and regeneration with the opportunity to serve. (*Pacheco v. State Bar* (1987) 43 Cal. 3d 1041, 1058.) The evidentiary significance of an individual's misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) Cal. 3d 1061, 1070.) While Marietta's stubborn refusal to acknowledge the impropriety of his actions, on the one hand, makes it difficult to feel confident that he will conform his conduct to the required high professional standards in the future (See, *Kapelus v. State Bar* (1987) 44 Cal.3d 179); his consistent refusal to retract his claim of innocence and repent may reinforce rather than undercut a showing of good character on the other hand because Marietta refused, in effect, to become a fraudulent penitent to his own advantage. (See, *Hall v. Committee of Bar Examiners* (1979) 25 Cal.3d 73.) Finally, since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, in evaluating rehabilitation, little weight is generally placed on the fact that an individual has not committed additional crimes while in prison or while on probation or parole. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.)

12. Marietta is a likeable, sympathetic individual with a compelling story. Nevertheless, he stands convicted of a very serious felony involving moral turpitude. His testimony at the administrative hearing concerning his lack of culpability was supported in large measure by the documentary evidence he presented; but, his testimony, in that regard, was wholly inconsistent with plea he entered and the factual basis he provided to support that plea. The conviction is recent, and Marietta remains on supervised release. Under all the circumstances, the evidence in mitigation and rehabilitation, when measured against the crime of which Marietta was convicted and the evidence in aggravation, does not support Marietta's retention of his certificate, even on a probationary basis. This conclusion is based on Factual Findings 2-15 and on Legal Conclusions 10 and 11.

Cause to Revoke the Certificate

13. Cause does not exist under Business and Professions Code section 5063 to take any disciplinary action against Marietta's certification for the alleged failure to report his felony conviction to the Board. The clear and convincing evidence did not establish that Marietta willfully failed to report that conviction because it is more likely than not that Marietta believed the conviction would be reported to the Board by the last federal attorney who represented the United States government in the criminal prosecution.

This conclusion is based on Factual Findings 2, 3, and 5 and on Legal Conclusions 1 and 4.

14. Cause exists under Business and Professions Code sections 490 and 5100, subdivision (a), to revoke Marietta's certification as a certified public accountant. The clear and convincing evidence established that on December 12, 2005, Marietta was convicted on his plea of guilty of violating title 18, United States Code, section 371 (conspiracy to defraud the United States), a felony involving moral turpitude. The conviction is substantially related to the qualifications, functions, and duties of a certified public accountant. Insufficient evidence of rehabilitation was provided to permit Marietta to retain his certification, even on a probationary basis.

This conclusion is based on Factual Findings 2-23 and on Legal Conclusions 1-3 and 5-12.

Recovery of Costs

15. Business and Professions Code section 125.3 provides in part:

> "(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the department . . . upon request of the entity bringing the proceeding may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.
>
> . . .
>
> (c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the entity bringing the proceeding or its designated representative shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

(d) The administrative law judge shall make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a). The finding of the administrative law judge with regard to costs shall not be reviewable by the board to increase the cost award. The board may reduce or eliminate the cost award . . ."

16. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court held that the imposition of costs for investigation and enforcement under title 16, California Code of Regulations, section 317.5 did not violate due process. However, the court held that it was incumbent on the Board to exercise its discretion to reduce or eliminate cost awards in a manner to ensure that the claims recovery regulation did not "deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing." The Court set forth four factors required to consider in deciding whether to reduce or eliminate costs: (1) whether the chiropractor used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; (2) whether the chiropractor had a "subjective" good faith belief in the merits of his position; (3) whether the chiropractor raised a "colorable challenge" to the proposed discipline; and (4) whether the chiropractor had the financial ability to make payments.

Since title 16, California Code of Regulations, section 317.5 and Business and Professions Code section 125.3 contain substantially the same language and seek the same kind of recovery, it is reasonable to extend the reasoning in *Zuckerman* to Business and Professions Code section 125.3.

17. Complainant established that the Board's reasonable costs of investigation and prosecution totaled $7,900. (Factual Findings 24 and 25.) Marietta used this proceeding to reduce the severity of the discipline, he had a subjective good faith belief in the merits of his claim, he raised a colorable challenge to the proposed discipline, and he established that he is virtually destitute and cannot reasonably be expected to pay such costs. (Factual Findings 4, 7, 8, 11-13, and 26.)

18. Under all the circumstances, causes exists to direct Marietta to pay $2,500 in costs.

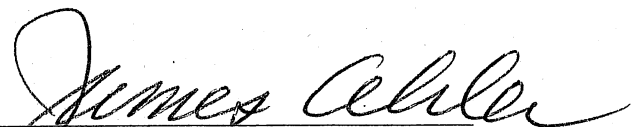
This conclusion is based on Factual Findings 4, 7, 8, 11-13, and 24-26 and on Legal Conclusions 15-17

ORDER

Certified Public Accountant Certificate No. 56082 issued by the California Board of Accountancy to James Marcus Marietta, III, C.P.A., J.D. is revoked.

James Marcus Marietta, III, C.P.A., J.D. shall pay $2,500 to the California Board of Accountancy for its costs of investigation and enforcement.

DATED: 10/11/07.



JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
BOARD OF ACCOUNTANCY
STATE OF CALIFORNIA

In the Matter of the Accusation Against JAMES MARCUS MARIETTA, III 895 Dove Street, Suite 300 Newport Beach, CA 92660 Respondent,	Case No. AC-2006-20 OAH No. L2006120288

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the CALIFORNIA BOARD OF ACCOUNTANCY as its Decision in the above-entitled matter.

This Decision shall become effective December 26, 2007.

IT IS SO ORDERED.

Date: November 26, 2007

CALIIFORNIA BOARD OF ACCOUNTANCY

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BEFORE THE
BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: JAMES MARCUS MARIETTA, III, C.P.A. 895 Dove Street, Suite 300 Newport Beach, CA 92660 Certified Public Accountant Certificate No. 56082 Respondent.	Case No. AC-2006-20 **ACCUSATION**

Complainant alleges:

PARTIES

1. Carol Sigmann ("Complainant") brings this Accusation solely in her official capacity as the Executive Officer of the Board of Accountancy.

2. On or about May 11, 2006, the Board issued Certified Public Accountant Certificate Number 56082 to James Marcus Marietta, III, CPA ("Respondent"). The Certificate expires on February 28, 2007, unless renewed.

JURISDICTION

3. This Accusation is brought before the Board of Accountancy, under the authority of the following laws. All section references are to the Business and Professions Code

unless otherwise indicated.

4. Section 5100 of the Code states in pertinent part:

"After notice and hearing the board may revoke, suspend, or refuse to renew any permit or certificate granted under Article 4 (commencing with Section 5070) and Article 5 (commencing with Section 5080), or may censure the holder of that permit or certificate for unprofessional conduct that includes, but is not limited to, one or any combination of the following causes:

"(a) Conviction of any crime substantially related to the qualifications, functions and duties of a certified public accountant or a public accountant.

". . . ."

5. Section 5063 of the Code requires a licensee to report in writing to the Board within 30 days all felony convictions and convictions of any crime related to the qualifications, functions or duties of a licensee or committed in the course and scope of practice of public accountancy, or involving theft, embezzlement, misappropriation of funds or property, breach of a fiduciary responsibility, or the preparation, publication, or dissemination of false, fraudulent, or materially misleading financial statements, reports or information.

6. Section 5106 of the Code states:

"A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this article. The record of the conviction shall be conclusive evidence thereof. The board may order the certificate or permit suspended or revoked, or may decline to issue a certificate or permit, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made, suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing such person to withdraw his plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty or dismissing the accusation, information or indictment."

7. Section 5107(a) of the Code states:

"The executive officer of the board may request the administrative law judge, as

part of the proposed decision in a disciplinary proceeding, to direct any holder of a permit or certificate found to have committed a violation or violations of this chapter to pay to the board all reasonable costs of investigation and prosecution of the case, including, but not limited to, attorneys' fees. The board shall not recover costs incurred at the administrative hearing."

8. Section 490 of the Code states:

"A board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code."

9. Section 493 of the Code states:

"Notwithstanding any other provision of law, in a proceeding conducted by a board within the department pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, upon the ground that the applicant or the licensee has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact, and the board may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question.

"As used in this section, 'license' includes 'certificate,' 'permit,' 'authority,' and 'registration.'"

10. Section 482 of the Code states, in pertinent part:

"Each board under the provisions of this code shall develop criteria to evaluate the rehabilitation of a person when:

". . . ."

"(b) Considering suspension or revocation of license under Section 490.

"Each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee."

11. Section 118, subdivision (b), of the Code provides that the expiration of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

FIRST CAUSE FOR DISCIPLINE

(December 12, 2005 Criminal Conviction - Conspiracy to Defraud the United States from late 1994 to early 1995))

12. Respondent is subject to disciplinary action under sections 5100(a) and 490 of the Code in that he was convicted of a crime substantially related to the qualifications, functions and duties of a certified public accountant. On or about December 12, 2005, in an Indictment filed in the United States District Court for the Northern District of Ohio, Eastern Division, in a case entitled *United States of America* v. *James M. Marietta, III* (CR. NO. 1:02CR 450), Respondent pled guilty to Ct. 1s, conspiracy to defraud the United States (18 U.S.C. 371). The circumstances are as follows:

13. In the plea agreement of December 12, 2005, Respondent stipulated to the following facts: "From in or about late 1994 to in or about early 1995, [Respondent] willfully and knowingly conspired with [L.E.R.] to provide [L.E.R.] with taxable income in such a way that the Internal Revenue Service would be unlikely to detect the transactions. Specifically, between September and December 1994, [L.E.R.] caused P.I.E. Mutual Insurance Company ("P.I.E.") to pay a total of $400,000 to Economic Research Institute & Consulting Association, Inc. ("ERICA"), a company owned by [Respondent]. Between October and December 1994, [Respondent] caused ERICA to pay $320,000 of these funds to P.I.E. to reduce [L.E.R.'s] loan

account with P.I.E.. As a result of the manner in which [Respondent] and [L.E.R.] arranged these transactions, [Respondent] caused the amount of [L.E.R.'s] taxable income reported to the Internal Revenue Service to be improperly understated by $320,000."

14. On March 7, 2006, Respondent was committed to the custody of the United States Bureau of Prisons to be imprisoned for fourteen (14) months. In addition, he was fined $10,000, ordered to pay restitution in the amount of $86,900 to the Internal Revenue Service, and ordered to not possess a firearm or other dangerous weapon, and to cooperate in the collection of DNA as directed by the probation officer.

SECOND CAUSE FOR DISCIPLINE

15. Respondent is subject to discipline under section 5063 in that he failed to report within thirty (30) days to the Board that in a plea agreement dated December 12, 2005, he pled guilty to a crime of conspiracy to defraud the United States, as more particularly described in paragraphs 12 through 14, inclusive, above.

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PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board of Accountancy issue a decision:

1. Revoking or suspending or otherwise imposing discipline upon Certified Public Accountant Certificate Number 56082, issued to James Marcus Marietta, III;

2. Ordering James Marcus Marietta, III to pay the Board of Accountancy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 5107; and

3. Taking such other and further action as deemed necessary and proper.

DATED: September 1, 2006

CAROL SIGMANN
Executive Officer
Board of Accountancy
State of California
Complainant

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