IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

THE SOCIETY OF LLOYD'S,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No: 4:03CV01113HEA**
	)	
ROBERT W. FUERST, et al.,	)	**(Judge Autrey)**
	)	
Defendants.	)	

PLAINTIFF LLOYD'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Introduction

Plaintiff The Society of Lloyd's addresses the opposition papers of all defendants in this Brief except for defendant Harold F. Ilg. Because Mr. Ilg did not file any counter-affidavit or other response in opposition to Lloyd's motion for summary judgment, Lloyd's is filing a separate motion for entry of judgment against him under Federal Rules 54 and 56.

The remaining seven defendants' counter-affidavits and the counter-affidavit of Michael David Freeman, the Names' former solicitor in England, fail to raise genuine issues of material fact under Federal Rule 56. Although defendants dispute certain immaterial factual details, there are no disputes of relevant and controlling facts. Defendants simply have failed to show that any elements of the Missouri Uniform Foreign Money-Judgments Recognition Act has not been satisfied. Therefore, the Court should grant plaintiff's motion for summary judgment against all defendants and permit Lloyd's to enforce the English Judgments against them.

I. THE CONTROLLING FACTS UNDERLYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ARE NOT DISPUTED

Defendants do not dispute the following facts underlying Lloyd's motion for summary judgment:

1. Defendants signed General Undertakings which provided that the English courts had exclusive jurisdiction of all disputes between Names and Lloyd's, that only English law would apply and that all English judgments would be conclusive and enforceable.

2. Defendants received notice of the Lloyd's legal collection proceedings against them in England.[1]

3. Defendants retained English solicitors to defend them in the English courts against Lloyd's collection actions.

4. Defendants' solicitors presented and argued their defenses in the English trial and appellate courts.

5. The English courts heard defendants' claims and defenses against Lloyd's but ruled against the Names in several detailed written decisions.

6. Defendants had the opportunity to join other Names in the English *Jaffray* fraud action against Lloyd's, but did not do so.

7. The English courts in *Jaffray* ruled against the Names as well.

8. Defendants have not shown that any of the English Judgments entered against them resulted from any fraud on the courts.

Because these facts remain undisputed, plaintiff is entitled to judgment as a matter of law.

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[1] Defendant John Shillington coyly claims he does "not recall" actually receiving notice in "May or June 1997" that Lloyd's had filed suit against him in England. (Shillington Affid., ¶ 8.) However, he does not deny that he received notice of suit.

II. DEFENDANTS' COUNTER-AFFIDAVITS DO NOT RAISE ANY ISSUES OF RELEVANT FACT

In essence, the defendants simply claim in their own Affidavits that various Lloyd's members or members' agents misled them when they agreed to become Names by signing the General Undertakings. As a result, they claim that although they "have a compelling fraud story to tell, they have never been able to tell it." (Defs. Brief, p. 2.) That statement is false. To the contrary, these defendants and hundreds of other Names presented many defenses, including alleged fraud, to the English trial and appellate courts. These defenses were rejected. Other Names also told their stories of alleged fraud in the *Jaffray* case but those claims likewise were rejected. As the overwhelming number of federal decisions have shown, the American courts uniformly have held that the Names' bites at the English "apple" were enough; no more bites are allowed here. As Judge Posner stated in *The Society of Lloyd's v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000), Lloyd's process of collecting the English Judgments against Names "is not meant to require a second lawsuit . . . thus converting every successful multinational suit into two suits."

Not only do the defendants' Affidavits fail to raise any issues of fact concerning the enforceability of the English Judgments but the Affidavit of Michael David Freeman, defendants' former solicitor, corroborates the factual accuracy of the Declaration of Nicholas P. Demery submitted by plaintiff in support of its motion for summary judgment. That is, Mr. Freeman's affidavit traces the Lloyd's collection actions against defendants through the English courts and confirms that the Names were involved in American style court procedures, i.e., notice, legal representation, hearings, presentation of defenses to courts of law and appeals. It is ludicrous for defendants to argue that the English tribunals were not impartial and that the legal

procedures were not "compatible with the requirements of due process of law." (See Missouri Recognition Act § 511.780 1.(1)). See also *Ashenden*, 233 F.3d at 476 ("The courts of England are fair and neutral forums.")

III. THERE IS NO AUTHORITY SUPPORTING DEFENDANTS' ARGUMENT THAT THEY SHOULD BE ALLOWED TO CLAIM FRAUDULENT CONCEALMENT

Mr. Freeman alleges in his affidavit that English law supposedly does not recognize "the doctrines of fraudulent concealment and/or fraudulent non-disclosure." (Freeman Affid., ¶ 24.) Therefore, defendants argue that their affirmative defenses of fraudulent inducement and fraudulent concealment somehow do not constitute a "relitigation" of those issues in this Court. (Defs. Brief, pp. 5-9.) However, defendants do not and cannot cite any legal authority supporting the proposition that they are entitled to litigate anew such claims in American courts after they presented defenses of fraud to the English courts in multiple actions.

All of the defendants claim in their counter-affidavits that they were deceived by their various members or members' agents. However, as Mr. Freeman admits in his affidavit, English courts in "four leading decisions" ruled that such members' agents, managing agents and auditors "were guilty of negligence with respect to their Names" and awarded £1 billion in aggregate damages to the Names. (Freeman Affid., ¶¶ 17-18.) Obviously, then, defendants and other Names like them already have had their days in court on the alleged fraudulent concealment issues. It is also clear that "the fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not alone a valid basis to deny enforcement of forum selection, arbitration and choice of law clauses" under the General Undertakings. *Bonny v. Society of Lloyd's*, 3 F.3d 156, 162 (7th Cir. 1993), cert.

denied, 510 U.S. 1113 (1994). Therefore, even if, *arguendo*, the doctrines of fraudulent omission or concealment are not recognized under English law, the English Judgments still are enforceable against defendants.

IV. THE MISSOURI COMMISSIONER OF SECURITIES PERMITTED LLOYD'S TO DRAW ON DEFENDANTS' LETTERS OF CREDIT

In their summary judgment opposition filings, defendants make numerous references to the Missouri Securities Commissioner's Cease and Desist Order entered against Lloyd's on February 28, 1996. Although defendants concede that the Cease and Desist Order was later vacated, defendants do not mention that Douglas F. Wilburn, then Commissioner of Securities for the State of Missouri, also expressly granted his approval in writing for Lloyd's to "draw down" immediately the letters of credit posted by Missouri Names who did not accept Lloyd's R&R Settlement. Mr. Wilburn's letter of approval to Alex Bartlett, then counsel for Lloyd's, dated November 8, 1996, is attached as Exhibit A. In addition, a copy of the Vacation of the Cease and Desist Order enclosed with the letter, also dated November 8, 1996, is attached as Exhibit B. Accordingly, the long-ago vacated Cease and Desist Order is irrelevant to defendants' opposition to Lloyd's motion for summary judgment.

V. DEFENDANT SHILLINGTON'S CLAIM THAT HE DID NOT RECEIVE NOTICE OF THE ENGLISH ACTION FAILS BECAUSE THERE IS A PRESUMPTION OF DELIVERY

Defendant Shillington claims that he does "not recall" receiving notice of the English Action and, he argues, the Court therefore should not enforce the English Judgment against him. Shillington's argument fails on several grounds. First, Shillington's agent in England, AUA9, was provided notice and a copy of the Writ of Summons by Lloyd's. (Demery Decl., ¶¶ 14-17, Grp. Ex. 2.) Thereafter, contrary to Shillington's implications, Lloyd's was not required to

provide him with any other notice. (See Demery Decl., Grp. Ex. 2.) Second, AUA9 sent Shillington a letter dated May 28, 1998, enclosing the service copy of the Writ of Summons, Guidance Notes and an Acknowledgement of Service form. *Id.* This letter stated: "Please note that you should return the Acknowledgement of Service form to the Commercial Court Registry within the period of time set out in the Guidance Notes to avoid default judgment being taken against you." *Id*. The Eighth Circuit has held that "[a] letter properly addressed and mailed is presumed to have been delivered to the addressee." *In re Hairopoulos*, 118 F.3d 1240, 1244 (8th Cir. 1997); *Kerry v. Charles F. Vatterott & Co.,* 184 F.3d 938, 947 (8th Cir. 1999) ("there is a general rebuttable presumption that a properly mailed document is received"). Shillington has not claimed that AUA9's letter was sent to the wrong address but merely that he does not "recall receiving any notice [of suit] in May or June 1997." (Shillington Affid., ¶ 8.) (Emphasis added.) Such a coy statement does not deny or rebut the presumption that he actually received notice then or at a later date because he does not deny ever receiving notice of suit. It therefore must be presumed that AUA9's letter and enclosed documents were received by Shillington. Accordingly, Shillington's citation to *Gondre v. Siberstein,* 744 F. Supp. 429 (E.D.N.Y.) misses the mark because it is distinguishable from Shillington's claim. (Shillington Br. at 7). Unlike the defendant in *Gondre* who did not receive any notice of the proceedings which resulted in the entry of the foreign default judgment against him, here Shillington's agent received actual notice of the proceedings as did Shillington personally.

Similarly, Shillington's argument that he was not given notice that a default judgment would be entered against him also fails. His agent's letter clearly states that failure to return the

Acknowledgement of Service form within the prescribed time period would result in a default judgment against him. (Demery Decl., Grp. Ex. 2).

Shillington's claim that he did not receive notice of the proceedings in sufficient time to enable him to defend is also meritless. Shillington's response brief attempts to argue that 27 days between service of the Writ of Summons and entry of the default judgment was insufficient. However, Shillington was not required to "defend" within 27 days, but merely respond whether he intended to defend. While Shillington may not like the amount of time he was provided under English law, he nevertheless signed the General Undertaking which provided that all disputes with Lloyd's would be resolved in England under English law. Regardless, our own Federal Rule of Civil Procedure 12(a)(1)(A) requires that a defendant must answer a complaint within 20 days. Therefore, Shillington had more time to serve his Acknowledgement of Service than is provided under American federal law to file an answer. In addition, every other United States Name, including the other defendants here, who was sued in the English Actions received notice in the same manner as Shillington. (See Demery Decl., ¶14-18.)

Shillington also alleges that he did not learn of Lloyd's claims against him "until after default judgment had already been entered in England." (Shillington Affid., ¶9.) However, he does not state when he received notice of the English Judgment against him. Moreover, it is undisputed that Shillington never applied to have the default judgment set aside in England. (See Demery Decl., ¶17.) As a result, Shillington waived his right to seek to vacate the default English Judgment by ignoring it. The result would not have been different if he had likewise ignored an American default judgment. Finally, he concedes that, even if he had received notice

of the English Actions and defended them, "it would have been futile for him" anyway. (Shillington Br., p. 10, n. 3.) Therefore, he has not been prejudiced in any way.

In any event, whether or not Shillington received prior notice of Lloyd's claims, he cannot escape the fact that he received notice of the English default judgment against him and he did nothing about it. He also cannot escape the undisputed fact that under English law, the English Judgment is "final, conclusive and fully enforceable" as agreed in the General Undertaking. (See Demery Decl., ¶17.) Therefore, summary judgment is appropriate because Shillington was accorded essentially the same procedures on a default in England as he would have been accorded in an American court of law.

VII. EVEN IF DEFENDANTS' CLAIMED FACTS WERE UNCONTRADICTED, LLOYD'S STILL IS ENTITLED TO SUMMARY JUDGMENT

As previously stated, there are certain disputes of fact but they are neither genuine, material nor relevant to this enforcement of judgment action. As defendants agree, the issue here "is a narrow one. Are there material issues of fact as to whether the English judgments comport with Missouri standards of due process and fundamental public policy?" (Defs. Br., p. 1.) (Emphasis added.) Based upon the overwhelming and uniform federal court authorities cited by plaintiff in its principal brief at pages 3-4, the answer is a resounding no; there are no such fact issues. Moreover, defendants have not cited any authority which even suggests that the legal procedures leading to the entries of the English Judgments do not comport with Missouri public policy or comport with procedures "compatible with" due process requirements.

Defendant Shillington's request that this Court "disregard the decisions of other jurisdictions" and "view the facts anew" is, to put it mildly, a novel proposition. (See Shillington Br., p. 2.) Not surprisingly, he cites no legal authority to support such an outlandish suggestion.

All of the defendants refuse to acknowledge that their dispute about Lloyd's entitlement to recover their Equitas premiums is now over. That dispute legally and finally ended upon entry of the English Judgments. Defendants simply cannot seek to relitigate the Lloyd's collection actions which were decided adversely to them years ago in the courts of England. This judgment enforcement action by Lloyd's represents the end of the collection cases, not the beginning. As more fully discussed below, Lloyd's is entitled to summary judgment even if, *arguendo*, defendants' own version of the facts were accepted as true.

VIII. DEFENDANTS FAIL TO CITE ANY AUTHORITY THAT SUPPORTS THEIR ARGUMENTS THAT THE ENGLISH JUDGMENTS VIOLATE MISSOURI PUBLIC POLICY AND SHOULD NOT BE ENFORCED

Defendants have not cited any authority to support their arguments that enforcement of the English Judgments violates Missouri public policy. Missouri's Recognition Act, § 511.780.2, provides that this Court need not recognize the Judgments if "the *claim for relief* on which the judgment is based is repugnant to the public policy of this state" or if "the *judgment* was obtained by fraud." (emphasis added). In fact, the defendants entirely ignore this language and instead attempt to relitigate their alleged, and previously decided, fraud claims. Defendants have not and cannot argue that Lloyd's breach of contract claim seeking relief in the form of money damages is repugnant to Missouri public policy. Nor can the defendants argue that the Judgments were obtained by fraud. In addition, the defendants have never identified the exact Missouri "public policy" that will allegedly be violated by enforcing the Judgments. Finally, the defendants have not and cannot explain how or why Missouri's public policy differs from the public policy of every other state that has recognized and enforced identical Lloyd's judgments. *The Society of Lloyd's v. Ashenden,* 1999 WL 6575 at 26-27 (N.D. Ill. April 23, 1999), *aff'd,* 233

F.3d 473 (7th Cir. 2000);[2] *Webb,* 156 F. Supp. 2d at 643-44, *aff'd,* 303 F.3d at 332-33; *The Society of Lloyd's v. Mullin*, *aff'd*, 2004 WL 1012904 (3rd Cir. May 5, 2004); 255 F.Supp.2d 468, 474-78 (E.D.P.A. 2003); *The Society of Lloyd's v. Shields, et al.*, No. 3:03-0032 slip op. at 10 (M.D.TN. Oct. 1, 2003); *The Society of Lloyd's v. Blackwell, et al.*, No. 02CV448-J (AJB), slip op. at 14-17 (S.D. Cal. Feb. 26, 2003); *The Society of Lloyd's v. Bennett, et al.*, No. 2:02-CV-204TC, slip op. at 15 (D. Utah. Nov. 12, 2002); *The Society of Lloyd's v. Reinhart*, *et al*., No. 02-264 LFG/WWD-ACE, slip op. at 16 (D. N.M. Sept. 30, 2002); *The Society of Lloyd's v. Borgers, et al.*, No. CV-02-0423-PHX-FJM slip op. at 4-5 (D. Az. March 28, 2003); *The Society of Lloyd's v. Davies, et al.*, No. 1:02-cv-1602-GET, slip op. at 10 (N.D. Ga. April 23, 2003); *The Society of Lloyd's v. Evnen*, No. 8:02CV118, slip op. at 17 (D. Neb. April 28, 2003); *The Society of Lloyd's v. Grace,* 718 N.Y.S. 2d 327, 328 (N.Y. App. Div. 2000).[3]

IX. THE GENERAL UNDERTAKINGS' FORUM SELECTION AND CHOICE OF LAW CLAUSES MUST BE ENFORCED

Similarly, Shillington's argument that the General Undertakings' forum selection and choice of law clauses should be ignored is baseless. Instead of providing any factual or legal support for his argument that the General Undertaking was procured by fraud, Shillington merely makes a blanket statement that such is the case. (Shillington Br. at 12). Moreover, Shillington's citation to *M.B. Restaurants, Inc. v CKE Restaurants, Inc.,* 183 F.3d 750 (8th Cir. 1999) and *Sabatino v. LaSalle Bank, N.A.,* 96 S.W.3d 113 (Mo. App. W.D. 2003) do not support Shillington's request that this Court ignore the General Undertakings' forum selection and choice

[2] The *Ashenden* defendants abandoned their public policy arguments on appeal. *See Ashenden*, 233 F.3d at 480.

[3] Copies of the slip opinions were attached as exhibits to Lloyd's initial brief in support of its motion for summary judgment.

of law clauses. Both *M.B. Restaurants* and *Sabatino* held that an opposing party only be given an opportunity to have "his fair day in court." 183 F.3d at 752; 96 S.W.3d 115-116. Here, Shillington had his opportunity for a "fair day" in an English court and he chose not to pursue it. Accordingly, his request that this Court ignore his signed General Undertaking and ignore the holdings of the several United States Courts should be rejected.

Shillington also does not distinguish the eight Circuit Court of Appeals decisions enforcing the choice of law and choice of forum clauses contained in paragraphs 2.1-2.3 of the Names' General Undertakings. *Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285 (11th Cir. 1998), *cert. denied,* 525 U.S. 1093 (1999); *Stamm v. Barclay's Bank of N.Y.*, 153 F.3d 30 (2d Cir. 1998); *Richards v. Lloyd's of London,* 135 F.3d 1289 (9th Cir. 1998), *cert. denied,* 525 U.S. 943 (1998); *Haynsworth v. Lloyd's of London,* 121 F.3d 956 (5th Cir. 1997), *cert. denied*, 523 U.S. 1072 (1998); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Shell v. R. W. Sturge, LTD*, 55 F. 3d 1227 (6th Cir. 1995); *Bonny v. The Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); *Roby v. Corporation of Lloyd's,* 996 F.2d 1353 (2d Cir. 1993), *cert. denied*, 510 U.S. 945 (1993); and *Riley v. Kingley Underwriting Agencies, Ltd.,* 969 F.2d 953 (10th Cir. 1992), *cert. denied*, 506 U.S. 1021 (1992). These cases hold that pursuant to a Name's General Undertaking, English law applies to his or her dispute with Lloyd's. Accordingly, Shillington's citations to Missouri cases defining fraudulent concealment are inapplicable because he agreed in his General Undertaking that English law, not Missouri law, would control his disputes with Lloyd's. (Shillington Br. at 11).

Defendants Fuerst, Hardin, Klein, McCain, and Michael Todorovich also were parties in *Richards v. Lloyd's of London,* 135 F.3d 1289 (9th Cir. 1998), which they disingenuously argue

this Court should ignore. (Defs. Br. at 6). Therefore, their arguments concerning their General Undertakings already have been rejected in *Richards* and they are barred under the doctrine of collateral estoppel from attempting to relitigate them here again. *In re Scarborough*, 171 F.3d 638, 641 (8th Cir. 1999) ("Collateral estoppel is a legal doctrine that 'bar[s] the relitigation of factual or legal issues that were determined in a prior ... court action,'" (citations omitted)).

X. DEFENDANTS FAIL TO CITE ANY APPLICABLE AUTHORITY UNDER THE MISSOURI UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT

Defendants fail to cite any relevant authority to show that any element of the Missouri Uniform Foreign Money-Judgments Recognition Act has not been satisfied. (See Defs. Br. at 8-9). Defendants' citation to *Overseas Inns, S.A.P.A. v. United States,* 911 F.2d 1146 (5th Cir.) and *Laker Airlines, Ltd., v. Sabena, Belgian World Airlines,* 731 F.2d 909 (D.C. Cir. 1984) are distinguishable from this case. (Defs. Br. at 8). Unlike the instant case, the *Overseas* and *Laker* cases involved United States governmental entities as parties who were involuntarily drawn into foreign courts' proceedings. In *Overseas,* the District of Columbia Circuit refused to recognize a foreign court's order where the defendants sought and received an English court's injunction order against a United States District Court's proceeding brought by a plaintiff for antitrust violations committed by the defendants. In *Laker*, the Fifth Circuit refused to recognize a Luxembourg court's order regarding the United States Internal Revenue Service's claim against a debtor which ruled the United States Government was an unsecured creditor under foreign bankruptcy law. Neither case dealt with private citizens entering into an agreement containing forum selection and choice of law provisions for adjudication of their disputes, as is the case here. Accordingly, both *Overseas* and *Laker,* are inapplicable.

In another case cited by defendants, *Somportex, Ltd. v. Philadelphia Chewing Gum*, 453 F.2d 435 (3rd Cir. 1971), the Third Circuit upheld the recognition of an English judgment in which the District Court had ruled that the English judicial "system ... is the very fount from which our system developed; a system which has procedures and goals which closely parallel our own." *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 318 F.Supp. 161, 166 (E.D.Pa.1970), *affirmed*, 453 F.2d 435 (3d Cir.1971). Accordingly, *Somportex*, actually supports recognizing Lloyd's English judgments.

Finally, Defendants' citations to *Mekelburg v. Whitman*, 545 S.W.2d 89 (Mo. App. 1976) and *Gibson v. Epps,* 352 S.W.2d 45 (Mo. App. 1961) for the proposition that a sister state judgment is subject to collateral attack for fraud, while technically correct, ignore that both cases held that a judgment debtor needed to prove *extrinsic* fraud to support non-recognition by a Missouri Court. Specifically, the *Mekelburg* court stated that the extrinsic fraud must be:

> "fraud [which] relates to the manner in which the judgment was procured. Fraud in matters pertaining to the judgment itself is intrinsic fraud and is not a proper basis for setting aside a default judgment." *Mekelburg*, 545 S.W.2d at 91 (citations omitted).

Assuming, *arguendo,* that Lloyd's judgment is subject to the same type of collateral attack, then the fraud alleged against Lloyd's by defendants is clearly intrinsic. The alleged fraud occurred, if at all, in proceedings separate and apart from the English Actions and had absolutely no impact on the integrity of the English Actions. Although defendants may argue otherwise, American courts in similar enforcement actions by Lloyd's have repeatedly disagreed. *See, e.g., Ashenden*, 233 F.3d at 478-81 (holding that the English Actions satisfied the operative "international concept of due process," and even American due process). Accordingly, defendants' argument fails.

CONCLUSION

Based on the foregoing reasons and those contained in Lloyd's initial brief in support of its Motion for Summary Judgment, this Court should grant Lloyd's motion and enter an order against each defendant recognizing and enforcing the English Judgments.

Respectfully submitted,

Plaintiff, The Society of Lloyd's

By: /s/ Blake T. Hannafan
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Dated: May 14, 2004

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CERTIFICATE OF SERVICE

I certify that on the 14th day of May, 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: Ted F. Frapolli, Esq., 275 North Lindbergh, Suite F, St. Louis, MO 63141, Attorney for Certain Defendants; Alan C. Kohn, Esq., One US Bank Plaza, Suite 2410, St. Louis MO 63101, Attorney for Defendant Shillington and Harold F. Ilg, 100 L'Ambiance Circle, Unit 202, Naples, FL 34108 and 16401 Ranchester Drive, Chesterfield, MO 63005.

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