

USDC SCAN INDEX SHEET



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3:04-CV-02184 USA V. GUESS
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DECL.

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FILED
NOV 19 2004
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
DEPUTY

Attorney for Defendants L. DONALD GUESS,
XÉLAN INVESTMENT SERVICES, INC.,
XÉLAN ANNUITY COMPANY, INC., AND
XÉLAN ADMINISTRATIVE SERVICES, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

Plaintiff,

v.

L. DONALD GUESS; LESLIE S. BUCK;
DAVID JACQUOT; MONTE T. MELLON; G.
THOMAS ROBERTS; CHRIS G. EVANS;
NIGEL BAILEY; DOCTORS BENEFIT
INSURANCE COMPANY, LTD.; DOCTORS
BENEFIT HOLDING COMPANY; DOCTORS
INSURANCE SERVICES, INC.; XÉLAN
INVESTMENT SERVICES, INC.; XÉLAN
ANNUITY CO., LTD.; XÉLAN
ADMINISTRATIVE SERVICES, INC.;
XÉLAN FOUNDATION, INC.; XÉLAN OF
TEXAS, INC.; XÉLAN, INC.; XÉLAN, THE
ECONOMIC ASSOCIATION OF HEALTH
PROFESSIONALS, INC.; PYRAMIDAL
FUNDING SYSTEMS, INC.; dba XÉLAN
INSURANCE SERVICES; XÉLAN PENSION

CASE No. 04-CV-2184 (AJB)

"By Fax"

Judge: Larry A. Burns

Date: November 18, 2004
Time: 10:30 a.m.

DECLARATION OF JAY H. ZIMBLER

34

OR

1 I, Jay H. Zimble, declare and state the following under penalty of perjury:

2
3 1. I am over 18 years of age and competent to make this declaration and do so from
4 personal knowledge.

5 2. I am an attorney licensed to practice in the State of Illinois and a partner in the law firm
6 of Sidley Austin Brown & Wood ("Sidley").

7
8 3. Earlier this year, I was retained by Gallagher Benefits Services, Inc., a long-time Sidley
9 client, to represent one of its recently acquired divisions, commonly referred to as NIIS/Apex, in
10 connection with summonses issued by the Internal Revenue Service (the "IRS") in the matter of a tax
11 shelter investigation of xélan Incorporated ("xélan") (the "Representation"). The summonses had
12 been issued to NIIS/Apex, Timothy Robinson, a current NIIS/Apex employee, and David Wilson, a
13 former NIIS/Apex employee, all in their capacity as third party record keepers. NIIS/Apex, an
14 actuarial consulting firm, and Messrs. Robinson and Wilson, actuaries, had provided actuarial services
15 to one or more of Doctors Benefit Insurance Company, Ltd. ("DBIC"), xélan Annuity Company, Ltd.
16 Inc. ("Annuity"), and Green Mountain Insurance Company ("Green Mountain"). Each of DBIC,
17 Annuity, and Green Mountain has business relationships and/or common ownership with xélan. I do
18 not represent xélan, DBIC, Annuity, Green Mountain, xélan affiliates or their customer/client/policy
19 holders in any matter.
20

21
22 4. During the course of the Representation, I have worked cooperatively with IRS counsel
23 and with counsel for DBIC, Annuity, and Green Mountain to assure that the IRS received on a timely
24 basis all non-privileged material encompassed by the summonses. In this cooperative effort, counsel
25 for one or more of DBIC, Annuity, and Green Mountain reviewed material in the possession of
26 NIIS/Apex, Mr. Robinson, or Mr. Wilson on a prompt and efficient basis to determine if any of the

1 documents were privileged. After this initial review, counsel determined that less than 20 pages should
2 be withheld pending further consideration but that no privilege would be claimed with respect to the
3 remaining documents (more than 4000 pages in the aggregate). I then promptly (and within the time
4 frame suggested by the IRS) furnished to the IRS these remaining documents, which included detailed
5 actuarial calculations and assumptions relating to the issue of whether certain products were insurance.
6 Subsequently, counsel for one or more of DBIC, Annuity, and Green Mountain concluded that no
7 privilege would be claimed even as to the few documents that had been withheld for further
8 consideration. I have now furnished these documents as well to the IRS. In certain cases, names and
9 other identifying information were redacted from the documents before their submission to the IRS but
10 such names and information were not relevant to, and their redaction should have no impact on, the
11 IRS's ability to evaluate the work performed by any of NIIS/Apex, Mr. Robinson, or Mr. Wilson.
12

13
14 5. On October 12, 2004, Mr. Robinson, and on October 13, 2004, Mr. Wilson, were
15 made available to, and were interviewed without time limit by, the IRS in connection with the
16 summonses. As arranged with and agreed to by IRS counsel beforehand, Steven Gaines and Darrell
17 Hallett, counsel representing one or more of DBIC, Annuity, and Green Mountain, attended as silent
18 observers. Their presence did not interfere with the process.
19

20 6. I am continuing to work cooperatively with the IRS to complete the verification of the
21 transcripts from the interviews on October 12 and 13 and to provide any further information the IRS
22 might request. None of Mr. Gaines, Mr. Hallett, or other counsel has made any request that would
23 interfere with this process or suggested in any manner that I should do anything other than cooperate
24 fully with the IRS in a manner consistent with the professional obligations of my client.
25
26

1 I declare under penalty of perjury under the laws of the United States and the State of Illinois
2 that the foregoing is true and correct to the best of my knowledge

3
4
5 DATED this ^{20th} 19 day of November, 2004

6
7 Jay H. Zimblér
8 Jay H. Zimblér