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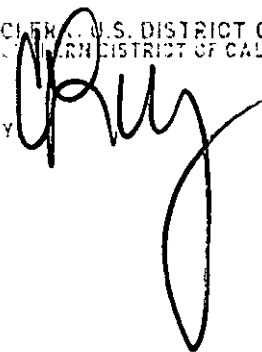


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SOUTHERN DISTRICT OF CALIFORNIA

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

CASE NO. 04CV2184-LAB (AJB)

Plaintiff,

**ORDER DENYING PRELIMINARY
INJUNCTION**

vs.

L. DONALD GUESS, et al.,

Defendants.

On December 3, 2004, the Court convened the scheduled hearing to determine whether the Temporary Restraining Order ("TRO") entered November 3, 2004 by the Honorable Thomas J. Whelan should be continued as a Preliminary Injunction. The government alleges the defendants (eight entities in the xélan family of companies and six individuals either currently or formerly associated with the management of one or more of those companies) have engaged in schemes to defraud the United States of tax revenues.¹ The TRO froze all the assets of all the defendants, estimated at \$500 million, appointed a Temporary Receiver to identify and take control of the assets, ordered the repatriation of off-shore assets, and granted a writ *ne exeat republica* with respect to the several individual defendants, ordering them to surrender their passports.² Most of the defendants filed extensive briefing in opposition to the continuation of any portion of the TRO.

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¹ Four of the named xélan entities are presently in bankruptcy proceedings, with their assets presumably under the control of the Bankruptcy Trustee, William A. Leonard, the same person appointed as the Temporary Receiver in this case.

² The United States indicated at the hearing it is no longer pursuing the writ relief and has no objection to return of the confiscated passports and lifting of all travel restrictions.

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1 Plaintiff the United States of America was represented at the hearing by Stuart D. Gibson, Esq.
2 The objecting defendants and interested third parties made appearances as follows: Pamela J.
3 Naughton, Esq. and Frank J. Johnson, Esq. for the xélan Foundation, Inc.; Miram L. Fisher, Esq. and
4 James N. Mastracchio, Esq. for Doctors Insurance Services, Inc.; Tom Pollack, Esq. for Doctors
5 Benefit Insurance Company LTD; Michael L. Lipman, Esq. and Darrell D. Hallett, Esq. for Dr. L.
6 Donald Guess; Bruce Zagaris, Esq. for Christopher G. Evans; C. James Frush, Esq. for David Jacquot;
7 Gary B. Rudolph, Esq. for Viatical Liquidity; John Morrell, Esq. for xélan entities; Keith Rutman, Esq.
8 for four frozen accounts of his former law firm; John W. Sunnen, Esq. for Carol Guess; and Donald
9 G. Rez, Esq. and James P. Hill, Esq. for the Temporary Receiver, William A. Leonard.

10 The Court considered all the papers and oral argument, then denied preliminary injunctive
11 relief, as is fully elaborated on the record, with the results briefly memorialized in an Order entered
12 December 6, 2004. Dkt No. 110. This Order records salient findings and conclusions of law in
13 support of that ruling.

14 **I. BACKGROUND**

15 The first of the xélan companies was founded by Dr. L. Donald Guess approximately 30 years
16 ago to provide mechanisms for doctors and dentists to invest excess earnings in a tax advantageous
17 manner. Various xélan programs evolved over time, expanding in breadth and organizational structure.
18 Today, the xélan-related companies offer retirement, investment, charitable, and insurance
19 arrangements to xélan participants.

20 This is an action pursued by the Internal Revenue Service ("IRS") alleging wire fraud, mail
21 fraud, and conspiracy in the marketing, administration, and treatment of contributions to certain xélan
22 programs. The case is predicated on the assumption that some of xélan's offerings violate portions of
23 the Internal Revenue Code by the manner in which the xélan entities report their products and
24 programs, distribute contributions, and represent the purported tax advantages to participating doctors.
25 The United States alleges defendants make inconsistent representations to plan participants and to the
26 government with respect to the administration and tax treatment of contributions and distributions
27 from the various programs, and that some of the programs promise tax benefits to the subscribing
28 medical professionals which do not in fact attach to xélan's investment, insurance, charitable, and
retirement plans.

1 The initiation of this case does not mark the first time the xélan companies have come under
2 civil and criminal scrutiny by the United States. During the past few years, the government has
3 initiated tax audits of participating doctors around the country and issued administrative summonses
4 to obtain records from certain xélan companies. *See, e.g., Cohen v. United States*, 306 F.Supp.2d 495
5 (E.D. Penn. 2004) (action to quash administrative summons seeking records of a xélan group disability
6 income trust). No government agency or court appears to have ruled on the merits whether the xélan
7 programs under investigation in fact violate tax laws. The issue whether DBIC supplemental disability
8 insurance is real insurance, qualifying the premiums to be tax-deductible by the participating doctors'
9 subchapter "C" corporations, is pending before the federal district court in a Wyoming case, Range &
10 River Radiology, P.C. v. United States, No. 04cv0299 (D. Wy.) ("Pettinger"), filed October 21, 2004.³
11 The parties represent the Pettinger case will address the tax issues that are also presented in this case.
12 In yet another concurrent effort to resolve the issue of deductibility, the parties acknowledge an
13 11 U.S.C. § 505 action challenging the government's claims as a creditor has been filed against the IRS
14 in the xélan bankruptcy proceedings.

15 The declarations of Revenue Agent Marien and Postal Inspector France, submitted in support
16 of the application for preliminary injunctive relief, trace the government's on-going investigations of
17 the xélan entities and the individual defendants named in this action. The United States has paid
18 particular adverse attention to xélan supplemental group disability insurance offered through Doctors
19 Benefit Insurance Company, to a xélan 419 Welfare Trust program, and to certain options formerly
20 available through the xélan Foundation. Defendants object that the injunctive relief sought in this case
21 is an inappropriate means to resolve the various civil, tax, and criminal issues the government raises.
22 They contend the government has already presented the same allegations in other, purportedly more
23 appropriate, administrative and judicial proceedings where the issues will be addressed. The issues
24 include whether the defendants mischaracterized the tax treatment of xélan products, allowing monies
25 the government characterizes as income to be improperly called something else, resulting in unjustified
26 tax benefits to the xélan doctors and their corporations.

27
28 ³ An insured doctor sued to establish the legitimacy of the premium deductions, after the IRS made its only actual deficiency assessment against a DBIC insured (according to DBIC), following exhaustion of IRS remedies with DBIC's assistance.

1 The sole question before the Court at this early stage of these proceedings is whether the
2 government has made an adequate showing to warrant a continuation, in some form, of the restrictions
3 imposed by the TRO. The Court finds the dispositive issue is whether any actual violation of the
4 Internal Revenue Code has been substantiated with respect to the xélan programs sought to be
5 enjoined. Unless a violation is identified, the United States cannot show a clear likelihood of success
6 on the merits of its claims, a prerequisite to preliminary injunctive relief.

7 **II. LEGAL STANDARDS**

8 The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable
9 loss of rights prior to judgment. Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1422
10 (9th Cir. 1984). Courts consider several factors in deciding whether provisional relief is warranted:
11 (1) the likelihood of plaintiff's success on the merits; (2) the possibility of plaintiff's suffering
12 irreparable injury if the relief is not granted; (3) the extent to which the balance of hardships favors
13 the respective parties; and (4) in appropriate cases, whether the public interest will be advanced by the
14 preliminary relief. United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174 (9th Cir.
15 1987); *see also* Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co., 887 F. Supp. 1320, 1323
16 (N.D. Cal. 1995) (the standard for issuing a temporary restraining order is identical to the standard for
17 issuing a preliminary injunction).

18 A party seeking Federal Rule of Civil Procedure ("Rule") 65 injunctive relief in the Ninth
19 Circuit must make a "clear showing" of either (1) a combination of probable success on the merits and
20 the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships
21 tips sharply in the moving party's favor. Connecticut Gen. Life Ins. Co. v. New Images of Beverly
22 Hills, 321 F.3d 878, 881 (9th Cir. 2003); Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115,
23 1119 (9th Cir. 1999). "These two formulations represent two points on a sliding scale in which the
24 required degree of irreparable harm increases as the probability of success decreases." Roe v.
25 Anderson, 134 F.3d 1400, 1402 (9th Cir. 1998); *see* United States v. Nutri-Cology, Inc., 982 F.2d 394,
26 397 (9th Cir. 1992).

27 Under the Fraud Injunction Statute (18 U.S.C. § 1345), the federal courts can enjoin schemes
28 to defraud the United States involving mail and wire transmissions. Under that section and the Tax

1 Injunction Statute (IRS Code 26 U.S.C. § 7402(a)), "for the enforcement of internal revenue laws," this
2 Court is authorized, upon a proper showing, to grant all the injunctive relief the United States is
3 seeking. When the government seeks an injunction based on a statute providing for pursuit of
4 equitable relief, *and* the government has met the "probability of success" prong of the preliminary
5 injunction test, "we presume it has met the 'possibility of irreparable injury' prong because the passage
6 of the statute is itself an implied finding by Congress that violations will harm the public." Miller v.
7 California Pacific Medical Center, 19 F.3d 449, 459 (9th Cir. 1994); Odessa, 833 F.2d at 175-76
8 ("[T]he agency to whom the enforcement of the right has been entrusted is not required to show
9 irreparable injury"). The government is not entitled to a presumption on the irreparable harm element,
10 however, unless it first satisfies the "probability of success" element of the test. Miller, 19 F.3d at 459.

11 Preliminary injunctive relief requires less formal and less complete evidentiary showings than
12 a trial on the merits under strict rules of evidence. Republic of Philippines v. Marcos, 862 F.2d 1355,
13 1363 (9th Cir. 1988) ("It was within the discretion of the district court to accept ... hearsay for purposes
14 of deciding whether to issue the preliminary injunction"); Flynt Distributing Co., Inc. v. Harvey, 734
15 F.2d 1389, 1394 (9th Cir. 1984 ("The trial court may give even inadmissible evidence some weight,
16 when to do so serves the purpose of preventing irreparable harm before trial"); Univ. of Texas v.
17 Camenisch, 451 U.S. 390, 395 (1981) ("A party ... is not required to prove his case in full at a
18 preliminary injunction hearing"). Nevertheless, conditional inferences, innuendo, and even strong
19 suspicions do not satisfy that burden.

20 **III. THE GOVERNMENT'S SHOWING IS INSUFFICIENT TO SUPPORT** 21 **PRELIMINARY INJUNCTIVE RELIEF**

22 The Court finds the government's evidence is insufficient to carry its burden. The United
23 States relies on the declarations of Postal Inspector Timothy D. France and of Revenue Agent John
24 L. Marien to support its application. France states in his October 29, 2004 Declaration that he has been
25 involved in the investigation of all the defendants, focusing on "whether L. Donald Guess..., Leslie
26 Buck ..., David Jacquot ..., G. Thomas Roberts ..., and others, have operated xélan, Inc. and its
27 affiliated entities as a criminal enterprise" engaged in Conspiracy To Defraud The United States, Mail
28 Fraud, Wire Fraud, "Unlawful Welfare Fund Payments -- 18 U.S.C. § 1954, and Money Laundering -
18 U.S.C. §§ 1956 and 1957." France Decl. ¶¶ 1-4. He describes the investigation as jointly

1 conducted by the Department of Homeland Security, Bureau of Immigration and Customs
2 Enforcement, the California Department of Insurance, and the IRS Criminal Investigation Division.
3 France declares he has personally reviewed documents that "describe the xélan tax reduction programs
4 that lie at the heart of this investigation." France Decl. ¶ 4. The investigators have also interviewed
5 "several witnesses who were either xélan customers or former employees of xélan," and have
6 "conducted consensual recordings of xélan representatives including Guess." Id.

7 After all that investigation, France's strongest characterizations in support of the government's
8 request for extraordinary and urgent injunctive relief is that he *believes* it is "*more likely than not* that
9 Guess, Buck, Jacquot, Roberts, and others, through the xélan affiliated entities, have violated and are
10 now violating federal law, including" mail fraud, wire fraud, money laundering, conspiracy to defraud
11 the United States, and unlawful welfare (*i.e.*, disability insurance coverage) fund payments.⁴ France
12 Decl. ¶ 5 (emphasis added). In his opinion, "the evidence shows that it is *more likely than not*" that
13 defendants are engaged in fraudulent activity, and he "*believe[s] it is more likely true than not*" that
14 defendants are in possession of assets traceable to alleged fraud. Id. pp. 30, 32. He declares
15 defendants "might" be in possession of documents that show allegedly fraudulent schemes. France
16 alludes to no present or imminent dissipation of particular assets by any named defendant potentially
17 acquired through xélan's suspected wrongdoing, yet the government seeks a preliminary injunction
18 placing all personal and business assets of all the named individual and entity defendants under the
19 control of a Receiver for the duration of this litigation.

20 Revenue Agent Marien states in his October 27, 2004 Declaration he is a National Technical
21 Advisor assigned "to help Revenue Agents around the United States when they are dealing with issues
22 involving the proper tax treatment of contributions to employee welfare benefit funds," including
23 "examinations to determine the correct federal income tax liabilities of doctors -- and their wholly-

24
25 ⁴ France identifies the mechanisms for this purported fraud as: selling specifically-identified programs
26 as legitimate tax reduction strategies, while knowing that as designed and operated, the xélan programs
27 do not produce the tax benefits they touted to xélan doctors; preventing the doctors and law
28 enforcement officials from learning all the underlying facts about xélan's programs; obstructing IRS
audits; preventing or dissuading xélan doctors from seeking their own independent financial and legal
advice; committing perjury in connection with IRS summons enforcement actions; and making false
statements in connection with the pending bankruptcy proceedings involving some of the xélan
affiliated entities. France Decl. ¶ 6

1 owned corporations -- who have participated in various so-called supplemental insurance programs
2 developed and sold by the xélan family of companies." Marien Decl. ¶¶ 2-3. In connection with his
3 work on the xélan audits and investigation, Marien reviewed audio and video tapes of sales
4 presentations by Guess, participated in interviews of Guess and others about xélan's supplemental
5 insurance plans and the 419 Welfare Benefit Trust, and reviewed documents and testimony produced
6 by third parties, including documents and testimony the IRS obtained from xélan doctors. Id. ¶ 4.

7 Marien declares xélan has not provided all the program information he needs to complete his
8 work. Marien Decl. ¶ 18. The parties attribute the delays to their discovery disputes in other
9 jurisdictions and fora which the Court finds are not material to this ruling. The Court is left with the
10 fact that Marien has only "preliminary results" from his "work thus far" which cause him to suspect,
11 for example, that the essential components of genuine insurance (*i.e.*, risk shifting and risk
12 distribution) are not present in the xélan supplemental disability insurance program, and that Guess'
13 statements to the contrary to doctors and to the IRS are false and misleading. Id. ¶ 18.

14 Marien is unable to "draw final conclusions about whether xélan doctors are entitled to the tax
15 benefits Guess and xélan have touted to them." Id. ¶ 17. He is able to draw only tentative and
16 qualified conclusions. "*If these conclusions are correct,*" then xélan doctors have improper
17 deductions and will owe tax on "all or nearly all of their 'contributions'" to, for example, the 419
18 Welfare Benefit Trust. Id. ¶ 25 (emphasis added). Marien identifies on-going, and as yet inconclusive,
19 IRS investigations into *whether* the xélan disability trust is providing insurance at all, *or* "simply a
20 savings program" that attempts to defer recognition of taxable income, and the limits on deductibility
21 in the event that the xélan disability trust is in fact providing insurance. Id. ¶ 16 (emphasis added).
22 He further identifies as yet inconclusive IRS investigations into *whether* the xélan 419 Welfare Benefit
23 Trust program provides "welfare benefits" at all, *or whether* it is "simply a deferred compensation or
24 dividend program" improperly attempting to defer the recognition of wage or dividend income, with
25 tax-free accumulations of earnings on that income, and *whether* that program "meets the requirements
26 of Internal Revenue Code § 419A(f)(6). Id. ¶ 24.b (emphasis added). "*If the IRS*" eventually makes
27 certain determinations, "it will *likely* make [necessary] substantial adjustments to the income tax
28 returns filed by the doctors and their corporations who participated" in the plans. Id. ¶ 24.b (emphasis

1 added). "The IRS is also examining *whether* the xélan 419 Welfare Benefit Trust is providing
2 severance benefits at all, *or whether* it is simply a savings program" *Id.* ¶ 24.c (emphasis added).
3 Marien concludes: "Because the xélan doctors and their subchapter C corporations *are likely not*
4 *entitled* to the tax benefits they claimed from participating in these xélan programs, they will owe
5 substantial additional taxes, penalties and interest to the IRS." *Id.* ¶ 34 (emphasis added).

6 This lawsuit does not name as a defendant any participating doctor who may have tax liabilities
7 for claiming unjustified tax deductions associated with xélan programs. Defendants are exclusively
8 the third-party xélan affiliates, potentially responsible for the doctors' potential under reporting. The
9 government argues it is essential to freeze all the assets controlled by the defendants, to confirm the
10 appointment of the Receiver, and to continue the other provisions of the TRO "so that the xélan
11 doctors for whose benefit the funds are held may have access to the funds to pay anticipated tax
12 deficiencies," and so the IRS can collect those revenues. Compl. ¶ 43. It characterizes the injunctive
13 relief as needed to "aid in the administration of the internal revenue laws, and to prevent the continuing
14 and substantial injury to the United States and to members of the public." Compl. ¶ 44. Receivers
15 appointed pursuant to 26 U.S.C. § 7402(a) are authorized to take control of property, to have an
16 accounting performed, and to preserve the property for tax administration purposes. However, the
17 powers conferred through 26 U.S.C. § 7402(a), based on the authority presented by the United States,
18 do not appear to include the appointment of a Receiver to take possession of all the assets of a party
19 against whom there has been no *finding* of a tax law violation and who, even assuming a tax liability
20 were eventually determined, is not *clearly responsible for paying* such liability.⁵

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23 ⁵ See *In re Gerwig*, 461 F.Supp. 449 (C.D.Cal. 1978), stating that applications by the government for
24 *ex parte*, unnoticed proceedings to result in the seizure of property apply to the IRS, requiring that a
25 judge must independently determine whether probable cause exists to believe; (1) an assessment of
26 tax **has been made** against the taxpayer; (2) **notice and demand** were properly made; (3) **the**
27 **taxpayer** neglected or refused to pay the assessment; and (4) property subject to seizure presently
28 exists at the premises sought to be searched and belongs to the taxpayer or is property subject to lien
for payment of the taxes. The *Gerwig* factors were cited with approval in *United States v. Condo*, 782
F.2d 1502 (9th Cir. 1986). Defendants analogize the seizure case to a Receiver taking possession of
their assets without an underlying assessment of tax made against any taxpayer, without notice or
demand for payment, without a prior refusal to pay any tax demanded, with the property frozen or
made subject to the receivership neither subject to a tax lien nor belonging to the "likely" taxpayers
with "anticipated" tax deficiencies, *i.e.* the xélan doctor-participants. See Buck & DIS P&A pp. 21-22
discussion of cases.

1 Defendants argue the government's theory that they conspired to defraud the doctors and the
2 United States depends entirely on a determination whether their financial plans are devised and
3 implemented permissibly under the Internal Revenue Code and, if not, then whether the defendants
4 knew them to be impermissible. The government itself has yet to make the first of those
5 determinations; thus, it cannot at this time impute culpable knowledge to the defendants. Defendants
6 persuasively challenge the "probability of success on the merits" element of the preliminary injunction
7 showing because the IRS has not made foundational determinations essential to prove the xélan
8 programs, or some of them, are not entitled to receive the tax treatment, or the degree of favorable tax
9 treatment, defendants claim. The government produced no evidence that any agency, court, or other
10 authority has definitively ruled that any of the xélan programs in fact runs afoul of the Internal
11 Revenue Code. The IRS is investigating xélan doctors, but does not appear to have had a case
12 successfully assessing tax deficiencies, or one contested to a final administrative ruling or in United
13 States Tax Court. Any damages liability of the xélan defendants would be derivative of the outcome
14 of those processes. The extremely large sums the government predicts xélan doctors will owe
15 similarly depends on a determination whether the challenged xélan programs violate tax law. Without
16 expressing any opinion on the ultimate merits of this action, the Court finds a clear showing of
17 probable success on the merits requires some such evidence.

18 The Court also finds that the government has not substantiated any immediate harm that will
19 arise if the Court dissolves the extremely broad TRO. The government acknowledges not all the xélan
20 programs are suspect. The Court does not find an urgent need to preserve an enormous pool of funds
21 through seizure of all assets from third-party xélan entities and xélan-affiliated individuals from which
22 speculative tax obligations might at some future time be collectable. Further, there is no principled
23 way to narrow the seizure to apply only to assets traceable to the suspected underlying wrongdoing.
24 The Court declines to impute fraudulent intent to defendants when the expert IRS witness is unable
25 himself to say definitively whether any of the xélan programs violate internal revenue regulations.
26 That lacuna in the government's evidence is dispositive of the result. No "clear showing" of likely
27 success on the merits can be made on the present record. Unless and until a probability of success on

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1 the merits is established, the government does not benefit from a presumption of irreparable injury.
2 Miller, 19 F.3d at 459; Nutri-Cology, 982 F.2d at 398; Odessa, 833 F.2d at 174-75.

3 Even had the government made a clear showing of probable success on the merits, the Court
4 finds the balance of hardships tips decidedly in defendants' favor. The TRO effectively closed down
5 the entities and profoundly intruded on the personal and professional interests of the individual
6 defendants. The extraordinary breadth of that injunction swept much broader than was reasonable and
7 necessary, even if portions of the xélan arrangements are ultimately recharacterized as taxable.

8 **IV. FINDINGS**

9 In consideration of the evidence, the Court makes specific findings, including:

10 1. The government conceded it can produce no evidence at this time that the IRS has ruled
11 any particular xélan program violates internal revenue statutes or regulations. The United States
12 identifies no definitive finding by any court or other authoritative agency in support of its contention
13 the suspect xélan products or programs *actually violate* tax law.

14 2. The government must show defendants are disposing of property traceable to criminal
15 activity to warrant seizure of the property. The government produced no evidence that any of the
16 defendants are dissipating their assets or that any of the assets seized under the TRO are traceable to
17 criminal activity.

18 3. The Receiver will be unable to trace any portion of defendants' seized assets to criminal
19 activity unless and until the government substantiates xélan doctors underpaid taxes through
20 impermissible xélan tax avoidance schemes.

21 4. The defendants' evidence refuted the government's assertion that the xélan entities lack
22 adequate funds or reserves to cover their outstanding obligations.

23 5. The Temporary Receiver's own Initial Preliminary Report identified either no
24 discrepancies, or only immaterial discrepancies, between the available reserves and what would be
25 needed to cover xélan entity obligations to participants, defeating the asset dissipation claim.

26 6. The findings regarding the xélan entities' actual financial holdings demonstrate the
27 government's allegations of a "Ponzi scheme" are without merit.

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1 7. The government's evidence that some of the xélan programs are not actually
2 administered as the arms length or legitimately tax insulated arrangements they purport to be is
3 speculative at this point. The government has not shown that the tax implications of any particular
4 xélan product were mischaracterized.

5 8. The present lack of evidence that defendants actually violated any tax laws is
6 dispositive of the "likelihood of success on the merits" showing required to obtain preliminary
7 injunctive relief.

8 9. The government concedes the fraction of xélan activities targeted by the IRS does not
9 extend to all the programs or all the assets it asks the Court to transfer to the Receiver's control. In
10 particular, the xélan Foundation administers legitimate and important charitable work, nationally and
11 internationally. It presently controls approximately \$42 million for those purposes. The TRO froze
12 all the Foundation's assets, although only a small percentage of those funds are associated with suspect
13 arrangements.⁶

14 10. Even if the government had shown a clear possibility of success on the merits, the scope
15 of the remedy far exceeds defendants' tax liability exposure should the government prevail on the
16 merits. That disproportionality, coupled with the extreme hardship on the xélan entities, the individual
17 defendants, and innocent third parties, weighs against a grant of preliminary injunctive relief.

18 **VI. CONCLUSION AND ORDER**

19 For the foregoing reasons, and those recited on the hearing record, and after careful
20 consideration of the papers and oral argument, the Court **DENIES** the motion for entry of a
21 Preliminary Injunction and terminates the injunctive relief granted in the TRO.

22 **IT IS SO ORDERED.**

23 DATED: 12-14-04



HONORABLE LARRY ALAN BURNS
United States District Judge

25 cc: **MAGISTRATE JUDGE ANTHONY J. BATTAGLIA**
26 **ALL COUNSEL OF RECORD**

27 ⁶ The government does not dispute the xélan Foundation has twice been approved for 501(c)(3) status
28 and is presently registered as such, although counsel for the Foundation represents that, in other
proceedings, the government is presently challenging whether the Foundation should be designated
a tax exempt 501(c)(3) charitable organization.