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3:02-CV-00448 SOCIETY OF LLOYDS V. BLACKWELL

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FILED *[Signature]*
OCT - 4 2002
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY *[Signature]* DEPUTY

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 THE SOCIETY OF LLOYD'S,
12 Plaintiff,
13

14 vs.

15 ROBERT C. BLACKWELL, et al.,
16 Defendants.
17

No. '02 CV 0448 J (AJB)
(Related to '02 CV 0449)

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS R. WILLIAM
JOHNSTON, FRANK F.S. LIN,
ROBERT KRAMER LOWRY,
RICHARD ROSENBLATT, and
ROBERT L. SWISHER'S EX PARTE
MOTION FOR CONTINUANCE OF
SUMMARY JUDGMENT

Hon. Napoleon A. Jones

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20 R. WILLIAM JOHNSTON, FRANK F.S.
LIN, ROBERT KRAMER LOWRY,
21 RICHARD DAVID ROSENBLATT, and
ROBERT L. SWISHER,
22 Counterclaimants,
23

24 vs.

25 THE SOCIETY OF LLOYD'S,
26 Counterdefendant.)
27

28 20407240v1

- 1 -

MEMO OF P'S & A'S IN SUPPORT OF JOHNSTON DEFENDANTS' EX PARTE MOTION FOR
CONTINUANCE OF SUMMARY JUDGMENT

No. '02 CV 0448 J (AJB)

ORIGINAL

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 Defendants and counterclaimants R. WILLIAM JOHNSTON, FRANK F.S. LIN,
3 ROBERT KRAMER LOWRY, RICHARD DAVID ROSENBLATT, and ROBERT L.
4 SWISHER (“Johnston Defendants”) submit the following memorandum of points and
5 authorities in support of their *Ex Parte* Motion For Continuance of Summary Judgment.

6
7 **I. INTRODUCTION.**

8 Plaintiff THE SOCIETY OF LLOYD’S (“Lloyd’s”) commenced this action on
9 March 8, 2002 to enforce English judgments against the Johnston Defendants. Lloyd’s
10 subsequently filed its Motion For Summary Judgment on August 16, 2002, for hearing on
11 October 28, 2002. Lloyd’s Motion For Summary Judgment is *wholly* based on purported
12 evidence contained in the Declaration of Nicholas P. Demery, an attorney for Lloyd’s, yet
13 Lloyd’s refuses to permit the Johnston Defendants to depose Mr. Demery. Moreover,
14 despite the fact that it is seeking to recover amounts as great as nearly \$1 million from
15 individual defendants, Lloyd’s has consistently refused every request for discovery by the
16 Johnston Defendants.

17 The Johnston Defendants contend that summary judgment is premature, as Lloyd’s
18 has obstructed the Johnston Defendants’ attempts to discover information vital to the
19 Johnston Defendants’ Opposition to Lloyd’s Motion For Summary Judgment. Specifically,
20 the Johnston Defendants have meritorious defenses to Lloyd’s Motion For Summary
21 Judgment including, among other things:

- 22 a. there is a difference between establishing the *conclusiveness* of the
23 foreign judgments and *enforcing* the judgments;
24 b. Lloyd’s fraudulently obtained the English judgments against the
25 Johnston Defendants;

- 1 c. Equitas never validly assigned to Lloyd's the right to sue on the debts
2 purportedly owed by the Johnston Defendants, so Lloyd's had no
3 right to obtain the English judgments in the first place;
- 4 d. Lloyd's is trying to enforce confessions of judgment against the
5 Johnston Defendants, although no due process protections as
6 required by California law were present;
- 7 e. Lloyd's has grossly inflated the amounts purportedly owed to
8 Lloyd's by each Johnston Defendant;
- 9 f. the Johnston Defendants were not permitted to assert Lloyd's fraud
10 as a defense in the English actions;
- 11 g. the second-highest court in England has now (after the judgments
12 against the Johnston Defendants were entered) confirmed that
13 Lloyd's made false representations to its investors for over a decade.
14 See Jaffray v. Society of Lloyd's, No. EWCA Civ 1101 (Court of
15 Appeal 2002); and
- 16 h. the Johnston Defendants have valid counterclaims against Lloyd's,
17 asserted in their counterclaims in this Court, that will establish that
18 Lloyd's, as a matter of law, should not be allowed to enforce the
19 English judgments based on California Business & Professions code
20 sections 17200 et seq.

21 These defenses all create triable issues of fact that will likely result in denial of
22 Lloyd's Motion For Summary Judgment, and ultimately allow the Johnston Defendants to
23 prevail on their defenses and counterclaims. Without the opportunity to conduct discovery,
24 the Johnston Defendants' ability to put on their case and oppose Lloyd's Motion For
25 Summary Judgment is severely compromised. The Johnston Defendant are entitled – at a
26 minimum – to depose attorney Demery, since *every piece of evidence* on which Lloyd's
27 based its Motion For Summary Judgment is offered and allegedly authenticated by attorney

1 Demery's Declaration. The Johnston Defendants contend there is no foundation to support
2 his efforts to establish facts and authenticate documents. See Orr v. Bank of Am. NT &
3 SA., 285 F. 3d 764 (2002) (holding that attorney may not authenticate certain documents in
4 support of motion of summary judgment).

5 Accordingly, the Johnston Defendants respectfully request that the Court continue
6 Lloyd's Motion For Summary Judgment, and permit the Johnston Defendants to conduct
7 the discovery they have been seeking. This case is different in many respects, factually and
8 legally, from other cases in which Lloyd's has obtained summary judgments without
9 permitting defendants adequate discovery.

10

11 **II. STANDARD FOR OBTAINING CONTINUANCE.**

12 Pursuant to Federal Rule of Civil Procedure 56(f):

13 Should it appear from the affidavits of a party opposing the motion that the
14 party cannot for reasons stated present by affidavit facts essential to justify
15 the party's opposition, the court may refuse the application for judgment or
may order a continuance to permit affidavits to be obtained or depositions
to be taken or discovery to be had or may make such order as is just.

16 (West 2002). Further, Local Rule 7.1(g)(2) states:

17 Any request for continuance of a noticed matter shall be made as soon as
18 possible to the judge to whom the matter is assigned. Prior to seeking such
19 continuance, the party seeking the continuance shall contact all opposing
parties or their counsel to determine whether they would agree to such
continuance.

20 (West 2002).

21 FRCP 56(f) is designed to prevent parties from "railroading" opponents with
22 premature summary judgment motions before any meaningful discovery has taken place.
23 Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986). Accordingly, courts treat FRCP 56(f)
24 motions liberally: "***Denial of a Rule 56(f) application is proper where it is clear that the***
25 ***evidence sought is almost certainly nonexistent or is the object of pure speculation.***"
26 Terrell v. Brewer, 935 F. 2d 1015, 1018 (9th Cir. 1990). Moreover, "***[g]enerally where a***
27 ***party has had no previous opportunity to develop evidence and the evidence is crucial to***

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- 4 -

1 *material issues in the case, discovery should be allowed before the trial court rules on a*
2 *motion for summary judgment.”* Program Eng’g, Inc. v. Triangle Publ’ns, Inc., 634 F. 2d
3 1188, 1193 (9th Cir. 1981).

4
5 **III. LLOYD’S HAS REFUSED TO COMPLY WITH THE JOHNSTON DEFENDANTS’ DILIGENT REQUESTS FOR DISCOVERY.**

6 In an effort to facilitate settlement, counsel for the Johnston Defendants began to
7 request documents from Lloyd’s on behalf of the Johnston Defendants as early as June 21,
8 2002. The documents initially sought related mainly to the Reconstruction and Renewal
9 Plan (the document that allegedly gave rise to the Johnston Defendants’ debts to Lloyd’s)
10 and the calculations of the amounts purportedly owing by the Johnston Defendants to
11 Lloyd’s. Lloyd’s refused to voluntarily produce the requested documents. See Declaration
12 of Kenneth R. Chiate In Support of Motion To Continue Summary Judgment Motion
13 (“Chiate Decl.”) at ¶6. Counsel for the Johnston Defendants again requested that Lloyd’s
14 produce certain documents –primarily requested documents reflecting the amounts that
15 Lloyd’s claims the Johnston Defendants owe to Lloyd’s and the manner in which those
16 amounts were calculated – in an effort to facilitate mediation on August 6, 2002. See
17 Chiate Decl. at ¶7.

18 In light of Lloyd’s continuing refusal to voluntarily comply with the Johnston
19 Defendants’ discovery requests, on August 6, 2002 counsel for the Johnston Defendants
20 requested an early meeting of counsel pursuant to Federal Rule of Civil Procedure Rule
21 26(f) in order to plan for discovery. In addition, the Deposition of Lloyd’s attorney and
22 declarant Nicholas P. Demery was noticed for September 5, 2002. See Chiate Decl. at ¶8.
23 Counsel for Lloyd’s objected to the meeting of counsel. See Chiate Decl. at ¶9. Counsel
24 for the Johnston Defendants again requested an early meeting of counsel and reiterated the
25 Johnston Defendants’ requests for discovery. See Chiate Decl. at ¶10.
26
27

1 On August 28, 2002, counsel for the Johnston Defendants met with Lloyd's counsel.
2 Counsel for the Johnston Defendants requested that Lloyd's comply with the Johnston
3 Defendants' requests for discovery, specifically requesting that Nicholas P. Demery be
4 deposed. Counsel for Lloyd's asserted that Lloyd's would probably not agree to these
5 discovery requests, but agreed to nonetheless ask Lloyd's for a response. See Chiate Decl.
6 at ¶11.

7 On September 3, 2002, pursuant to Lloyd's request, the Johnston Defendants'
8 counsel presented a copy of the Declaration of Nicholas P. Demery In Support of Lloyd's
9 Motion For Summary Judgment to Lloyd's counsel, highlighting certain passages which
10 reflected the topics on which the Johnston Defendants intended to depose Mr. Demery. See
11 Chiate Decl. at ¶12. The Johnston Defendants also served Requests For Production Of
12 Documents and Requests For Admissions on Lloyd's by mail on September 3, 2002,
13 responses to be served on the Johnston Defendants on October 7, 2002. See Chiate Decl. at
14 ¶13. Lloyd's counsel informed counsel for the Johnston Defendants for the first time on
15 October 3, 2002 that *Lloyd's would not provide any of the documents demanded by the*
16 *Johnston Defendants' discovery requests, nor would Lloyd's produce Mr. Demery for his*
17 *deposition.* See Chiate Decl. at ¶14.

18
19 IV. DISCOVERY IS VITAL TO THE JOHNSTON DEFENDANTS'
20 OPPOSITION TO LLOYD'S MOTION FOR SUMMARY
JUDGMENT.

21 For the reasons stated below, the Johnston Defendants are entitled to discover
22 certain information vital to the Johnston Defendants' opposition to Lloyd's Motion For
23 Summary Judgment. Specifically, the Johnston Defendants should be allowed to discover
24 facts pertaining to the following defenses:

- 25 a. there is a difference between establishing the *conclusiveness* of the
26 foreign judgments and *enforcing* the judgments;

- 1 • “All DOCUMENTS, including but not limited to security agreements and
2 deeds of assignment, RELATING TO any and all assignments to [Lloyd’s]
3 by EQUITAS or others in connection with the R&R.”
- 4 • “Any and all DOCUMENTS YOU contend support the allegation in
5 paragraph 19 of the Complaint that ‘[i]n the English Actions, Names
6 (including many Defendants) raised a number of defenses to payment of the
7 Equitas premium.’”
- 8 • “Copies of any and all finality statements for R. William Johnston, Frank
9 F.S. Lin, Robert Kramer Lowry, Richard D. Rosenblatt, and Robert L.
10 Swisher.”

11 These documents relate directly to the Johnston Defendants’ contention (1) that the
12 English judgments were fraudulently-obtained, i.e., Lloyd’s had no right to sue them in
13 English courts in the first place, as the debts were never transferred to Lloyd’s by Equitas. ;
14 and (2) the judgments should not be enforced in California in any event based on the
15 Johnston Defendants’ counterclaims. As such, summary judgment should not be
16 considered until the Johnston Defendants have been afforded the opportunity to obtain facts
17 to oppose the pending Motion For Summary Judgment and mount a defense against
18 Lloyd’s.

19 At a minimum, the Johnston Defendants are entitled to depose Lloyd’s attorney
20 Nicholas P. Demery, whose declaration Lloyd’s exclusively relies on to support the pending
21 Motion For Summary Judgment. Indeed, *every* “material fact” that Lloyd’s relies on to
22 enforce the foreign judgments comes solely from the Declaration of Nicholas P. Demery.
23 For example:

- 24 • “The right to recover payment of the Equitas Premium was subsequently
25 assigned to Lloyd’s by Equitas, including the right for Lloyd’s to sue in its
26 own behalf to recover any unpaid Equitas premium.” See Separate

1 Statement Of Material Facts In Support Of Plaintiff The Society Of Lloyd's
2 Motion For Summary Judgment ("Separate Statement) at ¶12; and

- 3 • "There were more than 32 days of hearings in trial and appellate courts in
4 England before the Judgments were issued. At these hearings, Names raised
5 a number of defenses to payment of their Equitas premium. These defenses
6 were considered and rejected by the English courts." See Separate
7 Statement at ¶18.

8 The Johnston Defendants have no way of contesting Mr. Demery's personal
9 knowledge of these so-called facts submitted on Lloyd's behalf without the opportunity to
10 depose him. The Johnston Defendants have no way of ascertaining whether Mr. Demery
11 can properly authenticate the documents on which Lloyd's bases its claims against the
12 Johnston Defendants without taking his deposition. The Johnston Defendants cannot test
13 the basis for Mr. Demery's claim that Equitas did assign to Lloyd's the right to collect the
14 Johnston Defendants' purported debts without deposing him about his personal knowledge
15 and the basis for his sworn declaration. The Johnston Defendants have reason to believe
16 Mr. Demery cannot back up his claims, and that he lacks personal knowledge of much of
17 the facts to which he has "sworn" in his declaration. Stated simply, the Johnston
18 Defendants cannot defend themselves against Lloyd's claims and pending Motion For
19 Summary Judgment if the Johnston Defendants are not permitted to depose Lloyd's "star
20 witness," indeed, Lloyd's *only* witness upon whose sole declaration Lloyd's relied for all of
21 its claimed "undisputed facts." Clearly, this evidence is crucial to the Johnston Defendants'
22 opposition to Lloyd's Motion For Summary Judgment.

23
24 **V. CONCLUSION.**

25 This *Ex Parte* Motion For Continuance of Summary Judgment is not made for the
26 purposes of delay. It is made solely so that the Johnston Defendants can gather the
27 evidence that is necessary to oppose Lloyd's Motion For Summary Judgment, and is

1 promptly being filed based on Lloyd's disclosure on October 3, 2002 that Lloyd's will not
2 produce *any* of the discovery requested by the Johnston Defendants. For the reasons stated
3 herein, the Johnston Defendants respectfully request that the Court continue Lloyd's
4 Motion For Summary Judgment pending completion of the Johnston Defendants'
5 discovery.

6

7 Dated: October 4, 2002

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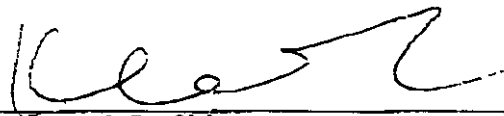
Respectfully submitted,
PILLSBURY WINTHROP LLP
KENNETH R. CHIATE
BARBARA L. CROUTCH
DAPHNE P. BISHOP

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By Kenneth R. Chiate
Attorneys for Defendants and Counterclaimants
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MEMO OF P'S & A'S IN SUPPORT OF JOHNSTON DEFENDANTS' *EX PARTE* MOTION FOR
CONTINUANCE OF SUMMARY JUDGMENT

No '02 CV 0448 J (AJB)

PROOF OF SERVICE BY OVERNIGHT COURIER

I, Judy Iott, the undersigned, hereby declare as follows:

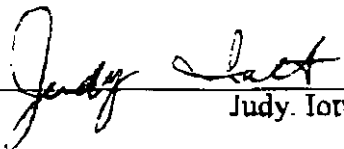
1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Winthrop LLP in the City of Los Angeles, California.

2. My business address is 725 South Figueroa Street, Suite 2800, Los Angeles, CA 90017-5406.

3. On October 4, 2002, in the city where I am employed, I served a true copy of the attached document titled exactly MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS R. WILLIAM JOHNSTON, FRANK F.S. LIN, ROBERT KRAMER LOWRY, RICHARD ROSENBLATT, and ROBERT L. SWISHER'S *EX PARTE* MOTION FOR CONTINUANCE OF SUMMARY JUDGMENT by depositing it in a box or other facility regularly maintained by FEDERAL EXPRESS, an express service carrier providing overnight delivery, or delivering it to an authorized courier or driver authorized by the express service carrier to receive document, in an envelop or package designated by the express service carrier, with overnight delivery fees paid or provided for, clearly labeled to identify the person being served at the address shown below:

[See Attached Service List]

I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of October, 2002, at Los Angeles, California.



Judy Iott

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- 11 -

MEMO OF P'S & A'S IN SUPPORT OF JOHNSTON DEFENDANTS' *EX PARTE* MOTION FOR CONTINUANCE OF SUMMARY JUDGMENT

No. '02 CV 0448 J (AJB)

ATTACHMENT

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(Lloyd's v. Blackwell)

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