

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.)	

RESPONSE TO PETITIONS TO QUASH AND
MOTION FOR SUMMARY ENFORCEMENT

Respondent the United States of America, files the following response to the Petitions to Quash Summonses, filed by the Petitioners. In addition, the Respondent moves that the Court enter an Order enforcing the two summonses at issue, and directing the summonsed parties to comply with the summonses.

RESPONSE TO PETITIONS TO QUASH SUMMONSES

- I. Petition filed in C.A. No. 03-cv-3234 - David A. Cohen, and Margaret L. Cohen, and David Andrew Cohen, MD, MS, PA v. United States

FIRST DEFENSE

The Internal Revenue Service has withdrawn these two summonses, because it did not follow all the procedural steps required by the Internal Revenue Code. The action to quash those two summonses is, therefore, moot. Because there is no longer an active case or controversy over the two summonses that are the subject of 03-cv-3234, the Court lacks jurisdiction over the petition to quash them, under Article III of the Constitution.

SECOND DEFENSE

For its response to the numbered paragraphs of the Petition filed in 03-cv-3234, the United States admits, denies and alleges as follows:

1.-5. Admits.

6. Admits that petitioners David A. Cohen, and Margaret L. Cohen, and David Andrew Cohen, MD, MS, PA (the Cohen Petitioners) object to these two summonses. Denies that their objections have merit.

a. Denies.

b. Denies.

c. Denies. Further alleges that until SEI produces the documents sought in the summonses, neither the Internal Revenue Service nor the Cohen Petitioners can possibly know whether those documents have already been produced by the Cohen Petitioners, by xélan, Inc., or by anyone else. Further alleges that the Cohen Petitioners and representatives of xélan have not established that any of the documents they have produced are identical to the documents in the possession of SEI, or that they represent the entire universe of documents in the possession of SEI.

d. Admits that the information sought in the summonses may assist the IRS in determining the liability of others for taxes and other impositions under the Internal Revenue Code. Denies the

allegation that the information sought will not shed light on the correctness of the Cohen Petitioners' returns. Denies that the IRS was required to follow the procedures outlined in 26 U.S.C. §7609(f), before issuing the summonses that are the subject of this petition.

7. Admits that the Cohen Petitioners filed Declarations of Michael R. Suverkrubbe and Silas Harrington with the Brief in Support of their Petition to Quash, filed with the Petition. Denies that the information set forth in those declarations is made on personal, firsthand knowledge, or otherwise complies with the requirements of Fed.R.Civ.P. 56(e). Further alleges that the declarations contain information that is untrue and/or inaccurate.

8. Denies.

9. Denies generally each and every allegation of the Petition and Declarations that has not been specifically admitted, qualified or denied.

II. Petition filed in C.A. No. 03-cv-3238 - David A. Cohen, and Margaret L. Cohen, and David Andrew Cohen, MD, MS, PA v. United States

For its response to the numbered paragraphs of the Petition filed in 03-cv-3238, the United States admits, denies and alleges as follows:

1. Admits. Alleges that the only substantive difference between the summonses that are the subject of 03-cv-3234 and this petition relate to the notices that Internal Revenue Agent Catherine Johns provided to the persons entitled to notice.

Revenue Agent Johns did not provide all the required notices for the summonses that are the subject of 03-cv-3234, but did provide all the required notices for the summonses that are the subject of this case.

2.-6. Admits.

7. Admits that petitioners David A. Cohen, and Margaret L. Cohen, and David Andrew Cohen, MD, MS, PA (the Cohen Petitioners) object to these two summonses. Denies that their objections have merit.

a. Denies.

b. Denies.

c. Denies. Alleges that until SEI produces the documents sought in the summonses, neither the Internal Revenue Service nor the Cohen Petitioners can possibly know whether those documents have already been produced by the Cohen Petitioners, by xélan, Inc., or by anyone else. Further alleges that the Cohen Petitioners and representatives of xélan have not established that any of the documents they have produced are identical to the documents in the possession of SEI, or that they represent the entire universe of documents in the possession of SEI.

d. Admits that the information sought in the summonses may assist the IRS in determining the liability of others for taxes and other impositions under the Internal Revenue Code. Denies the allegation that the information sought will not shed light on the correctness of the Cohen Petitioners' returns. Denies that the IRS was

required to follow the procedures outlined in 26 U.S.C. §7609(f), before issuing the summonses that are the subject of this petition.

8. Admits that the Cohen Petitioners filed Declarations of Michael R. Suverkrubbe and Silas Harrington with the Brief in Support of their Petition to Quash, filed with the Petition in 03-cv-3234. Denies that the information set forth in those declarations is made on personal, firsthand knowledge, or that the declarations otherwise comply with the requirements of Fed.R.Civ.P. 56(e). Further alleges that the declarations contain information that is untrue and/or inaccurate.

9. Denies.

10. Denies generally each and every allegation of the Petition and Declarations that has not been specifically admitted, qualified or denied.

III. Petition Filed in C.A. No. 03-cv-3239 – xélan, Inc., xélan Foundation, Inc., xélan Administrative Services, Inc., xélan Investment Services, Inc., xélan Annuity Co., Ltd., xélan, The Economic Association of Health Professionals, Inc., Pyramidal Funding Systems, Inc. dba xélan Insurance Services, and Jaye & Junck Consulting, Inc. v. United States.

FIRST DEFENSE

By appearing in this case as a petitioner and raising substantive defenses to enforcement of the summonses, xélan Annuity Co., Ltd. has waived any claim it might otherwise have that it was not sent timely notice under 26 U.S.C. §7609(a) of the issuance of the two summonses that are the subject of this petition.

SECOND DEFENSE

Contrary to the allegations of the petition, §7609(a) requires that notice be **given**, not that it be received. The claim of xélan Annuity Co., Ltd. that it never received the notice that was given does not state a cognizable claim or defense to enforcement of these summonses.

THIRD DEFENSE

The petitioners lack standing to object to the alleged burden on SEI, as alleged in ¶6(g) of the petition.

FOURTH DEFENSE

For its response to the numbered paragraphs of the Petition filed in 03-cv-3239, the United States admits, denies and alleges as follows:

- 1.-2. Admits.
3. Admits that the summonses that are the subject of this petition require the summonsed party to provide testimony and records that relate to the following petitioners:
 - a. Admits that xélan, Inc. is a California corporation located at 401 West A Street, Suite 2210, San Diego, CA. Lacks sufficient information to enable it to form a belief as to the truth of the remaining allegations of ¶3(a).
 - b. Admits that xélan, The Economic Association of Health Professionals, Inc. is a California corporation located at 401 West A

Street, Suite 2210, San Diego, CA. Admits that members of this organization are referred to as xélan members. Lacks sufficient information to enable it to form a belief as to the truth of the remaining allegations of ¶3(b).

- c. Admits that xélan Investment Services, Inc. is a California corporation located at 401 West A Street, Suite 2210, San Diego, CA. Lacks sufficient information to enable it to form a belief as to the truth of the remaining allegations of ¶3(c).
- d. Admits that xélan Administrative Services, Inc. is a California corporation located at 401 West A Street, Suite 2210, San Diego, CA. Lacks sufficient information to enable it to form a belief as to the truth of the remaining allegations of ¶3(d).
- e. Admits that xélan Foundation, Inc. is a California corporation located at 401 West A Street, Suite 2210, San Diego, CA. Lacks sufficient information to enable it to form a belief as to the truth of the remaining allegations of ¶3(e), or whether in fact, it operates in compliance with the laws that govern California and United States tax-exempt organizations.
- f. Admits that Pyramidal Funding Systems, Inc. dba xélan Insurance Services, Inc. is a California corporation located at 401 West A Street, Suite 2210, San Diego, CA. Lacks sufficient information to

enable it to form a belief as to the truth of the remaining allegations of ¶3(f).

- g. Admits that xélan Annuity Co., Ltd. is located at 401 West A Street, Suite 2210, San Diego, CA. Lacks sufficient information to enable it to form a belief as to the truth of the remaining allegations of ¶3(g).
- h. Admits that Jaye & Junck Consulting, Inc. (“Jaye & Junck”) is a Florida corporation that provides services to xélan members, and is located at 900 Fox Valley Drive, Suite 100, Longwood, FL. Lacks sufficient information to enable it to form a belief as to the truth of the remaining allegations of ¶3(h).

Admits that the petitioners in this case (the xélan Petitioners) were all entitled to be sent notice of the issuance of the summonses that are the subject of this petition.

Admits that, as persons entitled to notice, the xélan Petitioners are entitled to bring a proceeding to quash these summonses under the authority of 26 U.S.C. §7609(b)(2).

Admits that the xélan Petitioners have referred to themselves in the petition as the xélan group. Denies the remaining allegations of the flush language that appears between numbered paragraphs 3 and 4 of the petition.

4.-5. Admits.

6. Denies.

a.-e. Denies.

- f. Admits that the summonses demand information that pertains to others employers and their employees who participate in programs offered by one or more of the xélan Petitioners. Allege that all the documents and testimony sought by the summonses may shed light on the correctness of the income tax returns of the Cohen Petitioners, for the years under audit. Further alleges that the documents and testimony sought by the summonses will assist the IRS in determining whether the deductions that the Cohen Petitioners claimed for alleged insurance and charitable contributions were, in fact, properly deductible as such. Further alleges that the documents and testimony sought by the summonses will assist the IRS in determining whether the funds that the Cohen Petitioners claim to have paid to the xélan Petitioners for insurance and charitable contributions were, in fact, their own savings over which they maintained complete dominion and control. Denies the remaining allegations of paragraph 6(f).
- g. Denies. Alleges that the summonses properly seek information about other taxpayers who are xélan members, in order to determine whether the Cohen Petitioners are entitled to claim the tax benefits they reported on their returns now under audit.

7. Denies.

- a. Admits that the summonses that are the subject of this petition were issued in connection with an IRS examination of the Cohens' federal income tax returns for 1998, 1999 and 2000. Denies the remaining allegations of ¶7(a).
- b. Admits the allegations of the first sentence of ¶7(b). Admits that on the corporate income tax returns for the years under examination, the Cohen corporation claimed deductions for amounts it transferred to one or more members of the xélan Group. Admits that the Cohen corporation claims that those amounts are deductible in full as payments for supplemental disability insurance for the Cohens individually. Admits that the Cohens also claimed deductions from their gross income on the income tax returns they filed for the years under examination, for other amounts they transferred to one or more members of the xélan Group. Admits that the Cohens claim that those amounts are deductible in full as employee welfare benefits. Admits that the Cohens claimed still other deductions on their individual income tax returns for the years under examination for amounts they paid to xélan Foundation, Inc. Admits that the Cohens claim that those amounts are deductible in full as charitable contributions. Alleges

that the IRS has yet to determine in its examination of the Cohens whether the amounts that are alleged in ¶7(b) were, in fact, paid for the purposes alleged, or that they are properly deductible as claimed by the Cohen Petitioners. Further alleges that the IRS issued these summonses to gather information to enable it to make that determination. Denies the remaining allegations of ¶7(b).

- c. Admits the allegations of the first sentence of ¶7(c). Admits that the Cohens produced some documents and provided some testimony pursuant to the summonses. Admits that some of the information sought in the summonses that are the subject of this petition was also sought from the Cohens. Denies the remaining allegations of ¶7(c).
- d. Admits that the IRS served summonses upon xélan, Inc., demanding testimony and production of documents relating to its examination of the tax liabilities of the Cohen Petitioners. Admits the allegations of the second sentence of ¶7(d). Lacks sufficient information to enable it to form a belief as to the truth of the allegations of the third sentence of ¶7(d). Admits that a number of IRS revenue agents and attorneys participated in taking the testimony of Dr. Donald Guess, founder and chief executive officer of xélan, Inc., over a three-day period in January 2003. Alleges that

Dr. Guess gave no testimony on the first day, which was consumed by colloquy between his attorneys and the IRS representatives, and by Dr. Guess' refusal to answer any questions, in reliance upon his fifth amendment privilege against self-incrimination. Further alleges that Dr. Guess was unable to answer a number of questions during the second and third days of testimony that bore directly on the examination of the Cohens' tax returns. Further alleges that Dr. Guess professed an inability to provide many of the details that the IRS sought during the questioning. Further alleges that among the questions that Dr. Guess could not answer were questions about the content of documents that the Cohen Petitioners had produced, some of which came from xélan, and others purportedly from SEI. Denies the remaining allegations of ¶7(d).

- e. Admits the allegations of the first sentence of ¶7(e). Denies the remaining allegations of ¶7(e).
- f. Admits. Denies that there is merit to the position of counsel for xélan, as alleged in ¶7(f).
- g. Admits. Denies that there is merit to the position of counsel for Jaye & Junck Consulting, Inc., as alleged in ¶7(g).
- h. Admits the allegations of the first sentence of ¶7(h). Denies the allegations of the second sentence of ¶7(h), as stated. Alleges that

the summonses issued to xélan, Inc. required it to produce documents and testimony. Further alleges that in January 2003 it became apparent that xélan had not produced all the documents demanded by the summonses issued to it, and that Dr. Guess would not or could not answer many of the questions that were posed to him during his questioning. Further alleges that the IRS agreed to provide to xélan a comprehensive list of documents and testimony that it continued to pursue from xélan. Further alleges that the IRS at no time intended that list to substitute for xélan's obligation to comply in full with the summonses issued to it, nor did the IRS, by agreeing to send such a letter, waive or agree to waive any other lawful means that it has to obtain information that might shed light on the correctness of the Cohens' income tax returns. Admits that the IRS had not provided that list as of the date that the xélan Petitioners filed their petition in this case. Alleges that the IRS has since provided that list to xélan. Further alleges that the summonses that are the subject of this petition were issued independently of the IRS's pursuit of all the documents and testimony demanded in the summonses issued to xélan, Inc. Denies the remaining allegations of ¶7(h).

- i. Denies. Alleges that the information the IRS seeks from SEI in these summonses, as it pertains to xélan participants other than the Cohens, may shed light on the correctness of the Cohens' income tax returns by, among other things, showing whether the amounts allegedly paid to xélan for disability insurance were, in fact, held in individual investment accounts in the name of each xélan participant, for the sole and exclusive use of each individual xélan participant. Further alleges that neither the Cohens nor xélan has produced any information in response to summonses issued to them which might shed light on these issues, and the related issues of whether the amounts allegedly paid for disability insurance and held in segregated accounts at SEI in fact constituted payments for insurance of any kind.
- j. Lacks sufficient information to enable it to admit or deny the truth of the allegations of ¶7(j). Alleges that Dr. Guess was unable to provide many pertinent details about the insurance company that allegedly provides coverage to xélan members, or about how the alleged insurance policies are financed. Further alleges that Dr. Guess could not provide meaningful or informative testimony about the account statements that SEI provides to xélan

participants, including the Cohens, or the information reflected on those account statements.

- k. Admits the allegations of the first and second sentences of ¶7(k). Denies the remaining allegations of ¶7(k). Alleges that the xélan Petitioners lack standing to raise the issue alleged in ¶7(k).

8. Denies generally each and every allegation of the Petition that has not been specifically admitted, qualified or denied.

MOTION FOR SUMMARY ENFORCEMENT

Respondent the United States of America moves that the Court enforce the summonses issued to SEI Private Trust Company, by entering an order directing the summonsed party to comply in all respects with the summonses served upon it on April 21, 2003. In support of its motion for Summary Enforcement, the Respondent relies upon the Court's files in this case, including the Petitions to Quash Summonses, the Declarations of Catherine Johns and John L. Marien filed herewith, and upon the Memorandum in Support of Motion for Summary Enforcement, filed herewith.

WHEREFORE, the respondent prays that the Court,

- (1) deny the Petitions to Quash Summonses;
- (2) enter an Order directing the summonsed party to comply with the summonses in all respects, by producing documents and providing testimony called for by the summonses;

(3) award the respondent its costs incurred in defending this action, including reasonable attorneys' fees; and

(4) grant such other relief as is just.

DATED: August 8, 2003

Respectfully submitted,

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