IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 2912 Disciplinary Docket No. 3
Petitioner	:	
	:	No. 50 DB 2021
v.	:	
	:	Attorney Registration No. 66669
ERIK BENJAMIN CHERDAK,	:	
Respondent	:	(Out of State)

ORDER

PER CURIAM

AND NOW, this 28th day of October, 2022, upon consideration of the Report and Recommendations of the Disciplinary Board, Erik Benjamin Cherdak is disbarred from the Bar of this Commonwealth. Respondent shall comply with the provisions of Pa.R.D.E. 217 and pay costs to the Disciplinary Board pursuant to Pa.R.D.E. 208(g).

A True Copy Nicole Traini
As Of 10/28/2022

Attest: Nicole Traini
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, Petitioner	:	No. 50 DB 2021
v.	:	Attorney Registration No. 66669
ERIK BENJAMIN CHERDAK, Respondent	:	(Out of State)

REPORT AND RECOMMENDATIONS OF
THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES
OF THE SUPREME COURT OF PENNSYLVANIA:

Pursuant to Rule 208(d)(2)(iii) of the Pennsylvania Rules of Disciplinary Enforcement, the Disciplinary Board of the Supreme Court of Pennsylvania ("Board") herewith submits its findings and recommendations to your Honorable Court with respect to the above-captioned Petition for Discipline.

I. HISTORY OF PROCEEDINGS

By Petition for Discipline filed on April 12, 2021, Petitioner, Office of Disciplinary Counsel, charged Respondent, Erik Benjamin Cherdak, with violations of the Rules of Professional Conduct of Connecticut, Maryland, Massachusetts, and Virginia, and the Pennsylvania Rules of Disciplinary Enforcement. Petitioner personally served Respondent with the Petition on May 5, 2021; Respondent failed to file an Answer or seek an extension of time in which to do so. Pursuant to Pa.R.D.E. 208(b)(3), "[a]ny factual allegation that is not timely answered shall be deemed admitted."

By Notice and Order dated June 10, 2021, Respondent was notified of a prehearing conference scheduled on August 13, 2021 and a disciplinary hearing scheduled on September 29 and 30, 2021. District III Hearing Committee Chair Jason Giurintano conducted the prehearing conference on August 13, 2021, at which Petitioner appeared. Respondent failed to appear and failed to provide a reason for his absence. The prehearing Order dated August 13, 2021 established the deadlines by which the parties were to exchange exhibit and witness lists. Respondent did not at any time prior to the disciplinary hearing identify any exhibits or testimony to be presented at the hearing.

On August 17, 2021, Petitioner filed a Motion to deem all factual allegations of the Petition for Discipline admitted and to apply collateral estoppel to the August 23, 2018 Memorandum Opinion of United States District Judge Liam O'Grady in ***Fitistics, LLC v. Erik B. Cherdak***, Case No. 1:16-cv-112-LO-JFA, 2-18 WL 4059375 (E.D. Va.). Respondent did not respond to the Motion. By Order dated August 30, 2021, Chair Giurintano granted the Motion, deemed all factual allegations in the Petition for Discipline admitted, collaterally estopped Respondent from denying or attempting to refute Judge O'Grady's Memorandum Opinion, precluded Respondent from offering any evidence at the hearing other than as to the type of discipline to be imposed, and further ordered that the Hearing Committee had found evidence of a prima facie violation of at least one rule alleged in the Petition for Discipline.

On September 29 and 30, 2021, a District III Hearing Committee ("Committee") conducted a disciplinary hearing. Petitioner offered exhibits, which were admitted into evidence, and presented the testimony of four witnesses. Respondent did not offer any witnesses and did not testify. He did not offer any evidence on the issue of the type of discipline to be imposed.

On November 17, 2021, Petitioner filed a post-hearing brief to the Committee and requested that the Committee recommend to the Board that Respondent be disbarred. On January 24, 2022, Respondent filed a post-hearing brief to the Committee and requested that the Committee recommend no discipline or dismiss the action. On January 28, 2022, Petitioner filed a Motion to Strike Respondent's Exhibits and Sections A and B of his brief. After reviewing Respondent's response to the Motion, by Order dated March 3, 2022, the Committee granted Petitioner's Motion and struck Respondent's post-hearing brief in part.

By Report filed on April 20, 2022, the Committee concluded that Respondent violated the rules as charged in the Petition for Discipline and recommended that he be disbarred. The parties did not take exception to the Committee's Report and recommendation.

The Board adjudicated this matter at the meeting on July 21, 2022.

II. FINDINGS OF FACT

The Board makes the following findings:

1. Petitioner, whose principal office is located at Pennsylvania Judicial Center, Suite 2700, 601 Commonwealth Avenue, P.O. Box 62485, Harrisburg, Pennsylvania, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, with the power and duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of said Rules.

2. Respondent is Erik Benjamin Cherdak, born in 1966 and admitted to practice law in the Commonwealth in 1992. Respondent maintains an office at 149 Thurgood Street, Gaithersburg, MD 20878, and is subject to the jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

3. By Order dated August 12, 2020, effective September 11, 2020, the Supreme Court of Pennsylvania transferred Respondent to administrative suspension for failure to comply with annual attorney registration requirements.

4. Respondent has no record of prior discipline in Pennsylvania.

5. On April 12, 2021, Petitioner filed a Petition for Discipline against Respondent. Petitioner personally served Respondent on May 5, 2021. Respondent failed to file an Answer. Pursuant to Pa.R.D.E. 208(b)(3), the factual allegations of the Petition are deemed admitted.

6. The following findings at paragraphs 7 through 74 are set forth in the Petition for Discipline at paragraphs 4 through 73 therein and are deemed admitted.

7. Respondent became registered as an attorney with the United States Patent and Trademark Office (USPTO) on February 14, 1996.

8. Respondent became registered as an agent with the USPTO on February 22, 2016. Respondent's USPTO registration number is 39,936.

9. The facts set forth in paragraphs 10 through 55, infra, were established at a three-day bench trial from April 30, 2018 to May 2, 2018 before

United States District Judge Liam O'Grady of the United States District Court for the Eastern District of Virginia in the matter styled ***Fitistics, LLC v. Erik B. Cherdak***, Case No. 1:16-cv-112-LO-JFA ("the Fitistics case"); in an opinion dated August 23, 2018.

10. Fitistics, LLC ("Fitistics") is incorporated and located in Connecticut.

11. Sean L. McKirdy, is, and at all times relevant to this matter was, the President and Chief Executive Officer of Fitistics.

12. At all times during which Respondent conducted business with McKirdy/Fitistics, Respondent maintained a residence and office at 149 Thurgood St., Gaithersburg, Maryland 20878.

13. In the spring of 2012, Fitistics owned a patent portfolio pertaining to the retention and transfer of fitness related data.

14. The portfolio included U.S. Patent Number 8,118,709 (the '709 patent), which claimed priority from provisional application number 60/872,203 (filed 12/1/2006) and issuing from application number 11/998,766 (filed 11/30/2007).

15. The portfolio also included patent applications 13/305,788 and 13/350,790 (later developed into a patent), both filed 1/15/2012 and which were originally being prosecuted by Fitistics' attorney Steve McHugh.

16. In April 2012, Fitistics engaged Ward & Ward PLLC to render legal services pertaining to its patent portfolio.

17. Respondent was also a client of Ward & Ward, and was then a registered patent practitioner at the USPTO.

18. On April 9, 2012, Ward & Ward and Fitistics entered into an engagement letter for patent prosecution and preparation services which contemplated, as compensation for those services, a future assignment of a 25% ownership interest in Fitistics' patents, not including the '709 patent, to Ward & Ward. This future assignment would be made to "a corporate or other legal entity of Lawyers' choosing."

    a. No such assignment ever occurred.

    b. The April 9, 2012 engagement letter made no mention of Respondent.

19. Subsequent to this engagement letter, Ward & Ward and Fitistics, by addendum, agreed that Respondent would have no involvement, directly or indirectly, with Ward & Ward legal services to Fitistics.

20. Separately, on behalf of Ward & Ward, Respondent undertook to prosecute Fitistics' patent portfolio—specifically U.S. Patent Application Numbers 13/507,877, 13/507,876, 13/507,875, and 13/506,781.

21. Respondent routinely assured Fitistics and Ward & Ward that he was handling patent prosecution for these applications, including paying required fees to the USPTO.

22. Because of Respondent's lack of diligence, all the patent applications that Respondent had assured Fitistics and Ward & Ward he was prosecuting were abandoned.

23. Respondent failed to perform any work at all on the '788 and '790 applications through Ward & Ward.

24. The April 9, 2012 engagement letter was novated by an engagement letter dated September 20, 2012, and by agreement was backdated to March 3, 2012.

25. On October 4, 2012, that novation was modified at the request of Ward & Ward to explicitly preclude Respondent's involvement in Ward & Ward's work for Fitistics.

26. Fitistics independently entered into a Copyright Assignment Agreement (CAA) with Respondent in December 2012, which Respondent drafted and which provided for 65% of proceeds from the assigned copyrights going to Fitistics and 35% going to Respondent.

27. Pursuant to this assignment, Respondent filed a copyright infringement suit against Core Industries, Inc. in January 2013.

28. In Respondent's work leading up to the CAA, Respondent used his expertise in computer science to parse the code written for Fitistics by ESI Electronics Inc., a contracted vendor, and drafted copyright registration applications and assignments of rights in the code from ESI Electronics Inc. to Fitistics before the CAA was executed.

29. Pursuant to Respondent's assignment under the CAA, Respondent successfully negotiated settlements with Core Industries and Koko Fitclub totaling $130,000.

30. Under the express terms of the CAA, Fitistics was entitled to $84,500 from those settlements.

31. Respondent sent a check to Fitistics President Sean McKirdy for $42,000, but then:

a. Respondent placed a stop payment on that check;

b. Respondent lied to McKirdy about the reason the check didn't clear; and

c. Respondent blamed the banks.

32. In addition, Respondent inflated his litigation expenses in the Core Industries case and denied that he owed Fitistics any money under the Koko Fitclub settlement.

33. In July 2013, Respondent entered into a patent licensing agreement with Garmin International, Inc. ("Garmin").

a. Respondent licensed Fitistics' patent portfolio to Garmin for $90,000;

b. Respondent did so without Fitistics' knowledge and unrelated to the CAA; and

c. Respondent possessed no legal right to Fitistics' patent portfolio at the time Respondent entered into the license with Garmin.

34. At the time Respondent entered into the patent licensing agreement with Garmin, Respondent knew that licensing agreement covered Fitistics' portfolio.

35. Respondent did not disclose to Fitistics the existence of this license and Respondent has never paid to Fitistics any part of the $90,000 Respondent received from Garmin.

36. On August 12, 2013, Respondent and Fitistics entered into a Patent Rights Assignment Agreement (PRAA), which Respondent drafted.

37. On August 11, 2013, Respondent induced Fitistics to agree to backdate the PRAA to June 15, 2013, claiming that the backdating would bolster Respondent's position in future lawsuits under the PRAA.

38. The PRAA made explicit mention of existing licenses to MYE and Core Industries but made no mention of the Garmin license.

39. The reason the PRAA did not mention the Garmin license was because Respondent was continuing to conceal the existence of that license from Fitistics.

40. After entering into the PRAA, Respondent licensed Fitistics' patent portfolio to: Hanger, Inc. for $100,000; Virgin Pulse, Inc. for $50,000; Kersh Risk Management, LLC for $14,062.50; Starwood Hotels and Resorts Worldwide, Inc. for $20,000; Life Fitness/Brunswick Corp. for $100,000; Technogym USA Corp. for $30,000; Aliphcom, doing business as Jawbone for $25,000; Johnson Health Tech Co., Ltd., doing business as Matrix for $40,000; Google for $15,000; and Blue Cross and Blue Shield for $40,000.

41. While the Google license explicitly excludes the '709 patent, the license conveys an interest in other intellectual property of Fitistics. Respondent, as a trained attorney, could have ensured that all of Fitistics' intellectual property was excluded and Respondent failed to so ensure.

42. The Virgin, Starwood, Life Fitness (Brunswick), Technogym, Johnson Health Tech (Matrix Fitness), and Koko licensing agreements all expressly granted rights in the patent portfolio of Fitistics.

43. The remaining licensing agreements referred to above also expressly granted rights in the patent portfolio of Fitistics. *See*, e.g., Agreement between Respondent and Kersh Risk Management LLC (licensing "any and all ... patents that Cherdak now owns or may in the future own"); Agreement between Respondent and Aliphcom/dba/JAWBONE (licensing "all intellectual property rights now or hereafter owned, licensed, or controlled, directly or indirectly, by Cherdak").

44. The licensing agreements pursuant to which Respondent granted licenses to patents in Fitistics' portfolio generally contained a representation and warranty that Respondent was the sole owner of the portfolio.

45. In 2015, Respondent entered into the Starwood settlement agreement for $20,000.

    a. Respondent repeatedly assured McKirdy that the settlement was for $200,000;

    b. Respondent showed McKirdy a draft settlement agreement to that effect; and

    c. Based on Respondent's representation that the paid $20,000 was merely the first payment toward the $200,000 total amount, McKirdy allowed Respondent to retain the full $20,000.

46. McKirdy continued to confront Respondent about the remaining $180,000, and when he did so, Respondent continued his deception and pretended that he would pursue legal action to enforce the agreement.

47. Respondent similarly concealed the existence of Respondent's license agreements with Life Fitness (Brunswick), Technogym, and Johnson Health Tech (Matrix Fitness).

48. Despite having entered into license agreements with these three companies on April 23, 2015, August 4, 2015, and September 23, 2015, Respondent concealed these agreements from Fitistics.

49. On April 22, 2015, McKirdy asked Respondent about the status of the Life Fitness license, to which Respondent responded, "I don't know . . . thinking."

50. On August 7, 2015, McKirdy asked about a potential payment from Technogym. Despite having entered into a license with Technogym just three days prior, Respondent replied that he didn't know the status.

51. When McKirdy repeatedly pressed Respondent about licensing targets, rather than disclose Respondent's deception Respondent evaded the questions in an effort to mislead McKirdy. (Respondent writing to McKirdy: "Did I ever tell you that you ask stupid questions over and over again. Tiring!").

52. In order to delay addressing the issue and in a further attempt to mislead, Respondent used legal concepts that McKirdy would not necessarily understand. For example, in response to McKirdy's questions about these licenses, Respondent wrote on August 13, 2015,

"I am getting to that tomorrow ... Limelight case on direct infringement of a method claim just came down today en ban[c]. I need to review the case and make some decisions. Absolutely affects direct infringement of a method claim."

53. On September 8, 2015:

    a. McKirdy sent Respondent two videos depicting a cell phone syncing with Life Fitness equipment by Bluetooth, a technology similar to that covered in Fitistics' patent portfolio; and

    b. Respondent replied:

> Marriott is being a friend but they are looking to protect their interests too. They are brokering, but they want oems to handle the problem. So finger pointing is going on too. But ipr is big topic and I may just need to refile and let oems file their ipr. If the case comes out of pto then it's strong. If it does not, then this has all been for naught. If I take settlements now they are likely to be smaller and modest and that is where I am getting hung up in my thoughts. 10 years on patents, should I do what I did with mine and fight reexam. That worked out well at that time before octane. So far I can tell you that while there has been a lot of talk about ipr proceedings, nobody has produced a single reference for me to review - a reference or more than one that would have to be used to drive ipr proceeding. I think that sitting a bit while I Move for more patents may be the best course of action.

54. Respondent also lied to McKirdy to conceal other agreements Respondent had entered into.

55. On December 9, 2014:

    a. Respondent messaged McKirdy that Respondent was considering pursuing a Garmin license. (Respondent apparently

had forgotten that he had already licensed the Fitistics portfolio to Garmin);

b. Respondent e-mailed Garmin about that licensing and Garmin advised that Respondent had already licensed the Fitistics portfolio to Garmin in the July 2013 licensing agreement; and

c. Respondent then messaged McKirdy that Garmin would not be a potential licensee, and when McKirdy subsequently made inquiries to Respondent about the matter, Respondent failed to respond to his inquiries.

56. In addition to the factual findings set forth in Paragraphs 10 through 55, Judge O'Grady found that Respondent's testimony was wholly incredible and that Respondent's testimony was regularly contradicted by common sense and plain evidence before the court. Judge O'Grady found that Respondent's character for untruthfulness was well-established at trial.

57. Judge O'Grady stated that Respondent's character for untruthfulness was apparent on the witness stand, both during Respondent's narrative testimony and Plaintiffs' cross-examination of Respondent.

58. Judge O'Grady also found that Respondent lied to United States Magistrate Judge Judith Dein in the District of Massachusetts on October 1, 2015 at an in-person hearing.

a. Judge Dein directly asked Respondent about licensing agreements Respondent had failed to turn over in discovery in a separate case and Respondent asserted that he had turned over all

of them.

b. Respondent failed to disclose to Judge Dein the existence of the Virgin Pulse license agreement, the Johnson Health Tech Company license agreement (which Respondent had entered into a mere week before the hearing before Judge Dein), and the Life Fitness (Brunswick) license agreement.

59. Judge O'Grady found that there was also no doubt that Respondent perjured himself in the Fitistics case.

60. Judge O'Grady found that Respondent had told repeated lies upon lies in the case.

61. Judge O'Grady found that Respondent's dishonesty was apparent during the portion of Respondent's video deposition played at trial and was also apparent on the witness stand.

62. For example, when confronted with the fact that Respondent had perjured himself in financial disclosures to the United States Bankruptcy Court pursuant to the bankruptcy petition Respondent filed on the eve of the original scheduled trial in the Fitistics case, Respondent tried to explain that those documents were prepared by lawyers or otherwise involved complex calculations that did not require complete accuracy.

63. In another example, on cross-examination, Respondent was confronted with telephone calls he made to a gold and silver exchange, seeking information on the purchase of $130,000 in gold while his bankruptcy case was pending. Despite a highly detailed conversation with the exchange representative and Respondent's apparent extensive

familiarity with buying gold, Respondent nonetheless testified at trial, wholly incredibly, that the call was related to a school project for his son.

64. Respondent was the only witness called in the defendant's case. Thus, as the court noted, the defense consisted largely of Respondent's own testimony. The court determined that Respondent's character for untruthfulness, prior false statements to a federal judge, perjury in filings with the United States Bankruptcy Court, and perjury during his deposition and during the trial rendered Respondent's testimony worthless to the court.

65. Judge O'Grady, the finder of fact in the Fitistics case, determined that Fitistics had established by clear and convincing evidence that Respondent fraudulently induced Fitistics to enter into both the CAA and PRAA, and that Respondent had converted all monies due to Fitistics from the Licenses (the licensing agreements Respondent had entered into in order to license Fitistics' patent portfolio).

66. Judge O'Grady found that Respondent had converted the funds willfully and maliciously, as demonstrated by Respondent's efforts to conceal the existence of licenses and Respondent's regularly dishonest acts to justify his failure to pay monies he knew to be due to Fitistics.

67. Judge O'Grady found that the evidence was overwhelming that Respondent had failed to prosecute the patents he had contracted with Ward & Ward to prosecute.

68. Judge O'Grady found that full disgorgement of Respondent's ill-gotten gains was warranted. He determined that Fitistics was entitled to

disgorgement of $654,062.50 of the licensing proceeds Respondent had obtained. He further found that Respondent's conduct was willful and malicious, necessitating the imposition of punitive damages in the amount of $350,000, the statutory maximum under Virginia state law.

69. By Order dated August 23, 2018, Judge O'Grady ordered that judgment be entered in favor of Fitistics and against Respondent for $654,062.50 in compensatory damages and imposed $350,000 in punitive damages.

70. By Opinion and Order dated June 10, 2019 ("the June 10, 2019 sanctions Opinion and Order"), Judge O'Grady granted Fitistics' motion for sanctions against Respondent pursuant to Fed.R.Civ.P. 11 in the amount of $361,576.18.

71. In the June 10, 2019 sanctions Opinion and Order, Judge O'Grady stated that the "litigation was lengthy and proceedings were multiplied by frivolous filings made by [Respondent]." Judge O'Grady further stated that "[Respondent's] brazen conduct in filing many frivolous pleadings and putting false information before the Court demonstrate[d] both the severity of the Rule 11 violation and the importance of a significant sanction to serve as deterrence from [Respondent] continuing to abuse the legal system."

72. In a separate Opinion and Order dated June 10, 2019, Judge O'Grady, *inter alia*, denied three motions Respondent had filed to vacate the judgment in the Fitistics case.

73. On November 20, 2019, the United States Court of Appeals for the Fourth Circuit, in a per curiam opinion, affirmed Judge O'Grady's August

23, 2018 Order and June 10, 2019 sanctions Order, for the reasons expressed by Judge O'Grady in his opinions of those dates related to those Orders.

74. The 90-day period which Respondent had to file a petition for a writ of certiorari with the United States Supreme Court expired, and Respondent did not file such a petition.

75. On June 9, 2020, Petitioner sent Respondent a DB-7 Request for Statement of Respondent's Position ("DB-7 letter"). Petition for Discipline, ¶77.

76. On July 30, 2020, the DB-7 letter was served upon Respondent personally by hand-delivery. Petition for Discipline, ¶78.

77. Respondent requested an extension to respond to the DB-7 letter and on September 15, 2020, Petitioner gave Respondent an extension until September 30, 2020 by which to respond. Petition for Discipline, ¶79.

78. Respondent failed to respond by the September 30, 2020 deadline, and on November 6, 2020, he indicated that he would provide a response by mid-November 2020. Petition for Discipline, ¶80.

79. Respondent did not respond to the DB-7 letter. Petition for Discipline, ¶81.

Aggravating Factors

80. Judge O'Grady ordered compensatory damages against Respondent in the amount of $654,062.50, as disgorgement of ill-gotten gains. ODC-2 at 1 (Order) and 17-18 (Mem. Opinion). Judge O'Grady also ordered punitive damages against Respondent in the amount of $350,000 for his willful and malicious conduct. *Id.* With accrued interest, the total sum that Respondent owes McKirdy and Fitistics exceeds $1,500,000. N.T. 9/29/21 at 110.

81. Respondent retained Steven War, Esquire as an expert in certain cases and failed to pay Mr. War a portion of the fees owed to him. First, Respondent gave Mr. War checks that bounced. Next, Mr. War obtained judgments against Respondent, who then signed a promissory note promising to pay. As of the date of the disciplinary hearing, Respondent had not paid the judgments. N.T. 9/29/21 at 184-190; ODC-S, ODC-T, ODC-U.

82. Respondent falsified emails purporting to have been sent from Mr. War to Respondent, and then offered those false emails into evidence in a proceeding before the Office of Enrollment and Discipline in the U.S. Patent and Trademark Office. N.T. 9/29/21 at 190, 191, 192-196, 197-199, 200-202, 2-3-205, 207-208; ODC-V, ODC-W, ODC-X, ODC-Y.

83. In November 2016, Respondent contracted with Central Roofing and Siding ("Central") to have a roof put on his house. N.T. 9/30/21 at 5, 7.

84. In December 2016, Respondent filed for bankruptcy but did not inform Central, which completed the work in January 2017. N.T. 9/30/21 at 7-8, 9-10; ODC-C.

85. Respondent fraudulently paid Central using a credit card of his employer law firm that he was not authorized to use for any purposes other than paying fees of the U.S. Patent and Trademark Office. N.T.9/30/21 at 8-9, 23-24, 27-28, 36; ODC-C.

86. Central was required to refund the payment and obtain a judgment against Respondent, which still has not been paid in full. N.T. 9/30/21 at 8, 10-11; ODC-A; ODC-C.

87. Respondent disobeyed an order of the bankruptcy court by failing to pay Central's administrative claims as approved and ordered by the court, and was held in contempt. ODC-D.

88. Respondent signed a false declaration in the ***Fitistics*** case, stating that he was not a party to any litigation settlement agreements with specified parties. N.T. 9/29/21 at 43-46; ODC-P. Subsequently, Respondent signed discovery responses disclosing amounts he had received in settlements relating to patents in the Fitistics portfolio. N.T. 9/29/21 at 49-51; ODC-Q. These responses showed that Respondent's declaration was false.

89. Nearly two and a half years after Judge O'Grady entered judgment against Respondent, and nearly two years after the U.S. Court of Appeals for the Fourth Circuit affirmed the judgment, and months after Respondent was served with the DB-7 letter in the instant matter, Respondent sued Judge O'Grady in federal court in Virginia alleging bias. ODC-B. Respondent amended his original complaint to add, *inter alia,* Judge O'Grady's secretary as a defendant. *Id.* Respondent's

complaint consisted of 72 pages alleging a broad-ranging conspiracy against Respondent involving Judge O'Grady. By a February 23, 2022 Memorandum Opinion, Respondent's claims were dismissed with prejudice, as barred by judicial immunity. *See*, Petitioner's Letter of February 24, 2022.

90. Respondent has a large number of unpaid judgments outstanding against him, including judgments held by Fitistics/McKirdy, Steven War, and Central Roofing and Siding. ODC-A. Respondent has substantial outstanding tax liens held by the IRS and the State of Maryland. *Id.* The total amount of the 27 judgments outstanding against Respondent is more than $2.3 million.

91. Respondent did not accept responsibility for his misconduct.

92. Respondent failed to show any remorse.

93. Respondent's conduct during the course of the disciplinary proceedings evidenced a lack of respect for the disciplinary system, the Committee, and the Office of Disciplinary Counsel.

94. Throughout his disciplinary hearing, Respondent demonstrated an inability to competently represent himself.

95. Petitioner presented the testimony of Sean McKirdy, Fitistics CEO; Steven War, Esquire, an intellectual property lawyer; Terry Greenberg, owner of Central Roofing and Siding; and Martin Geissler, Esquire, a patent attorney. These witnesses were credible and their testimony established that Respondent's conduct undermined faith in lawyers, the legal profession and the justice system. N.T. 9/29/21 at 108-109

(McKirdy); 205-207 (War); N.T. 9/30/21 at 14-15 (Greenberg); 29 (Geissler).

III. CONCLUSIONS OF LAW

Respondent's misconduct took place in connection with court proceedings in Virginia and Massachusetts, and otherwise took place in Maryland (Respondent's state of residence) and Connecticut (Fitistics' state of incorporation and McKirdy's state of residence). Pursuant to Pennsylvania Rules of Professional Conduct 8.5(b)(1) and (b)(2) (pertaining to choice of law), the Rules of Professional Conduct to be applied in this matter are the rules of Connecticut, Maryland, Massachusetts and Virginia.

By his conduct as set forth above, Respondent violated the following Connecticut (CT), Maryland (MD), Massachusetts (MA) and Virginia (VA) Rules of Professional Conduct, and Pennsylvania Rules of Disciplinary Enforcement (Pa.R.D.E.):

1. MD RPC 1.3 and CT RPC 1.3, which state that an attorney or lawyer shall act with reasonable diligence and promptness in representing a client.
2. MD RPC 1.4(a)(1), 1.4(a)(2), and 1.4(b), which state, respectively, that an attorney or lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required, shall keep the client reasonably informed about the status of the matter, and shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, and CT RPC 1.4(a)(1), 1.4(a)(3),and 1.4(b) (same), and MD RPC 1.4(a)(3) and CT RPC 1.4(a)(4), which state that an attorney or lawyer shall promptly comply with reasonable requests for information.

3. MD RPC 1.15(d) and CT RPC 1.15(e), which state that upon receiving funds in which a client or third person has an interest, an attorney or lawyer shall promptly notify the client or third person and promptly deliver to the client funds the client is entitled to receive.
4. MD RPC 8.4(b) and CT RPC 8.4(2), which state that it is professional misconduct for an attorney or lawyer to commit a criminal act that reflects adversely on the attorney's honesty, trustworthiness or fitness as an attorney in other respects.
5. MD RPC 8.4(c) and CT RPC 8.4(3), which state that it is professional misconduct for an attorney or lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
6. VA RPC 3.1, which states that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law; VA RPC 3.3(a)(1), which states that a lawyer shall not knowingly make a false statement of fact or law to a tribunal; VA 3.3(a)(4), which states that a lawyer shall not knowingly offer evidence that the lawyer knows to be false; VA RPC 8.4(b) and 8.4(c), which state, respectively, that it is professional misconduct for a lawyer to commit a criminal or deliberately wrong act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law, or to engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.
7. MA RPC 3.1, which states that a lawyer shall not bring, continue, or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for

an extension, modification, or reversal of existing law; MA RPC 3.3(a)(1) and MA RPC 3.3(a)(3), which state, respectively, that a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, or offer evidence that the lawyer knows to be false; MA RPC 8.4(b), MA RPC 8.4(c) and MA RPC 8.4(d), which state, respectively, that is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as lawyer in other respects, to engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or to engage in conduct that is prejudicial to the administration of justice.

8. Pa.R.D.E. 203(b)(7), which states that failure by a respondent-attorney without good cause to respond to Disciplinary Counsel's request under Disciplinary Board Rules, § 87.7(b) for a statement of the respondent-attorney's position is grounds for discipline.

IV. DISCUSSION

Here, the Board considers the Committee's unanimous recommendation to disbar Respondent for his violations of the Rules of Professional Conduct in four states in connection with his engagement in an extensive scheme to defraud Fitistics, LLC, and its President and Chief Executive Officer, Sean McKirdy; his perjury in a court case; his false statements to a judge; his submission of false documents to a court; and his violation of the Pennsylvania Rules of Disciplinary Enforcement for his failure to respond to Petitioner's investigation of the above misconduct. Respondent did not file exceptions to the Committee's recommendation.

Petitioner proved Respondent's ethical misconduct by a preponderance of evidence that is clear and satisfactory. ***Office of Disciplinary Counsel v. John Grigsby***, 425 A.2d 730, 732 (Pa. 1981). Respondent's fraudulent scheme was set forth in the Petition for Discipline and is based on a civil fraud determination made by Judge Liam O'Grady in the matter of ***Fitistics, LLC v. Erik B. Cherdak***, after a three-day bench trial in the United States District Court for the Eastern District of Virginia, and memorialized in a Memorandum Opinion dated August 23, 2018. Judge O'Grady's determination was affirmed by the U.S. Court of Appeals for the Fourth Circuit by per curiam order dated November 20, 2019. Respondent failed to answer the Petition for Discipline; the factual allegations contained therein are deemed admitted under Pa.R.D.E. 208(b)(3). At the hearing, the Committee properly applied collateral estoppel to Judge O'Grady's findings set forth in the August 23, 2018 Memorandum Opinion[1], and deemed all factual allegations of the Petition for Discipline admitted, thereby precluding Respondent from offering any evidence in the proceeding other than evidence relevant to the type of discipline to be imposed, under D.Bd. Rules § 89.151(a) and (b). Because Respondent has been collaterally estopped from contesting Judge O'Grady's determination and factual findings, and because he is deemed to have admitted the factual allegations of the Petition for Discipline based on Judge O'Grady's findings, those findings and admitted allegations clearly and satisfactorily establish Respondent's violations of the Rules of Professional Conduct charged in the Petition.

For the following reasons, we recommend that Respondent be disbarred.

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[1] In ***Office of Disciplinary Counsel v. Kiesewetter***, 889 A.2d 47 (Pa. 2005), the Supreme Court of Pennsylvania applied collateral estoppel to a civil fraud verdict, determined that the record of the civil fraud proceeding was admissible in the disciplinary proceeding, and held that the facts found in the civil fraud trial established the alleged violations of the Rules of Professional Conduct based on the record of that proceeding. *Id.* at 54-55.

Respondent was admitted to practice in the Commonwealth in 1992 and currently is on administrative suspension pursuant to an order of the Supreme Court effective September 11, 2020, for failing to comply with annual attorney registration requirements. Respondent became registered as an attorney with the United States Patent and Trademark Office (USPTO) in 1996 and became registered as an agent with the USPTO on February 22, 2016.

The record established that in 2012, Respondent commenced his involvement with Fitistics, LLC and McKirdy related to Fitistics' patent portfolio pertaining to the retention and transfer of fitness data from fitness machines. Respondent at times served as an attorney to Fitistics but was also a co-owner on some of its patents.

On February 4, 2016, Fitistics and McKirdy commenced litigation in the United States Court for the Eastern District of Virginia against Respondent, alleging breach of contract, breach of fiduciary duty, conversion and fraud. As set forth in the Memorandum Opinion and Order, Judge O'Grady found that Respondent engaged in an extensive scheme to clandestinely license proprietary software without paying the owner's share of license agreements and settlements, and found Respondent liable for breach of contract, conversion and fraud as against Fitistics.

As evidenced by the Memorandum Opinion, Respondent's dishonest conduct permeated the proceedings. Judge O'Grady found Respondent perjured himself when he testified in the ***Fitisitcs*** case. ODC-2 at 10 ("There is no doubt that Cherdak perjured himself in this case ... Cherdak's dishonesty was apparent during the portion of his video deposition played in trial and also apparent on the witness stand."). Judge O'Grady also found that Respondent perjured himself in financial disclosures to the U.S. Bankruptcy Court. *Id.* at 10-11. Further, Judge O'Grady found Respondent lied to United States

Magistrate Judge Judith Dein in the District of Massachusetts on October 1, 2015, at an in-person hearing when Respondent falsely told Magistrate Judge Dein that he had turned over all licensing agreements in discovery. *Id.* at 10.

In a pointed condemnation of Respondent's dishonesty, Judge O'Grady found his testimony "to be wholly incredible, regularly contradicted by common sense and plain evidence before the court," and referred to Respondent's "repeated lies upon lies." ODC-2 at 10. As well, the Court stated that "[Respondent's] character for untruthfulness, prior false statements to a federal judge, perjury in filings with the United States Bankruptcy Court, and perjury during his deposition and during the trial in this matter render his testimony worthless to the Court." *Id.* at 11. Judge O'Grady awarded to Fitistics as the victim of Respondent's conduct, $654,062.50 as disgorgement of profits and $350,000 in punitive damages. In a subsequent decision dated June 10, 2019, Judge O'Grady found that Respondent violated Federal Rule 11 and imposed $361,576.18 in sanctions against Respondent, in the form of attorneys' fees incurred by Fitistics. The Fourth Circuit Court of Appeals affirmed both decisions.

Respondent's perpetration of fraud upon Fitistics and McKirdy, his perjury, his false statements to Magistrate Judge Dein, and submission of false documents to the court, as found by Judge O'Grady, violated a host of ethical rules in four states relative to engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and for committing a criminal act (or, under Virginia's rules a deliberately wrongful act) that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law. Respondent's misconduct also violated the rules of four states which prohibit a lawyer from bringing or defending a proceeding, or asserting or controverting an issue therein, unless there is a basis for doing so that is not frivolous, prohibit a lawyer from knowingly making a false

statement of fact or law to a tribunal, and prohibit a lawyer from offering evidence that the lawyer knows to be false.

Furthermore, Respondent's misconduct in receiving proceeds of patent settlements and failing to remit the proceeds he owed to McKirdy violated rules in Maryland and Connecticut to the effect that upon receiving funds in which a client or third person has an interest, a lawyer shall promptly notify the client or third person and promptly deliver to them funds they are entitled to receive.

Respondent also violated ethical rules in Maryland and Connecticut regarding acting with reasonable diligence and promptness, informing the client of a decision or circumstance by which the client's informed consent is required and keeping the client informed of the status of the matter, and complying with reasonable requests for information.

Lastly, Respondent violated Pa.R.D.E. 203(b)(7) by failing to respond to Petitioner's request for a statement of his position on this matter, despite Petitioner's affording Respondent a continuance to file a response.

Having determined that Respondent engaged in professional misconduct, we next consider the appropriate quantum of discipline to be imposed. "The primary purpose of our system of lawyer discipline is to protect the public from unfit attorneys and to maintain the integrity of the legal system." ***Office of Disciplinary Counsel v. John Keller***, 506 A.2d 872, 875 (Pa. 1986). The disciplinary system also seeks to deter similar misconduct. ***In re Dennis Iulo***, 766 A.2d 335, 339 (Pa. 2001). In determining the appropriate discipline, the Board examines precedent for the purpose of examining "the respondent's conduct against other similar transgressions." ***In re Anonymous No. 56 DB 1994 (Linda Gertrude Roback)***, 29 Pa. D. & C. 4th 398, 406 (1995). The Board considers any

aggravating and mitigating factors when making its recommendation. ***Office of Disciplinary Counsel v. Brian Preski***, 134 A.3d 1027, 1031 (Pa. 2016).

The record clearly established that Respondent engaged in abysmal misconduct. Respondent's rampant duplicity showcases his lack of character, which underscores the necessity of removing him from the legal profession. The impact of Respondent's misconduct on the profession cannot be understated. Petitioner's witnesses credibly and clearly established that Respondent's misconduct undermined faith in lawyers, the legal profession, and the justice system. Unfortunately, Respondent's egregious behavior at the heart of this disciplinary matter is not the only conduct that gives the Board pause. Many weighty aggravating factors exist that provide further proof of Respondent's dishonest nature and lack of fitness to practice law.

The record demonstrated that Respondent falsified emails that he offered into evidence in a proceeding before the Office of Enrollment and Discipline in the U.S. Patent and Trademark Office. These emails were purported to have been sent from Attorney Steven War to Respondent. Mr. War credibly testified at the disciplinary hearing on September 29, 2021, that he never sent those emails to Respondent. N.T. 9/29/21 at 190-191, 192-196.

The record established that Respondent played fast and loose with his financial obligations, to the detriment of others. This fiscal irresponsibility is an aggravating factor. ***Office of Disciplinary Counsel v. Anthony Dennis Jackson***, No. 145 DB 2007 (D. Bd. Rpt. 11/21/2008 at 15-16) (S. Ct. Order 4/3/2009) (Jackson was deemed "unable to effectively manage his personal affairs and professional matters" because of default judgments, unsatisfied judgments, and open liens entered against him; the Board treated these fiscal problems as an aggravating factor). Respondent has a large number of

unpaid judgments outstanding against him. Respondent used Mr. War as an expert in certain cases and gave Mr. War checks that bounced. Mr. War obtained judgments against Respondent, who signed a promissory note to pay, but still has not paid. In the matter involving Central Roofing and Siding, Respondent filed for bankruptcy after he contracted with Central for a roof for his home. He did not inform Central of the bankruptcy filing and fraudulently paid Central upon completion of the work using a credit card of his employer law firm that he was not authorized to use. Central was forced to refund the payment and obtain a judgment, which has not been paid. We note that in the Central matter, Respondent disobeyed an order of the bankruptcy court by failing to pay Central's administrative claim as approved and ordered by the court and was thereafter held in contempt. Respondent also has substantial outstanding tax liens held by the IRS and the State of Maryland. The total amount of 27 judgments outstanding against Respondent, including the ***Fitistics*** judgment in excess of $1,500,000, is over $2,300,000.

Perhaps not unsurprisingly, throughout these disciplinary proceedings, Respondent failed to recognize his wrongdoing, accept responsibility and show remorse, thus demonstrating that he is unrepentant and has no regard for the considerable harm and loss he caused. These failures constitute weighty aggravating factors. ***Office of Disciplinary Counsel v. Donald B. Moreman***, No. 112 DB 2019 (D. Bd. Rpt. 3/18/2021 at 9-10, 11) (S. Ct. Order 3/18/2021); ***Office of Disciplinary Counsel v. Robert J. Murphy***, No. 206 DB 2016 (D. Bd. Rpt. 9/3/2019 at 35-36) (S. Ct. Order 12/19/2019). Considering that some two and a half years after Judge O'Grady entered judgment against him, Respondent sued the judge (and the judge's secretary) alleging bias, it is apparent that he has had difficulty accepting the outcome of the ***Fitistics*** case.

Respondent's claims in that matter were dismissed with prejudice. Respondent offered no testimony at the disciplinary hearing that would demonstrate that he understands the gravity of his fraudulent and dishonest actions or that he regrets his conduct. In fact, the Committee found that Respondent insisted on placing blame on others "when such explanations defy logic and common sense." HC Report at 15. As an example, the Committee noted Mr. Greenberg's credible testimony that his company completed putting a new roof on Respondent's house in January 2017 and that Mr. Greenberg has never been paid for it. Respondent did not dispute that he received a new roof, but offered arguments that Greenberg's judgement against Respondent was somehow "questionable," as if Mr. Greenberg were to blame for not getting paid for his work.

Respondent's conduct during the disciplinary hearing must be weighed as an aggravating factor. As the Committee specifically found, Respondent demonstrated a lack of respect for the disciplinary system, the Committee and Disciplinary Counsel. Respondent argued with the Committee throughout the proceedings and attempted to "intimidate" the Committee in several instance where he disagreed with a ruling by the Chair or "reminded" the Committee that he was making a record for appeal (N.T. 9/29/21 at 11-12, 38, 57, 117, 215; N.T. 9/30/21 at 27, 49). Respondent acted in a manner that caused the Chair to chastise him, for example when he sought to cross-examine witnesses on irrelevant matters solely in an attempt to argue with them, argued with the Committee Chair, and attempted to circumvent the Chair's sustaining of objections to impertinent questions. N.T. 9/29/21 at 150-153; N.T. 9/30/21 at 33-34. The Committee pointed out that in several instances where Respondent disagreed with a ruling made by Chair Giurintano, Respondent childishly exclaimed "wow" in response to the ruling, as though the Chair should doubt his ruling simply because Respondent disagreed with it.

N.T. 9/29/21 at 38, 57, 215. The Committee found Respondent's hearing performance to be "inept" and observed that such performance likely was Respondent's "usual way of doing business, which appears to be to attempt to manipulate, confuse, embarrass, and bully those with whom he is dealing." HC Report. at p. 15. Respondent's purported "apology" at the close of the hearing (N.T. 9/30/21 at 54) did not impress the Committee as genuine in nature and did not serve to mitigate his prior poor behavior.

The Committee also faulted other aspects of Respondent's approach to his disciplinary proceedings, finding that he showed an inability to competently represent himself. In addition to Respondent's failure to respond to Petitioner's DB-7 request, which constituted a violation of Pa.R.D.E. 203(b)(7), Respondent failed to respond to the Petition for Discipline and failed to attend the prehearing conference. Respondent identified no witnesses and no documents to be used as exhibits, but later attempted unsuccessfully to have the Committee keep the record open so that he could bring in witnesses and exhibits. Respondent chose not to testify on his own behalf and failed to offer any evidence whatsoever. The Committee noted that in his post-hearing submission, instead of taking the opportunity to consider the evidence and recommend a sanction, Respondent attempted to relitigate previous rulings and attack perceived wrongs brought upon him, specifically by Judge O'Grady. The record before this Board provides no insight into why Respondent committed such reprehensible misconduct and no assurance that he will refrain from engaging in similar misconduct in the future.

We consider, as we must, the mitigating factor of Respondent's lack of prior discipline since his admission to the Pennsylvania bar in 1992 and find, as did the Committee, that this factor is not entitled to any appreciable weight in light of the serious

nature of Respondent's misconduct and the multiple and significant aggravating factors. ***Office of Disciplinary Counsel v. Jonathan F. Altman***, 228 A.3d 508 (Pa. 2020).

The totality of these facts and circumstances compel disbarment. Such a sanction is consistent with discipline imposed in prior similar matters. In ***Kiesewetter***, the Court disbarred the respondent, who like the instant Respondent had no prior discipline, carried out an extensive fraud and was held liable for that fraud in a civil action resulting in a substantial judgment again him. The Court stated: "We hold that Respondent's actions in defrauding his sisters and nephews of family assets clearly violate R.P.C. 8.4(c), which provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. We further hold that such misconduct warrants disbarment from the practice of law in this Commonwealth." 889 A.2d at 55.

Other cases that resulted in disbarment based on a lawyer's gravely dishonest actions support disbarring the instant Respondent. In ***Office of Disciplinary Counsel v. John Kelvin Conner***, No. 29 DB 2018 (D. Bd. Rpt. 4/2/2019) (S. Ct. Order 6/20/2019), Conner engaged in misconduct when he served as his elderly client's power of attorney and executed numerous transactions against the account without his client's permission. Conner then attempted to conceal his misconduct by fraudulent and deceptive means. The Board found several weighty aggravating factors, including Conner's failure to express remorse, his incredible testimony at the disciplinary hearing, and his fiscal irresponsibility as demonstrated by the many outstanding liens against him. The Court adopted the Board's recommendation and disbarred Conner. In ***Office of Disciplinary Counsel v. Glenn D. McGogney***, No. 194 DB 2009 (D. Bd. Rpt. 2/25/2011) (S. Ct. Order 3/28/2012), the Court disbarred McGogney for engaging in personal dealings with a client and defrauding the client, and grossly neglecting the case of another client and lying to

the client to camouflage his wrongdoing. In ***Office of Disciplinary Counsel v. Antoinette M.J. Bentivegna***, No. 88 DB 2005 (D. Bd. Rpt. 11/21/2006) (S. Ct. Order 1/26/2007), the Court disbarred Bentivegna after she submitted false and misleading documents to federal bankruptcy courts and testified falsely before a federal bankruptcy judge in order to conceal the false and misleading fillings.

As disbarment is the most severe form of disciplinary sanction, the Board recognizes its responsibility to exercise caution and recommend disbarment only in the most egregious matters. ***Matter of Leopold***, 366 A.2d 227, 231 (Pa. 1976). In our view, the facts and circumstances in the instant matter are as egregious as those in the ***Conner***, ***Kiesewetter***, ***McGogney*** and ***Bentivegna*** matters and warrant imposition of this severe sanction, in order to protect the public from unscrupulous members of the profession and to preserve confidence in the courts and the profession. Consistent with the guiding decisional law, upon this record, we recommend that Respondent be disbarred.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, Erik Benjamin Cherdak, be Disbarred from the practice of law in this Commonwealth.

It is further recommended that the expenses incurred in the investigation and prosecution of this matter are to be paid by the Respondent.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By: */s/ Robert J. Mongeluzzi*
Robert J. Mongeluzzi, Member

Date: 08/29/2022