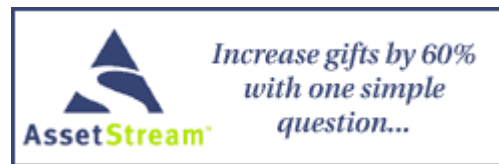


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Tuesday, December 07, 2004 Posted: 11:19 AM EST

Court Denies Preliminary Injunction in Xélan Case

U.S. District Judge Larry A. Burns, in an order filed December 6, has refused to grant a preliminary injunction in the government's case against Xélan Inc. and has ordered the temporary restraining order dissolved and the return of all assets frozen or property seized.

Citations: United States v. L. Donald Guess et al.; No. 04 CV 2184-LAB (AJB)

Date: Dec. 6, 2004

Full Text:

UNITED STATES OF AMERICA,
Plaintiff,

v.

L. DONALD GUESS, ET AL.,
Defendants.

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

UNITED STATES OF AMERICA,
Plaintiff,

v.

L. DONALD GUESS, LESLIE S. BUCK, DAVID JACQUOT,
MONTE T. MELLON, G. THOMAS ROBERTS, CHRIS G. EVANS,
NIGEL BAILEY, DOCTORS BENEFIT INSURANCE COMPANY, LTD.,
DOCTORS INSURANCE SERVICES, INC., XELAN INVESTMENT
SERVICES, INC., XELAN ANNUITY CO., LTD., XELAN
ADMINISTRATIVE SERVICES INC., XELAN FOUNDATION, INC.,
XELAN OF TEXAS, INC., XELAN, INC., XELAN, THE ECONOMIC
ASSOCIATION OF THE HEALTH PROFESSIONALS, INC., PYRAMIDAL
FUNDING SYSTEMS, INC., DBA XELAN INSURANCE SERVICES,
XELAN PENSION SERVICES, INC., XELAN FINANCIAL
PLANNING, INC., EURO-AMERICAN TRUST COMPANY, AMS TRUST
COMPANY, AND JOHN DOES, UNKNOWN PERSONS WHO ARE TRUSTEES
OF XELAN LONG TERM CARE TRUST, XELAN DISABILITY EQUITY
TRUST, XELAN MALPRACTICE EQUITY TRUST,
AND XELAN MEDICAL SAVINGS EQUITY TRUST,
Defendants.

**ORDER RE RESULT OF
PRELIMINARY INJUNCTION
HEARING**

On December 3, 2004, the Court convened the scheduled hearing to determine whether the Temporary Restraining Order ("TRO") previously entered in this case should be converted to a Preliminary Injunction. Appearances were

by Stuart D. Gibson, Esq. on behalf of plaintiff the United States, and counsel of record on behalf of each of the objecting Defendants. After careful consideration of the papers, extensive oral argument, and for the reasons recited on the record, the Court **DENIED** entry of any Preliminary Injunction. To the extent the TRO may not dissolve by its own terms, it was expressly dissolved at the hearing. The Temporary Receiver's appointment in this case is terminated, and all assets frozen or property seized pursuant to the TRO shall be immediately returned. The passports surrendered under the terms of the TRO shall forthwith be restored to their owners. The Court will prepare a separate Order memorializing its findings and reasoning.

IT IS SO ORDERED.

DATED: December 3, 2004

HONORABLE LARRY ALAN BURNS
United States District Judge

cc: MAGISTRATE JUDGE ANTHONY J. BATTAGLIA
ALL COUNSEL or RECORD

* * * * *

ORDER TO SHOW CAUSE HEARING
COURT'S RULING

BEFORE THE HONORABLE LARRY ALAN BURNS
UNITED STATES DISTRICT JUDGE

APPEARANCES;
FOR DEPARTMENT OF JUSTICE:

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COURT REPORTER:

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SAN DIEGO, CALIFORNIA -- FRIDAY, DECEMBER 3. 2004 1:30 P.M.

THE COURT: MR. GIBSON, THANK YOU VERY MUCH. I APPRECIATE THE COMMENTS OF ALL COUNSEL.

THEY HAVE BEEN HELPFUL. THE COURT HAD QUESTIONS AS THE MATTER PROCEEDED TO HEARING TODAY. ALL THOSE QUESTIONS HAVE BEEN ANSWERED.

LET ME BEGIN BY SAYING WHAT THIS IS NOT, BECAUSE I THINK THIS PRELUDE IS APPROPRIATE IN LIGHT OF SOME OF THE ARGUMENTS THAT HAVE BEEN MADE, AND SOME OF THE MATTERS THAT ARE IN DISPUTE IN THAT ISSUE.

IN PARTICULAR, I HEARD A LOT TODAY ABOUT XELAN'S EFFORTS IN DIFFERENT STATES AND DIFFERENT FORUMS TO PROTECT THE INTEGRITY OF ITS ENTITIES AND THE SQUABBLES THAT HAVE GONE ON WITH RESPECT TO PRODUCTION OF DOCUMENTS AND ALL.

AS I SAID, I FIND THAT TO BE AN INTERESTING FOOTNOTE IN THE HISTORY OF THE DISPUTE BETWEEN THE GOVERNMENT AND XELAN, BUT IT DOESN'T PARTICULARLY PERTAIN TODAY TO THE QUESTION BEFORE ME, WHICH IS WHETHER THE INJUNCTION SHOULD BE CONTINUED.

MAYBE ONLY TO THIS EXTENT, MR. GIBSON, THAT ABSENT THE EXPLANATIONS I WAS GIVEN TODAY, WHICH I THINK ARE FAIR EXPLANATIONS ABOUT SOME OF THE CONCERNS RAISED, IT MIGHT LEAD PERMISSIBLY TO AN INFERENCE THAT THERE IS SOMETHING TO HIDE, BECAUSE THERE IS SQUABBLING ABOUT DOCUMENTS.

I HAVE GOT AN ADDITIONAL CONTEXT TODAY ON THAT, TOO, AND I AM NOT SO SURE THAT I WOULD EVEN DRAW THAT INFERENCE AT THIS POINT. BUT THE ISSUE SEEMS TO ME LARGELY BESIDES THE POINT REGARDING WHAT I HAVE TO RULE ON TODAY.

LET ME ALSO SAY THAT THIS IS NOT IN ANY SENSE A TRIAL ON THE MERITS. THAT WILL COME TN TIME. INSTEAD, THIS IS AN ACTION TO PRESERVE WHAT HAS BEEN THE STATUS QUO, WHICH IS A TEMPORARY RESTRAINING ORDER ISSUED BY JUDGE WHELAN NOVEMBER 3RD THAT HAS EFFECTIVELY CLOSED DOWN THESE ENTITIES AND HAD A PRONOUNCED EFFECT ON A NUMBER OF OTHERS, BOTH IN A PERSONAL AND SOME ENTITIES, LIKE A LAW FIRM, FOR EXAMPLE, THAT IS NO LONGER -- MAYBE NEVER WAS -- RELATED TO XELAN.

THE COURT IS FAMILIAR WITH THE STANDARD ARTICULATED BY THE NINTH CIRCUIT FOR GRANTING THE PRELIMINARY IN JUNCTION. IT IS TO PRESERVE THE STATUS QUO, PREVENT IRREPARABLE LOSS OF RIGHTS PRIOR TO JUDGMENT.

FACTORS SET FORTH BY THIS CIRCUIT THAT INFORM THE DECISION ARE THESE: FIRST, THE LIKELIHOOD OF PLAINTIFF'S SUCCESS ON THE MERITS;

SECOND, THE POSSIBILITY OF PLAINTIFF'S SUFFERING IRREPARABLE INJURY IF THE RELIEF IS NOT GRANTED;

THIRD, THE EXTENT TO WHICH THE BALANCE OF HARDSHIP FAVORS THE RESPECTIVE PARTIES;

FOURTH, IN APPROPRIATE CASES WHETHER THE PUBLIC INTEREST WILL BE ADVANCED BY PRELIMINARY RELIEF.

PARTIES SEEKING RULE 65 INJUNCTIVE RELIEF IN THE NINTH CIRCUIT MUST MAKE, QUOTE "A CLEAR SHOWING" END QUOTE, OF EITHER A COMBINATION OF PROBABLE SUCCESS ON THE MERITS AND THE POSSIBILITY OF IRREPARABLE HARM OR, ALTERNATIVELY, SERIOUS QUESTIONS ARE RAISED AND THE BALANCE OF HARDSHIP TIPS SHARPLY IN THE MOVING PARTY'S FAVOR.

THE GOVERNMENT IN THIS CASE RELIES ON A PRESUMPTION THAT HAS BEEN RECOGNIZED APPLICABLE TO CASES BASED ON A STATUTE WHERE THE GOVERNMENT SEEKS AN INJUNCTION BASED ON A STATUTE, PROVIDING THE BASIS TO SEEK THE EQUITABLE RELIEF AND -- THIS IS AN IMPORTANT CONJUNCTION HERE -- AND THE GOVERNMENT HAS MET THE PROBABILITY-OF- SUCCESS PRONG. IN THE NINTH CIRCUIT IT'S PRESUMED THAT IT HAS MET THE POSSIBILITY-OF-IRREPARABLE-INJURY PRONG. BUT STILL SUBSUMED WITHIN THAT ANALYSIS, OF COURSE, IS THE PROBABILITY OF SUCCESS.

AS MY QUESTIONS TO YOU, MR. GIBSON, INDICATED, THAT'S WHERE I HAVE DIFFICULTY. YOU SAID MAYBE I HAVE OVERSIMPLIFIED IT, AND PERHAPS I HAVE, BUT TO ME, IT COMES DOWN TO THIS QUESTION: I AM HERE TRYING TO HANDICAP THE PROBABILITY OF SUCCESS, AND THE GIST OF THIS ACTION IS A CLAIM THAT THE XELAN ENTITIES HAVE COMMITTED VIOLATIONS OF THE INTERNAL REVENUE CODE.

THEY HAVE EITHER MISCHARACTERIZED PRODUCTS AS TAX EXEMPT, OR THEY HAVE TAKEN -- THEY HAVE ALLOWED MONIES TO BE TAKEN AS WHAT THE GOVERNMENT CONSIDERS INCOME AND CALLED IT SOMETHING ELSE. AND WHEN I PUT THAT IN THE CONTEXT OF THIS FIRST ELEMENT OF THE LIKELIHOOD OF SUCCESS, THE PROBABILITY OF SUCCESS ON THE MERITS, I AM STYMIED, BECAUSE WHAT I HAVE IS A DECLARATION BY PRESUMABLY SOMEONE WHO IS VERY KNOWLEDGEABLE. I READ THE BACKGROUND OF AGENT MARIEN, AND I AM SATISFIED THAT HE IS IN A POSITION OF AN EXPERT ON THE CODES.

BUT WHAT HE IS NOT ABLE TO TELL ME THAT ANY OF THESE THINGS VIOLATE THE CODE AT THIS POINT. HE IS CAREFUL, AND HE IS METICULOUS, AND HE GOES THROUGH EVERYTHING AND IS CERTAINLY SUSPICIOUS, BUT HE IS UNABLE TO SAY DEFINITELY TO ME THAT THERE IS ANY VIOLATION OF THE INTERNAL REVENUE REGULATIONS BY ANY, OF THESE SO-CALLED TAX EXEMPT PRODUCTS OR ANY OF THE OTHER ACTIVITIES THAT ARE AT ISSUE IN THIS CASE.

I FIND THAT TO BE DISPOSITIVE HERE. I CAN'T IN GOOD CONSCIENCE MAKE A FINDING THAT THE GOVERNMENT WILL LIKELY PREVAIL -- THAT THEY HAVE A STRONG PROBABILITY OF SUCCESS. I CAN'T CERTAINLY SAY THAT THERE HAS BEEN A CLEAR SHOWING OF THAT WHEN THE PERSON MOST KNOWLEDGEABLE, THE IRS AGENT, CAN'T SAY THAT, WON'T SAY THAT, WON'T AVER TO THAT IN A DECLARATION.

I SUPPOSE, I NEED NOT GO ON AND ANALYZE THIS THROUGH THE OTHER FACTORS, BECAUSE I JUST DON'T FIND THE PROBABILITY-OF-SUCCESS PRONG TO HAVE BEEN MET. AND THAT IS FATAL IN ITS OWN RIGHT. BUT I HAVE ALSO BEEN IMPRESSED BY WHAT I HAVE READ IN THE PAPERS AND WHAT I HAVE HEARD TODAY ABOUT THE BALANCE OF HARDSHIPS, AND ESPECIALLY, MR. GIBSON, IN THE CONTEXT OF PROPORTIONALITY HERE.

I TOLD YOU CANDIDLY THAT LOOKING OVER THIS, MY EYEBROWS WERE RAISED A COUPLE OF TIMES AT WHAT'S BEEN CHARACTERIZED AS A TAX-EXEMPT PRODUCT. MY EYEBROWS RAISED AGAIN, ALTHOUGH I TRIED NOT TO SHOW IT, WHEN YOU READ DR. GUESS'S QUOTE ABOUT HOW THE LAWYERS ARE USED OR WHAT WE'LL DO IN HIS CHARACTERIZATIONS OF THE PRODUCTS.

I THINK, SUBJECT TO DEVELOPMENT BY INVESTIGATION -- AND I DON'T KNOW WHERE IT'S GOING TO GO, IT IS NOT IN MY PORTFOLIO AT THIS POINT TO MAKE ANY GUESS OR PREDICTION AS TO THAT, BUT I UNDERSTAND WHY YOU AND WHY THE IRS ARE CURIOUS ABOUT THIS AND SUSPICIOUS ABOUT THIS.

THAT CURIOSITY AND LEVEL OF SUSPICION IS BENEATH WHAT IT TAKES, I THINK, TO SUSTAIN A FREEZE OF ASSETS OF THIS AMOUNT. WHEN I TRIED TO PARSE THIS AND LOOK AT WHAT'S REALLY AT ISSUE HERE, WHAT'S THE GOVERNMENT SAYING, AND I TRIED TO CRUNCH NUMBERS, TRY AS I MIGHT, I COULDN'T COME UP WITH A JUSTIFICATION FOR FREEZING THE AMOUNT OF MONEY THAT WAS INITIALLY FROZEN.

IT'S BEEN PUT IN SOME CONTEXT, I THINK, BY MS. NAUGHTON'S ANALYSIS WITH THE FOUNDATION AND THE PART THAT WAS SO PROVOCATIVE TO ME ABOUT PAYING FOR THE TUITION OF DOCTOR'S CHILDREN WHEN THE DOCTOR CLAIMS A CHARITABLE CONTRIBUTION. IF YOU ARE RIGHT ON THAT AND THAT'S DISALLOWED AT SOME POINT, IT IS A MILLION DOLLARS. SO HOW DO I JUSTIFY THEN -- LOOKING JUST AT THE FOUNDATION, FREEZING OR CONTINUING TO FREEZE \$42 MILLION?

I AM PERSUADED TODAY -- AND YOU HAVEN'T CONTESTED THIS. TO YOUR CREDIT, YOU CONCEDED THIS FROM THE BEGINNING THAT THE FOUNDATION DOES DO AN AWFUL LOT OF PUBLIC GOOD. THE PRESENTATION THAT I SAW TODAY MIRRORED WHAT WAS IN THE PAPERS, AND I AM FAMILIAR WITH SOME OF THOSE ORGANIZATIONS. I KNOW THEM TO BE FINE CHARITIES, AND I APPLAUD THE WORK OF THE DOCTORS WHO HAVE CONTRIBUTED TO THOSE AND TAKEN A SPECIAL INTEREST IN THOSE.

BUT IN TERMS OF ASSESSING THE PROPORTIONALITY OF THE RELIEF SOUGHT, I JUST THOUGHT IT WAS ALL

OUT OF PROPORTION. MAY NOT HAVE APPEARED THAT WAY TO YOU AT THE TIME YOU APPLIED FOR THE TEMPORARY RESTRAINING ORDER. AND I UNDERSTAND THAT AS A RESULT OF THIS ACTION, YOU HAVE MUCH MORE INFORMATION THAN YOU HAVE HAD. AND I UNDERSTAND ALSO THAT YOU STRUGGLED TO GET THAT INFORMATION BEFORE THE ACTION WAS BROUGHT. SO I DON'T FAULT YOU OR MAKE ANY FINDING. I KNOW THERE HAS BEEN A LOT OF BACK AND FORTH ABOUT WHETHER YOU ACTED IN GOOD FAITH OR BAD FAITH.

AND, LOOK, WITH A RECORD THIS SIZE, THERE IS BOUND TO BE SOME MISTAKES. PEOPLE ARE BOUND TO HAVE SOME INCONSISTENCIES IN THE RECORD. WE ALL KNOW THAT. SO I DON'T DRAW ANY INFERENCE THAT SO AND SO PERJURED HIMSELF OR SOMEBODY ON THE OTHER SIDE PERJURED HIMSELF. I DON'T WANT TO BE POLLYANNA ABOUT IT, BUT IT HASN'T RISEN TO THAT LEVEL. AND CERTAINLY, NONE OF WHAT IS ALLEGED TO BE PERJURY IS DISPOSITIVE OF THIS DECISION EITHER.

BUT I DO SAY, LOOKING AT THE OTHER FACTORS, THAT I THINK THAT THE RELIEF SOUGHT TODAY IS OUT OF PROPORTION TO THE HARM THAT HAS BEEN CLAIMED.

I ALSO FIND THAT TO GRANT THAT FORM OF CONTINUING RELIEF WOULD CAUSE A GREAT HARDSHIP FOR A NUMBER OF CONCEDEDLY INNOCENT INDIVIDUALS AND ENTITIES, PEOPLE WHO RELY ON THESE PAYMENTS TO GET BY MONTH-TO-MONTH, PEOPLE WHO ARE THE BENEFICIARIES OF THESE WONDERFUL CHARITIES.

BUT AS I SAID, I REST MY RULING AND MY HAT ON THE FAILURE OF THE GOVERNMENT TO ESTABLISH WHAT IT MUST AS THE FIRST PRONG; THAT IS, THE LIKELIHOOD OF SUCCESS ON THE MERITS.

BY MAKING THIS STATEMENT, I AM NOT PREJUDGING THE CASE. I DON'T FORECLOSE THAT WITH ADDITIONAL DISCOVERY, MR. GIBSON, YOU MAY FIND YOUR WAY AND, ULTIMATELY, BE ABLE TO ESTABLISH SOME OF THE ALLEGATIONS THAT YOU BELIEVE -- THE GOVERNMENT BELIEVES SO FERVENTLY. IT'S NOT MY PLACE TO MAKE A DECISION LIKE THAT SIMPLY TO MAKE AN ASSESSMENT AS OF TODAY BASED ON THE PRESENTATION OF EVIDENCE TO ME.

SO, ACCORDINGLY, THE COURT DENIES THE MOTION FOR PRELIMINARY INJUNCTION. I DON'T KNOW THAT I NEED TO DISSOLVE THE TEMPORARY RESTRAINING ORDER. I THINK IT DISSOLVES ON ITS OWN PURSUANT TO JUDGE WHELAN'S ORDER IF IT WASN'T SUSTAINED BY THE PRELIMINARY INJUNCTION.

TO THE EXTENT THAT'S NECESSARY, I DISSOLVE THAT. I DECLINE TO APPOINT A RECEIVER, OBVIOUSLY. THERE IS NO NEED FOR THE RECEIVER TO TAKE ON A NEW AND DIFFERENT CAPACITY. I KNOW THE RECEIVER WILL CONTINUE TO HAVE SOME RESPONSIBILITY FOR THE CASE.

YOU ARE ALSO THE BANKRUPTCY RECEIVER?

MR. LEONARD: YES, I AM.

THE COURT: MY RULING, OF COURSE, DOES NOT AFFECT THAT STATUS. TO THE EXTENT THE PROPERTY WAS TAKEN, IT NEEDS TO BE RETURNED. THAT SHOULD BE DONE AS A CONSEQUENCE OF THE COURT'S RULING TODAY.

A FULL WRITTEN DECISION THAT CONTAINS THE COMPLETE EXPLICATION OF MY REASONS FOR DENYING THE PRELIMINARY INJUNCTION WILL FOLLOW.

THANK YOU ALL. WE ARE IN RECESS.

MR. LIPMAN: YOUR HONOR, IS THERE GOING TO BE A NEW ORDER PREPARED?

THE COURT: YES. TODAY?

MR. LIPMAN: OR MONDAY?

THE COURT: WE WILL HAVE THE ORDER BE OUT BY MONDAY.

I HEREBY CERTIFY THAT THE
TESTIMONY ADDUCED IN THE FOREGOING
MATTER IS A TRUE, PARTIAL RECORD

OF SAID PROCEEDINGS.

Eva Oemick / December 6, 2004

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