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

In the Matter of the Accusation Against: LOWELL ALAN BAISDEN CPA Certificate No. 26811 Respondent	Case No. AC-2007-20 OAH NO. L2007040298

ORDER DENYING RECONSIDERATION

On September 24, 2007, Administrative Law Judge Joseph D. Montoya, State of California Office of Administrative Hearings, heard this matter in Bakersfield, California. Kevin W. Bush, Deputy Attorney General, represented complainant Carol Sigmann, Executive Officer of the California Board of Accountancy. Respondent represented himself.

The matter was submitted on September 24, 2007. Administrative Law Judge Joseph D. Montoya issued his Proposed Decision on October 26, 2007. The California Board of Accountancy adopted the Proposed Decision and issued its Decision and Order on November 26, 2007, with an effective date of December 26, 2007.

On December 17, 2007, Lowell Alan Baisden, filed a Petition for Reconsideration of the Decision and Order. On December 18, 2007, the California Board of Accountancy issued an Order of Stay of Execution of Decision until January 7, 2008, in order to permit the Board to decide whether to order reconsideration.

ORDER

The Board hereby issues this Order denying the Petition for Reconsideration, and the Decision and Order of the Board issued on November 26, 2007, is imposed, effective January 7, 2008.

IT IS SO ORDERED this 4 day of January 2008.

Donald A. Driftmier

Donald A. Driftmier, President
For The CALIFORNIA BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS

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

In the Matter of the Accusation Against: LOWELL ALAN BAISDEN CPA Certificate No: 26811 Respondent	Case No. AC-2007-20 OAH NO. L2007040298

ORDER OF STAY OF EXECUTION OF DECISION

Pursuant to Section 11521 of the Government Code, the Decision adopted by the California Board of Accountancy in the above-entitled matter is hereby stayed for ten (10) days until January 7, 2008 in order to permit the Board to decide whether to order reconsideration.

IT IS SO ORDERED this 18th day of December, 2007.

Carol Sigmann, Executive Officer

For The CALIFORNIA BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS

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

In the Matter of the Accusation Against: LOWELL ALAN BAISDEN P.O. Box 21357 Bakersfield, CA 93390 Certified Public Accountant License No. CPA 26811 Respondent.	Case No. AC-2007-20 OAH No. L2007040298

PROPOSED DECISION

The hearing in the above-captioned matter was held on July 9 and 10, 2007, at Bakersfield, California, and on September 24, 2007, at Los Angeles, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings, presided. Complainant was represented by Kevin W. Bush, Deputy Attorney General. Respondent appeared and represented himself.

Evidence was received, the matter argued, and the case was submitted for decision on September 24, 2007. The Administrative Law Judge hereby makes his factual findings, legal conclusions, and orders, as follows:

FACTUAL FINDINGS

The Parties, and Jurisdiction:

1. Complainant Carol Sigmann filed the Accusation in the above-captioned matter while acting in her official capacity as Executive Officer of the California Board of Accountancy (Board), Department of Consumer Affairs, State of California.

2. Respondent Lowell Alan Baisden (Respondent or Baisden) is licensed by the Board as a certified public accountant (CPA). He was first licensed on December 1, 1978, and holds license number CPA 26811, which at all times relevant hereto was in full force and effect. Respondent's license will expire on February 28, 2009, unless otherwise renewed.

3. The Accusation against Respondent accuses him of violating provisions of the Business and Professions Code through dishonesty, fraud, gross negligence, fiscal dishonesty (first cause for discipline), or breach of fiduciary duty, as well as knowing preparation of false, fraudulent, or materially misleading financial statements (second cause for discipline). A third cause for discipline is his alleged failure to conform to professional standards and independence. Respondent filed a notice of defense whereby he denied those allegations, and this proceeding ensued.

The Engagement By the Geilenkirchens and The Plan To Provide Tax Savings To the Clients:

4. The case arises out of Respondent's services to Evan and Jane Geilenkirchen (sometimes hereafter "the clients"). The Gielenkirchens are residents of North Platte, Nebraska. Mr. Geilenkirchen is a nurse anesthetist, and his wife is a homemaker who was operating a small business from the family home.

5. In approximately September 2002, the Geilenkirchens engaged Respondent to provide them with accounting services, which included tax consultation and the preparation of tax returns. The Geilenkirchens were introduced to Respondent by Dr. Michael Koning, M.D., for whom Mr. Geilenkirchen worked. Dr. Koning is Respondent's brother-in-law, and Respondent had performed tax and accounting services for Dr. Koning.

6. After being introduced to Mr. Geilenkirchen by Dr. Koning, Respondent met with both clients and discussed how he could provide tax savings for them. He advised the Geilenkirchens to form a corporation in Nevada, which would be a vehicle that could help them save on taxes. He opined that Mrs. Geilenkirchen could operate her business through the corporation as well. Mrs. Geilenkirchen had a scrapbooking business and she designed and made greeting cards. Respondent also advised that a corporation could provide liability protection to the clients in the event that some claim arose against Mr. Geilenkirchen as a result of his professional work as an anesthetist. According to Respondent, the engagement was to last "for many years," beyond 2004, but no engagement letter was prepared. (Ex. 13. p.4.)

7. As noted above, Mr. Geilenkirchen worked with Dr. Koning and his firm, Anesthesia Consultants of Nebraska (ACN). Dr. Koning and/or ACN had a contract to provide anesthesiology services to a local hospital. While there has been some debate during the hearing as to whether Mr. Geilenkirchen was an employee of Koning, or an independent contractor, his entire income in 2002 was derived from services performed for, or on behalf of, Dr. Koning.

8. It is not clear that the clients completely understood just how Respondent intended to provide them with tax savings by forming a corporation. Outwardly, Respondent had in mind a plan where Koning or ACN would pay the client's new corporation for the work provided by Mr. Geilenkirchen to Koning, and then the new corporation would employ Mr. Geilenkirchen. Income generated by Mrs. Geilenkirchen's small business, and expenses

incurred by it, would also be kept inside the corporation.[1] The Geilenkirchens were led to believe, by Respondent, that performing services through a corporation would provide tax savings. There is no evidence that Respondent ever discussed the pros and cons of that structure with the clients, or ever showed them that legitimate tax savings, if any, could exceed the cost of maintaining the corporation. It is clear that he did not explain the pros and cons of the risky strategy he was about to employ on their behalf.

Formation of the Corporation For the Geilenkirchens:

9. Respondent agreed with the clients that he would take the necessary steps to form the Nevada corporation, initially to be named PTW Corporation. His fee to set up the corporation was $4,800, and there was to be an annual fee of $1,400 for the corporation; presumably to be paid to the State of Nevada each year. The clients agreed to pay Respondent $800 per month as a fee to perform accounting and tax services, and a quarterly fee of $400. The engagement was for an indeterminate period of time.

10. (A) Respondent took steps to organize the Nevada corporation, but it is inferred he did little himself, and there is no evidence that he engaged attorneys to assist in the formation of the corporation, as he represented he would. To be sure, articles of incorporation were prepared and filed, but they were initially rejected, because the original name was not available. Respondent spoke to the clients, and the name was modified slightly, so that the name of the corporation would be PTCW Corporation.

(B) PTCW Corporation was not incorporated until February 7, 2003. On that date articles of incorporation were filed, with Deborah J. Fields as the incorporator. The business purpose was stated in the articles of incorporation as "any lawful business," and Ms. Fields was identified as the resident agent and the only director. A separate document, listing the initial officers and directors of the corporation, identified Ms. Fields as the president, secretary, and treasurer of the then-new firm.

(C) Ms. Fields is Dr. Koning's sister. This fact was not known to the clients when the corporation was formed, or for months thereafter.

11. (A) Despite the aforementioned basic concept for how the corporation would be used by the clients to their benefit, none of the formalities typically associated with a

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[1] Respondent was handling tax matters for Dr. Koning as well. The latter had an interest in treating those who worked for him as independent contractors, rather than employees. It is reasonably inferred that if Dr. Koning had contracts with corporations rather than individuals so as to obtain necessary support services, then it would be easier for Dr. Koning to hold those relationships out as independent contractor relationships. In turn, it would be easier for Dr. Koning to justify not withholding taxes, not contributing to social security, and to otherwise not shoulder the burdens that fall on an employer in the traditional employer-employee relationship.

corporation were ever put in place, and there was no contractual structure to support the main part of the plan. That is, no by-laws were ever written or approved. Neither of the clients was ever made an officer or director of the corporation, and no stock was ever issued by it. No meetings of directors were ever held. Importantly, no checking account was ever opened in the corporation's name, although an employee identification number was issued for the corporation. As will be seen, the checking accounts, cars, credit cards, and various debts of the clients were treated as the corporation's.[2] As to a contractual structure for the new organization, no agreement was made between PTCW and Dr. Koning's firm, and no corresponding employment agreement between PTCW and Evan Geilenkirchen was executed. Mr. Geilenkirchen continued to receive a check from Koning, and that check went into the family's bank account, as there was no bank account for the corporation.

(B) There is no evidence that Respondent ever took steps to assure that the corporate formalities were met, or that a contractual structure was erected among his mutual clients. That is, he had received nearly $5,000 to organize a Nevada corporation, and the Geilenkirchen's were relying on him to complete that task, but he did not make sure the formalities were accomplished. There is no evidence he paid attorneys or specialists to incorporate PTCW; it is reasonably inferred that he kept several thousand dollars in exchange for having Ms. Fields file a few pieces of paper with the Nevada authorities.

(C) Respondent subsequently asserted that he advised the clients to have the appropriate contracts prepared, and to open a corporate bank account, but that claim is not credible. The clients were relying on him, and as to the formation of the corporation, the fee should have encompassed preparation of organic documents and the issuance of stock. Further, Respondent had to have known that these steps had not been taken by the client, and if he really believed them necessary to properly carry out the tax savings plan, he should not have filed tax returns for 2002 (see Factual Findings 12 through 18, below) knowing that there was no supporting structure.

The Fraudulent 2002 Tax Returns:

12. Based on Respondent's advice, the clients built a check register with a QuickBooks program, and forwarded that information to Respondent. Basically, every expense the family had incurred in 2002 went into the register, including but not limited to mortgage payments, credit card payments, payments to a local parochial school for children's

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[2] The failure to properly form the corporation, and subsequent treatment of the individuals' assets corporate assets, tended to defeat the purpose of the corporation as a liability shield, a state purpose for forming PTCW. A patient harmed by Mr. Geilenkirchen would have been able to "pierce the corporate veil" and attack the individual's assets. (See, *e.g., Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825.) The failure of Respondent to properly form the corporation, after being paid a fee of $4,800, tends to bring discredit upon him.

education, groceries bills, utilities, car payments, payments for student loans, and even video rentals. Respondent in turn used that data to generate books and records labeled as ledgers, trial balances, and compilations for the corporation.[3] Respondent used his discretion in deciding how to account for each type of expense within the documents he generated.

13. Respondent prepared a 2002 federal corporate tax return for PTCW, and individual returns for the clients, state and federal. The federal returns were filed in approximately June 2003, pursuant to an extension.

14. (A) The federal tax return for PTCW was false in every respect. First, it was a tax return for the year 2002, a year when the corporation did not exist, and the return stated, on the first page of the form 1120, that PTCW was incorporated on December 7, 2002. That was blatantly false. (See Factual Finding 8(B).) At schedule K of the return (Ex. 8, p. 33) it states that the business activity is "real estate." That was also false. Although Respondent and the clients had discussed the notion that eventually the Geilenkirchens would begin investing in real estate, they had not begun to do so, and were years away from doing so. The corporation never had any interest of any type in any real estate, when it finally did come into existence, or at any time thereafter.

(B) The corporate tax return, at the first page, just under the false date of incorporation, describes the corporation as having $27,113 in total assets. The record in this matter shows that no property of any type was ever transferred into the corporation, even after it's incorporation in 2003. As noted above, it did not even have a checking account.[4]

(C) The corporate return states that PTCW had gross receipts or sales of $176,164 in 2002, that same number being used as the gross profit and total income of the

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[3] During the hearing there was a certain amount of disagreement between Respondent and the Board's investigator as to what the accounting documents Respondent generated for the clients really were, *i.e*, whether journals, ledgers, etc. Respondent pointed out that the computer programs used by accountants may describe a document one way, when functionally, the document is something else. While Respondent displayed a good technical grasp of the differences in basic business accounting documents, the ALJ will refer to the documents by the titles printed on them, whether the computer program used to generate them properly titled them, or not. It should be observed that Respondent had, in response to Board inquiry, sent these documents to the investigator, without bothering to change the titles of the documents that were placed on them by the particular computer programs he had used. To that extent, he adopted the description of the documents he sent.

[4] To be sure, some of the expense of incorporation might have been treated as capital, but no hard assets were transferred into the corporation, such as cars, real estate, or equipment of any type. Likewise, other assets such as accounts receivable were not transferred to the corporation either. It was virtually an empty shell.

firm. Essentially, that number coincides with Mr. Geilenkirchen's income in 2002, earned from ACN, along with a few thousand dollars of income from Mrs. Geilenkirchen's activities.[5]

(D) The corporate return declares, on its first page, deductions totaling $150,903, leading to taxable income of $25,261, and tax due on that sum in the amount of $3,789. The two largest deductions were for "rents," described as $45,250, and "other deductions" in the amount of $81,273; those were broken down into several categories on an "overflow" schedule. Since the corporation did not ever rent any property, the deduction for rental expense was false. Ultimately, the amount of the rental deduction was used as the main income figure for the clients on their individual tax returns for 2002.

(E) Among the "other deductions" was one for utilities, in the amount of $6,160, and one for insurance in the sum of $23,270. Further, a deduction for "supplies" totaling $22,124 made up a considerable part of the $81,000 in "other" deductions. Smaller amounts, for office expense, professional services, vehicle expense, and 50 percent of meals and entertainment were deducted as well under this catch-all category.

(F) When the various deductions are compared to the books created by Respondent from the clients' check register, it becomes quite clear that Respondent listed non-business and personal expenses of the individual clients as expenses of the non-existent corporation.

(G) The most glaring example of such improper conduct is the "rent" deduction of $45,250, which plainly comes from an account entitled "rent," and set out on the "detail trial balance," at pages 26 through 31 of Exhibit 23. First, the total on that trial balance account is $45,250, the amount of the rent deduction. Among the expenses in that account—number 1315—are payments to various religious institutions and a private school, payments to Walmart, Wells Fargo for mortgage payments, and department stores such as JC Penny. Payments to veterinarians and even a nail salon are deemed rent within the books Respondent created, as are payments to firms identified as "U Save Foods" and Albertsons, which expenditures are reasonably inferred as being for groceries. Payments to toy stores, Blockbuster video, and for student loans were also accounted for as rent. To be clear, these were expenditures made by the Geilenkirchens personally in 2002, but they became deductions on a tax return filed for the corporation that did not come into existence until 2003.

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[5] According to the "detail trial balance" created by Respondent, the corporation had "contract" income in 2002 totaling $171,767.27. (Ex. 23, p.24.) A second category of income was described as "product sales," in the amount of $4,396.83. (*Id.*) The two figures add up to $176,164.10. The amount of $171,767 was eventually stated as wages and salary for the individuals when they filed amended returns. (See Ex. 24, p. 9.)

(H) The corporation's tax deduction for "professional services," in the amount of $7,876, was for payments by the individual taxpayers to Respondent, including the $4,800 they had paid to incorporate PTCW. (Compare Ex. 8, p.38 with Ex. 23, p. 44, at account number 1390.) The corporation's tax deduction for "utilities," in the amount of $6,160, was plainly taken from the "utilities account, number 1325, found in the trial balance at page 31 of Exhibit 23. In turn, the entries in the utilities account are from monies paid by the individuals for utilities at their residence, including electricity, water, phones, and satellite television.

(I) One of the "other deductions" scheduled was $23, 270, for "insurance." A review of the detail trial balance shows that Respondent combined the expenses assigned to four accounts to obtain that number. They are account 130505, "payroll taxes and insurance, health insurance" ($16,148.89); account number 130506, "payroll taxes and insurance, medical expenses" ($4,366.66); account number 133501, "liability insurance" ($1,416.20); and, account 133502, "vehicle insurance" ($1,338.73). (Ex. 23, pp. 24, 25, 33.) Again, these accounts are based on the clients' personal expenses, with many of the expenditures made to financial institutions, as well as to health insurers, pharmacies, and medical providers.

(J) Turning back to page one of the corporate return, a deduction of $4,048 was taken on line 18 of the return, for interest. That amount is the sum of the interest payments the individual clients made in 2002 to various credit card companies, and for their car loans; even late fees were made part of the total. (Compare Ex. 8, p. 31 with Ex. 23, pp. 44-46.) At line 14 of the tax return, Respondent had the non-existent corporation deducting expenses during 2002 for repairs and maintenance, in the amount of $11,339. (Ex. 8, p. 31.) Turning to the detail trial balance, account number 1330, titled "repair and maintenance," the sum of $11,339.46 is found. (Ex. 23, p. 32.) Among the repair and maintenance expenses listed there are payments to Walmart, Target, Gateway computer for a laptop and desktop computer, Radio Shack and Best Buy. Nearly one-half of the total is identified simply as "rep & mt" (sic) for the period January to July, 2002, with no detail. (*Ibid.*)

15. In summary, the 2002 tax return for PTCW was a complete sham. It was filed for a corporation that did not exist in 2002, and therefore did no business in 2002. All of the income figures, and all of the deductions, were properly those of the individual taxpayers. The Respondent had prepared the documents so that personal, non-business expenses of the individual taxpayers could be deducted under other guises, as the expenses of a corporate concern. While Respondent claimed to have relied on the clients for the information, it is apparent to the untrained eye that many, if not most, of the expenses could not be legitimate deductions for any corporation, in any year. Further, to the untrained eye, not one expense making up the $45,250 account entitled rent constituted rental payments.

16. (A) Respondent also prepared individual federal tax returns for Mr. and Mrs. Geilenkirchen for the year 2002, and filed them on their behalf. Like the corporate return, the individual return was a creature of fraud. For example, the return identifies Mr. Geilenkirchen as an "investor," which is not true. (Ex. 8, p. 23.) Other fraudulent statements abound in the return.

(B) None of the income Mr. Geilenkirchen derived from Dr. Koning was set forth on the individual return. Line 7 of the individual return, where wages and salaries would be identified, was blank. Instead, the total income to the family was stated as $1,075 for taxable refunds (line 10), and $45,250 for "rental real estate, royalties, partnerships, . . . etc." (Ex. 8, p. 22, at line 17.)

(C) Schedule E to the individual return, which is to be attached when income is stated on line 17, states that the clients received "royalty" payments of $45,250. As noted earlier, this is the amount set out on the corporate return as a deduction for royalty or rental expenses.

(D) Respondent set out $26,905 in deductions for the individuals. Reference to schedule A of the individual return, which breaks down the deductions, shows $16,894 for the home mortgage interest deduction, and $3,161 as a deduction for gifts to charity. It appears, however, that such expenses were already run through the corporate return.[6]

(E) The total tax that is shown on the individual returns is $688. (Ex. 8, p. 23, line 42.) However, Respondent then calculated tax credits in the same amount, leaving the individuals to claim they owed no taxes in 2002. On behalf of his clients, Respondent claimed a refund of $9,000, based on payments of that amount in 2001. (*Id.*, at lines 44-55, 63-71a.)

17. Through his machinations, Respondent put the Geilenkirchens in the position of having paid, individually and through their fictitious corporation, taxes of $3,789 on gross income exceeding $176,000. At one time during the process of preparing and filing the returns, Mr. Geilenkirchen questioned Respondent regarding the steps he was taking to minimize the taxes, and Respondent assured him, and said that "it all comes out in the wash."

18. Dr. Koning had treated Mr. Geilenkirchen as an independent contractor, and not an employee. He had not withheld any income taxes, social security, or similar deductions from Mr. Geilenkirchen's pay. Meanwhile, Respondent did not report tax liability for Mr. Geilenkirchen for self-employment or social security taxes, which Geilenkirchen should have paid if he were an independent contractor.

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[6] In account 1315, "rent", two entries for payment to "WELLS FARGO BANK mort." are listed, totaling more than $16,000; one is a compilation for the first six months of 2002. (Ex. 23, pp. 26 & 28.) Four payments of $1,701 are listed, to First National Bank. Three of the payments are shown on the 16th of the month in August, September, and October; the November payment is on the 18th. (Ex. 23, pp. 28-30.) Such recurring monthly payments, by inference, were for mortgage payments, especially as they post-date the payments to Wells Fargo. As the total of the "rent" account was deducted from the corporate return, it appears that Respondent tried to take the deductions twice.

Events Following the Filing of the 2002 Tax Returns:

19. The Geilenkirchens continued to pay Respondent his monthly fee of $800, through approximately May 2004. He did prepare further compilations for the corporation or clients, in March 2003. However, Respondent did not prepare tax returns for them for 2003 or 2004. Extensions were applied for, but the extensions ran out, without the returns being filed.

20. In January 2005, the clients were contacted by the Internal Revenue Service (IRS), because it wished to examine their 2002 tax return. Initially, they tried to turn the matter over to Respondent, and he had a power of attorney to represent the clients before the IRS. He told the Clients to ignore the IRS, that he would take care of the problems, that the government would see it did not have a case. The IRS contacted him, and asked for documents and information, but Respondent failed to provide information to the IRS, despite several requests. Eventually the IRS subpoenaed the Geilenkirchens' books and records. This occurred at a time when the IRS was auditing Dr. Koning and many of Respondent's other Nebraska clients.

21. In January 2006, the IRS made changes to the clients' tax returns, calculating that the clients owed approximately $42,000 in taxes, and another $49,000 in penalties and interest for 2002. The Geilenkirchens hired attorneys in March 2006 to take over representation of their interests before the IRS, and they wrote to Respondent, terminating him. The clients filed a civil suit in Nebraska against Respondent, and obtained a default judgment against him.

22. Ultimately, with the assistance of their attorneys, the Geilenkirchens were able to substantially reduce their liability to the IRS, but that only occurred after they retained professionals to file amended returns for 2002, and to file returns for 2003 and 2004, and after they paid attorneys to represent them in proceedings before the IRS. Essentially, the clients' attorneys convinced the IRS not to penalize the clients for fraud, based on their reliance on Respondent's advice. The fact that the IRS reduced the penalties against the clients did not constitute a finding that the 2002 returns were properly prepared and filed; indeed, amended returns had to be filed. The clients were forced to pay the professionals for those services, even though they had paid Respondent in excess of $23,000 for his services. The clients paid accountants over $4,000 to amend the 2002 returns and to file the 2003 and 2004 returns, and they paid their attorneys over $20,000 for representation before the IRS. The clients, through their attorneys, made demand on Respondent for a refund of the monies they had paid him, but none was forthcoming.

23. Meanwhile, in approximately 2004, Respondent's tax practice was brought under scrutiny by the IRS, when it initiated an investigation of him to determine if he had been promoting an abusive tax avoidance transaction. The investigation involved 14 of Respondent's clients. In September 2006, the IRS sued in the federal court to obtain an injunction against Respondent, and the federal court granted a preliminary injunction against Respondent in April 2007.

24. In March 2007, the Clients' attorneys obtained a default judgment against Respondent in the civil case they had filed against him in Lincoln County, Nebraska. The court granted a motion by the Geilenkirchens to strike Respondent's answer, because he had failed to cooperate in discovery. The court entered a judgment in favor of the clients and against Respondent for $204,278.

Respondent's Defense To the Allegations:

25. Respondent has been licensed for nearly 30 years, and has no prior record of discipline. He pointed out that the client's tax liability had been reduced by the IRS, so that they owed only about $2,700 as of May 2007, the penalty being reduced to approximately $835.

26. (A) Respondent asserted he had advised the clients to open a corporate bank account, and to prepare contracts between the PTCW and Evan Geilenkirchen, and PTCW and ACN/Koning. He did not prepare the 2003 returns because the IRS had begun to audit some of his other clients in Nebraska (who were connected with his brother-in-law), and he was awaiting the outcome of those audits to understand how the IRS was going to treat matters. He did not prepare the 2004 returns because the clients stopped paying him. He has also asserted that some of the monies paid him were used to defend the audit.

(B) Respondent focused on small issues and details, such as what types of records he had really generated, *i.e.*, whether a document was a trial balance, or some type of ledger. This did little to respond to the core issue, of whether or not Respondent had engaged in some fraudulent activity, or acted with gross negligence. When questioned as to why he would file a 2002 income tax return for a corporation that had not been formed until 2003, his defense amounted to the claim that the parties had intended the corporation to be formed in 2002, and a small clerical issue had prevented it, and the clients should have the benefit of their effort.

(C) Respondent took steps to demonstrate, on paper, how the allocation of the income and expenses, between the corporation and the individual tax payers, would have yielded tax savings within the confines of the law. This supposed that the deductions were legitimate. It should be noted that in correspondence with the Board, prior to the hearing, he had tended to blame the Clients' problems on their failure to stay with the program he planned, and their failure to wait for him to deal with the IRS. Basically, he blames much of the client's problems on the clients. (See Ex. 13, pp. 4-6.) That line of defense continued into Respondent's closing argument, where he asserted that the clients were, ultimately, penalized only $835, and that being their fault, for not following his advice.

(D) In the final analysis, Respondent contends that his actions were correct, and that the actions of the clients, and the IRS, are really to blame for any harm that has befallen the clients.

Other Findings Necessary For the Decision:

27. In preparing the compilations used for the 2002 tax returns, as well as compilations prepared in March 2003, Respondent failed to disclose his lack of independence. Nor was he independent in connection with the corporation, which was essentially his creature.

28. All of the witnesses were credible in terms of their demeanor when testifying. The Board's investigator, Ms. Coffin, at times demonstrated a lack of expertise in some tax issues, and auditing issues. The Board's expert, Mr. Laffer, is highly-qualified, and his opinions were given significant weight. Mr. Geilenkirchen appeared honest and forthright in his testimony. Respondent, while demonstrating a good demeanor, was not credible. For example, he took positions that at times defied credulity, such as when he maintained it was appropriate to file a 2002 tax return for PTCW when that corporation did not come into existence until 2003. That he could take such a position, with a straight face, made his demeanor irrelevant to the finding that he lacked credibility.

29. The Board has incurred costs and expenses in the investigation and prosecution of this matter, in the amount of $15,141.40. That amount is reasonable in all the circumstances, given the complexity of the facts and law, the number of potential witnesses, the size of the document base, the billing rates charged, and the skill and experience of the Deputy Attorney General and the investigator.

LEGAL CONCLUSIONS

1. Jurisdiction to proceed in this matter pursuant to Business and Professions Code[7] section 5100 was established, based on Factual Findings 1 through 3.

2. The standard (as opposed to the burden) of proof in this proceeding is that of clear and convincing evidence, to a reasonable certainty. *(Eittinger v. Bd. of Med. Quality Assurance* (1982) 135 Cal.App.3d 853.) Complainant was therefore obligated to adduce evidence that was clear, explicit, and unequivocal—so clear as to leave no substantial doubt and sufficiently strong as to command the unhesitating assent of every reasonable mind. (*In Re Marriage of Weaver* (1990) 224 Cal.App. 278.)

3. Respondent is accused, among other things, of gross negligence in connection with his licensed activities. The Code does not define just what "gross negligence" means in

[7] All further citations to statutes are to the Business and Professions Code, unless otherwise noted.

proceedings of this type. The Court of Appeal addressed this matter in *Kearl v. Board of Medical Quality Assurance,* (1986) 189 Cal. App. 3d 1040. There the Second District Court of Appeal stated:

> "Gross negligence is "'the want of even scant care or an extreme departure from the ordinary standard of conduct.'" (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 941 [123 Cal.Rptr.[page 1053] 563], quoting from *Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 594 [297 Cal.Rptr. 644].) The use of the disjunctive in the definition indicates alternative elements of gross negligence—both need not be present before gross negligence will be found. (*Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 184, 196-197 [167 Cal.Rptr. 881].)"[8]
>
> (189 Cal. App. 3d at 1052-53.)

4. Repeated negligent acts have also been alleged against Respondent. A professional is negligent if he or she fails to use that reasonable degree of skill, care, and knowledge ordinarily possessed and exercised by members of the profession under similar circumstances, at or about the time of the incidents in question. Just what that standard of care is for a given professional is a question of fact, and in most circumstances must be proven through expert witnesses. *(Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997-998, 1001; *Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215; *see* 6 B. Witkin, *Summary of California Law* (9th Ed.), *Torts*, sections 749, 750, and 774.) However, in some cases the standard may be defined by a statute or regulation.

5. (A) Respondent has also been accused of fraudulent acts, and of preparing fraudulent papers. From a statutory point of view, fraud means an act committed by one party, with the intent to deceive another, the acts including the suggestion of a fact as true by someone who does not believe it to be true. Suppression of facts, in order to induce some conduct can also be fraud, as can a false promise—one made without any intention of performance—and negligent misrepresentations. (See, *e.g.*, Civ. Code, §§ 1571 (1872), 1573 (1872), and 1710 (1872).

(B) Civil Code section 1571, subdivision 5, provides that "any act fitted to deceive" may constitute fraud. As aptly stated by the Court of Appeal some 80 years ago,

> Fraud is a generic term which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to get an advantage over another. No definite and invar-

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[8] The disjunctive definition set forth in *Gore* was also followed in *Yellen v. Bd. of Med. Quality Assurance* (1985) 174 Cal.App.3d 1040, 1058

> iable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and unfair ways by which another is deceived.
> (*Wells v. Zenz* (1927) 83 Cal.App.137, 140.)

(C) A breach of fiduciary duty constitutes constructive fraud. (*California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1581

6. (A) It is settled that the trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal. App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of "one credible witness may constitute substantial evidence", including a single expert witness. (*Kearl v. Board of Medical Quality Assurance, sup*ra, 189 Cal.App.3d at 1052.)

(B) The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. Disbelief does not create affirmative evidence to the contrary of that which is discarded. "The fact that a jury may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative." (*Hutchinson v. Contractors' State License Bd.* (1956) 143 Cal.App. 2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* (1923) 191 Cal. 295, 304.)

(C) Discrepancies in a witness's testimony, or between that witness's testimony and that of others does not necessarily mean that the testimony should be discredited. (*Wilson v. State Personnel Bd.* (1976) 58 Cal App.3d 865, 879.)

7. Cause exists to discipline Respondent's license pursuant to section 5100, subdivision (c), for acts of dishonesty, fraud, gross negligence, and repeated negligent acts, and each of those, in connection with his engagement by Evan and Jane Geilenkirchen to provide tax advice, and to prepare and file tax returns for the year 2002, and by his failure to prepare and file their tax returns for 2003 and 2004. This Conclusion is based on Legal Conclusions 1 through 6, and Factual Findings 4 through 28.

8. Cause exists to discipline Respondent's license pursuant to section 5100, subdivision (i), for acts of fiscal dishonesty and breach of fiduciary responsibility, in connection with his engagement by Evan and Jane Geilenkirchen to provide tax advice, and

to prepare and file tax returns for the year 2002, and by his failure to prepare and file their tax returns for 2003 and 2004. This Conclusion is based on Legal Conclusions 1 through 6, and Factual Findings 4 through 28.

9. Cause exists to discipline Respondent's license pursuant to section 5100, subdivision (j), for knowingly preparing, publishing, and disseminating false, fraudulent, or materially misleading financial statements, reports, or information, by preparing and filing false and fraudulent tax returns for Evan and Jane Geilenkirchen for the year 2002. This Conclusion is based on Legal Conclusions 1 through 8, and Factual Findings 4 through 28.

10. Cause exists to discipline Respondent's license pursuant to section 5062 and California Code of Regulations, title 16, section 58, for his failure to disclose his lack of independence in his compilation reports, prepared for PCTW corporation for December 31 and March 2003. This Conclusion is based on Factual Findings 4 through 28.

11. The Board is entitled to recover its reasonable costs of investigation and prosecution from Respondent pursuant to section 125.3, based on Legal Conclusions 1, and 7 through 10. The reasonable amount of such costs is $15,141.40, based on Factual Finding 29.

12. (A) The purpose of proceedings of this type are to protect the public, and not to punish an errant licensee. (*E.g., Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164.) However, it must also be noted that protection of the public is the highest priority assigned to the Board by the legislature, and where the policy of public protection clashes with some other recognized policy, the former must prevail. (§5000.1.)

(B) There are no mitigating facts to consider in determining what disciplinary response should be made. Respondent has taken no steps to make restitution. His actions were not the result of some honest mistake, and he did not fail to perform work because he was seriously ill, distracted by a family crisis, or reasonably relying on others.

(C) There are numerous aggravating factors in the case. To start, Respondent prepared false and fraudulent tax returns, one for a corporation that legally did not exist, and which had no income. He created tax deductions out of whole cloth. In doing so he exposed his clients to tens of thousands of dollars of tax liability, and potential incarceration. He failed to cooperate with the IRS and his clients' lawyers. He was involved with other questionable activities with other clients, and in his representation of his brother-in-law, Dr. Koning, Respondent had a potential conflict of interest with the Geilenkirchens, as Dr. Koning had an interest in treating Geilenkirchen as an independent contractor, when the latter may have been better off in the status of an employee.

(D) There is no evidence of rehabilitation whatsoever. Respondent has not acknowledged that his actions were wrong or harmful; at the time of closing argument he was still blaming his clients for not following his advice, and asserting that they had only been harmed in the amount of $835. Such ignored the other financial hardships they had

suffered, along with the stress of facing the wrath of the IRS when it believed it had been defrauded. Respondent has taken no steps to alleviate any of his client's distress. In justifying his conduct, Respondent pointed to a brief, written by his lawyers for the federal government's civil suit, as explaining why his strategy in this case was appropriate. That Brief (Ex. K) essentially argues that Geilenkirchen could be an independent contractor, and that he could use a corporation as a vehicle between him and Dr. Koning. This did nothing to respond to the heart of the matter, where false and fraudulent tax returns were filed.[9]

(E) Given his lack of remorse and attempt to rationalize his wrongdoing, it is plain that if Respondent is allowed to continue to practice as a CPA he is very likely to transgress the law and his ethical obligations in other very serious ways; he does not intend to turn over a new leaf. It is plain that the public can not be protected unless Respondent's license to act as a CPA is revoked.

ORDER

The license issued to Lowell Alan Baisden to practice as a certified public accountant, number CPA 26811, is hereby revoked.

Respondent is ordered to pay the Board the sum of $15,141.40 within 30 days of the effective date of this order.

October 26, 2007

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

[9] It is quite likely that Geilenkirchen could legally form a corporation that could be employed by Koning, and which would in turn employ Geilenkirchen. Whether such a structure would make good tax sense, or good business sense, is debatable, but the outcome of that debate is not dispositive of this case. What matters is the fact that a legally constructed corporation, in the position suggested by Respondent, still could not deduct expenses for the family's groceries, or its water bill, or claim that Geilenkirchen was being paid royalties or rent, such as happened for 2002.

BEFORE THE
BOARD OF ACCOUNTANCY
STATE OF CALIFORNIA

In the Matter of the Accusation Against: LOWELL ALAN BAISDEN P.O. Box 21357 Bakersfield, CA 93390 Certified Public Accountant License No. CPA 26811, Respondent.	Case No.: AC-2007-20 OAH No.: L2007040298

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Accountancy as its Decision in the above-entitled matter.

This Decision shall become effective December 26,2007.

IT IS SO ORDERED November 26,2007.

BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By _____

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

In the Matter of the Accusation Against: LOWELL ALAN BAISDEN P.O. Box 21537 Bakersfield, CA 93390 Certified Public Accountant License No. CPA 26811 Respondent.	Case No. AC-2007-20 OAH No. **ACCUSATION**

Complainant alleges:

PARTIES

1. Carol Sigmann (Complainant) brings this Accusation solely in her official capacity as the Executive Officer of the California Board of Accountancy (Board), Department of Consumer Affairs.

2. On or about December 1, 1978, the Board issued Certified Public Accountant License No. CPA 26811 to Lowell Alan Baisden (Respondent). The license was in full force and effect at all times relevant to the charges brought herein against Respondent, and will expire on February 28, 2007 unless renewed.

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JURISDICTION

3. This Accusation is brought before the Board, Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 5100 states:

"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 which includes, but is not limited to, one or any combination of the following causes:

. . . . .

"(c) Dishonesty, fraud, gross negligence, or repeated negligent acts committed in the same or different engagements, for the same or different clients, or any combination of engagements or clients, each resulting in a violation of applicable professional standards that indicate a lack of competency in the practice of public accountancy or in the performance of the bookkeeping operations described in Section 5052.

"(i) Fiscal dishonesty or breach of fiduciary responsibility of any kind.

"(j) Knowing preparation, publication, or dissemination of false, fraudulent, or materially misleading financial statements, reports, or information.

5. Section 5062 states:

"A licensee shall issue a report which conforms to professional standards upon completion of a compilation, review or audit of financial statements.

6. Section 5107 provides, in pertinent part, that the Board's Executive Officer 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, attorney's fees. The board shall not recover costs incurred at the administrative hearing.

7. California Code of Regulations, title 16, section 58 states:

" Licensees engaged in the practice of public accountancy shall comply with all applicable professional standards, including but not limited to general accepted accounting principles and generally accepted auditing standards.

FIRST CAUSE FOR DISCIPLINE

(Dishonesty, Fraud, Gross Negligence, Fiscal Dishonesty or Breach of Fiduciary Responsibility)

8. Respondent is subject to disciplinary action on the grounds of unprofessional conduct as defined in section 5100, subdivisions (c) and (i) by reason of the following:

a. Respondent devised and promoted an unlawful tax scheme in which he provided false tax advice, created a sham corporation and, among other things, prepared fraudulent income tax returns.

Specifically, in or about September 2002, Evan and Jane Geilenkirchen (Geilenkirchens) engaged the services of the Respondent to provide them with accounting services including, but not limited to, tax consulting and tax return preparation. The engagement was for an indefinite period of time.

A substantial part of the Respondent's accounting services included the promotion of a tax fraud scheme whereby Respondent gave the Geilenkirchens false and fraudulent tax advice regarding the allowability of deductions, the excludability of income and other purported tax benefits. Respondent advised and assisted the Geilenkirchens in creating and incorporating PTCW Corporation (PTCW) in Nevada for the sole purpose of assigning the Geilenkirchens' wage and self-employment income as well as their expenses. Respondent reported on the 2002 PTCW corporate income tax return that the corporation was in the "real estate" business. However, PTCW was a sham corporation as it neither owned any property, nor conducted any real estate transactions. In fact, the corporation did not engage in any bona fide business activity for which deductions or other tax benefits were entitled to be claimed.

In an effort to promote the establishment of the corporation, Respondent provided the Geilenkirchens with false and fraudulent tax advice regarding the allowability of deductions,

the excludability of income and other purported tax benefits. Using PTCW as the catalyst for the scheme, Respondent prepared fraudulent 2002 income tax returns which mischaracterized wage and self-employment income, and falsely deducted items as business expenses which were actually personal non-deductible expenses. Respondent understated the Geilenkirchens' tax liability, for 2002, by failing to report the tax liability for self-employment or social security taxes due on the earned income.

Respondent falsely reported royalty income on the Geilenkirchens' 2002 individual income tax returns. The Geilenkirchens, however, rented no property, and did not receive any income from property rental. Respondent intentionally understated the Geilenkirchens' tax liability by mischaracterizing income derived from employment as rental or royalty income.

Moreover, Respondent advised the Geilenkirchens to provide him with a list of expenses for the 2002 tax year. The expenses were not business related, but were actually personal expenses. The Respondent falsely claimed those expenses as business expenses on the 2002 PTCW corporate income tax returns.

b. Respondent failed to complete the Geilenkirchens' individual income tax returns for 2003 and 2004.

Specifically, the Geilenkirchens paid Respondent a monthly retainer for various accounting services which included the preparation of their individual income tax returns. The Geilenkirchens made all payments for 2003, and a portion of the 2004 payments. The Respondent, however, failed to prepare the Geilenkirchens' tax return for 2003 and 2004. The Respondent's actions caused the Geilenkirchens to suffer financial injury including, but not limited, substantial failure-to-file penalties assessed by the Internal Revenue Service.

SECOND CAUSE FOR DISCIPLINE

(Knowing Preparation of False, Fraudulent, or Materially Misleading Financial Statement, Reports or Information)

9. Respondent is subject to disciplinary action as defined in section 5100, subdivision (j) based on the following facts and circumstances:

Respondent knowingly prepared the Geilenkirchens 2002 corporate and individual income tax returns using false, fraudulent and misleading information as more fully discussed in paragraph 8 above.

THIRD CAUSE FOR DISCIPLINE

(Reports Failed to Conform to Professional Standards and Independence)

10. Respondent is subject to disciplinary action as defined in section 5062 and California Code of Regulations, title 16 section 58 based on the following facts and circumstances:

Respondent failed to disclose his lack of independence in his compilation reports for PTCW Corporation for December 31, 2002 and March 31, 2003. Further, the compilation reports prepared by the Respondent did not conform to professional standards.

Respondent was active in promoting and establishing Geilenkirchens' corporation, PTCW. The corporation was formed in Nevada with another individual, unknown to the Geilenkirchens, to fill in as the Board/Trustee, President, Secretary, Treasurer and Director. Further, the address used on the tax return for PTCW was unknown to the Geilenkirchens.

Respondent handled all details of the corporation, and all communication with its president. For 2002, Respondent prepared a general ledger, trial balance and compilation from source documents provided by the Geilenkirchens. Respondent made the decisions with regard to assignment of income and expenditures. The Geilenkirchens were not involved in any management functions related to PTCW Corporation.

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PRAYER

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

1. Revoking, suspending, or otherwise imposing discipline upon Certified Public Accountant License No. CPA 26811, issued to Lowell Alan Baisden.

2. Ordering Lowell Alan Baisden to pay the California Board of Accountancy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 5107;

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

DATED: February 7, 2007

CAROL SIGMANN
Executive Officer
California Board of Accountancy
Department of Consumer Affairs
State of California
Complainant

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