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CLERK OF COURT  
FEDERAL BANKRUPTCY COURT  
DISTRICT OF UTAH  
SALT LAKE CITY

Attorneys for The Society of Lloyd's

**IN THE UNITED STATES BANKRUPTCY COURT**

**FOR THE DISTRICT OF UTAH**

Central Division

**UNSIGNED**

**ORDER**  
Bankruptcy No. 03-3637 JAB  
(Involuntary Chapter 7)

In re

**STEPHEN M. HARMSSEN,**  
  
Debtor.

**THE SOCIETY OF LLOYD'S  
PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

The Society of Lloyds ("Lloyd's") hereby submits the following proposed Findings of Fact and Conclusions of Law for the Court's consideration prior to the trial of the Involuntary Petition commencing this case:

**FINDINGS OF FACT**

1. This case was commenced on August 9, 2003, by the filing by Lloyd's of an Involuntary Petition in bankruptcy against Stephen M. Harmsen ("Harmsen").
2. Harmsen is an individual residing in the State of Utah.



3. Harmsen is the judgment debtor named in a Judgment entered by Judge Tena Campbell of the United States District Court for the District of Utah on March 18, 2003, in the principal amount of £163,858.44 which enforces a Judgment entered earlier by the Courts of England against the Debtor. Interest accrues on the Judgment at 8% from and after March 11, 1998 (the date the Judgment was entered against Harmsen in the Courts of England), and as of August 9, 2003, the balance is £243,846.52 or approximately \$445,300.43.

4. West American Finance Corporation ("WAFCO") is a corporation owned and controlled by the Debtor's family. The Debtor himself manages the day-to-day operations of WAFCO and has done so since at least 1992 with almost complete autonomy.

5. In 1996 the Debtor owed approximately \$2,200,000.00 to an unrelated creditor. Rather than pay the creditor directly Debtor caused WAFCO to acquire this debt.

6. On October 24, 1996, the Debtor (while in control of WAFCO) agreed to give WAFCO a consensual judgment against himself, his wife (Kelly Harmsen), and other Debtor-controlled companies in the amount of \$2,215,907.11.

7. The Debtor thereafter entered into a forbearance agreement with WAFCO pursuant to which WAFCO was given a security interest in certain items of the Debtor's property and other items of property were transferred to WAFCO in partial satisfaction of the debt. Despite these transfers and credits a substantial balance remained.

8. After Lloyd's obtained Judge Campbell's ruling recognizing the enforceability in the United States of Lloyd's English Judgment, negotiations for the payment of the Judgment began between Debtor and Lloyd's, through Debtor's attorney Steven A. Wuthrich.

9. During negotiation, Mr. Wuthrich warned Lloyd's, as part of negotiations, that WAFCO would begin execution proceedings against Debtor's personal property so as to make him collection proof unless Lloyd's agreed to compromise the amount owed pursuant to the Judgment.

10. Thereafter, a writ of execution was issued pursuant to WAFCO's judgment on May 5, 2003, and a constable's sale was conducted on June 17, 2003, purporting to sell all of the Debtor's non-exempt personal property without notice to Lloyd's.

11. In furtherance of Lloyd's efforts to collect its Judgment against the Debtor, Lloyd's served post-judgment Requests for Production of Documents on Debtor.

12. The Debtor's responses to Lloyd's post-judgment discovery indicated that Debtor did not have 12 or more creditors who qualify under § 303(b)(2) of the Bankruptcy Code.

13. After learning of the June execution sale, Lloyd's filed the Involuntary Petition commencing this case.

14. After the Involuntary Petition was filed, Lloyd's received a letter from Mr. Wuthrich asking that he receive a copy of the Summons and Return of Service in this case and confirmed that he would advise his client to contest the Involuntary Petition. Mr. Wuthrich also

currently represents the Debtor and his wife before the Tenth Circuit Court of Appeals in the appeal of Judge Campbell's Judgment.

15. Mr. Wuthrich is an "insider" within the meaning of 11 U.S.C. § 101(31).

16. Thereafter, Debtor retained the firm of Holland & Hart to represent him in this case. The Debtor defends against the Involuntary Petition, asserting that he has more than 11 qualifying creditors and that as of the Petition Date, he was paying his debts generally as they came due. The Debtor also asserts that Lloyd's claim against him is in "bona fide dispute" within the meaning of 11 U.S.C. § 303(b)(1), despite the Judgment entered against him by the Courts of England and Judge Campbell's Judgment, because he asserts he still has unresolved fraud claims against Lloyd's which might offset the entire amount he owes under the Judgment.

17. With respect to Lloyd's claim, the Court finds that there is no good faith objective basis to dispute the claim for the following reasons:

a. The claim has been litigated both in England and by the Federal District Court in this district and Judgments have been entered. No stay of the District Court's Judgment pending appeal has been granted;

b. The fraud claim the Debtor claims to have against Lloyd's may not be used as an offset against Lloyd's claim because any such claim has been barred by the three-year statute of limitations application in the State of Utah;

c. This claim was expressly dismissed by Judge Campbell on summary judgment in the District Court in this district when the Debtor brought a counterclaim against Lloyd's in Lloyd's enforcement action; and

d. The Debtor was given notice of an ordered by the Courts of England requiring him to join in a quasi class action against Lloyd's if the Debtor wished to pursue a fraud claim in the case of *Society of Lloyd's v. Jaffrey*, 2000 W.L. 1629463 (Q. B. Nov. 2, 2000), *aff'd*, 2002 W.L. 1654876 (C.A. July 26, 2002). The English courts fully litigated the fraud claim and rejected that claim. See Judge Campbell's Summary Judgment Order, p. 12, fn 5, citing *Society of Lloyd's v. Jaffrey*. The District Court here has ruled that Mr. Harmsen was given a full and fair opportunity to litigate this issue in the Courts of England and all of the other issues, including the fraud issue in *Jaffrey*, but thus far has declined to do so. He cannot do so now.

18. Rather than file an answer, Debtor first filed a Motion to Dismiss. In anticipation of responding to the Motion, Lloyd's moved for and obtained an order requiring the Debtor to respond to Requests for Production of Documents by September 24, 2003, which requested that the Debtor produce all documentary proof of the existence and amount of any debt he claimed to have had as of the Petition Date and all payments made to any such creditor within 90 days prior to the Petition or at any time after the Petition.

19. On September 25, 2003, Lloyd's began a deposition of the Debtor but was unable to complete it because not all of the documents were provided as ordered. Eventually, Mr. Harmsen provided additional documents and the deposition was completed.

20. In his Answer, Harmsen asserts that he had, as of August 9, 2003, the following creditors in the following amounts (to the extent stated by him in the Answer):

<u>Creditor</u>	<u>Amount</u>
Steven Wuthrich, Esq.	1,150.00
H. J. & Associates	not stated
Dr. Thomas Lyddell	103.00
Washington Mutual Bank	not stated
Western Farm Credit Bank	not stated
Names Legal Committee	not stated
F. Weixler Company	20.40
Zions Investment Securities, Inc.	not stated
Key Private Bank	1,708.51
Comcast	89.40
Salt Lake City Corp.	274.52
Questar Gas	63.49
Utah Power	601.70
Dr. Gerald Summerhays	146.00
Quick & Reilly	28,369.12
Internal Revenue Service	6,789.00
Utah State Tax Commission	3,179.00
Idaho State Tax Commission	1,179.00
Silkies	13.96
Melenaite Vi	1,020.00
Steve Lybbert	not stated
Dr. Brandson Call	not stated
California National Bank	not stated
Bank of America	7,972.32
MBNA	1,248.50
American Express	217.18
Capital One	926.47
Salt Lake City Credit Union	1,744.72

<u>Creditor</u>	<u>Amount</u>
Utah Jazz	not stated
San Diego Gas & Electric Co.	not stated
Alta Club	487.46
Time Warner Cable	11.77

21. Of the above creditors, the following creditors have received payments from the Debtor or on the Debtor's behalf by companies controlled by the Debtor, which payments are properly considered compensation to the Debtor for pre-petition services and thus recoverable under § 549(a)(2)(A) of the Bankruptcy Code. The following list of creditors are therefore not eligible to be counted as creditors for purposes of § 303(b)(2).

<u>Creditor</u>	<u>Amount of Payment</u>	<u>Date of Payment</u>	<u>Exh. No.</u>
Steven Wuthrich	\$800.00	08/21/03	2 & 3
Dr. Thomas R. Lyddell	103.00	08/14/03	7, 8 & 31
Washington Mutual Bank (Loan No. 0038841680)	7,257.42	08/18/03	4 & 39
Washington Mutual Bank (Loan No. 7015848521)	2,233.50	By-weekly beginning 8/18/03	40
Names Legal Committee	3,000.00	08/20/03	16 & 72
Comcast	89.40	09/2/03	54
Salt Lake City Corp.	274.52	08/15/03	55, 63 & 85
Questar Gas	63.49	08/15/03	32, 33 & 80
Utah Power <sup>1</sup>	601.70	08/28/03	81
Dr. Gerald Summerhays	146.00	08/15/03	31
Steve Lybbert	820.42	08/26/03	10, 11, 12, 13, 15 & 82
Bank of America	4,027.68	08/25/03	21, 22, 23 & 24
	7,927.32	08/26/03	
MBNA	2,000.00	08/20/03	28, 29 & 30
	1,248.50	08/11/03	

<sup>1</sup>The Debtor's name was added to this bill for the first time with the July 31, 2003 bill at the Debtor's request after the Petition was filed on August 9, 2003. Prior to that time the account was in the name of Oquirrh Associates, an entity described by the Debtor as a "partnership" in which the Debtor is the only member.

<u>Creditor</u>	<u>Amount of Payment</u>	<u>Date of Payment</u>	<u>Exh. No.</u>
American Express	217.00	08/19/03	17, 18, 19 & 20
Capital One Card	2,809.86	08/16/03	44, 45 & 46
	1,500.00	08/23/03	
Salt Lake City Credit Union	1,744.72	08/21/03	34, 35 & 36
	332.43	09/15/03	
The Alta Club	487.46	09/09/03	6, 69, 70, 71 & 71A

22. The following creditors are not eligible to be counted under § 303(b)(2) because they have received payments recoverable as a preference by a trustee in this case under § 547 of the Bankruptcy Code:

<u>Creditor</u>	<u>Amount</u>	<u>Date</u>	<u>Exh. No.</u>
Washington Mutual Bank <sup>2</sup>	\$7,257.42	07/16/03	4 & 39
	7,257.42	06/17/03	
Utah Power	310.74	05/29/03	81
	229.39	07/02/03	
	399.34	07/31/03	
Bank of America	22,232.56	05/26/03	21, 22, 23 & 24
	2,483.66	06/24/03	
	3,339.30	07/30/03	
MBNA	8,508.38	07/___/03	28, 29 & 30
American Express	3,879.33	08/07/03	17, 18, 19 & 20
Capital One Card	4,050.31	06/16/03	
	3,524.39	07/14/03	44, 45 & 46
Salt Lake City Credit Union	2,132.72	06/05/03	34, 35 & 36
	1,737.23	07/___/03	
Utah Jazz	2,633.20	06/16/03	28 & 51
	312.00	06/30/03	
The Alta Club	249.39	05/12/03	6, 39, 70, 71 & 71A

<sup>2</sup>These payments were made to Washington Mutual as rent owed to WAFCO which owns the Debtor's home and is the Debtor's landlord. Because the home is not property of the estate, Washington Mutual is not secured by property of this estate and these payments will allow Washington Mutual to receive more than it would receive from the Debtor in a liquidation under Chapter 7 if the payment had not been made.



<u>Creditor</u>	<u>Amount</u>	<u>Date</u>	<u>Exh. No.</u>
WAFCO	394.82	06/30/03	
	Certain property of the Debtor listed on the constable's return of execution sale	06/17/03	

23. Each of the above creditors held unsecured claims against the Debtor at the time they received payment and each payment made was made on account of an antecedent debt during the 90-days prior to the petition during which the Debtor is presumed to be insolvent and in each case the creditor received more than it would have received in a liquidation under Chapter 7 had the payments not been made.

24. The following additional creditors have each been paid after August 9, 2003, by the Debtor or on his behalf, giving rise to a claim under § 549(a)(2)(A). In each case the Debtor admits that the claims against him held by the each of the creditors as of the Petition Date have been paid in full but the Debtor has not provided evidence of the actual payment, its specific source or payor. Because the Debtor has the burden of proof of all issues arising under § 549 (*see* Bankruptcy Rule 6001), and because the documentary evidence regarding these payments is in the exclusive possession and control of the Debtor, the Court finds that the following creditors are not eligible to be counted under § 303(b)(2) because they have received transfers avoidable under § 549:

- a. F. Weixler Co.
- b. Key Bank
- c. Internal Revenue Service
- d. State of Utah
- e. State of Idaho

- f. Silkies
- g. Melenaite Vi
- h. Dr. Brandson Call
- i. Utah Jazz

25. The Debtor may not count the following creditors toward the 12 necessary to defeat the Involuntary Petition under § 303(b)(1) and (2) because the Debtor has failed to state in his Answer to the Petition the amount owed as of the Petition Date as required by Bankruptcy Rule 1003(b):

- a. H.J. & Associates
- b. Washington Mutual Bank
- c. Names Legal Committee
- d. Zions Investment Securities, Inc.
- e. Steve Lybbert
- f. Dr. Brandson Call
- g. California National Bank
- h. Utah Jazz
- i. San Diego Gas & Electric Co.

26. The following creditors may not be counted under § 303(b)(2) because their claims against the Debtor and payments received on account of such claims are subject to being avoided by a bankruptcy trustee in this case under § 548 (fraudulent conveyances) because in each case, the Debtor has incurred debts for the benefit of a limited partnership of which neither he nor his wife was a member or he has incurred debts for utility services to real estate not owned by him or for medical bills for an emancipated adult family member. The Debtor has not received any reasonably equivalent value in money or money's worth in exchange for the debts so incurred, all incurred at a time when the Debtor was insolvent (*i.e.*, after June 1993, when the Debtor

asserts that all of his non-exempt personal property was executed upon and sold to WAFCO at a constable's execution sale):

- a. San Diego Electric Co.
- b. Time Warner Cable
- c. Dr. Lyddell<sup>3</sup>

Because these claims are avoidable under § 548 the claims are disputable on an objective basis under the law. Section 544 would also make Utah's Fraudulent Transfers Act applicable as a basis for dispute outside of this bankruptcy case.

27. The following creditors may not be counted under § 303(b)(1) because they are "insiders" within the meaning of 11 U.S.C. § 103(31):

- a. Steve Wuthrich, Esq.
- b. WAFCO<sup>4</sup>

28. The following creditors may not be counted under § 303(b)(1) because their claims are "contingent:"

- a. Western Farm Credit Bank
- b. California National Bank
- c. Washington Mutual Bank

29. It is undisputed that in each case regarding the creditors mentioned in the immediately preceding paragraph, the creditors' claims are fully secured by real estate of a value in excess of the balance owed by the Debtor and that the real estate acting as security is not

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<sup>3</sup>With respect to Dr. Lyddell the evidence shows that the Debtor incurred this obligation for dental services performed for Sage Harmsen, who is a 24-year-old son of the Debtor.

<sup>4</sup>The Court notes that WAFCO is not claimed by the Debtor to be a creditor accountable under § 303, but makes this Finding to avoid any confusion regarding the count.

owned by the Debtor. In each case, however, the Debtor is an obligor on the promissory note and not a mere guarantor and is thus protected by the One Action Rules and antideficiency statutes adopted in the states of Nevada, California and Utah wherein the real estate is located. *Bank of Ephraim v. Davis*, 581 P.2d 1001, 1003 (Utah 1978) (until the security is exhausted "the creditor is not in a position to obtain personal judgment against the debtor."); *Berman v. Loeb*, 64 Cal. App. 4<sup>th</sup> 502, 512, 75 Cal. Rpt. 2d 294, 300 (Cal. App. 1998) ("In California, a creditor's right to enforce a debt secured by a trust deed on real property is restricted by statute . . . 'the creditor must rely upon his security before enforcing the debt.'"); *Component Systems Corp. v. Eighth Judicial District Court*, 692 P.2d 1296 (Nev. 1985) (creditor had no claim for personal judgment because at the time of serving the complaint the creditor had not sold the property).

30. The following creditors may not be counted under § 303(b)(2) because there has been no proof presented that the Debtor, Stephen Harmsen, is indebted to the creditor:

- a. Utah Jazz—while the Debtor had the right to purchase season tickets for Utah Jazz games, there is no contract obligating him to do so;
- b. Key Bank—the evidence at trial has shown that Key Bank is owed an overdraft on a checking account owned by Kelly Harmsen. There is no evidence that Steven Harmsen is obligated on this account.

31. The following creditors may not be counted under § 303(b)(1) because the Debtor testified in his deposition that he disputed their claims as of the Petition Date:

- a. Silkies
- b. State of Idaho

32. The following creditors may not be counted under § 303(b)(2) because the Debtor expressly waived, at his deposition, any right to claim the creditor as a creditor to be counted under § 303 (*see* p. 246 of S. Harmsen depo.):

- a. State of Idaho

Furthermore, the Debtor supplied an Affidavit in support of his Motion to Dismiss wherein he asserted that all taxes were paid prior to the Petition Date.

33. The following creditors may not be counted under § 303(b)(2) because their claims are *de minimus*:

- |    |                   |         |
|----|-------------------|---------|
| a. | F. Wexler Co.     | \$20.40 |
| b. | Silkies           | 13.96   |
| c. | Dr. Brandson Call | 15.00   |

34. With respect to Dr. Call's claim, the Debtor admits that Dr. Call told him that the doctor did not care when this debt was paid. It cannot be disputed that the debt is *de minimus* both in the mind of the Debtor and the doctor/creditor.

35. From the foregoing, it is the Finding of this Court that in addition to Lloyd's, Quick & Reilly is the only other creditor eligible to be counted under § 303.

36. The Court also finds that the Debtor was not, as of the Petition Date, paying his debts generally as they became due. As of the Petition Date, the Debtor was indebted to Lloyd's in the amount of £243,846.52 pursuant to the Judgment entered against him in Lloyd's favor. The Debtor was also indebted to WAFCO in an amount exceeding \$2 million. Both of these debts

were long-standing over several years. In addition, the Debtor had not paid F. Wexler Co. its claim of \$20.40, which had been outstanding for a period of months nor the claim of Dr. Call in the amount of \$15.00 that had been outstanding also for a period of months. More importantly, the Debtor had suffered an execution sale (whether avoidable or not) wherein WAFCO ostensibly became the owner of all of his non-exempt personal property. The Debtor's unpaid claims constitute the vast majority of all claims the Debtor claims to have had as of August 9, 2003.

37. The Court has considered, as suggested by the case of *In re Norris*, 183 B.R. 137 (Bankr. W.D. La. 1995) the following four factors in determining whether a debtor was generally paying his debts as they became due at the time the petition was filed: (1) the number of debts, (2) the amount of the delinquencies, (3) the materiality of nonpayment of the debtor's debt, and (4) the nature of the debtor's overall financial affairs.

38. It also appears to the Court that while this is not strictly speaking a "single creditor" case, it is primarily a dispute between Lloyd's and the Debtor and perhaps the Debtor's family in the form of WAFCO and other companies controlled by the Debtor which the Debtor has favored over the last few years to Lloyd's detriment. It appears to the Court that the Debtor has engaged in a fraud, artifice or sham, and possibly all three, in an effort to protect his assets and lifestyle from the consequences of the obligation to Lloyd's and the resulting judgments in Lloyd's favor. The Debtor lives in a home (owned by WAFCO) valued at approximately \$2 million and is paid a salary and bonuses in the amounts he chooses from various companies he and his family control. Although WAFCO's judgment is against the Debtor and other entities as

well, no effort was taken by WAFCO (while controlled by the Debtor) to satisfy the judgment from any of the other judgment debtors. Rather, the Debtor offered to seemingly sacrifice himself and his assets to WAFCO for the benefit of the other judgment debtors (all companies controlled by him) in such a way that his lifestyle would not change but that no assets would remain in his name. Having done this, however, in June of 2003, the Debtor failed to follow through with respect to many important assets. For example, his furniture was not removed from his home, his brokerage accounts remained in his name and in the name of his wife.

The elements of the Involuntary Petition have been established to the satisfaction of the Court and an order for relief shall enter.

Having entered the foregoing Findings of Fact, the Court now enters the following

#### CONCLUSIONS OF LAW:

1. Whether a claim is "disputed" is to be determined as of the petition date based upon objective facts or an objective legal theory and subsequent payment of the claim by the debtor is irrelevant. *Bartholomew v. Maverick 2 Corp.*, 853 F.2d 1540, 1544 (10<sup>th</sup> Cir. 1981). The Debtor testified unequivocally in his deposition that the claim of Silkies in the amount of \$13.96 was, in his opinion, a "sham" and was disputed because neither he nor his wife could recall ever ordering anything from Silkies and, when asked, Silkies could not produce any documentation that any order was made for Silkies' products. Silkies is apparently a telephone order company specializing in silk stockings and other womens apparel. The Debtor eventually changed his tune

and paid the claim. This does not change the fact that the claim was in bona fide dispute as of the Petition Date.

2. Similarly, with respect to the claim of the State of Idaho, the Debtor testified in his deposition that he disputed that he owed any money to the State of Idaho and expressly waived his right to claim the State of Idaho as a creditor. The Debtor did not comply with this Court's order and provide any documentation prior to the end of his deposition showing that he owed any money to the State of Idaho. A debtor may waive his right to contest an involuntary petition based on the number of his creditors. The number of petitioning creditors is a substantive defense as opposed to a jurisdictional requirement. *In re Mason*, 20 B.R. 650 (9<sup>th</sup> Cir. BAP), *aff'd*, 709 F.2d 1313; *In re Kidwell*, 158 B.R. 203 (Bankr. E.D. Ca. 1993). This only stands to reason since the Debtor may file a voluntary petition if he chooses at any time irrespective of the number of creditors he has. The Court may also refuse to allow evidence of creditors' claims where the debtor has failed to comply with discovery orders. *Id.*

3. Creditors who qualify as of the petition date cease to qualify if they receive post-petition payments recoverable by a bankruptcy trustee in the case under § 549(a)(2). *See* § 303(b)(2); *In re Garland Coal & Mining*, 67 B.R. 514, 519 (Bankr. W.D. Ark. 1986).

4. The debtor has the burden of proving the validity (nonavoidability) of any post-petition transfer under § 549. *In re Remill*, 111 B.R. 250, 256 (Bankr. E.D. Mo. 1990) (debtor has burden to prove post-petition payments to creditors are not recoverable under § 549 in order



to defeat involuntary petition). See Bankruptcy Rule 6001 ("any entity asserting the validity of a transfer under § 549 of the Code shall have the burden of proof:").

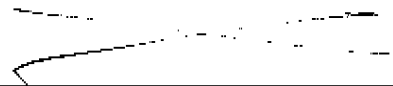
5. Similarly, any entity who holds a claim avoidable under § 548(a)(B) ("trustee may avoid . . . any obligation incurred by the debtor . . .") or has received a payment avoidable under § 547(b) is not eligible to be counted under § 303(b)(2).

6. To the extent that any of the foregoing Conclusions of Law should more properly be considered as findings of fact, they should be deemed such. Conversely, to the extent that any of the Court's previous Findings of Fact should be more properly deemed conclusions of law, they are adopted as such.

DATED this \_\_\_\_\_ day of March, 2004.

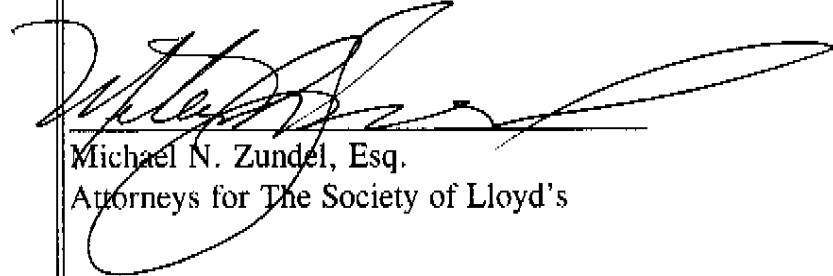
**BY THE COURT:**

*Alternative  
Opinion entered.  
4-15-04  
JHB*

  
Honorable Judith A. Boulden  
United States Bankruptcy Judge

Respectfully submitted:

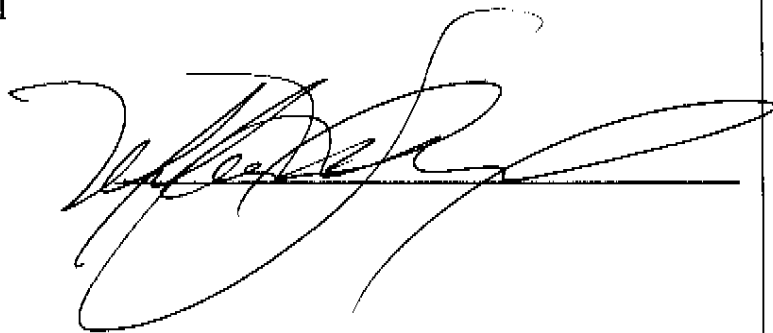
**PRINCE, YEATES & GELDZAHLER**

  
Michael N. Zundel, Esq.  
Attorneys for The Society of Lloyd's

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4<sup>th</sup> day of March, 2004, I served the foregoing by causing a true and correct copy thereof to be hand delivered to the following:

Mona L. Burton, Esq.  
Holland & Hart  
60 East South Temple, Suite 2000  
Salt Lake City, UT 84111

A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to be the name of the person who served the documents.

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File No. 14303-1