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

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16 THE SOCIETY OF LLOYD'S

17 UNITED STATES DISTRICT COURT
18 SOUTHERN DISTRICT OF CALIFORNIA

19 THE SOCIETY OF LLOYD'S,

20 Plaintiff,

21 v.

22 ROBERT C. BLACKWELL, SAMME JO BRADY,
23 COCO ALEXANDRA ELIZABETH CARTER,
24 JOHN R. DOUGERY, JOSEPH MELVIN
25 GAGLIARDI, HARRY WALTER GORST,
26 FREDERICK GORDON GRAEBER, MICHAEL
27 CALVIN HIRSH, IVARS RALPH JANIEKS,
28 ROWLAND WILLIAM JOHNSTON, WILLIAM
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.

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

BY: *[Signature]* DEPUTY

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 ROWLAND W.
JOHNSTON, FRANK F. LIN,
ROBERT K. LOWRY,
RICHARD D. ROSENBLATT,
AND ROBERT L. SWISHER

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

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INTRODUCTION

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2 Defendants Rowland Johnston, Frank Lin, Robert Lowry, Richard Rosenblatt and
3 Robert Swisher ("Johnston Defendants") readily acknowledge that many courts have already
4 granted Lloyd's summary judgment under virtually identical recognition statutes enforcing
5 English judgments entered against United States Names.¹ Notwithstanding these unanimous
6 court rulings, Johnston Defendants baldly assert that facts "unique to this case require a
7 different result." In truth, and as the record makes indisputably clear, this case is identical in
8 all material respects to each of the enforcement actions that state and federal courts have
9 already decided in Lloyd's favor. In fact, Johnston Defendants' Opposition, which fails to
10 raise a single, triable issue of fact germane to the "very narrow legal issue[s]" before this
11 Court,² consist solely of conclusory and self-serving allegations with no support whatsoever
12 in the record. Incredibly, Johnston Defendants do not cite a *single* piece of evidence in their
13 entire "Statement of Facts."

14 Accordingly, there is simply no disputed fact material to the mandatory criteria set
15 forth by the Uniform Foreign Money Judgment Act ("Recognition Act"):

- 16 • Johnston Defendants do not dispute the English Courts' personal jurisdiction
17 over them or subject matter jurisdiction over the actions (Cal. Code of Civ.
18 Proc. ("C.C.P.") § 1713.4(a)(2)(3);
- 19 • Courts have already conclusively determined as a matter of law that the
20 English system is one with impartial tribunals and procedures compatible
21 with the requirements of due process (C.C.P. § 1713.4(a)(1)); Johnston
22 Defendants' claim that the recent *Jaffray* decision undermines the fairness of
23 the entire English legal system is ludicrous; and
- 24 • There is simply no cognovit, or confession of judgment, involved in this case

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

² See Court's October 17, 2002 Order Denying Defendants' Motion to Continue
Summary Judgment.

1 that deprived Johnston Defendants of any due process rights.

2 Nor are there disputed facts material to any discretionary ground for non-
3 enforcement:

- 4 • The cause of action on which the English Judgments is based -- breach of
5 contract -- is not repugnant to the public policy of this state;
- 6 • The Equitas Reinsurance contract in no way exempts Lloyd's from fraud
7 liability, as firmly established by *Jaffray* -- had the Names in that case
8 demonstrated that Lloyd's had acted fraudulently, Lloyd's would have been
9 held liable for fraud; the Reinsurance contract therefore does not implicate
10 the policy concerns of Cal. Civ. Code § 1668;
- 11 • The validity of the Choice Clause is entirely irrelevant to the enforceability of
12 the Judgments in this action;
- 13 • Johnston Defendants' claim of extrinsic fraud is based on the validity of the
14 Equitas assignments and the conclusive evidence clause, which has already
15 been litigated and lost by Johnston Defendants in England; Johnston
16 Defendants cannot retry these issues before this Court.

17 In short, the Recognition Act neither requires, nor permits, a court to decline
18 recognition of a foreign judgment under the undisputed facts presented here.

19 FACTUAL BACKGROUND

20 The bulk of Johnston Defendants' "facts" relate to their allegations of fraud, which
21 are nothing more than a rehash of the same allegations presented to numerous courts --
22 including *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998)(en banc) -- and are
23 therefore irrelevant to the narrow legal issues presented by Lloyd's motion. However, one
24 of Johnston Defendants' most egregious allegations requires a response.

25 Johnston Defendants' scathing accusations of corruption against the English courts
26 and government as a result of their "unique relationship" with Lloyd's is baseless and
27 scurrilous. Indeed, there is nothing in the record whatsoever to even suggest that Lloyd's or
28 the English courts have engaged in any improper conduct. Moreover, while Johnston
29 Defendants conclusorily assert that they would have no "effective right to appellate review,"
30 they do not allege, much less provide a scintilla of evidence, that the appellate decisions
31 would have resulted in a different outcome in *Jaffray* or the proceedings giving rise to the
32 English Judgments had Lloyd's not been a party.

ARGUMENT

I. The Court Should Grant Summary Judgment Because Johnston Defendants Fail to Present Evidence That Raises a Triable Issue of Material Fact

It is axiomatic that a party opposing summary judgment must present admissible evidence setting forth specific facts that create a genuine issue of fact that is material to the outcome of the case. Fed. R. Civ. P. 56(e); *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995); *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1340 (9th Cir. 1987). Here, the "facts" asserted in Johnston Defendants' Opposition ("Opposition") are nothing more than self-serving allegations that have no support whatsoever in the record. Indeed, Johnston Defendants fail to cite to a *single* piece of evidence in their entire ten-page recitation of alleged "facts." Accordingly, Johnston Defendants' utter failure to reference any evidence that can even purport to form the basis of their claims mandates summary judgment in favor of Lloyd's.

II. The Court Should Grant Summary Judgment Because There is No Triable Issue of Fact that the Judgments Meet the Criteria for Recognition and Enforcement Set By California's Recognition Act

A. Johnston Defendants Have No Valid Due Process Challenge

1. The Judgments Were Rendered Under a System that Has Impartial Tribunals and Procedures Compatible with Due Process

Johnston Defendants' claim that the English Judgments "were *not* rendered under a system compatible with due process" has been termed "risible" by the Seventh Circuit. *Ashenden*, 233 F.3d at 476. As Judge Posner in *Ashenden* observed, "the question [of the English Court's fairness] is not open to doubt." *Id.* at 477. Similarly, the Fifth Circuit has emphasized that "England [is] a forum that American courts repeatedly have recognized to be fair and impartial." *Turner*, 303 F.3d at 330 (citation omitted). Indeed, every Court, including the Ninth Circuit, that has addressed this issue has uniformly held that the English legal system, "the very fount from which our system developed,"³ has procedures

³ *Arab Monetary Fund v. Hashim*, 213 F.3d 1169, 1172 (9th Cir. 2000).

1 compatible with the requirements of due process. *See, e.g.*, cases cited in Lloyd's Opening
2 Memorandum of Points and Authorities in Support of its Motion for Summary Judgment
3 ("Motion") at 9-11; *Reinhart*.

4 In direct contravention of these decisions, Johnston Defendants now argue that "as
5 far as Lloyd's opponents are concerned, English courts have consistently failed to provide
6 procedures compatible with due process . . . [as] clearly established by the *Jaffray* decision."
7 Opposition at 13.

8 As a threshold matter, the determinative factor in an action under the Recognition
9 Act is the fact that the English system as a whole comports with due process; thus,
10 challenges to the due process offered in specific proceedings are simply irrelevant to the
11 recognition of judgments under the Act: "the statute, with its reference to 'system' does not
12 support such a retail approach . . . which would in effect give the judgment creditor a further
13 appeal on the merits." *See Ashenden*, 233 F.3d at 477; *Turner*, 303 F.3d at 330 (the
14 "Recognition Act requires that the foreign judgment be 'rendered [only] under a system' that
15 provides . . . due process")(emphasis in original). Thus, the specific procedures employed in
16 the English proceedings against Johnston Defendants are irrelevant to this enforcement
17 action.

18 In any event, the *Jaffray* decision does not demonstrate any unfairness in the English
19 courts' procedures in either the proceedings against Johnston Defendants or in *Jaffray* itself.
20 To the contrary, the *Jaffray* proceedings exemplify why English tribunals "are highly
21 regarded for impartiality, professionalism, and scrupulous regard for procedural rights."
22 *Ashenden*, 233 F.3d at 476. As the *Jaffray* appellate opinion makes indisputably clear, the
23 Names were afforded an exceedingly fair trial in the lower court where they had more than
24 ample opportunity to exhaustively litigate the merits of their fraud claims during a lengthy
25 trial involving tens of witnesses and hundreds of thousands of documents. *Jaffray* ¶¶ 486-
26 586.⁴ Even on appeal, the Names were afforded thirteen days of hearings, after which the

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

1 Court of Appeal issued a detailed opinion spanning more than 300 pages. In that opinion,
2 the Court, after extensive discussion and analysis on whether the Names were afforded a fair
3 trial, explicitly ruled that “there was nothing unfair about this trial either in terms of
4 substance or appearance.” *Jaffray* at ¶ 585.

5 Johnston Defendants also shamelessly mischaracterize the record: The *Jaffray* court
6 did not “[find] that Lloyd’s was dishonest with investors . . . [yet] nonetheless rule[] in
7 Lloyd’s favor.” Opposition at 13. Rather, the court specifically held that Lloyd’s had *not*
8 been “dishonest” and that any inaccurate representations by Lloyd’s were *not* made with any
9 fraudulent intent. *Jaffray* at ¶ 587. In any event, Johnston Defendants’ disappointment with
10 the outcome of the *Jaffray* trial is irrelevant here, because substantive differences between
11 English law and U.S. law are irrelevant in the context of considering a due process challenge
12 to recognition under the Recognition Act. *See Ashenden*, 233 F.3d at 477;⁵ *Turner*, 303 F.3d
13 at 330 n.16.

14 2. The Reconstruction and Renewal Plan, the General
15 Undertaking and the Equitas Reinsurance Contract Do Not
16 Involve a Cognovit

17 Johnston Defendants also claim that Lloyd’s is attempting to enforce a confession of
18 judgment, or cognovit, without complying with the requirements of California statutory law
19 and in violation of their due process rights. Opposition, at 19-20. Johnston Defendants’
20 argument is meritless because there is simply no cognovit involved here.

21 As Johnston Defendants acknowledge, and as Courts have uniformly held, the
22 defining characteristic of a cognovit is the waiver of the right to receive notice of
23 proceedings and an opportunity to be heard. Opposition at 14 (a cognovit is a legal device
24 “by which the debtor consents in advance to the holder’s obtaining a judgment without
25 notice and hearing,” citing *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174, 176 (1972)); *see*
26 *also FDIC v. Aaronian*, 93 F.3d 636, 637 (9th Cir. 1996)(same); *Commercial Nat’l Bank of*

27 ⁵ It bears repeating here the *Ashenden* Court’s “reminder” that the Illinois Recognition
28 Act -- like California’s Act -- “is a uniform act, not one intended to reflect the idiosyncratic
jurisprudence of a particular state.” 233 F.3d. at 476-77.

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1 *Peoria v. Kermeen*, 225 Cal. App. 3d 396, 401 (1990)(a cognovit permits entry of judgment
2 without the "due process elements of notice and an opportunity to be heard"). Each of the
3 cases relied on by Johnston Defendants likewise define a cognovit as a waiver of notice and
4 hearing prior to the entry of judgment. *See, e.g., Isbell v. County of Sonoma*, 21 Cal. 3d 61,
5 68 (1978)(cognovit is "a waiver of the debtor's due process rights to a hearing preceding
6 entry of a judgment"); *Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.*, 75
7 Cal. App. 4th 110, 121 (1999)("notice and a chance to be heard are essential components . . .
8 for due process").

9 Here, Johnston Defendants admit they were properly served, had notice of the
10 proceedings and entered appearances in the English Actions through counsel, the Solicitors
11 firm of Epstein Grower & Michael Freeman. Johnston Defendants' Answer ¶ 17. By
12 participating in the English Action, Johnston Defendants had, and fully availed themselves
13 of, an opportunity to be heard -- in the court in which they agreed to litigate -- before the
14 Judgments were rendered. As the English court decisions attached to Lloyd's Motion make
15 clear, Johnston Defendants had a full and fair opportunity to argue that Lloyd's did not have
16 the power under English Law to make the Equitas Reinsurance Contract mandatory, and to
17 contest the effect of the "pay now, sue later" and "conclusive evidence" clauses. In fact,
18 Johnston Defendants concede that they had the right to, and did, assert fraud as a defense to
19 their obligation to pay the Equitas premium.⁶ Johnston Defendants were not therefore
20 "effectively cut off . . . from defenses to Lloyd's fraudulent conduct." Opposition at 19.
21 That the English court rejected this defense, ruling that Johnston Defendants' fraud
22 allegations -- even if assumed to be true -- did not support a legally cognizable defense to
23 the Equitas premium, in no way denied Johnston Defendants due process.

24 Given these undisputed facts, Johnston Defendants' contention that there was a
25 cognovit is baseless. Accordingly, Lloyd's was not required to comply with the
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27 ⁶ See Motion at 12-18 for a detailed discussion on how these defenses were fully
28 litigated in England.

1 requirements of C.C.P. §§ 1132 *et seq.*⁷

2 B. The Cause of Action on which Lloyds' Judgments are Based Does
3 Not Contravene Public Policy

4 Johnston Defendants acknowledge that under the Recognition Act, a court may (but
5 need not) decline to recognize a foreign money judgment only if the "cause of action" on
6 which the judgment is based is repugnant to the public policy of this state. Opposition at 20.
7 While Johnston Defendants do not dispute that the cause of action on which Lloyd's sued
8 each of the Johnston Defendants -- breach of contract -- is generally not contrary to public
9 policy, they assert that the Equitas Reinsurance Contract, with its "pay now, sue later"
10 provision" ("Clause 5.5"), had the "effect of exempting Lloyd's from liability from its fraud"
11 in violation of Cal. Civ. Code § 1668.⁸ *Id.*

12 This same argument, however, was expressly rejected by the English trial and
13 appellate courts. In *Society of Lloyd's v. Wilkinson et al.* (High Court of Justice, April 23,
14 1997), the Court specifically held that "Clause 5.5 does not exclude or limit [Lloyd's]
15 liability for fraud or on any other basis. Its effect ... only is to insulate, as a matter of
16 procedure, claims for the premium from counterclaims or set-offs [including a set-off
17 operating by way of equitable defense] asserted by the reinsureds. It neither excludes nor
18 necessarily postpones such cross-claims. Nor does it make satisfaction of a claim for the
19 premium a condition precedent to the pursuit to judgment of a cross-claim." *Wilkinson*, at
20 18. In short, the English courts held that as a matter of law, any purported fraud by Lloyd's
21 was not a defense to the obligation to pay the Equitas premium, but instead created a

22 ⁷ Moreover, Johnston Defendants' claim that no court has yet addressed the cognovit
23 issue is patently false. In *Turner*, the Fifth Circuit specifically rejected the Names' argument
24 that the judgments in their particular cases violated the Texas public policy on cognovit
25 judgments and on the non-waivable protections of consumers from fraud and noncompliance
26 with Texas securities laws. The Fifth Circuit held that these "arguments [were] without
27 merit, as 'under the Texas Recognition Act,' [--as under the California Recognition statute--]
28 it is irrelevant that the [foreign] judgment itself contravened Texas' public policy." 303 F.3d
at 333 n.34. As in *Turner*, Johnston Defendants also assert a public policy argument on the
basis of an alleged cognovit.

⁸ Cal. Civil Code § 1668 provides that contracts which have as their object to exempt
anyone from responsibility for his own fraud is against the policy of the law.

1 separate cause of action that must be litigated independently.

2 The Names -- including Johnston Defendants -- therefore had every right to pursue
3 their fraud actions against Lloyd's, which many did in *The Society of Lloyd's v. Jaffray*
4 (Queen's Bench Division, Commercial Court, November 3, 2000). If Names could or had
5 proved their fraud claims, the "pay now, sue later" clause would in no way shield Lloyd's
6 from any fraud liability. Accordingly, Cal. Civil Code § 1668 is entirely inapplicable to the
7 Equitas Reinsurance Contract.⁹

8 Johnston Defendants also argue that Lloyd's cause of action contravenes public
9 policy, because "Lloyd's asserted in England causes of action against Johnston Defendants
10 pursuant to the Choice Clause despite the fact that the California Court of Appeals [in *West*
11 *v. Lloyd's*] prohibited enforcement of the Choice Clause." Opposition at 21. This argument
12 has no merit: Lloyd's breach of contract causes of action were not brought "pursuant" to the
13 Choice Clause; Lloyd's chose to sue the Johnston Defendants in England, as would have
14 been its right even if the Names had not previously consented to be sued in England. The
15 Johnston Defendants appeared in the English proceedings and did not dispute that they were
16 subject to personal jurisdiction in England. Lloyd's contract cause of action and the
17 Judgments obtained pursuant to these claims are thus in no way predicated on the validity of
18 the Choice Clause, which is entirely irrelevant to the enforceability of the Judgments at issue
19 in this case.¹⁰ The question before this Court is not whether Johnston Defendants should be

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21 ⁹ That the "pay now, sue later" clause implicates no public policy concerns of Cal.
22 Civil Code § 1668 is further demonstrated by U.S. courts' routine enforcement of
23 obligations under letters of credit despite allegations of fraud in the inducement of the
24 underlying transaction; such claims must be litigated separately. *See, e.g., Andy Marine,*
25 *Inc. v. Zidell, Inc.*, 812 F.2d 534, 537 (9th Cir. 1987) ("[t]he letter of credit is an instrument
26 designed to enable the beneficiary to collect money to which it believes itself entitled and to
27 hold such sums while any disputes are pending"); *Western Security Bank v. Superior Court*,
28 15 Cal. 4th 232, 237 (1997)(same); *San Diego Gas & Electric Co. v. Bank Leumi*, 42 Cal.
App. 4th 928, 933-34 (1996)(same); *see also* Motion at 14-15.

¹⁰ In addition, *West v. Lloyd's* is an unpublished California case that cannot be cited
under California Rule of Court 977(a) and has no binding effect whatsoever on Lloyd's. *See*
Lloyd's Memorandum of Points and Authorities in Support of its Motion to Dismiss
Johnston Defendants' Counterclaims, filed with this Court on October 15, 2002, at 8-9.

1 forced to go to England to sue Lloyds; rather, the only question is whether Judgments
2 entered against Johnston Defendants after Lloyd's sued them in England should be
3 recognized here.

4 C. Lloyd's Judgments Were Not the Result of Extrinsic Fraud

5 Johnston Defendants also claim that the Judgments were the result of extrinsic fraud
6 because "Equitas never validly transferred or assigned . . . the debt owed to Equitas back to
7 Lloyd's" and thus the debt "cannot be the basis for an enforceable English judgment."
8 Opposition at 22. The English court, however, has already expressly held that the Equitas
9 assignments were valid. In *Society of Lloyd's v. Wilkinson et al.* (High Court of Justice,
10 April 23, 1997), the Court rejected the Names' assertion that Lloyd's did not have title to sue
11 in its own name, but should have joined Equitas as a co-plaintiff. The Court also found that
12 even if Lloyd's were only an "equitable assignee," rather than a legal assignee, joinder of
13 Equitas was unnecessary under English law because the Names were not exposed to "even
14 the remotest prospect" that they would be subject to claims from Equitas for the premiums.
15 Thus, because the English court has already unambiguously ruled on the validity of the
16 assignment, Defendants cannot relitigate the issue in this action.

17 In addition, Johnston Defendants also claim that there was extrinsic fraud because
18 Lloyd's cannot explain the basis for the alleged debt amount of each Defendant. Opposition
19 at 22. Again, however, Johnston Defendants are estopped from challenging the amounts due
20 under the Equitas reinsurance contract because they have already litigated and lost their
21 claim that, under Clause 5.10 of the Equitas Reinsurance contract ("Conclusive Evidence
22 Clause"), Lloyd's was in fact required to show how the premiums were calculated. *See*
23 Motion at 15-16.

24 Accordingly, Johnston Defendants cannot "retry issues litigated and laid to rest in the
25 United Kingdom." *Reinhart* at 1.

26
27 _____
28 *Richards*, to which all of the Johnston Defendants were parties and are therefore bound, was
decided *after* the California state court issued its unpublished decision in *West*.

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1 **III. Johnston Defendants' Counterclaims Are Entirely Irrelevant to this**
2 **Summary Judgment Motion**

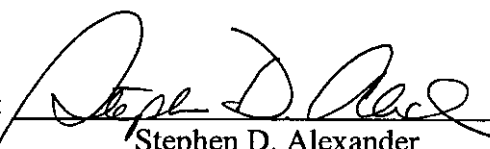
3 Johnston Defendants assert that they have "raised counterclaims arising under
4 California Business & Professions Code sections 17200 *et seq.*, and it would be unfair to
5 recognize . . . the judgments before those claims are decided." Johnston Defendants'
6 counterclaims, however, are not a basis for non-recognition and do not affect the
7 enforceability of the Judgments under the criteria set forth by the Recognition Act.
8 Accordingly, under Fed. R. Civ. P. 54(b), the Court should make an "express determination
9 that there is no just reason for delay" of Lloyd's summary judgment motion and grant
10 summary judgment against Johnston Defendants on Lloyd's enforcement action. *See*
11 *Shwarzer, Tashima & Wagstaffe, Fed. Civ. P. Before Trial § 14:382* ("Partial judgment
12 under Rule 54(b) is proper where there are distinct and severable claims and immediate
13 review of the portions ruled upon will not result in later duplicative proceedings in the trial
14 or appellate court," citing *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921 (9th Cir.
15 1986); *Ginett v. Computer Task Group, Inc.*, 962 F.2d 1085, 1092 (2nd Cir. 1992)).¹¹

16 **CONCLUSION**

17 For the above reasons, the Court should grant Lloyd's summary judgment motion.

18 DATED: October 28, 2002

18 Respectfully submitted,
19 Stephen D. Alexander
20 FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

21 By: 
22 Stephen D. Alexander
23 Attorneys for Plaintiff The Society of Lloyd's

23 ¹¹ Moreover, Lloyd's has filed a Motion to Dismiss Johnston Defendants' counterclaims
24 based on *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998)(en banc), which
25 binds all of the Johnston Defendants and upheld the enforceability of the forum selection
26 and choice of law provisions in the General Undertakings. *See* Lloyd's Motion to Dismiss
27 Byrens Defendants' Counterclaims, filed with this Court on October 15, 2002. *Richards*
28 mandates dismissal of the Johnston Defendants' counterclaims – indeed, the counterclaims
must be considered frivolous in light of *Richards*. It is therefore likely that Johnston
Defendants' argument will be moot shortly -- another reason that Lloyd's present summary
judgment motion should not be delayed.