

Jeffrey A. Dickstein, Bar Number 70638
Law Offices of Robert G. Bernhoft
207 E. Buffalo Street, Suite 600
Milwaukee, WI 53202
(414) 276-3333 telephone
Attorney for Joseph Banister

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,) CR. No. S-04-435 WBS
)
Plaintiff,)
)
vs.)
)
JOSEPH BANISTER, et al.,)
)
Defendants.)
_____)

**DEFENDANT BANISTER’S POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR BILL OF PARTICULARS**

COMES NOW Defendant Joseph Banister (hereinafter “Banister”), by and through his undersigned attorney of record, and respectfully submits these points and authorities in support of his motion for a bill of particulars. In support of said motion, Banister makes the following showing:

Paragraph 9 of the indictment alleges there are unnamed and unknown co-conspirators. If any of the witnesses to be called by the government include any such person, Banister needs to know in order to properly prepare cross-examination of that witness.

The indictment generally talks about “income” taxes, “FICA” taxes, “social security” taxes and “Medicare” taxes. Assuming, based upon paragraphs 6, 7, 8 and 29 of the indictment, that reference is being made to taxes found in Chapter 21 and Chapter

24 of Subtitle C. These chapters identify “income” taxes at 26 U.S.C. §§ 3101(a) and (b), “excise” taxes at 26 U.S.C. §§ 3111(a) and (b), and just a “tax” at 26 U.S.C. § 3402. The indictment appears to make no mention of other taxes contained in Subtitle C in Chapters 22 and 23. It also appears the indictment is calling the 26 U.S.C. § 3402 tax an “income” tax despite the fact that Congress chose not to use the word “income” at section 3402 as it did in sections 3101(a) and (b). The indictment also makes at paragraph 4 an allegation as to the definition of “gross income,” a definition contained in 26 U.S.C § 61 of the Internal Revenue Code, which is contained in Subtitle A of the Internal Revenue Code, known generically as “income taxes.” Further, the indictment uses the words “income,” “FICA” and “Medicare” taxes in paragraph 10 pertaining to co-defendant Thompson’s taxes as a self-employed sole proprietor, calling into questions various statutes in Subtitle A pertaining not only to “taxable income,” “adjusted gross income” and “gross income,” but also “self-employment income.” Banister is entitled to know exactly what taxes are in issue and exactly what he is being charged with in order to prepare a proper defense.

Paragraph 9 of the indictment charges four functions of the Internal Revenue Service that were impaired or impeded: the ascertainment, computation, assessment and collection of taxes due and owing from the employees of Cencal and from Thompson. Notwithstanding the allegations in the indictment that the illegal agreement of the Defendants sought to impair these four specific functions of the I.R.S., it is still critically important that those functions be defined and the statutory foundation for the performance of them be identified. The essence of a conspiracy to defraud is the obstruction of agency functions, thus proper analysis of such a charge requires finding the statutory basis for the performance of those functions to determine the scope of the

alleged conspiracy. Once that statutory basis is so identified, one must review the alleged overt acts to make a determination as to whether any one of those acts was one committed in furtherance of that carefully defined conspiracy. *United States v. Rosenblatt*, 554 F.2d 36 (2nd Cir. 1977); *United States v. Mollica*, 849 F.2d 723 (2nd Cir. 1988). Therefore, to give some connection to federal statutes to the word “defraud,” the functions of the agency must be described by statute, regulation, or delegation order. *United States v. Porter*, 591 F.2d 1048 (5th Cir. 1979). Banister is entitled to know what these statutes and/or regulations are to prepare his defense and to avoid surprise at trial.

WHEREFORE, Defendant Joseph Banister moves this Court for an order requiring the Plaintiff to file a bill of particulars.

Dated: May 20, 2005.

The Law Office of Robert G. Bernhoft, S.C.

By: /s/ Jeffrey A. Dickstein
Jeffrey A. Dickstein
Attorney for Defendant Joseph Banister