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Office of Administrative Hearings
1515 Clay Street
Suite 206
Oakland, California 94612

October 11, 2006

Re: In the matter of Joseph R. Banister, Case No. AC-2005-22

To whom it may concern:

Please find enclosed with this letter an original and two copies of an Opposition to the Government's Memorandum filed pursuant to the Judge's Order of July 6, 2006. Please return the extra copies in the self-addressed stamped envelope provided.

Sincerely,

Daniel Treuden
Paralegal

1 Robert E. Barnes
2 The Law Office of Robert G. Bernhoft, S.C.
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5 Appearing for Respondent

6
7 **BEFORE THE**
8 **CALIFORNIA BOARD OF ACCOUNTANCY**
9 **DEPARTMENT OF CONSUMER AFFAIRS**
10 **STATE OF CALIFORNIA**

11 In the matter of the Accusation Against:)
12)
13 JOSEPH R. BANISTER)
14 2282 Sunny Vista Drive)
15 San Jose, California 95128-1258)
Certified Public Accountant No. CPA 57875)
Respondent.)
_____)

Case Nos. AC-2005-22

**OPPOSITION TO
GOVERNMENT'S
MEMORANDUM**

16 The respondent, Joseph R. Banister ("Banister"), by and through counsel of
17 record, Robert E. Barnes, hereby respectfully files this opposition to the Government's
18 memorandum pursuant to the Order made at the hearing of July 6, 2006.

19
20 **ARGUMENT**

21 The California Board of Accountancy ("CBA") made their position clear in the
22 complaint and at the hearing: if an accountant is not allowed to practice before the IRS,
23 then that fact alone, regardless of the reasons for the IRS action, constitutes statutory
24 grounds for revoking their California accounting license. The CBA relied on the
25 statutory provision permitting disciplinary action where an accountant has their *right to*
26 *practice* suspended by another entity. The question before this court is two-fold: first,
27 does the IRS action constitute a revocation of the "right to practice" as intended by the
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1 California legislature; and secondly, does that fact alone warrant the harshest possible
2 sanction for someone who was acquitted of these very charges when he finally got his
3 day in court, the IRS did not recommend or refer him for prosecution by this body, and
4 Banister has an impeccable record previously as an accountant.
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6 **I. The Board Cannot Argue Facts Not in the Complaint As Grounds for**
7 **Revocation.**

8 Here, the CBA in their complaint and at the hearing made only one argument:
9 that the mere fact the IRS does not allow Banister to appear in a representative capacity
10 for anyone before their agency was itself independently sufficient to strip him of his
11 California accounting license.

12 The CBA in their responsive briefs, at the last minute, attempts to change their
13 position and argue that facts the CBA has never alleged against Banister – such as the
14 reasons the IRS gave for its earlier actions, which Banister disputed in those proceedings
15 and disputes here as factually false allegations against him, which a jury of his peers
16 completely acquitted him on – should be the basis for this court’s action.
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18 The CBA cannot argue facts never alleged in the complaint as its reason for its
19 action, and the IRS’ conclusions, which contradict the conclusions reached by a
20 California jury, are not binding as any kind of res judicata here, given the manifest lack
21 of due process in those proceedings. Put simply, in order to avoid the real issue – does an
22 IRS restriction on representation before it constitute a revocation of the right to practice
23 as California intended it – the CBA argues various red herrings that a transcript will show
24 they never even discussed at the hearing and a cursory review of the complaint will show
25 are nowhere alleged in factual averments of the complaint. It would be an independent
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1 violation of due process for Banister to lose his license based on allegations never made
2 against him in these proceedings.

3 **II. Clare Does Not Support the CBA's Position in This Case.**

4 The CBA next turns to a California decision involving different issues, which
5 addressed whether the phrase right to practice had to have a limiting definition to
6 conserve its Constitutionality.

7
8 Banister argues that the words "right to practice" in the relevant section of the
9 California code means what it has always meant in California: a vested property right in
10 a particular profession. Banister further argues that, as the IRS conceded (which it had
11 to, in order to justify treating all of their own disciplinary procedural rules as
12 discretionary, rather than binding, since the IRS failed to abide by any of them in
13 Banister's case), practice before the IRS is not a vested property right in a particular
14 profession. While Banister argues this interpretation of right to practice has the added
15 benefit of conforming to due process standards, this is a statutory cannon argument, not a
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Constitutionality argument.

The plaintiff in *Clare* (hereinafter "Clare") had stipulated to losing his license
before the SEC, which Banister did not.¹ Clare did not challenge whether the SEC
disciplinary order was a suspension of the right to practice; to the contrary, Clare's case
stipulated that the SEC order was a suspension of the right to practice, but argued the
California statute allowing discipline for losing the right to practice before a federal

¹ Banister also, contrary to IRS claims and these belated CBA claims, did not stipulate to the allegations
against him. This was part of Banister's due process argument: the hearing examiner in his case just made
up facts as he went along, and if discovery had been allowed, Banister could have shown there were
impermissible ex parte contacts between the hearing examiner and the IRS. The hearing examiner
originally attempted to schedule the "hearing" where no evidence could be introduced on behalf of Banister
at a secure military facility after press inquiries.

1 agency was facially unconstitutional, because it sets forth an “irrebuttable presumption
2 that any governmental agency suspension is a result of conduct related to an accountant’s
3 qualifications, functions or duties.” *Clare v. State Bd. of Accountancy*, 10 Cal.App.4th
4 294, 304, 12 Cal.Rptr.2d 481 (1992). The *Clare* court held that a limiting interpretation
5 of the statute preserved the statute’s Constitutionality by reading into the phrase “the
6 right to practice” a requirement that the action of the foreign entity be substantially
7 related to the accounting profession.
8

9 *Clare* actually supports Banister: *Clare* stands for axiom that a statute, and this
10 particular statute, should be read to conform the statute’s meaning to the Constitutional
11 due process requirements clearly intended by the California state legislature.
12

13 CBA fails to recite any cases suggesting practice before the IRS is a vested
14 property right, since the IRS said otherwise in its own order in Banister and cited federal
15 cases so interpreting it – namely, practice before the IRS is not a vested property right.
16 Thus, the only question is whether the California legislature intended a radical departure
17 from the common and Constitutionally-conforming interpretation of the right to practice
18 – which has always been defined as when a state agency confers a vested property right
19 on an individual in a particular form of practice or profession. Here, again, the CBA can
20 find no cases to argue against Banister’s position.
21

22 The issue is simple: does the right to practice mean a vested property right by a
23 state agency to a particular profession or practice, with the due process safeguards that
24 come with it; and if so, then how can an IRS restriction on practice before it suffice when
25 the IRS and everyone else to address the issue concluded practice before the IRS does not
26 constitute a vested property right?
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1 **III. Disbarment Is Not Appropriate**

2 The CBA engages in deceptive and unfair argument by suggesting Banister
3 should have presented mitigating evidence against the underlying allegations of the IRS
4 complaint when the CBA never alleged any of those facts against Banister, Banister had
5 no notice until their brief filing that any such allegations were at issue, and the CBA's
6 position was that there was no such mitigating evidence to the basic fact of IRS' action.
7 As is, Banister did present compelling mitigating facts: first, he was completely acquitted
8 of all charges against him arising out of these identical facts in the only trial he ever
9 received on these allegations; secondly, the IRS itself did not refer or recommend
10 Banister for CBA prosecution, despite their obligations to do so if they believed the
11 actions warranted accounting discipline, showing they did not think the allegations rose
12 to that level; and third, Banister never received anything vaguely resembling due process
13 in his IRS proceedings, which the IRS evaded by holding there is no vested property right
14 in practice before the IRS, so all of its procedures are purely discretionary, and not
15 binding.
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19 As is, maybe the most compelling mitigating evidence is that, as the CBA admits,
20 it was Banister who self-reported out of an abundance of caution, and secondly, no
21 employer or client or member of the public, or even the IRS, has ever filed a complaint
22 with the CBA against Banister throughout his entire career.
23

24 **Conclusion**

25 The CBA could have charged Banister with the underlying facts the IRS charged,
26 but chose not to, and for good reason: a California jury completely acquitted Banister of
27 those charges when they saw the facts in a real trial, not the "kangaroo" proceeding that
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1 constitutes IRS “disciplinary hearings.” The sole issue thus remains: does the IRS
2 action, admitted to not be a revocation of a vested property right, constitute a revocation
3 of the right to practice under California statutes, when the right to practice has always
4 meant a vested property right in California?
5

6 The IRS action was not the revocation of a right to practice, so no discipline is
7 appropriate, and were this court to find otherwise, then disbarment would not be the
8 proportionate sanction.

9 Signed this 11th day of October, 2006.

10
11 THE LAW OFFICE OF ROBERT G. BERNHOFT
12 Attorneys for the Respondent

13 

14 By: _____

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CERTIFICATE OF SERVICE

I, Daniel J. Treuden, hereby declare that:

I am competent to serve papers and further certify that I caused a copy of the foregoing paper to be served this date by placing an envelope with postage pre-paid into the custody of the Federal Express, a national courier, addressed as follows:

Jeanne C. Werner
Deputy Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, California 94612-0550

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed on October 11, 2006 at Milwaukee, Wisconsin.



Daniel J. Treuden