UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

DAVID A. COHEN, et. al.	)	
	)	
Petitioners,	)	
	)	
v.	)	Civil No. 03-cv-3234
	)	
UNITED STATES OF AMERICA	)	
	)	
Respondent.	)	

MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION FOR SUMMARY ENFORCEMENT

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MEMORANDUM IN SUPPORT OF RESPONDENT'S
MOTION FOR SUMMARY ENFORCEMENT

ISSUES PRESENTED

1. Courts should enforce an IRS administrative summons if the summons was issued for a legitimate purpose, the information sought may be relevant to that purpose, the proper administrative steps were followed, and the information is not already in the IRS's possession. The Declarations of Catherine Johns and John L. Marien make that showing. Should the Court enforce these summonses?

2. The IRS may use its summons power to obtain information that "may shed light on" the correctness of tax returns. The IRS is examining whether amounts the Cohens paid to SEI were insurance premiums, as claimed, or disguised dividends/compensation. May the IRS obtain information from SEI that may show whether segregated asset accounts maintained in the Cohens' names are part of an insurance program and, if so, the amount properly deductible as such?

3. The IRS may use summonses to obtain information it does not already possess. The IRS has obtained documents from others that bear on whether the Cohens

were entitled to claim tax benefits from participating in xélan programs. It has not obtained any documents or testimony from SEI. Nor has it confirmed or verified that documents it has obtained from others about the Cohens are complete and accurate. May the IRS obtain documents from SEI under the summonses?

4. A summons is not vague or overbroad if it fairly advises the summonsed party what information is sought, so that he can respond adequately to the summons. The summonses here describe precisely what information is sought, and SEI has not objected to them. Are these summonses so vague or overbroad as to be unenforceable?

FACTS[1]

Internal Revenue Agent Catherine Johns is conducting an examination (audit) to determine the correct income tax liabilities for years 1998 through 2001 of David A. Cohen, Margaret L. Cohen, and David A. Cohen's wholly-owned professional corporation, David Andrew Cohen, DMD, MS, PA (the Cohens).[2] No "Justice Department referral" (as defined in 26 U.S.C. §7602(d)(2)) is in effect for any of the Cohens, for any of the petitioners, or for the summonsed party. Nor has the IRS delayed making a Justice Department referral in order to collect additional information. Finally, the Department of Justice has not made any request under 26 U.S.C.

[1]The facts recited in this section are taken from the Declarations of Catherine Johns and John L. Marien.

[2]Johns Decl., ¶¶ 1,2.

§6103(h)(3)(B) for the disclosure of any returns or return information relating to any of the Cohens or any of the petitioners.[3]

In connection with that audit, and in accordance with 26 U.S.C. §7602, on March 31, 2003, Revenue Agent Johns issued and served two administrative summonses on Kristen Nolan of SEI Private Trust Company, Oaks, Pennsylvania. One summons sought information in connection with the audit of David A. and Margaret L. Cohen, and the other summons sought information in connection with the audit of David A. Cohen's professional corporation. Revenue Agent Johns did not send copies of those summonses to all the persons entitled to notice under the 26 U.S.C. §7609(a). When she realized she had not done so, Revenue Agent Johns she wrote to SEI and advised it that it did not have to comply with the summonses served on March 31, 2003, as she was withdrawing them.[4] The United States does not seek to enforce these summonses, which are the subject of the petition in Case No. 03-cv-3234.

In connection with that audit, in accordance with 26 U.S.C. §7602, and with the approval of an IRS Group Manager, on April 17, 2003, Revenue Agent Johns issued two additional administrative summonses on SEI Private Trust Company, of Oaks, Pennsylvania.[5] One summons sought information in connection with the audit of David A. and Margaret L. Cohen, and the other summons sought information in

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[3]Johns Decl., ¶10.

[4]Johns Decl., ¶¶ 3,4.

[5]These summonses sought the identical information as the summonses that Revenue Agent Johns served on March 31, 2003 and later withdrew.

connection with the audit of David A. Cohen's professional corporation. On April 21, 2003, another revenue agent, Gregory A. Valenti, served attested copies of the two summonses personally on Kristen Nolan of SEI. On April 23, 2003 Revenue Agent Johns gave proper notice to all persons about whom the summonses sought information. The information sought in the summonses is not already in the possession of the IRS.[6]

The summonses demand that SEI Private Trust Company appear and provide testimony and documents for the years 1998-2002, as described in greater detail in the attachments.[7] In particular, the IRS seeks information about individual account holders and participants in programs offered by xélan and its family of entities. As discussed in greater detail in the next section, the Cohens claimed significant tax benefits relating to their participation in xélan programs during the years under audit. The IRS seeks the information from SEI primarily because:

(A) The information in SEI's possession will shed light on whether the xélan supplemental disability insurance trust was, in fact, a program of insurance, as the Cohens and xélan claim, or whether it was simply a program that enabled participating doctors to improperly avoid federal income taxation on wage and dividend income, and the investments earnings from that income; and

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[6]Johns Decl., ¶¶ 5-7; Marien Decl., ¶39.

[7]Copies of the summonses are attached as Exhibits A and B to the Johns Declaration.

(B) Neither xélan, the Cohens, nor the Cohens' "financial advisors," were willing or able to provide complete and accurate information about the xélan programs that generated the claimed tax benefits on the Cohens' income tax returns.

A more detailed discussion of xélan follows.

The xélan Program – Financial Planning Combined with Tax Reduction.[8]

Dr. Donald Guess is the founder and Chairman of xélan, The Economic Association of Health Professionals. Xélan is a membership organization, open only to medical doctors and dentists. Dr. Guess claims that xélan has provided financial services to over 70,000 physicians.

Dr. Guess introduces xélan by explaining some elements of the federal income tax system, and how they impact financial planning for medical doctors. Dr. Guess states that the tax code does not require you to pay taxes on what you earn, "only on what you spend." Dr. Guess explains that xélan is based upon the concept of "saving your excess earnings, deductibly."

According to Dr. Guess, the concept behind the xélan program involves determining how much money a doctor requires to meet his or her basic lifestyle needs, plus the taxes due on that amount, and diverting what he calls the doctor's "surplus pretax earnings" into a "practice savings account." Dr. Guess indicates that xélan has

[8]From time to time in this memorandum, we use xélan to refer in general to one or more of the xélan entities. The information presented in this section is taken from documents, testimony and audio and videotapes obtained by the IRS in its examination of the Cohens. Marien Decl., ¶¶ 7-13.

six or seven different "deductible savings plans" to help doctors achieve their savings goals.

The xélan program is based at the outset upon the doctor accumulating an amount of money called the "critical capital mass," or CCM. According to Dr. Guess, the CCM represents the amount of money that the particular doctor anticipates he would require to meet his lifestyle needs for his expected lifetime – and, if married, his spouse's lifetime. Xélan calculates this amount by assuming that the CCM is invested in a guaranteed insurance company CD, with insured principal, earning an annually adjusted rate of 3% above inflation.

Once xélan has calculated a doctor's CCM, one of xélan's "financial consultants" prepares a plan for the particular doctor to accumulate that amount of money, using one of the allegedly deductible savings plans offered by xélan. Jaye & Junck Consultants, Inc., one of only 60 xélan consultants in America, prepared the xélan plans for the Cohens. According to Dr. Guess, the average doctor without a pre-existing savings plan takes 12½ years to reach CCM – as shown below, the Cohens did it in far less time. **Xélan's plan called for the Cohens to avoid $93,000 in federal income taxes on their wages and dividends each year.**

One important aspect of the xélan program is to enable a doctor to divert pre-tax dollars to grow his or her net worth annually, until he or she achieves CCM. According to Dr. Guess, "If your net worth doesn't go up every year you're in the xélan program, . . . if your net worth doesn't increase, then you should fire xélan."

The xélan Disability Insurance Program – Insurance, or "Tax Free" Savings?[9]

The Cohens selected one of xélan's allegedly "deductible savings plans," the "disability insurance trust," to build their CCM. The summonses at issue in this lawsuit were issued primarily – but not solely – to obtain information that could help verify or disprove factual assertions made by the Cohen and xélan Petitioners about the disability insurance trust program. Those factual assertions bear directly on the correct income tax liabilities of the Cohens for the years under examination.

According to Dr. Guess, the principal theory behind the disability insurance trust program is the concept that a Subchapter C corporation may deduct as ordinary and necessary business expenses under 26 U.S.C. §162 the entire annual cost of providing disability insurance coverage to its employees. As noted above, Dr. Guess and the xélan financial counselors advise xélan participants that **every year** their employers – for example, David Cohen's wholly-owned professional corporation – may divert between $4,000 and 100% of their "net practice income" to the xélan disability insurance trust, and deduct that entire amount from gross income as a business expense.

The IRS examination of the Cohens is focused in part on two separate aspects of Dr. Guess' claimed tax effects of the xélan disability insurance trust program, as they impact the individuals as employees and the corporation as employer:

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

[9]Marien Decl., ¶¶ 14-19.

improperly attempts to defer the recognition – and taxation – of wage or dividend income, and permit the earnings on that income to accumulate tax free until they are distributed to the participants. Two key components of insurance are risk shifting and risk distribution. As applied here, the concept of risk *shifting* essentially means that the Cohens must "shift" to the insurance company – here, xélan – the risk that one or both of them will become disabled. In other words, if one or both of the Cohens become disabled, assets of the insurance company – not just of the Cohens – must be available to pay claims. The concept of risk *distribution* means that, through its premium structure and accumulation of assets, the insurance company "distributes" each participant's risk of disability among **all** the participants. In other words, the assets of **each** xélan disability insurance group member must be at risk to pay the claims of **any** xélan group member. The IRS issued the summonses at issue here, in part, to help determine whether the xélan disability insurance trust program, as actually operated, includes these essential components of risk *shifting* and risk *distribution*.

B. The IRS is also examining the limits on deductibility to the Cohen corporation – and includability in Dr. David and Margaret Cohens' taxable income – in the event it determines that the xélan disability insurance trust is in fact providing insurance. Dr. David Cohen's corporation is making contributions to a trust that purportedly provides welfare benefits (disability insurance coverage). Employer contributions to such a trust are not deductible under 26

U.S.C. §162, as Dr. Guess represents to xélan members. Instead, their deductibility is determined under 26 U.S.C. §419, which adds to the requirements of, and expressly limits what would otherwise be deductible under, 26 U.S.C. §162. Section 419 specifically limits the amount that an employer may deduct for any given year to the "qualified cost." For a trust that provides disability insurance coverage, the qualified cost is, in general, the trust's actual cost of purchasing insurance coverage from an insurance company for that employee **for that year**. One aspect of the IRS's examination of the Cohens involves determining this cost for any insurance coverage that the xélan disability insurance trust may have actually purchased for them for each of the years under examination. One reason the IRS issued the summonses at issue here is to help determine what part – if any – of the purported "premiums" that the Cohens' employers paid, and that Dr. David Cohen's professional corporation deducted, in the years under examination represented the actual cost of the disability insurance that the xélan trust may have purchased for them.

In a videotape presentation obtained by the IRS in the Cohens' examination, Dr. Guess explained the concept behind the xélan disability insurance trust program: **If you work for a Subchapter C corporation, you don't have to pay taxes on any of your insurance premiums.** Xélan, Dr. Guess explains, "minimizes taxable compensation to maximize deductible savings." Dr. Guess tell doctors in this presentation that they can "contribute" anywhere between $4,000 per year and 100% of their net practice income

to the disability insurance trust, **deductibly**, adding that the money "grows tax free and comes out taxable."[10] He summarized the program this way, "It really doesn't matter how much you earn. Anything that you don't need for lifestyle can be saved without having to lose taxes on your savings."

In an audiotape presentation obtained by the IRS in the Cohens' examination, Dr. Guess stated that the xélan disability insurance trust is a new approach to disability coverage, "that combines savings along with the disability coverage component," noting that the doctors have a low probability of becoming disabled in any 10-year period of time. Dr. Guess explained the following details of the xélan disability insurance trust program:

A. "If a doctor does not become disabled during the course of this program, it has a premium refund feature where a high percentage of the premiums paid are refunded to the doctor as unused premium payments." After seven years, the premium refund benefits become "fully vested."

B. Dr. Guess described the premium refund aspect as an "equity feature," that is constituted so that 96% of the premiums paid by the doctor, plus the earnings on those premiums, may be returned to the doctor as a "refund" of his "premium."

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[10] Although not mentioned in Dr. Guess' presentation, it is essentially impossible for the IRS to track whether any xélan participant does **in fact** pay taxes on the money that, in his words, "comes out taxable." The way xélan has structured this program, the money comes from an offshore trust or insurance company, located in a "tax haven" country like Barbados or the British Virgin Islands. When those entities make taxable distributions to xélan participants, they do not and are not required to report the payments to the IRS. This compounds the abusive nature of the xélan program.

C. The "premiums" are invested in segregated accounts at a major US based institutional trust company.

D. The investment of the "premium payments, the 96% of the premiums," can be allocated to a number of investment vehicles, including U.S. government securities, bonds rated AAA or higher, and/or an index mutual fund based on the S&P 500.

E. Each participating doctor receives "monthly statements directly from the custodian firm, that gives the doctor the exact value in this premium refund type account."

F. The participating doctors must pay fees to set up and maintain these accounts. The doctor pays a one-time setup fee of $1,250, and an annual administration fee of $650 per year. In addition, "there is an annual investment advisory and custodial fee of 1.2% of the assets accumulated within the segregated accounts per doctor."

G. The insurance policy is issued by the xélan Disability Insurance Company, which Dr. Guess represented to be a "fully licensed and accredited life and disability insurance company domiciled in the British Virgin Islands." According to Dr. Guess, xélan Disability Insurance Company maintains, "segregated accounts for all the participating doctors, and all other participating xélan members with a US based trust company or institutional brokerage firm."

One of the documents which the IRS has obtained in its examination of the Cohens is a memo dated April 13, 2001 from the xélan Investment Management

Division to "All Financial Counselors." That memo states that "premiums" paid to the xélan disability insurance program will be invested according to the participant's prior advice, and that the participant may change how any of the funds are invested.

The xélan Public Charity/Foundation Program[11]

In his videotape presentation, Dr. Guess describes another xélan program called the xélan Foundation Public Charity program. Dr. Guess states that the xélan Foundation was established not only to benefit charities, "but also doctors and their families." In a letter to Dr. David Cohen dated May 22, 1997, Dr. Guess describes the "xélan Foundation Program" as follows (emphasis added):

> 4. The xélan Foundation Program – The Xélan Foundation is a public charity that enables Xélan doctor-members to allocate current surplus earnings to deductible contributions to personal public charity foundations that are administered as sub foundations of the Xélan Foundation. Earnings or savings contributed by doctors to their personal foundations prevent losses to income taxes, and are removed from their taxable estates. Savings and earnings contributed to their personal foundations are deductible, and continue to grow tax deferred outside their taxable estates. These accumulations can be distributed as expense reimbursements and taxable compensation to doctors and their family members or to other individuals or charitable institutions performing "good works" for the benefit of society. **Doctors and family members of doctors may be compensated by their personal foundations for their own teaching, research, and other pro-bono work on charitable projects important to them that are approved for funding by the Board of Directors of the Xélan Foundation.**

[11]Marien Decl., ¶20, Exh. 1.

The Cohens' Experience With xélan and its Programs[12]

In 1997 the Cohens decided to participate in xélan. The letter and attachments in Exhibit 1 to the Marien Declaration set out the "Tax Reduction Plan" that xélan prepared for Dr. David Cohen. Among other things, the xélan tax reduction plan recommended that Dr. David Cohen establish his orthodontic practice as a Subchapter C corporation, and begin "purchasing" xélan's supplemental disability insurance for Dr. David Cohen, its sole shareholder and only full-time employee. This was part of the xélan plan to generate annual tax savings exceeding $93,000 (Exh. 1, p. 28), to help Dr. David Cohen achieve his Critical Capital Mass, which xélan determined was just over $3 million.

Xélan, The Economic Association of Health Professionals, issued a "Statement of Value and Activity," for the period January 1 - 31, 1998, reflecting the xélan disability insurance plan established for the benefit of Dr. David Cohen. That statement reflects Dr. David Cohen's "Investment Representative" as xélan, Inc. Among other things that statement – on the letterhead of xélan, Inc. – shows that Dr. David Cohen added $19,200 to his account in January 1998, and that 99% of his "portfolio" was invested in an S&P 500 Index fund, and 1% in a "prime obligation fund."

Among other documents obtained by the IRS in this examination, are the records of insurance "premiums" and "distributions" for Dr. David Cohen and Dr. Margaret Cohen, respectively. These records show the payments made on behalf of the Cohens

[12]Marien Decl., ¶¶ 21 - 28, Exhs. 1-5.

for the period January 6, 1998 through April 22, 2002. Comparing the statements of account with the records of "premiums" paid, 96% of the $20,000 in "premiums" that Dr. David Cohen's professional corporation paid in 1997 ostensibly to provide disability insurance for Dr. David Cohen are reflected as $19,200 in additions to Dr. David Cohen's **personal** account. This 96% allocation is consistent with Dr. Guess' representations in the audiotape of his presentation, in which he tells prospective xélan members that they will recover 96% of their premiums – plus earnings on the investment of those premiums – when they participate in the xélan disability insurance trust.

An example of the annual financial information that xélan provides to its participants is a letter dated June 23, 1998 from Dr. Guess to Dr. David Cohen, along with the attachments to that letter. The letter and attachments, attached to the Marien Declaration as Exhibit 4, set out the annual update to the xélan"Tax Reduction Plan" that Dr. David Cohen had adopted in 1997. The letter and attachments sent to Dr. David Cohen show, among other things:

A. The progress made by Dr. David Cohen since joining xélan toward achieving his CCM, then computed to be $2,116,372.

B. The representation that, "All assets shown in the attached exhibits, other than your personal residence and 'other' are available eventually to satisfy your lifestyle needs."

C. Dr. David Cohen's "Summary of Assets," listing Dr. David Cohen's assets as of May 1997 (as he reported to xélan when he joined the program), and as of June 1998, after he had participated in xélan for about six months. That summary reflects no assets in May 1997 in the "Disability Equity Trust" in May 1997. As of June 1998, the summary includes among Dr. David Cohen's assets $151,430 in the "Disability Equity Trust." The summary indicates that Dr. David Cohen had assets categorized as "Other (jewelry, cars, etc – Loans)" of $50,000 in May 1997, and $64,000 in June 1998.

D. A recommendation that Dr. David Cohen's remaining "surplus," – all the earnings he does not require for current lifestyle and taxes, totaling over a quarter of a million dollars – "should be diverted into various xélan qualified and non-qualified savings programs, . . ." including the disability insurance trust.

To show what progress Dr. David Cohen had made in reaching his financial goals through the xélan disability insurance trust program, we have attached to the Marien Declaration a letter dated February 16, 2000 from Dr. Guess to Dr. David Cohen, along with the attachments to that letter. The letter and attachments set out the annual update to the xélan"Tax Reduction Plan" that Dr. David Cohen had adopted in 1997. The letter and attachments show the following:

A. Since joining xélan in 1997, Dr. David Cohen has met and exceeded his CCM, computed in February 2000 as $2,273,484. According to Dr. Guess, Dr.

Cohen had amassed "current savings" of $2,766,700 – up from just over $1.1 million less than three years earlier.

B. The representation that, "All assets shown in the attached exhibits, other than your personal residence and 'other' are available eventually to satisfy your lifestyle needs."

C. Dr. David Cohen's "Summary of Assets," lists Dr. David Cohen's assets as of May 1999 (as he reported to xélan), and as of February 2000, after he had participated in xélan for nearly three years. That summary reflects that Dr. David Cohen's assets in the "Disability Equity Trust" grew from $295,000 in May 1999 to $469,000 in February 2000. The summary also includes among Dr. David Cohen's assets in February 2000, $50,000 in "419 Trust." The summary includes among Dr. David Cohen's assets $227,000 in May 1999 and $234,000 in February 2000 in "Family Public Charity/xélan Foundation." Finally, the summary indicates that Dr. David Cohen had assets categorized as "Other (jewelry, cars, etc – Loans)" of $70,000 in May 1999, and $100,000 in February 2000. **In other words, xélan told Dr. David Cohen that $234,000 that he had supposedly "donated" to the xélan Foundation, a "public charity" – for which he had claimed deductions from his gross income – were part of his net worth, and "available eventually to satisfy [his] lifestyle needs."**

D. Xélan recommends that Dr. David Cohen divert his remaining "surplus," totaling over $860,000 "into various xélan qualified and non-qualified savings

programs, . . ." including "419 Plans," the disability insurance trust and "Family Public Charity/xélan Foundation Plans."

Dr. David Cohen's professional corporation, David Andrew Cohen, DMD, MS, PA, pays the disability insurance plan premiums for Dr. David Cohen directly to xélan. The professional corporation deducts those payments in full from the income it reports to the IRS, and Dr. David Cohen does not include those payments in the income he reports to the IRS. During the period January 6, 1998 through April 22, 2002, Dr. David Cohen's professional corporation paid a total $393,500 for the xélan disability insurance trust program.

Dr. David Cohen is not the only member of the Cohen household who shielded current income from taxation by participating in the xélan disability insurance trust program. His wife, Dr. Margaret Cohen, also diverted a sizeable portion of her wage income, by participating in the xélan disability insurance trust program through her employer, Ameripath, Inc. Ameripath deducted the "premiums" from Dr. Margaret Cohen's salary, and remitted them directly to xélan. In the Forms W-2 that it issued to Dr. Margaret Cohen, Ameripath did not include in "wages" reported to her and the IRS the funds that it withheld from her pay and sent to xélan. During the period January 6, 1998 through June 14, 2002, Ameripath had withheld from Dr. Margaret Cohen's salary and remitted to xélan a total of $504,852.69 for the xélan disability insurance trust program.

In summary, for the period January 6, 1998 through June 14, 2002, the Drs. Cohen diverted nearly **$900,000** of their total income to xélan. They have not paid tax on the diverted funds, or on the earnings on those funds. According to the statements the Drs. Cohen have received from xélan, all those funds – less perhaps 4% – are eventually available to them to fund their lifestyle needs.

Changes in the xélan Disability Insurance Trust Program[13]

When the Cohens began participating in the xélan Disability Insurance Trust program, the trust was maintained by the Royal Trust Corporation of Canada, and the Cohens – and Ameripath – sent their "premium" payments through xélan to the Royal Trust Corporation of Canada. Beginning some time in 2000 the trustee of the xélan disability insurance trust changed, to an entity called Euro American Trust and Management Services, Limited of Tortola, British Virgin Islands.

According to Dr. Guess, SEI manages the assets of the "insurance company."[14] The "Statement of Value and Activity," for the period January October 1 - 31, 2001, of the xélan disability insurance plan for the benefit of Dr. David Cohen indicates it was issued by SEI Investments, and indicates that Dr. David Cohen's "Investment Representative" is xélan, Isi (presumably xélan Investment Services, Inc.)/Rick Jaye & Mike Junck. Among other things, that statement shows that Dr. David Cohen added

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[13]Marien Decl., ¶¶ 29 - 31, Exh. 6.

[14]It is unclear from Dr. Guess' statements what "insurance company" he is talking about. Presumably, it is xélan Insurance Company.

$39,360 to his account in 2001, and that 100% of his portfolio – valued at nearly $266,000 – was invested in an S&P 500 Index fund. This is the first document in time that reflects SEI's participation in xélan.

The IRS Cannot Get Complete, Accurate Information From the Cohens or xélan[15]

Throughout its examination of the Cohens, the IRS has attempted to obtain timely, accurate and probative information from the Cohens, xélan, and others about the tax issues presented by the xélan disability insurance trust program, the xélan Foundation and other xélan programs that affect or may affect the Cohens' income tax liabilities. But on a number of important matters, the Cohens and xélan have not provided timely, reliable, accurate information about the xélan programs that affect the IRS's examination of the Cohens. In some instances the information that the Cohens and xélan have provided is of questionable accuracy. In other instances neither the Cohens nor xélan have been capable of providing information which would assist the IRS in examining the Cohens' income tax returns. The following examples, though not exclusive, illustrate the IRS's inability to obtain timely, accurate and reliable information from the Cohens and xélan:

A. Both Dr. David Cohen and Dr. Margaret Cohen told the IRS that they decided to participate in the xélan disability insurance trust program solely to obtain supplemental disability insurance. Dr. Margaret Cohen repeatedly told

[15]Marien Decl., ¶¶ 32 - 33, Exh. 7.

the IRS agents during her testimony that tax considerations played absolutely no role in her decision to participate in the xélan disability insurance trust program.

B. Dr. Margaret Cohen's statements to the IRS directly contradict the statements she made to her employer Ameripath, Inc., when she sought to begin participating in xélan. When she wrote to her employer in May 1997, and asked for authorization to participate in the xélan disability insurance trust program, Dr. Margaret Cohen stated that to attract and retain good pathologists, "**strategies must be developed to lower their tax liabilities** and at the same time provide excellent retirement benefits. High income employees . . . will not tolerate the current structure of withholding from their salary for long." With her memo, Dr. Margaret Cohen said she was attaching to her memo the written materials she had obtained from xélan, along with a videotape from the xélan program. She described xélan as, "a company of financial consultants strictly focusing on structuring high income individuals to allow provisions for **tax reduction strategies, accumulation of pretax dollars, tax free growth and tax free distribution.**" (Emphasis added.)

C. Both Dr. David Cohen and Dr. Margaret Cohen told the IRS that, as they understood the xélan disability insurance trust program, they did not ever expect to receive refunds of their "premiums." Yet their statements to the IRS contradict Dr. Guess' videotape and audiotape explanations of the xélan disability

insurance trust program, as well as the monthly account statements and annual updates the Cohens received from xélan.

D. During his testimony to the IRS in January 2003, Dr. Guess could not or would not identify who prepared the annual updates that bear his signature, nor could he explain how the updates were prepared. He also testified that he did not actually sign the annual updates that bear his signature. E. During his testimony to the IRS in January 2003, Dr. Guess could not or would not explain how xélan handles the receipt of "premiums" for the xélan disability insurance trust program, or how investment decisions are made or communicated to the trustee.

F. During his testimony to the IRS in January 2003, Dr. Guess could not or would not identify even one person who owns or controls xélan Disability Insurance Company, now allegedly located in the tax haven country of Barbados. Dr. Guess could not or would not explain how he, as founder and CEO of xélan, permitted xélan Disability Insurance Company to use the xélan name.

G. During his testimony to the IRS in January 2003, Dr. Guess could not or would not explain the meaning of term "segregated accounts," that he used in his various presentations about the xélan disability insurance trust program.

H. During his testimony to the IRS in January 2003, Dr. Guess could not or would not describe how the funds that employers of the participants – such as the Cohens – pay to xélan for "premiums" in the disability insurance trust

program are handled or divided among the various entities that administer the trust, nor could he explain what each amount (or percentage) represented in terms of the actual cost of providing any disability insurance to any individual xélan participant.

I. During his testimony to the IRS in January 2003, Dr. Guess could not or would not tell the IRS who prepared the xélan promotional materials that describe its various programs – including the programs that the Cohens participated in. Nor could Dr. Guess tell the IRS how those materials are prepared, or even how they are used.

J. During his testimony to the IRS in January 2003, Dr. Guess indicated that a former xélan employee, Leslie Buck, had been involved in the xélan disability insurance trust program. The Trust Agreement establishing the xélan Disability Equity Trust, dated October 17, 1995 (made an exhibit to Dr. Guess' testimony), bears the signature of Leslie S. Buck, as Executive Vice President of xélan, Inc. When asked about Mr. Buck's present relationship with xélan, Dr. Guess indicated that Mr. Buck had left xélan a number of years ago, possibly prompted by a 1999 inquiry from the Securities and Exchange Commission. Dr. Guess added that Mr. Buck had moved to the east coast, and "pretty much withdrew from any management roles at xélan." Notwithstanding that statement, Dr. Guess also told the IRS that Mr. Buck is now involved in management of the off-shore insurance companies.

K. Dr. Guess' testimony to the IRS that Mr. Buck left xélan some time in the 1990s is contradicted by a document obtained by the IRS in its examination of the Cohens. That document, which appointed Euro American Trust and Management Services, Ltd. of the British Virgin Islands, as successor trustee to Royal Trust Corporation of Canada for the xélan disability equity trust, bears Mr. Buck's signature on behalf of xélan, Inc., and is dated November 20, 2000 – after the time that Dr. Guess told the IRS that Mr. Buck had left xélan. Dr. Guess' testimony about Mr. Buck is also contradicted by the xélan website, www.xelan.com. As of July 31, 2003, the "Key Personnel" page of that website shows a photograph of Leslie S. Buck, and identifies him as President of xélan Annuity Company.[16]

L. During his testimony to the IRS in January 2003, Dr. Guess could not or would not tell the IRS how the xélan disability insurance policies operate, what coverage they provide, and how the "premiums" are determined.

M. During his testimony to the IRS in January 2003, Dr. Guess could not or would not even tell the IRS how xélan determined the "Critical Capital Mass" for its members, a key component of its programs.

N. During his testimony to the IRS in January 2003, Dr. Guess indicated that the xélan disability insurance trust program had changed since its inception in 1995. But Dr. Guess could or would not provide detailed information on the

[16]Marien Decl., ¶33.K, Exh. 8.

precise changes that had been made, when each change had been made, or at whose behest and why.

Why the IRS Seeks Information From SEI[17]

As noted above, to determine whether the xélan disability insurance trust program is a program of insurance – as xélan and the Cohens claim – or is simply a "disguised" savings plan, it is important to determine whether the program possesses the elements of risk shifting and risk distribution, two essential components of the insurance concept. For the following reasons, the IRS has not succeeded in obtaining any information about whether the xélan disability insurance trust program possesses these elements of risk shifting and risk distribution:

A. The IRS cannot compel the offshore insurance company to provide information about the program. Dr. Guess has been unwilling or unable to identify even one person associated with the offshore insurance company, other than Leslie S. Buck – and Dr. Guess could not provide Mr. Buck's current address or phone number. So the IRS does not even know how to contact any person who might have relevant information about the insurance company.

B. Dr. Guess, the founder and CEO of xélan, has been unable or unwilling to provide any meaningful details about how the xélan disability insurance trust program operates, or about the offshore insurance company. Dr. Guess has been unwilling or unable to explain or identify important documents that xélan

[17]Marien Decl., ¶¶ 34 - 38.

prepares and distributes about the program, and has not offered any information which would explain and prove how the program involves risk shifting and risk distribution.

C. The Cohens have not provided detailed and accurate information about their participation in the program.

The IRS is clearly entitled to examine whether the Cohens properly excluded or deducted from their income nearly $1 million in wages and dividends over the past few years. But neither the Cohens nor xélan have been forthcoming with detailed and accurate information about how the programs which generated the alleged tax benefits actually work. So the IRS has turned to SEI, which maintains records that would clearly help the IRS determine how these programs worked, and whether the Cohens claimed legal and proper tax benefits from them. In particular, the SEI information will enable the IRS to conduct these analyses:

1. The IRS can review all the account statements of all the xélan members who participated in the xélan disability insurance trust program, and determine whether any individual participant's account was charged for providing disability insurance **benefits** in response to claims filed by other participants in the xélan disability insurance trust program. If, for example, those statements show that a hypothetical Dr. Smith had a charge to his account to pay his share of the cost of paying the disability claim of a hypothetical Dr. Jones, then there would be evidence of risk distribution that is essential to the insurance concept. If, on the other hand, the account

statements do not show those types of charges, there would be no evidence of risk distribution, and the IRS might reasonably conclude that the xélan program was not insurance.[18]

2. If it determines that the xélan disability insurance trust program is, in fact, a program of insurance, the IRS can also examine the documents and testimony from SEI to determine the portion of the "premium" that represents the "qualified cost" of the insurance for purposes of 26 U.S.C. §419.[19]

All the information the IRS seeks from SEI would, therefore, shed light on the Cohens' income tax returns by helping the IRS determine whether Dr. David Cohen's employer was entitled to claim deductions in the amounts claimed for disability insurance premiums for Dr. David Cohen, whether the Drs. Cohen were required to report the alleged insurance premiums paid by their respective employers in their gross income, and whether the Drs. Cohen were required to report in their gross income the earnings on those premiums in the xélan program.

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[18]Marien Decl., ¶36.

[19]Marien Decl., ¶37.

ARGUMENT
THE COURT SHOULD DENY THE PETITIONS AND ENFORCE THE SUMMONSES

I.

THE RESPONDENT HAS PROVED A PRIMA FACIE CASE FOR ENFORCEMENT OF THESE SUMMONSES

A. Congress Has Given the IRS a Broad Duty and Broad Powers to Investigate.

The Secretary of the Treasury and the Commissioner of Internal Revenue are charged with administering and enforcing the Internal Revenue Code. Section 7601 of the Code (26 U.S.C.) describes the IRS's statutory duty and powers of investigation in very broad terms, providing:

> The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax ...

The authority which Congress has given the IRS to enforce the internal revenue laws and related statutes is an extraordinarily broad mandate which directs (not just permits) it to inquire as to all persons who may be liable to pay any internal revenue tax.[20] The great breadth of §7601's mandate is facilitated by the substantial arsenal available to the IRS to ensure the enforcement of the internal revenue laws.

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[20] See United States v. LaSalle Nat'l Bank, 437 U.S. 298, 308 (1978); Donaldson v. United States, 400 U.S. 517, 523 (1971) (imposing upon the Secretary the duty "to canvass and to inquire").

Indeed, in order to determine the correctness of any return or to determine the liability of any person for any internal revenue tax, the IRS may examine any books, papers, records, or other data **which may be relevant or material to such inquiry**, may issue summonses as to any person in order to obtain any books, papers, records, or other data **that may be relevant or material to the inquiry**, and may take such testimony, under oath, as may be relevant or material to the inquiry.[21]

The Supreme Court has observed how broad the authority is that Congress intended to give to the Service when it enacted §7602:

> In order to encourage effective tax investigations, Congress has endowed the IRS with expansive information-gathering authority; §7602 is the centerpiece of that congressional design. As we noted in United States v. Bisceglia, 420 U.S. 141, 146 (1975):
>
> "The purpose of [§ 7602] is not to accuse, but to inquire. Although such investigations unquestionably involve some invasion of privacy, they are essential to our self-reporting system, and the alternatives could well involve far less agreeable invasions of house, business, and records."[22]

The Court has observed that, "[T]he §7602 summons is critical to the investigative and enforcement functions of the IRS ...".[23] There is, therefore, no question that the Internal Revenue Service has the duty and the power to conduct this examination to determine the correct income tax liabilities of David A. Cohen, Margaret L. Cohen and David

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[21] 26 U.S.C. §7602(a)(emphasis added).

[22] United States v. Arthur Young & Co., 465 U.S. 805, 816 (1984); accord, Hintze v. IRS, 879 F.2d 121, 125 (4th Cir. 1989).

[23] Arthur Young & Co., 465 U.S. at 814.

Andrew Cohen, DMD, MS, PA. The IRS most certainly has the power to examine whether the Cohens are properly entitled to claim the tax benefits that they claimed from their participation in various xélan programs, including the disability insurance trust and the xélan Foundation Public Charity, and to examine documents and take testimony (by compelled summons, as necessary) as part of its examination.

B. The United States Has Established a Prima Facie Case to Enforce the Summonses.

In order to stay compliance with an IRS summons on a third-party recordkeeper such as SEI, a taxpayer must promptly file a petition to quash and comply with all the service requirements of the statute.[24] The United States may then seek enforcement of the summons in the taxpayer's proceeding.[25] That is what the United States has done here, citing as support for summary enforcement the Johns and Marien Declarations. As discussed below, these declarations establish a prima facie case to enforce the summonses at issue here without the necessity of discovery or an evidentiary hearing.

Courts have granted the United States' motions for summary enforcement of IRS summonses in all but the most exceptional circumstances.[26] To demonstrate a prima facie case for enforcement, the United States need only show: (1) that the summons was issued for a proper purpose; (2) that the information sought may be relevant to that purpose; (3) that the information sought is not already in the possession of the Internal

[24] 26 U.S.C. §§7609(b)(2)(A)-(B).

[25] 26 U.S.C. §7609(b)(2)(A)

[26] Hintze, 879 F.2d at 126.

Revenue Service; and (4) that the administrative steps required by the Code with respect to the issuance and service of a summons have been followed.[27] The United States generally establishes this showing by submitting an affidavit from the agent who issued the summonses, establishing the four elements described in Powell.[28] "Once a prima facie case has been established, the burden shifts to the taxpayer to prove that enforcement of the summonses would be an abuse of the court's process. [United States v. Will]. This burden is a heavy one."[29]

The Johns and Marien Declarations establish all four of the Powell requirements. Revenue Agent Johns is conducting an examination to determine the correct income tax liabilities of the Cohens for the years 1998 through 2001. In particular, she is examining whether the Cohens properly claimed substantial tax benefits stemming from their participation in a number of xélan programs, including the xélan disability insurance trust program and the xélan Foundation Public Charity program. As described above, xélan's founder promises participants that those programs deliver substantial tax benefits. **The Cohens diverted over $1 million in income to these programs between 1998 and 2002.**

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[27]United States v. Powell, 379 U.S. 48, 57-58 (1964); Hintze, 879 F.2d at 126; United States v. Ritchie, 15 F.3d 592, 599-600 (6th Cir.), cert. denied, 513 U.S. 868 (1994).

[28]United States v. Will, 671 F.2d 963, 966 (6th Cir. 1982).

[29]Kondik v. United States, 81 F.3d 655, 656 (6th Cir. 1996), citing, United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978).

The Third Circuit Court of Appeals recently upheld the IRS's determination that a program of "excess premium life insurance" similar to the xélan disability insurance trust program was, in fact, an improper scheme for avoiding income taxes on the "premiums." In Neonatology Assocs., P.A. v. Commissioner, the court affirmed a Tax Court decision that upheld the IRS's determination that excess refundable "premiums" paid for such insurance were, in fact, a series of disguised dividends that were taxable to the doctors, and not deductible to their Subchapter C employers.[30] Perhaps as important to understanding the IRS's inquiry into the Cohens' participation in xélan are the Third Circuit's comments affirming the imposition of 20% negligence penalties on the doctors and their controlled corporations:

> We also add the following. When, as here, a taxpayer is presented with what would appear to be a fabulous opportunity to avoid tax obligations, he should recognize that he proceeds at his own peril. In this case, PES devised a program which it marketed as "creat[ing] a tax deduction for the contributions to the employee welfare benefit plan going in and a permanent tax deferral coming out." As highly educated professionals, the individual taxpayers should have recognized that it was not likely that by complex manipulation they could obtain large deductions for their corporations and tax free income for themselves.[31]

The IRS seeks the information in these summonses to determine, in part, the extent to which the xélan program is similar to the program struck down in Neonatology. The IRS is certainly entitled to examine the Cohens' income tax returns to

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[30] 299 F.3d 221 (3d Cir. 2002), aff'g, 115 T.C. 43 (2000).

[31] 299 F.3d at 234.

determine whether they properly claimed hundreds of thousands of dollars in tax benefits from their participation in various xélan programs, including the disability insurance trust.

To prove the second element under Powell, the United States must show that the summonsed information is potentially relevant to the inquiry, that is, whether it "might throw light upon the correctness of the return."[32] Here, the Declaration of John L. Marien explains in great detail why the IRS seeks this information from SEI, and how it might throw light upon the correctness of the Cohens' income tax returns.

As noted above, the Cohens claimed substantial tax benefits from their participation in various xélan programs, including the disability insurance trust. Of particular importance is whether this program is, in fact, a program of insurance as the Cohens and xélan contend, or whether it is a system for improperly avoiding income taxes on wage and dividend income. As explained above, the IRS has been singularly unsuccessful in getting accurate and complete information about the disability insurance trust program from the Cohens, xélan, or others associated with the xélan program. The Cohens have not been forthcoming about how the program affects their personal finances. Indeed, Margaret L. Cohen told the IRS that tax reduction played no role in her decision to participate in the xélan disability insurance trust program, even though she told her employer that it was the primary – indeed, the only – reason. Dr. Guess, the founder and Chairman of xélan, could not identify even one person who is

[32] United States v. Rockwell Int'l, 897 F.2d 1255, 1263 (3d Cir. 1990).

associated with the insurance company – the xélan Insurance Company – nor could he describe in detail how the money from the participants flows through xélan and into individually segregated accounts maintained by the summonsed party, SEI. He even obfuscated in describing the meaning of the term "segregated accounts." The IRS cannot, with any acceptable level of confidence, rely upon the information it has obtained thus far from the Cohens, from xélan, or from Rick Jaye, the xélan "financial advisor" to the Cohens.

As John L. Marien noted in his declaration, the IRS is examining whether the xélan disability insurance trust program is, in fact, a program of insurance. Although the Internal Revenue Code does not define what is "insurance," the Supreme Court has explained that in order for an arrangement to constitute "insurance" for federal income tax purposes, it must have both the elements of *risk shifting* and *risk distribution*.[33] As John Marien explained in his declaration, the concept of risk *shifting* essentially means that the Cohens must "shift" to the insurance company – here, xélan – the risk that one or both of them will become disabled. In other words, if one or both of the Cohens become disabled, assets of the insurance company – not just of the Cohens – must be available to pay claims. The concept of risk *distribution* means that, through its premium structure and accumulation of assets, the insurance company "distributes" each participant's risk of disability among **all** the participants. Risk distribution

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[33] Helvering v. LeGierse, 312 U.S. 531 (1941). For a more detailed discussion of these concepts, see also, Clougherty Packing Co. v. Commissioner, 811 F.2d 1297, 1300 (9th Cir. 1987).

necessarily entails a pooling of premiums so that a potential insured is not in significant part paying for his own risks.[34] On its face, it appears that the xélan disability insurance trust program requires each participant to bear a significant share of his or her own risk. The summonses are intended, in part, to determine whether that is, in fact, the case.

SEI maintains individually segregated accounts for all participants in the xélan disability insurance trust program. The IRS seeks the records of all those accounts, and intends to examine those records to determine whether the elements of risk shifting and risk distribution are present in the program, or whether the program simply consists of a series of individual investment accounts that do not bear the hallmarks of an insurance arrangement. Only by examining these records can the IRS obtain a complete and accurate view of how the xélan disability insurance trust program operates – a view untainted by the "spin" of the founder, Dr. Guess, participants like the Cohens, or xélan salesmen like Rick Jaye.

In sum, the information sought may shed light on the correctness of the Cohens' tax returns, by helping the IRS determine whether the xélan disability insurance trust program is a program of insurance, or a disguised savings/investment plan.

The third element of Powell is that the information sought is not already in the possession of the IRS. The Declarations of John L. Marien and Catherine Johns prove that it is not. Thus the United States has established this element as well.

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[34] Humana, Inc. v. Commissioner, 881 F.2d 247, 257 (6th Cir. 1989); Marien Decl., ¶16.A.

Although the petitioners claim that the IRS already possesses the information sought in the summonses, that does not end the inquiry. The Cohens and xélan merely claim that all information about **the Cohens** is in the IRS's possession. They do not contend that the IRS possesses all the information in SEI's possession about the other xélan program participants – indeed, xélan has filed its petition to quash these summonses precisely because it wants to prevent the IRS from obtaining information about any participants in the xélan disability insurance trust program. Perhaps more importantly, neither the Cohens nor xélan has provided any reliable evidence to suggest – let alone prove – that the information they have provided to the IRS is complete, accurate and unredacted, as well as identical to the information about them the IRS seeks from SEI. Given the gaps in the information which the Cohens and xélan have provided thus far, as well as their undisputed and substantial financial interest, it must be beyond serious question that the IRS is entitled to obtain all potentially relevant information from a reliable source, SEI.

Finally, the Declaration of Catherine Johns establishes that the IRS followed all the administrative steps required by the Code to issue and serve these summonses. The only issue that the petitioners have raised is whether she properly sent notice to xélan Annuity Co., Ltd. The statute requires that notice be "given," but does not require that the notice be "accepted" or received. Revenue Agent Johns testified that she sent notice to xélan Annuity Co., Ltd. Xélan Annuity Co., Ltd. has filed a petition to quash in which it claims not to have received the notice. But xélan does not claim that the IRS

did not **send** the notice, only that it did not **receive** the notice. Not only is it disingenuous for xélan Annuity Co., Ltd. to file a petition to quash summonses it claims it did not receive, the claim itself does not refute the fourth Powell element.

Because the United States has proven its prima facie case for enforcement, the burden shifts to the petitioners to show that enforcing these summonses is an abuse of the court's process. For the reasons discussed below, neither the facts nor the legal arguments raised by the petitioners meet that "heavy" burden.

II.

THE PETITIONERS' ARGUMENTS LACK MERIT

In their petitions to quash these summonses, the petitioners have raised a number of arguments why the Court should not enforce these summonses. They argue that the IRS should have followed the procedures for "John Doe" summonses in §7609(f), that the summonses seek information for years outside the periods under audit, and that the summonses are overbroad. On this record, the Court should reject these arguments for the reasons discussed below.

A. The IRS May Issue a Summons for More Than One Purpose.

The petitioners argue that enforcing these summonses would be an abuse of the Court's power. They claim that the IRS is not really seeking information here to audit the Cohens, but in fact seeks information so that it can audit presently unknown participants in the xélan disability insurance trust program. They argue that the IRS cannot obtain the information until it first complies with the statute that authorizes

summonses to aid in the audit of unknown taxpayers, so-called "John Does." For the reasons discussed briefly below, their argument is misplaced.

The IRS must obtain an *ex parte* order before serving a summons, "which does not identify the person with respect to whose liability a summons is issued."[35] And there is no dispute that no such order was obtained here. But that statute does not apply to these summonses. First, these summonses were issued in respect of the income tax liabilities of specifically identified taxpayers, Dr. David Cohen, Dr. Margaret Cohen, and Dr. David Cohen's professional corporation. As explained in detail in the Declaration of John L. Marien, the IRS seeks detailed financial records in SEI's possession concerning the accounts of every participant in the xélan disability insurance trust program, so that it can determine whether the program is, in fact, a program of insurance. By examining those records, the IRS may be able to determine whether the Cohens properly claimed substantial tax benefits on their income tax returns now under audit. Because they were issued in aid of the IRS's audit of the Cohens, they do not fall within §7609(f).

Because the IRS issued these summonses to obtain information for its audit of the Cohens, it is irrelevant that the summons might also provide information to the IRS that might enable it to identify and audit other taxpayers whose identities may or may not now be known to the IRS. The Supreme Court in Tiffany Fine Arts expressly upheld the IRS's right to issue a summons – without first obtaining an *ex parte* order – that seeks

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[35] 26 U.S.C. §7609(f).

potentially relevant information in connection with the legitimate audit of a known taxpayer, even if the summons requires the summonsed party to disclose information about unknown taxpayers.[36] Accordingly, the IRS is entitled to obtain all the summonsed information from SEI, without having to comply with §7609(f).

The petitioners might try to distinguish Tiffany Fine Arts, on the ground that there the IRS issued the summons to the taxpayer under audit, while here the IRS issued the summonses to a third party that is not under audit. But that is a distinction without any discernable difference. The Supreme Court explained that it would not require the IRS to obtain court approval for serving a "dual purpose" summons, because Congress enacted §7609(f) so that there would be somebody in the lawsuit who could advocate for the interests of the unknown taxpayers. Where there is no taxpayer under audit, the court substitutes for the unknown taxpayers through the *ex parte* application process. But where taxpayer under audit is the summonsed party, the Supreme Court reasoned, the taxpayer has an interest in advocating for the unknown taxpayers.

That same reasoning applies here, where there are many parties in this lawsuit who not only can, but actually **are,** advocating for the interests of the unknown taxpayers. Every single petitioner in Case No. 03-cv-3239 purports to be advocating for the unidentified xélan participants. For the same reasons that the Supreme Court discussed in Tiffany Fine Arts, there is no need for this Court to apply the additional

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[36] Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 324 (1985).

procedural safeguards of §7609(f). These summonses were issued in connection with IRS audits of specifically identified taxpayers. The petitioners have ample interest in and desire to represent the interests of the unknown taxpayers whose information is sought in this summons. Under the holding and reasoning of Tiffany Fine Arts, the IRS was not required to comply with §7609(f) before serving these summonses.

B. The IRS May Issue Summonses to Obtain Information for Years Outside the Period Now Under Audit.

The petitioners argue that the IRS may not enforce these summonses, insofar as they seek documents and testimony for 2002, beyond the period under audit. But their argument is misplaced, both on this record and as a matter of law.

As the Supreme Court has held, the IRS may use its summons power to seek information that is "potentially relevant" to the matters under examination by the IRS.[37] Here the United States has shown why it may shed light on the Cohens' tax returns under audit to review all the records in SEI's possession that pertain to the xélan disability insurance trust program. As discussed above, the IRS is examining whether, as organized and operated, that program is a program of insurance. In considering that issue, the IRS intends to review how individually segregated accounts are maintained and treated, including whether any funds from the account of any one doctor are used to pay claims filed by any other doctor. By necessity, the records that might bear on this determination are not limited to the documents for 1998-2001. Thus the information

[37] United States v. Powell, 379 U.S. 48 (1964).

sought for the year 2002 may shed light on the correctness of the Cohens' tax returns for 1998-2001. As such, the IRS is entitled to obtain that information by summons. Finally, the courts that have considered the issue have held that the IRS summons power is not limited to the years under consideration, so long as the summonsed information may shed light on the matters under consideration.[38]

C. The Summonses Are Neither Overbroad nor Indefinite.

Finally, the petitioners argues that the Court should not enforce the summonses because they are allegedly overbroad and "indefinite." For the reasons discussed below, they are wrong on the facts and on the law.

The "specificity" requirement for an IRS summons is extraordinarily low. The only requirement is that the summons describe the information sought in enough detail to inform the summonsed party of exactly what he is supposed to produce.[39] These summonses describe precisely what records the IRS wants SEI to produce. They could scarcely be more explicit. The Court should reject this argument out of hand.

As for the "definiteness" argument, the petitioners raise the familiar (and oft-rejected) argument that this is a "fishing expedition." This Court should reject it too.

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[38] Barquero v. United States, 18 F.3d 1311, 1318 (5th Cir. 1994).

[39] United States v. Abrahams, 905 F.2d 1276, 1282 (9th Cir. 1990); United States v. Wyatt, 637 F.2d 293, 302 n.16 (5th Cir. 1981).

The courts have described the IRS's summons power as a "license to fish."[40] While this license is not without limit, the courts do not look into whether the IRS seeks to examine a large volume of records. Instead, courts look at whether the records are described in sufficient detail to inform the summonsed party of exactly what is to be produced, and whether the summonsed records may be relevant to the inquiry. The courts have consistently enforced against challenges for overbreadth summonses that are definite in nature and finite in scope, and that request records that may be relevant to the IRS inquiry.[41]

The IRS is auditing whether the Cohens properly claimed hundreds of thousands of dollars in tax benefits, stemming from their participation in various xélan programs, including the xélan disability insurance trust program. John L. Marien has explained in detail why the IRS seeks this voluminous information, and how that information may shed light on the correctness of the Cohens' tax returns. That the information sought may require SEI to produce voluminous records should, therefore, have no bearing on whether the IRS is entitled to them. The Court should reject the petitioners' contention that the summonses are indefinite or overbroad.

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[40] United States v. Luther, 481 F.2d 429, 432-433 (9th Cir. 1973); United States v. Giordano, 419 F.2d 564, 568 (8th Cir. 1969), cert. denied, 397 U.S. 1037 (1970) ("Secretary or his delegate has been specifically licensed to fish by §7602.")

[41] United States v. Reis, 765 F.2d 1094, 1096 n.2 (11th Cir. 1985); United States v. Lindsteadt, 724 F.2d 480, 483 n.1 (5th Cir. 1984); United States v. National Bank of South Dakota, 622 F.2d 365 (8th Cir. 1980).

CONCLUSION

The respondent has made a *prima facie* case to enforce these summonses. The petitioners have not met their "heavy" burden to establish that enforcing these summonses would constitute an abuse of the Court's power. Accordingly, the Court should dismiss the Petitions and enter an Order directing the summonsed party to comply with the summonses, fully and promptly.

Dated: August 8, 2003

Respectfully submitted,

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