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

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\*M.\*

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CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
DEPUTY

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17 RONALD GEORGE SPENO, STEPHEN JOHN WILSEY, PETER FRANCIS ZINSLI,

**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

18 THE SOCIETY OF LLOYD'S,

19 Plaintiff,

20 v.

21 ROBERT C. BLACKWELL, SAMME JO BRADY,  
22 COCO ALEXANDRA ELIZABETH CARTER,  
23 JOHN R. DOUGERY, JOSEPH MELVIN  
24 GAGLIARDI, HARRY WALTER GORST,  
25 FREDERICK GORDON GRAEBER, MICHAEL  
26 CALVIN HIRSH, IVARS RALPH JANIEKS,  
27 ROWLAND WLLIAM JOHNSTON, WILLIAM  
28 DOBSON KILDUFF, JANE ELIZABETH LAMB,  
DONALD RUDOLPH LAUB, FRANK F. S. LIN,  
ROBERT KRAMER LOWRY, GEOFFREY O.  
MAVIS, WILLIAM FENTON MILLER JR.,  
ROBERT MARSHALL MORTON, CHARLES  
WEBB OTT, RICHARD DAVID ROSENBLATT,  
RONALD GEORGE SPENO, ROBERT LYNN  
SWISHER, STEPHEN JOHN WILSEY, PETER  
FRANCIS ZINSLI, DOES 1-100 AS PERSONAL  
REPRESENTATIVES, BENEFICIARIES AND  
TRUSTEES OF THE TRUST OF ALFRED  
VERNE BALLARD'S ESTATE, DOES 1-100 AS  
PERSONAL REPRESENTATIVES,  
BENEFICIARIES AND TRUSTEES OF THE  
TRUST OF DELMAR ABSHER BRADY'S  
ESTATE,

Defendants.

) Case No. 02 CV 0448 J (AJB)

) **BLACKWELL DEFENDANTS**  
) **REQUEST TO STRIKE**  
) **PLAINTIFF LLOYD'S**  
) **CITATION TO UNPUBLISHED**  
) **CASES**

) Date: November 4, 2002  
) Time: 10:30 a.m.  
) Courtroom: 2<sup>nd</sup> Floor, Room 12  
) Honorable Napoleon A. Jones

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1 Pursuant to Ninth Circuit Rule 36-3, Defendants Robert C. Blackwell, Samme Jo Brady,  
2 John R. Dougery, Joseph Melvin Gagliardi, Harry Walter Gorst, Frederick/ Gordon Graeber,  
3 Michael Calvin Hirsh, Ivars Ralph Janieks, William Dobson Kilduff, Jane Elizabeth Lamb,  
4 Donald Rudolph Laub, Geoffrey O. Mavis, William Fenton Miller Jr., Robert Marshall Morton,  
5 Charles Webb Ott, Ronald George Speno, Stephen John Wilsey, Peter Francis Zinsli,  
6 (“Blackwell defendants”) move to strike significant portions of Lloyd’s memorandum of points  
7 and authorities in support of its motion for summary judgment citing unpublished Fifth Circuit  
8 decisions in *The Society of Lloyd’s v. Webb*, 156 F. Supp. 2d. 632 (N.D. Tex 2001) *aff’d sub*  
9 *non*, *Society of Lloyd’s v. Turner*, No. 01-10463 (5<sup>th</sup> Cir. July 25, 2002) and attaching a copy as  
10 Exhibit A.

11 Blackwell defendants further anticipate that Lloyd’s will cite an unpublished  
12 Memorandum and Order of the New Mexico District Court in *The Society of Lloyd’s v.*  
13 *Reinhart*, Civil No. 02-264 (D. New Mex. Sept. 30, 2002) as they have done so in separate  
14 papers filed with this Court in connection with defendants’ motions for continuance.  
15 Defendants move to strike any all references to this disposition from the record in this action.

16 This motion is made on the grounds that Ninth Circuit Rule 36-3 and local California  
17 Court Rules prohibit the citation of unpublished dispositions. The Blackwell Defendants  
18 request that the improper portions of Lloyd’s briefs and Exhibit A be stricken.

19 Respectfully submitted,

20 LAW OFFICES OF GREG J. RYAN, APLC

21  
22 Dated: October 29, 2002

23 By: Greg J. Ryan  
24 Greg J. Ryan, Esq.  
25 Attorneys for Blackwell Defendants  
26  
27  
28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 *Lloyd's v. Webb* and *Lloyd's v. Reinhart* are Not  
4 Citeable Precedent Under California Law

5 Plaintiff Lloyd's liberally cites to unpublished Fifth Circuit decisions in *The Society of*  
6 *Lloyd's v. Webb*, 156 F. Supp. 2d 632 (N.D. Tex. 2001) *aff'd sub nom Society of Lloyd's v.*  
7 *Turner* No. 01-10463 (5<sup>th</sup> Cir. July 25, 2002) in its memorandum of points and authorities in  
8 support of its motion for summary judgment, attaching a copy of the ruling as Exhibit A.  
9 Additionally, in opposition to Defendants' motion for a continuance of this motion for summary  
10 judgment, Lloyd's has submitted materials and an unpublished Memorandum and Order of the  
11 District Court of New Mexico in *The Society of Lloyd's v. Reinhart*, Civil No. 02-264 (Sept.  
12 30, 2002).

13 Ninth Circuit Rule 36-3 generally prohibits citation of unpublished opinions to the courts  
14 within the Ninth Circuit. *Hart v. Massanari*, 266 F. 3d 1155 (9<sup>th</sup> Cir. 2001); *Sorchini v. City of*  
15 *Covina*, 250 F.3d 706, 709 (9<sup>th</sup> Cir. 2001). Further, unpublished opinions of the federal district  
16 courts may not be cited to and relied on by other courts where there is a local rule prohibiting  
17 such practice. (See, *Schwartzner, Tashima & Wagstaffe*, California Practice Guide: Federal Civil  
18 Procedure Before Trial (The Rutter Group 2002) ¶1:15, 12:65). California Rules of Court, Rule  
19 977(a) prohibits citation to unpublished opinions. Not only is it improper for counsel to cite  
20 unpublished decisions, but courts are prohibited from relying on unpublished decisions in any  
21 other action or proceeding. California Court Rule 977(a); See also *People v. Russo*, 25 Cal.4th  
22 1124 (2001); *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 6 (2001).

23 In *America Online v. Superior Court*, *supra*, AOL contended that a forum selection  
24 clause was presumptively valid under California law, was a rational, voluntary, and  
25 conscionable choice, and that its enforcement would not violate any strong public policy of this  
26 state. Among the legal authorities on which it relied, AOL referred to several unpublished out-  
27 of-state cases in which the clause had been previously enforced. The Court of Appeal observed:  
28

1 Both here and in the trial court, the parties cite *unpublished*  
2 out-of-state decisions favoring their respective positions.  
3 Rule 977 of the California Rules of Court prohibits citation  
4 to our own state's unpublished opinions, thus we are hardly  
5 inclined to consider those of the Massachusetts Superior  
6 Court, federal district courts in Illinois and New York, or  
7 Florida trial courts and its Court of Appeal. *AOL*, 90  
8 Cal.App.4th at 6, fn. 2.

## 9 II

### 10 **Unpublished Opinions May Not Be** 11 **Cited for the Purpose of Providing "Notice" to the** 12 **Court of the Existence of Other Legal Precedent**

13 The California rules prohibiting citation to unpublished opinions are more than mere  
14 procedural prohibitions. They allow the courts of the Ninth Circuit and the California Supreme  
15 Court to manage the development of a coherent body of "decisional law" through their powers  
16 to regulate the publication of their own decisions and the decisions of the lower courts. *Hart v.*  
17 *Massanari*, 266 F. 3d 1155, 1180 (9<sup>th</sup> Cir. 2001); *Schmier v. Supreme Court*, 78 Cal.App.4th  
18 703 hrg denied, rev denied, cert denied, 531 U.S. 958.

19 Counsel may not evade these rules by citing unpublished decisions for the purpose of  
20 providing "notice" to the Court of the existence of other legal precedent. Commenting on the  
21 rule, Justice Kozinski recently derided the rash of attorneys improper attempts to cite  
22 unpublished cases:

23 Ninth Circuit Rule 36-3(b)(ii) permits the citation of unpublished  
24 dispositions "for factual purposes, such as to show double jeopardy,  
25 sanctionable conduct, notice, entitlement to attorneys' fees, or the  
26 existence of a related case."

27 The rule does not permit the citation of an unpublished disposition for  
28 the purpose of providing "notice" to the court of the existence or  
absence of legal precedent. If precedent were a "fact" for purposes of  
the exception, then the exception would swallow up the rule. It would  
permit an argument such as this: "I am not citing this unpublished  
disposition as precedent, but only to inform the court of the fact that a  
prior panel held precisely what I would like the court to hold in my  
case." Obviously, this is not what the exception was meant to permit ...

1 Because [the unpublished case] is not precedent, neither [the  
2 unpublished case's] holding, nor [the unpublished case's] observations  
3 about the state of the law, have any bearing on this case. The only way  
4 [the unpublished case] could help counsel's arguments is prohibited by  
5 Ninth Circuit Rule 36-3 — persuading us to rule in the City's favor  
6 because an earlier panel of our court had ruled the same way.  
7 Unpublished dispositions are neither persuasive nor controlling  
8 authority, and the limited exceptions to the noncitation rule... are not  
9 intended to change that.

10 *Sorchini v. City of Covina*, 250 F.3d at 708-709 (9<sup>th</sup> Cir. 2001).

11 Counsel is making the same kind of "I am not citing this unpublished disposition as  
12 precedent, but only to inform the court of the fact that a prior panel held precisely what I would  
13 like the court to hold in my case" argument. The *Lloyd's v. Webb* and *Lloyd's v. Reinhart* cases  
14 are neither persuasive nor controlling authority and Lloyd's liberal and pervasive references to  
15 them in its briefs should be stricken.

### 16 III.

### 17 CONCLUSION

18 For the foregoing reasons, the Blackwell Defendants respectfully submit that the  
19 following matter be stricken from Plaintiff Lloyd's brief:

- 20 1. Table of Authorities, pg. iii, lines 9-10 and 12-14;
- 21 2. Lloyd's memorandum of points and authorities in support of Motion for  
22 Summary Judgment at p.p. 3: lines 1-3, fn. 2 at lines 23-25; p. 10 at lines 12-17; p. 12 at lines  
23 7-8, and 19-21; p. 16 at lines 7-10; p. 20 at lines 2-5; p. 21, fn. 13 at lines 19-23 and fn. 14 at  
24 lines 26-28; and p. 22 at lines 9-18;
- 25 3. Exhibit A to Lloyd's memorandum of points and authorities.
- 26 4. All materials referencing *Lloyd's v. Reinhart* submitted in connection with  
27 previous motions by the parties.

28 Respectfully submitted,

LAW OFFICES OF GREG J. RYAN, APLC

Dated: October 24 2002

By:   
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Attorneys for Blackwell Defendants

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18 WEBB OTT, STEPHEN JOHN WILSEY, PETER FRANCIS ZINSLI,

11 UNITED STATES DISTRICT COURT  
12 SOUTHERN DISTRICT OF CALIFORNIA

14 THE SOCIETY OF LLOYD'S,

15 Plaintiff,

16 v.

17 ROBERT C. BLACKWELL, SAMME JO BRADY,  
18 COCO ALEXANDRA ELIZABETH CARTER, JOHN  
19 R. DOUGERY, JOSEPH MELVIN GAGLIARDI,  
20 HARRY WALTER GORST, FREDERICK GORDON  
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22 RALPH JANIEKS, ROWLAND WLLIAM  
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24 ELIZABETH LAMB, DONALD RUDOLPH LAUB,  
25 FRANK F. S. LIN, ROBERT KRAMER LOWRY,  
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27 JR., ROBERT MARSHALL MORTON, CHARLES  
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REPRESENTATIVES, BENEFICIARIES AND  
TRUSTEES OF THE TRUST OF ALFRED VERNE  
BALLARD'S ESTATE, DOES 1-100 AS PERSONAL  
REPRESENTATIVES, BENEFICIARIES AND  
TRUSTEES OF THE TRUST OF DELMAR ABSHER  
BRADY'S ESTATE,

Defendants.

) Case No. 02 CV 0448 J (AJB)

) **PROOF OF SERVICE**

) JUDGE: Honorable Napoleon A. Jones  
) Presiding

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I, Sheryl D. Adams, declare:

That I am, and was at the time of service of the papers herein referred to, over the age of 18 years, and not a party to this action; and I am employed in the County of San Diego, California, within which county the subject mailing occurred. My business address is 1010 Second Avenue, Suite 2500, San Diego, California 92101.

On October 24, 2002, I served the following document(s):

**BLACKWELL DEFENDANTS REQUEST TO STRIKE PLAINTIFF LLOYD'S CITATION TO UNPUBLISHED CASES**

**BY MAIL:** I declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business; and that a true copy was placed in a separate envelope, with postage thereon fully prepaid for each addressee named hereafter:

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Susan Chun, Esq.  
Fried, Frank, Harris, Shriver  
and Jacobson  
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**THE SOCIETY OF LLOYD'S**

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**DEFENDANTS**

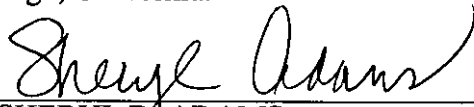
**BY PERSONAL SERVICE:** I placed a true copy of the above documents in a sealed envelope clearly labeled to identify the attorney for the party being served, and personally caused said such envelope to be personally delivered by hand by DLS Attorney Service, leaving a copy with the receptionist or other person in charge at the office of each addressee named hereafter:

**BY FACSIMILE:** I declare that upon the prior agreement of the party being served, I served the above named documents by facsimile transmission during usual office hours **from facsimile number (619) 239-5601**, to a facsimile machine maintained by the person on whom it is served and that the transmission was reported as complete and without error. Thereafter, I mailed (by first-class mail, postage prepaid) a true copy to each addressee named hereafter:

**STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on October 24, 2002.

**FEDERAL:** I hereby certify that I am employed in the office of a member of the Bar of the Court at whose direction this service was made.

Executed **October 24, 2002**, at San Diego, California.

  
\_\_\_\_\_  
SHERYL D. ADAMS