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APPL.

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MICHAEL C. DURNEY

LAW OFFICES OF MICHAEL C. DURNEY
1072 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(202) 965-7744
FAX: 202 965-7744
D.C. Bar No. 111872

Attorney for Intervenors CARL J. FLATLEY, JOAN M. COLLINS, FRANK J. GRESKOVICH, II, MITCHELL L. COLLINS, DANIEL L. ORR II, BRUCE K. FELDER, STEPHEN R. CORSELLO, JOAN R. WHEELWRIGHT and WALTER B. HALL

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)

INTERVENORS' APPLICATION FOR INJUNCTIVE RELIEF PURSUANT TO 26 U.S.C. § 6213(a)

BY FACSIMILE

COME NOW INTERVENORS CARL J. FLATLEY, JOAN M. COLLINS, FRANK J. GRESKOVICH, II, MITCHELL L. COLLINS, DANIEL L. ORR II, BRUCE K. FELDER, STEPHEN R. CORSELLO, JOAN R. WHEELWRIGHT, and WALTER B. HALL, by their undersigned attorney, and hereby apply to the Court pursuant to Federal Rule of Civil Procedure 65 for preliminary and permanent injunctive relief pursuant to 26 U.S.C. § 6213(a) to restrain the United States from violating their statutory rights and those of hundreds of other similarly situated persons. The basis for this application is the unprecedented and unwarranted complaint for receivership filed by the United States in the instant proceeding. Because of the

substantial, continuing, and irreparable harm being suffered by Intervenors and the several hundred other similarly situated persons, Intervenors seek the immediate issuance of the following orders:

1. Dissolve the Temporary Restraining Order issued in this case;

2. Withdraw the receivership imposed on the xélan Foundation and Doctors Benefit Insurance Company;

3. Direct the United States to return forthwith all items seized from the xélan Foundation and Doctors Benefit Insurance Company;

4. Dismiss with prejudice the complaint of the United States in Case No. 04-CV-2184W(AJB).

5. Award all costs and attorneys fees necessitated by the actions of the United States in Case No. 04-CV-2184W(AJB); and

6. Grant such other and further relief as it deems just and necessary to prevent further injury by the United States to Intervenors, the several hundred similarly situated persons, the xélan Foundation, and Doctors Benefit Insurance Company.

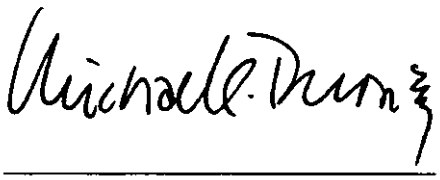
This application is based on the Counterclaim filed herewith, the accompanying memorandum of points and authorities, the Declarations of Intervenors, and such other and additional matters as the Court may consider at the hearing on this Application. A proposed Order is filed herewith.

MICHAEL C. DURNEY
Law Offices
1072 Thomas Jefferson St., N.W.
Washington, D.C. 20007

Dated: November 24, 2004

Respectfully submitted,

MICHAEL C. DURNEY



LAW OFFICES OF MICHAEL C. DURNEY
1072 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(202) 965-7744
FAX: 202 965-7744
D.C. Bar No. 111872
Attorney for Intervenors

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MICHAEL C. DURNEY
Law Offices
1072 Thomas Jefferson St., N.W.
Washington, D.C. 20007

MEMORANDUM OF POINTS AND AUTHORITIES

I. QUESTIONS PRESENTED

1. Has the United States violated the rights of Intervenors by its failure to follow the requirements of 26 U.S.C. § 6213(a)?
2. Does this violation of Intervenors' rights warrant the issuance of injunctive relief pursuant to 26 U.S.C. § 6213(a)?
3. Does this violation of Intervenors' rights and its intended blocking of legal fees necessary to provide an adequate defense, coupled with the substantial, continuing, and irreparable harm to Intervenors, warrant the issuance of immediate injunctive relief pursuant to 26 U.S.C. § 6213(a)?

II. STATEMENT

The filing of the xélan Receivership action by the United States and the resulting freeze and/or seizure of the assets of the xélan Foundation and Doctors Benefit Insurance Company ("DBIC"), is unprecedented and unwarranted. In its compliant, the government claimed, erroneously and without citing any authority, that the transactions into which Intervenors entered with the xélan Foundation and DBIC are fraudulent. The contrary is true. Intervenors have substantial legal authority that their dealings with the xélan Foundation and DBIC are proper, and that the reported tax treatment of their charitable transactions and insurance policies is correct.

More important, however, is the clear violation by the government of the statutory rights accorded Intervenors by 26, U.S.C. § 6213(a). By reason of that statute, the Intervenors are entitled to receive a Notice of Deficiency from the Internal Revenue Service before any action is commenced by the government to collect any tax. None of the Intervenors or any of the other similarly situated persons have received a Notice of Deficiency with respect to the unasserted tax liabilities that form the basis for this Receivership Proceeding. If the government sincerely

believed that the collection of the undetermined taxes were in jeopardy, it could have made jeopardy assessments of such taxes under 26 U.S.C. § 6861. However, as the government well knows, there are significant procedural safeguards for taxpayers to protect against improvident or baseless jeopardy assessments. 26 U.S.C. § 7429 provides for mandatory administrative and judicial review of this extraordinary collection action by the government, where the burden of proof is on the government to establish the necessity for collection before collection activity is begun.

Here, the government baldly admits that it has not assessed any of the taxes in question. (Complaint par. 32.) Rather than accord the legal remedies to which Intervenors are entitled, the government filed an illegal end-run around 26 U.S.C. § 6213(a), and obtained a seizure of assets in order to satisfy non-existent tax liabilities of Intervenors. One of the insidious aspects of this action by the government, which can not be taken as other than intentional, was a freeze on all legal fees.[1] Prior to the seizure, legal fees were being paid by the xélan Foundation and DBIC to defend both the entities and the medical professionals, including Intervenors, who participated in their programs against the baseless assumptions that underlie the IRS investigation. The result of the government's action, if not immediately reversed by the Court, is that the government will be able to proceed against Intervenors and the other similarly situated persons unimpeded by the legal representation they had been provided by the xélan Foundation and DBIC.

[1] Following the seizure, counsel for Intervenors met with Stuart D. Gibson, lead counsel for the government. Mr. Gibson was asked if the government would consent to the continuing payment of legal fees in order to defend the affected parties. Mr. Gibson said he could not and that it was a matter for the receiver and the Court. Thereafter, by letter hand-delivered to the Assistant Attorney General of the Tax Division, Eileen J. O'Connor, on November 10, 2004, counsel for Intervenors asked for a considered review of the propriety of the government's case in light of the substantial harm resulting to Intervenors and similarly situated persons. A copy of that letter is attached hereto as Exhibit 14. In response to that letter, in a letter from Mr. Gibson dated November 22, 2004, and received by counsel for Intervenors on November 24, 2004, it was stated that the concerns expressed in the letter to Mrs. O'Connor should await action by the receiver or the Court. It is clear from this that the government fully supports the harm that has befallen Intervenors.

MICHAEL C. DURNEY
Law Offices
1072 Thomas Jefferson St., N.W.
Washington, D.C. 20007

Additionally, in the case of each Intervenor, the seizure has prevented them from (1) receiving from the xélan Foundation or DBIC, as the case may be, a periodic payment to which each Intervenor is legally entitled by contract to receive, or (2) continuing disability income insurance coverage from DBIC to prevent a loss of such coverage and/or a forfeiture of policy values. No allowance was made by the government that would enable either the xélan Foundation or DBIC to continue necessary business operations and honor the commitments the two organizations are legally obligated to make. Similarly, no provision was made by the government to protect the interests of the Intervenors. The freeze and/or seizure of the assets the xélan Foundation and DBIC by the United States in violation of 26 U.S.C. § 6213(a) has resulted in substantial, continuing, and irreparable harm to the Intervenors.

III. ARGUMENT

A. INTERVENORS ARE ENTITLED TO INJUNCTIVE RELIEF UNDER 26 U.S.C. §6213(a)

26 U.S.C. § 6213(a) provides one of the few statutory exceptions to the Anti-Injunction Act, 26 U.S.C. § 7241. As pertinent herein, the statute provides that the appropriate district court may enjoin the Internal Revenue Service from collecting a tax before a Notice of Deficiency has been sent to the taxpayer. A Notice of Deficiency enables a taxpayer to have the merits of his tax liability litigated in the Tax Court without having to first pay the tax. 26 U.S.C. §§ 6212, 6213. None of the Intervenors or any of the several hundred similarly situated doctors whose returns are under examination have received a Notice of Deficiency with respect to their xélan transactions. The xélan Receivership action filed by the government squarely violated the rights of Intervenors and the other doctors by proceeding to collect from the xélan Foundation and DBIC non-existent tax liabilities.

In its receivership complaint, the government claimed, without citing any authority, that the transactions into which the Intervenors entered with the xélan Foundation and DBIC were

MICHAEL C. DURNEY
Law Offices
1072 Thomas Jefferson St., N.W.
Washington, D.C. 20007

fraudulent. The contrary is true. Intervenors have substantial legal authority that their dealings with the xélan Foundation and DBIC are proper, and that the reported tax treatment of their charitable transactions and insurance policies is correct.

1. xélan Foundation

In the case of the xélan Foundation, the Internal Revenue Service stated in a letter dated March 20, 1998, that the Foundation qualified as a public charity under Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)). A copy of that determination letter is attached as Exhibit 10. Subsequently, by letter dated May 6, 2002, the Internal Revenue Service confirmed that the xélan Foundation was a publicly-supported charity and that contributors were entitled to a deduction under Section 170 of the Internal Revenue Code (26 U.S.C. § 170) for contributions made to it. A copy of that letter is attached as Exhibit 11. Additionally, each of the Intervenors received a letter from counsel for the xélan Foundation at the time of their initial contribution confirming the tax deductibility of their contributions. A representative letter, sent to Intervenor Corsello, is attached as Attachment A to his Declaration. See Exhibit 7.

Additionally, the Internal Revenue Service continues to include the xélan Foundation in its Publication 78, *Cumulative List of Organizations described in Section 170(c) of the Internal Revenue Code of 1986.* Publication 78 is described by the Internal Revenue Service in the introduction as a "list of organizations eligible to receive tax-deductible charitable contributions".

The Intervenors made their contributions to the xélan Foundation knowing that once the contributions were made, the contributions were under the sole control of the xélan Foundation. While each of the Intervenors could give advice as to how distributions should be made, each realized that the final determination as to distributions would be made by the xélan Foundation. The Intervenors knew that they could not retrieve their contributions from the xélan Foundation. As stated by Intervenor Wheelwright (Exhibit 8, par. 8):

MICHAEL C. DURNEY
Law Offices
1072 Thomas Jefferson St., N.W.
Washington, D.C. 20007

> From the beginning of my involvement with the xélan Foundation, I understood that the contributions I made were donations to a recognized charity and while I could express my preferences for the distribution of that contribution, the xélan Foundation had the right to distribute it as they saw fit. I understood that I could never retrieve my contributions to the Foundation, and I neither expected nor held any desire to do so.

Similarly, Intervenor Corsello stated (Exhibit 7, par. 7):

> From the time we first contributed to the xélan Foundation, I understood that the assets we donated became the property of the Foundation, and that my role was exclusively one of an advisor. I understood that once the contribution was made, I relinquished all control over those assets, and they would not be returned to me. I have never expected, requested or received a refund of any portion of the assets donated to the xélan Foundation.

Additionally, attached to each of the Declarations of Intervenors Collins and Corsello are Fund Advisor Statements which provide in part:

> I certify that I understand the nature of donor-advised funds and will conduct activities which satisfy the Internal Revenue Code. I understand that in order to qualify as a deductible contribution for income tax purposes, the ownership and custody of my donated funds and property will be fully relinquished to the [name of donor advised account], a Donor Advised Fund of the xélan Foundation.

See Attachment A to Intervenor Joan M. Collins Declaration, Exhibit 2; Attachment B to Intervenor Corsello Declaration, Exhibit 7.

In support of this unprecedented seizure of the assets of the xélan Foundation, the government submitted two affidavits by government agents, one a postal inspector, and one a revenue agent. No mention is made in the affidavit of the revenue agent with respect to the xélan Foundation. The postal inspector states, however, that "it appears that xélan does not operate the [Foundation] program is accordance with IRS regulations." (See affidavit of Postal Inspector Timothy D. France, par. 51.) The postal inspector makes no reference to the above-described determination letters issued by the Internal Revenue Service to the xélan Foundation, nor to its inclusion in Publication 78. The postal inspector makes no reference to the Fund Advisor Statements which clearly set forth the charitable intent and understanding of the Intervenors. The postal inspector does not mention that even if his unsupported statement were true, which it categorically is not, Treasury Regulation §1.170A-9 (26 CFR §1.170A-9) specifically provides that a donor may rely on the IRS determination "until notice of change of status of such

organization is made to the public (such as by publication of the Internal Revenue Bulletin)." No change of status with respect to the xélan Foundation has been made by the Internal Revenue Service. Again, the postal inspector makes no reference to this fact. In other words, even if the unsupported opinion of the postal inspector regarding the entitlement of the xélan Foundation to tax exempt status were true, there would be no additional tax liability of the Intervenors. In short, there is absolutely nothing to support the claim by the government that additional taxes may be owing with respect to contributions made by the Intervenors to the xélan Foundation.

2. Supplemental Disability Insurance

Intervenors Carl J. Flatley, Joan M. Collins, Frank J. Greskovich, II, and Mitchell Collins (no relation to Intervenor Joan M. Collins) each obtained supplemental disability income insurance coverage through xélan. Current insurance coverage is provided to Intervenors by DBIC, a successor entity that is the target of the TRO freeze order and the injunction sought by the government. All four Intervenors have suffered disabling illnesses or injuries and are entitled to receive monthly benefit payments from DBIC by reason of their supplemental disability income insurance coverage.

Intervenors Daniel L. Orr II and Bruce K. Felder similarly obtained supplemental disability insurance coverage thorough xélan. One of the features of this insurance is that after coverage has been maintained for seven consecutive years, an experience adjusted premium refund can be requested. This refund is a retrospective premium adjustment that is common in many insurance policies, and is based on the claims and expense experience of the particular insurance carrier. In the event coverage is not maintained for seven years, all benefits under the supplemental disability income insurance policy are forfeited.

In addition to preventing the payment of disability claims by DBIC, as outlined above, the seizure prevents Intervenors Orr and Felder from maintaining their disability income insurance

coverage. This would terminate their certificates of insurance coverage and cause a forfeiture of approximately $1,242,571.34 in benefits in the case of Intervenor Orr and approximately $211,114.51 in benefits in the case of Intervenor Felder. Furthermore, such termination would eliminate valuable catastrophic claim benefits for Intervenor Orr in the amount of $4,452,000 and for Intervenor Felder in the amount of $860,000, should either become catastrophically disabled from being able to work in any occupation.

None of the Intervenors support the government's position in this case, believe he or she has been defrauded, and each strenuously objects to the actions taken by the government as being violative of his or her rights under the DBIC disability income insurance coverage. At the time Intervenors first obtained their supplemental disability income insurance coverage through xélan, each received a legal opinion from counsel for the xélan Supplemental Disability Trust ("Trust") which set forth the legal basis for the tax treatment of the premium payments made to obtain the coverage for Intervenors. [2]

The government's position with respect to the disability insurance was set out in the affidavit of a revenue agent who is stated to be a specialist in employee welfare benefit plans. Nowhere is it asserted that this revenue agent is a specialist in disability insurance. This revenue agent stated (affidavit of John L. Marien, par. 16a):

> a. First, the IRS is examining whether the xélan disability trust is providing insurance at all, or whether it is simply a savings program...

The revenue agent continued (par. 16b):

> b. The IRS is also examining the limits on deductibility to the doctor's subchapter C corporation—and includability in the doctor's taxable income—in the event it determines that the xélan disability insurance is in fact providing insurance.

[2] A representative sample of the legal opinion is attached hereto as Exhibit 12. Additionally, attached as Exhibit 13 is a representative supplemental disability income insurance policy issued by DBIC that provided coverage to Intervenors.

The revenue agent then claimed that because "steps have been taken to prevent me from obtaining the information I require from doctors and third parties...," he has been unable

> ... to determine whether xélan doctors are entitled to the tax benefits that Guess and xélan have touted to them, and make it impossible for me to express a final opinion now on these programs. (par. 17.)

Contrary to the revenue agent's claim, Intervenors have provided all documents and responses requested by the Internal Revenue Service with respect to their xélan programs.[3] Moving beyond that point, however, the stark fact remains that this revenue agent, upon whose assertions the government bases the freeze of DBIC and the consequent blocking of disability payments and continuation of disability coverage to which Intervenors are entitled, has not yet determined whether the insurance coverage offered by DBIC is not what it purports to be. The agent admits that the IRS is "examining" the disability insurance program and that he is unable to express a final opinion as to its validity. This admission clearly demonstrates that since the government hasn't made up its own mind as to the merits of the case, it is impossible for it to show that it is likely to succeed on these undetermined merits.

In each case, the Intervenors believed they were buying disability insurance, did not think they were establishing a savings account, knew that their experience refund would be forfeited if they terminated the coverage before the end of seven years, and knew that this experience refund would be subject to the claims and expenses of DBIC. See, e.g., Exhibit 1, Flatley Declaration, pars. 9, 10, 11; Exhibit 2, Joan M. Collins Declaration, pars. 7, 8, 9, 10, 11, 12; Exhibit 3, Greskovich Declaration, par. 5; Exhibit 4, Mitchell L. Collins Declaration, pars. 11, 12; Exhibit 5, Orr Declaration, pars. 12, 13, 14; Exhibit 6, Felder Declaration, pars. 8, 9, 10. The government has shown nothing other than unsupported speculation to counter these facts.

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[3] See, e.g., Exhibit 1, Flatley Declaration, par. 17; Exhibit 2, Joan M. Collins Declaration, pars. 18, 19; Exhibit 3, Greskovich Declaration, pars. 14, 15; Exhibit 4, Mitchell L. Collins Declaration, pars. 14,15 ; Exhibit 5, Orr Declaration, pars. 16, 17, 18; Exhibit 6, Felder Declaration, par. 3; Exhibit 7, Corsello Declaration, pars. 11, 12, 13; Exhibit 8, Wheelwright Declaration, par. 3; Exhibit 9, Hall Declaration, pars. 4,5.

B. INTERVENORS ARE ENTITLED TO IMMEDIATE INJUNCTIVE RELIEF

The seizure of the assets by the government has deprived Intervenors of either disability income or annuity payments that provided them with substantial living support. These unwarranted financial deprivations were then exacerbated by the prohibition of legal fees by the government that provided Intervenors with legal counsel to defend the IRS investigation of their xélan transactions. The final blow was that Intervenors have been denied their statutory right to litigate whatever tax liability the government ultimately decides to assert without first paying the tax.

The Ninth Circuit, in *Jenson v. IRS,* 835 F.2d 196 (9th Cir. 1987), made clear that in such circumstances, Intervenors are entitled to injunction relief. In *Jensen,* the Court held that when the IRS fails to comply with 26 U.S.C. § 6213(a), the loss of the right to litigate a tax liability without first paying the tax, coupled with severe monetary deprivation, warrants injunctive relief. As stated by Court:

> . . . Moreover, the alleged [**6] failure by the IRS to give Jensen notice of the deficiency deprived him of his opportunity to challenge the claimed deficiency in the tax court without having to pay the tax. *See Abrams v. Commissioner, 814 F.2d 1356, 1357* [*199] *(9th Cir. 1987)* (tax court lacked jurisdiction to hear a taxpayer's petition for redetermination of taxes because no notice of deficiency was given). This deprivation of the opportunity to litigate a tax liability before paying the tax can cause substantial hardship to a taxpayer. *Granquist v. Hackleman, 264 F.2d 9, 14 (9th Cir. 1959).* Such a deprivation is also "out of keeping with the thrust of the Code." *Laing, 423 U.S. at 176.* n2
>
> n1 Jensen was apparently allowed to exempt $ 300 per month from the levy under regulations made pursuant to *26 U.S.C. § 6334*(a)(9).
>
> n2 The court is aware that monetary harm does not usually establish irreparable harm in analyzing equitable grounds for injunctive relief. *See Sampson v. Murray, 415 U.S. 61, 88-92, 39 L. Ed. 2d 166, 94 S. Ct. 937 (1974).* This case, however, includes allegations not only of severe monetary deprivation, but loss of a valuable administrative remedy as well.

835 F.2d at 198-9.

MICHAEL C. DURNEY
Law Offices
1072 Thomas Jefferson St., N.W.
Washington, D.C. 20007

In its decision remanding the case to the district court, the Ninth Circuit made clear that the failure to provide a Notice of Deficiency establishes jurisdiction to hear a claim for injunctive relief. 835 F.2d at 198. The Court further held that the issuance of the injunction will then turn on whether equitable grounds for relief exist, citing *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982). *Id.*

In *Cool Fuel,* equitable relief was denied as it was found that the taxpayer could sue for a refund of the seized funds. 685 F.2d 309, 313-14. That remedy is unavailable in the instant case as Intervenors and the other similarly situated persons have no idea what their tax liabilities are and what to sue for. The government has seized millions of dollars held by the xélan Foundation and DBIC with no differentiation or calculation of tax other that the fanciful assumption of Revenue Agent John L. Marien that each doctor improperly deducted or excluded $100,000 per year from their taxable income. Marien Affidavit, par. 33. The refund suit procedure present in *Cool Fuel* is clearly unavailable in this case.

In *Weinberger v. Romero-Barcelo,* 456 U.S. 305, (1982), the Supreme Court stated:

> It goes without saying that an injunction is an equitable remedy. It "is not a remedy which issues as of course," *Harrisonville v. U.S. Dickey Clay Mfg. Co., 289 U.S. 334, 338 [53 S. Ct. 602, 603, 77 L. Ed. 1208]* (1933), or "to restrain an act the injurious consequences of which are merely trifling." *Consolidated Canal Co. v. Mesa Canal Co., 177 U.S. 296, 302 [20 S. Ct. 628, 630, 44 L. Ed. 777]* (1900). An injunction should issue only where the intervention of a court of equity "is essential in order effectually to protect property rights against injuries otherwise irremediable." *Cavanaugh v. Looney, 248 U.S. 453, 456 [39 S. Ct. 142, 143, 63 L. Ed. 354]* (1919). The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies. [citations omitted.]

Here, Intervenors are entitled to the equitable relief sought. The government has established no reasonable basis for its position that Intervenors have underpaid their tax. The government has deprived Intervenors and other similarly situated persons of valuable statutory rights and caused them substantial, continuing, and irreparable harm. They have no legal remedy available to correct this manifest injustice.

MICHAEL C. DURNEY
Law Offices
1072 Thomas Jefferson St., N.W.
Washington, D.C. 20007

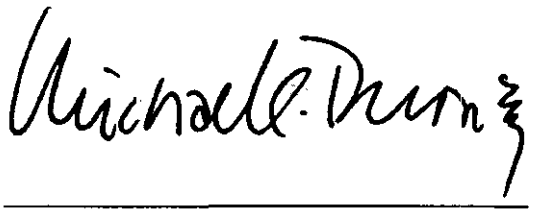
IV. CONCLUSION

The facts presented herein clearly establish that the government's unprecedented and unwarranted action against the Intervenors, the xélan Foundation, and DBIC must be enjoined immediately. Intervenors have sustained substantial, continuing, and irreparable harm, as well as deprivation of a fundamental right in the determination of their tax liabilities. Their legal counsel and assistance has been cut off. They have been vilified in press releases and court filings as having engaged in fraudulent and illegal activities. The actions of the government must be stopped.

Dated: November 24, 2004

Respectfully submitted,

MICHAEL C. DURNEY



LAW OFFICES OF MICHAEL C. DURNEY

1072 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(202) 965-7744
FAX: 202 965-7744
D.C. Bar No. 111872
Attorney for Intervenors

V. TABLE OF EXHIBITS

Exhibit 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. L. DONALD GUESS, et al. Defendants.	)	Case No. 04-CV-2184W (AJB) DECLARATION OF CARL J. FLATLEY

1. My name is Carl J. Flatley and I am a resident of Denedin, Florida.
2. I am a retired doctor of dental surgery (DDS), with a specialization in endodontics.
3. I have been a member of xélan, the Economic Association of Health Professionals, since 1975, when I first used xélan to assist in my money management and estate planning.
4. I first learned of xélan at a seminar held in Sarasota, Florida, sometime around 1975.
5. I purchased through xélan a disability insurance policy from Reassure America in the mid 1970's. My corporation purchased supplemental disability insurance through xélan beginning in the late 1990's.
6. I purchased the supplemental disability coverage because I could not find a source for adequate primary disability policies.

EXHIBIT 1

7. In 1995 I suffered neck and back injuries. After several surgeries, I filed claims for permanent disability in 2004.

8. Currently, my supplemental disability policy provides about $5,000 a month, which makes up approximately 25% of my income.

9. From the outset, I understood that these disability policies were insurance and not some form of savings account.

10. I also understood that whatever I paid for this insurance was subject to the claims and expenses of the insurance company, and there was never a guarantee of the amount of the experience refund I could receive after my seventh year of participation.

11. I understand that if I should terminate my coverage or die before my seventh year of participation in the plan, I will forfeit all premiums paid.

12. In the late 1990's I became aware of the xélan Foundation and used it to establish a donor-advised account.

13. My initial reason for establishing this account was to set up an endowment for the Dental Society. In 2002, after the death of my daughter, I changed the focus of my charitable activities to the fight against sepsis and re-named my account the Erin K. Flatley Foundation, in her memory. I established and currently chair the American Sepsis Alliance. My xélan Foundation account currently holds approximately $28,000 in cash contributed by friends of my daughter and two $1,000,000 life insurance policies, all to be used to research and fight sepsis.

14. I feel the xélan Foundation fees are perfectly reasonable, in light of the administrative service the foundation provides.

15. It has always been clear to me that any contributions to the xélan Foundation are charitable gifts, and that once made, the donations are under the control of the

EXHIBIT 1

foundation. My role is simply one of advisor, with the Foundation controlling all aspects of the account.

16. I have every confidence in the management and operation of xélan. I look forward to the conclusion of this matter so that I may continue to use the xélan Foundation as a tool for the management of my charitable activates.

17. My 2001, 2002 and 2003 tax returns are currently under examination by the IRS. My attorney has advised me to produce all documentation and information requested by the IRS. He has also advised me to consent to all requests made by the IRS for extensions to the statute of limitations in this matter. My examination is ongoing, and I am cooperating as suggested by my attorney.

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

CARL J. FLATLEY

Executed on 2-17/64.

EXHIBIT 1

Exhibit 2

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. L. DONALD GUESS, et al. Defendants.	)	Case No. 04-CV-2184W (AJB) DECLARATION OF JOAN M. COLLINS

1. My name is Joan M. Collins and I am a resident of Oceanside, California.
2. I am a medical doctor specializing in family practice. I am on temporary disability due to depression.
3. I have been a member of xélan, the Economic Association of Health Professionals, since the mid-1990s.
4. I became aware of insurance programs offered by xélan through a business associate.
5. In approximately 1996, I first used xélan to assist in my financial planning.
6. My reason for purchasing supplemental disability insurance through xélan was to protect my income in the event that a disability would prevent me from working.

EXHIBIT 2

7. I chose to participate in the xélan supplemental insurance plans with the understanding that I was purchasing insurance. I did not believe I was putting money into a savings account.

8. I purchased this insurance from xélan because I could not obtain the necessary coverage elsewhere.

9. I knew that my premiums were owned by the insurance company and subject to its claims and expenses.

10. I understood that I would not know how much my experience refund would be until I had paid premiums for seven years.

11. I understood that if I should die before the seventh year of participation in a plan, my premiums paid into that plan would be forfeited.

12. Additionally, I understood that the statements I received from SEI showed an estimated balance of my account and would be adjusted by the claims and expenses the insurance company had with all of its policy holders.

13. Subsequently, my husband (at the time) opened a donor-advised charity account with xélan.

14. I have attached to this declaration (Attachment A) the Fund Advisor Statement signed by my husband, which shows that he relinquished the ownership and control of this donation to the Foundation.

15. I currently receive a disability payment of $4,000 in the first week of every month. I am expecting at least one payment of $3000 from my primary disability policy, but I am uncertain as to whether or not this payment will be an ongoing and reliable source of

EXHIBIT 2

income. I expect my supplemental disability claim to provide approximately 70% of my monthly income.

16. My only other source of income is child support in the amount of $1,700 per month.

17. My ex-husband and I share custody of two children, ages 17 and 14.

18. I am under audit by the IRS and have furnished all documents and answered all questions to the best of my ability. To my knowledge, all requests by the IRS to extend the statute of limitations in this matter have been granted.

19. When I was first contacted by the IRS, Michael Suverkrubbe was my attorney. Because of my concern that I was not being adequately represented, I retained Michael C. Durney to represent me before the IRS. I am aware that Mr. Durney's fees are being paid by the xélan Foundation and by DBIC.

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

Joan M Collins
JOAN M. COLLINS

Executed on 1-17-04.

EXHIBIT 2

10/24/97

Fund Advisor Statement

By completing and signing this application, I hereby apply to participate in the Xélan Foundation Program. I understand that the full amount of my initial contribution is tax deductible unless the deferred gift annuity election has been selected. Also, I understand that the contribution amount less fees (set-up fee, annual administration fee and marketing fee) will be deposited and maintained in a separate investment account. I certify that I understand the nature of donor-advised funds and will conduct activities which satisfy the requirements of the Internal Revenue Code. I understand that in order to qualify as a deductible contribution for income tax purposes, the ownership and custody of my donated funds and property will be fully relinquished to the Kozlowski College Foundation, a Donor Advised Fund of the Xélan Foundation. These statements accurately represent my desires for my charitable fund at the Xélan Foundation.

APPLICANT:

David P. Kozlowski 12/15/98
Signature Date

David P. Kozlowski
Name (please print)

* After signing, please return with your personal check made out to the Xélan Foundation to your Xélan Financial Counselor.

ATTACHMENT A

EXHIBIT 2
ATTACHMENT A
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Exhibit 3

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. L. DONALD GUESS, et al. Defendants.	)	Case No. 04-CV-2184W (AJB) DECLARATION OF FRANK J. GRESKOVICH, II

1. My name is Frank J. Greskovich, II and I am a resident of Pensacola, Florida.
2. I am a retired oral and maxillofacial surgeon.
3. I first learned of xélan at a meeting held by a xélan representative in approximately 1997.
4. In 1997, I purchased supplemental disability insurance through xélan. I chose this product because my primary policy through the American Dental Association would not adequately cover my income should I become disabled.
5. I understood that I was purchasing an insurance policy. I did not believe that I was putting money into a savings account.
6. I am disabled by numbness in my hands. I had two consecutive back surgeries and in 2001 I had foot surgery. This caused me to favor my opposite leg, and in turn led to

EXHIBIT 3

degradation of my knees. I can no longer stand for any length of time, which prevents me from performing surgery. I receive disability payments of $10,000 per month from my supplemental disability insurance.

7. Around 1999 I became aware of the xélan Foundation and decided to use it to establish a donor-advised account

8. Prior to establishing this donor-advised account, I examined other options for charitable gift management from companies such as Vanguard and Fidelity. I chose the xélan foundation in large part because of xélan's 30 year history, and the caliber of their associates.

9. I felt the administrative fees assessed by the foundation were reasonable and within normal limits.

10. My reason for establishing a donor-advised account was to provide funding for religious, educational and charitable purposes. In the past, we have donated directly to Pensacola Catholic High School to build a new science lab. It is our intention to continue donating to the school through the xélan foundation, this time to establish a scholarship fund. Just as the foundation assets were frozen by the temporary restraining order, I was preparing to make a $100,000 donation to our church's building fund. We also intend to make ongoing donations to the Society of St. Vincent de Paul.

11. I understood that my contributions to the xélan Foundation were charitable gifts, and that those gifts were deductible from my taxes. While I could express my opinion about the best use of my donations, I held no control over them. I never expected to receive anything in return for my contributions.

EXHIBIT 3

12. In approximately 2000, I purchased long term care insurance through xélan to supplement my primary policy through Alliance. Again, I chose xélan because I could not purchase the level of coverage I desired anywhere else.

13. As in my earlier transactions with xélan, I felt reassured by their long history, and the substantial number of favorable legal opinions provided.

14. I am currently under examination by the IRS. I have furnished all documents and answered all questions asked by the IRS to the best of my ability.

15. As requested by the IRS, I have extended the statute of limitations on this examination.

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

Frank Greskovich II

FRANK GRESKOVICH, II

Executed on 17 Nov. 2004

EXHIBIT 3

Exhibit 4

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. L. DONALD GUESS, et al. Defendants.	)	Case No. 04-CV-2184W (AJB) DECLARATION OF MITCHELL L. COLLINS

1. My name is Mitchell L. Collins and I am a resident of Conway, Arkansas.
2. I am a doctor of dental surgery (DDS) and medical doctor (MD). I specialize in oral and maxillofacial surgery.
3. I first learned of xélan in the late 1990's. I attended a seminar in Little Rock, Arkansas hosted by a xélan representative in approximately 1998.
4. In 1998, I established a xélan Foundation donor-advised charity account.

EXHIBIT 4

5. I established this account because I felt it offered a good option for long-term management of my charitable interests. In particular, I found it convenient to make one large donation instead of multiple smaller ones.

6. In an average year, I donate between $12,000 and $20,000 to several charities, including the United Way, my church, and the Boys and Girls Club of America.

7. From my first involvement in the xélan Foundation, I understood that contributions made to the foundation were made as gifts, and I had no interest in or expectation of receiving anything in return. I also understood that my role in the foundation was strictly advisory, and that the xélan Foundation would make the final determination in the distribution of the funds.

8. I first purchased supplemental disability insurance through xélan in 2000.

9. I was attracted to xélan supplemental disability insurance because I could not find another provider offering adequate coverage. I expected to undergo heart surgery some time in the near future, and I was concerned about my ability to continue working afterward. In addition to protecting my own financial security, I felt a responsibility toward my employees and therefore needed substantial coverage.

10. I subsequently did undergo heart surgery in 2001, and filed a disability claim with xélan in 2002.

11. My intent in purchasing supplemental disability insurance was to provide more complete coverage for myself and my business; I did not believe I was establishing a savings account.

EXHIBIT 4

12. I also understood that whatever I paid for this insurance was subject to the claims and expenses of the insurance company, and there was no guarantee of the amount of the experience refund I could receive after my seventh year of participation.

13. I currently receive about $10,000 a month in disability from xélan, which makes up about 30% of my annual income.

14. My 2001 and 2002 tax returns are currently under examination by the IRS. I have supplied all documentation and information requested by the IRS.

15. I have consented to all requests by the IRS to extend the statute of limitations in this examination.

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

Mitchell L. Collins

MITCHELL L. COLLINS

Executed on Nov. 16, 2004

EXHIBIT 4

Exhibit 5

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. L. DONALD GUESS, et al. Defendants.	)	Case No. 04-CV-2184W (AJB) DECLARATION OF DANIEL L. ORR II

1. My name is Daniel L. Orr II and I am a resident of Las Vegas, Nevada.
2. I am a dentist in active practice, with a specialization in oral and maxillofacial surgery.
3. I first joined xélan in the early 1980's when I established a defined benefit plan.
4. I subsequently became aware of the xélan Foundation and decided to use it to establish a donor-advised account in approximately 1997.
5. In an average year I estimate my charitable contributions to be approximately $100,000, distributed to several organizations. I established my xélan account to track and manage these donations.
6. At the time I established the xélan Foundation account, I also considered starting a private foundation. The fees associated with the xélan Foundation were immensely

EXHIBIT 5

better than the cost of establishing a private foundation. I estimate I saved almost $35,000 by using the xélan donor-advised program.

7. Through the xélan foundation I have funded educational programs at the University of Nevada Las Vegas, the University of Southern California, Brigham Young University and the University of Utah. In addition, I have funded the Las Vegas Natural History Museum, the Donated Dental Services program, the Boy Scouts of America, and the Boulder Dam Area Council.

8. When I contribute to the xélan Foundation, I am aware that I am making an irrevocable gift to a charitable organization listed by the IRS in Publication 78. I expect nothing in return for my donation.

9. I also understand that the xélan Foundation controls the distribution of funds I gift to them. I advise the foundation on my preferences for the use of my donations, but xélan has the ultimate and final word on the use of its holdings.

10. Around the same time I established my donor-advised foundation account, I purchased supplemental disability insurance through xélan.

11. I chose to purchase this insurance because my primary disability policy through Lincoln National does not provide the level of coverage necessary to sustain my family in the event I can no longer work.

12. I purchased this supplemental plan to provide insurance coverage. I did not believe I was establishing any form of savings account.

13. I am aware that should I terminate my coverage or die before my seventh year in the plan, I will forfeit all premiums paid. A 2004 Certificate of Insurance (Attachment A)

EXHIBIT 5

from DBIC and a current statement of the approximate value of my policy (Attachment B) are attached to this declaration.

14. I also understand that whatever I pay for this insurance is subject to the claims and expenses of the insurance company, and the amount of the experience refund I could receive after my seventh year of participation has never been guaranteed. I know that the periodic statements of value I receive are only an estimate of this potential refund.

15. I intend to continue this coverage through a premium payment due before the end of this year.

16. I am currently under examination by the IRS with respect to my xélan activities. At the suggestion of my current counsel, I have responded to all requests of the IRS for documents and information.

17. At the request of the IRS, I have granted an extension of the statute of limitations related to the examination of my returns.

18. At the time I was first contacted by the IRS, I was represented by Michael Suverkrubbe. I was dissatisfied with Mr. Suverkrubbe's progress, and subsequently retained Michael Durney to represent me in my audit. I am aware that Mr. Durney's fees are being paid by the xélan Foundation and DBIC.

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

Daniel L. Orr II

DANIEL L. ORR II

Executed on 16 NOV 2004

EXHIBIT 5

DOCTORS BENEFIT INSURANCE COMPANY, LTD.

Administrative Office : R.G. Hodge Plaza
PO Box 3261
Road Town, Tortola
British Virgin Islands

Executive Office: The Business Centre
Upton
St Michael, Barbados

SUPPLEMENTAL DISABILITY INSURANCE CERTIFICATE

CERTIFICATE NUMBER: 1199 **EFFECTIVE DATE:** 03/31/2004

MEMBER/INSURED: Daniel Orr **ISSUE AGE:** 53

GENDER: M **PREMIUM PAID:** $ 4,000

MINIMUM ANNUAL PREMIUM: $4000

COVERAGE:

Disability Income – "Own Occupation": Under the "Own Occupation" section of the Policy, a Member is considered to be disabled if and when he can no longer perform all of the duties of the Member's Regular Occupation for at least forty hours during a regular work week for at least fifty weeks during a calendar year. Moreover, said condition must have existed for at least 120 consecutive days and, if required by Us, must be attested to by an independent physician. Also, no coverage shall exist under the "Own Occupation" section if the insured has reached the age of 76 or if no premiums have been received within twelve months of incurring an Accident, manifesting a Sickness, or of filing a claim.

Maximum Annual Benefit: $300,000

Estimated Aggregate Lifetime Benefit: $1,265,690

Disability Income – "Any Occupation": Under the "Any Occupation" section of the Policy, a Member is considered to be disabled only if, in Our judgment after investigation, the Member cannot perform any of the duties of any occupation for wage or profit for any period of time. This includes consulting, part time employment of any nature, self-employment in any venture that is intended to produce any revenues, or any other activity by the Member that is intended to generate income for the Member or any other person. Moreover, said condition must have existed for at least 120 consecutive days and must be attested to by an independent physician. Also, no coverage shall exist under the "Any Occupation" section if the insured has reached the age of 65 or if no premiums have been received within twelve months of incurring an Accident, manifesting a Sickness, or of filing a claim.

Maximum Annual Benefit: $300,000

Estimated Aggregate Lifetime Benefit: $4,452,000

ELIMINATION PERIOD: 120 days for both "Own Occupation" and "Any Occupation"

EXHIBIT 5
ATTACHMENT A
ATTACHMENT A

JLCo.

DBIC Program Administration Tool

Home | Password | Logout

The participant transaction and balance information reported on this website has been accumulated by Johnson Lambert & Co. from information provided by Management of Doctors Benefit Insurance Company and its other service providers. Johnson Lambert & Co. was not engaged to verify this information, including but not limited to, Johnson Lambert & Co. has not performed procedures to verify the existence and valuation of investments or other assets underlying the reported participant transactions and balances. Accordingly, Johnson Lambert & Co. has not audited or reviewed the accompanying information and, accordingly, does not express an opinion or any other form of assurance on it.

Transaction Information

Daniel Orr DDS — **45061J-1** / Disability Policy

Office
Daniel Orr DDS
2040 W. Charleston, #201
Las Vegas, NV 89102

Date	Type	Total $	Effective $	# of Units	Unit Value
9/21/2003	Opening Balance	$1,186,151.71	$1,186,151.71	118615.17	$10.00
1/29/2004	Premium	$4,000.00	$3,840.00	351.12	$10.94
11/16/2004	**Current Reserve**		**$1,242,571.34**	**118,966.29**	**$10.44**

Questions? Problems? Contact Doctors Insurance Services at 1-800-388-3722

Disability Trust
As of 11/16/2004

CLI NO	FC LNAME	P CLI LNAME	ACCT NO	CERT NO	INIT CREDIT YEAR	CREDIT YEAR	DATE REC'D	CK NO	CONTRIBUTION	DATE SENT BANK	DATE RECEPT SY
12117	Orr	D Orr	45061J-1	1199	1997	1997	04/23/1997		200,000	04/28/1997	04/28/199
	Orr	D Orr	45061J-1	1199	1997	1997	12/31/1997		150,000	01/06/1998	01/06/199
								By Crediting YR	350,000		
	Orr	D Orr	45061J-1	1199	1997	1998	01/12/1999	0125	450,000	01/12/1999	01/12/199
	Orr	D Orr	45061J-1	1199	1997	1999	01/04/2000	129	4,000	01/06/2000	01/06/200
	Orr	D Orr	45061J-1	1199	1997	2000	12/28/2000	0136	200,000	12/28/2000	12/28/200
	Orr	D Orr	45061J-1	1199	1997	2001	01/11/2002	0148	80,000	01/15/2002	01/15/200
	Orr	D Orr	45061J-1	1199	1997	2002	01/08/2003	155	25,000	01/14/2003	01/14/200
	Orr	D Orr	45061J-1	1199	1997	2003	01/13/2004	0164	4,000	01/14/2004	01/14/200
								Total	1,113,000		
								Grand Total	1,113,000		

ATTACHMENT B

EXHIBIT 5
ATTACHMENT B
34

Exhibit 6

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. L. DONALD GUESS, et al.. Defendants.	)	Case No. 04-CV-2184W (AJB) DECLARATION OF BRUCE K. FELDER

1. My name is Bruce K. Felder and I am a resident of Pensacola, Florida.
2. I am a dentist in active practice, with a specialization in endodontics.
3. My 2001 and 2002 tax returns are currently being examined by the Internal Revenue Service because of my association with xélan. This examination is ongoing, and on the advice of my attorney I am in the process of supplying all documentation and information requested by the IRS. I have also consented to extend the statute of limitations in this matter, as requested by the IRS.
4. I have been a member of xélan, the Economic Association of Health Professionals, since 2001.
5. I was referred to xélan through a friend and colleague who was also a member. In late 2000 I attended a meeting held by a xélan representative for local medical professionals.

EXHIBIT 6

6. I chose to participate in the supplemental long term care insurance program offered through xélan in 2001. The current insurance company issuing the policy is Doctors Benefit Insurance Company.

7. In 2002, I began participating in the supplemental disability insurance program; in part because I felt my primary disability insurance would not provide sufficient income to my family in the event that I was disabled.

8. It was my understanding that if I should die or terminate coverage before the seventh year of participation in a plan, my premiums paid into that plan would be forfeited.

9. I also understood that whatever I paid for this insurance was subject to the claims and expenses of the insurance company, and there was no guarantee of the amount of the experience refund I could receive after my seventh year of participation.

10. I chose to participate in the xélan supplemental insurance plans with the understanding that I was purchasing insurance. I did not believe I was putting money into a savings account.

11. I would like to continue my participation in these supplemental insurance programs, however the temporary restraining order placed on xélan and its associates will not allow this. I fear this may unfairly jeopardize the policies I hold. A current Certificate of Insurance (Attachment A) from DBIC and a statement of the approximate value of my policy (Attachment B) are attached to this declaration.

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

Bruce Felder

BRUCE K. FELDER

Executed on 11-17-04.

EXHIBIT 6

DOCTORS BENEFIT INSURANCE COMPANY, LTD.

Administrative Office : R.G. Hodge Plaza
PO Box 3261
Road Town, Tortola
British Virgin Islands

Executive Office: The Business Centre
Upton
St Michael, Barbados

SUPPLEMENTAL DISABILITY INSURANCE CERTIFICATE

CERTIFICATE NUMBER: 3172 **EFFECTIVE DATE:** 03/31/2004

MEMBER/INSURED: Bruce K. Felder **ISSUE AGE:** 54

GENDER: M **PREMIUM PAID:** $100,000

MINIMUM ANNUAL PREMIUM: $4000

COVERAGE:

Disability Income – "Own Occupation": Under the "Own Occupation" section of the Policy, a Member is considered to be disabled if and when he can no longer perform all of the duties of the Member's Regular Occupation for at least forty hours during a regular work week for at least fifty weeks during a calendar year. Moreover, said condition must have existed for at least 120 consecutive days and, if required by Us, must be attested to by an independent physician. Also, no coverage shall exist under the "Own Occupation" section if the insured has reached the age of 76 or if no premiums have been received within twelve months of incurring an Accident, manifesting a Sickness, or of filing a claim.

Maximum Annual Benefit: $150,000

Estimated Aggregate Lifetime Benefit: $236,500

Disability Income – "Any Occupation": Under the "Any Occupation" section of the Policy, a Member is considered to be disabled only if, in Our judgment after investigation, the Member cannot perform any of the duties of any occupation for wage or profit for any period of time. This includes consulting, part time employment of any nature, self-employment in any venture that is intended to produce any revenues, or any other activity by the Member that is intended to generate income for the Member or any other person. Moreover, said condition must have existed for at least 120 consecutive days and must be attested to by an independent physician. Also, no coverage shall exist under the "Any Occupation" section if the insured has reached the age of 65 or if no premiums have been received within twelve months of incurring an Accident, manifesting a Sickness, or of filing a claim.

Maximum Annual Benefit: $150,000

Estimated Aggregate Lifetime Benefit: $860,000

ELIMINATION PERIOD: 120 days for both "Own Occupation" and "Any Occupation"

Form No. SDI20035(Rev. 3-04)

ATTACHMENT A

EXHIBIT 6
ATTACHMENT A
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JLCo. DBIC Program Administration Tool

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The participant transaction and balance information reported on this website has been accumulated by Johnson Lambert & Co. from information provided by Management of Doctors Benefit Insurance Company and its other service providers. Johnson Lambert & Co. was not engaged to verify this information, including but not limited to, Johnson Lambert & Co. has not performed procedures to verify the existence and valuation of investments or other assets underlying the reported participant transactions and balances. Accordingly, Johnson Lambert & Co. has not audited or reviewed the accompanying information and, accordingly, does not express an opinion or any other form of assurance on it.

Transaction Information

Bruce K. Felder DDS **168307-3172** / Disability Policy

Home
Bruce K. Felder DDS
P.O. Box 10231
Pensacola, FL 32524

Date	Type	Total $	Effective $	# of Units	Unit Value
9/21/2003	Opening Balance	$125,767.07	$125,767.07	12576.71	$10.00
1/16/2004	Premium	$100,000.00	$94,000.00	8593.24	$10.94
11/16/2004	**Current Reserve**		**$221,114.51**	**21,169.95**	**$10.44**

Questions? Problems? Contact Doctors Insurance Services at 1-800-388-3722

EXHIBIT 6
ATTACHMENT B

Disability Trust
As of 11/16/2004

CLI NO	FC LNAME	F CLI LNAME	ACCT NO	CERT NO	INIT CREDIT YEAR	CREDIT YEAR	DATE REC'D	CK NO	CONTRIBUTION	DATE SENT BANK	DATE RECEI
18099	Davenport	B Felder	168307-3172	3172	2002	2002	01/08/2003	6369	115,000	01/14/2003	01/14,
	Davenport	B Felder	168307-3172	3172	2002	2003	01/02/2004	6851	100,000	01/02/2004	01/02,
								Total	215,000		
								Grand Total	215,000		

ATTACHMENT B

EXHIBIT 6
ATTACHMENT B
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Exhibit 7

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. L. DONALD GUESS, et al. Defendants.	)	Case No. 04-CV-2184W (AJB) DECLARATION OF STEPHEN R. CORSELLO

1. My name is Stephen R. Corsello and I am a resident of Chatham, New Jersey. I am a retired doctor of dental surgery, with a specialization in general dentistry.
2. I have been a member of xélan, the Economic Association of Health Professionals, since 2000.
3. In early 2000, I became aware of the xélan Foundation and decided to use it to establish a donor-advised account.
4. I chose to establish this donor-advised account with the xélan Foundation because it was administered by a dentist, and because colleagues had recommended it as a reliable program. I received a letter (Attachment A) dated December 19, 2000, from

EXHIBIT 7

Conner & Winters, legal counsel to the xélan Foundation, confirming the tax exempt status of the xélan Foundation.

5. My intent was to give back to the community through charitable donations throughout my retirement, and this account helped me to effectively manage my contributions. I understood that the xélan foundation was a tax exempt organization listed in Publication 78, and that my donations would be tax deductible.

6. We established the xélan Foundation account by donating a portion of 8,000 shares of Disney stock held for my wife's retirement. The stock was donated to the xélan Foundation, with a portion of its value returned to us in the form of a yearly annuity.

7. From the time we first contributed to the xélan Foundation, I understood that the assets we donated became the property of the Foundation, and that my role was exclusively one of an advisor. I understood that once the contribution was made, I relinquished all control over those assets, and they would not be returned to me. I have never expected, requested or received a refund of any portion of the assets donated to the xélan foundation. I have attached a Fund Advisor Statement (Attachment B) signed by myself at the inception of my Foundation account which shows my intent to relinquish control over my contributions.

8. This annuity is paid in early December of every year, and is valued at $17,600 per year.

9. This amounts to 8.8% of our yearly gross household income, though it is effectively 100% of my wife's portion of that income.

EXHIBIT 7

10. The annuity is primarily used to pay for a long-term care insurance policy through John Hancock Insurance, and to provide financial assistance to members of my wife's family.

11. My 2000 and 2001 personal income tax returns are being examined by the IRS as a result my association with xélan and its affiliates. When I was first contacted by the IRS, I was represented by Michael R. Suverkrubbe. Because of my concern that I was not being adequately represented, I retained Michael C. Durney to represent me before the IRS. I know that Mr. Durney's fees are being paid by the xélan Foundation and by DBIC.

12. Mr. Durney has advised me to fully cooperate with the IRS and to provide all documents requested and answer all questions raised with respect to my dealings with xélan. To my knowledge, I have supplied all materials requested by the IRS, and on the advice of my attorney I will continue to do so.

13. I have also been advised by Mr. Durney to consent to the extension of the statute of limitations with respect to the IRS examination of my returns.

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

Stephen R. Corsello
STEPHEN R. CORSELLO

Executed on November 17, 2004

EXHIBIT 7

CONNER & WINTERS

ATTORNEYS & COUNSELORS AT LAW

Conner & Winters, P.C.
3700 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4344
918-586-5711
Fax 918-586-8982
www.cwlaw.com

Writer's Direct Number
918-586-5690
Writer's Fax Number
918-586-8549
Writer's E-mail Address
hwill@cwlaw.com

December 19, 2000

Stephen R. Corsello, MD
Corsello Family Public Charity
22 H Canterbury Road
Chatham Township, NJ 07928

Re: **xélan** Foundation, Inc. -- Corsello Family Public Charity

Dear Dr. Corsello:

We have been asked by **xélan** Foundation, Inc. (the "Foundation") to advise you as to the Federal income tax status of the Foundation and the general tax effects of contributions to it.

Conner & Winters, A Professional Corporation, has acted as legal counsel to the Foundation, an Oklahoma not-for-profit corporation, in connection with (a) its formation and (b) the submission of an application on its behalf to the Internal Revenue Service ("IRS") for recognition of tax-exempt status under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), and recognition that it qualifies under Sections 509(a)(1) and 170(b)(1)(a)(vi) of the Code so as not to be a private foundation. The Internal Revenue Service has issued a letter (the "IRS Ruling Letter") dated March 20, 1998, to the effect that the Foundation is so qualified. A copy of such letter is attached hereto and made a part hereof. Although we are unable to render advice as to the tax effect of actions taken by any individual donor, at the request of and as legal counsel to the Foundation, we have set forth herein general rules regarding public charities. We advise you to review the general comments in this letter carefully and to seek your own legal or tax counsel with respect to your own particular transactions involving the Foundation.

EXHIBIT 7
ATTACHMENT A
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The Foundation was incorporated under the laws of the State of Oklahoma on December 18, 1997 as a not-for-profit corporation. The Directors of the Foundation have adopted bylaws ("Bylaws") and resolutions containing formal procedures (the "Resolutions") for the Foundation to function as a "donor-advised" "public" foundation pursuant to guidelines established by the Internal Revenue Service. The Bylaws and Resolutions require that the disposition of all contributions be for charitable, religious, educational or literary purposes, that no benefit inure to a donor except as may be permitted by law, and that the Directors have ultimate control over the charitable disposition of all donor-advised funds.

In rendering the opinions contained in this letter, we have examined the Certificate of Incorporation of the Foundation, its Bylaws and Resolutions adopted by the Directors of the Foundation, and representations made by the Directors to the Internal Revenue Service in connection with the Foundation's application for recognition under Sections 501(c)(3) and 509(a)(1) of the Code. We have relied on the continued existence of such Certificates, Bylaws and Resolutions and the truthfulness of such representations.

We have been advised that you made a contribution to the Foundation shortly after its formation and we understand that for accounting purposes a subaccount of the Foundation has been established in the name shown in the caption to this letter. References herein to "**xélan** Foundation" include the captioned account.

Opinions

Status of Foundation

Based on the IRS Ruling Letter, we are of the opinion that the Foundation is an organization described at Sections 501(c)(3) and 509(a)(1) of the Code, and that contributions made to the Foundation after December 18, 1997 will, subject to limitations under the Code applicable on a contributor-by-contributor basis (as described generally below), entitle the contributor to a deduction for a contribution made to a 501(c)(3) organization that is a publicly supported organization within the meaning of Section 509(a)(1) and Section 170(b)(1)(a)(vi) of the Code.

Contributions to Publicly Supported Charities.

With respect to contributions to the Foundation, please be advised as follows:

A contribution by an individual to the Foundation is a contribution to a public charitable organization described in Section 170(c)(2) of the Internal Revenue Code. The fair market value of property contributed, reduced by the value of indebtedness thereon, may be deducted on the donor's federal income tax return, subject, however, to limitations based on the type of property contributed and the donor's gross income, as described in the following paragraphs. To the

extent they are not used because of such limitations, deductions may be used (carried forward) by an individual contributor in determining such contributor's taxable income for the five taxable years succeeding the year of contribution.

(a) Cash contributions

Cash contributions to the Foundation by an individual are subject to a deduction limitation of 50% of the donor's adjusted gross income, without further reduction.

(b) Gifts of Appreciated Property

A contribution to the Foundation of property for which the fair market value of the property exceeds the donor's basis ("appreciated property"), which is not subject to a mortgage, will not give rise to taxable gain or loss to the donor.

Gifts to the Foundation of appreciated property generally are subject to a deduction limit of 30% of the donor's adjusted gross income, with further reduction as noted below. The contribution will be deductible either at the property's fair market value on the date of the gift or with a reduction depending on the kind of property contributed.

(i) "Ordinary income property" gifted to the Foundation is deductible to the extent of its fair market value less the amount that would be ordinary income if the property had been sold at the time of the gift. Ordinary income property includes inventory, capital assets held less than the required holding period for long-term capital gain treatment, and Section 306 stock.

(ii) "Capital gain property" gifted to the Foundation is deductible to the extent of the property's fair market value on the date of contribution. However, the deduction will be reduced by the potential long-term gain (*i.e.*, the amount of the appreciation) if the property is tangible personal property put to a use unrelated to the purpose or function of the Foundation, or if the taxpayer elects to disregard the special 30% capital gains limitation in favor of the 50% limitation.

(iii) Appreciated long-term capital gain property gifted to the Foundation will not be treated as a tax preference item for purposes of computing the Alternative Minimum Tax. However, the appreciation inherent in donations of inventory or other ordinary income property, short-term capital gain property, or certain gifts to private foundations will be subject to treatment as tax preference items.

(c) Gifts of Partial Interests in Property

Generally, a donor will be denied a charitable deduction for gifts to the Foundation if less than the taxpayer's entire interest is contributed. However, a gift of an undivided interest, a remainder interest in a personal residence or farm, a qualified conservation contribution, or a transfer of property to a pooled interest fund, charitable remainder trust or charitable lead trust which benefits the Foundation will qualify for a charitable deduction.

(d) Gift of Future Interest in Tangible Personal Property

No contribution deduction will be allowed for transfer of a future interest in tangible personal property, such as a painting, if there are any intervening (before the Foundation) interests in or rights to possession and control of the property held by persons unrelated to the donor.

Appraisals

Contributions of non-cash property valued in excess of $5,000, other than marketable securities, must be appraised.

Substantiation is required for both cash and non-cash contributions of $250 or more.

Taxation of Foundation Income

Generally, income on assets held by the Foundation will not be taxed to the Foundation, unless it is income from an activity regularly carried on that is not substantially related to the Foundation's tax-exempt purpose. Foundation income is not taxable to an individual donor.

xélan Foundation Programs

We are aware of several programs which the Directors of the Foundation may undertake in furtherance of the charitable activities of the Foundation. We have no reason to believe that a donor=s participation in any of the following programs will cause the foundation to lose its status under Sections 501(c)(3), 509(a)(1) and 170(b)(1)(a)(vi) of the Code. Although we have not examined documents with respect to any specific program and do not hereby render an opinion as to the tax effect with respect to any such program, we make the following general comments regarding the following possible activities of the Foundation:

1. Donor Advised Distributions.

It is anticipated that a donor may advise the Foundation of qualified charitable organizations and charitable activities which the donor would like the Foundation to support. No contribution will be accepted if the donor's contributions are conditioned on distributions being made to specific programs or charities. The Board of Directors of the Foundation may make an independent determination as to the appropriateness of such charitable contributions, and the donor=s advisory directives may be observed.

2. Charitable Services for the Foundation

An individual who renders services in connection with a charitable project of the Foundation may receive "reasonable" compensation for the value of services in accordance with guidelines of the Foundation's Board of Directors. The Foundation may fund reasonable compensation for charitable activities performed by a donor provided that the Board of Directors determines that the charitable programs and/or research activities meet the requirements established for charitable projects for the Foundation. Such compensation will be taxable as ordinary income to the recipient in the year received. Such compensation may be received by the individual as an independent contractor, or an employee, depending on the facts of each situation. A donor=s receipt of compensation or other benefits from the Foundation in excess of the reasonable value of services or other consideration provided to the Foundation can result in the imposition of penalties known as "intermediate sanctions." Accordingly, any such program must and will be reviewed individually to assure that reasonable standards have been observed.

3. Educational Loans

The Foundation may support an educational loan program whereby students may borrow college and graduate school tuition and related expenses for education in an area related to the Foundation=s charitable purposes. Each student must agree to a loan agreement under which he or she agrees to repay the loan, with interest, or alternatively provide one year of service to a charitable organization or charitable activity for each year of tuition received. Such agreement will be enforced. There can be no private inurement with respect to such a program.

4. Gift Annuities

The Foundation may engage in charitable gift annuity programs wherein the donor receives annuity income during his or her lifetime from the Foundation with any remaining funds at the death of the donor being retained by the Foundation or distributed for its charitable purposes.

5. Endowment Programs

The Foundation can assist the donor in establishing a large endowment for a major charitable, religious, educational or research project. Leveraged endowment programs may use life insurance wherein the Foundation purchases a paid-up life insurance policy on the life of the donor or other person naming a charitable organization and the Foundation as beneficiaries. Alternatively contributions may be accumulated over several years.

Scope of Opinion

We do not render an opinion as to the tax effect of any specific charitable or other activity of the Foundation or any donor with respect to the Foundation. This letter is intended only to advise you as to our opinion of the tax effects of the Foundation's status as determined by the Internal Revenue Service in the IRS Ruling Letter. Each donor should consult with his or her individual tax advisor with regard to his or her particular situation.

In addition to and not in limitation of the foregoing and taking into account Circular 230, it is our opinion that (except where the manner or treatment is stated to be uncertain) the tax treatment set out herein is more likely than not the proper treatment. The discussion and conclusions set forth in this letter are based upon our interpretation of the Internal Revenue Code as amended to date and existing Treasury Regulations, rules and case law. We can give no assurance that changes in such statutes or such Treasury Regulations or in the interpretation thereof will not affect the opinions herein expressed. In view of the changes made by tax legislation in recent years and the fact that a number of regulations and interpretations thereof have not been adopted or issued and by reason of the fact that recent legislation, as well as existing regulations and rules, will be subject to new and ongoing judicial and administrative interpretations, there can be no assurance that the discussions of tax matters set forth in this letter will not be subject to different interpretations.

The opinions herein are rendered for your sole benefit and are not to be used, circulated or otherwise referred to in connection with any other transactions.

Very truly yours,

CONNER & WINTERS,
A Professional Corporation

By:
Henry G. Will
Director and Shareholder

HGW/dst
Enclosure
[Enclosure is tax-exempt letter from IRS.]

EXHIBIT 7
ATTACHMENT A
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Fund Advisor Statement

By completing and signing this application, I hereby apply to participate in the xélan Foundation Program. I understand that the full amount of my initial contribution is tax deductible unless the deferred gift annuity election has been selected. Also, I understand that the contribution amount less fees (set-up fee, annual administration fee and marketing fee) will be deposited and maintained in a separate investment account. I hereby consent to the automatic deduction of the Annual Administration Fee from the Donor Advised Fund investment account.

I certify that I understand the nature of donor-advised funds and will conduct activities which satisfy the requirements of the Internal Revenue Code. I understand that in order to qualify as a deductible contribution for income tax purposes, the ownership and custody of my donated funds and property will be fully relinquished to the CORSELLO FAMILY PUBLIC CHARITY, a Donor Advised Fund of the xélan Foundation. These statements accurately represent my desires for my charitable fund at the xélan Foundation.

APPLICANT:

Stephen R. Corsello / [redacted]

Signature Date

STEPHEN R. CORSELLO / [redacted]

Name (please print)

* **After signing, please return with your personal check made out to the xélan Foundation to your xélan Financial Counselor.**

Attachment B

EXHIBIT 7
ATTACHMENT B
10

Exhibit 8

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. L. DONALD GUESS, et al. Defendants.	Case No. 04-CV-2184W (AJB) DECLARATION OF JOAN R. WHEELWRIGHT

1. My name is Joan R. Wheelwright and I am a resident of San Carlos, California.
2. I am a retired medical doctor, with a specialization in anesthesiology.
3. My recent tax returns are currently being examined by the Internal Revenue Service because of my involvement with xélan. I have complied with all demands for documentation submitted by the IRS.
4. In 1996, I became aware of the xélan Foundation and established a donor-advised account to assist in the management of my charitable giving.
5. My reason for establishing such an account was to provide long term support to the University of California at Berkeley and San Francisco, both of which I received degrees from.

EXHIBIT 8

6. Also by establishing this donor-advised account, I could make charitable donations more easily, simply by contacting the xélan Foundation and requesting a donation be made.

7. At the time I established the account, I was comfortable with the administrative fees charged by xélan.

8. From the beginning of my involvement with the xélan Foundation, I understood that the contributions I made were donations to a recognized charity and while I could express my preferences for the distribution of that contribution, the xélan Foundation had the right to distribute it as they saw fit. I understood that I could never retrieve my contributions to the foundation, and I neither expected nor held any desire to do so.

9. I initially contributed approximately $40,000 to the Foundation, of which approximately $20,000 was distributed to a school for Native American children in Montana. I intend to contribute the remaining funds to the University of California at the conclusion of this matter.

10. At the time of my initial contribution, I obtained a gift annuity from the Foundation, which pays me $2750 per month.

11. I use this annuity payment to pay a portion of my basic living expenses including housing, food, utilities and transportation.

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

Joan R Wheelwright

JOAN R. WHEELWRIGHT

Executed on Nov 17, 2004

EXHIBIT 8

Exhibit 9

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. L. DONALD GUESS, et al. Defendants.	)	Case No. 04-CV-2184W (AJB) DECLARATION OF WALTER B. HALL

1. My name is Walter B. Hall and I am a resident of Tiburon, California.
2. I received my Doctorate of Dental Surgery from the University of Maryland, and my Masters of Science in Dentistry from the University of Washington.
3. In 2002 I retired from the faculty of the University of the Pacific School of Dentistry after 43 years in teaching, including department chairs at the University of Oregon, the University of Washington and the University of the Pacific.
4. I am currently under examination by the IRS for my activities with xélan. On the advice of my attorney, I have turned over all documents and information in my

EXHIBIT 9

possession as requested by the IRS. I have also consented to the extension of the statute of limitations in this matter, as requested by the IRS.

5. When I was first contacted by the IRS, I was represented by Michael R. Suverkrubbe. Because of my concern that I was not being adequately represented, I retained Michael C. Durney to represent me before the IRS. I know that Mr. Durney's fees are being paid by the xélan Foundation and by DBIC.

6. In 1999 or 2000, I first heard Dr. Donald Guess speak about the xélan Foundation at a faculty event.

7. Soon thereafter, I established a donor-advised charitable account with the xélan Foundation.

8. In 1978 and again in 1982 my wife and I purchased homes in California with the intention of using them as housing for developmentally disabled and handicapped persons. We traded these two properties for one home in Santa Barbara, which we then contracted to the Deveraux Foundation, a Philadelphia based non-profit established around 100 years ago. The Deveraux Foundation used this home to provide housing and services to the disabled. Subsequently the Deveraux Foundation was unable to support the project and asked to be released from the contract.

9. In 2001, my wife and I donated the house to the xélan Foundation. After paying off the remaining mortgage on the house, our donation was valued at $220,000.

10. We receive a monthly charitable gift annuity of $1,329 from the xélan Foundation. This payment is a vital component of our monthly budget, which we would be hard-pressed to forgo.

EXHIBIT 9

11. From the beginning of our relationship with the xélan Foundation, I understood that any contributions to the xélan Foundation are charitable gifts, and that once made, the donations are under the control of the Foundation. My gifts to the xélan Foundation are charitable donations, not business deals. I do not expect or receive anything in return for my donations.

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

Walter B. Hall

WALTER B. HALL

Executed on 11/16/04.

EXHIBIT 9

Exhibit 10

INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
P. O. BOX 2508
CINCINNATI, OH 45201

DEPARTMENT OF THE TREASURY

Date: MAR 20 1998

XELAN FOUNDATION
C/O KATHERINE G COYLE
CONNER & WINTERS
15 E 5TH ST STE 3700
TULSA, OK 74103-4391

Employer Identification Number:
74-2851236
DLN:
17053022042008
Contact Person:
D. A. DOWNING
Contact Telephone Number:
(513) 241-5199

Accounting Period Ending:
December 31
Foundation Status Classification:
509(a)(1)
Advance Ruling Period Begins:
December 18, 1997
Advance Ruling Period Ends:
December 31, 2001
Addendum Applies:
No

Dear Applicant:

Based on information you supplied, and assuming your operations will be as stated in your application for recognition of exemption, we have determined you are exempt from federal income tax under section 501(a) of the Internal Revenue Code as an organization described in section 501(c)(3).

Because you are a newly created organization, we are not now making a final determination of your foundation status under section 509(a) of the Code. However, we have determined that you can reasonably expect to be a publicly supported organization described in sections 509(a)(1) and 170(b)(1)(A)(vi).

Accordingly, during an advance ruling period you will be treated as a publicly supported organization, and not as a private foundation. This advance ruling period begins and ends on the dates shown above.

Within 90 days after the end of your advance ruling period, you must send us the information needed to determine whether you have met the requirements of the applicable support test during the advance ruling period. If you establish that you have been a publicly supported organization, we will classify you as a section 509(a)(1) or 509(a)(2) organization as long as you continue to meet the requirements of the applicable support test. If you do not meet the public support requirements during the advance ruling period, we will classify you as a private foundation for future periods. Also, if we classify you as a private foundation, we will treat you as a private foundation from your beginning date for purposes of section 507(d) and 4940.

Grantors and contributors may rely on our determination that you are not a private foundation until 90 days after the end of your advance ruling period. If you send us the required information within the 90 days, grantors and contributors may continue to rely on the advance determination until we make a final determination of your foundation status.

EXHIBIT 10

XELAN FOUNDATION

If we publish a notice in the Internal Revenue Bulletin stating that we will no longer treat you as a publicly supported organization, grantors and contributors may not rely on this determination after the date we publish the notice. In addition, if you lose your status as a publicly supported organization, and a grantor or contributor was responsible for, or was aware of, the act or failure to act, that resulted in your loss of such status, that person may not rely on this determination from the date of the act or failure to act. Also, if a grantor or contributor learned that we had given notice that you would be removed from classification as a publicly supported organization, then that person may not rely on this determination as of the date he or she acquired such knowledge.

If you change your sources of support, your purposes, character, or method of operation, please let us know so we can consider the effect of the change on your exempt status and foundation status. If you amend your organizational document or bylaws, please send us a copy of the amended document or bylaws. Also, let us know all changes in your name or address.

As of January 1, 1984, you are liable for social security taxes under the Federal Insurance Contributions Act on amounts of $100 or more you pay to each of your employees during a calendar year. You are not liable for the tax imposed under the Federal Unemployment Tax Act (FUTA).

Organizations that are not private foundations are not subject to the private foundation excise taxes under Chapter 42 of the Internal Revenue Code. However, you are not automatically exempt from other federal excise taxes. If you have any questions about excise, employment, or other federal taxes, please let us know.

Donors may deduct contributions to you as provided in section 170 of the Internal Revenue Code. Bequests, legacies, devises, transfers, or gifts to you or for your use are deductible for Federal estate and gift tax purposes if they meet the applicable provisions of sections 2055, 2106, and 2522 of the Code.

Donors may deduct contributions to you only to the extent that their contributions are gifts, with no consideration received. Ticket purchases and similar payments in conjunction with fundraising events may not necessarily qualify as deductible contributions, depending on the circumstances. Revenue Ruling 67-246, published in Cumulative Bulletin 1967-2, on page 104, gives guidelines regarding when taxpayers may deduct payments for admission to, or other participation in, fundraising activities for charity.

You are not required to file Form 990, Return of Organization Exempt From Income Tax, if your gross receipts each year are normally $25,000 or less. If you receive a Form 990 package in the mail, simply attach the label provided, check the box in the heading to indicate that your annual gross receipts are normally $25,000 or less, and sign the return.

EXHIBIT 10
EXHIBIT 10

If a return is required, it must be filed by the 15th day of the fifth

month after the end of your annual accounting period. A penalty of $20 a day is charged when a return is filed late, unless there is reasonable cause for the delay. However, the maximum penalty charged cannot exceed $10,000 or 5 percent of your gross receipts for the year, whichever is less. For organizations with gross receipts exceeding $1,000,000 in any year, the penalty is $100 per day per return, unless there is reasonable cause for the delay. The maximum penalty for an organization with gross receipts exceeding $1,000,000 shall not exceed $50,000. This penalty may also be charged if a return is not complete. So, please be sure your return is complete before you file it.

You are not required to file federal income tax returns unless you are subject to the tax on unrelated business income under section 511 of the Code. If you are subject to this tax, you must file an income tax return on Form 990-T, Exempt Organization Business Income Tax Return. In this letter we are not determining whether any of your present or proposed activities are unrelated trade or business as defined in section 513 of the Code.

You are required to make your annual return available for public inspection for three years after the return is due. You are also required to make available a copy of your exemption application, any supporting documents, and this exemption letter. Failure to make these documents available for public inspection may subject you to a penalty of $20 per day for each day there is a failure to comply (up to a maximum of $10,000 in the case of an annual return).

You need an employer identification number even if you have no employees. If an employer identification number was not entered on your application, we will assign a number to you and advise you of it. Please use that number on all returns you file and in all correspondence with the Internal Revenue Service.

This determination is based on evidence that your funds are dedicated to the purposes listed in section 501(c)(3) of the Code. To assure your continued exemption, you should keep records to show that funds are spent only for those purposes. If you distribute funds to other organizations, your records should show whether they are exempt under section 501(c)(3). In cases where the recipient organization is not exempt under section 501(c)(3), you must have evidence that the funds will remain dedicated to the required purposes and that the recipient will use the funds for those purposes.

If we said in the heading of this letter that an addendum applies, the addendum enclosed is an integral part of this letter.

Because this letter could help us resolve any questions about your exempt status and foundation status, you should keep it in your permanent records.

EXHIBIT 10

XELAN FOUNDATION

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter.

Sincerely yours,

Ellen Murphy
Acting

District Director

Enclosure(s):
Form 872-C

EXHIBIT 10

Exhibit 11

INTERNAL REVENUE SERVICE
P. O. BOX 2508
CINCINNATI, OH 45201

DEPARTMENT OF THE TREASURY

Date: MAY 06 2002

XELAN FOUNDATION
401 W A ST STE 2210
SAN DIEGO, CA 92101

Employer Identification Number:
74-2861236
DLN:
17053075849072
Contact Person:
YVONNE LIGGETT ID# 31296
Contact Telephone Number:
(877) 829-5500
Our Letter Dated:
MARCH 1998
Addendum Applies:
NO

Dear Applicant:

This modifies our letter of the above date in which we stated that you would be treated as an organization that is not a private foundation until the expiration of your advance ruling period.

Your exempt status under section 501(a) of the Internal Revenue Code as an organization described in section 501(c)(3) is still in effect. Based on the information you submitted, we have determined that you are not a private foundation within the meaning of section 509(a) of the Code because you are an organization of the type described in section 509(a)(1) and 170(b)(1)(A)(vi).

Grantors and contributors may rely on this determination unless the Internal Revenue Service publishes notice to the contrary. However, if you lose your section 509(a)(1) status, a grantor or contributor may not rely on this determination if he or she was in part responsible for, or was aware of, the act or failure to act, or the substantial or material change on the part of the organization that resulted in your loss of such status, or if he or she acquired knowledge that the Internal Revenue Service had given notice that you would no longer be classified as a section 509(a)(1) organization.

You are required to make your annual information return, Form 990 or Form 990-EZ, available for public inspection for three years after the later of the due date of the return or the date the return is filed. You are also required to make available for public inspection your exemption application, any supporting documents, and your exemption letter. Copies of these documents are also required to be provided to any individual upon written or in person request without charge other than reasonable fees for copying and postage. You may fulfill this requirement by placing these documents on the Internet. Penalties may be imposed for failure to comply with these requirements. Additional information is available in Publication 557, Tax-Exempt Status for Your Organization, or you may call our toll free number shown above.

If we have indicated in the heading of this letter that an addendum applies, the addendum enclosed is an integral part of this letter.

Letter 1050 (DO/CG)

EXHIBIT 11

XELAN FOUNDATION

Because this letter could help resolve any questions about your private foundation status, please keep it in your permanent records.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

Steven T. Miller
Director, Exempt Organizations

Letter 1050 (DO/CG)

EXHIBIT 11

Exhibit 12

WILLIAMS COULSON
ATTORNEYS AT LAW

15TH FLOOR • TWO CHATHAM CENTER • PITTSBURGH, PA 15219
(412) 454-0200 • FAX: (412) 281-6622

MICHAEL E. LLOYD
(412) 454-0225

October 1, 2003

Re: The xélan Supplemental Disability Trust

Dear Dr.

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).

EXHIBIT 12

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.

EXHIBIT 12

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 xfilan 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.

EXHIBIT 12

"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.

EXHIBIT 12

IV. Facts.

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

2. The Company is a participating member of xélan.

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 xélan.

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.

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 nonrelated 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 seem less abstruse 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 dicta 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 are 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

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 accrualbility 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.

Xélan, 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 xélan qualifies as an association that can purchase group insurance in every state. Similarly, a trust formed by xélan 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 xélan 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 contracts 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 employer/member belongs to xélan. 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

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 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.

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

[redacted]

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.

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

EXHIBIT 12

Exhibit 13

DOCTORS BENEFIT INSURANCE COMPANY, LTD.

Group Supplemental Disability Income Insurance Policy

Issued Specifically To:

Xélan Supplemental Disability Trust
An Association Group Insurance Trust

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Doctors Benefit Insurance Company, Ltd.

Group Supplemental Disability Income Policy

The Group Supplemental Disability Income Policy ("Policy") is a legal contract between the insured, the **xélan** Supplemental Disability Trust ("Owner") and the **Doctors Benefit Insurance Company, Ltd.** ("Company"). In this Policy, the words "We", "Our" and "Us" refer to **Doctors Benefit Insurance Company, Ltd.** The words "You" and "Your" refer to the **xélan** Supplemental Disability Trust. The words "Member" and "Insured" refer to an individual participant in the **xélan** Supplemental Disability Trust.

Coverage Provided by This Insurance

We agree to

- Insure Your Members against an "Own Occupation" Disability due to Accident or Sickness covered by this Policy, and
- Insure Your Members against an "Any Occupation" Disability due to Accident or Sickness covered by this Policy, and
- Pay the benefits provided in the Certificate of Insurance to any disabled Member.

We agree to do this in consideration of

- Payment of certain premiums on behalf of Your Members.
- The statements made in Your Member's enrollment documents.

Ten-Day Right to Examine This Insurance

If You are not satisfied with this Policy, it may be returned to Us within 10 days after the date it was delivered. We will promptly refund all premiums paid.

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DEFINITIONS

1. **CERTIFICATE OF INSURANCE** means the Certificate Of Insurance delivered to each insured Member which is the legal contract between You, Your Member and Us.

2. **MEMBER or INSURED** means an employee participant in the xélan Supplemental Disability Trust

3. **ACCIDENT** means an accidental bodily injury that occurs after the Certificate of Insurance Effective Date and while this Policy is in force. An intentional self-inflicted injury is not an Accident for purposes of this Policy.

4. **SICKNESS** means a sickness or disease which first manifests itself after the Certificate of Insurance Effective Date and while this Policy is in force. The word **MANIFESTS** means a condition that becomes known to Your Member by the presence of symptoms that would cause an ordinarily prudent person to seek medical attention.

5. **DATE OF CERTIFICATE ISSUE** means the date We receive the first premium check for the participating Member.

6. **CERTIFICATE OF INSURANCE EFFECTIVE DATE**

   The date We receive payment of the first premium check under the premium plan the Member chooses, provided that the statements made in the Member's enrollment documents remain true and there has been no material change in the information provided by the statements as of that date.

7. **DETERMINING DISABILITY**

   Under the "Own Occupation" section of this Policy, a Member is considered to be disabled if and when he can no longer perform all of the duties of the Member's Regular Occupation for at least forty hours during a regular work week for at least 50 weeks during a calendar year. Moreover, said condition must have existed for at least 120 consecutive days and, if required by Us, must be attested to by an independent physician. Also, no coverage shall exist under the "Own Occupation" section if the Member has reached age 76 or if no premiums have been received within twelve months of incurring an Accident, manifesting a Sickness, or of filing a claim.

   Under the "Any Occupation" section of this Policy, a Member is considered to be disabled only if, in Our judgement after investigation, the Member can not perform any of the duties of any occupation for wage or profit for any period of time. This includes consulting, part-time employment of any nature, self-employment in any venture that is intended to produce any revenues, or any other activity by the member that is intended to generate income for the Member or any other person. Moreover, said condition must have existed for at least 120 consecutive days and must be attested to by an independent physician. Also, no coverage shall exist under the "Any Occupation" section if the Member has reached the age of 65 or if no premiums have been received within twelve months of incurring an Accident, manifesting a Sickness, or of filing a claim.

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8. MEMBER'S REGULAR OCCUPATION means the Regular Occupation in which a Member is engaged at the Certificate of Insurance Effective Date. If a Regular Occupation is limited to a professionally recognized specialty within the scope of a Member's license or degree, We will consider that specialty to be the Member's Regular Occupation.

9. MEMBER'S EXPERIENCE ADJUSTED ACCOUNT shall be based on a percentage of the premiums paid (as specified in the Certificate) reduced by claims paid on behalf of the Member, and as adjusted each year for the investment experience of the Company, the claims experience of the entire pool of Insureds under the Policy, policy lapses, surrenders, settlements, and the mortality experience of insured Members.

BENEFITS

10. MAXIMUM BENEFIT

All Insureds shall be covered by a primary disability income insurance policy. The maximum benefit under this Policy shall be an annual amount not to exceed 40% of the net medical practice income of the insured.

11. PAYMENT OF BENEFITS ONCE DISABILITY OCCURS

The minimum benefit for Your Member's "Own Occupation" disability is 110% of Premiums paid by Your Member. Once disability occurs under the "Own Occupation" section pursuant to paragraph number 7 above, annual disability payments will commence according to the benefit amount specified in the Certificate and shall continue until all funds have been expended from the Member's Experience Adjusted Account. When this account has been fully expended, subject to the 110% minimum referred to above, there will be no other benefit paid.

The minimum benefit for Your Member's "Any Occupation" disability is 400% of Premiums paid by Your Member, less any benefits paid to Your Member under the "Own Occupation" benefit of this insurance. Once disability occurs under the "Any Occupation" section, annual disability payments will commence according to the benefit amount specified in the Certificate and shall continue until the amount shown on the Certificate has been paid to the insured. Once these payments have been made, no other benefit will be paid.

The benefits payable as described in this paragraph 11 shall be adjusted by, the Experience Adjusted "Factor". This Factor shall be determined periodically based on the experience of the total insured Members for such gains and losses as, investment experience, lapses, settlements, experience refunds, the mortality experience of all insured Members and the "any occupation" experience of all insured Members.

All Benefits terminate at death of Member, to include "Own Occupation" coverage, "Any Occupation" coverage, and Experience Adjusted Refund Benefit.

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12 EXPERIENCE ADJUSTED REFUND BENEFIT

Subject to the experience of the total pool of Insureds under the Policy, and subject to the payment of the required minimum payments as described in paragraph 15 below, a premium payor shall be eligible for an Experience Adjusted Refund Benefit equal to the Member's Experience Adjusted Account described in paragraph 9 above following discontinuance of the payment of premiums. The Experience Adjusted Refund Benefit shall be paid in a single lump sum.

13. TERMINATION OF EXPERIENCE ADJUSTED REFUND BENEFIT

If the Minimum Premiums are not paid pursuant to paragraph 15 below, then no Experience Adjusted Refund Benefit shall be payable. At the death of the Insured, no Experience Adjusted Refund Benefit or any other benefit will be payable and the disability insurance on the Member will terminate.

PREMIUM PAYMENTS

14. PAYMENT OF PREMIUMS

Contributions are payable at least annually to the **xélan** Supplemental Disability Trust or as directed by the Trustee, as set forth in the Certificate. The Trust will, in turn, remit all premiums to the Company.

The maximum annual premium is limited to 40% of a member's established net practice income

The minimum annual premium that must be paid to keep this insurance in force is $4,000. There is a grace period of 30 days after the annual renewal date to pay the premium.

Premium payments shall not be required during any period in which an insured is disabled for purposes of this Policy.

15. MINIMUM PREMIUM PAYMENTS REQUIRED

Unless a disability of the insured occurs, premiums must be paid for a seven (7) year period or until the Member reaches age 65, whichever comes first. For Members who are age 62 or older at the time their coverage begins, premiums must be paid for at least three (3) years in order to be eligible for the Experience Adjusted Refund Benefit. If the premiums are not paid for this required period, the Experience Adjusted Refund Benefit described in paragraph number 12 will not be available. At the option of the Member, premiums may be paid for more than the required period. The minimum annual premium is $4,000, except during any period of disability where no premium payments are required.

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INVESTMENT OF RESERVES

16. INVESTMENT AUTHORITY

We retain the sole right and responsibility to invest the policy reserves.

CLAIMS AND GENERAL PROVISIONS

17. TIME OF LOSS

Disability must begin while the Member's Certificate of Insurance is in force.

18. NOTICE OF CLAIM

We must receive written notice of a claim within 120 days after a disability begins, or as soon as reasonably possible.

Notice is sufficient if it identifies the Member and is sent to Our home office at the following address:

Home Office
Doctors Benefit Insurance Company, Ltd.
Chelston Park
Building No. 2
Collymore Rock
St. Michael, Barbados

19. CLAIM FORM

After We receive a written notice of disability, We will send You and Your member our proof of loss forms within 15 days. If We do not, it will be sufficient if Your Member sends Us a written statement of the nature and extent of his loss within the time set forth below.

20. WRITTEN PROOF OF LOSS

We must receive written proof of loss within 180 days after the date of disability begins. If that is not reasonably possible, it will not affect Your Member's claim. But unless Your Member is legally incapacitated, We must be furnished written proof within one year.

We can require reasonable proof of:

1. Your Member's "Own Occupation" disability and/or

2. Your Member's "Any Occupation" disability

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This may include statements from the Member, any Physician who attends the Member or examination by any Physician chosen by us.

21. PAYMENT OF CLAIMS

After We receive satisfactory proof of a Member's disability, We will pay any benefit due under the terms of this Policy for payment set forth in this Policy and in the Certificate of Insurance pertaining to that Member.

22. PHYSICAL EXAMINATIONS AND ADJUSTMENT EXPENSES

If a claim is filed, We may, at our option, conduct a claims evaluation investigation of the nature of the claimed disability. At Our expense, We can have a Member examined by a physician of Our choice. We may do so as often as is reasonable while a claim continues. If the claim involves a disability for "Any Occupation", the evaluation whether the Member is capable of performing any duties of any occupation for any period of time shall be conducted at the Member's expense by an adjuster and/or physician of Our choice. We reserve the right to reevaluate any "Any Occupation" claims from time to time, not more often than each 30 days.

23. LEGAL ACTION

Legal Actions cannot be brought against us before 180 days from the date written proof of loss is provided to us. Jurisdiction and venue shall be Barbados unless changed by the mutual written agreement of the Insured, You and Us.

24 WHEN COVERAGE IS EFFECTIVE

Coverage for each Member goes into force at 12:01 AM on the effective date shown on the Certificate of Insurance. It will remain in force for as long as a Member continues to pay premiums, provided however, that coverage for a Member under the "Any Occupation" disability benefit will terminate after the Member stops paying the minimum premium or at age 65, whichever comes first, and provided further, that coverage under the "Own Occupation" disability benefit will terminate after the Member stops paying the minimum premium or at age 76. On the day the insurance ends, it will cease to be in force at 12:01 AM.

25. CERTIFICATE OF INSURANCE CHANGES

The Certificate of Insurance and its provisions can only be changed in writing and such writing must be signed by an authorized Company officer and attached to the Certificate of Insurance. No agent can change the Certificate of Insurance or waive any Certificate of Insurance or Policy provisions.

26. SETTLEMENT OPTIONS

The Insured shall receive disability benefits as a monthly payment as outlined on the Certificate until all benefits have been expended.

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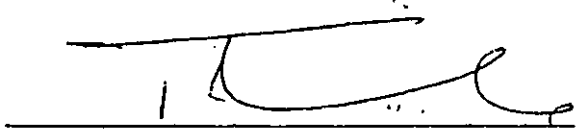
27. GUARANTEE REGARDING RENEWAL

This Policy and the Certificates are guaranteed as to renewability; provided that We may increase premium rates uniformly for all persons insured based on experience under this Policy.

28. MISCELLANEOUS

The effective date of this policy shall be January 1, 2003

Agreed to and legally binding on **Doctors Benefit Insurance Company, Ltd.** when executed below.



Authorized Signatory

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Exhibit 14

MICHAEL C. DURNEY
LAW OFFICES
1072 THOMAS JEFFERSON STREET, N.W.
WASHINGTON, D.C. 20007
(202) 965-7744 FAX: (202) 965-7745

November 10, 2004

DELIVERED VIA MESSENGER

The Honorable Eileen J. O'Connor
Assistant Attorney General
Tax Division
Department of Justice
9th and Constitution Avenue
Washington, D.C. 20530

Re: The xélan Receivership Proceeding
U.S. v. L. Donald Guess, et al.
USDC SD CA, Case No. 04-CV-2184W(AJB)

Dear Mrs. O'Connor:

I am writing you on behalf of several hundred of my clients that have either made contributions to the xélan Foundation, Inc. ("Foundation") or purchased supplemental insurance, principally disability, from Doctors Benefit Insurance Company ("DBIC").

As you know, the Department of Justice Tax Division, in connection with the United States Attorney's Office in San Diego, California, sought and obtained a temporary restraining order ("TRO") against the Foundation and DBIC, as well as a number of individuals and other entities. This TRO shut down the operations of all organizations and persons subject to the TRO. At the same time, a search warrant was executed against the San Diego premises of the Foundation, several xélan entities, and the independent operator of xélan entities in Chapter 11 proceedings, resulting in a seizure of all of its records.

These actions have produced the following results, among others:

1. No disability payments can be made by DBIC to its insureds, my clients, who have been disabled and are entitled to monthly payments which is the principal, if not exclusive, source of income to them;

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2. No annuity payments can be made to persons, my clients, who obtained annuities as a part of their charitable contributions to the Foundation;

3. Information can no longer be obtained from either the Foundation or DBIC necessary to defend the hundreds of IRS examinations of my clients;

4. No payments can be made to lawyers responsible for defending the Foundation or DBIC against unproven charges raised by the government;

5. No payments can be made to lawyers retained by the Foundation and DBIC to defend medical professionals, who have in good faith and on substantial authority, either made contributions to the Foundation or purchased supplemental disability, long-term care, medical savings, or professional malpractice insurance from DBIC; and

6. Chapter 11 proceedings involving four xélan entities will be terminated entirely, despite the fact that: (1) a Plan of Reorganization is pending, which provides for full payment of creditors; (2) an independent operator has been in control for several months with the approval of the government; and (3) an adversary proceeding as been filed to obtain a judicial resolution as to whether xélan programs are in fact abusive tax shelters, as claimed by the government.

This TRO was obtained *ex parte* without one of the underlying charges, questions, or complaints, ever being reviewed or substantiated or in court. No assessment of tax has been made, no jeopardy assessment asserted, no criminal charge brought, or any other action taken whatsoever that would warrant this freeze of approximately $560 million dollars in tax-exempt organization and insurance company assets.

xélan was created over thirty years ago by a dentist, L. Donald Guess, who wanted to bring financial assistance and order to the medical profession. Medical professionals, by nature, are excellent at medical care, but often struggle with the financial side of running a medical practice. The core of xélan is a membership organization that provides financial and estate planning, retirement plan and insurance advice, and the opportunity to pursue charitable endeavors by means of a publicly supported charitable foundation. It is not a mob-controlled organization or a sponsor of terrorist activities. While the government asserts that three of its programs constitute abusive tax shelters, which is vigorously being disputed, xélan has and continues to provide insurance, pension, and investment services to doctors. These programs constitute a substantial part of xélan's business and any tax benefits are not being

disputed by the government. In addition, one of the three programs that is disputed, the Welfare Benefit Trust, was voluntarily terminated by xélan after the issuance of final Treasury Regulations in 2001.

The government's attack on xélan began with a routine IRS examination of Dr. David M. Cohen, a dentist living in Hawthorne, Florida, in 2001. Dr. Cohen had made contributions to the xelan Foundation, Inc.—a donor-advised organization that was and still is tax-exempt under Section 501(a) as a Section 501(c)(3) organization and listed in Treasury Publication 78, entitling Dr. Cohen to a deduction under Section 170 of the Code. Dr. Cohen's professional corporation had also purchased supplemental disability from a predecessor entity of DBIC the cost of which qualified as a Section 162 business expense deduction.

This examination of Dr. Cohen spawned numerous summons actions by the IRS seeking the names of all contributors to the Foundation and purchasers of supplemental insurance from DBIC or its predecessors. This was done before there had been any fair evaluation of the Foundation or the DBIC insurance.

Additionally, the IRS examined the operations of the Foundation and obtained, under disputed circumstances, a list of donors to the Foundation. This list was turned over to the IRS Abusive Trust Coordinator in Florida, and became the source of the hundreds of IRS examinations of donors to the Foundation, several hundred of which are my clients. The status of the Foundation is presently under consideration by the Appeals Division of the IRS. To date, its tax-exempt status has not been revoked.

As a side note, a lawsuit was filed against the IRS based on the claim that IRS agents improperly obtained this list of the Foundation's donors. I mention this only because this suit has been cited by the government as an example of improper efforts to impede the IRS in its examinations.. The suit was dropped following receipt by the attorneys involved in the suit of an anonymous death threat against them and their families stating, "Stop representing xélan against the IRS before you and your family get hurt." The threats were promptly reported to the U.S. Attorney's Office, and we understand are currently under investigation by the FBI.

This brings us to the current receivership proceeding. We understand that the TRO was sought because of the belief by government agents and attorneys that unspecified amounts of money had been improperly spent or secreted by the Foundation and DBIC. In fact, none of this occurred, as a telephone call to any one of several attorneys involved in this case could have readily demonstrated.

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The only payments that have been made since at least April of this year, the first time that I became personally aware of the operations of these entities, have been for regular business operations and reasonable legal fees. Moreover, I might add, the legal fees have been paid to lawyers whose principal goal has been to satisfactorily answer any and all legitimate claims or questions of the government relating to the operations and correct tax consequences of the operations of the Foundation and DBIC. All of this is being exhaustively documented and will be submitted to the district court in the receivership proceeding.

In the government's receivership Complaint, a charge was made that legal fees were being paid to lawyers, who were obstructing these IRS examinationsMuch to xélan's credit, I was retained because it was believed that the prior attorney representing the donors had not been timely responding to the IRS. My representation of these medical professionals began in April of this year. It has been my uniform practice to advise every one of my clients to fully cooperate with the examining agent, to turn over all documents they have relating to xélan, to answer all questions of the IRS relating to xélan, and to extend the statute of limitations with respect to these examinations. There has been no obstruction of these IRS examinations of any kind under my representation.

Many of the questions raised by the IRS in these examinations can only be answered by me obtaining that information from either the Foundation or DBIC. The seizure of the Foundation's records and the freezing of DBIC's operations has brought this to a halt. My clients are now facing possible tax adjustments that they cannot defend against by reason of this receivership.

None of the "irreparable harm" asserted in the government's complaint exists as required by Rule 65 (b). In fact, irreparable harm is being sustained by the defendant entities and the affected medical professionals by reason of this action you have taken. I have been involved in civil and criminal tax controversies both in behalf of the Department of Justice and of taxpayers for 36 years. This action you have taken against the xélan organization is extraordinary and unprecedented. It is also unwarranted.

The reason I am writing you at this point is to request in the strongest terms that you personally reconsider the propriety of the action you have taken. I have discussed the matter with Stuart Gibson and have been advised that the matter is out of his hands and in those of the temporary receiver and the judge. I believe you have a personal responsibility as head of the Tax Division to see that justice is done on an immediate basis, and not at some point down the road when a court ultimately determines whether the various charges that are the subject of this receivership action are accurate.

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As you must know, this action filed by the government is unprecedented. I am personally amazed that a TRO freezing the assets and operations of a charitable organization and insurance company was issued on an *ex parte* basis. However, having sat in your chair, albeit on an acting basis, I know the power of a filing by the Department of Justice. It is this power, and the responsibility that comes with the exercise of that power, that makes it incumbent upon you to make certain that you have a proper basis for what you are doing.

The irony of all this is that the basic operations of the Foundation and DBIC, and their tax consequences, are all supported by substantial authority. If the government has questions about these operations, or disputes the authority underlying the tax consequences of such operations, these questions and disputes can be sorted out in customary fashion. The *Pettinger* case is pending in the district court in Wyoming that will test the *bona fides* of the supplemental insurance. The *Viralam* case is docketed in the Tax Court with a March 2005 trial date that will review the tax deductibility of a contribution to the Foundation. The bankruptcy adversary proceeding to determine the validity of tax benefits was expected to proceed expeditiously through discovery and trial. Hundreds of cases that are in the IRS examination pipeline, my clients, raise identical issues.

In light of this pending judicial review of the basic programs of the Foundation and DBIC, and absolutely no evidence whatsoever of any "wasting" of assets, how can you possibly justify the seizure of records and freeze placed on these organizations? In addition to preventing my clients from getting periodic disability payments, or medical payments, or meeting malpractice claims from DBIC, or allowing my clients to receive periodic annuity payments from the Foundation, you have cut off the ability of both organizations to defend themselves through legal representation, and have cut off the legal representation afforded the doctors in defending their actions before the IRS. I do not think this constitutes due process by any stretch of the imagination.

At present, in order to adequately respond to your filing, the matter will not be heard until December 1st or 2nd. The court will obviously need adequate time to review the matter. Without your intervention, this deprivation of due process will continue and all concerned will suffer unnecessary, if not irreparable harm.

Despite what you may have been told, xélan is not promoting abusive tax shelters such as has been charged of KPMG or Ernst & Young. In those instances, the organizations made no effort to defend the propriety of the products they offered. By contrast, the Foundation and DBIC strenuously defend their programs, to the extent of defending at their cost the tax treatment claimed by their program participants. We should be allowed to fairly and adequately continue this defense without an

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unwarranted seizure of records or freeze of operations. Due process requires nothing less.

My request to you is this: Please immediately re-evaluate the propriety of the government's actions. We can demonstrate that the concerns that led to this receivership filing were baseless. The lawyers involved in representing xélan are reputable members of the bar and most have extensive prior government experience. There is no unnecessary or obstructive legal action being taken by reason of legal fees paid by either the Foundation or DBIC.I know this request is unusual, but the actions taken are extraordinary and unprecedented. I also request the opportunity of meeting with you as soon as possible to discuss this and answer any questions you may have.

Sincerely yours,

MICHAEL C. DURNEY

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of November, 2004, a true and correct copy of the foregoing **APPLICATION FOR INJUNCTIVE RELIEF PURSUANT TO 26 U.S.C. § 6213(a) AND COUNTERCLAIM** was served by United States Mail, postage paid, and electronically by email, upon the following:

Darrell D. Hallett, Esq. Chicoine & Hallett, P.S. Waterfront Place One, Suite 803 1011 Western Avenue Seattle, Washington 98104 Attorney For Defendants: DONALD L. GUESS	Don Rez Sullivan Hill Lewin Rez & Engel 550 West C Street Suite 1500 San Diego, CA 92101 Counsel for the Receiver
Michael L. Lipman, Esq. Coughlan, Semmer & Lipman, LLP 501 West Broadway, Suite 400 San Diego, CA 92101 Attorney For Defendants: XÉLAN INVESTMENT SERVICES, INC. XÉLAN ANNUITY COMPANY, INC. XÉLAN ADMINISTRATIVE SERVICES, INC.	C. James Frush Gordon Thomas Honeywell One Union Square 600 University 21st Floor Seattle, WA 98101 Counsel for David Jacquot
Thomas Pollack Irell & Manella LLP 1800 Avenue of the Stars, Suite 900 Los Angeles, CA 90067-4276 Counsel for Doctors Benefit Insurance Company, Doctors Benefit Holding Company and Monte Mellon	Bruce Zagaris Berliner Corcoran & Rowe 1011 - 17th Street NW, Suite 1100 Washington, D.C. 20036-4798 Counsel for Chris Evans
Miriam Fisher James Mastracchio Morgan, Lewis, Bockius, LLP 1111 Pennsylvania Avenue, NW Washington, DC 20004 Counsel for Les Buck, G. Thomas Roberts, and Doctor's Insurance Services, Inc.	Frank Johnson 402 W. Broadway, 27th Floor San Diego, CA 92101 Counsel for xélan Foundation, Inc. and xélan, the Economic Association of Healthcare Professionals
John Morrell Higgs, Fletcher & Mack, LLP 401 West A Street, Ste. 2600 San Diego, CA 92101 Proposed Bankruptcy Counsel for xélan, Inc., xélan Pension Services, Inc., xélan Financial Planning, Inc., and Pyramidal Funding Systems, Inc., dba xélan Insurance Services	Henry Will, Esq. Conner & Winters 3700 First Place Tower 15 East Fifth Street Tulsa, Oklahoma 74103-4344 Counsel for xélan Foundation, Inc.

Faith Devine, Esq. Assistant United States Attorney Office of the United States Attorney 880 Front Street, Room 6293 San Diego, CA 92101-8893 Counsel for the United States	Stuart D. Gibson, Esq. Tax Division U.S. Department of Justice P.O. Box 227 Washington, DC 20044 Counsel for the United States

Michael C. Durney