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

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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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THE SOCIETY OF LLOYD'S
UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA

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

v.

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

Case No. 02 CV 0448 J (AJB)

PLAINTIFF THE SOCIETY
OF LLOYD'S REPLY
MEMORANDUM IN
SUPPORT OF ITS MOTION
FOR SUMMARY JUDGMENT
PURSUANT TO FED. R. CIV.
P. 56 AGAINST
DEFENDANTS ROBERT C.
BLACKWELL, SAMME JO
BRADY, JOHN R. DOUGERY,
JOSEPH M. GAGLIARDI,
HARRY W. GORST,
FREDERICK G. GRAEBER,
MICHAEL C. HIRSH, IVARS
R. JANIEKS, WILLIAM D.
KILDUFF, JANE E. LAMB,
DONALD R. LAUB,
GEOFFREY O. MAVIS,
WILLIAM F. MILLER, JR.,
ROBERT M. MORTON,
CHARLES W. OTT, RONALD
G. SPENO, STEPHEN J.
WILSEY, PETER F. ZINSLI

Date: November 4, 2002
Time: 10:30 a.m.
Courtroom: 2nd Floor, Room 12
Honorable Napoleon A. Jones, Jr.

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PRELIMINARY STATEMENT

1 Ignoring the unanimous rulings of five state and federal courts — including the U.S.
2 Court of Appeals for the Fifth and Seventh Circuits — that have already granted summary
3 judgment recognizing English judgments entered against U.S. Names under identical
4 circumstances¹, Defendants Blackwell, Brady, Dougery, Gagliardi, Gorst, Graeber, Hirsh,
5 Janieks, Kilduff, Lamb, Laub, Mavis, Miller, Morton, Ott, Speno, Wilsey and Zinsli (the
6 “Blackwell Defendants” or “Defendants”)² argue that material issues of disputed fact
7 preclude the entry of summary judgment against them, citing self-serving affidavits full of
8 legal argument, hearsay and rank speculation. Defendants’ “evidentiary” submissions,
9 however, are completely irrelevant to the “very narrow legal issues” before this Court,³
10 because Defendants do not dispute any of the facts material to the question of whether the
11 English Judgments should be recognized.⁴

12 The Blackwell Defendants do not dispute any facts that are material to the question
13 of whether the mandatory requirements for recognition set forth by the Uniform Foreign
14 Money Judgments Act (“UFMJRA”), Cal. Civ. Proc. Code (“C.C.P.”) § 1713 *et seq.*, have
15 been met. Specifically, there is no dispute that:
16
17

18 ¹ See *The Society of Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002); *The Society of*
19 *Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000); *The Society of Lloyd's v. Grace*, 278
20 A.D.2d 169 (Sup. Ct. N.Y. 2000)(attached as Ex. 1 to Joint Appendix filed concurrently
21 herewith); *The Society of Lloyd's v. Reinhart*, Civil No. 02-264, Memorandum Opinion
22 Granting Lloyd's Motion for Summary Judgment (D. N. Mex. Sept. 30, 2002)(hereinafter
23 “*Reinhart*”)(attached as Ex. 2 to Joint Appendix); *The Society of Lloyd's v. Rosenberg*, Civil
24 No. 02-1195, Order Granting Lloyd's Motion for Summary Judgment (E.D. Pa. August 12,
25 2002)(attached as Ex. 3 to Joint Appendix).

26 ² A number of other defendants in this action (the so-called “Johnston and Byrens
27 Defendants”) are represented separately and have submitted separate briefs in opposition to
28 Lloyd’s motion for summary judgment. Lloyd’s has submitted separate briefs in reply to the
briefs submitted by the Johnston and Byrens Defendants.

³ See October 17, 2002 Order Denying Defendants’ Motion to Continue Summary
Judgment at 3.

⁴ Together with this reply brief, Lloyd’s is moving to strike these affidavits.

- 1 • They were subject to the personal jurisdiction of the English courts (C.C.P. §
- 2 1713.4(a)(2));
- 3 • The English courts had subject matter of the action (C.C.P. § 1713.4(a)(3)); and
- 4 • The English legal system has been repeatedly recognized as one with “impartial
- 5 tribunals and procedures compatible with the requirements of due process of law”
- 6 (C.C.P. § 1713.4(a)(1)).

7 The Blackwell Defendants likewise do not dispute any facts material to the question
8 of whether this Court has discretion, pursuant to C.C.P. § 1713(b), to deny recognition of the
9 Judgments on public policy grounds. Specifically, they do not dispute that:

- 10 • They argued in the English proceedings that Lloyd’s alleged fraud provided them
- 11 with a complete defense or set-off to their obligation to pay the Equitas premium;
- 12 • The English courts rejected this defense as a matter of law;
- 13 • The English courts explicitly ruled that Defendants could separately pursue an
- 14 independent counterclaim of fraud against Lloyd’s;
- 15 • Hundreds of Names, including many U.S. Names, pursued such claims; and
- 16 • Defendants chose not to pursue their fraud claims, although they were invited to do
- 17 so.

18 The Blackwell Defendants’ desire to have this Court consider issues that were either
19 resolved in England, or are legally irrelevant to the issues presented here, finds no support in
20 either principles of due process, or California public policy. The UFMJRA neither requires,
21 nor permits, a court to decline recognition to a foreign judgment under the undisputed facts
22 presented here. The Judgments should be recognized.

23 **I. FACTS**

24 Most of the “facts” — more accurately described as hearsay, speculation and
25 argument — set forth in the Blackwell Defendants’ Opposition Brief, Statement of Material
26 Facts, and supporting affidavits, relate to Defendants’ allegations of fraud, and are therefore
27 irrelevant to the narrow legal issues presented by Lloyd’s motion. However, several of
28 Defendants’ more egregious mischaracterizations of the record in the English proceedings

1 bear correction.

2 In arguing that they were denied due process because they were not "permitted" to
3 litigate their fraud claims in the English courts, the Blackwell Defendants cannot dispute
4 that the English courts expressly ruled that they could assert fraud claims against Lloyd's in
5 an independent counterclaim. *Society of Lloyd's v. Wilkinson, et. al* (High Court of Justice,
6 April 23, 1997) at 18 ("Clause 5.5 does not limit or exclude [Lloyd's] liability for fraud . . .
7 It neither excludes nor necessarily postpones [fraud] cross-claims"). The Blackwell
8 Defendants contend that this ruling was "fictive" because they could not afford to pay both
9 the Equitas premium and their share of the legal costs in *Jaffray*. Blackwell Def. Opp. Br. at
10 8-9 and n.7. However, Names were not required by clause 5.5 of the Equitas Reinsurance
11 Contract to pay the Equitas premium prior to commencing such a suit. *Wilkinson*, at 18
12 ("Nor does [clause 5.5] make satisfaction of a claim for the premium a condition precedent
13 to the pursuit to judgment of a cross-claim."). Defendants proffer no other explanation for
14 their purported inability to bear the legal costs of a fraud counter-suit despite their apparent
15 willingness to bear the cost of litigating the merits of their fraud claims as a defense.

16 Defendants also deliberately misstate the holding of the *Jaffray* case by claiming that
17 the *Jaffray* court "reiterated that no remedy existed under English law for Lloyd's fraudulent
18 failure to disclose material facts to Names." Blackwell Def. Opp. Br. at 9. This Court may
19 take judicial notice of the fact that the *Jaffray* court expressly found, following a lengthy
20 trial involving dozens of witnesses and hundreds of thousands of documents, *that Lloyd's*
21 *did not act fraudulently*. *Society of Lloyd's v. Jaffray* (Court of Appeal 26 July 2002) at
22 ¶ 587.⁵

23 **II. ARGUMENT**

24 **A. The Applicable Legal Standard**

25 In a desperate attempt to distinguish the growing list of decisions granting summary
26 judgment recognizing Judgments against U.S. Names, the Blackwell Defendants devote

27 ⁵ This portion of the *Jaffray* opinion is attached as Exhibit 4 to the Joint Appendix.
28

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1 much of their legal argument to the proposition that California state court decisions
2 concerning the enforceability of forum selection and choice of law provisions govern the
3 question of whether the Judgments should be recognized. Blackwell Def. Opp. Br. at 10-15.
4 This argument confuses two completely different issues. The question before this Court is
5 *not* the enforceability of Defendants' agreement to bring any suits against Lloyd's in the
6 English courts; rather, the question is whether there is any basis under the UFMJRA not to
7 recognize English judgments entered against Defendants, who concede that they submitted
8 themselves to the jurisdiction of the English courts. Even if Defendants had never agreed to
9 sue Lloyd's only in England, the Judgments against them would be due recognition and
10 enforcement because they satisfy all the requirements of the UFMJRA.

11 It is therefore irrelevant whether, as Defendants suggest (Blackwell Def. Opp. Br. at
12 11-14), a California state court deciding the enforceability of the forum selection and choice
13 of law provisions of the General Undertaking would have reached a different decision than
14 the Ninth Circuit did in *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998)(en
15 banc).⁶ Nothing in California's enactment of the UFMJRA requires that a foreign
16 jurisdiction must permit California residents to assert defenses based on causes of action
17 available under California statutes. California's enactment of the UFMJRA is substantively
18 identical to the statutes construed in *Ashenden, Turner, Grace, Rosenberg and Reinhart* (see
19 footnote 1), and these decisions are therefore persuasive precedent supporting recognition of
20 the Judgments here. See *Ashenden*, 233 F.3d at 476-77 (the UFMJRA is "a uniform act, not
21 one intended to reflect the idiosyncratic jurisprudence of a particular state"). The Blackwell
22 Defendants' attempt to distinguish *Ashenden* and its progeny based on an inapposite line of
23 cases must therefore be rejected.

24

25

26 ⁶ Defendants Blackwell, Gagliardi, Gorst, Graeber, Kilduff, Lamb, Morton, Ott and
27 Wilsey were plaintiffs in *Richards*. Significantly, none of the Blackwell Defendants has
28 ever attempted to sue Lloyd's in the California state courts, despite their suggestion that the
state courts would not follow *Richards* to dismiss their claims.

28

1 B. Recognition of the Judgments Does Not Violate Principles of
2 Due Process

3 The Blackwell Defendants cite no cases supporting the proposition that recognition
4 of the Judgments would violate principles of due process because of the substantive
5 differences between English and California law, because there are none.⁷ Instead,
6 Defendants contend that *Nedlloyd Lines, B.V. v. Superior Court*, 3 Cal. 4th 459 (1992), in
7 which the California Supreme Court enunciated the standard for enforcing choice of law
8 agreements, sets forth the “same test applied by California courts to measure the
9 enforceability of sister state judgments.” Blackwell Def. Opp. Br. at 17. Even if *Nedlloyd*
10 were relevant here – which it is not – it would not support the argument that substantive
11 differences between California and English law create a due process issue for purposes of
12 the UFMJRA; to the contrary, in *Nedlloyd* the California Supreme Court rejected a public
13 policy challenge to enforcement of the parties’ contractual choice of Hong Kong law based
14 on substantive differences between Hong Kong and California law. *Id.* at 468.¹

15 Thus, *Nedlloyd* provides no support for the Blackwell Defendants’ bald assertion that
16 “California does not follow the *Ashenden* approach.” Blackwell Def. Opp. at 15. The
17 Blackwell Defendants cannot avoid the persuasive precedential value of *Ashenden, Turner*,

18 ⁷
19 The only case cited by Defendants involving non-recognition of a foreign judgment
20 on due process grounds, *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995), is
21 completely inapposite. In that case, the Ninth Circuit held that the sister of the Shah of Iran
22 had demonstrated that Iran’s legal system did not afford impartial tribunals with procedures
23 consistent with due process, and therefore denied recognition to an Iranian default judgment
24 against her. *Id.* at 1411-13. The Ninth Circuit did not examine the substantive differences
25 between Iranian and U.S. law in reaching this conclusion. While Defendants cite *In re*
26 *Hashim*, 213 F.3d 1169, 1171-72 (9th Cir. 2000), to support their “due process” challenge,
27 this case did not involve a due process challenge to recognition of a foreign judgment;
28 rather, it involved a public policy objection to allowance of a claim in bankruptcy based on
an English judgment for attorneys’ fees. This objection was rejected in light of, *inter alia*,
the debtors’ residence in England at the time the judgments were entered.

⁸
Equally inapposite is *Huang Tang v. Aetna Life Ins. Co.*, 523 F.2d 811 (9th Cir.
1975), which involved the question of whether a primary beneficiary of a life insurance
policy was collaterally estopped to deny that he had murdered the insured by his criminal
conviction under Taiwanese law for the murder.

1 *Grace, Rosenberg and Reinhart*, all of which rejected arguments asserted by Names – most
2 of them represented by Mr. Grippo, counsel for Defendants here – that substantive
3 differences between English law and U.S. law precluded recognition under the UFMJRA.
4 See Lloyd’s Opening Mem. in Support of Motion for Summary Judgment at 9-11. Due
5 process does not require that an admittedly impartial foreign tribunal resolve the sufficiency
6 of defenses asserted by a California resident in the same way a California court would.
7 *Ashenden*, 233 F.3d at 477-78 (rejecting such a “retail” approach in construing the due
8 process prong of the UFMJRA). To hold otherwise would open the floodgates for endless
9 relitigation of substantive issues litigated and resolved in the foreign proceeding under the
10 guise of “due process.” *Id.* (“The process of collecting a judgment is not meant to require a
11 second lawsuit . . . thus converting every successful multinational suit for damages into two
12 suits . . .”) (citations omitted).

13 It is therefore irrelevant whether, under California law, the Equitas reinsurance
14 contract would be deemed “unconscionable” due to its mandatory nature. Blackwell Def.
15 Opp. Br. at 19-21. Defendants do not dispute that they challenged the validity of the
16 contract on this ground in the English proceedings. Blackwell Def. Statement of Material
17 Facts at ¶¶ 11, 20. Defendants’ disappointment with the English courts’ rejection of this
18 defense does not create a due process violation. Similarly, Defendants concede that they
19 litigated the question of whether their fraud allegations constituted a legally sufficient
20 defense to the obligation to pay the Equitas premium. Blackwell Def. Br. Opp. at 22. No
21 due process issue is presented by Defendants’ unhappiness with the English courts’ ruling
22 that their fraud allegations – even if assumed to be true – did not support a legally
23 cognizable defense.

24 B. Recognition of the Judgments Does Not Contravene Public Policy

25 1. California’s Public Policy Is Not Unique

26 Although this Court has discretion under the UFMJRA to deny recognition of
27 foreign judgments that violate California’s public policies, it need not consider this issue.
28 The courts that considered public policy arguments identical to those asserted by the

1 Blackwell Defendants have rejected them. *Turner*, 303 F.3d at 332-33; *Reinhart* at 15-17;
2 *Grace*, 718 N.Y.S.2d at 328.⁹ Defendants attempt to distinguish these rulings by arguing
3 that California public policy is somehow unique, again citing California state cases
4 concerning conflicts of law and the enforceability of forum selection and choice of law
5 provisions. As noted above, however, such cases do not control the issues presented in this
6 action, and do not undermine the persuasive precedential value of *Ashenden* and its progeny.

7 Nevertheless, Defendants' public policy argument relies heavily on several
8 intermediate state appellate decisions voiding choice of law or forum agreements where
9 California residents would be unable to litigate claims arising under a California statute
10 containing an anti-waiver provision in the chosen forum or under the chosen law.¹⁰ These
11 cases are inapposite for several reasons. First, none of these cases involved a public policy
12 challenge to the recognition of a foreign judgment; indeed, none of these cases involved any
13 issue of international or foreign law. Second, this case does not involve an alleged waiver of
14 Defendants' right to sue against Lloyd's in a California court under a California statute
15 containing an anti-waiver provision. Even assuming that Defendants had *bona fide* claims
16 against Lloyd's under such statutes — which they do not¹¹ — anti-waiver provisions do not
17 inoculate California residents concededly subject to the personal jurisdiction of the English

18 ⁹ The Seventh Circuit in *Ashenden* did not reach the public policy issue because
19 defendants in that case — represented by the same counsel representing the Blackwell
20 Defendants here — dropped their public policy argument on appeal after it had been rejected
21 by the district court. *Society of Lloyd's v. Ashenden*, 1999 WL 6575 at ** 26-27 (N.D. Ill.
22 April 23, 1999).

23 ¹⁰ See Blackwell Def. Opp. Br. at 14, citing *Hall v. Superior Court*, 150 Cal. App. 3d
24 411 (1983); *Wimsatt v. Beverly Hills Weight Loss Clinics Int'l, Inc.*, 32 Cal. App. 4th 1511
25 (1995); *America Online, Inc. v. Superior Court of Alameda*, 90 Cal. App. 4th 1 (2001).

26 ¹¹ Although the Blackwell Defendants repeatedly suggest that they have meritorious
27 claims against Lloyd's under the California securities statutes that cannot be waived (*see*,
28 *e.g.*, Blackwell Def. Opp. Br. at 13, 19), no court has ever determined that they purchased
securities from Lloyd's, and Defendants offer this Court no evidence supporting this
assertion. In any event, those Defendants who were parties to *Richards* are barred by *res*
judicata from asserting claims under the federal or state securities laws claims in the U.S.
courts, and those who were not parties to *Richards* never attempted to assert such claims in a
U.S. court within the applicable statute of limitations, which has long since expired.

1 courts from judgments rendered against them pursuant to English law. Finally, even if
2 forum selection and choice of law cases governed here, there is no controlling authority on
3 the enforceability of international forum selection and choice of law agreements in the
4 context of an alleged violation of a statute with anti-waiver provisions, because the
5 California Supreme Court has never ruled on the issue.¹²

6 Nor can the Blackwell Defendants rely on *Richards* to argue that “public policy”
7 required that Defendants be able to assert all defenses that might be available under
8 California law in the English courts. Contrary to Defendants’ contention (Blackwell Def.
9 Opp. Br. at 10), the Ninth Circuit did *not* assume in *Richards* that the English courts would
10 recognize fraud as a defense to claims brought against them by Lloyd’s. *Richards* never
11 addressed what defenses would be available to Names if they were sued *by Lloyd’s* in the
12 English courts. Nor did the Ninth Circuit “assume” that Names would be able to sue
13 Lloyd’s for fraud successfully in the English courts. To the contrary, the Ninth Circuit
14 recognized that the causes of action available under English law were not identical to those
15 available under U.S. law. *See Richards*, 135 F.3d at 1295-96 (rejecting “parochial concept”
16 that all international disputes be governed by U.S. law and noting inapplicability of U.S.
17 securities statutes in English proceedings). In short, Defendants cannot transform the
18 holding in *Richards* that Names had adequate remedies under English law for affirmative
19 claims of fraud against Lloyd’s into a justification for non-recognition of the Judgments
20 obtained against them.

21 2. Recognition of the Judgments Does Not Contravene California’s
22 Public Policy

23 Defendants cite no cases denying recognition to a foreign judgment because the

24 ¹² To the contrary, the California Supreme Court has made clear that a contractual
25 choice of law will not be disregarded on public policy grounds simply because the chosen
26 law differs substantively from the law of California. *Nedlloyd*, 3 Cal. 4th at 466-67 & n.6
27 (finding that where foreign law conflicts with a fundamental public policy of California,
28 foreign law will still be applied in all instances where foreign jurisdiction has a materially
greater interest in the determination of the issue, and even in some instances where it does
not).

1 defendant was unable to assert a defense in the foreign jurisdiction that would have been
2 available in a proceeding governed by California law. Defendants attempt to distinguish
3 *Crockford's Club Ltd. v. Si-Ahmed*, 203 Cal. App.3d 1402 (1988), which is directly on
4 point, by citing *Metropolitan Creditors Service v. Sadri*, 15 Cal. App.4th 1821 (1993), and
5 *Kelly v. First Astri Corp.*, 72 Cal. App. 4th 462 (1999). However, both *Metropolitan* and
6 *Kelly* are inapposite, because neither case involved recognition of a foreign judgment." By
7 contrast, California's public policy against gambling did not prevent recognition of an
8 English judgment for a gambling debt in *Crockford's Club*. Noting that casino gambling
9 was legal in England, the court found that recognition was not "so antagonistic to California
10 public policy as to preclude the extension of comity . . ." 203 Cal. App. 3d at 1406. In
11 short, under the UFMJRA a foreign judgment based on foreign law that is substantively
12 different from California law will be recognized, even if a California court would find it
13 contrary to public policy to apply that foreign jurisdiction's law in a suit brought in
14 California.

15 3. Defendants Are Collaterally Attacking the Judgments

16 Defendants deny that their due process and public policy objections constitute a
17 collateral attack on the Judgments (Blackwell Def. Opp. Br. at 22-24), but this disclaimer is
18 belied by their complaint that the English courts treated their fraud defense as an
19 "irrelevancy." *Id.* at 23. Ruling that a defense is legally insufficient does not mean that a
20 litigant has not been permitted to raise a defense. Defendants, in effect, are asking this
21 Court to over-rule the English courts' ruling on the legal insufficiency of their defenses.
22 The UFMJRA "does not support such a retail approach . . . which would in effect give the
23 judgment creditor a further appeal on the merits." *Ashenden*, 233 F.3d at 477.

24 If the Blackwell Defendants really believed they had a "compelling fraud story to

25 ¹³ In *Metropolitan*, a California court refused to apply Nevada law to a suit brought to
26 recover a gambling debt incurred in Nevada, while in *Kelly*, the court granted summary
27 judgment dismissing plaintiff's attempt to recover gambling losses suffered on an Indian
28 reservation located within California, where the form of gambling in question was illegal
under both California and federal statutes.

1 tell" (Blackwell Def. Opp. Br. at 2), they should have joined the *Jaffray* action, or initiated
2 their own suit against Lloyd's in England. They cannot now use their own failure to do so
3 as a sword to attack the Judgments.

4 **CONCLUSION**

5 For all the reasons set forth herein, and in Lloyd's Opening Memorandum in Support
6 of Summary Judgment, summary judgment recognizing all of the Judgments should be
7 granted.

8 DATED: October 28, 2002

Respectfully submitted,

9 Stephen D. Alexander

10 Susan C. Chun

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