

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO. 1:06CR394
	)	
Plaintiff,	)	JUDGE ANN ALDRICH
	)	
-VS-	)	
	)	
JOSEPH SMITH and	)	MEMORANDUM IN SUPPORT
ANTON ZGOZNIK,	)	OF MOTION FOR BILL
	)	OF PARTICULARS
Defendants.	)	

Federal Rule of Criminal Procedure 7(f) authorizes the filing of a motion for bill of particulars within ten days of arraignment or as the Court may permit.

The purposes of bills of particulars are 1) for clarification of the indictment; 2) prevention of undue labor in the defendant's preparation for trial; 3) facilitation of the defendant's adequate preparation for trial; 4) the avoidance of surprise 5) the prevention of double jeopardy; and 6) limitation of the scope of prosecution. *See generally*, Fed. Rule Crim. Pro. 7(F).

The Indictment repeatedly alleges that Mr. Zgoznik made false and fraudulent (or at times "misleading") statements to two different IRS agents, to officials of the Diocese and to an attorney hired by the Diocese. In addition, the Indictment alleges that Mr. Zgoznik provided false and or "purported" documents to all of the above-mentioned persons.

GENERAL FACTS RELEVANT TO THIS CASE

The Defendant's need particulars regarding these alleged statements and documents is somewhat unique as the Defendant and the Diocese had an ongoing

relationship that spanned years and involved literally thousands of transactions and thousands of statements and conversations.

At the time Institutional Financial Advisors, Inc. (IFA), and Institutional Business Solutions, Inc. (IBS)(or their predecessors) were retained by the Diocese, the financial picture at the Diocese was unclear. There were no accounting systems in place in many offices and there was little or no ability to accurately monitor finances. Off-book accounts and assets were somewhat widespread, Each office in the Diocese was its own little fiefdom when it came to finances, with no oversight and even less accountability. Trying to design and install accounting systems in an nearly \$1 billion organization that had none is a big job - and it is the job that Anton Zgoznik was hired to do. In addition, IFA and IBS were hired to provide management information systems and support to the Diocese and many of its constituent organizations. In many cases, this meant wiring networks and original computerization and full-time employee training. As time went by, these services were provided on a 24 hour-a-day basis. IFA and IBS (along with Alexander Systems, Inc.) at times employed as many as 55 employees to provide these services, many of which were professional certified public accountants, computer software and hardware experts and support staff.

Institutional Financial Advisors, Inc., and Institutional Business Solutions, Inc., were large scale professional services organizations providing services daily, some around the clock, to a nearly \$1 billion organization. Billings were usually monthly on a project by project basis and there could be dozens of active projects in progress at any one time. The addressee on the billings varied, depending on which arm of the Diocese had hired IFA or IBS and how the costs was to be allocated for budget purposes. In

short, there were numerous transactions between the Diocese and IFA and IBS. While it appears that only a small percentage of the overall transactions are at issue in the Indictment, unless the government specifies the particular transactions it believes are at issue, Mr. Zgoznik may have no way to know until the trial which ones they are and will be surprised and deprived of his chance to adequately prepare his defense. It is patently unfair to take a vast universe of transactions and label "some" of them bad. In this instance, specificity is required to preserve not just fundamental fairness but due process of law.

Similarly, the audit of Joseph Smith's tax return and the audit of the Zgoznik Entities involved many conversations with the respective agents. During the audits many documents were passed through Mr. Zgoznik to the agent by many different sources.

In short, the events complained of in the Indictment were not born of discrete transactions between strangers, but were single events out of many similar events between familiar parties over an extended period of time. Practically speaking, the government should be required to isolate the particular statements and documents so that the Defendant can prepare to defend those statements or documents, as opposed to every statement or document that ever passed between he and the IRS agents, Diocese officials or Diocese attorney.

Each request seeking particulars with respect to statements or documents is discussed below.

1. Requests Relating to Alleged False Statements or Fraudulent Documents  
Requests 5, 7, 8, 9, 10, 11, 13, 16, 17, 21

Count 1 of the Indictment charges a conspiracy to commit mail fraud by Mr. Zgoznik and Mr. Smith. Among other things, the overt acts in furtherance of the conspiracy include, preparing and sending allegedly false invoices to the Cleveland Catholic Diocese or its constituent organizations, p. 9, ¶¶ 20-25 (General Allegations) & p. 16, ¶¶ 5 & 6; and making allegedly false and misleading statements to both the Diocese and p. 11, ¶ 29a. (General Allegations) & p. 18, ¶ 11.

Requests 24, 25, 26, 27, 30 and 31

Count 18 of the Indictment charges a conspiracy to defraud the IRS. Among other things, it charges that Mr. Zgoznik caused the tax returns of two corporations, ZJ & Associates, Inc. (ZJA), and Institutional Financial Advisors, Inc. (IFA), to claim false deductions on their respective tax returns; that Mr. Zgoznik made false representations and "misrepresentations" to an IRS Revenue Agent (civil auditor) during the course of an audit of Mr. Smith's tax return and fraudulently provided documentation to the Revenue Agent auditing Mr. Smith's tax return; and provided a false unsigned tax return to the Revenue Agent auditing ZJA and IFA.

Requests No. 32, 33 and 34.

Count 23 of the Indictment charges Mr. Zgoznik with corruptly endeavoring to obstruct and impede the due administration of the internal revenue laws by making purported false representations, presenting false documentation and making "omissions of material facts."

Each of these allegations, but particularly those in Counts 18 and 23, hinges on a false statement, however, the no particulars regarding the alleged false statements are provided. In order to defend his case, avoid surprise at trial and ensure against double

jeopardy, Mr. Zgoznik needs to know exactly which statements are alleged to have been false and exactly which documents provided were allegedly false and how they were supposedly false.

In considering Counts 1, 18 and 23, Mr. Zgoznik provided literally thousands of pages to both the Diocese (Count 1) and the IRS (Counts 18 and 23), during the course of his work for the Diocese and afterwards and during the audit of Mr. Smith's return and IFA's tax returns. He also had many conversations with the Diocesan officials and the IRS agents in the course of this activity. Asking him to guess as to which statements and/or documents the government has decided were false would not only make it impossible to prepare for trial (what defense - truth, misunderstanding by the recipient, etc.), but he would have no comfort that he is defending against the correct document or statement. In defending the case, moving for a judgment of acquittal and preventing against double jeopardy, knowing which specific document or statement is alleged to have been false and how it was supposedly false is critical. "[H]e should not have to guess which false statements he has to defend against while he prepares for trial." *United States v. Anderson*, \_\_ F.Supp.2d \_\_, 2006 WL 2044696 (D.D.C. July 24, 2006). This is entirely consistent with the purpose of Criminal Rule 7.

In *Anderson*, the defendant, like Mr. Zgoznik, was charged with violating 26 U.S.C. § 7212(a) and was also charged with making false statements as part of his offense conduct in violating 26 U.S.C. § 7201. The court in *Anderson*, considered a motion for a bill of particulars seeking detailed information regarding allegedly false statements made by Anderson. Rejecting the government's arguments to the contrary, the court held that "Anderson is entitled to know precisely which allegedly false

statements the government relies on in each paragraph, the way in which the government alleges them to be false and when approximately they were allegedly made." *Anderson*, at p. 5.

A defendant faced with false statements charges should not have to waste precious pre-trial preparation time guessing which statements he has to defend against or which contributors may be witnesses against him at trial when the government knows precisely the statements on which it intends to rely and can easily provide the information. See *United States v. Rogers*, 617 F.Supp. 1024, 1029 (D.Colo.1985) (general allegations of false statements not sufficient); *United States v. Clifford*, 426 F.Supp. 696, 703 n. 4 (E.D.N.Y.1976) (in a false statements case, "[t]he starting point for everything is the statement"). The government must provide information as to exactly what the false statements are, what about them is false, who made them, and how Mr. Trie caused them to be made.

*United States v. Trie*, 21 F.Supp.2d 7, 21-22 (D.DC 1998).

Clearly, in light of the voluminous amount of contact between the parties to whom the government contends false statements were made and false documents provided, Mr. Zgoznik is entitled to the same information as the court or for the government to provide in a bill of particulars in *Anderson and Trie*.

## 2. Requests Relating to Financial Transactions

Requests 14, 18, 19, 20, 23, 28 and 29

These requests seek particulars with regard to the financial transactions involved in this case, namely the checks written to execute the transfers of money which the government contends were either fraudulently obtained or were used in making the "kickbacks" the government has alleged as the basis for its case. Again, there were numerous financial transactions between what the government has labeled the Zgoznik Entities, the Diocese or its constituent organizations and Joseph Smith. Many of the transactions do not appear to be a part of the government's case. Without the particulars

sought in these requests, Mr. Zgozniak will be forced to confront and prepare to confront numerous (potentially thousands?) documents that are unrelated to the charges set forth in the Indictment. The government should have to provide the particular information sought with regard to these transactions lest the Defendant be left unguided as to which of the many transactions will be at issue. In *United States v. Bortnovsky*, 820 F.2d 572 (2<sup>nd</sup> Cir. 1987), the court, in reversing the defendants' convictions, found that, in a case where the government turned over more than 4000 documents, three of which were alleged to have been false, "appellants were hindered in preparing their defense by the district court's failure to compel the Government to reveal crucial information: . . . and the identity of the three fraudulent documents." *Bortnovsky* at 574.

Clearly, given the number of transactions, the government should be required to identify with particularity the checks on which it bases its overt acts or charges. Where, in a mail fraud case, the "indictment includes the mailing date of checks received from Blue Cross/Blue Shield, as well as the number and amount of the checks in question . . . the indictment was sufficiently specific to inform the various defendants of the charges against them, to protect . . . [the defendants] . . . from double jeopardy, and to enable preparation for trial . . ." *United States v. Azad*, 806 F.2d 291, 295-96 (6<sup>th</sup> Cir. 1987).

### 3. Other Requests

#### Requests 2 and 3

As explained above, IFA and IBS provided services to many different constituent entities under the umbrella of "The Diocese." The allegations in the Indictment that correspond to these requests imply that Smith somehow improperly induced them to retain the services of IFA and IBS. All these ask is for the government to state which

ones. It is hard for the Defendant to prepare his defense to a fraud case if he is unsure as to who the government claims was the victim of the alleged fraud.

The identity of the alleged victims or intended victims is always critical to the defense and must be supplied. *United States v. Diaz*, Slip Copy, 2006 WL 1133081 (N.D. Cal., June 24, 2006) (copy attached)

#### Requests 6 and 7

Specificity in these allegations is critical to the preparation of the defense of this case. The government alleges that there existed over billing to the Diocese or one of its constituent organizations by IFA and/or IBS, but it provides nothing but a bald assertion. In short, the Defendant needs to know which bills and how much. This assertion by the government may require expert testimony and significant discovery, but the Defendant does not know because he does not know the particulars. Without the specific facts surrounding these allegations, the Defendant will have no way to evaluate whether an expert is necessary, much less what type of expert (accounting, computer, etc.). Nor will the Defendant be able to assess who his witnesses will be at trial as the current providers of these services to the Diocese may be necessary, depending on the specific allegations. In short, there will be no way to prepare, which will lead to surprise at trial which will lead to delay. Just like in the case of false statements, the government must state which statements and why they are false. *Anderson, supra* and *Trie, supra*.

#### Requests 12 and 15

These requests seek the specifics about what appear to be two alleged conspiratorial agreements that are the basis for the government's case. In Request 10, information is sought about an agreement that it does not seem Mr. Zgozniak was a party

to, yet he is alleged to have assisted the conspiracy. In Request 13, information is sought about an alleged agreement between Mr. Zgoznik and Mr. Smith. These alleged "agreements" are the lynchpins of the government's case and the government should be ordered to set out the facts now so that no change in the government's theory occurs later in the case, surprising the Defendant and scuttling preparation of the defenses.

Courts often grant bills of particulars "to the extent that the Government must provide [the] Defendant . . . with information regarding the criminal acts that the Government intends to prove at trial, along with the location and date of each act."

*United States v. Malone*, Slip. Op. 2005 WL 1243762 (M.D.Fla. May 25, 2005).

#### Requests 1 and 2

The government has alleged that the "Diocese" is a charitable trust and that as such it owns fiduciary duties. The Defendant is entitled to know who the victim is in this case. Is it a corporation? Or is it simply some sort of association? Is it the Bishop? Who is the Diocese? This is legally significant in this case. The second part of this question involves the government's allegation that the Diocese owed a fiduciary duty to some one. The question seeks to who did they owe a fiduciary duty and how?

#### CONCLUSION

The Defendant has tailored his requests for particulars to those necessary to prepare his defense, avoid surprise and protect against double jeopardy. The need for particulars in this case is acute due to the extensive relationship between the alleged victims and IFA and IBS. Under Rule 7(f), which was changed in 1966 "to encourage a more liberal attitude by the courts towards bill of particulars," see, Advisory Committee Notes to 1966 Amendments, the bill of particulars in this case should be granted.

Ordering the government to produce the particulars sought would prevent undue hardship on the defendants, allow the defendants to adequately prepare for trial and prevent surprise at trial by fully and completely apprising the defendants of the charges brought against them.

Accordingly, the Defendant, Anton Zgoznik's Motion for a Bill of Particulars should be GRANTED.

Respectfully submitted,

/s/ J. Scott Broome

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**CERTIFICATE OF SERVICE**

A true copy of the foregoing Memorandum in Support of Motion for Bill of Particulars was served via the Court's electronic filing system upon the persons noted therein.

/s/ J. Scott Broome  
J. Scott Broome, Esq.