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

In the Matter of the Accusation Against: **ROBERT J. SCHWEI** **PO Box 31158** **San Francisco, CA 94131-0158** **Certified Public Accountant** **Certificate No. 33655** Respondent.	Case No. AC-2013-7 **DEFAULT DECISION AND ORDER** [Gov. Code, §11520]

FINDINGS OF FACT

1. On or about January 8, 2013, Complainant Patti Bowers, in her official capacity as the Executive Officer of the California Board of Accountancy, Department of Consumer Affairs, filed Accusation No. AC-2013-7 against Robert J. Schwei (Respondent) before the California Board of Accountancy. A copy of the Accusation is attached as Exhibit A.

2. On or about December 4, 1981, the California Board of Accountancy (CBA) issued Certified Public Accountant Certificate No. 33655 to Respondent. The Certified Public Accountant Certificate expired on December 31, 2012, and has not been renewed. Under Business and Professions Code sections 5109 and 118, subdivision (b), this lapse in licensure does not deprive CBA of its authority to institute or continue this disciplinary proceeding.

3. On or about January 15, 2013, Respondent was served by Certified and First Class Mail copies of the Accusation No. AC-2013-7, Statement to Respondent, Notice of Defense, Request for Discovery, and Discovery Statutes (Government Code sections 11507.5, 11507.6, and 11507.7) at Respondent's address of record which, under California Code of Regulations, title 16, section 3, is required to be reported and maintained with the CBA. Respondent's address of record was and is: PO Box 31158, San Francisco, CA 94131.

4. Service of the Accusation was effective as a matter of law under the provisions of Government Code section 11505, subdivision (c) and/or Business & Professions Code section 124.

5. On or about February 20, 2013, the envelope with the documents sent by certified mail was returned by the U.S. Postal Service marked "Unclaimed."

6. Government Code section 11506 states, in pertinent part:

> (c) The respondent shall be entitled to a hearing on the merits if the respondent files a notice of defense, and the notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file a notice of defense shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing.

7. Respondent failed to file a Notice of Defense within 15 days after service upon him of the Accusation, and therefore waived his right to a hearing on the merits of Accusation No. AC-2013-7.

8. California Government Code section 11520 states, in pertinent part:

> (a) If the respondent either fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent.

9. Under its authority afforded by Government Code section 11520, the CBA finds Respondent is in default. The CBA will take action without further hearing and, by considering the relevant evidence contained in the Default Decision Evidence Packet in this matter, and by taking official notice of all the investigatory reports, exhibits and statements on file at the CBA's offices regarding the allegations contained in Accusation No. AC-2013-7, the CBA finds that the charges and allegations in Accusation No. AC-2013-7, are true and correct by clear and convincing evidence.

10. Taking official notice of its own internal records, the CBA has determined that the reasonable costs for Investigation and Enforcement under Business and Professions Code section 5107 are $7,861.50 as of February 28, 2013.

DETERMINATION OF ISSUES

1. Based on the preceding findings of fact, Respondent Robert J. Schwei has subjected his Certified Public Accountant Certificate No. 33655 to discipline.

2. The agency has jurisdiction to adjudicate this case by default.

3. The California Board of Accountancy is authorized to revoke Respondent's Certified Public Accountant Certificate based upon the following violations that are alleged in the Accusation and that are supported by the evidence contained in the Default Decision Evidence Packet in this case:

a. Business and Professions Code section 5100, subdivision (i) (Breach of Fiduciary Responsibility); and

b. Business and Professions Code section 5100, subdivision (g) (Violation of CBA Regulation) in conjunction with California Code of regulations, title 16, section 52 (Failure to Respond to CBA Inquiry and Subpoena).

ORDER

IT IS ORDERED that Certified Public Accountant Certificate No. 33655, issued to Respondent Robert J. Schwei, is revoked.

Under Government Code section 11520, subdivision (c), Respondent may serve a written motion requesting that the Decision be vacated and stating the grounds relied on within seven (7) days after service of the Decision on Respondent. The agency in its discretion may vacate the Decision and grant a hearing on a showing of good cause, as defined in the statute.

This Decision shall become effective on June 29, 2013.

It is so ORDERED May 30, 2013

Leslie J. LaManna

FOR THE CALIFORNIA BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS

DOJ Matter ID:SF2012901060
Attachment: Exhibit A: Accusation

Exhibit A

KAMALA D. HARRIS
Attorney General of California
DIANN SOKOLOFF
Supervising Deputy Attorney General
ASPASIA A. PAPAVASSILIOU
Deputy Attorney General
State Bar No. 196360
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 622-2199
Facsimile: (510) 622-2270
E-mail: Aspasia.Papavassiliou@doj.ca.gov
Attorneys for Complainant

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

In the Matter of the Accusation Against: **ROBERT J. SCHWEI** **PO Box 31158** **San Francisco, CA 94131** **Certified Public Accountant** **Certificate No. 33655** Respondent.	Case No. AC-2013-7 **ACCUSATION**

Complainant alleges:

PARTIES

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

2. On or about December 4, 1981, the California Board of Accountancy issued Certified Public Accountant Certificate Number 33655 to Robert J. Schwei (Respondent). The Certified Public Accountant Certificate expired on December 31, 2012 and has not been renewed. The Certificate was in an inactive status since at least on or about January 1, 2001, due to Respondent's non-compliance with continuing education requirements.

JURISDICTION

3. This Accusation is brought before the California Board of Accountancy (CBA),

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 5109 states:

"The expiration, cancellation, forfeiture, or suspension of a license, practice privilege, or other authority to practice public accountancy by operation of law or by order or decision of the board or a court of law, the placement of a license on a retired status, or the voluntary surrender of a license by a licensee shall not deprive the board of jurisdiction to commence or proceed with any investigation of or action or disciplinary proceeding against the licensee, or to render a decision suspending or revoking the license."

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

STATUTORY PROVISIONS

6. Section 5100 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:

. . .

"(g) Willful violation of this chapter or any rule or regulation promulgated by the board under the authority granted under this chapter.

. . .

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

7. Probate Code section 16004.5, subdivision (a), states that a trustee may not require a beneficiary to relieve the trustee of liability as a condition for making a distribution or payment to, or for the benefit of, the beneficiary, if the distribution or payment is required by the trust instrument.

8. Probate Code section 16014 states that the trustee has a duty to apply the full extent of the trustee's skills, and that if the settlor, in selecting the trustee, has relied on the trustee's representation of having special skills, the trustee is held to the standard of the skills represented.

9. Probate Code section 16041 states that a trustee's standard of care and performance in administering the trust is not affected by whether or not the trustee receives any compensation.

10. Probate Code section 16060 states that a trustee has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration.

11. Probate Code section 16062 states that a trustee shall account at least annually to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed.

12. Probate Code section 16400 states that a violation by the trustee of any duty that the trustee owes the beneficiary is a breach of trust.

REGULATORY PROVISION

13. California Code of Regulations, title 16, section 52, states, in pertinent part:

"(a) A licensee shall respond to any inquiry by the Board or its appointed representatives within 30 days. The response shall include making available all files, working papers and other documents requested.

"(b) A licensee shall respond to any subpoena issued by the Board or its executive officer or the assistant executive officer in the absence of the executive officer within 30 days and in accordance with the provisions of the Accountancy Act and other applicable laws or regulations."

COST RECOVERY PROVISION

14. Section 5107, subdivision (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."

FACTS

15. Respondent is the trustee of his father's trust and one of six siblings who are beneficiaries of his father's estate. The father died in September of 2008. In August of 2011, one of the sibling beneficiaries (the Beneficary) complained to the CBA that Respondent never provided him with an accounting and that Respondent was demanding, as a condition of making a $70,000 distribution, that the beneficiary sign an agreement relieving Respondent of any liability arising out of the distribution. The Beneficiary had signed such an agreement when accepting a prior distribution, but questioned whether he had to sign the agreement for the current distribution.

16. Following a telephone call from a CBA representative, Respondent paid the balance of the current $70,000 distribution and also provided an accounting to the Beneficiary in or around December of 2011. The accounting was a half page, with one column accounting for the periods ending December 31, 2008, through December 31, 2010. The accounting's line items were very generally titled and accounts were aggregated with no further explanation or documentation as follows: Cash; Proceeds; Interest; Expense; and Distributions.

17. In February of 2012, the CBA representative informed Respondent that the accounting was inadequate. Respondent provided another accounting to the Beneficiary in or around March of 2012. The second accounting for the three years ending December 31, 2010, was still aggregated into general headings and did not provide the information the Beneficiary requested.

18. On or about March 29, 2012, the CBA representative sent Respondent a certified letter requesting the following documents: a copy of the trust; a copy of any tax returns filed for the trust; and supporting documentation for the accounting. Respondent signed for the letter but never responded to the Board inquiry.

19. On or about May 21, 2012, the CBA representative issued a subpoena via certified mail to Respondent's address of record asking for a response to the March letter and the requested documentation. Respondent never responded to the subpoena, which was returned unclaimed.

FIRST CAUSE FOR DISCIPLINE

(Breach of Fiduciary Responsibility)
(Bus. & Prof. Code § 5100, subd. (i))

20. Respondent has subjected his Certified Public Accountant Certificate to disciplinary action under section 5100, subdivision (i) (Breach of Fiduciary Responsibility) because he violated Probate Code section 16400 (Violation of Duty Breach of Trust) in administration of his father's trust regarding the Beneficiary. The circumstances are set forth below.

A. Respondent requested that he and the trust be relieved of any liability as a condition of distributing proceeds of the trust, as described in more detail in paragraph 15 above. The request was in violation of Probate Code section 16004.5, subdivision (a) (Prohibition on Relief of Liability Requirement).

B. Respondent failed to keep the Beneficiary reasonably informed of the trust and its administration by either not providing an annual accounting, or by providing an inadequate annual accounting, as described in more detail in paragraphs 15 through 17 above. This failure was in violation of Probation Code sections 16060 (Duty to Reasonably Inform) and 16062 (Annual Accounting).

SECOND CAUSE FOR DISCIPLINE

(Violation of CBA Regulation: Failure to Respond to CBA Inquiry and Subpoena)
(Bus. & Prof. Code § 5100, subd. (g) & Cal. Code Regs., tit 16, § 52)

21. Respondent has subjected his Certified Public Accountant Certificate to disciplinary action under section 5100, subdivision (g) (Violation of CBA Regulation) and California Code of Regulations, title 16, section 52 (Failure to Respond to Board Inquiry and Subpoena). The circumstances are described in paragraphs 18 through 19 above.

PRAYER

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

1. Revoking or suspending or otherwise imposing discipline upon Certified Public Accountant Certificate Number 33655, issued to Robert J. Schwei;

2. Ordering Robert J. Schwei to pay the California Board of Accountancy the reasonable costs of the investigation and enforcement of this case, under Business and Professions Code

section 5107; and

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

DATED: 1/8/2013

PATTI BOWERS
Executive Officer
California Board of Accountancy
Department of Consumer Affairs
State of California
Complainant

SF2012901060