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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 LAB (AJB)

Judge: Honorable Larry A. Burns

Date: December 3, 2004
Time: 1:30 a.m.

OPPOSITION OF DEFENDANT L. DONALD GUESS TO APPLICATION TO MOTION FOR PRELIMINARY INJUNCTION APPOINTMENT OF RECEIVER AND REPATRIATION OF FOREIGN ASSETS

SERVICES, INC.; XÉLAN FINANCIAL PLANNING, INC.; EURO-AMERICAN TRUST COMPANY; AMS TRUST COMPANY; and JOHN DOES, UNKNOWN PERSONS WHO ARE TRUSTEES OF XÉLAN LONG TERM CARE TRUST, XÉLAN DISABILITY EQUITY TRUST, XÉLAN MALPRACTICE EQUITY TRUST and XÉLAN MEDICAL SAVINGS EQUITY TRUST,

Defendants.

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I. PRELIMINARY STATEMENT

Dr. L. Donald Guess ("Guess") founded xélan over 30 years ago, as a membership organization for doctors, focusing on economic issues common to physicians. Through several entities, Guess and the xélan companies ("xélan") have provided xélan members with a wide array of insurance products, both traditional products offered by established companies, as well as a Group Supplemental Disability Insurance Policy ("Group Policy") designed specifically for its members. xélan also provides other services, including the administration of qualified pension plans, financial planning, and investment management of members' personal funds.

For the last several years, three of xélan's programs have been the focus of Internal Revenue Service ("IRS") civil examinations: the Group Policy, the xélan 419 Welfare Benefit Plan ("the 419 Plan"), and the xélan Foundation (the "Foundation"), a charitable foundation. Each of these programs was designed by separate, independent law firms with special expertise in the areas of insurance, welfare benefit plans, and charitable foundations, respectively. The law firms provided independent opinions regarding the tax consequences of the programs before they were offered by xélan. To date, no judicial determinations have been made concerning the tax benefits claimed by xélan members with respect to participation in these programs.

The government recently disclosed that Guess is the subject of a federal criminal investigation. In these proceedings, the government attempts to deprive Guess of the personal assets and income necessary to defend himself, as well as to terminate the existence of both the insurance company that offered the Group Policy and the Foundation, and foreclose their ability to defend themselves as well.

The insurance company that issued the Group Policy (Doctors Benefit Insurance Company, Ltd., or "DBIC"), the Foundation, and xélan Investment Services, Inc., an entity that provided

investment management services to both DBIC and the Foundation, have filed separate oppositions, which Guess hereby joins. Guess will deal herein with: (1) the government's general assertions of fraud with respect to his alleged misrepresentations regarding the viability of xélan programs; (2) the government's assertions of fraud with respect to his alleged misrepresentations regarding the xélan 419 Welfare Benefit Trust; (3) the government's contention that he and others have made efforts to impede IRS's examinations; and (4) the allegation that he made false statements in bankruptcy filings and in testimony before the Internal Revenue Service.

II. THE GOVERNMENT'S CLAIM THAT GUESS MISLED THE DOCTOR MEMBERS OF XELAN IS ERRONEOUS

A. France's Selective Use Of Promotional Materials Encouraging Safety, Efficiency, Control And Tax Minimization Do Not Establish That Guess Committed Fraud.

Agent Timothy France ("France") selectively lifts portions of xélan promotional material and presents it in his declaration in a manner designed to support his central theme: that xélan's assertions concerning safety, efficiency, control, and tax minimization are inconsistent with the claim the Group Policy is genuine insurance, the 419 Plan was a valid welfare benefit program, and that the Foundation is legitimate. *France Dec,* Exh. 5, ¶¶ 56, 61, 63, and 64.[1]

For example, France's quote from an audiotape regarding "Maximum Efficiency and Maximum Control" relates to the overall xélan investment philosophy, as does his reference to a "Doctors Economic Newsletter." *France Dec,* Exh 5, ¶¶ 61 and 63. These materials do not purport to represent the operational details of the three specific programs France is focused upon. Instead, the materials pertain to the broader "investment philosophy" of the entire landscape of the services xélan provides, including personal investment management of doctors' funds, planning and administration

of qualified retirement plans, insurance services (including providing primary disability, life, health, and other insurance from commercial carriers, wholly aside from the Group Policy), as well as the three programs under IRS scrutiny.

The newsletter, written in football jargon, refers to the doctors' "defensive team" as having the goal of "capital preservation" and preventing losses of personal savings to "unnecessary income taxes" and "unnecessary risk of principal investments." It refers to the doctors' "team" as including a "tight end," which is "large insurance companies that are highly regulated by governmental agencies, supply[ing] guaranteed principle, legal reserve life insurance, and annuity investments with a guaranteed minimum on the investment return." The "right tackle" is the plan administrator of qualified retirement plans "that conform to legal requirements while maximizing the team owner's contributions and minimizing contributions to other employees and annual administration fees." The "split-end" is "suppliers of risk of principal of modern portfolio theory."

These philosophies, recommending personal, secure investments by doctors, products offered by large insurance companies, and minimizing taxes and maximizing accumulation of funds through qualified retirement plans certainly are not fraudulent. Recent amendments to the Internal Revenue Code greatly liberalized the amounts that high income professionals, such as doctors, can shelter from current tax through qualified retirement plans, at the same time as minimizing contributions on behalf of other staff. *See*, Economic Growth and Tax Reconciliation Act of 2000, effecting 26 U.S.C. §§ 401(a)(17) and 415.

The philosophy of safety, efficiency, and control is equally legitimate when applied to the Group Policy. First, the Group Policy provides guaranteed renewable, non-cancelable disability

[1] While the government may use hearsay to support its application for preliminary injunction in a § 1345 action, hearsay should be given less credence than direct allegations. *United States v. Quadro Corp.*, 916 F. Supp. 613, 617 (E.D.Tex. 1996). Here, France relies upon multiple layers of hearsay, including statements of unidentified, confidential informants.

coverage, something many large commercial carriers have not provided for a number of years. Thus, the element of "safety" is met. The refund feature of the plan after seven years provides some element of control, in that the doctor can then elect to obtain a premium refund, or choose to maintain disability coverage. Also consistent with the overall investment philosophy, most insurance company reserves are invested under the modern portfolio theory of diversification (i.e., government securities, fixed income, and index funds) with large institutional firms (i.e., first with SEI Private Trust Company, and later with Vanguard).

The Foundation offers the doctor an alternative method of charitable giving, in that, as a donor-advised fund, the doctor can advise with respect to both the timing of the gift and the specific 501(c)(3) recipients. The IRS recently recognized that even greater "control" over the management of donated funds is legitimate. Priv. Ltr. Rul. 200445024 (Nov. 5, 2004), attached as Exhibit B to this brief. As in the case of DBIC's reserves, the Foundation funds are invested in a diversified portfolio with SEI. The doctors thus are provided assurances that their charitable goals will be realized.

The benefits of the 419 Welfare Benefit Program (discussed *infra* at III) were funded with life insurance polices, issued by Indianapolis Life, a major U.S. life insurance company. Again, the presence of the institutional insurance company supplies the element of safety.

Finally, France's references to promotional materials encouraging "minimizing taxes" and "avoiding unnecessary taxes," as well as engaging lawyers to provide additional "safety" through legal opinions does not show fraud. As stated many years ago by Judge Leonard Hand, "[a]ny one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes." *Gregory v. Helvering*, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd* 293 U.S. 465 (1935). Although the IRS and the Justice Department have recently received well deserved publicity for their recent

enforcement actions against abusive tax shelters, they have recently suffered significant defeats when their general allegations regarding the "lack of economic substance" with respect to plans that were designed by highly regarded professionals were tested by the scrutiny of a court. *Black & Decker Corp. v. United States,* ___F. Supp.2d ___, 2004 WL 2375610 at *2 (N.D. Md. Oct. 22, 2004) ("court may not ignore a transaction that has economic substance, even if the motive for the transaction is to avoid taxes."); *Coltec Indus., Inc. v. United States,* ___ F. Supp.2d ___ 2004 WL 2480664 at *41 (Fed. Cl. Oct. 29, 2004) "Under our time-tested system of separation of powers, it is Congress, not the court, that should determine how the federal tax laws should be used to promote economic welfare." *citing, Gitlitz v. Commissioner,* 531 U.S. 206, 220 (2001)); *Castle Harbour-1, LLC v. United States,* ___ F. Supp.2d ___, 2004 WL 2471581 (D.Conn. Nov. 1, 2004).[2]

Notably, the above are cases in the civil arena, not involving fraud. They involved sophisticated taxpayers with intelligent and expensive lawyers who advised with respect to the programs involved. Since they succeeded in the civil arena, they demonstrate the fallacy of the government taking arrangements with significant tax benefits that are fairly debatable into the

[2] The *Castle Harbour* court was quite explicit that a transaction that met the literal requirements of the Internal Revenue Code would not be disregarded just because a principal motivation for entry into the transaction was the reduction of taxes:

> The government is understandably concerned that the Castle Harbour transaction deprived the public fisc of some $62 million in tax revenue. Moreover, it appears likely that one of GECC's principal motivations in entering into this transaction – though certainly not its only motivation – was to avoid that substantial tax burden. Nevertheless, the Castle Harbour transaction was an economically real transaction, undertaken, at least in part, for a non-tax business purpose; the transaction resulted in the creation of a true partnership with all participants holding valid partnership interests; and the income was allocated among the partners in accordance with the Internal Revenue Code and Treasury Regulations. In short, the transaction, though it sheltered a great deal of income from taxes, was legally permissible. Under such circumstances, the I.R.S. should address its concerns to those who write the tax laws.

criminal arena[3], before there is any civil determination on the merits of the arrangement, as it has chosen to do in this case.

Judge Matsch, a highly respected district court judge appointed in 1969, stated in *United States v. Kilpatrick*:

> When the government uses the Internal Revenue Code for purposes other than raising revenue thereby inducing particular types of conduct, it is not illegal to be innovative in putting an elaborate dress on prosaic transactions. Leveraged financing and complex investment programs have been commonplace in our economy. What divides a tax shelter from a tax fraud is the existence of some actual economic purpose and what divides civil from criminal liability is the intent of the actor.

United States v. Kilpatrick, 726 F.Supp.789 (D. Colo. 1989).

Here, there was "actual economic purpose" to the xélan plans under attack. Many doctors are actually receiving disability payments and many more continue to have coverage in the event of disability in the future. A number of doctors represented by Michael C. Durney have moved to intervene in these proceedings, and have filed declarations setting out their situations, focusing on the nature of their relationship to DBIC and the Foundation. For example, Carl Flatley of Florida, a retired dentist, became totally disabled after several surgeries. He is currently receiving disability benefits of $5,000/month, or one quarter of his monthly income. *Declaration of Carl Flatley.*[4] Joan Collins, on disability due to depression, is receiving a benefit of $4,000/month, almost 70% of her monthly income. *Declaration of Joan Collins*. Frank Greskovich II, a surgeon, is receiving a benefit

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Castle Harbour-1, LLC v. United States, 2004 WL 2471581 at *24.

[3] In *United States v. Harris*, 942 F.2d 1125 (7th Cir. 1991), the court ruled that fairly debatable tax positions, even those in which the government would likely succeed in a civil case, cannot form the basis of criminal tax charges.

[4] The declarations cited in this paragraph and the following are attached to the Motion to Intervene filed by attorney Michael C. Durney on behalf of several xélan member doctors.

of $10,000/month, as a result of several back and foot operations, and numbness in his hands. *Declaration of Frank Greskovich.*

The Foundation has given over 11 million dollars to charitable causes, and holds many millions more for future giving. For example, Joan Wheelwright contributed $40,000 to the Foundation, or which $20,000 was distributed for Native American children in Montana. Her charitable contribution deduction was reduced because it was in the form of a charitable remainder annuity, which pays her less than $3,000/month to support her necessary living expenses. *Declaration of Joan Wheelwright.* Walter Hall donated a Santa Barbara home valued at $220,000, which is being used to provide housing and services to the disabled. *Declaration of Walter Hall.*

Guess always understood that the Group Policy provided the doctors with valuable earning protection, and the Foundation provided a means to satisfy the doctors' charitable purposes. He relied upon reputable law firms and lawyers[5] that assured him, as well as the doctors, the programs complied with the tax laws.

B. The Tax Benefits Claimed Had, At The Very Least, An Arguable Basis. Guess And xélan Relied Upon An Independent Legal Opinion Determining That The Benefits Were Supported By Substantial Authority.

To the extent the government suggests Guess misrepresented tax benefits, doctors were specifically cautioned against such reliance. *See, e.g.,* "xelan, The Economic Association of Health Professionals, Retainer Agreement," attached as Exhibit G to the accompanying Declaration of

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[5] The attorney and law firms relied upon were highly reputable. Eckert Seamans was a large law firm with offices in several cities. Henry G. Will, who advised regarding the Foundation, was a Yale graduate and an AV rated lawyer, listed in the "Best Lawyers in America." Michael E. Lloyd, who advised with respect to both the Group Policy and the 419 Welfare Benefit Plan, was also an AV rated lawyer with a Masters in Taxation from Georgetown, and significant experience as an attorney at the IRS National Office in the employee benefits area. Copies of the Martindale Hubble entries for Mr. Will and Mr. Lloyd, and their respective firms, are attached as Exhs. 17 and 18 to the Declaration of John M. Colvin ("Colvin Dec"), which accompanies the Opposition of Defendant xélan Investment Services.

Patricia de la Torre ("de la Torre Dec") ("I understand that Xelan and Xelan Financial Counselors do not provide tax and legal advice and that Xelan recommends that I seek independent professional tax advice regarding any programs, services and products being considered"); *de la Torre Dec*, Exh. A at 8 ("You are responsible for determining the tax consequences, if any, to you of your participation in the Xelan Welfare Benefit Trust"). *See also Bank of America v. Vannini*, 140 Cal. App. 2d 120, 131 (1956) (party cannot reasonably rely on representations made when advised to make their own investigation).

In his declaration, Revenue Agent John Marien ("Marien") indicates that the "preliminary results" of his analysis indicate that the xélan 419 Welfare Benefit Plan did not meet statutory requirements. *Declaration of John Marien ("Marien Dec")*, at ¶ 25. Despite the admittedly preliminary nature of his investigation, Marien then asserts that Guess's claims regarding tax benefits were false and misleading. *Marien Dec*, at ¶ 27.

The xélan 419 Welfare Benefit Program was a multi-employer plan, which was designed to allow small employers to pool together and collectively purchase employee welfare benefits. The funding limitations contained in 26 U.S.C. §§ 419 and 419A generally prevent employers from deducting payments for employee benefits to be paid in the future, until such benefits are actually paid. However, certain employee benefit plans are exempt from these funding limitations, including plans which qualify under § 419A(f)(6). By enacting this exemptions from the funding limitations, Congress intended to support employers who offer welfare benefits to their employees to cover contingent life events ranging from loss of employment, to illness and accident, to death.

The IRS has long expressed hostility to these plans, believing that the plans are sometimes merely mechanisms to pay "disguised compensation." In Notice 95-34, 1995-1 C.B. 309, the IRS set out several arguments which it indicated would be raised against plans purporting to qualify under

§ 419A(f)(6). However, it is clear that arrangements structured in compliance with § 419A(f)(6) are perfectly legitimate. Agent Marien has offered no explanation as to why the xélan 419 Welfare Benefit Plan is more like the arrangements set out in Notice 95-34, as opposed to arrangements explicitly permitted by statute.

In 1997, the Tax Court decided the first case which directly addressed the exemption set out in § 419A(f)(6) and the arguments of the IRS set out in Notice 95-34, *Booth v. Commissioner*, 108 T.C. 524 (1997). The Tax Court rejected a significant portion of the argument in Notice 95-34, including the argument that the plan was really disguised deferred compensation (which argument Agent Marien makes at ¶¶ 24(a) and (c) of his declaration), stating "All welfare benefit plans bear some element of deferred compensation ... ." 108 T.C. at 564. It did, however, describe factors which would indicate whether a plan would be viewed as having statutorily prohibited "experience-rating arrangements."

The xélan 419 Program was designed by an independent law firm specifically to meet the criteria established in the *Booth* case. The legal opinion received by participants from the law firm of Williams Coulson Johnson Lloyd Parker & Tedesco ("Williams Coulson"), addressed the relevant case law, specifically including compliance with the requirements of 26 U.S.C. § 419A(f)(6) and *Booth*. *de la Torre Dec*, Exh. I. In light of this legal advice, which provided strong support for the tax position taken on the returns, the government's suggestion of fraud is completely unfounded.

The law establishing the funding limitations set out in §§ 419 and 419A of Title 26, as well as the "10 employer exception" of § 419A(f)(6), was enacted in 1984. Eighteen years later, in 2002, the Treasury issued proposed regulations with respect to § 419A(f)(6) multi-employer plans. These regulations took a very restrictive approach with respect to what type of plan would qualified for favorable tax treatment under 26 U.S.C. § 419A(f)(6), and were criticized by many in the industry. In light of the proposed regulations, in 2002, xélan, Inc. ceased offering participation in the 419 Welfare

Benefit Trust to new participants, and the Plan was terminated in May of 2003. These actions demonstrate that Guess and the xélan Welfare Benefit Trust acted in good faith with respect to the requirements of the tax law.

III. THE ALLEGATIONS REGARDING THE XÉLAN WELFARE BENEFIT PLAN ARE INSUFFICIENT TO ESTABLISH FRAUD

A. To Prevail, The Government Must Establish "Ongoing Violations." Yet Many Of The Practices And Activities Which The Government Complains Of Have Been Discontinued.

To obtain relief under 18 U.S.C. § 1345, the government must prove by a preponderance of the evidence, that a fraud is currently being committed, or is about to be committed. *United States v. Barnes*, 912 F. Supp. 1187, 1195 (N.D. Iowa 1996). The *Barnes* court concluded that the statute expressly stated the "violation" requirement in the "present tense," although the temporary cessation of an activity to avoid a TRO or in light of a government investigation does not automatically defeat this requirement. Generally, in determining if past violations indicate the likelihood of future violations, courts look at how long the defendant was doing something illegal, whether the illegal activity had stopped before the government sued, and whether the statutory violation was based on a good-faith mistake of law. *See, e.g., Hecht Co. v. Bowles,* 321 U.S. 321 (1944); *U.S. v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953); *Aaron v. SEC,* 446 U.S. 680, 701 (1980). In *United States v. Anderson*, M.D. Fla. Civ. No. 2:04-cv-400-FtM-29SPC (Order entered September 23, 2004, a copy of which is attached to this brief as Exhibit A), the court refused to enjoin allegedly improper conduct on the part of tax return preparers on the grounds that the evidence before the court was that the conduct had terminated approximately one year prior to the institution of the government's action.

The requirement of "ongoing fraud" is clearly not met in the case of the 419 Welfare Benefit Trust, because the government admits that the Trust was terminated over one year ago. The government

admits that the xélan 419 Trust was terminated in mid 2003 (France Dec., ¶ 38).[6] Just as in *Anderson*, *supra*, there is no evidence of any ongoing fraud. This case is even more compelling than *Anderson*, because there is not even the possibility that the defendants would establish and market a new 419 Welfare Benefit Trust in light of the recently adopted final Treasury Regulations.

The government complains that Guess, through the insurance agency, Pyramidal Funding Systems, Inc.[7], continues to receive residual commissions. *France Dec*, ¶ 41. However, the receipt of residual commissions does not constitute an ongoing scheme to defraud, subject to injunction under 18 U.S.C. § 1345. The claims for tax deductions arising out of the Welfare Benefit Plan have been terminated. The commissions relate solely to undeducted premiums paid by the doctors for the purpose of investing in life insurance products with substantial cash value (at the termination of the Trust, there was no obligation on the part of xélan members and their covered employees to purchase the policies taken out on their lives). All allegations regarding the 419 Welfare Benefit Trust should be stricken.

Additionally, the alleged misrepresentations concerning the Group Policy rely upon six year old documents (account statements produced by SEI in 1998 and 1999), and disregard more current documents (described in detail in the Opposition of xélan Investment Services), which explicitly set out the operation of Group Policy. Furthermore, the student loan program of the Foundation, which forms the basis of the government's attack on that entity, was closed to new participants in February of 1999 and terminated entirely at the end of 2002.

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[6] The government states that termination happened in August of 2003, but the documents disclose that the date of the termination was May 28, 2003. *See* September 12, 2003 Letter of Mike Lloyd to Selznick, attached as Exhibit E to the de la Torre Dec.

[7] Like most general insurance agencies, Pyramidal pays a substantial portion of the commissions it receives to the agents responsible for the contract, in this case, the xélan counselors. Pyramidal is one of the entities in bankruptcy

B. There Was No Fraud In The Marketing Of The 419 Welfare Benefit Plan.

To address the allegations regarding Guess's alleged misrepresentations and failures to disclose, it is useful to look at the case of Jay Selznick[8], a doctor identified by the government as a complainant. Selznick has, in fact, filed a complaint against xélan and other parties in federal district court in San Diego. A copy of this complaint is attached as Exhibit 5 to the Colvin Dec.

Selznick and his wholly owned corporation, Double R Oral and Maxillofacial Surgery, elected to participate in the 419 plan in April of 1999. (Colvin Dec., Exh. 5 ¶ 84). The xélan 419 Welfare Benefit Trust ("the Trust") purchased individual insurance policies in the name of Double R's employees from an insurer, *e.g.*, Indianapolis Life. In signing up for the plan, the doctor and other employees received a Summary Plan Description (an executed copy of which is attached as Exhibit A to the de la Torre Dec), and agreed in writing to be bound by the Trust's terms and conditions, as well as those of the individual life insurance policies purchased as investments by the trust.[9] A copy of the xélan Welfare Benefit Trust is attached as Exhibit B to the de la Torre Dec. The cost for Double R to participate was $300,000/year. A copy of Double R's Application to Participate in the 419 Welfare Benefit Plan, showing this amount is attached as Exhibit C to the de la Torre Dec.

As part of the plan, a whole life insurance policy insuring Dr. Selznick, with a face value of $10 million, was purchased by the 419 Welfare Benefit Trust and issued by Indianapolis Life. A copy

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[8] The government did not disclose to the Court that Selznick is a cooperating witness, who appears to have received a substantial benefit from taking positions adverse to Guess. On December 18, 2003, Selznick was sentenced by the U.S. District Court for the District of Nevada to willfully filing a false tax return. The basis for Selznick's guilty plea was that Selznick skimmed about $940,000 in gross business receipts from 1996 to 1999, conduct having nothing to do with Guess or xélan. *Colvin Dec*, Exh. 3. While the Plea Agreement provided that Selznick was to receive a sentence of 12 to 18 months, prior to sentencing, the government filed a 5K motion for a downward departure based upon Selznick's substantial assistance in an ongoing IRS criminal investigation, including monitored calls to the targets of the investigation, which appear to Guess and others associated with xélan. *Colvin Dec*, Exh. 4.

of this policy is attached as Exhibit D to the de la Torre Dec. Under the terms of the Trust, benefits vested after five years of participation. *de La Torre Dec*, Exh. B, at 11.[10]

The government alleges that it was misrepresented to the doctors that the premiums on the underlying insurance policies (purchased by the Trust) would only have to be paid for five years. This is incorrect. In his Complaint, Selznick acknowledged that he understood the premium obligation would continue beyond five years, though some portion of subsequent premiums could be funded via borrowing on the cash value that had accumulated. *See Colvin Dec*, Exh. 5 ¶ 91)

While the government suggests that there is a discrepancy between the $300,000/year for participation in the plan and the $281,000 paid for insurance on Dr. Selznick's life[11] (*France Dec*, ¶ 34), it completely overlooks the fact that there were other employees covered as part of Double R's participation in the Trust. A copy of the Election to Participation and Beneficiary Designations by the various members of the Double R staff are attached as Exhibit E to the de la Torre Dec. One of the employees, Brandy Rowland, ultimately exercised her rights at the termination of the 419 Welfare Benefit Trust and acquired the policy that had been purchased by the Trust on her life. *See de la Torre Dec*, Exh. F (showing payments by Ms. Rowland to acquire a policy and a distribution to Ms. Rowlands from the Trust).

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[9] The Summary Plan Description notified employees, including Selznick, of the familiar ERISA right to review and obtain copies of all Plan documents. *de la Torre Dec*, Exh. A at 9.

[10] In paragraph 34 of his declaration, Agent France confuses the vesting of the right to benefits under the Welfare Benefit Plan, which vested only after five years of level premium payment by the employer and service by the employee, with full funding. Defendants can locate no instance where it was ever represented that there would never be additional premiums due on the policy after five years. Indeed, the Selznick Indianapolis Life policy provides that the policy is payable for "lifetime" rather than a specified number of years. *de la Torre Dec*, Exh D, at D- 3.

[11] Interestingly, the lengthy and sophisticated complaint filed by Selznick does not allege or imply that the difference between the $300,000 paid by Double R and the $281,000 paid by the 419 Trust as premium on the policy on Selznick's life was improperly diverted by Guess or xélan. *Colvin Dec*, Exh. C.

Agent France makes the ludicrous suggestion that doctors were defrauded because it was falsely represented that they would own insurance policies, when in fact the Trust was the owner of the policies. *France Dec*, ¶ 35. The Summary Plan Description makes full disclosure that the Trust is the party that will obtain any insurance under the plan and the entity to which any claim under the Plan must be made.. *de la Torre Dec*, Exh. A, A-5 to A-7. The Trust itself provides in no uncertain terms that the Trust is the beneficiary of all insurance policies acquired. *de la Torre Dec*, Exh. B at B-18.[12] Finally, the insurance policy application, signed by the doctor as the applicant, indicates the owner of the policy is the Trust. *de la Torre Dec*, Exh. G at G-8.

With respect to the government's claim that Guess failed to disclose his agency relationship[13] with Indianapolis Life, that relationship was evident on the face of the policy application, signed both by Selznick and by Guess as the "Agent." *de la Torre Dec*, Exh. G, at page G-8.

IV. NEITHER GUESS NOR OTHERS HAVE WRONGLY IMPEDED THE IRS IN ITS EXAMINATIONS

The government asserts that Guess orchestrated a litany of acts and omissions impeding the IRS from obtaining information relevant to determining the legitimacy of the xélan programs. A close examination of these assertions will demonstrate that they are without merit.

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[12] *Also* see page 19 of Exh. B to the de la Torre Dec., authorizing Trustee to "access cash values of any life insurance policy on the life of any Participant to pay benefits under the Trust. Although it is intended that the Trustee shall first look to the cash values of a specific Participant in paying that Participant's benefits, if such amounts are insufficient, the Trustee may access the cash values of any other Participants").

[13] The government asserts that Guess violated 18 U.S.C. § 1954 in his dual role as Trustee of the Trust and insurance agent for the Trust. The government appears to believe that § 1954 is a "conflict of interest" statute, which automatically applies any time the Trustee provides any type of services to the Trust. This is an incorrect reading of the statute, which penalizes only payments in the nature of bribes and kickbacks.

A. The IRS Has Obtained A Huge Volume of Information About the Group Policy Over A Six Year Period.

Well before 2002, the period Marien chooses to focus upon, the IRS was provided with all the *information it requested and all the information it believed it needed in order to make a final decision* regarding the deductibility of premiums paid to the Group Policy. The IRS examination and appeals proceedings related to Wyoming radiologist Thomas Pettinger began in 1998 and continued through 2001. Pettinger's representatives, the law firm of Williams Coulson, fully cooperated in the administrative proceedings. The many items produced to the IRS during the administrative process included documents describing the Group Policy, the participation documents, actuarial opinions and analyses from two actuarial firms, certificates of insurance, and disability policies. *See Declaration of Thomas W. Pettinger,* Exhs.8a through 8i.

In 2001, an IRS examination of the Cohens was commenced. In June, 2002, summonses were served on xélan, Inc. requesting, in connection with the Cohen examination, production of virtually all xélan, Inc. documents relating to the Group Policy and the 419 Plan, as well as testimony of Guess. *Colvin Dec.,* Exh. 6.

Approximately 3000 pages of documents were produced and were available to the IRS when two agents and three IRS lawyers questioned Guess on January 30 and 31, 2003. *Colvin Dec., Exhs. 8 and 9.*

The IRS was advised that it was xélan, Inc.'s position that only documents in its possession or control were covered by the summons, not those with other entities. However, it was stated that, in the interest of expediency, other entities were requested to produce their documents and information. The IRS was also advised that information identifying other doctors participating in xélan programs ("identity information") was being redacted from the production, and the grounds for doing so were lack of relevancy to the Cohens' examination. *Colvin Dec., Exh. 8.*

After January, 2003, more information was requested, and was provided. This information included: (1) five actuarial reports from firms that had performed actuarial services for the insurance agencies, and/or expressed opinions as to whether the Group Policy constitutes "insurance;" (2) information concerning disability claims paid and being paid, and forfeitures due to non-payment of premiums; and (3) signed copies of Group Policy insurance policies. Additional explanations and additional information was provided, including the name and phone number of Buck's counsel, Roger Olsen, a lawyer in Potomac, Maryland. *Colvin Dec., Exh. 10.*

Almost a year after production of the actuarial reports, summonses were served upon the actuary firms and their employees. *Colvin Dec., Exh. 11.* Two actuaries for NIIS/Apex testified in two full-day sessions, responding fully to all questions asked. Their firm has produced all of the documents requested, amounting to thousands of pages. *See Declaration of Jaye Zimbler.* Much more information was produced pursuant to summonses served upon Jaye & Junck also in connection with the Cohen audit. Over 400 pages of documents were produced. Jaye, who has been a xélan counselor since 1992 and was the financial advisor to the Cohens, testified to IRS lawyers and two agents, including Marien, for most of the day on February 19, 2003. *Colvin Dec., Exh. 2.*

B. An IRS Examination of the Foundation Was Conducted And An Administrative Appeal is Pending.

The government asserts that the IRS has also been unable to develop the facts relevant to the Foundation, because it has been obstructed from doing so. Defendants refer to the opposition filed by the Foundation showing that is not the case.

C. Petitions To Quash Summonses Do Not Constitute Obstruction.

Marien asserts obstructive acts include "attempts to quash summons." The first petition to quash a summons in the IRS proceedings was filed after the IRS summonses were served upon SEI, in connection with the Cohens' audit, seeking documents not only relating to the Cohens, but also

identity information. Pursuant to 26 U.S.C. § 7609(a), the IRS gave notice to persons identified in the summonses, including the Cohens and xélan, Inc. xélan, Inc and other noticed parties filed petitions pursuant to 26 U.S.C. § 7609(b), which provides that any person entitled to notice "shall have the right to begin a proceeding to quash." Thus, Marien alleges that exercising a statutory right constitutes obstruction.

The crux of the objection asserted was the production of identity information. On that issue, the Court stated:

> We readily conclude that information in SEI's possession concerning the general administration and the Cohens' experience as participants are subjects relevant to their audit. The more difficult question is whether the IRS has made a prima facie showing that the wholesale disclosure of other participants' identities and financial information is relevant here.

United States v. Cohen, 306 F.Supp.2d 495, 501 (E.D. Penn 2004). While the Court ultimately ordered that the IRS was entitled to the information it sought, it called the matter a "close question" and held:

> As the detail and length of our analysis here has evidenced, we found [Petitioners'] positions to be ***much more than frivolous taxpayer intransigence.***

306 F.Supp.2d at 505, fn. 12, *supra.* (Emphasis supplied.)

Despite the above, the government asserts in its memorandum in this case that Guess and others "filed frivolous lawsuits and pursued frivolous claims." *See Memorandum of Points and Authorities ("Govt. Memo"), pg. 20.*

The court's opinion in *Cohen* was appealed. A stay precluding disclosure of identity information was obtained from the District Court, pending a decision by the Third Circuit on a stay pending appeal petition filed with it. *Xélan, Inc., et al., v U.S.*, No. 04-2289; *xélan, Inc., et. al., v U.S.*, No. M-1-84, M-1-84; *xélan, Inc. et al., v U.S.* No. 03-CV-6433SD; *xelan, Inc. et. al., v. U.S.* No. RWT 04-CV-1863; xélan, Inc. et al., v. U.S. No. RWT 04-CF.

Following the *Cohen* decision, the IRS proceeded to seek identity information in other summonses, and while petitions to quash were filed, the objections were focused on the identity issue.

Finally, France refers to information allegedly obtained from a financial counselor that xélan's strategy has been to delay examinations until the statute of limitations has run. *France Dec, pg. 66.* Depending upon the ultimate outcome of the list litigation, it may result in the IRS not obtaining identity information in the manner it has chosen to do so, or a delay in it obtaining such information. However, that alone does not make the non-frivolous litigation illegal or improper, even if it results in statutes of limitations limiting the IRS's ability to assert tax liabilities against doctors. Rather than seeking to obtain identity information in connection with the Cohen audit, the IRS could have sought the entire list directly from xélan, Inc. under the John Doe Summons procedures of 26 U.S.C § 7609(f). Had it done so, the statute of limitations for assessing doctors for any particular year[14] would have been suspended during the period of any challenge to any summons. 26 U.S.C. § 7609(e).

D. The Los Angeles Lawsuit Challenging IRS Conduct in Connection with the Foundation Audit was not Frivolous, Nor Brought For Wrongful Purposes.

France refers to a suit brought in the United States District Court for the Central District of California. *France Dec.* pg. 64, ¶ 71. The complaint in *xélan, Inc. et. al. v. United States, et. al.,* C.A. No. 03-6025 MMM (USDC C.D. Cal.), asserted that agents examining the Foundation wrongfully copied and used computer software of the Foundation in violation of 26 U.S.C.§ 7612, and wrongfully provided identity information to other agents for the purposes of initiating audits of doctors. The government filed a motion to dismiss. A Brief in Opposition was filed by the plaintiffs. Before oral argument, the following anonymous letter was received by Plaintiff's counsel in the case

"Stop representing xélan against the IRS before you and your family get hurt."

[14] Generally, the IRS has three years from the date a tax return is filed to assert a deficiency with respect to that year. 26 U.S.C. § 6501(a).

Colvin Dec, Exh. 12. The Department of Justice was promptly advised of the letter received by counsel, and the case was dismissed.

E. The Presence Of Counsel For Parties Other Than The Witnesses' Counsel Did Not Impede The IRS's Ability To Obtain Documents and Testimony From Witnesses.

Marien asserts as an act of obstruction xélan "insist[ing] on being present during interviews of witnesses." Apparently, his reference is to the testimony of two actuaries concerning their analyses and opinions on behalf of the NiiS/Apex firm. The Niis/Apex firm was represented by Jay Zimbler of the Law Firm Sidley Austin Brown & Wood LLP. He requested, and the IRS agreed, that a representative of DBIC and of xélan Annuity Co. Inc. (the two entities which had engaged the actuaries being summonsed) be permitted to sit in on the proceedings as silent observers. Neither representative made any effort to participate in the proceedings, and all questions asked by the IRS agents and lawyers were answered in full. All documents requested were produced. *See Declaration of Jaye Zimbler.*

V. GUESS DID NOT MAKE FALSE STATEMENTS IN CONNECTION WITH BANKRUPTCY PROCEEDINGS OR IN TESTIMONY TO THE IRS

France asserts that Guess fraudulently concealed, in connection with bankruptcy proceedings, the fact that DBIC has paid attorneys fees for representation of doctors under examination, and instead indicated that the debtor entities paid the fees. France concludes "DBIC paid for that [audit defense fees], using the doctors' own money, without their knowledge or consent." *France Dec*, ¶¶ 80-81. First, DBIC funds are not the "doctors' own money," nor is it illegal for DBIC to pay, from its funds, doctors' attorney fees. We refer the Court to the submission by DBIC for a full discussion on this issue.

Secondly, an examination of Guess's declaration filed in the bankruptcy proceedings, shows that Guess did not intentionally mislead. *Colvin Dec., Exh. 14.* First, under the heading "History and

Events Leading to the Chapter 11 Case," Guess disclosed that xélan was paying several million dollars per year as a result of an investment loss (the "Viatical Settlement"). *Colvin Dec, Exh. 14 ¶ 24.* Guess then referred to the IRS's attempt to get an additional fourteen or fifteen hundred names of xélan members to audit them, then stated "Significant legal fees are being incurred and the costs of defending thousands more audits is daunting." *Colvin Dec., Exh. 14 ¶ 27.*

xélan debtor entities had in fact paid substantial legal fees for attorneys representing doctors in audits, as did DBIC. Colvin Dec., Exh. 15 ¶ 11. Obviously, the threat of 1,500 more audits was "daunting," particularly because both xélan and DBIC have, to date, defended their product against IRS challenges in individual doctor audits by providing the doctors with the resources to defend.

France further asserts that Guess also falsely testified that "there is no relationship whatsoever between DBIC and xélan, Inc. or Pyramidal Funding." *France Dec*, ¶ 82. France submits nothing whatsoever to show that there is in fact any relationship between xélan, Inc. and Pyramidal Funding (which entities are wholly owned by Guess), and DBIC.

Les Buck testified in 2003 that Guess "does not, nor has he ever had, an ownership interest in the insurance company. [Guess] has never participated in the management of the insurance company." *Colvin Dec., Exh. 16.* In an apparent effort to support his notion that Guess made false and evasive responses to questions about who owns or controls DBIC, France refers to the following testimony by Guess to the IRS agents and attorneys:

> Q. How can we get in touch with Leslie Buck?
> A. I think that, you know, he, you know, he lives in Maryland. He has a home in Maryland, and I'm sure he's got a telephone number there, I don't have it, but.
> Q. Do you know where in Maryland?
> A. Somewhere outside of Annapolis.
> Q. Okay. Do you still stay in touch with him?
> A. Yeah, he's got a telephone. I just don't have the phone number.

Sworn Statement of Lewis Donald Guess DMD, Vol. III, January 31, 2003, p. 440, l.6-15. Colvin Dec., Exh. 14. This exchange supports nothing more than the fact that Guess did not have the phone number and address of a business associate memorized.

Subsequent to Guess' testimony, the IRS was provided the name, phone number and address of Buck's attorney in attorney in Potomac, Maryland, Roger Olsen, and was encouraged to contact him regarding information requested of Buck. *Colvin Dec., Exh. 10.*

VI. SUMMARY AND CONCLUSION

Donald Guess has spent the better part of his adult life attempting to provide meaningful financial planning services to doctors. He has done his best to offer programs that assisted doctors in meeting their financial needs. The programs which the government impugns in these proceedings were formed in consultation with highly regarded legal professionals, to meet real needs on the part of xélan members for disability insurance, employee welfare benefits, and efficient charitable vehicles. The government should not be permitted to simply assume the existence of fraud. Close scrutiny of each of the government's allegations reveals that, rather than operating a scheme to defraud Dr. Guess and xélan have always acted in good faith, doing what they believed was best for the xélan members.

DATED this 19th day of November, 2004.

Michael Lipman (SBN # 66605)
COUGHLAN, SEMMER & LIPMAN, LLP
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EXHIBIT A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 2:04-cv-400-FtM-29SPC

FRED J. ANDERSON, RICHARD ALAN WALTERS, and DEBORAH A. MARTIN, and TAX STRATEGIES, INC.,

Defendants.
_____/

ORDER

This matter comes before the Court on plaintiff's Motion For Preliminary Injunction (Doc. #2) filed on July 28, 2004. Plaintiff has filed a Brief in Support of its motion (Doc. #9), along with declarations (Docs. #4-6) and exhibits (Doc. #10). Defendants have filed an Amended Brief in Support of its Opposition to plaintiff's motion.[1] (Doc. #33).

I.

Defendant Fred J. Anderson (Anderson) formed defendant Tax Strategies, Inc. (Tax Strategies) in October of 1997. Tax Strategies, which was located in Lehigh Acres, Florida, sold financial and tax services to the public. Defendant Richard Alan

[1] Defendants Fred J. Anderson, Richard Alan Walters, and Deborah A. Martin are proceeding pro se in this matter. The Court has previously informed defendant Tax Strategies, Inc. that pursuant to Local Rule 2.03(d), a corporation cannot proceed pro se. Defendant Richard Alan Walters subsequently filed a Notice informing the Court that Tax Strategies, Inc. has been dissolved and no longer exists as a Florida corporation. (Doc. #35).

EXHIBIT A PG 1

Walters (Walters) purchased all or part of Tax Strategies from Anderson in April of 2001 and served first as its vice president and then as its president. Defendant Deborah Martin (Martin) was the vice president of Tax Strategies and prepared tax returns for its customers.

The Complaint (Doc. #1) alleges that defendants promoted and marketed abusive tax schemes through seminars, the Internet, and promotional literature. According to plaintiff, those schemes involved the creation and use of sham entities, such as trusts, charitable foundations, and limited liability companies, to eliminate or reduce reported federal income and/or self-employment tax liability. From 1998 to June of 2003, Martin allegedly prepared federal tax returns for defendants' customers using these schemes, which resulted in these customers under-reporting and under-paying their federal taxes.

Plaintiff's three-count Complaint (Doc. #1) seeks (1) an injunction against Martin pursuant to 26 U.S.C. § 7407; and injunctions against all defendants pursuant to (2) 26 U.S.C. § 7408, and (3) 26 U.S.C. § 7402. Plaintiff seeks a preliminary injunction as to all three counts of the Complaint enjoining all defendants from further promoting their allegedly abusive tax schemes and enjoining Martin from preparing federal tax returns. (Doc. #2, p. 1).

II.

Section 7407 authorizes injunctions against income tax return preparers who, among things, (1) violate 26 U.S.C. §§ 6694 or 6695, (2) misrepresent their experience or education as a tax return preparer, or (3) engage in any other fraudulent or deceptive conduct that substantially interferes with the proper administration of the internal revenue laws. In addition, the Court must find that injunctive relief is appropriate to prevent the recurrence of such conduct. Section 6694 covers the understatement of a taxpayer's liability by an income tax return preparer. Section 6695 covers other assessable penalties with respect to the preparation of income tax returns, such as failing to (1) furnish a proper identifying number, (2) keep copies of returns prepared or list of customers for whom returns were prepared, or (3) turn over those copies of returns or list of customers to the Internal Revenue Service upon request. If a return preparer continually or repeatedly engaged in the prohibited conduct, a court can impose a lifetime return-preparation ban. Under § 7407, the Court need not "address directly the common law requisites for injunctive relief since Congress, in legislatively granting injunctive powers, has already taken these requirements into account." United States v. Ratfield, 2002 WL 31556427, at *3 (S.D. Fla. 2002), quoting U.S. v. Bailey, 789 F. Supp. 788, 812 (N.D. Tex. 1992).

EXHIBIT A PG 3

To obtain a preliminary injunction under § 7408, the United States must show that defendants engaged in conduct subject to penalty under 26 U.S.C. §§ 6700 or 6701, and that injunctive relief is appropriate to prevent the conduct from recurring. Section 6700 penalizes anyone who, among other things (1) participates, either directly or indirectly, in the sale of any shelter plan or arrangement; (2) makes false statements about tax benefits in connection with the sale; (3) knows or has reason to know that the statements are false; and (4) the false statements pertain to a material matter, such as a purported tax deduction or the exclusion of income. Section 6701 imposes penalties on any person who (1) aids, assists, or advises with respect to the preparation or presentation of any portion of a return, (2) knowing or having reason to believe that such assistance or advice will be used in connection with any material matter, and (3) who knows that such portion of the return, if used, would result in an understatement of another person's tax liability. Similar to § 7407, the Court need not address directly the common law requisites for injunctive relief.

Section 7402(a) provides district courts the jurisdiction to issue injunctions in civil actions "as may be necessary or appropriate for the enforcement of the internal revenue laws." Unlike §§ 7407 and 7408, "the decision to issue an injunction under § 7402(a) is governed by the traditional factors shaping the

district court's use of the equitable remedy." United States v. Ernst & Whinney, 735 F.2d 1296, 1301 (11th Cir. 1984). In the Eleventh Circuit the issuance of "a preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant clearly carries the burden of persuasion on each of [four] prerequisites." Suntrust Bank v. Houghton Mifflin Co., 252 F.3d 1165, 1166 (11th Cir. 2001), reh'g & reh'g en banc denied, 275 F.3d 58 (11th Cir. 2001); see also Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1210 (11th Cir. 2003); McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998). The four prerequisites for a preliminary injunction are: (1) a substantial likelihood of succeeding on the merits; (2) a substantial threat of irreparable injury if relief is denied; (3) an injury that outweighs the opponent's potential injury if relief is not granted; and (4) an injunction would not harm or do a disservice to the public interest. Four Seasons Hotels & Resorts, 320 F.3d at 1210; Suntrust Bank, 252 F.3d at 1166; American Red Cross v. Palm Beach Blood Bank, Inc., 143 F.3d 1407, 1410 (11th Cir. 1998); Gold Coast Pub'ns, Inc. v. Corrigan, 42 F.3d 1336, 1343 (11th Cir. 1994), cert. denied, 516 U.S. 931 (1995).

"A showing of irreparable injury is the *sine qua non* of injunctive relief." Siegel v. Lepore, 234 F.3d 1163, 1176 (11th Cir. 2000), quoting Northeastern Fla. Chapter of the Ass'n of Gen. Contractors v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir.

1990) (internal quotation omitted). As the Eleventh Circuit has stated on numerous occasions, the asserted irreparable injury "must be neither remote nor speculative, but actual and imminent." Siegel, 234 F.3d at 1176, quoting City of Jacksonville, 896 F.2d at 1285 (internal quotation omitted). Further, because injunctions regulate future conduct, "a party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate - as opposed to a merely conjectural or hypothetical - threat of future injury." Church v. City of Huntsville, 30 F.3d 1332, 1337 (11th Cir. 1994), citing City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (emphasis original). Past exposure to illegal conduct is not sufficient to show an entitlement to injunctive relief "if unaccompanied by any continuing, present adverse effects." Church, 30 F.3d at 1337, quoting Lyons, 461 U.S. at 102.

III.

Defendants contend that plaintiff has not shown an entitlement to preliminary injunctive relief under any of the relevant sections of the Internal Revenue Code. Specifically, defendants argue that plaintiff has not met its burden of showing that defendants are currently engaged in any of the alleged activities detailed in the Complaint or that there is a threat of recurrence of such activities. (Doc. #33, pp. 1-2). The Court agrees. To the extent the Complaint alleges specific dates for defendants' conduct, such

conduct allegedly occurred from 1998 through June of 2003. (Doc. #1, ¶¶ 23, 25, 30). In addition, the only evidence offered by plaintiff in support of its motion suggests that such conduct continued in 2002 and through the first half of 2003. (Doc. #6, ¶ 21). If anything, plaintiff's evidence suggests that defendants are waiting for the present matter to be resolved before engaging in any of the alleged conduct. (Id., ¶ 20). In short, plaintiff has neither alleged nor offered evidence that defendants' alleged conduct is continuing or that there is a threat of recurrence. Therefore, under §§ 7407 and 7408, plaintiff has failed to meet its burden of showing that injunctive relief is appropriate to prevent the alleged conduct from recurring; under § 7402, plaintiff has not met its burden of showing a real and immediate threat of future injury from defendants' alleged conduct. Thus, the Court concludes that plaintiff's motion for an injunction is due to be denied.

Accordingly, it is now

ORDERED:

United States' Motion For Preliminary Injunction (Doc. #2) is **DENIED.**

DONE AND ORDERED at Fort Myers, Florida, this 23rd day of September, 2004.

JOHN E. STEELE
United States District Judge

EXHIBIT A PG 7

Copies:
Hon. Sheri Polster Chappell
Counsel of record

EXHIBIT A PG 8

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 2:04-cv-400-FtM-29SPC

FRED J. ANDERSON, RICHARD ALAN WALTERS, and DEBORAH A. MARTIN, and TAX STRATEGIES, INC.,

Defendants.
_____/

ORDER

This matter comes before the Court on Plaintiff's Motion For Reconsideration and Request For Hearing (Doc. #50) filed on October 6, 2004. Plaintiff filed a declaration (Doc. #51) in support of its motion. Defendants filed a Response (Doc. #54) and two affidavits (Docs. #55-56) on October 14, 2004. Also before the Court is Plaintiff's Motion To File Reply (Doc. #57) filed on October 22, 2004. The Court has reviewed plaintiff's motion for reconsideration and defendants' response and concludes that neither a reply nor a hearing is necessary. Thus, plaintiff's request for a telephonic hearing and its request to file a reply will be denied.

I.

Reconsideration of a court's previous order is an extraordinary remedy and, thus, is a power which should be used sparingly. American Ass'n of People with Disabilities v. Hood, 278

F. Supp. 2d 1337, 1339 (M.D. Fla. 2003), citing Taylor Woodrow Constr. Corp. v. Sarasota/Manatee Airport Auth., 814 F. Supp. 1072, 1072-73 (M.D. Fla. 1993). The courts have "delineated three major grounds justifying reconsideration: (1) 'an intervening change in controlling law; (2) the availability of new evidence; (3) the need to correct clear error or prevent manifest injustice." Sussman v. Salem, Saxon & Nielsen, P.A., 153 F.R.D. 689, 694 (M.D. Fla. 1994).

"A motion for reconsideration should raise new issues, not merely readdress issues litigated previously." PaineWebber Income Props. Three Ltd. P'ship v. Mobil Oil Corp., 902 F. Supp. 1514, 1521 (M.D. Fla. 1995). The motion must set forth facts or law of a strongly convincing nature to demonstrate to the court the reason to reverse its prior decision. Taylor Woodrow, 814 F. Supp. at 1073; PaineWebber, 902 F. Supp. at 1521. "When issues have been carefully considered and decisions rendered, the only reason which should commend reconsideration of that decision is a change in the factual or legal underpinning upon which the decision was based. Taylor Woodrow, 814 F. Supp. at 1072-73.

A motion for reconsideration does not provide an opportunity to simply reargue - or argue for the first time - an issue the Court has once determined. Court opinions "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." Quaker Alloy Casting Co. v. Gulfco Indus., Inc., 123 F.R.D. 282, 288 (N.D. Ill. 1988). "The burden is upon

the movant to establish the extraordinary circumstances supporting reconsideration." Mannings v. School Bd. of Hillsborough County, Fla., 149 F.R.D. 235, 235 (M.D. Fla. 1993). Unless the movant's arguments fall into the limited categories outlined above, a motion to reconsider must be denied.

II.

In its previous Order (Doc. #41), the Court denied plaintiff's request for a preliminary injunction under 26 U.S.C. §7407, §7408 and §7402 enjoining all defendants from further promoting allegedly abusive tax schemes and enjoining defendant Martin from preparing federal tax returns. Specifically, the Court concluded that "plaintiff has neither alleged nor offered evidence that defendants' alleged conduct is continuing or that there is a threat of recurrence." (Doc. #41, p. 7).

Plaintiff does not specify which of the three grounds listed above justify reconsideration of the Court's previous Order. Instead, plaintiff contends that there is a need for a preliminary injunction because "defendant Martin has prepared abusive returns as recently as September, 2004, and defendant Anderson is still providing 'trustee' services." (Doc. #50, p. 1). Plaintiff argues that it provided evidence of these facts in its initial motion for a preliminary injunction. (Doc. #50, p. 2 n.1). As explained above, a motion for reconsideration is not an opportunity for a party to relitigate issues already decided. Thus, to the

extent that plaintiff is attempting to reargue the merits of its previous motion, its motion for reconsideration is due to be denied.

Plaintiff also has filed a declaration of Revenue Agent Arthur Brake (Doc. #51) in support of its contention that defendants' alleged wrongful conduct is continuing. In response, defendants Martin and Anderson filed affidavits disputing this contention. (Docs. #55-56). After reviewing this material, under the standard outlined above, the Court concludes that plaintiff has not set forth facts or law of a strongly convincing nature for the Court to reconsider its previous Order. Thus, plaintiff's motion is due to be denied.

Accordingly, it is now

ORDERED:

1. Plaintiff's Motion For Reconsideration and Request For Hearing (Doc. #50) is **DENIED.**

2. Plaintiff's Motion To File Reply (Doc. #57) is **DENIED.**

DONE AND ORDERED at Fort Myers, Florida, this 25th day of October, 2004.

JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

Copies:
Hon. Sheri Polster Chappell
Counsel of record

EXHIBIT B

C

Internal Revenue Service (I.R.S.)

Private Letter Ruling

Issue: November 5, 2004
July 12, 2004

Section 170 -- Charitable, Etc. Contributions and Gifts

170.00-00 Charitable, Etc. Contributions and Gifts

Section 2522 -- Charitable and Similar Gifts (Deductible v. Not Deductible)

2522.00-00 Charitable and Similar Gifts (Deductible v. Not Deductible)

2522.01-00 Charitable Gifts

CC:PSI:04 - PLR-163849-03

Re:

Legend

Donor 1 =

Donor 2 =

X =

Agreement =

Account =

Dear *** :

This responds to a letter dated November 4, 2003, submitted by your authorized representatives on your behalf, concerning the income and gift tax consequences of a proposed donation to X.

The facts and representations submitted are summarized as follows: Donor 1, an individual, and Donor 2, a limited liability company, propose to make donations of cash and traded securities to X. It is represented that X is a tax-exempt college described in sections 170(b)(1)(A)(ii), 501(c)(3), and 2522(a) of the Internal Revenue Code.

At the time of the donation, Donor 1 and Donor 2 will each enter into a separate agreement (Agreement) with X. The Agreements are identical except for the identity of the respective Donor and description of the contributed assets. Under the terms

of Agreement, any donation made to X is to be placed in an investment or brokerage account, Account, established in the name of X exclusively for its own benefit. Each donation will be unconditional and irrevocable. Donor 1 and Donor 2 will surrender all rights to retain or reclaim ownership, possession or a beneficial interest in any donation, and Donor 1 and Donor 2 may not divert the assets held in the Account to any person. Under each Agreement, Donor 1 or Donor 2, respectively, or the respective Donor's investment manager, is permitted to manage the investments in Account pursuant to a limited power of attorney. The respective Donor is prohibited from engaging in any act of self-dealing, as defined in the applicable provisions of the Code or regulations thereunder, with respect to assets in Account.

Agreement imposes the following investment restrictions and limitations on a Donor's management of Account as follows: the Donor will hold or invest only in United States (U.S.) equities, U.S. open-end mutual funds, U.S. closed-end mutual funds, U.S. fixed income securities (including, but not limited to treasures and mortgage-backed, asset-backed and high-yield securities), offshore/onshore hedge funds, REITS, and private placements; no investment may be made in companies in which the Donor owns, directly or indirectly, more than 5 percent of the outstanding shares of stock; assets in Account may not be pledged or encumbered by the Donor or advisor, or used to satisfy any debt or liability of the Donor; the Donor has no right to vote any stock or other securities held in Account; the Donor may not commingle assets in Account with any assets outside Account; the Donor's power to manage investments terminate 10 years from the date of the donation (unless sooner terminated as discussed below); and the Donor may not invest in short sales, forward settling transactions, derivatives, or any borrowings.

Agreement also provides that X has the right at any time or for any purpose and in its sole discretion to withdraw any or all of the assets held in Account or to terminate the limited power of attorney and Agreement.

Finally, Agreement will terminate automatically in severe loss cases, as determined by X in its sole discretion. Agreement may also be terminated at any time by either party upon written notice to the other party.

You request the following rulings:

(1) The proposed contributions to be made by Donor 1 and Donor 2 to X, under the circumstances described above, meet the requirements for a deduction as charitable contributions for income tax purposes.

(2) The proposed contributions to be made by Donor 1 and Donor 2 to X, under the circumstances described above, meet the requirements for deduction as charitable contributions for gift tax purposes.

Issue 1

Section 170(a) allows as a deduction any charitable contribution, payment of which is made within the taxable year. Section 170(c) defines a charitable contribution to include a contribution or gift to or for the use of an organization described in section 170(c)(2). Taxpayers represent that X is a tax-exempt college described in section 170(b)(1)(A)(ii). We assume for purposes of this ruling that X is an organization described in section 170(c).

In order to be deductible under section 170 of the Code, a contribution must qualify as a gift in the common law sense of being a voluntary transfer of property by the owner to another without consideration. Pettit v. Commissioner, 61 T.C. 634,

639 (1974). See also Hansen v. Commissioner, 820 F.2d 1464, 1468 (9th Cir. 1987) (the term "charitable contribution" is synonymous with the term "gift"); Elrod v. Commissioner, 87 T.C. 1046, 1075 (1986). If the donor receives, or can reasonably expect to receive, a financial or economic benefit commensurate with the money or property transferred, no deduction under section 170 is allowable. Rev. Rul. 76-185, 1976-1 C.B. 60.

Section 170(f)(3) denies taxpayers a charitable contribution deduction for certain contributions of partial interests in property. Section 170(f)(3)(A) provides, in part, that in the case of a contribution (not made by a transfer in trust) of an interest in property which consists of less than the taxpayer's entire interest in such property, a deduction shall be allowed only to the extent that the value of the interest contributed would be allowable as a deduction under section 170 if such interest had been transferred in trust. For purposes of section 170(f)(3)(A), a contribution by a taxpayer of the right to use property shall be treated as a contribution of less than the taxpayer's entire interest in such property.

Section 170(f)(3)(B) and section 1.170A-7(b)(1)(i) of the Income Tax Regulations provide, as an exception to section 170(f)(3)(A), that a deduction is allowed under section 170 for the value of a charitable contribution not in trust of an undivided portion of a taxpayer's entire interest in property. An undivided portion of a donor's entire interest in property must consist of a fraction or percentage of each and every substantial interest or right owned by the donor in such property and must extend over the entire term of the donor's interest in such property and in other property into which such property is converted. Section 1.170A-7(b)(1)(i). A charitable contribution in perpetuity of an interest in property not in trust where the donor transfers some specific rights and retains other substantial rights will not be considered a contribution of an undivided portion of the donor's entire interest in property to which section 170(f)(3)(A) does not apply. Id. A donor is therefore not entitled to a charitable contribution deduction if the donor has retained substantial rights in the contributed property. See Stark v. Commissioner, 86 T.C. 243, 251-252 (1986). If, however, the rights in the contributed property retained by the donor are so insubstantial that the donor has, in substance, transferred his entire interest in the property, the partial interest limitations of section 170(f)(3) do not apply, section 1.170A-7(b)(1)(i) is satisfied, and a deduction is allowed under section 170. Id. See also Rev. Rul. 76-331, 1976-2 C.B. 52; Rev. Rul. 75-66, 1975-1 C.B. 85.

In Rev. Rul. 81-282, 1981-2 C.B. 78, the taxpayer contributed shares of voting stock to a charitable organization, but retained the right to vote the contributed stock. The ruling concludes the right to vote the stock is a substantial right inherent in the ownership of common stock. Accordingly, the ruling holds that the taxpayer is not entitled to a deduction under section 170 since the taxpayer did not transfer all substantial rights in the stock to the donee, but only a partial interest under section 170(f)(3), and the contributed interest was not an undivided portion.

In Rev. Rul. 75-66, 1975-1 C.B. 85, the taxpayer donated his entire interest in 800 acres of real property to the United States but retained the right during his life to train his personal hunting dog on trails extending over the entire property, and to maintain paths and lanes relating to this reserved use. The ruling holds that the contribution satisfied section 1.170- 7(b)(1)(i) since the rights retained by the taxpayer were not substantial enough to affect the deductibility of the property contributed, and the taxpayer was thus entitled to a charitable contribution deduction under section 170.

In the present case, the retention of investment management control by Donor 1 and Donor 2, respectively, subject to the restrictions and limitations contained in the Agreements, is not substantial enough to affect the deductibility of the property contributed, and does not constitute the retention of a prohibited partial interest under section 170(f)(3).

Accordingly, Donor 1 and Donor 2 may deduct their respective contributions of the cash and publicly traded securities to X in the manner and to the extent provided by section 170. This conclusion is based on the assumption that X is an organization described in section 170(c).

Issue 2

Section 2501 imposes a tax for each calendar year on the transfer of property by gift by any individual. Section 2511(a) provides that subject to limitations contained in chapter 12, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 25.2511-2(b) of the Gift Tax Regulations provides, in part, that as to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over its disposition, the gift may be wholly incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined.

Section 25.2511-1(h)(1) provides that a transfer of property by a corporation to B is a gift to B from the stockholder of the corporation.

Section 2522(a) provides, in part, that in computing taxable gifts for the calendar year, there is allowed a deduction for the amount of all gifts to or for the use of a corporation or trust organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes.

Section 25.2522(c)-3(b)(1) provides that if, as of the date of the gift, a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that the charitable transfer will not become effective is so remote as to be negligible. If an interest has passed to, or is vested in, charity on the date of the gift and the interest would be defeated by the performance of some act or the happening of some event, the possibility of occurrence of which appeared on such date to be so remote as to be negligible, the deduction is allowable.

Under section 2522(c)(2) and section 25.2522(c)-3(c)(1)(i), if a donor transfers an interest in property (other than an interest described in section 170(f)(3)(B)) to a charitable organization and if the donor also retains an interest in the subject property, no deduction is allowable with respect to the transferred interest unless the transaction is structured to conform to specified statutory and regulatory requirements.

In this case, Donor 1 and Donor 2 propose to make gifts to X. Pursuant to the terms of the respective Agreements, after making a contribution to X, the assets contributed will be held in respective Accounts in the name of X. Donor 1 and Donor

2, or their investment managers, may manage the investments in the respective Donor's account for a period of 10 years. However, under Agreement each Donor is subject to certain restrictions and limitations discussed above, and X may terminate the arrangement at any time and X has the right at any time or for any purpose and in its sole discretion to withdraw any or all of the assets held in Account. Under the facts presented, we conclude that the power retained by Donor 1 and Donor 2, respectively, to manage the investment of the assets contributed by each Donor, does not constitute the retention of an interest in the property for purposes of section 2522(c)(2) and section 25.2522(c)-3(c)(1). Further, under the facts presented, the retained power to manage investments of an Account does not cause the charitable gifts to be subject to a condition or power under section 25.2522(c)-3(b). Accordingly, under the facts of this case, we conclude that a gift tax deduction will be allowable under section 2522 to Donor 1 and to the appropriate individual with respect to the gift by Donor 2.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

In accordance with the power of attorney on file with this office, we are sending a copy of this letter to your authorized representative.

Sincerely,

George L. Masnik

Chief, Branch 4

Office of Associate Chief Counsel (Passthroughs and Special Industries)

Enclosures

Copy for section 6110 purposes

Copy of this letter

cc:

This document may not be used or cited as precedent. Section 6110(j)(3) of the Internal Revenue Code.

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