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.	)	

DECLARATION OF JOHN L. MARIEN

John L. Marien, pursuant to 28 U.S.C. § 1746, declares:

1. I am an Internal Revenue Agent employed by the Internal Revenue Service. My a post of duty is 111 W. Huron Street, Room 1455, Buffalo, New York 14202. I have been an Internal Revenue Agent since 1979.

2. In January 1993 I became the IRS's National Issue Specialist for issues under 26 U.S.C. §§419 and 419A – the position is now called National Technical Advisor. The IRS created this position to help investigate improper uses of employee welfare benefit funds. As a Technical Advisor, I help Internal Revenue Agents around the United States when they are dealing with issues involving the proper tax treatment of contributions to employee welfare benefit funds. I have written a training guide for IRS employees, and taught many classes for IRS employees on issues in my area of expertise. Over the past ten years I have assisted in more than 100 individual and corporate income tax audits, involving the proper tax treatment of contributions to employee welfare benefit funds. I have served on the litigation team in about twelve cases, and testified in one Tax Court

case, dealing with issues involving the proper tax treatment of contributions to employee welfare benefit funds.

3. In my capacity as an Technical Advisor, I have been assigned to help Internal Revenue Agent Catherine Johns in her examination to determine the correct federal income tax liabilities of David A. and Margaret L. Cohen, and the wholly-owned professional corporation of David A. Cohen, David Andrew Cohen, DMD, MS, PA, (the Cohens) for 1998, 1999, 2000 and 2001. I understand that Dr. David Andrew Cohen goes by the name Andrew Cohen and that Dr. Margaret L. Cohen goes by the name Peggy Cohen.

4. To assist Revenue Agent Johns in her examination of the Cohens' correct income tax liabilities for 1998-2001, I drafted the summonses that Revenue Agent Johns issued to Jaye & Junck Consulting, Inc.; xélan, Inc. [sic]; and SEI Private Trust Company. I also assisted another IRS employee in drafting summonses issued to Dr. David A. Cohen; Dr. Margaret L. Cohen; David Andrew Cohen, DMD, MS, PA; and Ameripath, Inc. (the employer of Dr. Margaret L. Cohen).

5. All of the parties listed in the preceding paragraph, except for SEI Private Trust Company, produced some documents and oral testimony in response to summonses issued to them. Xélan, Inc. also produced audio and videotapes. I participated in every session in which oral testimony was taken by the IRS under the authority of summonses issued in its examination of the Cohens. I have reviewed all the

documents and all the testimony that the IRS has accumulated in its examination of the Cohens.

6. I make this declaration based upon the information obtained thus far by the IRS in its examination of the Cohens, and upon my experience in the field of employee welfare benefit funds.

The xélan Program – Financial Planning Combined with Tax Reduction.

7. 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.

8. From time to time in this declaration, I 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.

9. 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."

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

11. 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.

12. 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.

13. 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?

14. One of xélan's allegedly "deductible savings plans" that the Cohens relied upon to build their CCM is called the "disability insurance trust." 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.

15. 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 – including the Cohens – that **every year** their employers 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.

16. 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 improperly attempts to defer the recognition 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 includes these essential components or 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.

17. In a videotape presentation obtained by the IRS in the Cohens' examination, Dr. Guess explained the concept behind the 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." 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.”

18. 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.”

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."

19. 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

20. In the videotape presentation discussed in ¶17 above, Dr. Guess also describes a 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." Attached to this declaration as Exhibit 1 is a letter dated May 22, 1997 from Dr. Guess to Dr. David Cohen, along with the attachments to that letter. Beginning on page 18 of that letter, 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.**

The Cohens' Experience With xélan and its Programs

21. In 1997 the Cohens decided to participate in xélan. The letter and attachments in Exhibit 1 (identified in the preceding paragraph) 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.

22. Attached to this declaration as Exhibit 2 is a "Statement of Value and Activity," for the period January 1 - 31, 1998, of the xélan disability insurance plan for the benefit of Dr. David Cohen. That statement indicates it was issued by xélan, The Economic Association of Health Professionals, and indicates that Dr. David Cohen's "Investment Representative" is 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."

23. Attached to this declaration as Exhibits 3-A and 3-B are the records of insurance premiums and distributions for Dr. David Cohen and Dr. Margaret Cohen, respectively. These records, obtained by the IRS in its examination of the Cohens, show

the payments made on behalf of David and Margaret Cohen for the period January 6, 1998 through April 22, 2002. Comparing Exhibits 2 and 3-A, 96% of the $20,000 in "premiums" paid for 1997 for disability insurance by Dr. David Cohen's corporation, as shown in Exhibit 3-A, are reflected as $19,200 in additions to Dr. David Cohen's account, as shown in Exhibit 2. This allocation is consistent with Dr. Guess' representations in the audiotape of his presentation on the xélan disability insurance trust program, mentioned in ¶18.B., above.

24. Attached to this declaration as Exhibit 4 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 set out the annual update to the xélan"Tax Reduction Plan" that Dr. David Cohen had adopted in 1997. The following matters appear in the letter and attachments sent to Dr. David Cohen:

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

B. The June 23, 1998 letter from Dr. Guess advises Dr. David Cohen, "All assets shown in the attached exhibits, other than your personal residence and 'other' are available eventually to satisfy your lifestyle needs."

C. The final page of attachments, Dr. David Cohen's "Summary of Assets," lists 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 for Dr. Cohen in May 1997 in the "Disability Equity Trust," and includes among Dr. David Cohen's assets in June 1998 $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. Among other things, the letter recommends that Dr. David Cohen's remaining "surplus," that is 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.

25. Attached to this declaration as Exhibit 5 is 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 following matters appear in the letter and attachments sent to Dr. David Cohen:

A. The attached exhibits to the letter reflect that, since joining xélan in 1997, Dr. David Cohen has met and exceeded his CCM, then computed to be $2,273,484. According to the letter from Dr. Guess, Dr. Cohen had achieved "current savings" of $2,766,700 – compared with just over $1.1 million less than three years earlier. (See, Exhibit 1 to this Declaration)

B. The February 16, 2000 letter from Dr. Guess advises Dr. David Cohen, "All assets shown in the attached exhibits, other than your personal residence and those assets listed as 'other' on your financial data form are available eventually to satisfy your lifestyle needs."

C. The final page of attachments, 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.

D. Among other things, the letter recommends that Dr. David Cohen's remaining "surplus," totaling over $860,000 "should be diverted into various xélan qualified and non-qualified savings programs, . . ." including "419 Plans," the disability insurance trust and "Family Public Charity/xélan Foundation Plans."

26. Dr. David Cohen's professional corporation, David Andrew Cohen, DMD, MS, PA, remits 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. Exhibit 3-A reflects that 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.

27. As noted above, Dr. Margaret Cohen also participates 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. Exhibit 3-B reflects that 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.

28. According to Exhibits 3-A and 3-B, 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, those funds are eventually available to them to fund their lifestyle needs.

Changes in the xélan Disability Insurance Trust Program

29. 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.

30. 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.

31. According to Dr. Guess, SEI manages the assets of the "insurance company." Attached to this declaration as Exhibit 6 is a "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. That statement 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 $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.

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

32. 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.

33. 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 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. Attached to this declaration as Exhibit 7 is a memo dated May 20, 1997 from Dr. Margaret Cohen to Stephen V. Fuller, Vice President of Human Resources of Ameripath, Inc. In that memo Dr.

Margaret Cohen urged Mr. Fuller to allow her to participate in the xélan disability insurance trust program. Among the reasons she articulated in the memo, 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. Attached as Exhibit 8 are printouts of the "Key Personnel" page of the xélan website, along with the page devoted to Mr. Buck, identified on the xélan website as President of xélan Annuity Company.

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 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

34. 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, components of the insurance concept.

35. 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 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.

36. When it obtains from SEI all the account statements of all the xélan members who participated in the xélan disability insurance trust program, the IRS can review them, 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 the hypothetical Dr. Smith had a charge to his account to pay his share of the cost of paying the disability claim of the 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.

37. The IRS seeks the account statements of the xélan participants from SEI in order to determine whether the xélan disability insurance trust program is a program of insurance, as the Cohens claimed on their federal income tax returns. If it determines that the xélan disability insurance trust program is, in fact, a program of insurance, the documents and testimony from SEI may help the IRS determine the portion of the

"premium" that represents the "qualified cost" of the insurance for purposes of 26 U.S.C. §419.

38. The documents and testimony that the IRS seeks from SEI in these summonses would shed light on the correctness of the Cohens' income tax returns by helping to shed light on whether the xélan disability insurance trust program is, in fact, a program of insurance and, if so, the portion of the "premium" that represents the "qualified cost" of the insurance for purposes of 26 U.S.C. §419. This would 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, whether the individual Dr. Cohens were required to report the alleged insurance premiums paid by their employers in their gross income, and whether they were required to report in their gross income the earnings on those premiums in the xélan program.

39. The documents and testimony that the IRS seeks from SEI in these summonses are not already in the possession of the Internal Revenue Service.

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

Dated: August 8, 2003

/s/ John L. Marien
JOHN L. MARIEN
Buffalo, New York