EXHIBIT H

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

THE SOCIETY OF LLOYD'S,

Plaintiff,

v.

Case No 4:03CV1113 HEA
(Honorable Henry E Autrey)

ROBERT W FUERST, HORD HARDIN,
HAROLD F ILG, WALTER A KLEIN,
MEADE M McCAIN,
JOHN J SHILLINGTON,
CYNTHIA J TODORIVICH AND
MICHAEL B TODOROVICH

AFFIDAVIT OF
MICHAEL DAVID FREEMAN

I, MICHAEL DAVID FREEMAN, of Ivor House, 25-26 Ivor Place, London NW1 6HR, based upon my personal knowledge, hereby declare as follows:

1. I am a member of Grower Freeman, a firm of solicitors located at Ivor House, 25-26 Ivor Place, London NW1 6HR, and am a solicitor duly licensed to practise in England and Wales. I first became licensed to practise as a solicitor in March of 1961.

2. I make this Affidavit at the request of Ted Frapolli, counsel for the Missouri Names. I have been advised that it will be submitted as part of the response to be filed by the Missouri Names to Lloyd's motion for Summary Judgment.

3. Since 1961, my experience in the law has been mostly concentrated in commercial litigation. My formative years, as an articled clerk from 1956 to 1961, and then from 1961 to 1968, were with the City of London firm, Middleton Lewis, which firm later merged with the firm of Lawrence Graham. Middleton Lewis acted as solicitors for a number of Lloyd's Members' and Managing Agents, and for many Lloyd's Names. I became involved with Lloyd's again in 1990 when the Names on the Oakeley Vaughan Syndicates

retained me in connection with their claims against Lloyd's for breach of implied duty of care. I have also been engaged in all aspects of the litigation with the Society of Lloyd's ("Lloyd's") in the Commercial Court and the Court of Appeal in London which culminated in Summary Judgment being confirmed by the Court of Appeal on 31 July 1998 against approximately 650 Names. This Action was known as The Society of Lloyd's v. Fraser & Others ("Fraser").

4. I am familiar with the Lloyd's Acts 1871-1982 ("the Lloyd's Acts") which are private Acts of Parliament duly passed in England under English Law. The last of the Lloyd's Acts was the Lloyd's Act 1982 under which Lloyd's was given full self-regulatory status. In particular, Section 6 provides the Council of Lloyd's with the authority to execute, amend, or revoke any Byelaw "as from time to time seem requisite or expedient" for the execution of the Lloyd's Acts 1871 to 1982. Under Section 14, the exclusion of liabilities of Lloyd's is expressly stated not to apply only if: "the act or omission complained of was done or omitted to be done in bad faith"; or was that of an employee and occurred carrying out "routine or clerical duties."

5. Pursuant to the Lloyd's Act 1982, all Byelaws passed by the Council of Lloyd's, provided they are not ultra vires, have the force of English Law insofar as they purport to regulate the affairs of Lloyd's and its Members. The Byelaws include those which enable Lloyd's to: (a) standardise and regulate the form of Members' and Managing Agency Agreements; and (b) impose a substitute Members' Agent on Names, if the Name's chosen Agent is disqualified or refuses to obey Lloyd's instructions.

6. Another Byelaw is No. 22 of 1995 which came into effect on December 6, 1995, and is known as the Reconstruction and Renewal Byelaw ("the Byelaw"). It was passed when Lloyd's became aware that, if the radical steps set out in the Byelaw were not implemented, Lloyd's would be unable to continue as an

insurance market as a result of: (a) the calamitous losses which the Market had sustained; (b) the High Court judgments which had been obtained against most of Lloyd's Members' Agents and many of its Managing Agents; and (c) the sheer weight of pending and imminent further litigation against such bodies and against Lloyd's.

7. Part of Byelaw No. 22 involved "the Equitas Scheme," and within that scheme, a provision for the Equitas Reinsurance Contract ("Contract"). I am not aware that any of the approximately 2,500 Members of Lloyd's who I represented prior to August 31, 1996, ever saw or were made aware of the detailed provisions of the Contract. To the best of my knowledge, the first time that any U.S. Names knew of the Contract was when they received a letter before action dated on or about October 3, 1996, from Dibb Lupton Alsop ("DLA"), the solicitors acting for Lloyd's. This letter claimed from U.S. Names their Equitas Premium pursuant to the Contract – which the letter stated had been entered into by them and was dated September 3, 1996.

8. Because I had not seen the Contract, I immediately requested a copy from DLA. I received such a copy on or about October 10, 1996. I saw that the Contract contained what has become known as the "pay now – sue later" provision at clause 5.5. The Contract was purportedly signed on behalf of U.S. Names by a wholly owned subsidiary of Lloyd's in the capacity of a substitute Members' Agent that had been imposed on the Names. This was directly contrary to the instructions given by many Names to their Members' Agents. Many of the Members' Agents declined to sign the Contract because they considered that were they to do so it would involve a conflict of interest. Their role was then abrogated by Lloyd's pursuant to its powers under the Byelaws.

9. Clause 5.5 of the Contract states as follows:

"Each Name shall be obliged to and shall pay his Name's Premium in all respects free and clear from any set-off, counterclaim or other deduction on any account whatsoever including in each case, without prejudice to the generality of the foregoing, in respect of any claim against ERL ["Equitas Reinsurance Limited"], the Substitute Agent, any Managing Agent, his Members' Agent, Lloyd's or any other person whatsoever and:

(a) in connection with any proceedings which may be brought to enforce the Name's obligation to pay his Name's Premium, the Name hereby waives any claim to any stay of execution and consents to the immediate enforcement of any judgment obtained;

(b) the Name shall not be entitled to issue proceedings and no cause of action shall arise or accrue in connection with his obligation to pay his Name's Premium unless the liability for his name's premium has been discharged in full; and

(c) the Name shall not seek injunctive or any other relief for the purpose, or which would have the result, of preventing ERL, or any assignee of ERL, from enforcing the Name's obligation to pay his Name's Premium."

10. Clause 5.10 of the Contract provides that: ". . . the records of and calculations performed by the CSU shall be conclusive evidence as between the Name and ERL in the absence of any manifest error."

11. In a series of decisions on preliminary issues, English Courts concluded that the "pay now – sue later" clause included in the Equitas Reinsurance Contract was effective against all Names, even assuming they could prove fraud by Lloyd's.

Society of Lloyd's v. Leighs Lyon & Wilkinson (unpublished) (Q. B. Feb. 20, 1997) (all Names' non-fraud defenses barred); *Society of Lloyd's v. Wilkinson & Others* (unpublished) (Q. B. Apr. 23, 1997) (all Names' fraud defenses also barred – even assuming Lloyd's committed fraud). Appeals from these decisions were dismissed. *Society of Lloyd's v. Leighs Lyon and Wilkinson* (unpublished) (Court of Appeals, July 31, 1997).

12. The English Courts also rejected the Names' challenges to the "conclusive evidence" provision. *Society of Lloyd's v. Fraser & Others*, (unpublished March 4, 1998). On July 31, 1998, the Court of Appeal rejected the Names' application for leave to appeal the Fraser decision. *Society of Lloyd's v. Fraser & Others* (unpublished) (July 31, 1998).

13. The Court also rejected the attempt by some United States, Canadian and Australian Names to raise matters relating to the violation of the securities laws of their respective countries and/or states. The rejection was the consequence of the provision in the General Undertaking which all Names were required to enter into with Lloyd's as a condition of underwriting from January 1 1987 which provided for all matters regarding the underwriting of Names to be decided in the English courts under English law.

14. Were it not for the provisions of Clause 5.5 of the Contract, the Defendants would have been able to plead by way of Defense the fraudulent misrepresentations which at the time of these decisions the Defendants claimed had been made to them by the Plaintiffs. They would also have been able to counterclaim or apply to set-off against the amount claimed by the Plaintiffs the amount which they claimed to have suffered by way of damages as a result of the said fraudulent misrepresentations. The Defense and the Counterclaim and/or the Set-Off would have been heard at the same time and as part of the Claim of the Plaintiffs.

15. Similarly, the "conclusive evidence" provision prevented Names from examining or even seeing the underlying documentation which gave rise to the calculations of the Equitas premium claimed from them. As a result, it was not possible for Names to know whether there was any manifest error within the underlying documentation.

16. The provision in clause 5.5 of the contract that the Defendants should "pay now" and then sue later is simply not practical. The costs of instituting proceedings against Lloyd's even as part of a grouping were substantial and for many of those Names who paid their Equitas Premium under protest there were insufficient funds remaining to enable them to participate in litigation against Lloyd's. This was especially the case where the banks or insurance companies who had guaranteed the Names' underwriting obligations to Lloyd's were seeking payment from the Names under their counter indemnities following the draw down by Lloyd's or which had issued letters of credit to Lloyd's by way of security against all the guarantees and letters of credit many of which counter indemnities were supported by charges over Names' homes by way of collateral security.

17. In four leading decisions, English courts did rule that Lloyd's Members' Agents, Managing Agents, and Auditors were guilty of negligence with respect to their Names. *Henderson, et al. v. Merett Syndicates, Ltd., et al.*, Nos. 1992/1946, etc., (Q. B. Division, Commercial Court, October 31, 1995); , Q. B. Division, Commercial Court (unpublished April 2, 1996); *Deany, et al. v. Gooda Walker Ltd., et al.* [1996] LRLR 183; *Arbuthnott, et al. v. Feltrim Underwriting Agencies, Ltd.*, [1996] LRLR 135. Although these cases awarded damages to Names aggregating approximately £1 billion, Lloyd's successfully decreed that all of the damages must be credited to the Premiums Trust Fund of each Name of which Funds Lloyd's was a Trustee. However, a substantial proportion of the

damages awarded remained unpaid because the Errors & Omissions insurers of the agents and auditors, most of which insurance was itself placed within syndicates in the Lloyd's market, was wholly insufficient to meet the claims.

18. Lloyd's treatment of the Names' litigation recoveries was upheld by the Court of Appeal pursuant to Lloyd's broad powers of self-regulation granted to it by the Lloyd's Act of 1982. Napier v. Kershaw [1997] LRLR 1.

19. A number of Names against whom Summary Judgment was given in Fraser, but not the Missouri Names, issued discrete and separate Counterclaims against Lloyd's in which they effectively became the Plaintiffs because of the provisions of Clause 5.5 of the contract. The Action is known as *The Society of Lloyd's v. Sir William Jaffray and Others ("Jaffray")*.

20. Pursuant to Directions Orders issued by the Commercial Court in London in which *Jaffray* was to be tried, Lloyd's was instructed to give notice to all non-accepting Names that they had the right to become parties to *Jaffray* and if they did not they would be bound by the decisions of the Court in any event. Those who wished to consider joining *Jaffray* were not entitled to access to the disclosure produced by Lloyd's in the Action prior to joining. Although they would have been able to apply to become litigants in person they would not have been entitled to examine any witnesses at the trial but will have been able to submit a written statement. There is no right to a jury in England in such trials. All those joining *Jaffray* would have become liable for a several share of Lloyd's costs in the event that *Jaffray* was unsuccessful. Lloyd's claims that its costs up to the end of the *Jaffray* trial were approximately £20 million.

21. The issue at trial in *Jaffray* was confined to what was known as the "Threshold Fraud." The reason for such confinement as ordered by Mr Justice Colman on 30th June 1998 was because the Courts had ruled that there were no defences

to Lloyd's claims as set out in paragraph 11 above. Until the Human Rights Act 1956 was adopted as part of English Law on October 2nd 2000 as referred to in paragraph 25 below, there could be no cause of action against Lloyd's other than one based on fraud because of the immunity provisions in section 14.3 of the Lloyd's Act 1982 as referred to in paragraph 33 below. Therefore, the only issue to be decided by the Court in *"Jaffray"* was whether Lloyd's made any misrepresentations which they knew to be untrue and/or as to which they were reckless as to whether they were true or false. Judgment was given against the Counterclaimants at first instance by Mr. Justice Cresswell in November 2000. Mr. Justice Cresswell held that Lloyd's did not make any representations to Counterclaimants on which they were entitled to rely.

22. A full Court of Appeal heard the Appeal of the Counterclaimants from this Judgment over a period of 13 days ending on March 27, 2001, and delivered its Judgment on July 26, 2001. The Court of Appeal unanimously held that there was a representation by Lloyd's that a rigorous system of auditing was in place which involved the making of a reasonable estimate of outstanding liabilities, including unknown and unnoted losses. The Court further held that these representations continued throughout the period 1981-1988, and that the representations were untrue during the whole of that period. However, the Court held that the Courterclaimants had failed to discharge the heavy burden of proof upon them that Lloyd's did not believe the representations to be true or that they either knew that they were or became untrue or were reckless as to whether they were true or untrue.

23. For the reasons referred to in paragraph 21 above, *Jaffray* did not involve any other claims under English Law. Thus, no consideration was given to what I understand to be the doctrine in the United States of fraudulent omission, nor was any consideration given to negligent misrepresentation or any statutory

cause of action such as any violation of the United Kingdom laws relating to securities. In addition, no consideration was given to any foreign legal doctrine or laws by virtue of the forum selection/choice of law provision in the General Undertaking referred to in paragraph 13 above..

24. The doctrines of fraudulent concealment and/or fraudulent non-disclosure are not recognized under English Law.

25. As a result of the Judgment of the Court of Appeal referred to in paragraph 22 many of the Counterclaimants in *Jaffray* sought Permission to Amend their Counterclaims to plead negligent misrepresentation. Section 14 (3) of the Lloyd's Act 1982 precludes any such claim against Lloyd's unless the negligent misrepresentation was made in bad faith, that is to say that the misrepresentation was fraudulent under English law. On October 2, 2000 the Human Rights Act 1956 was adopted as part of English domestic law. The Counterclaimants contended that Section 14 (3) operates as an impediment to their access to Court to try their claim that the misrepresentation found by the Court of Appeal was made negligently and is therefore prohibited under Article 6 (1). Mr Justice Cooke handed down Judgment on May 23rd 2003 and held that the Counterclaimants were attempting to invoke Article 6 (1) of the Human Rights Act retrospectively (which analysis the Counterclaimants reject) and thus all claims by those who became members of Lloyd's after July 23rd 1982, which date the Court held was the operative date of the Lloyd's Act 1982, were prohibited from relying on negligent misrepresentation. In addition, the Judge identified numerous hurdles for those who joined before the Lloyd's Act to overcome before he would give Permission to anyone to Amend their Counterclaims.

26. The Counterclaimants sought the leave of the Court of Appeal to appeal against the Judgment of Mr Justice Cooke. The Court of Appeal granted leave

but after some five days of submissions then dismissed the Appeal by Judgment dated 19th December 2003.

27. Following four days of submissions in January 2004 on behalf of those Counterclaimants who joined Lloyd's before the Lloyd's Act, Mr Justice Cooke by Judgment dated 28th January 2004 granted seven Counterclaimants (out of some thirty) Leave to Amend their Counterclaims to plead negligent misrepresentation on the basis that they had surmounted the hurdles referred to in paragraph 25 above.

28. With only a few exceptions, including six of the seven Counterclaimants referred to in paragraph 27, Lloyd's is now taking urgent steps to bankrupt all those who did not accept Reconstruction & Renewal and who have not already been put into bankruptcy.

Sworn before me at 137, Baker Street
London W1-U 6-5F

This 12th day of March 2004

A SOLICITOR/ COMMISSIONER FOR OATHS

JOHN C. MILLER

A SOLICITOR EMPOWERED TO ADMINISTER OATHS.

VERIFICATION OF SIGNED ORIGINAL DOCUMENT

Pursuant to Local Rule 11-2.11, Ted F. Frapolli, Attorney for Defendants Robert W. Fuerst, Hord Hardin II, Walter A. Klein, Meade M. McCain, Cynthia J. Todorovich and Michael B. Todorovich hereby attests to the existence of a paper copy of the Affidavit of Michael David Freeman bearing the original signature of Michael David Freeman. The document was filed electronically on April 15, 2004 as an attachment to Response, Evidentiary Objections and Counterstatements of Defendants Robert W. Fuerst, Hord Hardin II, Walter A. Klein, Meade M. McCain, Cynthia J. Todorovich and Michael B. Todorovich to Plaintiff's Statement of Undisputed Material Facts. Counsel will retain the paper copy bearing the original signature during the pendency of the litigation including all possible appeals.

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CERTIFICATE OF SERVICE

I certify that on the 15th day of April, 2004, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following: Martin J. Buckley, Attorney for Plaintiff, 1139 Olive Street, Suite 800, St. Louis, Missouri 63101; Alan C. Kohn, Esq., Attorney for Defendant Shillington, One US Bank Plaza, Suite 2410, St. Louis, Missouri 63101; Blake T. Hannafan, Esq., Michael T. Hannafan & Associates, Ltd., One East Wacker Drive, Suite 1208, Chicago, IL 60601; and Harold F. Ilg, 100 L'Ambiance Circle, Unit 202, Naples, Florida 34108.

/s/ Ted F. Frapolli