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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,, Plaintiff, vs. L. DONALD GUESS, et al., Defendants.	Case No. 04-CV-2184 LAB (AJB) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE RESPONSE OF G. THOMAS TO THE ORDER TO SHOW CAUSE Date: December 3, 2004 Time: 1:30 p.m. Ctrm: Hon. Larry A. Burns

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Preliminary Statement

This Response to the Court's November 3, 2004, Order to Show Cause (the "Order"), is being filed on behalf of G. Thomas Roberts ("Roberts"), one of the named defendants in this case. Each of the defendants will be filing separate memoranda in response to the Order and certain of the underlying factual and legal arguments regarding the legitimacy of the operations of Doctors Benefit Insurance Corporation ("DBIC")--and the status of that entity as an insurance company--

are being addressed in the reply briefs filed by the other defendants. Rather than repeat those arguments here, we will refer--where appropriate and in a limited fashion--to those arguments in an effort not to burden the Court. We respectfully ask the Court to consider the referenced arguments, as the Court deems appropriate.

II. Background.

The United States asserts that the named individual defendants presently control over $500 million in funds allegedly misappropriated from doctors, which funds, if not dissipated, diverted, stolen, or wasted, could be used to pay the substantial tax liabilities that the doctors *may* owe *if* the IRS ultimately determines to disallow tax benefits the doctors claimed as a result of their participation in defendants' financial planning strategies. Government's Complaint at 11 ("Gov't Cmplt."). Based on that assertion, the Government states that it is necessary for a receiver to be appointed and take possession of the funds controlled by the defendants and to enjoin the defendants' allegedly fraudulent activities, so that the funds are available to pay any possible as-yet-un-assessed tax deficiencies and so that the Internal Revenue Service will be able to collect any such taxes. Gov't Cmplt at 11. The Government also secured a temporary restraining order pursuant to 18 U.S.C. § 1345 and 26 U.S.C. § 7402(a) that enjoins Roberts from selling, assigning, hypothecating, pledging, withdrawing, transferring, removing, dissipating, or disposing of any property that he owns. The Court also issued a writ of *ne exeat republica* restricting Roberts' ability to travel and required Roberts to turn in his passport to Governmental officials.

Mr. Roberts has complied with the Order. At this time, he submits this Response to the Order to Show Cause and respectfully requests the Court to lift the temporary restraining order, to withdraw the writ of *ne exeat republica,* and to direct the Government to return his passport.

III. The Various Fraud Allegations Raised by the Government Against Roberts are Unsubstantiated.

A. Roberts was Not Part of a Conspiracy to Defraud the U.S. Government As a Result of Signing Tax Opinions on Behalf of the Law Firms that Employed Him.

Mr. Roberts has not been a participant in a conspiracy to commit fraud against either the doctors or the U.S. Government as repeatedly alleged in the Government's moving papers and Declarations. The source of the Government's concern with Roberts is that he signed certain tax opinion letters on behalf of the law firms of Eckert Seamans Cherin & Mellot, LLC ("Eckert Seamans") and Williams Coulson Johnson Lloyd Parker & Tedesco, LLC ("Williams Coulson") from 1998 to 2002. According to the Government, those tax opinions either fraudulently omit the correct tax advice (Government's Complaint at 6 ("Gov't Cmplt.") or were issued with Roberts' knowledge that "as designed and operated" the disability plans did not produce the tax benefits described in the opinions because there was no insurance to begin with. (Gov't Br. at 9); Declaration of Timothy D. France at 31 ("France Decl.") The only reason the Government provides for making these allegations is that the "so-called insurance products do not possess the risk shifting and risk distribution characteristics that are necessary to any program of insurance. Instead, the premiums operate primarily as savings and investment vehicles, payments for which are not deductible in calculating taxable income."[1] (Gov't Br. at 9).

As more fully addressed in the Memorandum of Points and Authorities filed by Doctors Benefit Insurance Company, Ltd. ("DBIC"), the issue of whether DBIC is an insurance company and whether it issued supplemental disability insurance to doctors is the heart of the Government's

[1] The widely accepted test for determining whether insurance qualifies as such for federal tax purposes is whether there is risk-shifting and risk-distributing. *Helvering v. Le Gierse*, 312 U.S. 531, 539 (1941). *See also Clougherty Packing Co. v. Commissioner of Internal Revenue*, 811 F.2d 1297, 1300 (9th Cir. 1987) ("The accepted definition for purposes of federal income taxation dates back to [*Helvering*], in which the Supreme Court stated that '[h]istorically and commonly insurance involves risk-shifting and risk-distributing.'").

case. The Government argues that the product offered by DBIC is not insurance and that Roberts and others, through certain tax opinions, have defrauded the doctors by representing that premiums paid for the insurance are tax deductible, a position which the Government disagrees. There is simply no evidence that Roberts believed his opinions were false or even without substantial authority. The tax implications of DBIC's policies were analyzed not only by Mr. Roberts, but also by Michael E. Lloyd. Mr. Lloyd, who also has no financial interest in DBIC or xélan, The Economic Association of Health Professionals ("xélan"), agrees with Roberts that premiums paid for the DBIC's disability insurance--if those policies constitute insurance--would be deductible by a corporation making those payments. Examples of opinion letters issued by the law firms of Williams Coulson and Eckert Seamans, and signed by Messrs. Roberts and. Lloyd, are attached as Exhibits A and B.

Just because the Government disagrees with the legal conclusion contained in tax opinions does not mean that the opinions were a fraud on the doctors or the U.S. Government, as the Government alleges. These well reasoned legal opinions provide a detailed analysis of the tax laws as they existed at the time the opinions were issued. Roberts and other lawyers associated with the opinions properly relied upon factual assumptions made by xélan to come to a reasoned legal conclusion as to the tax effect of the premium payments and distributions from the disability insurance plans. *See* opinions at Exhibits A and B.

In its Response, DBIC provides the Court with copies of five actuarial reports from highly esteemed actuaries–all of which were previously provided to the Government–that conclude that DBIC was an insurance company with risk shifting and risk distribution attributes. *See* Exhibits to DBIC Response. The legal opinions issued by Eckert Seamans and Williams Coulson rely on the fact that DBIC is an insurance company and that the premiums paid were for purposes of acquiring disability insurance. The tax opinions also point out that, because the premiums were

deductible upon payment, distributions made on account of disability from the plan would be fully taxable to the doctor as ordinary income. *See* opinions Exhibits A and B. The Government's statement that Roberts intentionally and fraudulently omitted the correct tax advice simply has no support.

B. Roberts' Position as Outside Counsel to xélan was Disclosed to the Doctors.

The Government states that Roberts furthered a scheme to defraud because he failed to disclose his (i)"relationship" with xélan and (ii) his role as a Director of DBIC to the doctors. (Gov't Cmplt. at 6). In Timothy D. France's Declaration, the Government describes Roberts as holding the title of "xélan's Office of General Counsel" (France's Decl. at 33). Additionally, the Government asserts that to "prove the 'legality' of these schemes, the defendants provide the doctors with 'opinion letters' written by lawyers....and that at least one of the lawyers is actually a director of the 'captive' offshore insurance company, Doctors Benefit Insurance Co., Ltd." (Gov't Br. at 18).

Roberts never held a position with xélan as "xélan's Office of General Counsel." (Roberts Decl. at 3). Roberts was an uncompensated director of the predecessor insurance company and he did sign some tax opinions that were issued to xélan and doctors while he was a Partner with Eckert Seamans and as Of Counsel to Williams Coulson. Roberts Declaration at 3 ("Roberts Decl.")[2]. To Roberts' knowledge, however, neither firm had a financial interest in xélan other than earning fees for legal services performed, and neither did Roberts. (Roberts Decl. at 3) Furthermore, contrary to the Government's assertions, he never signed a tax opinion while a Director of DBIC. (Roberts Decl. at 3). Roberts became a director of DBIC on June 13, 2004 after he had retired from Williams Coulson in 2002. (Roberts Decl. at 3).

[2] Roberts' Declaration is attached, hereto, as Exhibit D.

Furthermore, Roberts' association with xélan was never kept secret as the Government alleges. The Government feels that "the defendants neglected to tell xélan doctors that the attorney who signed those letters, defendant Roberts, was not independent, and was closely tied to xélan and DBIC." (Gov't Br. at 19). The Government knows the opposite is true as it admits such in its motion. According to the Government's own witness: "G. Thomas Roberts has been listed on the "Key Personnel" page of xélan's website as one of three xélan 'tax counsel.'" (France's Decl. at 36). This is a correct description of Roberts' role as one of xélan's outside lawyers. We have also attached as Exhibit C, a copy of another version of xélan's website, dated June 18, 2002, which posted a picture of Roberts and described him as a lawyer for the company and "primarily involved with the Pension Transfer Plan, the Disability Equity Trust, the Malpractice Equity Trust, and the Long Term Care Equity Trust components of the xélan program." Clearly, as the Government's sworn witness admits, there was no attempt to hide Roberts' role as a legal advisor to the company. He has been publicly promoted as its outside counsel and closely associated with xélan for a number of years.

C. **Roberts Did Not Hold a Direct Financial Stake in the Sale of xélan Insurance Products.**

The Government alleges that "no defendant was a bona fide transferee for value" for any of the doctors' funds. (Gov't Cmplt. at 10). And France's Declaration claims that "Roberts has a direct personal financial stake in the sale of xélan/DBIC tax reduction products" (France Decl. at 36) and a "financial stake in xélan and DBIC" (France's Decl. at 59). These allegations are patently false.

Roberts never held a financial interest (i.e., an equity position, option to purchase equities, loans, profit sharing or bonus arrangements) and never personally received any money in any form from any of the defendants at any time. (Roberts Decl. at 3). Furthermore, Roberts has never held a direct personal financial stake in the sale of any product offered by the defendants, and he holds

no financial stake in xélan or DBIC. (Since June 13, 2004, he has held an uncompensated position as Director of DBIC. (Roberts Decl. at 3). Roberts has always been compensated from the operations of the law firms of Eckert Seamans and Williams Coulson while employed by those firms on the basis of a draw against earnings. (Roberts Decl. at 3). He was a Partner in Eckert Seamans from 1991 to 1997 and Of Counsel to Williams, Coulson from 1997 to 2002. (Roberts Decl. at 3). During the time that Eckert Seamans and Williams Coulson issued opinions on the tax impact of the disability plan, Roberts never received direct remuneration from any of the defendants or the doctors. (Roberts Decl. at 3) Those firms charged for the legal services performed. (Roberts Decl. at 3). Furthermore, the rate of pay was based on an hourly rate times the number of hours of work performed on client matters. (Roberts' Decl. at 3).

D. The Government's Assertions that Roberts Obstructed IRS Audits, Made Knowingly False Statements to the IRS in Summons Enforcement Actions and Made False Statements in Bankruptcy Proceedings, are Unsubstantiated.

The Government also asserts that Roberts and other defendants obstructed IRS audits by preventing doctors from seeking legal advice, making knowingly false statements to IRS officials involved in summons enforcement actions, and making false statements in bankruptcy proceedings. (Gov't. Complt. at 9) The Government provides no support – whatsoever-- for these accusations against Roberts – because there is none. Roberts has never advised anyone against seeking legal advice. He has never issued a false statement with respect to any IRS summons. Moreover, he has never appeared in the bankruptcy proceeding cited by the Government – so he could not possibly have made knowingly false statements in those proceedings. It is obvious that the Government simply included Roberts in with the other defendants in an attempt to paint a trumped-up scenario of conspiracy and fraud. As described above, however, the facts simply do not bear any resemblance to the Government's assertions, and there is no justification for continuing with the temporary restraining order as it relates to Mr. Roberts.

IV. **The United States Did Not Meet Its Obligations Under Fed. R. Civ. P. 65(b) for the Issuance of an Ex Parte Temporary Restraining Order Under 18 U.S.C. § 1345 and 26 U.S.C. § 7402(a).**

An *ex parte* temporary restraining order should not have been entered in this matter against Roberts because the United States failed to meet its burden to establish that such relief was warranted. In order to succeed on a request for injunction relief under 18 U.S.C. § 1345 or 26 U.S.C. § 7402(a) the moving party must satisfy the requirements of Federal Rule of Civil Procedure 65(b), which governs the issuance of temporary restraining orders ("TROs"). *See* 18 U.S.C. 1345(b) ("A proceeding under this section is governed by the Federal Rules of Civil Procedure . . . ."); *United States v. Shaheen*, 445 F.2d 6 (7th Cir. 1971) (an injunction under § 7402(a) must satisfy Rule 65). Under Rule 65(b) TROs should be issued *ex parte*

> only if (1) it is clear from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

Fed. R. Civ. P. 65(b) (emphasis added). Fed. R. Civ. P. 65(d) further requires that

> [e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . .

Ex parte TROs are an extraordinary remedy which are only appropriate when the applicant is in need of immediate relief and the moving party has clearly established that such relief is warranted. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Evergreen Presbyterian Ministries Inc. v. Hood*, 235 F.3d 908, 917 (5th Cir. 2000); *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 823 (7th Cir. 1998); *Joyce v. San Francisco*, 846 F. Supp. 843, 850 (N.D. Ca. 1994). The provisions of Rule 65(b) are in place to assure the restrained party some

measure of protection in lieu of receiving formal notice of and the opportunity to participate in a hearing. Wright & Miller, Federal Practice & Procedure, § 2951 (West 1995). Moreover, a plaintiff moving for an *ex parte* order based on an assertion that a defendant would disregard a court order or dispose of assets within the time it would have taken for a hearing must show that the defendant had a history of disposing of evidence or violating court orders. *First Technology Safety Sys. v. Depinet*, 11 F.3d 641, 650 (6th Cir. 1993). The Government makes no such assertions against Roberts.

In deciding whether to impose temporary or preliminary injunctive relief, courts in the Ninth Circuit rely on four traditional factors:

> (1) the likelihood of plaintiff's success on the merits;
> (2) the possibility of plaintiff's suffering an irreparable injury;
> (3) the extent to which the balance of hardships favors the respective parties; and
> (4) in certain cases, whether the public interest will be advanced by the provision of preliminary relief.

United States v. Odessa Union Warehouse Co-Op, 833 F.2d 172, 174 (9th Cir. 1987). To meet its burden, a party must establish either "(1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in its favor." *United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Gentala v. City of Tuscon*, 213 F.3d 1055, 1060-61 (9th Cir. 2000). However, "[u]nder any formulation of this test, the moving party must demonstrate a significant threat of irreparable injury." *Arcamuzi v. Continental Airlines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987) (emphasis in original). Because the Government has not adequately established irreparable injury or that it is likely to succeed on the merits, a temporary restraining order should not have been granted enjoining Roberts from utilizing his assets.

A. The United States Has Not Shown that It is Likely to Succeed on the Merits.

The Government has made no evidentiary showing that it is likely to succeed on the merits of this action. The Government contends that Roberts and the other defendants conspired to defraud the United States under 18 U.S.C. § 371 by engaging in mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343. (Gov't Br. at 15-16). At its core, this allegation centers on the Government's assertion that defendants fraudulently induced the doctor-participants to invest in their financial plans, which caused the doctors to take improper deductions, and thus, underpay their taxes. (*Id.* at 16). And, as discussed above, Roberts simply issued well reasoned tax opinions to clients of the firms for which he was employed. Thus, the determination of whether Roberts engaged in a conspiracy to defraud the doctors and the United States, rests heavily on whether xélan's financial plans were permissible under the Internal Revenue Code, and, if not, whether Roberts knew them to be impermissible. We emphasize that "[t]he legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." *Gregory v. Helvering*, 293 U.S. 465, 469 (1935) (citations omitted).

The Government's assertion that the "facts establish that (i) each of the named defendants is involved in a scheme to defraud the doctors; (ii) both mail and wire communications are used to further the fraudulent scheme; and (iii) each of the named defendants is involved in a conspiracy to defraud the United States of income taxes . . . " is belied by the Government's own statements as to whether the financial plans at issue violate the tax code.

The Government's ultimately rests its application for *ex parte* relief on Revenue Agent Marien's sworn uncertainty as to whether xélan's plans provide the claimed tax benefits. In sum, the alleged injury to the United States is totally and utterly contingent upon an IRS determination,

yet to be made, that the doctor-participants owe federal income taxes and have failed to pay any such taxes. (Gov't Br. at 22). The Government fails to discuss why the normal statutory prerequisites to assessment and collection have been ignored to pursue the extraordinary relief here at issue. *See e.g.* 26 U.S.C. §§ 6201 *et seq.* (assessments), 6321 *et seq.* (liens), 6330 *et seq.* (levy), and 6751 (penalties). The Government here claims that defendants have violated the tax code and thereby defrauded the United States and the doctors, (*see* Gov't Br. at 16-21) while at the same time conceding that the IRS has not even made a preliminary determination--in accordance with its own procedures--that most of the doctors owe any taxes. This falls far short of establishing that the Government is likely to succeed on the merits of its action. Agent Marien concedes that he has not been able to make any final determination on the merits (Marien decl. at 79), and yet Roberts is alleged to have committed fraud in knowingly misleading the doctors as to the tax consequences of the plans.

It is worth noting that, even if the Government were to follow the proper procedures mandated by the Internal Revenue Code, the taxpayers (doctors) would have a right to challenge any proposed tax deficiency made by the IRS in the United States Tax Court and any assessment in refund litigation. *See* 26 U.S.C. § 6330(d). For the Government to argue that it is likely to succeed on the merits of *this* action ignores the significant statutory and administrative hurdles the Government must overcome before it can determine that xélan's financial plans contravene the Internal Revenue Code, much less that Roberts' action amounted to fraud. As described above, the assertions against Roberts are unsubstantiated and it is difficult to see why his rights should be so unreasonably restricted.

B. <u>The United States Has Not Established Irreparable Injury.</u>

1. <u>The Government is Required to Establish Irreparable Injury.</u>

The Government cites to *Miller v. California Pacific Medical Center*, 19 F.3d 449, 459 (9th Cir. 1994) for the proposition that the "usual standard for injunctive relief does not apply" when the Government relies on a statute as the basis for seeking equitable relief. (Gov't Br. 13-14). The Government, again relying on *Miller*, asserts that, where the Government meets the "probability of success" prong of the preliminary injunction test, the "possibility of irreparable injury" is automatically satisfied. (*Id.* at 14). The Government goes on to contend that "the Court should presume the existence of irreparable injury because the United States seeks relief on the basis of an express grant of statutory authority." (*Id.* at 22). The assertion that there is an automatic or even rebuttable presumption of irreparable injury when the Government moves for injunctive relief pursuant to a statute has been unequivocally rejected by the Ninth Circuit in the very cases cited by the Government.

Both *United States v. Nutri-Cology, Inc.* and *Miller v. California Pacific Medical Center* squarely state that the Government is not entitled to a presumption of irreparable injury, rebuttable or otherwise, unless it shows that it will likely prevail on the merits. *Miller*, 19 F.3d at 459; *Nutri-Cology*, 982 F.2d at 398. The *Nutri-Cology* court's discussion of the cases in which it has applied this presumption, *i.e.*, where the Government *has* established that it will likely prevail, is instructive here. *Id.* For example, the presumption applied where both parties conceded that the defendants had violated the statute, where two of three corporate defendants admitted noncompliance with orders of a federal agency, and where a defendant did not dispute the factual finding that it was violating a federal agency's order. *Id.* (citations omitted). Clearly, similar facts are not present here. Roberts has not admitted to any wrongdoing, and there has been no factual finding that he or the other defendants violated or are violating any federal law. There has been no tax assessment, no failure to pay, no indictment and no refusal to comply with any Court order. Roberts has simply caused no injury to the doctors or to the U.S. Government.

2. The Government's Application Makes Clear That There is no Threatened, Immediate, Irreparable Injury.

To succeed on this prong, the United States must show that there is a significant threat of irreparable injury. *Simula Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999); *Caribbean Marine Services Co. v. Baldridge*, 884 F.2d 668, 675 (9th Cir. 1988); *Dollar Rent A Car v. Travlers Indemnity Co.*, 774 F.2d 1371, 1375 (9th Cir. 1985). While it need only allege an immediate threatened injury to establish standing to bring an action for injunctive relief, it must demonstrate that such an injury will occur as a "prerequisite" for such relief. *Caribbean Marine*, 884 F.2d at 675.

The Government's application for an *ex parte* TRO makes clear that there was no immediate irreparable harm that justified either the imposition of the TRO or the further imposition of preliminary injunctive relief. The Government contended that there were two different parties who would suffer an injury if the TRO was not granted: the doctors participating in defendants' financial plans and the United States. However, the language the Government used to describe the alleged injuries facing both parties plainly shows that no immediate, irreparable injury would result absent the TRO. Further, the Government relies solely on uncontested equivocal statements as evidence to support its showing of injury.

Nowhere in its application for *ex parte* relief does the Government describe the injury facing the doctors or the United States as "immediate." Rule 65(b) is clear that a party seeking an *ex parte* TRO must show that an "immediate, irreparable injury will result . . ." absent temporary relief. Fed. R. Civ. P. 65(b) (emphasis added). Instead, the Government moved for the TRO because "there [was] a substantial likelihood that the defendants will dissipate the assets [of the

companies]." (Gov't Br. at 2). Note again that there is no assessment of any kind pending against those assets. The "evidence" the Government used to support its application is of the weakest quality. (*See e.g.* Declaration of Timothy France at 30 ("the evidence shows that it is more likely than not" that defendants are engaging in fraudulent activity); at 32 ("I believe . . . it is more likely true than not that" defendants are in possession of assets traceable to alleged fraud); at 32 (defendants "might" be in possession of documents that show alleged fraudulent scheme)). [3] France's conclusions are based on the even more equivocal statements of Agent Marien about the merits of the programs under the tax code.

The Government alleged that the doctor-participants would suffer irreparable injury because the defendants "could–as they have done secretly in the past–move the [doctor's deposited] funds in very short order." (Gov't Br. at 22) (emphasis added). The Government proffered no evidence, because it has none, that Roberts or any of the other defendants "secretly" or for any improper purpose transferred any of the funds at issue. That the defendants theoretically "could" do something that may contravene a court order is irrelevant to the inquiry. The question is whether the moving party has established that they "would." *See First Technology*, 11 F.3d at 650.

As to the immediacy of the injury to the United States, the Government disproves its own case. The Government has alleged that *if* the defendants move their assets out of the country, "[t]he United States will also be injured *if* the IRS is unable to otherwise collect from the doctors or from the defendants any unpaid taxes it [*possibly, after further consideration*] determines are due." (Gov't Br. at 22) (emphasis and parenthetical added). Further, the Government states that "the Internal Revenue Service may eventually have to look to [defendants'] accounts as a source

[3] It is well-known in the tax world that the "more likely than not" standard translates into a fraction over fifty percent. In other words, France has concluded, in reliance on Agent Marian, that the Government has at best just over a fifty percent chance of proving its fraud allegations.

of paying taxes, penalties and interest that the IRS, based on information currently available to it, expects to assess against xélan doctors." (Compl't ¶ 32) (emphasis added). Thus, by the Government's own admission, before the United States will be injured, three conditions must be met: (1) the IRS will have to determine that the doctor participants owe taxes; (2) those doctors will have to be unable to pay those liabilities; and (3) the IRS will have to show that the assets in defendants' control are subject to attachment for payment of the doctors' unpaid taxes. Yet another implicit prerequisite to the relief sought here is that, before a finding of fraud against Roberts can be made, the Government must show that the claimed tax benefits are not supported by law and that defendants knew that to be the case. There has been no showing here.

Injunctive relief is inappropriate where the Government has done nothing more than proffer that it "may eventually" decide to impose tax liability on the doctors participating in the plans, that the doctors might not pay such liability, and that the funds in xélan's control might properly be used to pay such unpaid liabilities.[4] Indeed, the Government's ambivalence about whether or to extent what tax liability may properly be imposed on the doctors puts in serious doubt its comparative certainty that a fraud has been committed by any of the defendants . The Government admits it has made no final determination concerning the application of the underlying tax law. There are no taxes currently owed the Government by the doctors or Roberts, and it will be established in this proceeding that no funds are unaccounted for or have been improperly dissipated. The Government has no proof to the contrary. No injury, much less irreparable injury, has been shown that would warrant the extraordinary relief sought by the Government.

[4] This latter assertion is undercut by Agent Marion himself, who has preliminarily concluded that the DBIC program may indeed be *insurance*, and not a savings plan, in which case the insurance reserves would not necessarily be available to pay tax liabilities of the doctors.

V. **Appointing a Receiver To Take Possession of All the Assets And Restraining the Movement of Un-Seized Assets To Ensure that a Taxpayer has the Ability To Pay As-Yet-Un-Assessed Taxes is Not Authorized Under § 7402(a).**

The Government relies on 26 U.S.C. § 7402(a) as providing this Court the power to enforce the Internal Revenue Code by taking possession of defendants' assets and enjoining Roberts from using or disposing of his assets (and appointing a receiver over the insurance company).[5] (*See* Gov't Br. at 12, *citing Brody v. United States*, 243 F.2d 378, 384 (1st Cir. 1957)). Two major distinctions characterize the cases on which the Government relies to support its argument that § 7402(a) empowers it to take such action: (1) none actually involve the extraordinary remedy of appointing a receiver to take possession of a party's assets, and (2) all involve situations in which the taxpayer had either been *assessed* a tax liability or *convicted* of a tax law violation. Not one of these cases even remotely stands for the proposition that § 7402 (a) empowers a court to take possession of or restrain the use of assets of a party against whom there has been no finding of a tax code violation, and who, even assuming a tax liability were eventually determined, is not clearly responsible for paying such liability. The Government does not assert that Roberts owes any taxes at all.

A review of the cases cited by the Government establishes the weakness of its position. *Ryan v. Bilby*, 764 F.2d 1325, 1327 (9th Cir. 1985), involved a "frivolous appeal by a disgruntled taxpayer" who had been *convicted* of failing to file tax returns under 26 U.S.C. § 7203, and in response placed common law liens on the assets of Internal Revenue officials involved in his case.

[5] The Government has not addressed why it should not be required to pursue its administrative remedies in this matter instead of relying on § 7402(a). No reported case stands for the proposition that the IRS can resort to § 7402(a) instead of using the ordinary administrative processes mandated by the tax code, *e.g.* 26 U.S.C. §§ 6201 *et seq.* (assessments), 6321 *et seq.* (liens), 6330 *et seq.* (levy), and 6751 (penalties). Considering that the IRS has not even determined whether defendants or the doctors have violated any tax laws, and § 7402(a) can be used only to "enforce[] . . . the internal revenue laws," the Government's resort to § 7402(a) is unwarranted. Because the burden of proof rests solely with the moving party, the Government should be required to explain why its ordinary administrative procedures are inadequate here.

The court of appeals found that the district court had the power under § 7402(a) to void the liens because they were being used to impede and harass the IRS official. *Id.* In *United States v. Lansberger*, 692 F.2d 501, 503-04 (8th Cir. 1982), the court of appeals upheld the district court's imposition of an injunction preventing a taxpayer from engaging in fraudulent and deceptive schemes that violated the tax code for which the taxpayer had already been *convicted*. *Id.* at 502. In *United States v. Molen*, 2003 WL 190606 (E.D. Cal. Oct 1, 2003), the magistrate judge entered an injunction under § 7402(a) compelling defendant taxpayers to pay *assessed and unpaid* back taxes to the IRS. *Id.* at *1. Approximately three years prior, the defendant-taxpayers sent a letter to the IRS informing it that they intended to stop withholding and paying federal employment and unemployment taxes because they "did not consider the compensation they paid to their employees to be wages or gross income." *Id.* at *2. True to their word, the defendants *failed to pay their taxes*, and the IRS moved to use § 7402(a) to force them to pay. *Id.* Notably, the court did not use its injunctive power to order the payment of past due liabilities but only to order current compliance, observing that the government has "specific remedial statutes" governing the collection of past due liabilities. *Id.* at *4.

These cases do not support the Government's contention that § 7402(a) can be used to take possession of the assets of a party because, as the Government puts it so succinctly, the IRS "may eventually" have to look to those assets as a source of paying the taxes, penalties and interest the IRS "expects" it may assess against a third-party. (*See* Compl't ¶ 32).

Moreover, only an assessed tax deficiency may become subject to a tax lien or levy. The Government's action here seeks to circumvent those rules established to protect the rights of taxpayers. Before a tax deficiency is assessed, *i.e.*, formally entered on the assessment rolls and asserted against the taxpayer, the taxpayer must be furnished with a statutory notice of deficiency setting forth the specifics of the Government's claim. The taxpayer is provided with the

opportunity of an administrative conference and is entitled to contest the deficiency in the United States Tax Court before it can be assessed. Only after these deficiency procedures are exhausted or waived by the taxpayer can the assessment be entered on the rolls. *See* 26 U.S.C. §§ 6211 through 6215. [6] Once the deficiency in tax has been assessed, a statutory lien is imposed on the taxpayer's property. *See* 26 U.S.C. § 6321. At this point, if the taxpayer fails to pay the tax after notice and demand, the Government is entitled to collect the tax by levy against the taxpayer's property, subject to reasonable notice requirements and other procedural safeguards that are provided. *See* 26 U.S.C. §6331 *et seq.*

Further, while § 7402(a) can be used to aid in the enforcement of the revenue laws, the Government has failed here to meet the exacting standards required before any assets may be taken under the auspices of § 7402(a). The limitations imposed on the exercise of the district court's jurisdiction under § 7402(a) within the Ninth Circuit were clearly spelled out in *In re Gerwig*, 461 F. Supp. 449 (C.D. Ca. 1978). In *Gerwig*, the Government had assessed tax liability against a taxpayer and made demand for payment, but the taxpayer failed to pay. *Id.* at 450. The Government made an *ex parte* application to the court for an order authorizing entry into taxpayer's premises by the IRS agents to seize property in satisfaction of the unpaid taxes. *Id.* The court noted that the affidavit of the IRS revenue officer indicated that a formal assessment of unpaid taxes had been made pursuant to sections 26 U.S.C. §§ 6201, 6202, and 6203; that notice and demand for payment of tax had been made pursuant to 26 U.S.C. §§ 6303 and 6321; that a lien had arisen on all property and rights to property of the taxpayer pursuant to 26 U.S.C. §§ 6321 and 6322; and that levy against the property could be made. *Id.*

[6] If the Government believes that its assessment or collection of a tax deficiency is in jeopardy, it can immediately assess the tax deficiency, without providing the aforementioned deficiency procedures, but only in accordance with the jeopardy assessment rules. *See* 26 U.S.C. §§ 6851, 6861.

The court stated that, with some reluctance, it would permit an *ex parte*, unnoticed proceeding to result in the seizure of property under specific guidelines with which the IRS had to comply. *Id.* The judge ruled that applications by the Government must enable the judge to make an independent determination of whether probable cause exists to believe that: (1) an assessment of tax has been made against the taxpayer; (2) notice and demand have been properly made; (3) the taxpayer has neglected or refused to pay said assessment within ten days after notice and demand; and (4) property, subject to seizure, presently exists at the premises sought to be searched and that said property either belongs to the taxpayer or is property upon which a lien exists for the payment of the taxes. These *Gerwig* requirements were referred to with approval in *United States v. Condo*, 782 F.2d 1502 (9th Cir. 1986). The Government has here failed on all four counts.

While *Gerwig* involves the execution of search warrant and the seizure of property, its underlying principles should be applied in this matter. [7] Here, the Court has ordered the Government to take possession of defendants' assets, restrict the use of assets, and appointed a receiver to manage them when no assessment of tax has been made against any taxpayer; no notice and demand for payment has been made; there has been no refusal to pay any tax; and the property frozen or made subject to receivership is neither subject to a tax lien nor belongs to, in the words of the Complaint, the "likely" taxpayers with "anticipated" tax deficiencies. The Government should be denied this unprecedented and unwarranted use of § 7402(a), in circumvention of existing law and its own applicable procedures.

[7] The Service has recognized the *Gerwig* limitations apply where it seeks a writ to enter and seize property, acknowledging that its authority under such a writ is limited to "seiz[ing] property to satisfy *unpaid* taxes." IRS General Litigation Bulletin No. 452, May 1998 (emphasis added).

VI. The Court Should Reverse its Issuance of a Writ of *ne exeat republica* Against G. Thomas Roberts and Order the Government to Return His Passport.

The Government moved this Court to enter a writ of *ne exeat republica*, which required the defendants to turn over their passports until "after the receiver has identified and secured all property acquired in the alleged fraudulent schemes." (Gov't Br. at 11). While this action is specifically allowed under § 7402(a), the Government failed to meet the high standards for imposing such a restriction on Roberts.

The seminal case interpreting the issuance of a writ of *ne exeat republica* is *United States v. Shaheen*, 445 F.2d 6 (7th Cir. 1971). In *Shaheen*, the district court granted the Government's *ex parte* request for a writ of *ne exeat republica* to bar a taxpayer from leaving the country until he paid *assessed* income tax deficiencies in the amount of $452,534.89. *Id.* at 7. In support of its application the Government provided evidence that the taxpayer had sold his residence, shipped his household goods to family in the United Kingdom and borrowed $80,000. *Id.* at 8. In addition, the taxpayer had admitted that he desired to leave the United States promptly, but denied that he would never return. *Id.* at 9.

In reversing the district court's grant of the writ, the court of appeals held that because the right to travel outside of the United States is "a constitutional liberty closely related to the rights of free speech and association," a writ of *ne exeat republica* should not issue unless the Government introduced "findings of fact predicated on evidence that the taxpayer's departure will frustrate the collection of the amount due." *Id.* at 10 (citing *Aptheker v. Sec. of State*, 378 U.S. 500, 517 (1964)). Moreover, the court found, that such an infringement on a constitutional right "cannot be abridged without due process of law" and the Government must show exceptional circumstances to warrant its imposition. *Id.* (*citing United States v. Laub*, 385 U.S. 475, 481 (1967); *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958); *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S.

212 (1945)). The Government must also establish that the restraint on liberty inherent in a writ of *ne exeat republica* "is a necessary, and not a coercive and convenient, method of enforcement." *Shaheen*, 445 F.3d at 11.

In *United States v. Lipper*, U.S. Dist. LEXIS 11766 *1, 20 (N.D. Ca. 1981), the district court granted the Government's application for a writ of *ne exeat republica* against a taxpayer who *failed to comply with an IRS summons* commanding him to furnish information. The court determined that the writ was justified because the taxpayer: (1) had willfully avoided being served, (2) was in the process of liquidating all of his assets; (3) was in possession of $350,000 in cash; and (4) had stated to Government officials that he was liquidating all of his assets so that he could flee to France and "live [there] in style." *Id.* at *2-4. The court found that the writ was warranted because it would be "difficult if not impossible" to collect the taxpayer's assets if he fled. *Id.* at 20.

Given the high standards for granting a such a writ, the Government has not even come close to satisfying its burden and has, frankly, wildly overstepped its bounds. Unlike the taxpayers in *Shaheen* or *Lipper*, the Government has not indicated that Roberts has any outstanding tax liabilities. Rather, the Government asserts that the writ is necessary to ensure that "the receiver has identified and secured all the property derived from defendants' fraudulent schemes." Government's Complaint. at 15 ("Gov't Cmplt."). However, the Government has not established that Roberts continued possession of his passport would impede the identification of defendants' assets.

Furthermore, the Government makes no mention of Roberts as a flight risk because clearly none exists. He has resided his entire life in Pennsylvania and all of his assets are held within the state. Declaration of G. Thomas Roberts at 1, 2 ("Roberts Decl."). He owns a home with his wife of 28 years in Sommerset County, Pennsylvania – a residence that was passed down to him from

his parents. (Roberts Decl. at 2). Roberts remains close with his immediate family and takes pride in his five children and six grandchildren - all of whom reside in the United States. (Roberts Decl. at 1).

He is also involved in the local community. Through his family owned pet rescue organization, Roberts works many hours each week to help owners locate their lost animals. The organization also provides boarding, food and medical care for stray animals until the owners can be identified or adoption arranged – at no charge to the local community. (Roberts Decl. at 2). Roberts is also involved in the business community. He is the founding member of the Donnegal-Laural Highlands Rotary Club, a local branch of the National Rotary Association. (Roberts Decl. at 2). He was also the founding member of the local Chamber of Commerce for Laural Mountain, Pennsylvania. (Roberts Decl. at 2).

Mr. Roberts is a lawyer who graduated from the University of Pittsburgh Law School in 1967. (Roberts Decl. at 2). He has both worked for--and provided legal advice to--insurance companies for over 37 years. As a result of his considerable legal experience, his work periodically requires him to travel to Barbados, Bermuda, U.S. Virgin Islands, British Virgin Islands, and St. Lucia to advise clients. (Roberts Decl. at 3) These trips usually last 3 or 4 days. As indicated on his passport--currently in the Government's possession--he immediately returns to his family and community activities in Pennsylvania after the conclusion of business in those locales. (Roberts Decl. at 3.) In fact, Roberts has only been outside of the country one time for pleasure–back in the mid 1970's–on a visit to the United Kingdom. (Roberts Decl. at 2).

The Government simply has provided no evidence whatsoever that Mr. Roberts should be subject to the writ of *ne exeat republica*. He is not a flight risk – he has never resided outside the State of Pennsylvania where he raised his family, holds his assets, and performs community service. The Government's assertion that the writ is necessary to ensure that the receiver has

identified and secured property must fail. It has not established a single fact to support the conclusion that Roberts' continued possession of his passport would impede the identification of defendants' assets or frustrate Government efforts to secure those assets, assuming such actions were warranted. Moreover, Roberts needs his passport to continue his law practice specializing in insurance law. As such, the writ of *ne exeat republica* imposed upon Roberts should be withdrawn and his passport, which has been duly surrendered, returned to him.

CONCLUSION

For the foregoing reasons, G. Thomas Roberts respectfully requests that the Court lift the temporary restraining order entered against him, thereby removing all restraints on his right to sell, assign hypothecate, pledge, withdraw, transfer, remove, dissipate or dispose of his interest in any real or personal property; to withdraw the writ of *ne exeat republica,* and require the Government to return his passport.

Dated: November 19, 2004

Respectfully submitted,

By: _____
Martina Bernstein
Attorney for Defendant
G. Thomas Roberts[8]

[8] Defendant's lead counsel are Miriam Fisher and James Mastracchio of the Washington, D.C. office of Morgan Lewis & Bockius, LLP. Their application for admission *pro hoc vice* are being filed forthwith.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 300 South Grand Avenue, Twenty-Second Floor, Los Angeles, California 90071-3132.

On November 19, 2004, I served the foregoing documents described as Response of G. Thomas Roberts To Order to Show Cause, and Memorandum of Points and Authorities in Support of the of Response of G. Thomas Roberts to the Order to Show Cause on each interested party, as follows:

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Frank Johnson, Esq. 402 W. Broadway, 27th Floor San Diego, CA 92101	Attorney For Defendant: XÉLAN, THE ECONOMIC ASSOCIATION OF HEALTHCARE PROFESSIONALS
Miriam L. Fisher, Esq. Morgan, Lewis & Bockius LLP 1111 Pennsylvania Avenue, NW Washington, DC 20004	Attorney For Defendants: LESLIE S. BUCK G. THOMAS ROBERTS DOCTOR'S INSURANCE SERVICES, INC.
John Morrell, Esq. Higgs, Fletcher & Mack, LLP 401 West A Street, Ste. 2600 San Diego, CA 92101	Attorney For Defendants: XÉLAN, INC. XÉLAN PENSION SERVICES, INC. XÉLAN FINANCIAL PLANNING, INC. PYRAMIDAL FUNDING SYSTEMS, INC., dba XÉLAN INSURANCE SERVICES
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☒ (BY MAIL) I placed a true copy of the foregoing document in a sealed envelope addressed to each interested party, as set forth above. I placed each such envelope, with postage thereon fully prepaid, for collection and mailing at 300 South Grand Avenue, Los Angeles, California. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

Executed on November 19, 2004, at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct.

Roxanna M. Cole
(Type or print name)

Roxanna M. Cole
(Signature)

Exhibit A

WILLIAMS COULSON
ATTORNEYS AT LAW

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MICHAEL E. LLOYD
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October 1, 2003

Jacqueline C. Castagno, M.D.
Southeastern Gynecologic Oncology
980 Johnson Ferry Road, 9th Floor
Atlanta, GA 30342

Re: The xélan Supplemental Disability Trust

Dear Dr. Castagno:

Williams Coulson Johnson Lloyd Parker & Tedesco, LLC ("Williams Coulson") has acted as counsel for xélan, The Economic Association of Health Professionals ("xélan") in connection with the development of the xélan Supplemental Disability Trust ("Trust"). As a result of this representation, we have been asked to provide your Company with legal opinions in connection with your participation in the xélan Supplemental Disability Trust.

I. *Summary of Opinions*

Williams Coulson has rendered certain legal opinions under Section VI of this letter based on the legal authorities and analysis set forth therein. It is our view that each of the Opinions stated in Section VI and summarized in this Section satisfies both a substantial authority standard and a more likely than not standard as described in Section VII of this letter. The following is a summary of the legal opinions:

1. The disability benefit coverage provided under the Policy constitutes "insurance" under the Internal Revenue Code.

2. The Contributions paid by the Company to the Trust are deductible by the Company as an ordinary and necessary business expense under Code Section 162(a).

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3. The Contributions paid by the Company to the Trust are deductible currently under Code Section 461(h).

4. Insureds who receive disability benefit protection as a result of the Trust's payment of the Premiums shall exclude from their gross income the amount of the payment of the Premiums under Code Section 106.

5. Insureds who receive Disability Benefits shall include such amounts in their gross income under Code Section 105.

6. The Retrospective Refund, if any, received by a Premium Payor shall be included in his or her gross income under Code Section 61.

7. As of September 23, 2003, the Trust is a qualified association group trust, meeting the association group requirements of each of the fifty states of the United States of America, and is therefore able to provide supplemental disability income insurance coverage to members of xélan residing in any state of the United States of America.

8. As of September 23, 2003, the Policy is subject to the insurance laws of the British Virgin Islands and not the insurance laws of any state of the United States of America, except Arkansas.

The summary of legal opinions set forth above is intended for quick reference and is qualified in its entirety by the full text of the Opinions as well as the conditions and qualifications set forth below.

II. Conditions and Limitations

The opinions rendered in this letter (the "Opinions") are subject to the following specific conditions and limitations:

1. The Opinions are based on the general fact pattern as provided to us by xélan and summarized below. If the facts relating to your case are different from the facts set forth in this letter, the Opinions shall not apply. Further, if there are additional facts of your case which are not consistent with the assumptions or analysis and conclusions set forth in this letter, the Opinions shall not apply. Although we believe that the facts set forth in this letter are reasonable and should apply accurately to your case, we have not made an independent investigation of the application and accuracy of those facts to your case.

2. The Opinions are also based on the documents provided to us by xélan, as well as the opinion letter from the Actuary for the Insurer. If any of these documents are changed, revoked or do not accurately reflect the actual operation of the Trust, the Insurer or the Policy, the Opinions shall not apply.

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3. The Opinions are based on the laws and legal authorities as they exist on the date of this letter. Specifically, the Opinions are based on the Internal Revenue Code of 1986, as amended (the "Code") and the Treasury Regulations thereunder (the "Regulations") and on current Internal Revenue Service ("IRS") published rulings and existing court decisions. Any changes to the before-mentioned laws and legal authorities may negate the application of the Opinions.

4. Opinions seven and eight are based on the opinions issued to our Williams Coulson dated September 23, 2003, from the Law Firm, Roberts & Patton (the "Roberts & Patton Opinion Letter"). Williams Coulson has not independently reviewed these issues and is relying completely on the Roberts Opinion Letter. Further, we are not admitted to practice law in any state other than Pennsylvania, and the Opinions regarding laws of the other states are based upon our review of the laws, standard compilations and treatises available to us. Any changes in the state laws since that time may negate the application of such Opinions. Although we currently advise xxlan with respect to the Trust, the Insurer and the Policy, we specifically undertake no responsibility to update this letter or otherwise notify you of any such changes.

5. The Opinions expressed in this letter may be relied upon only by your Company. The Opinions shall specifically not apply to any other entity or individual.

6. We express no opinion on issues not discussed in this letter.

III. Definitions

Throughout this letter, there are certain defined terms which have been listed below and which are identified as capitalized in the text of this letter.

"Actuary" means the actuarial firm of APEX.

"Any Occupation Benefit" means the disability benefit provided under the Policy by which an insured receives disability benefits in the event of a disability that prevents the Insured from future employment in any occupation.

"Certificate" means the evidence of insurance coverage provided by the Trust to an Insured with respect to the Disability Insurance under the Policy.

"Code" means the Internal Revenue Code of 1986, as amended.

"Company" means the entity that is the recipient of this letter.

"Contributions" means the payments made by the Company to the Trust for Disability Benefits under the Policy.

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"Disability Benefits" means the Any Occupation and Own Occupation disability benefits provided under the Policy.

"Disability Insurance" means the disability insurance protection purchased by the Trust from the Insurer under the Policy.

"Experience Adjusted Benefit" means the benefit available to an Insured as computed by the Insurer. The computation involves an adjustment of the benefit based on investment gains and losses of the Insurer, experience gains and losses of the Insurer arising from the payment of claims and the surrender experience of the Insurer.

"Insured" means an employee of the Company who receives the protection of Disability Insurance under the Policy.

"Insurer" means xélan Insurance Company, Limited.

"IRS" means the Internal Revenue Service (also referred to as the "Service").

"Own Occupation Benefit" means the disability benefit provided under the Policy by which an insured receives disability benefits in the event of a disability that prevents the Insured from future employment in his or her present occupation.

"Policy" means the master group supplemental disability income policy issued to the Trust by the Insurer.

"Premiums" means the insurance premiums paid by the Trust to the Insurer under the terms of the Policy.

"Retrospective Refund" means the amount paid to a Premium Payor, if any, as a result of the favorable claims, investment and surrender experience of the Insurer in accordance with the terms of the Policy.

"*Regulations*" *means the* Treasury Regulations.

"Trust" means the xélan Supplemental Disability Trust, a group association insurance trust.

"Williams Coulson" means the law firm Williams Coulson Johnson Lloyd Parker & Tedesco, LLC.

"Xélan" means xélan, the Economic Association of Health Professionals, Inc.

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IV. Facts

1. The Company is taxed as a "C Corporation" under the Code.

2. The Company is a participating member of xelan.

3. The Company has determined that its existing commercial disability insurance is not satisfactory to meet the total need for disability benefits of one or more of its employees, and that supplemental disability insurance is desirable.

4. The Trust is established under the laws of the British Virgin Islands for the purpose of owning a group insurance policy through which group disability income benefits are provided to participating members of xelan.

5. The Insurer is a life, property and casualty insurance company which is properly licensed to do business under the laws of the Barbados.

6. The Company makes Contributions to the Trust and the Trust purchases the Policy from the Insurer.

7. In a letter dated September 4, 2001, the actuary issued an opinion letter to xelan in which it opined that (i) "the benefits offered by the Policy have been actuarially determined by the premiums paid, without regard to any experience refund benefit contained in the Policy," and (ii) "there is adequate risk transfer in the Policy to constitute legitimate insurance."

8. The Insurer provides two types of Disability Benefits under the Policy: an Own Occupation Benefit and an Any Occupation Benefit.

9. Under the Own Occupation Benefit, an Insured shall receive Disability Benefits in the amount stated in the Certificate upon the occurrence of an own occupation disability which is defined under the Policy. The Own Occupation Benefit will be paid monthly until an Insured has received the greater of his or her Experience Adjusted Benefit or 110% of the Premiums paid on his or her behalf.

10. Under the Any Occupation Benefit, an Insured shall receive Disability Benefits following the completion of payment of the Own Occupation Benefit in the amount stated in the Certificate per month and upon the occurrence of an any occupation disability which is defined under the Policy. The minimum aggregate Any Occupation Benefit will be equal to 400% of the Premiums paid on his or her behalf less any benefits received under "Own Occupation Coverage."

11. The Insured's Experience Adjusted Benefit shall equal 94% of the total amount of Premiums paid to the Insurer as adjusted by the investment gains of the Insurer,

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the experience gains and losses of the Insurer arising from the payment of claims and the surrender experience of the Insurer with respect to all Insureds.

12. If the Company terminates the Disability Insurance by written direction or by ceasing to make minimum premium payments to the Trust, then the values and benefits accumulated under the Policy shall be surrendered for the benefit of other participants in the Trust unless a premium payer has completed seven or more years of participation in the Trust. In such event, a premium payer may receive a Retrospective Refund which shall be based on the experience of the Insurer. The Retrospective Refund shall be paid to the premium payer in a single lump-sum cash payment.

13. Upon an Insured's death, all of his or her benefits under the Policy shall cease, and any values and benefits accumulated under the Policy with respect to such Insured shall be surrendered for the benefit of all remaining Insureds under the Trust.

V. Assumptions

1. It is assumed that the Company, the Trust and the Insurer are all properly licensed business entities as required by their respective locales.

2. It is assumed that the Company has purchased Disability Insurance from the Insurer for the purpose of providing supplemental Disability Benefits for one or more of its employees and that such supplemental disability coverage is not otherwise generally available in the commercial marketplace.

3. It is assumed that there are more than Five Hundred Insureds who may receive benefits under the Trust.

4. It is assumed that the Trust will be administered in accordance with its terms and that neither it nor the Insurer shall provide any other benefits to the Company or the Insureds, other than those provided for therein.

5. It is assumed that there exists no agreement or transaction, other than those described in the Trust, the Policy and the Certificate, that the Company, the Insurer or an Insured is required to enter into as an integral part of the transactions described herein.

6. It is assumed that the model formulated by the Actuary on which the Actuary's opinions are based accurately represents the Policy and that the Actuary's opinion that the Premiums are actuarially determined to be necessary to pay benefits without regard to the retrospective refund apply to the Insured.

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VI. Analysis

1. **The Disability Benefit coverage provided under the Policy constitutes "insurance" for purposes of the Code.**

The Code and Regulations do not provide a definition of the term "insurance". Instead, the definition of "insurance" has been developed by case law. Although its development is not completely uniform, collectively the cases describe and rely upon certain factors which provide evidence of the existence or nonexistence of insurance.

The seminal case in this area is Helvering v. Le Gierse, 312 U.S. 531, 539 (1941). In this case, the Court held that insurance did not exist where an insurance company issued a life insurance policy and an annuity policy to an elderly woman. The policies were issued pursuant to an agreement that one policy would not be written without the other, and when reviewing both contracts together, the risk to the insurance company was neutralized. The court stated that:

> "Historically and commonly insurance involves risk-shifting and risk-distributing. That life insurance is desirable from an economic and social standpoint as a device to shift and distribute risk of loss from premature death is unquestionable. That these elements of risk-shifting and risk-distributing are essential to a life insurance contract is agreed by courts and commentators."

The concept of risk-shifting and risk-distribution as a prerequisite to insurance was followed in three Tax Court cases, AMERCO v. Commissioner, 96 T.C. 18 (1991), aff'd 979 F.2d 162 (1992); The Harper Group v. Commissioner, 96 T.C. 45 (1991) aff'd 979 F.2d 1341; and Sears, Roebuck and Co. v. Commissioner, 96 T.C. 63 (1991), aff'd in part and rev'd in part, 972 F.2d 858 (1992). In these cases, the Tax Court set forth the following factors for determining the existence of insurance:

(1) The transaction must involve insurance risk;

(2) The transaction must involve "risk-shifting" and "risk-distribution"; and

(3) The transaction must constitute "insurance" in that term's commonly accepted sense. AMERCO, 96 T.C. 18 at 38; Harper, 96 T.C. 45 at 58; Sears, 96 T.C. 63 at 100-101.

In the case AMERCO v. Commissioner, AMERCO and a number of its subsidiaries purchased insurance policies from Republic Western Insurance Company ("Republic"). Republic was a subsidiary of AMERCO. The IRS determined that because of the relationships among the parties, the transactions did not constitute insurance. The Tax Court disagreed with the determination of the Service and held that the premiums were deductible.

The Court considered the three factors set forth above. With respect to the first factor, the Court stated that:

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> "Basic to any insurance transaction must be risk. An insured faces some hazard; an insurer accepts a premium and agrees to perform some act if or when the loss event occurs. If no risk exists, then insurance cannot be present. "Insurance risk" is required; investment risk is insufficient. If parties structure an apparent insurance transaction so as to effectively eliminate the effect of insurance risk therein, insurance cannot be present."

The Court concluded that the property and casualty risks insured by Republic involved a real risk of loss to Republic. Accordingly the first factor was satisfied.

With respect to the second factor, the Court observed that "risk shifting means one party shifts his risk of loss to another, and risk distributing means that the party assuming the risk distributes his potential liability, in part, among others." See also, Beech Aircraft Corp. v. United States, 797 F.2d 920, 922 (10th Cir. 1986).

The Court held in AMERCO that because Republic provided substantial unrelated insurance, there was both risk shifting and risk distribution between AMERCO and Republic, such that the premiums were deductible as insurance.

With respect to the third factor, the Court stated that commonly accepted notions of insurance involve a consideration of whether the insurance company satisfies state licensing requirements and whether the transactions involve commonly accepted insurance business. Again, the Court concluded in this case that this factor was satisfied by Republic.

On appeal, the Ninth Circuit affirmed the Tax Court decision. In its opinion, the Court of Appeals compared the relative value of risk shifting and risk distribution by stating that

> "when the pool consists of a substantial amount of dollars, and risk from those outside the parent and its affiliates, there is a true shift of the risk, even though the parent could suffer somewhat if the captive made a payment on account of an insured's loss."

In the Harper Group case, the Tax Court considered whether a parent company's payments of premiums for cargo shipment insurance to a subsidiary company were currently deductible. The Court considered the three factors listed above.

With respect to the first factor, the Court identified that the parent company faced substantial potential liability in the course of its international air and ocean freight forwarding businesses, and that the risk was transferred to the subsidiary in satisfaction of the first factor.

With respect to the second factor, the Court stated that "risk transfer and risk distribution are two sides of the same coin which as an integrated whole constitute insurance." The Court concluded that the risk was shifted to the subsidiary and that because of the unrelated insurance provided by the subsidiary, the risk was distributed among the various insureds.

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With respect to the third factor, the Court concluded that the factor was satisfied because the subsidiary insurance company was organized and operated as an insurance company. It was regulated by the Insurance Registry of Hong Kong and was adequately capitalized. The Court of Appeals for the Ninth Circuit affirmed the Tax Court decision.

In the Sears case, the Tax Court considered whether the premium payments it made to Allstate Insurance Company, a wholly owned subsidiary of Sears, were deductible. The Court considered the three factors above and determined that all three factors were satisfied. Sears was subject to substantial risk with respect to injuries on its premises or by its vehicles and it transferred that risk to Allstate. Allstate had substantial unrelated business through which the risk it accepted from Sears was distributed, and Allstate was clearly providing insurance in its commonly accepted sense.

On appeal, the Seventh Circuit Court of Appeals affirmed the Tax Court's decision on the determination of the existence of "insurance" but rejected the Le Gierse definition of insurance. The Court stated that in its opinion "it is a blunder to treat a phrase in an opinion as if it were *statutory language*." *972 F.2d 858, 861.* The Court also rejected the Tax Court's three-pronged test described above. Instead, the Seventh Circuit focused its inquiry on whether there was adequate reason to recharacterize the transaction instead of whether there was insurance.[1]

Another case which is relevant to the determination of "insurance" is Steere Tank Lines, Inc. v. United States, *577 F.2d 279 (5th Cir. 1978)*, cert. denied *440 U.S. 446 (1978)*. In this case, the Court of Appeals held that premiums paid by Steere Tank Lines, Inc. were not deductible currently to the extent that the amount set aside in an account from which (1) all accident claims against Steere were to be satisfied and (2) any amounts remaining in the account upon satisfaction of all claims and administrative expenses were to be returned to Steere after expiration of the statute of limitations with respect to such claims. The Court concluded that no risk of loss was shifted or distributed with respect to the amount set aside in the account because Steere was obligated to pay all losses it sustained and, if no losses occurred, the entire account was refundable to Steere.

In IRS Field Service Advisory 1999-732, the Assistant Chief Counsel (Field Service) of the IRS issued a Field Memorandum to the District Counsel regarding the hazards of litigation relating to a retrospectively rated insurance arrangement. The District Counsel considered the cases described above and concluded that:

> "After careful consideration of the instant cases, in light of the foregoing authorities and litigating hazards, we have concluded that it would be difficult to argue that the retrospectively rated insurance arrangements at issue are not insurance for federal income tax purposes.[2] Accordingly, absent evidence to

[1] Note that in dicta, the Ninth Circuit Court of Appeals in AMERCO agreed with the Seventh Circuit that discussions in this area might stem less obstruse if we focus not on what is insurance, but whether there is adequate reason to recharacterize the transaction.

[2] The Service noted in particular the following facts set forth in the Sears and AMERCO cases:

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support a sham transaction or tax avoidance theory, we recommend that you do not litigate this issue."

In the case at hand, all three factors set forth in the Tax Court cases discussed above are satisfied. With respect to the first factor, an Insured is subject to substantial risk of loss of income in the event he or she suffers a disability, and which risk of loss was not adequately covered by existing disability insurance. This risk has been transferred to the Trust. The risk is then transferred to the Insurer under the Policy. With respect to the second factor, the Trust is an independent third party to the Company. The Trust assumes the risk that an Insured will experience an own occupation or any occupation disability. In such event, the Trust shall be obligated to pay Disability Benefits that may exceed the Contributions paid by the Company. Because the Trust provides similar Disability Benefits for more than five hundred Insureds, the risk to the Trust is adequately pooled and distributed among all Insureds. With respect to the third factor, the Trust is licensed under the laws of the British Virgin Islands ("BVI") as a group insurance trust and the Insurer is a regulated and licensed insurance company under the laws of the BVI. Further, under the Seventh Circuit analysis in Sears, there is not adequate reason to recharacterize the transaction in this case for the reasons discussed above. Further, the Actuary also opined that there is adequate risk transfer under the Policy to constitute insurance.

Accordingly, it is the opinion of Williams Coulson that the disability benefit coverage provided under the Policy constitutes "insurance" for purposes of the Internal Revenue Code.

2. **The Premiums paid by the Company are deductible by the Company as an ordinary and necessary business expense under Code Section 162(a).**

Code Section 162(a) provides that there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

Treasury Regulation Section 1.162-1(a) provides that deductible business expenses include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than Section 162. Among the items included in business expenses are insurance premiums against fire, storm, theft, accident, or other similar losses.

"If retrospectively rated policies, called "insurance" by both issuers and regulators for insurance for tax purposes, and the Commissioner's lawyer conceded for purposes of this case that they are- then it is impossible to see how risk shifting can be a sine qua non of "insurance." Sears, 972 F.2d 858 at 862.

"Nor can we accept the Commissioner's position that there is no insurance unless all effects of a possible risk of loss have been removed from the insured. That overbroad position flies in the face of the reality of the insurance market. It takes no real account of mutual insurance companies, where policy holders suffer losses each time an amount is paid out of the pool, whether that amount is for their own insurance risk or for someone else's. It also fails to take account of the well-known phenomenon of retrospectively rated policies, where the insured will often ultimately bear a large part of the insurance risk." AMERCO, 979 F.2d 162 at 167-168.

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In Revenue Ruling 58-90, 1958-1 C.B. 88, the IRS concluded that premiums paid by a corporate employer for sickness and disability insurance protection for the benefit of a key employee are deductible as an ordinary and necessary business expense under Code Section 162(a) where the taxpayer corporation is not directly or indirectly a beneficiary under the policy, subject to two additional requirements. First, the premiums must be paid in consideration of personal services actually rendered by the employee. In addition, the total amount paid the employee, including the premiums, cannot be unreasonable compensation for the employee's services. The policy at issue in Revenue Ruling 58-90 was not part of a group insurance plan but that does not appear to be a key fact to the holding.

In this case, the Contributions paid by the Company shall be deductible provided that the Company is not directly or indirectly a beneficiary under the Policy and the two-part test of Revenue Ruling 58-90 is satisfied.

3. **The Premiums paid by the Company to the Trust are deductible currently under Code Section 461(h).**

An issue that is related to the deductibility of the payment of Premiums under Section 162(a) is whether the payment of Premiums is deductible currently under Code Section 461(h). The issues are related since both involve initial determinations of whether the coverage provided by the payments constitutes "insurance."

Section 461(a) provides that the amount of any deduction or credit allowed under Subtitle A of the Code shall be taken for the taxable year which is the proper taxable year under the method of accounting used in computing taxable income.

Code Section 461(h)(1) provides that in determining whether an amount has been incurred with respect to any item during any taxable year, the all events test shall not be treated as met any earlier than when economic performance with respect to such item occurs. Code Section 461(h)(4) provides that the all events test is met with respect to any item if all events have occurred which determine the fact of liability and the amount of such liability can be determined with reasonable accuracy. United States v. Hughes Properties, Inc., 476 U.S. 593 (1986).

In many cases, the application of Section 461(h) to the payment of premiums for insurance is straight-forward, as the all events test is immediately satisfied upon the payment of premiums. This Section has more relevance to this case, however, since there is a possibility that an Insured may receive a Retrospective Refund under the Policy. The specific issue is whether the Premiums constitute a business expense which is deductible currently under Section 461(h), or whether they involve the creation of a capital asset which is not deductible currently.

Treasury Regulation Section 1.461-1(a)(1) provides that a taxpayer using the cash receipts and disbursements method of accounting must take into account amounts representing allowable deductions, as a general rule, in the tax year in which they are paid. Section 1.461-1(a)(1) of the Treasury Regulations further provides that if an expenditure results in the creation of an asset

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having a useful life that extends substantially beyond the close of the tax year the expenditure may not be deductible, or may be deductible only in part, for the tax year in which paid.

Treasury Regulation Section 1.461-4(g)(5) provides that if the liability of a taxpayer arises out of the provision to the taxpayer of insurance or a warranty or service contract, economic performance occurs as payment is made to the person to whom the liability is owed. In example 6 of Treasury Regulation Section 1.461-4(g)(8) however, the Regulations clarify that the total amount of an insurance premium is not deductible currently to the extent that it creates an asset with a useful life extending substantially beyond the close of a taxable year.

In the case Midwest Motor Express, Inc. v. Commissioner, 27 T.C. 167, 186 (1956), the Court considered whether a retrospective premium was deductible currently. The Court held that the premiums were deductible currently because all events had occurred which fixed with reasonable certainty the fact and amount of the taxpayer's liability. Although settlement of a claim might have resulted in an adjustment which would entitle the petitioner to a refund in the future, such an adjustment would not postpone the accrualability of the premium expense.

In Revenue Ruling 83-66, 1983-2 C.B. 43, the IRS considered whether reserve premiums paid under a medical malpractice liability insurance policy that was subject to a retrospective rate credit refund were deductible in the year paid as a business expense under Code Section 162. The Service concluded that the full amount of premiums was deductible currently because the premiums represented part of the actuarial cost of insurance, were not segregated in any manner, and could be used by the insurance company to pay losses of the group of insureds as a whole. The only way that an individual insured could receive a refund of the reserve premiums was if the insurance company achieved a favorable loss experience.

In Technical Advice Memoranda 8637003 and 8638003, the Service isolated the separable elements of retrospectively rated arrangements and determined that retrospectively rated premiums were not insurance premiums to the extent that the amounts paid were based on the insured's actual losses.

In Technical Advice Memorandum 9540001 (April 17, 1995) the Service considered whether contributions to an "insurance pool" for catastrophe-type insurance coverage were deductible currently by the participating insureds. The premiums paid by insureds included a retrospective premium under which an insured could be entitled to a refund based on the experience of the insurance pool.

In determining that the retrospective premiums were deductible currently, the Service stated that:

> "The examining agent has argued that Taxpayer's payments under the excess of loss reinsurance agreement should be split between an amount paid for excess of loss protection (the Basic Premium) and a nondeductible deposit fund (the excess of the Standard Premium over the Basic Premium). The examining agent has not submitted any evidence, however, that the Standard Premium is other than the

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actuarially determined cost of the reinsurance against a potential catastrophic loss.

The foregoing authorities indicate that if a taxpayer incurs a contractual obligation to pay premiums under an insurance or a reinsurance contract, and these premiums reflect the actuarial cost of transferring the insurance risk, these premiums may be deducted when paid, notwithstanding that the premiums may be subject to later adjustment depending on the taxpayer's actual loss experience under the contract.

In this instance, the Standard Premium is allocable only to the risk of a potential catastrophic loss which occurs within the stated period of the reinsurance. Due to the nature and size of this potential catastrophic loss, the payment of a large up-front Standard Premium served a valid business purpose by assuring Reinsurer that the retrospective premium attributable to this risk was available without waiting for Taxpayer to assess its members."

In Field Service Advisory 1999-732, the District Court concluded that the positions taken in the IRS TAMs 8637003 and 8638003 would be "subject to significant litigation hazards." Further, the District Counsel observed that the TAM 8637003 was distinguishable because an insured's refund was based *solely* on his or her experience and not the overall experience of the class of insureds.

In the case at hand, the Premiums have been determined by the Actuary to be actuarially necessary for the payment of Disability Benefits without regard to the Retrospective Refund. The Retrospective Refund, if any, that is paid to an Insured is based on the experience of the entire group of unrelated Insureds. Further, the Premiums are not segregated in any way for an Insured and can be used by the Trust to pay Disability Benefits for other Insureds. Further, the Retrospective Refund for an Insured is affected by the overall experience of the Trust. Accordingly, based on the authorities and analysis set forth above, it is the opinion of Williams Coulson that the Premiums paid by the Company to the Trust are deductible currently under Code Section 461(h).

4. **Insureds who receive disability benefit protection as a result of the Company's payment of the Premiums shall exclude from their income the payment of the Premiums under Code Section 106.**

Treasury Regulation Section 1.106-1 provides that contributions made to an accident or health plan for the benefit of an employee are excluded from the employee's gross income whether the employer pays the premium covering one or more of its employees on an insurance policy, or contributes to a separate trust or fund which provides accident or health benefits directly or through insurance to one or more of its employees.

In Revenue Ruling 58-90, 1958-1 C.B. 88, the IRS held that disability insurance premiums paid by a corporation on a policy wholly owned by a key employee were excluded from that

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employee's gross income under Section 106 of the Code. Although the ruling indicated that the key employee was not a shareholder of the corporation and that the policy was not a group policy, neither of these facts was key to the holding. This ruling makes it clear that disability insurance is a type of accident or health plan for purposes of Code Section 106.

In Private Letter Ruling 8804010, the IRS determined that the payment of additional premiums for a return of premium rider was an additional benefit to the accident and/or health benefits under the disability policy and therefore was not excludable under Section 106. The company paying the premiums maintained a cafeteria plan for the benefit of its employees. One benefit provided under the plan was payment of premiums on an individual health insurance policy covering disability. The return of premium rider was offered in conjunction with the policy, and it provided that all premiums would be refunded to the employee at the end of a twenty year period, after subtraction for disability benefits paid.

The return of premium feature described in the ruling, which was available as an optional rider to the underlying disability policy, is distinguishable from the Retrospective Refund feature of the Policy. The Premiums paid under the Policy are actuarially determined to provide the stated Disability Benefits and the Retrospective Refund, if any, is a function of the claims experience of the entire pool of Insureds. *In contrast*, the refund rider discussed in the ruling appears to be a pure add-on feature bearing no actuarial relationship to the disability benefit and it is based solely on the premiums paid and claims made by a single insured. In addition, the refund rider discussed in the ruling is only available for an additional premium whereas the Retrospective Refund feature is a component of an indivisible policy providing Disability Benefits to an Insured. For these reasons, the Retrospective Refund feature is not properly characterized as a benefit in addition to the Policy and the entire premium paid is excludable from the income of an employee under Code Section 106(a).

In the case at hand, the Insureds receive disability benefit protection as a result of the Company's payment of Contributions to the Trust. Accordingly, based on the authorities and analysis set forth above, it is the opinion of Williams Coulson that the Contributions paid by the Company to the Trust are excluded from an Insured's gross income under Code Section 106(a).

5. **Insureds who receive Disability Benefits shall include such amounts in income under Code Section 105.**

Code Section 105(a) provides that amounts received by an employee through accident or health insurance for personal injuries or sickness are included in gross income to the extent the amounts are either attributable to contributions by the employer that were not included in the employee's gross income, or are paid by the employer.

Code Section 105(b) provides that gross income does not include certain amounts received by an employee to reimburse the employee for medical care expenses. Code section 105(c) provides that gross income does not include certain amounts received by an employee to the extent those amounts constitute payment for the permanent loss or loss of use of a member or function of the

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body, or the permanent disfigurement of the taxpayer and are computed with reference to the nature of the injury without regard to the period the employee is absent from work.

Treasury Regulation Section 1.105-1(a) provides that for purposes of Code Section 105(a), the phrase "amounts received by an employee through an accident or health plan" refers to any amounts received through accident or health insurance.

Treasury Regulation Section 1.105-1(b) provides that all amounts received by employees through an accident or health plan which is financed solely by their employer, either (1) by payment of premiums on an accident or health insurance policy, (2) by contributions to a fund which pays accident or health benefits, or (3) by direct payment of the benefits under the plan, are subject to the provisions of Code Section 105(a), except to the extent that they are excludable under Code Section 105(b) or (c).

In the case at hand, the Insureds receive disability benefit protection as a result of the Company's payment of Contributions to the Trust. None of the benefits attributable to the Company's contributions constitute medical care reimbursement or payment for the permanent loss or loss of use of a member or function of the body, or the permanent disfigurement of an Insured. Therefore, the benefits attributable to the Company's contributions are governed by the inclusionary rule of Code Section 105(a), and the exceptions found in Code Sections 105(b) and (c) are not applicable to any amount received as a benefit under the Policy. Accordingly, based on the authorities set forth above, it is the opinion of Williams Coulson that any Disability Benefits or Retrospective Refund paid shall be includible in an Insured's gross income under Code Section 105(a).

6. The Retrospective Refund, if any, received by an Insured shall be included in his or her gross income under Code Section 61.

An Insured who has completed seven or more years of participation in the Trust may receive a Retrospective Refund based on the experience of the Insurer. Code Section 61 provides the general rule that gross income means all income from whatever source derived. There exists no exclusion or exemption from gross income applicable to the Retrospective Refund that may be received by an Insured. For this reason, any such Retrospective Refund shall be included in the Insured's gross income under Code Section 61.

7. As of September 23, 2003, the xélan Supplemental Disability Trust is a qualified association group trust, eligible to purchase group insurance under the laws of every state of the United States.

The Trust is a Canadian trust established by xélan in 1995 that was re-domiciled to the British Virgin Islands in 2000. Xélan is a for-profit membership organization founded in 1974. The laws of many states set forth requirements for organizations that qualify to purchase group insurance policies. Employers, labor organizations, trade associations and trusts established by these organizations may purchase group insurance in all states. The common concept included in all of these laws is that the entity/policy owner must not be formed "for the purpose of insurance." To simplify matters, many statutes create a presumption that any entity formed

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during the three-year period prior to the purchase of the policy is created "for the purpose of insurance" and is prohibited from purchasing group policies.

X4lan, the Economic Association of Health Professionals is more than twenty five (25) years old and is qualified to purchase insurance coverage for its members or to organize a trust for such purpose under state law in the United States.

As of September 23, 2003, the insurance laws of all fifty (50) states and the District of Columbia were surveyed by Roberts & Patton and they concluded that x4lan qualifies as an association that can purchase group insurance in every state. Similarly, a trust formed by x4lan also qualifies as a purchaser of group insurance in each state. Their survey was limited to their review of the standard compilations and treatises of those states which were available to them.

8. **The Policy is subject to British Virgin Islands law as to its form and content, and filing in the United States, except in the state of Arkansas, is not required.**

The Policy and the Certificates of insurance which would be delivered to an Insured contain certain provisions which, *inter alia*, provide for: (i) disability income insurance protection if the Insured becomes disabled while the insurance is in effect; and (ii) a refund of premium benefit which returns a dividend type payment upon termination of the Policy.

The Policy is issued by x4lan Insurance Company, Ltd. (the "Insurance Company"), a Barbados domiciled insurance company, to the Trust, a British Virgin Islands trust. Neither the Insurance Company nor the Trust maintain any offices, employees or operations in the United States.

The Trust conducts all of its business in the British Virgin Islands. The application for the insurance Policy was made at the offices of the Trustee in Road Town, Tortola, BVI, and all of the negotiations and correspondence between the Trustee and the Insurance Company have originated from the British Virgin Islands. All personal contacts with Insurance Company representatives have occurred in Tortola. The master group policy was delivered to the Trustee in Road Town. Certificates of insurance are issued in Tortola and are mailed to the Insureds from the BVI. Premium payments are made in the BVI.

The Insureds are enrolled in the group insurance program and do not apply for coverage through an application. The insurance is available to them because the employee/member belongs to x4lan. There is no solicitation of insurance under any state statutes because the process of enrollment under a group policy is exempt from the definition of solicitation under the state statutes of all states. The insurance is therefore not offered in the United States.

Based on the Roberts & Patton Opinion Letter, the laws of the British Virgin Islands govern the form and content of the Policy and that BVI law, not the laws of the individual states of the United States, control matters relating to insurance issued to the Trust. Filing of the Policy and the accompanying Certificates is not required in any state in which an Insured may reside, with the exception of the state of Arkansas which asserts jurisdiction over the content of all policies

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covering residents of that state. The Policy has not been filed in Arkansas and coverage cannot be afforded to Arkansas residents. The Policy has also not been filed in any other state; however, such filing is not required and coverage can be afforded to residents of all other states.

VII. Ethical Responsibility

On July 7, 1985, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 85-352 (the "ABA Opinion"), which sets forth the ethical standards governing a lawyer's duty in advising clients on positions that can be taken in a client's tax return. The ABA Opinion generally provides that the lawyer, in advising the client in the course of preparation of the client's return, may advise the client to take positions most favorable to the client if the lawyer has a "good faith belief" that these positions are warranted by existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law.

The ABA Opinion also states that a lawyer can have a good faith belief even if the lawyer believes the client's position probably will not prevail. Nevertheless, a lawyer cannot advise taking a tax return position unless there is a "realistic possibility" of success if litigated. The ABA Opinion further requires a lawyer to advise his or her client of the potential penalty under Code Section 6662 if there is not "substantial authority" for the positions to be taken.

The requirements of the ABA Opinion also closely reflect the standards of conduct imposed on tax practitioners under Section 10.34(a) of Treasury Department Circular 230 ("Circular 230"). Circular 230 also provides that a tax practitioner may not advise a client to take a position on a return unless the practitioner determines that the position satisfies the realistic possibility standard or is not frivolous, and the practitioner advises the client to adequately disclose the position. Under Circular 230, a position satisfies the realistic possibility standard if a reasonable and well-informed analysis by a person knowledgeable in the tax law would lead such person to conclude that the position has approximately a one in three or greater likelihood of being sustained on its merits.

Code Section 6662(a) provides an accuracy-related penalty to any portion of an underpayment of tax required to be shown on a return in an amount of 20% of the underpayment. Code Section 6662(b) provides that the underpayment penalty shall apply to any of the following:

1. any negligence or disregard of rules and regulations;
2. any substantial understatement of income tax;
3. any substantial valuation misstatement under Chapter 1 of the Code;
4. any substantial overstatement of pension liabilities; and
5. any substantial estate or gift tax valuation understatement.

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Code Section 6662(d) provides that there is a substantial understatement of income tax for purposes of Code Section 6662(a) for any taxable year if the amount of the understatement exceeds the greater of (i) 10% of the tax required to be shown on the return for the taxable year, or (ii) $5,000. In the case of a corporation other than an S corporation or personal holding company however, the $5,000 limit shall be replaced with a $10,000 limit.

Code Section 6662(d)(2) reduces the amount of the understatement by that portion which is attributable to (i) the tax treatment of any item by the taxpayer if there is or was substantial authority for such treatment, or (ii) any item if the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return and there is a reasonable basis for the tax treatment of such item by the taxpayer.

For tax years after 1994, with respect to transactions occurring after December 8, 1994, Code Section 6662(d)(2)(c)(ii), as amended by the Uruguay Round Agreements Act (which augments the General Agreement on Tariffs & Trade ("GATT")), provides that the reduction for understatement due to the position of a taxpayer or a disclosed item set forth in Section 6662(d)(2)(B) shall not apply to any item of a corporation which is attributable to a tax shelter. For this purpose, the term "tax shelter" means a partnership or other entity, investment plan or arrangement, or any other plan or arrangement if the principal purpose is the avoidance or evasion of federal income tax.

Regulation Section 1.6662-4(g)(2) provides that the principal purpose of an entity, plan or arrangement is to avoid or evade federal income tax if that purpose exceeds any other purpose. The Regulation provides further that the principal purpose of an entity, plan or arrangement is not to avoid or evade federal income tax if the entity, plan or arrangement has as its purpose the claiming of exclusions from income, accelerated deductions or other tax benefits in a manner consistent with the statute and congressional purpose. For example, an entity, plan or arrangement does not have as its principal purpose the avoidance or evasion of federal income tax solely as a result of certain rules provided by the Code, including the establishment of a qualified retirement plan under Code Section 401(a).

Regulation Section 1.6662-4(d)(2) provides that the substantial authority standard is an objective standard involving an analysis of the law and application of the law to relevant facts. The substantial authority standard is less stringent than the more likely than not standard but is more stringent than the reasonable basis standard. The possibility that a return will not be audited or, if audited, that an item will not be raised on audit is not relevant in determining whether the substantial authority standard is satisfied.

Regulation Section 1.6662-4(d)(3) provides that there is substantial authority for the tax treatment of an item only if the weight of the authority supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment. All authorities relevant to the tax treatment of an item, including the authorities contrary, are taken into account. There may be substantial authority for more than one position with respect to the same item. Because the substantial authority standard is an objective standard, a taxpayer's belief that there is substantial authority is not relevant. The following types of authority may be used in determining whether

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there is substantial authority: applicable provisions of the Code and other statutes; proposed, temporary and final regulations; revenue rulings and revenue procedures; tax treaties and regulations thereunder; court cases; congressional intent as reflected in committee reports; private letter rulings; technical advice memoranda; general counsel memoranda; IRS information or press releases; notices and announcements published in the Internal Revenue Bulletin.

Although conclusions reached in legal opinions rendered by tax professionals are not substantial authority, the authorities underlying such expressions of opinions where applicable to a particular case may give rise to substantial authority.

It is our opinion that the Trust and the Policy are not collectively or individually a tax shelter within the meaning of Code Section 6662(d)(2)(c)(iii). This is the case because the benefits provided under the Policy through the Trust are legitimate, disability insurance benefits similar to those offered by many insurers in the United States, and the principal purpose of the arrangement is not the avoidance or evasion of federal income tax but to provide certain disability insurance benefits.

Also, it is our opinion that there is substantial authority for all of the Opinions expressed in this letter. For this reason, if the IRS were to claim that an employer or employee had an understatement of federal income tax on account of its participation in the Trust, the understatement should not subject the employer or employee to an accuracy-related penalty under Code Section 6662 because there is substantial authority for the Opinions expressed herein.

Notwithstanding our determination that the opinions issued in this letter are based on substantial authority as described above, you should be on notice of recent developments that may affect the tax treatment of the Trust in the future. The Trust was changed in 2001 in several respects to address actuarial and technical issues. The IRS has denied deductions of a participating employer in the pre-2001 Trust and is currently reviewing the deductibility of contributions by other employers who participate in the Trust. The resolution of the cases with the IRS and the continued viability of the Trust will depend on the actuarial determinations and facts of each case.

Code Section 6011(a) provides that when required by the Regulations, any person made liable for any tax imposed by this title is required to make a return or statement according to the Regulations and include such information provided in the Regulations.

More specifically, Treasury Regulation Section 1.6011-4(a) provides that every taxpayer that has participated in certain reportable transactions and who is required to file a tax return must attach a disclosure statement. Treasury Regulation Section 1.6011-4(b) defines reportable transactions to include "listed transactions." This Section also defines a "listed transaction" as a transaction that is the same or substantially similar to one of the types of transactions that the Internal Revenue Service has determined to be a tax avoidance transaction and identified by notice, regulation, or other published materials as a listed transaction.

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Notice 2001-51, 2001-2 CB 190 identifies certain transactions that have been determined by the Internal Revenue Service to be "listed transactions." Among the listed transactions is "Notice 95-34, 1995-1 CB 309 (certain trust arrangements purported to qualify as multiple employer welfare benefit funds exempt from the limits of sections 419 and 419A of the Internal Revenue Code)."

Notice 95-34, 1995-1 CB 309 provides that contributions to a welfare benefit fund are deductible when paid, but only if they qualify as ordinary and necessary business expenses of the taxpayer and only to the extent allowable under Code Sections 419 and 419A. These sections impose strict limits on the amount of tax deductible prefunding permitted for contributions to a welfare benefit fund. Code Section 419A(f)(6) provides an exemption from Sections 419 and 419A for certain welfare benefit funds.
Because the Trust is not a multiple employer welfare trust under Code Section 419A(f)(6), it is our opinion that participating in the Trust is not a listed transaction for purposes of the reporting requirements. Consequently, an employer participating in the Trust should not have a reporting requirement under Code Section 6011.

This opinion letter is being delivered to you pursuant to your request and is solely for your benefit. Without our prior written consent, this opinion letter, and the Opinions set forth herein, may not be used or relied on by any other person, or used by you for any other purpose than that which has been agreed upon.

WILLIAMS COULSON JOHNSON LLOYD
PARKER AND TEDESCO, LLC

By: Michael E. Lloyd
Member

Doc 144896

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Exhibit B

ECKERT SEAMANS CHERIN & MELLOTT, LLC

ATTORNEYS AT LAW

November 10, 1997

Richard G. Berman
Richard G. Berman, DDS, Inc.
61 Long Court, Ste. 202
Thousand Oaks, CA 91360

Re: The Xelan Disability Equity Trust

Dear Dr. Berman:

Eckert Seamans Cherin & Mellott ("ESC&M") has acted as counsel for Xelan, The Economic Association of Health Professionals ("Xelan") in connection with the development of the Xelan Disability Equity Trust ("Trust"). As a result of this representation, we have rendered certain legal opinions concerning issuance of a disability income insurance policy on a group basis to the Trust and the federal tax consequences of participation in the Trust to Xelan in a letter dated October 25, 1996. Pursuant to our arrangement with Xelan, we are pleased to send you a separate opinion letter directed to your firm and to you dealing with these same issues.

The opinions rendered in this letter (the "Opinions") are directed solely to you and your corporation and may be relied upon only by you.

The Opinions are based solely on the documents which have been furnished to us and the Statement of Facts and Assumptions set forth below. We have made such independent investigation of the accuracy of the facts and assumptions as we deem necessary and we believe them to be reasonable. Nothing has come to our attention which indicates such facts and assumptions are incorrect or unreasonable.

If the Trust, the Insurance Policy or any of the documents are subsequently modified, the Opinions shall be of no further force or effect until such amendments have been received and reviewed by us and this letter is updated accordingly.

We have examined such matters of law as we have deemed necessary or appropriate for purposes of the Opinions. We note that the Opinions are based on existing provisions of the insurance laws of the several United States and Canada and the Internal Revenue Code of 1986, as amended (the "Code") and Treasury Regulations thereunder (the "Regulations") and on current Internal Revenue Service ("IRS") published rulings and existing court decisions, any of which can be changed at any time. Any such changes may be retroactive and could significantly modify the Opinions expressed herein.

We express no opinion on issues not discussed in this letter.

G. THOMAS ROBERTS
717/ 237-6028

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4 6

TR00021

One South Market Sq. Building
213 Market Street
Post Office Box 1248
Harrisburg, PA 17108
Telephone 717-237-6000
Facsimile 717-237-6019

ECKERT SEAMANS CHERIN & MELLOTT, LLC
ATTORNEYS AT LAW

November 10, 1997

STATEMENT OF FACTS

The following numbered paragraphs set forth facts that describe the basic characteristics of the Trust and the mechanics of its implementation:

The Parties

1. Xelan Disability Insurance Company Limited (the "Insurance Company" or the "Insurer"), a British Virgin Islands Insurance Company, is the insurance company that will provide the insurance coverage to the Trust.

2. The Trust is a Canadian trust established by Xelan, Inc. The Trust has applied for and is the policy owner of a master group disability income insurance policy insuring participating employees.

3. Your corporation (the "Employer") is taxed as a C-corporation and is a regular dues-paying member of Xelan.

4. The individuals who are Insured Participating Employees (the "Insured Participating Employees" or the "employees") are employees of your corporation.

The Insurance Policy

5. The insurance contract that has been issued to the Trust by the Insurance Company in connection with an employer's participation in the Trust is a group, disability income policy (the "Insurance Policy" or the "Policy") with coverages described below. Certain requirements of the Trust pertaining to the Insurance Policy are set forth in the Assumptions below.

6. The Insurance Company will accept scheduled premiums for twenty years or a lesser period of time, as determined by the Insurer (the "Scheduled Premiums"). These Scheduled Premiums will be paid by the employer in the form of contributions to the Trust. The Trust, in turn, will pay these as insurance premiums to the Insurance Company.

7. The Policy provides coverage for total and permanent disability of an Insured Participating Employee and, to a lesser extent, for disability preventing an Insured Participating Employee from performing each and every duty of the employee's own occupation. All benefits are stated as a maximum lifetime benefit amount and are shown on the schedule page of the Insured Participating Employee's Certificate of Insurance.

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8. After the coverage has been in effect for seven years (or until the insured reaches age 63, whichever comes first), the Policy provides for a refund of premiums upon surrender of the Policy. The Certificate may be surrendered at any time thereafter, at the time chosen by the Insured Participating Employee. The refund amount depends on the claims, if any, which have been made by a covered employee.

9. The Policy permits the insurer to reduce or waive future premiums at any time the Insurance Company believes the experience of the group is such that no future premiums are necessary to provide contractual benefits.

10. The Insurance Company has agreed to invest policy reserves in accordance with any one of three general investment strategy selected by participating employees.

The Association

11. Xelan is a corporation established on a membership basis in the State of California. Xelan was established in 1974.

12. Xelan has approximately 4000 members, comprised of individuals and corporations who are practicing physicians, dentists and others involved in related fields. All individual members, or their affiliated corporations, pay regular dues to Xelan.

ASSUMPTIONS

The following numbered paragraphs set forth the assumptions on which our opinions are based:

1. The Employer is a C-corporation within the meaning of Code Section 1361(a)(2) which is duly organized and existing in accordance with applicable state law.

2. The Employee is an employee of the Employer.

3. The Employer shall make scheduled premium payments for no less than seven complete years or until age 63, whichever comes first.

4. The aggregate amount of insurance under any disability income policies insuring the Employee and the coverage afforded through the Trust does not exceed 100% of the net practice income earned by the Employee during the current year. Further, the amount of insurance purchased from the Trust will increase

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the amount of coverage provided by the basic policy by at least 2% of the net practice income earned by the employee during the current year.

SUMMARY

The following numbered paragraphs set forth a summary of our opinions:

1. The Trust is a qualified association group trust, meeting the requirements of each of the fifty states of the United States of America, and is therefore able to provide disability insurance coverage to members of Xelan residing in any of the United States.

2. The trust is a valid trust established under the applicable laws of the Province of Ontario, Canada.

3. The group insurance policy issued by Xelan Disability Insurance Company is subject to the insurance laws of the Province of Ontario, Canada and the insurance laws of the British Virgin Islands and not the laws of any state of the United States of America.

4. Contributions made to the Trust are deductible as ordinary and necessary business expenses under Internal Revenue Code Section 162.

5. Benefits received by disabled covered individuals will be taxable as ordinary income in the year the benefits are received by the individuals.

6. Funds received by an insured individual as a refund of premium upon cancellation of the coverage will be taxed as ordinary income in the year the amounts are received by the individual.

ANALYSIS

1. The Xelan Disability Equity Trust is a Qualified Association Group Trust, eligible to purchase group insurance under the laws of each and every state of the Union.

The Trust is a Canadian trust established by Xelan in 1995. Xelan is a for profit membership organization founded in 1974. The laws of many states set forth the requirements for organizations to qualify to purchase group insurance policies, most commonly employers, labor organizations, trade associations and others. The

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common concept included in all of these laws is that the entity/policy owner must not be formed "for the purpose of insurance." To simplify matters, many statutes create a presumption that any entity formed during the three year period prior to the purchase of the policy are prohibited from purchasing group policies. Xelan is more than 20 years old and is qualified to purchase insurance coverage for its members.

We have surveyed the insurance laws of all 50 states and the District of Columbia and have concluded that Xelan qualifies as an association which could purchase group insurance in each state. Similarly, a trust formed by Xelan also qualifies as a purchaser of group insurance in each state.

We have also reviewed the insurance statutes of applicable Canadian jurisdictions and have concluded that the Trust qualifies as a purchaser of group insurance; however, we are not experts as to Canadian law, and therefore qualify this advice accordingly.

2. The Group Disability Income Policy issued to the Trust is subject to Canadian law as to its form and content: filing in the United States is not required.

The Policy and the Certificates of Insurance which will be delivered to Insured Participating Employees contain certain provisions which, *inter alia*, provide for (i) a lifetime limit of benefits for total and permanent disability set as a function of premiums paid; (ii) a lifetime limit of benefits for disability from the insured's own occupation based on a combination of premiums paid and the investment income of the insurance company for certain classes of investments; and (iii) a refund of premium provision which returns to the premium payor a dividend type payment upon termination of the policy (certificate) if claims paid do not exceed total premiums paid.

The Policy is issued by Xelan Disability Insurance Company, a British Virgin Islands domiciled insurance company, to the Trust, a Canadian trust. The Trust does not maintain any offices nor does it have any employees or assets in the United States. The Trust conducts all of its business in the British Virgin Islands and in Canada. The application for the Insurance Policy was made at the offices of the Trustee in Toronto Ontario, Canada and all of the negotiations and correspondence from the Trustee to the Insurance Company originated from the Trustee's offices. All personal contacts with Insurance Company representatives occurred in Toronto. The master group policy was delivered to the Trustee in that city.

We are of the opinion that the laws of the Province of Ontario, Canada govern the form and content of the Insurance Policy and that Canadian law, not the laws of the several states of the United States, controls matters relating to insurance issued to the

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trust. Filing of the group insurance policy is not required in any state in which an insured employee/participant will reside except in the state of Arkansas.

3. **Premiums paid by an employer for disability income insurance covering an employee of the C-corporation are deductible to the employer as ordinary and necessary business expenses under Internal Revenue Code Section 162.**

All premiums for the Group Disability Income Insurance are paid by corporate employers who are Xelan members. Deductibility of disability income insurance premiums is well established.

Generally, pursuant to section 162(a) of the Internal Revenue Code of 1986, as amended (the "Code"), payment of premiums for long-term disability coverage by an employer for the benefit of its employee is deductible provided that such payments are ordinary and necessary expenses of its trade or business. Under section 461 of the Code, such employee would be able to deduct such premium in the year the liability for the premium payment is established and reasonably determined if such employer was an accrual taxpayer. Under section 106 of the Code, the employer's payments of premiums to a long-term disability policy on behalf of its employees are excluded from the employees' gross income.

There is no authority which would indicate that the general method of deduction would not be available under a disability income policy with a premium refund feature. Thus, applying the aforementioned general deduction rule, the Employer should be able to fully deduct the premium paid for a disability income policy with a premium refund feature in the year paid or accrued, depending on whether the Employer is a cash-method or accrual taxpayer.

We are of the opinion that, based upon the assumptions stated above, a participating employer may deduct the full amount of the contributions made to the Trust, the full amount of which are paid by the Trustee as premiums to the Insurer, under IRC Section 162 as ordinary and necessary business expenses.

4. **Benefits received by employees who are disabled, as defined in the policy, will be ordinary income to the employee in the year of receipt. Refund of premium amounts received by the employee, as provided in the Insurance Policy, will be ordinary income to the employee in the year of receipt.**

We believe that employees will incur ordinary income in the year any benefits or premium refunds are received from the Trust. Section 105(a) of the Code generally requires employees to include in gross income benefits received from employer-

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provided LTD. Two broad exceptions exist under the above-mentioned general rule pertaining to section 105(a) of the Code:

a. Section 105(b) of the Code provides for non-recognition of gross income to the employee if the employer-provided plan reimburses the employee or his spouse or dependents for medical expenses incurred; and

b. Section 105(c) of the Code provides for non-recognition of gross income to the employee if the payments from the employer-provided plan are made for permanent loss of or loss of a bodily function, or a permanent disfigurement of such employee, his spouse or his dependents.

Neither of these exceptions will apply to a disabled employee; therefore, we conclude that amounts received as benefits will be includable as ordinary income to the employee as received. This applies to disability income benefits and to amounts received as a premium refund.

IRS PENALTIES

We have an ethical obligation to opine not only on the tax issues related to the Trust, but also to provide information regarding the applicability of any tax penalties.

Code Section 6662(a) provides an accuracy-related penalty to any portion of an underpayment of tax required to be shown on a return in an amount of 20% of the underpayment. Code Section 6662(b) provides that the underpayment penalty shall apply to any of the following:

1. any negligence or disregard of rules and regulations;
2. any substantial understatement of income tax;
3. any substantial valuation misstatement under Chapter 1 of the Code;
4. any substantial overstatement of pension liabilities; and
5. any substantial estate or gift tax valuation understatement.

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Code Section 6662(d) provides that there is a substantial understatement of income tax for purposes of Code Section 6662(a) for any taxable year if the amount of the understatement exceeds the greater of (i) 10% of the tax required to be shown on the return for the taxable year, or (ii) $5,000. In the case of a corporation other than an S corporation or personal holding company, however, this $5,000 limit shall be replaced with a $10,000 limit.

Code Section 6662(d)(2)(B) reduces the amount of the understatement by that portion which is attributable to (I) the tax treatment of any item by the taxpayer if there is or was substantial authority for such treatment, or (II) any item if the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in the statement attached to the return and there is a reasonable basis for the tax treatment of such item by the taxpayer.

For tax years after 1994 with respect to transactions occurring after December 8, 1994, Code Section 6662(d)(2)(C)(iii), as amended by the Uruguay Round Agreements Act (which augments the General Agreement on Tariffs & Trade ("GATT")), provides that the reduction for understatement due to the position of a taxpayer or a disclosed item set forth in Section 6662(d)(2)(B) shall not apply to any item of a corporation which is attributable to a tax shelter. For this purpose, the term "tax shelter" means a partnership or other entity, investment plan or arrangement or any other plan or arrangement if the principal purpose is the avoidance or evasion of federal income tax.

Regulation Section 1.6662-4(g)(2) provides that the principal purpose of an entity, plan or arrangement is to avoid or evade federal income tax if that purpose exceeds any other purpose. The Regulation provides further that the principal purpose of an entity, plan or arrangement is not to avoid or evade federal income tax if the entity, plan or arrangement has as its purpose the claiming of exclusions from income, accelerated deductions or other tax benefits in a manner consistent with the statute and congressional purpose. For example, an entity, plan or arrangement does not have as its principal purpose the avoidance or evasion of federal income tax solely as a result of certain uses provided by the Code, including the establishment of a qualified retirement plan under Code Section 401(a).

Regulation Section 1.6662-4(d)(2) provides that the substantial authority standard is an objective standard involving an analysis of the law and application of the law to relevant facts. The substantial authority standard is less stringent than the more likely than not standard but is more stringent than the reasonable basis standard. The possibility that a return will not be audited or, if audited, that an item will not be raised on audit is not relevant in determining whether the substantial authority standard is satisfied.

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Regulation Section 1.6662-4(d)(3) provides that there is substantial authority for the tax treatment of an item only if the weight of the authority supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment. All authorities relevant to the tax treatment of an item, including the authorities contrary are taken into account. There may be substantial authority for more than one position with respect to the same item. Because the substantial authority standard is an objective standard, the taxpayer's belief that there is substantial authority is not relevant. The following types of authority may be used in determining whether there is substantial authority: applicable provisions of the Code and other statutes; proposed, temporary and final regulations; revenue rulings and revenue procedures; tax treaties and regulations thereunder; court cases; congressional intent as reflected in committee reports; private letter rulings; technical advice memoranda; general counsel memoranda; IRS information or press releases; notices and announcements published in the Internal Revenue Bulletin.

Although conclusions reached in legal opinions rendered by tax professionals are not substantial authority, the authorities underlying such expressions of opinions where applicable to a particular case may give rise to substantial authority.

It is our opinion that Trust and the Insurance Policy are not collectively or individually a tax shelter within the meaning of Code Section 6662(d)(2)(C)(iii). This is the case because the benefits provided under the Insurance policy through the Trust are legitimate disability income benefits similar to those offered by many insurers in the United States and the principal purpose of the arrangement is not the avoidance or evasion of federal income tax but to provide certain disability income benefits

Also, it is our opinion that there is substantial authority for all of the opinions expressed in this letter. For this reason, if the IRS were to claim that an employer or employee had an understatement of federal income tax on account of its participation in the Trust, the understatement should not subject the employer or employee to an accuracy-related penalty under Code Section 6662 because there is substantial authority for the Opinions expressed herein.

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ECKERT SEAMANS CHERIN & MELLOTT, LLC

November 10, 1997

CLOSING

You may not photocopy, reproduce or disclose the contents of this letter or the Opinions to any person or entity without our prior written consent. We undertake no duty or responsibility to update the Opinions upon a change in the law or in the documents which comprise the Trust, the Insurance Policy or any other documents which have been furnished to us for the purposes of preparing this Opinion.

Very truly yours,

G. Thomas Roberts

GTR/smn

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Exhibit C

Introduction
Membership Plans
The Company
Key Personnel
References
Testimonials
Event Calendar
Privacy Policy
Doctors Only
Financial Services
Unnecessary Losses
Members Only
Member ID:
Password:

Exhibit C
Esp

Key Personnel

Overview of Personnel

G. Thomas Roberts, JD
Williams Coulson Johnson Lloyd Parker & Tedesco
Pittsburgh, PA

G. Thomas Roberts, JD
Williams Coulson Johnson
Lloyd Parker & Tedesco

Mr. Roberts is primarily involved with the Pension Transfer Plan, the Disability Equity Trust, the Malpractice Equity Trust, and the Long Term Care Equity Trust components of the xélan program. Prior to joining the Williams Coulson firm, Mr. Roberts practiced law as a partner with the firm of Eckert Seamans Cherin & Mellott for ten years. Prior to this, he served for 12 years as general counsel of Consumers Life Insurance Company.

Mr. Roberts has extensive experience in corporate, regulatory and securities matters, with particular emphasis on issues relating to the insurance industry. He has had an active role in major insurance-related mergers and acquisitions as well as complex reinsurance and corporate finance arrangements relating to the insurance industry. Also, he is an authority on the establishment and structures of offshore insurance companies and relationships. He has served on several industry advisory committees appointed by the state government in the securities and insurance fields, including the Pennsylvania Credit Insurance Advisory Committee (1989-1990) and the drafting committee for the Pennsylvania Securities Act of 1972.

Mr. Roberts received his legal education at the University of Pittsburgh School of Law and is a graduate of Carnegie Institute of Technology. He is a member of the Pennsylvania and American Bar Associations and is admitted to practice before the Pennsylvania Supreme Court, the United States District Court for the Middle District of Pennsylvania and the United States Tax Court.

Return to Key Personnel

TR00031

Exhibit D

MORGAN, LEWIS & BOCKIUS LLP
MARTINA BERNSTEIN (SBN 230505)
300 South Grand Avenue
Twenty-Second Floor
Los Angeles, California 90071-3132
Telephone: 213.612.2500
Facsimile: 213.612.2501

Attorney for Defendant
G. Thomas Roberts

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,, Plaintiff, vs. L. DONALD GUESS, et al., Defendants.	Case No. 04-CV-2184W(AJB) DECLARATION OF G. THOMAS ROBERTS IN SUPPORT OF RESPONSE TO THE ORDER TO SHOW CAUSE Date: December 3, 2004 Time: 1:30 p.m. Ctrm: Hon. Larry A. Burns

Declaration of G. Thomas Roberts

My name is G. Thomas Roberts, and I reside in Champion, Summerset County, Pennsylvania. I do declare under penalty of perjury that the following is true and correct to the best of my knowledge and belief.

I am 62 years of age. I have been married for over 28 years. I have five children and 6 grandchildren who all reside within the United States.

I have lived in the State of Pennsylvania my entire life.

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I currently live in and own a house originally owned by my parents.

I am active in my local community. I spend several hours every week helping a family run non-profit organization that provides lost and found service for stray animals. The organization matches lost pets with their owners and I assist in finding temporary room and board for the animals until the owners are identified or adoption can be arranged. These services are offered free of charge to the local community.

I am active in the local business community. I am a founding member of the Donnegal-Laural Highlands Rotary Club, a local branch of the National Rotary Association. I was also founding member of the local chamber of commerce for Laural Mountain, Pennsylvania.

I hold no assets located outside the State of Pennsylvania.

The only travel outside the United States that I have taken for pleasure was in the mid-1970s when I visited the United Kingdom.

I hold no intention of moving from the State of Pennsylvania.

I hold a B.S. degree from Carnagie Mellon University (1964) and a Juris Doctorate degree from the University of Pittsburgh (1967).

I have been engaged in the practice of law since 1967. In that capacity, I have provided legal counsel to insurance companies for over 25 years.

From 1979 to 1991 I was General Counsel to Consumers Life Insurance Co. located in Camp Hill, PA.

From 1991 to 1997 I was a Partner in Eckert Seamans Cherin & Mellott, LLC ("Eckert Seamans) located in Harrisburg, PA.

From 1997 to 2002 I was Of Counsel to Williams Coulson Johnson Lloyd Parker & Tedesco, LLC, ("Williams Coulson") located in Pittsburgh, PA.

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In 2003 I became a Partner in Roberts & Patton, LLC located in Ligonier, PA. As part of my current practice, I periodically travel to Barbados, Bermuda, British Virgin Islands, U.S. Virgin Islands, and St. Lucia for several days to conduct business. My length of stay is typically no longer than 3 or 4 days.

The law firms of Eckert Seamans and Williams Coulson prepared tax opinions issued to xelan, The Economic Association of Health Professionals ("xelan") in connection with the development of the xelan Supplemental Disability Trust and to certain doctors participating in the supplemental disability program. I signed some, but not all, of those tax opinions while a member of Eckert Seamans and Williams Coulson.

I never held a financial interest (i.e., an equity position , option to purchase equities, loans, profit-sharing or bonus arrangements) and never personally received any money in any form from any of the defendants at any time.

I am not aware of any financial ownership or control in xelan by Eckert Seamans or Williams Coulson at the time that I signed tax opinions on behalf of those firms.

While a partner with Eckert Seamans and Of counsel to Williams Coulson I billed an hourly rate for the legal services provided to xelan and the doctors. Payments for those legal services were made to the law firms for which I was associated at the time.

I received no direct payment of any kind from xelan or from any doctor to whom an opinion was rendered. I was paid for my services out of the operations of the law firms.

I am currently a Director of Doctors Benefits Insurance Company, a Barbados company ("DBIC"). I became a Director on June 13, 2004. I receive no compensation for my services as a Director of DBIC. I have not signed any tax opinions while holding the position of Director of DBIC.

I have never held the position of "xelan, Office of General Counsel."

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I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 19th day of November, 2004.

G. Thomas Roberts

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Exhibit E

LEXSEE 1981 U.S. DIST LEXIS 11766

United States of America, Plaintiff v. Donald L. Lipper, Defendant.

No. C-81-1222-RPA.

United States District Court for the Northern District of California

1981 U.S. Dist. LEXIS 11766; 81-1 U.S. Tax Cas. (CCH) P9330; 47 A.F.T.R.2d (RIA) 1289

March 25, 1981.

COUNSEL:

G. William Hunter, United States Attorney, Jeffrey S. Niesen, Michael D. Howard, Assistant United States Attorneys, Tyler G. Draa, San Francisco, Calif. 94102, for plaintiff. Douglas Montgomery, 707 Haight Street, San Francisco, Calif. 94117, for defendant.

OPINIONBY:

SCHNACKE

OPINION:

Findings of Fact and Conclusions of Law

SCHNACKE, District Judge: An application for a Writ Ne Exeat Republica duly came on for hearing before the Court 10:00 A.M. Monday, March 23, 1981. The United States was represented by G. William Hunter, United States Attorney for the Northern District of California, Jeffrey S. Niesen, Assistant United States Attorney, Chief, Tax Division, and Michael D. Howard, Assistant United States Attorney. Donald L. Lipper was represented [*2] by Douglas Montgomery, Esq. Based on the facts presented to the Court at the March 23, 1981 hearing, the pleadings and other documents on file with the Court, and the arguments and representations of counsel, the Court hereby makes the following findings of fact and conclusions of law.

Findings of Fact

1. In February 1981, the United States filed a petition with the United States District Court for the Northern District of California requesting the Court to issue Donald L. Lipper an Order to Show Cause why he should not be compelled to comply with an internal revenue sommons which was issued in an attempt to find information necessary for the Internal Revenue Service to prepare tax returns of Donald L. Lipper for the years 1976, 1977, 1978 and 1979.

2. The Honorable Marilyn H. Patel issued the requested Order to Show Cause and ordered Donald L. Lipper to appear before the Court on April 6, 1981. The Internal Revenue Service made numerous attempts to serve the Court Order upon Donald L. Lipper but Mr. Lipper refused to answer his door, refused to return phone calls left with his answering service by the Internal Revenue Service and refused to respond to mail inquiries by [*3] the Internal Revenue Service.

3. On Thursday, March 19, 1981, the United States received information that within the last two months Donald L. Lipper had sold two real estate properties, his only remaining such holdings in the United States for about $ 900,000. The United States was further informed that Mr. Lipper was liquidating all of his furniture and personal assets, and that he was in possession of approximately $ 350,000 in cash. The United States was told that the purpose for this activity was that Mr. Lipper planned to depart quickly from the United States and intended to permanently reside in France.

4. The United States Attorney's Office obtained a description of Mr. Lipper and was advised that he sometimes used the alias of "Terry."

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5. Upon receiving the aforesaid information, Michael D. Howard, Assistant United States Attorney for the Northern District of California, Tyler Draa, a law clerk in the Office of the United States Attorney, Kenneth Chan, a Revenue Agent of the Internal Revenue Service and James Skeldon, Special Agent of the Criminal Investigation Division of the Internal Revenue Service, proceeded to 506 Haight Street, San Francisco, California, [*4] the last known address of Mr. Lipper.

6. Upon ringing the doorbell at 506 Haight Street and identifying themselves to the person who responded through an intercom system, the representatives of the United States were informed that Mr. Lipper had permanently left 506 Haight Street a few days earlier. The voice on the intercom identified himself as a workman who was effecting repairs on the flat for the new owner of the building. Further inquiries about Mr. Lipper were made over the intercom, and the "workman" was asked to come to the door. This request was refused, and the "workman" refused to speak any further.

7. The four United States officials then made inquiries of people in the neighborhood as to where Mr. Lipper might be located. The officials learned that Mr. Lipper had been selling and/or giving away all of his personal assets. The officials also confirmed their information that the building located at Haight and Fillmore Streets, which contained the 506 Haight Street flat, had just been sold by Mr. Lipper for approximately $ 650,000.

8. Two of the officials located a neighbor who identified himself as John L. Merchant. Mr. Merchant stated that he had recently [*5] purchased the Haight and Fillmore building, and that he did not currently have any workman in 506. Mr. Merchant was then asked to open the door at 506 Haight Street so that the flat could be inspected. This request was refused.

9. The four federal officials then returned to 506 Haight Street and observed two individuals through the glass portion of an alternate entrance to the flat.

10. A man whose appearance matched the description of Mr. Lipper given to the Government came to the door. He denied that he was Mr. Lipper, claiming instead to be a workman, and informed the officials that he was busy and that they should therefore leave. In response to several additional denials, the U.S. officials asked the "workman" to give them his name. The workman responded "Terry" – the alias which the Government had previously been informed was used by Mr. Lipper. "Terry" was immediately served with an Order to appear in the United States District Court on April 6, 1981.

11. "Terry" then admitted that he was in fact Mr. Lipper. He then stated that he was leaving the country and would not be available on April 6, 1981, nor would he return to the United States. He then described [*6] the Court Order and the Internal Revenue Service with a number of obscenities and further stated he had not filed tax returns since 1969.

12. Thereafter the federal officials returned to their offices. After locating and contacting various real estate people who had been involved with Mr. Lipper's recent sales and verifying that in January 1981 Mr. Lipper had sold a building for a gross sales price of approximately $ 270,000 and that on approximately March 10, 1981, he had sold what appeared to be his last real estate holding for $ 650,000, the Internal Revenue Service made a $ 183,315 termination assessment against Mr. Lipper for the period January 1, 1981 through March 19, 1981. The assessment was made late in the afternoon of March 19, 1981.

13. In order to preserve its revenue, the Internal Revenue Service, through the United States Attorney's Office, sought an emergency Writ of Entry to 506 Haight Street where Mr. Lipper both resided and conducted his real estate business. A Court Order granting the Writ of Entry was signed at approximately 8:45 P.M. on the evening of March 19, 1981.

14. Several revenue officers of the Internal Revenue Service as well as special [*7] agents of the Internal Revenue Service who accompanied the revenue officers for their protection (the entry was made at night in an area of town which is widely known as a high crime neighborhood) entered 506 Haight at approximately 9:45 P.M. and took control of a number of the items found therein.

15. After entering, they discovered suitcases and a trunk packed with what appeared to be substantially all of the clothes in the apartment. In addition, closely adjacent to or within the suitcases, the agents found a road map of France, several French/English dictionaries and 6 blank visa applications to enter France.

16. There was almost no furniture in the flat. Furthermore, within the previous 5 months Mr. Lipper had stated in court documents that he owned approximately $ 75,000 of artwork, but none was found in the apartment.

17. A "bill of sale" for what appeared to be most of his kitchenware and utensils was found. The bill evidenced receipts totalling $ 4,000.

18. An automatic phone answering machine was seized. Of the many messages left on it, one caller said: "Good luck on your trip to France." A second caller said:

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"If you want to get to the South of France [*8] on time, please contact me immediately."

19. The agents found documents which evidenced the fact that Mr. Lipper kept one or more bank accounts in the name of "Leroy von Lipper."

20. On both March 19, 1981, when first contacted, and again on March 20, 1981, while the Internal Revenue Service was removing what was left of Mr. Lipper's items of value, Mr. Lipper again stated to federal officials that he intended to leave the country.

21. Mr. Lipper has admitted he was liquidating all his personal assets so he could "live in France in style."

22. On Friday, March 20, 1981, Mr. Lipper was asked where the notes and/or deeds of trust related to the recent sales of two buildings were located. He stated he did not know and later that he could not remember.

23. The Government was unable to locate any tickets or reservations made by or for Mr. Lipper to France. However, Mr. Lipper stated to Revenue Officer Theresa Koenig he never made advance reservations but merely went to the airports and paid cash for his tickets.

Furthermore, on Friday, March 20, 1981, Internal Revenue Service Special Agent Dennis Hanson overheard Mr. Lipper make a phone call in which Mr. Lipper said [*9] "the IRS is hassling me but it doesn't make any difference because I'll get away anyway." Lastly, Mr. Lipper stated to Revenue Officer Theresa Koenig that not only was he leaving for France but he also intended to stay there permanently and had organized a business there. Mr. Lipper was clearly planning to depart quickly from the United States to France.

24. Mr. Lipper has been involved in numerous real estate transactions over the last 11 years. County records reflect that an estimated 100 transactions involving Mr. Lipper occurred from 1969 through 1981. However, at the time of this hearing, the Government had not had sufficient time to totally analyze these transactions.

25. Based on the aforementioned facts, Jeffrey S. Niesen, Assistant United States Attorney, Michael D. Howard, Assistant United States Attoney,. and officials of the San Francisco Office of the Internal Revenue Service sought the approval of the United States Department of Justice in Washington, D.C., and the Commissioner of Internal Revenue to seek a temporary Writ Ne Exeat Republica to, inter alia , restrain Mr. Lipper from fleeing the country.

26. At approximately 4:15 P.M. Friday, March 20, 1981, [*10] the final approvals to apply for the Writ were received from Washington, D.C., and the United States Attorney's Office made an Ex Parte Application to the United States District Court for the Northern District of California for a Writ Ne Exeat Republica against Mr. Lipper.

27. After reviewing the declarations on file, the memoranda of law, and other items in the file, the Honorable Robert H. Schnacke issued the temporary Writ and scheduled the matter for hearing on Monday morning, March 23, 1981, at 10:00 A.M.

28. At the hearing the above facts were established to the satisfaction of the Court plus the facts set forth below regarding Mr. Lipper's finances and tax liabilities.

29. For the period of 1969 to the present, Internal Revenue Service records indicate that they have no tax returns on file for Mr. Lipper except for the years 1970 and 1971. At no time since 1969 has Mr. Lipper reported any gains from the sale of real property (on Friday, March 20, 1981, Mr. Lipper stated to Internal Revenue Service personnel that it was too tedious for him to prepare tax returns).

30. On Friday, March 20, 1981, Mr. Lipper stated to Revenue Officer Theresa Koenig that he had "made [*11] a lot of money in real estate since 1969." As he stated this, he wrote down on a piece of paper "$ 121 mill."

31. The statement indicating he had "made a lot of money" is consistent with the fact that real estate records of the San Francisco County Recorder reflect numerous transactions.

32. On March 20, 1981, Mr. Lipper stated to Internal Revenue Service employees that "if $ 183,000 is all you want I'll be happy to pay it."

33. Subpoenaes were served on Mr. Lipper's accountant and as a result, prepared but unfiled tax returns for 1973, 1974, 1975, 1977 and 1978 were discovered. No similar documents were found for 1969, 1970, 1971, 1972, 1976, 1979 or 1980.

34. Of the returns which were discovered, none reflected any income arising from real estate transactions of Mr. Lipper.

35. The Government has thus far confirmed that Mr. Lipper owned at least 9 real estate properties during the period in question. Purchase and sale prices were only available for four of the properties at the time of the hearing. However, the Internal Revenue Service is continuing its attempts to locate properties owned and sold by Mr. Lipper during the years in question and to determine and [*12] verify the purchase prices for those properties as well as their ultimate sale prices.

36. The Government has discovered a financial statement made out by or for Mr. Lipper for 1976. It

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indicates rental income of $ 40,000. Because more precise figures have not been verified for 1976, no tax assessment has yet been made for that year.

37. Similarly, aside from the unverified proceeds, if any, from the sale of real property in 1979, the Government has in its possession both a Mastercharge and an American Express credit card application completed by Mr. Lipper and dated June 1979. Both applications state that his income for that year was $ 100,000+". He also stated to the representatives of the Internal Revenue Service that $ 4,000,000 went through his bank accounts in 1979.

38. Because Mr. Lipper's income has not yet been ascertained for 1979 and 1980, no tax assessment has yet been made for either year. This is also true for 1969, 1970, 1971, 1972 and as mentioned above, 1976.

39. On Sunday, March 22, 1981, the Internal Revenue Service made jeopardy assessments against Mr. Lipper in the following amounts:

1973	1974	1975	1977	1978	Sub Total
$ 2,941	$ 243.79	$ 8,125	$ 30,809	$ 42,133	$ 84,252

[*13]
As noted above, these assessments are based primarily on the prepared but unfiled returns subpoenaed from Mr. Lipper's accountant, but include only two of the real estate transactions of Mr. Lipper due to a lack of further accurate figures as of the time of the hearing.

40. On Sunday, March 22, 1981, the Internal Revenue Service also adjusted its termination assessment for the period January 1, 1981 through March 19, 1981. This assessment was reduced from $ 183,315 to $ 100,705. The adjustment was made because further documentation appeared to indicate the cost basis of each of the two buildings sold by Mr. Lipper were somewhat higher than the Internal Revenue Service had initially believed.

41. The Internal Revenue Service is currently treating Mr. Lipper's income from the sale of real estate as capital gain -- not ordinary income. Because of the lack of time, the Government was unable to establish to its satisfaction which, if any, of Mr. Lipper's sales of real estate were made in the ordinary course of business (thereby generating ordinary income). The tax computations of Mr. Lipper's known real estate sales were then made based on the assumption that the sales generated [*14] capital gain. Accordingly, the Government's present tax figures are lower than they will be if it is determined that one or more of the sales generated ordinary income.

42. After reviewing the facts, the Court is satisfied there is a substantial likelihood that the Internal Revenue Service's tax claim is legitimate. Indeed, the figures represent a nominal estimate of Mr. Lipper's tax liability since to date no assessments at all have been made for 1969, 1970, 1971, 1972, 1976, 1979 or 1980 and all tax computations on the building sales were made at capital gain rates and not ordinary income rates.

43. Because of the complicated facts involving Mr. Lipper's tax liabilities for the years 1969 through 1981, the Court finds it is not an unreasonable restraint upon him to remain in the jurisdiction of the Northern District of California for a reasonable period of time within which he and the Internal Revenue Service can ascertain his civil tax liabilities for the years 1969 through 1981.

44. The United States has already served a Notice to Take Deposition on Mr. Lipper and his deposition is scheduled to begin on Monday, March 30, 1981. The Court is advised that the Internal [*15] Revenue Service has and is devoting substantial efforts to determine Mr. Lipper's liabilities as quickly as possible.

45. The Court is further advised that Mr. Lipper has agreed to and is posting security in the approximate amount of $ 370,000 with the United States of America as security for the currently estimated tax liabilities of Mr. Lipper. Mr. Lipper has been ordered to surrender his passport into the temporary custody of the Clerk of the Court and the Court is advised the passport was delivered to the United States Marshal and the paper-work is being completed to effectuate transfer of possession of the passport to the Clerk of the Court.

46. The United States and the Internal Revenue Service are on notice that any unnecessary delays in the resolution of Mr. Lipper's tax liabilities are unacceptable. The issuance of the instant Writ is made only because of the highly unusual facts of this case and the high probability of Mr. Lipper's expatriation from the United States. While the Court is aware that it may take time to unravel Mr. Lipper's complicated financial transactions which have occurred since 1969, absent a showing of

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good cause by the Government, the Court [*16] fully expects this matter to be resolved within 120 days after the filing of these findings of fact and conclusions of law.

47. Nothing herein precludes the United States from applying to the Court for modification of the permanent Writ Ne Exeat Republica entered March 23, 1981, should the Internal Revenue Service figures of the tax liability change or should it appear that the other circumstances might warrant modification.

48. Any finding of fact determined to be a conclusion of law is hereby deemed a conclusion of law.

Conclusions of Law

49. The Court has jurisdiction of this matter by virtue of 26 U.S.C. § 7402(a) and 28 U.S.C. § 1651.

50. Section 1651(a) of Title 28 U.S.C. provides that:

[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

In addition, Internal Revenue Code Section 7402(a) (26 U.S.C. § 7402(a)) sets forth the jurisdiction and authority of the district court in cases such as this and specifically permits the issuance of a writ ne exeat republica . In pertinent part, it states:

The district [*17] courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs * * * of ne exeat republica * * * and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. * * * (Emphasis added).

51. Because of the exigent circumstances which must be shown, Writs of Ne Exeat Republica are rarely utilized by the courts. However federal courts have unanimously upheld the constitutionality of such writs issued pursuant to Section 7402(a) of the Internal Revenue Code of 1954. United States v. Shaheen , 445 F. 2d 6 (7th Cir. 1971); United States v. McNulty , 446 F. Supp. 90 (N.D. Cal., 1978); United States v. Clough , 33 AFTR 2d 74-650 (N.D. Cal., 1974); United States v. Robbins , 235 F. Supp. 353 (E.D. Ark., 1964).

52. The Writ derives from the Writ ne exeat regnum, a common law prerogative writ which enabled the sovereign to compel an individual to remain within the realm in order to aid in the defense of his country. n1

n1 "By the common law, (n) every man may go out of the realm for whatever cause he pleaseth, without obtaining the King's leave; provided he is under no injunction of staying home; (which liberty was expressly declared in King John's great charter, though left out in that of Henry III,) but because that every man out of right to defend the king and his realm, therefore, the king, at his pleasure, may command him by his writ that he go not beyond the seas, or out of the realm, without license; and, if he do the contrary, he shall be punished for disobeying the king's command." United States v. Shaheen, supra at 9, n. 5 (7th Cir. 1971), quoting 1 Cooley's Blackstone (3d Ed.) p. 264. [*18]

53. Freedom to travel is a right of constitutional dimension, Aptheker v. Secretary of State , 378 U.S. 500, 517 (1964), which cannot be abridged without due process of law. Kent v. Dulles , 357 U.S. 116, 125-26 (1958); United States v. Laub , 385 U.S. 475, 481 (1967). However, the writ of ne exeat republica restrains individuals' rights of free travel. Thus, while District Courts authority to issue writs of ne exeat republica is clearly without question, the power is seldom exercised.

54. Where the Government seeks to support the issuance of such an extraordinary writ it bears the burden of showing facts and circumstances which warrant civil restraint. United States v. Shaheen, 445 F. 2d 6, 10 (7th Cir. 1971); United States v. Clough , 33 AFTR 2d 74-650, 651 (n.d./ Cal., 1974). The burden on the Government in such a case is analogous to that required to obtain injunctive relief. Shaheen, supra at 10; Clough, supra at 651.

55. In compliance with Rule 65(d) of the Federal Rules of Civil Procedure, n2 the Government has specifically set forth the factual basis and its reasons for seeking a writ of ne exeat republica. It has established that Mr. Lipper has a sizeable, [*19] outstanding tax liability, that Mr. Lipper has liquidated all of his significant assets, that Mr. Lipper has admitted his intention to immediately and permanently leave this country, and that there is a strong likelihood that a substantial portion of Mr. Lipper's assets would be difficult if not impossible to collect absent issuance of the requested writ. The United States has additionally shown that its efforts to ascertain and seek the satisfaction of Mr. Lipper's tax liabilities would clearly be frustrated unless the court grants its request for the writ. In light of Mr. Lipper's obvious attempts to avoid the federal authorities, it is also a distinct possibility that Mr. Lipper will even attempt to thwart the power of the Court to grant the United States any effective relief in its action to collect taxes from Mr. Lipper -- absent issuance of the writ.

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n2 Rule 65(d) of the Federal Rules of Civil Procedure states in pertinent part that:

> [e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance, shall be specific in terms; [and] shall describe in reasonable detail * * * the act or acts sought to be restrained * * *. [*20]

56. The defendant's demonstrated intent to immediately leave the country, the marshalling of his assets in a manner which insures his ability to immediately expatriate these assets, in conjunction with the facts set forth in paragraph 54 above, provide a more than adequate basis for the Court to exercise its power pursuant to Internal Revenue Code Section 7402, 28 U.S.C. § 1651; United States v. Shaheen, supra , and United States v. Clough, supra , and to issue the Writ Ne Exeat Republica .

57. A defendant must be given prompt notice of the writ and an opportunity to exercise his or her constitutional rights to an evidentiary hearing before the court. United States v. Clough , 33 AFTR 2d 74-650, 651 (N.D. Cal., 1974). Cf . Rule 65(b) Federal Rules of Civil Procedure. In the case at bar, the defendant was brought before the Court for a full evidentiary hearing within three days of the Court's issuance of the temporary Writ Ne Exeat Republica. Defendant's proffered evidence at the hearing in no way contradicted his earlier statements of intent made to Government officers. The defendant's demonstrated intent to leave the country forthwith and expatriate assets to which [*21] the Government could look in satisfaction of his tax liability remained unchanged at the conclusion of the hearing.

58. The Government must additionally demonstrate the likelihood of its prevailing on the merits of its underlying action. United States v. Shaheen, supra; United States v. McNulty, supra; United States v. Clough, supra .The Government has met this burden.

59. The defendant was afforded an opportunity to exercise his constitutional right to a full evidentiary hearing before this Court. Based on the evidence presented by the parties, the Court finds that the Government has met each burden imposed upon it in support of its application for a writ ne exeat republica. Accordingly, the writ shall issue. A copy of the Court's order is attached hereto and incorporated by reference.

60. Any conclusion of law determined to be a finding of fact is hereby deemed a finding of fact.

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