IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 02-1961-REB-OES
(Consolidated with Civil Action Nos. 02-1962-REB-OES, 02-1963-REB-OES, 02-1979-REB-OES)

THE SOCIETY OF LLOYD'S,

Plaintiff,

v.

JOSEPH HENRI SILVERSMITH,

Defendant.

REPLY IN SUPPORT OF LLOYD'S (1) MOTION TO DISMISS COUNTERCLAIMS BASED ON IMPROPER VENUE AND (2) MOTION FOR ENTRY OF JUDGMENT

Plaintiff The Society Of Lloyd's ("Lloyd's"), through its undersigned counsel, states the following in support of its request that the Court dismiss plaintiff's counterclaims based on lack of venue and, after doing so, enter final judgment in favor of Lloyds.

SUMMARY OF ARGUMENT

Every federal court considering the forum selection clause at issue has rule that it is enforceable. Defendants' arguments provide no basis for ruling otherwise. Hence, Lloyd's motion to dismiss defendants' counterclaims should be granted.

If the Court dismisses defendants' counterclaims there will be no claims remaining, and entry of final judgment will be appropriate. Although defendants have not challenged the forms of Judgment Lloyd's tendered with its motion, Lloyd's has concluded that the interest component of the Judgments should be modified in light of *Society of Lloyd's v. Reinhart,* 402 F.3d 982 (10th Cir. 2005) and to ensure that defendants have received all credits due against the

English judgments. Accordingly, Lloyd's has also submitted herewith revised forms of Judgment.

ARGUMENT

A. Defendants' Arguments Do Not Present Any Basis For Concluding That The Forum Selection Clause In The Revised General Undertaking Is Unenforceable.

The bulk of defendants' response is devoted to attacking the supposed unreasonableness of the forum selection clause, the alleged inconsistency between that clause and the anti-waiver provisions of Colorado's securities laws, the alleged inadequacy of the remedies available in the English judicial system, and Lloyd's alleged failure to disclose material facts at the time it asked defendants to sign the revised General Undertaking. [*See* Counterclaim-Plaintiff's Response to Lloyd's Motion To (1) Dismiss Counterclaims Based On Improper Venue and (2) For Entry Of Judgment, pp. 20-21 and 23-27 (hereafter "Defendants' Response").]

What defendants fail to point out, however, is that many of the arguments they now advance have already been rejected by this Court. Thus, for the most part, what defendant is really doing is asking this Court to change its mind without presenting any new authority or facts that would justify doing so.

For example, in upholding the enforceability of the English Judgments, this Court rejected defendants' arguments that the anti-waiver provisions of Colorado law rendered the "choice" clauses unenforceable. [*Compare* April 15, 2005 Summary Judgment Order, p. 9 *with* Defendants' Response, pp. 19-22 and 27-28.] Defendants' cavils concerning the English judicial system also have already been addressed by this Court, which concluded that the English legal system, while different from the American system, provides adequate remedies.

[*Compare* Defendants' Response, pp. 23-26 *with* April 15, 2005 Order, p. 10.] And defendants' assertion that the revised General Undertaking is an adhesion contract for which there was no consideration completely ignores this Court' explicit holding that "[t]he right to continuing participation in Lloyd's market is certainly adequate consideration for the contract modification". [*See* April 15, 2005 Order, pp. 9-10.]

Further, to the extent this Court's summary judgment order did not specifically address defendants' arguments, as shown below those arguments have either been rejected by the Tenth Circuit (or other federal appellate courts) or fail of their own weight. Thus, the remainder of defendants' arguments also fail to provide any basis for denying Lloyd's request to dismiss defendants' counterclaims pursuant to Fed.R.Civ.P. 12(b)(3).

For example, defendants assert that Lloyd's engaged in fraudulent conduct by failing to disclose certain allegedly material facts. [*See* Defendants' Response, pp. 24-25.] As the federal appellate courts addressing similar allegations have recognized, the alleged fraud asserted by defendants goes to their contention that they were induced to enter into the *entire* revised General Undertaking by virtue of Lloyd's alleged fraud. There are no allegations that Lloyd's alleged fraud was directed specifically and solely at the forum selection clause. Consequently, defendants' fraud allegations fail to provide any basis for refusing to enforce the forum selection clause at issue. Instead, those allegations merely frame a claim that defendants, by agreement, are required to assert (to the extent cognizable) in England. *See Haynsworth v. The Corporation,* 121 F.3d 956, 963-64 (5th Cir. 1997); *Riley v. Kingsley Underwriting Agen-*

\\rupert\sys\lloyds\pleading\efile\reply mot judg.doc
dmw

cies, Ltd., 969 F.2d 953, 959 (10th Cir. 1992) (quoting *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 519 n. 14 (1974)).[1]

For the same reason, the preliminary injunction findings made in Colorado state court litigation involving Lloyds are irrelevant, even assuming those findings are binding on Lloyd's.[2] All of the "findings" concerning Lloyd's alleged fraudulent actions involve alleged misrepresentations made to induce Colorado residents to become Names. None relate solely, or even principally, to the forum selection clause in the revised General Undertaking. [*See* Defendants' Response, p. 12 n. 4.] Accordingly, even if one assumes those findings had some collateral estoppel effect, the alleged misrepresentations relied on by defendants would not affect the enforceability of the forum selection clause. *See, e.g., Haynsworth,* 121 F.3d at 963-64; *accord Riley,* 969 F.2d at 959.

---

[1] Defendants' assertion that Lloyd's engaged in a fraud by supposedly failing to explain the "purpose" or "effect" of the choice clause (*see* Defendants' Response, p. 25) does not distinguish this case from *Haynsworth* and *Riley.* To the contrary; as *Haynsworth* specifically held, the "[Names] were sophisticated parties contracting voluntarily; it is not for us to impose a duty upon one party to counsel the other as to the risks and benefits of a contract. Indeed, as Lloyd's points out, there was nothing to explain. The duty was the [Names'] to read the plain terms of the agreement, not Lloyd's to lecture them about it." *Id.* at p. 965.

Thus, Lloyd's alleged failure to explain the meaning and effect of the forum selection clause, or even why they wanted to include such a clause, does not make out a fraud claim, let along a fraud claim that could vitiate the forum selection clause.

[2] Typically, preliminary injunction findings have no collateral estoppel effect. *See, e.g., University of Texas v. Camenisch*, 451 U.S. 390, 396-98 (1981) (no preclusive effect in litigation on merits of same case); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1350 (9th Cir. 1982) (refusing to apply collateral estoppel to state court finding made in preliminary injunction proceeding in trial on merits of plaintiff 's § 1983 claim); *Community Nutrition Inst. v. Block*, 749 F.2d 50, 56 (D.C.Cir. 1984) (refusing to accord preclusive effect to determination made in granting of preliminary injunction in final hearing on the merits in a different case); *Zenith Radio Corp. v. Matsushita Elec. Ind. Co*., 505 F.Supp. 1125, 1185 (E.D.Pa. 1980) (Judge's findings, "which are addressed to the preliminary motion to dismiss, are not 'the law of the case[,]' ... do not control the issues ... upcoming in connection with the motions for summary judgment.").

Another argument advanced by defendants is that the combination of the forum selection clause and the choice-of-law clause somehow combine to make the revised General Undertaking substantively unenforceable. [*See* Defendants' Response, p. 22.] Again, this argument lacks merit. *See Haynsworth,* 121 F.3d at 967.

Defendants also make the suggestion that their counterclaims are not subject to the forum selection clause because those counterclaims are allegedly compulsory within the meaning of F.R.Civ.P. 13. [*See* Defendants' Response, p. 5.] That assertion is incorrect. Where compulsory counterclaims are encompassed by a forum selection clause, they must be litigated in the agreed-upon forum even if such counterclaims might be otherwise be "compulsory" under F.R.Civ.P. 13. *See Publicis Communication v. True North Communications, Inc.,* 132 F.3d 363, 366 (7th Cir. 1997); *Sokkia Credit Corp. v. Bush,* 147 F.Supp.2d 1101, 1105-06 (D.Kan. 2001).

Finally, defendants argue that the revised General Undertaking does not contain language demonstrating that it was intended to cover claims arising before its execution; that the revised General Undertaking instead evidences an intent to cover only matters relating to the Names' "'continuing' membership into the future"; and that Lloyd's motion must fail because Lloyd's has supposedly failed to meet its alleged burden of demonstrating that the forum selection clause was "unambiguously intended to cover disputed conduct that occurred before the Colorado Names were parties to the revised General Undertaking." [*See* Response, pp. 28-29.]

Even assuming Lloyd's has such a burden (and even assuming defendants' claims accrued after they executed the revised General Undertaking), there is no ambiguity concerning the application of the forum selection clause to any such pre-existing claims. The

\\rupert\sys\lloyds\pleading\efile\reply mot judg.doc
dmw

revised General Undertaking unambiguously states that the parties agree that the English courts will have exclusive jurisdiction over "*any* dispute and/or controversy *of whatsoever nature* arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's." [Emphasis supplied.][3] The breadth of this clause is manifest. Thus, because defendants' counterclaims arise out of a dispute "of whatsoever nature" relating to defendants' "membership of, and/or underwriting business at, Lloyd's", those claims are unambiguously encompassed by the forum selection clause contained in the revised General Undertaking. Hence, defendants' final argument also fails to provide a basis for denying Lloyd's motion to dismiss under Fed.R.Civ.P. 12(b)(3).

B. If Defendants' Counterclaims Are Dismissed, This Court Should Enter Judgment In Favor Of Lloyd's In Accordance With The Declaration Of Nicholas P. Demery, Esq.

Lloyd's submits herewith as Exhibit B the Declaration of Nicholas P. Demery, the Lloyd's attorney responsible for collection of the English judgments entered against defendants. Mr. Demery's Declaration establishes the amounts due and owing by each defendant with respect to the English judgment entered against that defendant, after application of all credits. That Declaration also sets forth the calculation of interest that has accrued on defendants' judgment balances pursuant to English law.

Based on Mr. Demery's Declaration, Lloyd's has made two changes to the proposed forms of Judgment. First, Lloyd's has ensured that each defendant has received proper credit for payments that effectively reduced that defendants' liability. Second, Lloyd's has

[3] Copies of the General Undertakings signed by each of the defendants were submitted as exhibits to Lloyd's summary judgment motions. For ease of reference, we have attached a copy of one of those previously filed revised General Undertakings as Exhibit A to this motion.

conformed its interest calculations to the approach taken in *Reinhart*, where the Court found it was proper to calculate interest prior to the district court's entry of judgment pursuant to English law, and to provide for post-judgment interest following the district court's final decision pursuant to 28 U.S.C. §1961(a). *See Reinhart,* 402 F.3d at 1005.

CONCLUSION

The forum selection clause contained in the revised General Undertaking unambiguously encompasses defendants' counterclaims, and defendants have provided no basis for refusing to enforce that clause. Consequently, this Court should dismiss all of defendants' counterclaims pursuant to F.R.Civ.P. 12(b)(3) and enter judgment in Lloyd's favor for the amounts set forth in Mr. Demery's Declaration. Final proposed forms of Judgment are attached as Exhibit C.

Dated: July 19, 2005
Denver, Colorado

\\rupert\sys\lloyds\pleading\efile\reply mot judg.doc
dmw

Respectfully submitted,

HOROWITZ WAKE & FORBES

s/Peter C. Forbes
By___________________________________

Jay S. Horowitz
Peter C. Forbes
370 Seventeenth Street, Suite 3950
Denver, Colorado 80202
Telephone (303) 572-5100
Telecopier (303) 572-5111
jhorowitz@hwiglaw.com
pforbes@hwiglaw.com

Attorneys for Plaintiff The Society Of Lloyd's

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2005, I electronically filed the foregoing Reply In Support Of Lloyd's (1) Motion To Dismiss Counterclaims Based on Improper Venue and (2) Motion For Entry Of Judgment with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail address:

rsander@siplaw.com Richard Sander, Esq.
dscheid@ssimlaw.com R. Daniel Scheid, Esq.

and I hereby certify that I have mailed or served the same upon the following non-CM/ECF as follows:

By mail:

Mr. Raymond Charlesworth Lee
5164 East Princeton Avenue
Cherry Hills Village, Colorado 80110

Mr. Joseph Henri Silversmith
15 Hyde Park Circle
Denver, Colorado 80209

By e-mail:

Nicholas P. Demery
Solicitor
Lloyd's Legal Services Department
One Lime Street
London EC3M7HA
England

HOROWITZ WAKE & FORBES

s/Peter C. Forbes
By____________________________________
Jay S. Horowitz
Peter C. Forbes
370 Seventeenth Street, Suite 3950
Denver, Colorado 80202
Telephone (303) 572-5100
Telecopier (303) 572-5111
jhorowitz@hwiglaw.com
pforbes@hwiglaw.com

Attorneys for Plaintiff The Society Of Lloyd's