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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 L. DONALD GUESS, et al.,
15 Defendants.

) Case No. 04-CV-2184 LAB (AJB)
)
) MEMORANDUM OF POINTS AND
) AUTHORITIES IN SUPPORT OF
) DEFENDANT MONTE MELLON'S
) OPPOSITION TO THE GOVERNMENT'S
) APPLICATION FOR A PRELIMINARY
) INJUNCTION, APPOINTMENT OF A
) RECEIVER AND REPATRIATION OF
) FOREIGN ASSETS
)
) Date: December 3, 2004
) Time: 1:30 p.m.
) Ctrm: Hon. Larry A. Burns

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I.

PRELIMINARY STATEMENT

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3 The Government's moving papers offer no rationale for Dr. Monte Mellon's inclusion in
4 its request for injunctive relief, other than that Dr. Mellon is a director of Doctors Benefit
5 Insurance Company ("DBIC"). The Government's memorandum of points and authorities
6 sweepingly includes Dr. Mellon in its allegations of wrongdoing: "The France and Marien
7 declarations describe in great detail how defendants Guess, Buck, David Jacquot ("Jacquot"),
8 Monte T. Mellon ("Mellon"), G. Thomas Roberts ("Roberts") and other have engaged in a scheme
9 to cause doctors to place hundreds of millions of dollars into fraudulent tax reduction insurance
10 trust and charitable contribution schemes . . ." Government Memorandum, p. 17. But the
11 declarations of Messrs. Marien and France -- the Government's exclusive evidentiary support for
12 its requested relief, upon which the temporary restraining order was granted, and the preliminary
13 injunction is sought -- do not back up the allegations of the memorandum. Thus, Mr. Marien does
14 not make a **single** mention of Dr. Mellon in his 14 page declaration. Mr. France omits Dr. Mellon
15 from his scope of inquiry: he states that he has been involved in the investigation of
16 Messrs. Guess, Buck Jacquot and Roberts, and that the investigation has focused on whether
17 Messrs. Guess, Buck, Jacquot and Roberts "operated xelan, Inc. and its affiliated entities as a
18 criminal enterprise." Declaration of Timothy D. France, at ¶ 3. No mention is made of
19 Dr. Mellon. In his 42 page declaration, the only reference to Dr. Mellon is that he is a director of
20 DBIC, and sent a letter to DBIC's policyholders on August 6, 2004 (attached as exhibit 8 to the
21 France declaration).

22 Based on that single reference, and nothing more, the Government sought and got an order
23 freezing Dr. Mellon's bank account, and an order requiring him to turn over his United States
24 passport. While Dr. Mellon has served as a director of DBIC since being appointed to the board in
25 June, 2004, Dr. Mellon's primary occupation is as an emergency room physician, and he has
26 recently served as Chairman of the Emergency Medicine Department at Scripps Memorial
27 Hospital in La Jolla. The Government has totally failed to make any showing why Dr. Mellon's
28 bank account should be frozen, or why his passport should be seized, and the request for

1 preliminary injunctive relief as to Dr. Mellon should be denied.¹

2 I.

3 **THE EVIDENCE PROFFERED BY THE GOVERNMENT IS INSUFFICIENT**
4 **TO SUPPORT THE ISSUANCE OF INJUNCTIVE OR OTHER**
5 **EXTRAORDINARY RELIEF AGAINST DR. MELLON**

6 A. **THE GOVERNMENT HAS NOT SHOWN THAT IT IS LIKELY TO SUCCEED**
7 **ON ITS FRAUD OR CONSPIRACY CLAIMS TO MERIT AN INJUNCTION**
8 **UNDER 18 U.S.C. § 1345**

9 Based on its allegations that Dr. Mellon violated 18 U.S.C. § 1341, 18 U.S.C. § 1343,
10 and/or 18 U.S.C. § 371, the Government asks the Court to order broad relief: (1) enjoin Mellon
11 from selling, assigning, hypothecating, pledging, withdrawing, transferring, removing, dissipating,
12 or disposing of any or all of his interest in property he allegedly obtained as the result of any
13 alleged fraudulent conduct; (2) appoint a receiver to take control of any property subject to
14 number (1); (3) repatriate all property generated from the allegedly fraudulent activity; and
15 (4) enter a writ of *ne exeat republica* requiring Mellon to turn over his passport and enjoining him
16 from leaving the country. Compl. ¶¶ 46-50. To secure injunctive relief under 18 U.S.C. § 1345,
17 the Government must first show that it is likely to succeed on the merits. Thus, the Government
18 must show that it is likely to prove: (1) a scheme or artifice to defraud; (2) use of the mails in
19 order to further the fraudulent scheme and (3) specific intent to defraud. *United States v. Munoz*,
20 233 F.3d 1117, 1129 (9th Cir. 2000).² To demonstrate a violation of 18 U.S.C. § 371 for
21 conspiracy to defraud the United States, the Government must prove (1) an agreement with one or
22 more persons; (2) to obstruct a lawful function of the Government; (3) by deceitful and dishonest
23

24 ¹ In addition to the arguments advanced in this brief, Dr. Mellon adopts and incorporates
25 by reference herein the memorandum of law, declarations and exhibits filed by defendants DBIC
26 and Doctors Benefit Insurance Holdings Ltd. in opposition to the Government's preliminary
injunction motion ("DBIC's Brief").

27 ² To establish a violation of 18 U.S.C. § 1343, the Government must show that the
28 defendant (1) engaged in a scheme to defraud; (2) used wire transmission in furtherance of the
scheme; and (3) had the specific intent to deceive or defraud. *United States v. Shipsey*, 363 F.3d
962, 971 (9th Cir. 2004).

1 means; and (4) an overt act committed by one of the co-conspirators in furtherance of the
2 agreement's objective. *United States v. Caldwell*, 989 F.2d 1056, 1058 (9th Cir. 1993).

3 The Government fails to offer any evidence to support the elements of these offenses. All
4 of Mr. France's references to Dr. Mellon relate to an August 6, 2004 letter sent by Dr. Mellon to
5 policyholders of DBIC. That letter, which is exhibit 8 to the France declaration, on its face is in
6 response to a letter sent to policyholders by an attorney who formerly represented some of the
7 doctors under audit. The letter was drafted by John Patton, DBIC's third party administrator and
8 an attorney, and reviewed by Steve Gaines, DBIC's United States counsel, before being mailed
9 out over Dr. Mellon's signature. See Patton Decl. ¶ 33., filed in support of DBIC's brief. The
10 purpose of the letter was to respond to misrepresentations made by Mr. Suverkrubbe in an earlier
11 letter to the doctors, and to give the doctors a status report on matters affecting DBIC. *Id.* The
12 letter addressed some of the misrepresentations made by that lawyer; discussed the bankruptcy of
13 certain xelan entities; discussed DBIC's solvency and intent to continue in business; and discussed
14 the state of the ongoing IRS audits. With respect to the latter, doctors who were being audited
15 were informed that DBIC had agreed to pay the legal fees of a Washington D.C. attorney, Michael
16 Durney, who had formerly been the assistant attorney general for the Tax Division of the
17 Department of Justice. The letter went on to say that any policyholder under audit could, if he or
18 she wanted, avail themselves of Mr. Durney's services at no cost. The letter also attempted to
19 address certain questions that had been raised in light of the xelan bankruptcies and the IRS audits.

20 That is the extent of the "evidence" proffered as to Dr. Mellon.

21 Based on this letter, Mr. France draws certain conclusions. Thus, he states his opinion,
22 unsupported by any facts or expertise, that by agreeing to pay only for the fees of a single attorney,
23 the letter "provides yet another example of xelan improperly using the doctors' funds to control
24 the individual doctor audits, in order to control the flow of information to the IRS" France
25 declaration, ¶ 79. In fact, as discussed at length in the DBIC brief, DBIC was entitled to retain a
26 single lawyer to represent doctors under audit who wished to use counsel provided by DBIC. A
27 corporation is entitled to exercise its business judgment in assessing how to allocate funds to cover
28 business expenses. See, e.g., *Lee v. Interinsurance Exchange of the Automobile Club of Southern*

1 *California*, 50 Cal.App.4th 694, 710 (Cal. Ct. App. 1997) (affirming dismissal of policyholders'
2 suit to require disposal of surplus funds in a particular way and stating that "[w]e can hardly
3 disagree with the proposition that decisions as to strategies for managing the surplus funds of an
4 insurer are quintessential exercises of business judgment."). That latitude extends to a
5 corporation's decision about whether paying a third party's attorneys' fees is in the best interest of
6 the corporation. *See Beehan v. Lido Isle Community Assn.*, 70 Cal.App.3d 858, 865-67 (Cal. Ct.
7 App. 1977) (refusing to overturn homeowners' association's decision not to pay attorney fees
8 incurred by member in enforcing CC & R's, because decision was protected by the business
9 judgment rule). DBIC's business decision to pay the attorney fees of clients who are being audited
10 by the IRS is also proper and does not constitute fraud. Additionally, the DBIC Board's decision
11 to pay legal fees only for a single attorney was not improper. The central issue in all of the audits
12 was the same -- whether DBIC's disability insurance is insurance for tax deductibility purposes --
13 and appointing one law firm to handle these essentially duplicative cases was an efficient way to
14 allocate the funds earmarked for that purpose.

15 Mr. France claims that Dr. Mellon's representation in the letter that DBIC is "independent"
16 and owned by doctors is false. France Decl. ¶ 82 n. 51. As discussed in DBIC's brief, and the
17 declaration of Steve Gaines filed therewith, Dr. Mellon's representation was correct. DBIC is
18 wholly owned by a Barbados holding company, which in turn is owned by thirteen doctors. See
19 DBIC's Brief, p.4.

20 Mr. France also maintains that the funds allocated to pay the doctors' attorneys' fees are
21 "the doctors' funds." As the DBIC memorandum explains, the actuarial calculations confirm that
22 DBIC has redundant reserves – funds in excess of those necessary to pay all of its present and
23 future obligations – and that the funds allocated for the doctors' attorneys' fees are therefore not
24 "the doctors' funds" at all. *See* DBIC Brief at 14-16.³

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27 ³ For this same reason, it was not fraudulent for Dr. Mellon to "reassur[e] doctors that
28 their investments in DBIC are safe, and that the funds the doctors have saved with Xélan are still
available to pay their insurance claims." France Decl. ¶ 88. DBIC's ample reserves confirm that
the doctors' funds *are* safe.

1 Based on nothing more than these interpretations of the letter, and the fact that Dr. Mellon
2 is a director of DBIC, the Government states extraordinary relief should be granted.

3 In fact, the letter does not establish any of the elements of mail fraud, wire fraud, or
4 conspiracy to defraud the United States with respect to Dr. Mellon, and the Government has
5 wholly failed to show that it is likely to succeed on these claims. On its face, the letter does not
6 show that Dr. Mellon engaged in a scheme or artifice to defraud, had the specific intent to deceive,
7 or had an agreement with some other person to obstruct a lawful function of the Government by
8 deceitful means. Additionally, none of Mr. France's references to that letter illuminate any fraud
9 or fraudulent intent.

10 Mr. France's interpretations of the letter are the sum-total of the Government's case against
11 Dr. Mellon. This does not come remotely close to establishing any involvement by him in a
12 scheme or conspiracy to defraud. In *The Republic of the Philippines v. Marcos*, 862 F.2d 1355
13 (9th Cir. 1988), the Ninth Circuit provided an example of the type and quantity of evidence
14 necessary to find a likelihood of success in this context. In that case, the Republic alleged that
15 Ferdinand Marcos and his wife engaged in mail fraud, wire fraud, and related activities. On the
16 Republic's motion for a preliminary injunction to freeze the defendants' assets, the district court
17 examined voluminous evidence that the Marcoses had transported considerable sums of money
18 from the Philippines to Hawaii and that they had set up and were using substantial bank accounts
19 in California under assumed names. *Id.* at 1362-63. The Republic also offered evidence showing
20 that the Marcoses had moved large amounts of money to a Swiss bank and an American
21 foundation they set up for the benefit of their children. *Id.* at 1363. On this extensive evidentiary
22 record, the Ninth Circuit affirmed the district court's finding that the Republic was likely to
23 succeed on the merits of its claims. *Id.* ("The Republic has put forward enough to show a fair
24 chance of succeeding with its proof.").

25 By contrast, the Government has offered no evidence, only allegations and interpretations,
26 that Dr. Mellon himself has engaged in any of the activities alleged in the complaint. Far from
27 showing that Dr. Mellon has transferred money beyond the reach of the Government, the
28 pleadings and supporting documents in this case suggest only that Dr. Mellon, in his capacity as a

1 director of DBIC, sent a single letter, prepared and reviewed by counsel, to policyholders about
2 DBIC's current condition and circumstances. The Government has made no showing that
3 Dr. Mellon has control over the assets of DBIC, has moved the assets of DBIC, has engaged in
4 any scheme to defraud, or had agreements with anyone to obstruct the lawful function of the
5 Government. The Government has completely failed to show that it is likely to succeed on the
6 merits of its fraud case against Dr. Mellon.

7 **B. THE GOVERNMENT HAS NOT SHOWN THAT IT IS ENTITLED TO**
8 **EXTRAORDINARY RELIEF UNDER 28 U.S.C. § 7402**

9 The Government also cannot show that an injunction, a receiver, repatriation of assets or
10 writ of *ne exeat republica* is "necessary or appropriate for the enforcement of the internal revenue
11 laws" under 26 U.S.C. § 7402(a). The Government's memorandum alleges that the "defendants"
12 can move DBIC funds "out of the reach of the doctors and the United States." Gov't Brief at 22.
13 There is no allegation, however, that Dr. Mellon has ever moved DBIC funds, or even that he has
14 the ability to do so. While Dr. Mellon's personal bank account was frozen by the court's order,
15 the Government has presented no evidence that any funds of DBIC were wrongfully diverted to
16 that account. While Dr. Mellon may have received fees from DBIC on account of serving as a
17 director and helping to operate the company, the Government has made no showing that any such
18 fees were wrongfully paid, and therefore should be frozen. The Government has also failed to
19 show how freezing Dr. Mellon's bank account is "necessary or appropriate for the enforcement of
20 the internal revenue laws." Thus, the Government is not entitled to any of the requested relief
21 under 26 U.S.C. § 7402.

22 **C. THE BALANCE OF HARDSHIPS STRONGLY FAVORS DENYING**
23 **INJUNCTIVE RELIEF**

24 The balance of hardships in this case plainly favors Dr. Mellon, who stands to lose his
25 constitutional right to travel as well as control over his personal bank accounts if the requested
26 relief is granted. The Government has made no showing that Dr. Mellon intends to leave the
27 country, or that it is at risk if Dr. Mellon does leave the country, nor has it shown that any DBIC
28 monies paid to him for his service to DBIC is the product of fraudulent conduct, or that it would

1 be harmed if those monies were not frozen. See DBIC's Brief, § VI.

2 **D. THE GOVERNMENT HAS FAILED TO SHOW GROUNDS FOR THE ISSUANCE**
3 **OF A WRIT OF NE EXEAT REPUBLICA AS TO DR. MELLON**

4 The Government's request for an order requiring Dr. Mellon to relinquish his passport and
5 preventing him from traveling outside the United States is entirely unsupported by the evidence
6 submitted by the Government. "[F]reedom of travel is a constitutional liberty," the right to which
7 cannot easily be taken away. *Aptheker v. Secretary of State*, 378 U.S. 500, 517 (1964). Where a
8 writ of *ne exeat republica* is sought, the burden of proof is even higher than it would be for
9 ordinary injunctive relief. See *United States v. Shaheen*, 445 F.2d 6, 10 (7th Cir. 1971) ("A party
10 seeking to support the issuance of an extraordinary writ [of *ne exeat republica*] has the burden of
11 showing exceptional circumstances warranting the relief requested."). Noting that a writ of *ne*
12 *exeat republica* is "an extraordinary writ which should issue only in exceptional cases," the
13 *Shaheen* court vacated such a writ even where the defendant had shipped all of his personal
14 possessions out of the country and had flown to Europe with his family. *Id.* at 12. Indeed, where
15 such writs are issued, they are typically based on extensive and unequivocal evidence that the
16 defendant has or intends to flee the country immediately. See, e.g., *United States v. Clough*,
17 No. C-73-2105-SW, 1977 WL 1196, at *3-4 (N.D. Cal. May 20, 1977) (granting writ where "[t]he
18 need for the writ of *ne ex republica* is demonstrated by this defendant's untimely flight from this
19 jurisdiction to a foreign country to avoid this court's orders"); *United States v. Lipper*, No. C-81-
20 1222-RPA, 1981 WL 1762, at *8 (N.D. Cal. Mar. 25, 1981) (granting writ where defendant twice
21 "stated to federal officials that he intended to leave the country[, and] admitted that he was
22 liquidating all his personal assets so he could 'live in France in style'").

23 The Government has made no such showing with respect to Dr. Mellon. Accordingly,
24 there is no basis for the extreme relief of a writ restricting Dr. Mellon's right to travel. See *Lipper*,
25 1981 WL 1762, at *6 ("[b]ecause of the exigent circumstances which must be shown, Writs of *Ne*
26 *Exeat Republica* are rarely utilized by the courts.").

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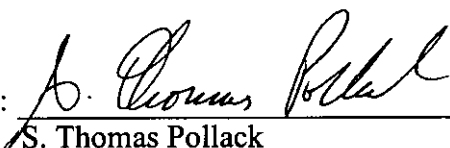
II.

CONCLUSION

For the foregoing reasons, Dr. Mellon respectfully requests that the Court deny the Government's motion for a preliminary injunction, for appointment of a receiver, repatriation of assets and for a writ of *ne exeat republica*.

Dated: November 19, 2004

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