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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD A. TROPP, individually, and On Behalf Of All Others Similarly Situated, Plaintiff, - against - THE CORPORATION OF LLOYD'S, also known as the Society of Lloyd's, Defendant.	07 Civ. 414 (NRB) **ECF CASE**

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF LLOYD'S CROSS-MOTION TO DISMISS THE COMPLAINT

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STATUTES, RULES AND REGULATIONS

Defendant the Corporation of Lloyd's, also known as The Society of Lloyd's ("Lloyd's") respectfully submits this memorandum of law in opposition to the motion of plaintiff Richard A. Tropp ("Tropp" or "plaintiff") for partial summary judgment and in support of its cross-motion to dismiss plaintiff's complaint (the "Complaint") pursuant to Rule 12(b)(3) and, in the alternative, Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP").

PRELIMINARY STATEMENT

Tropp, an individual insurer, or "Name," in the London insurance market regulated by Lloyd's pursuant to acts of the United Kingdom Parliament, commenced this action seeking, among other things, a pre-emptive declaratory judgment that an English judgment against him in favor of Lloyd's — which Lloyd's has not yet sought to enforce in the U.S. — should not be enforced by the New York courts; he also seeks money damages from Lloyd's in the form of a "recalculation" of the amount of the English judgment that would allegedly wipe out his judgment debt to Lloyd's and result in Lloyd's owing him money. Tropp is thus the latest U.S. Name to attempt to litigate — or relitigate — disputes with Lloyd's in the U.S. courts, in contravention of a written agreement to litigate all such disputes in the English courts pursuant to English law (the "Choice Clause"). All eight federal appellate courts that have considered the enforceability of the Choice Clause, including the Second Circuit in two separate, controlling decisions, have dismissed Names' suits against Lloyd's and held U.S. Names to their agreement to litigate only in the English courts.

The Complaint alleges that prior U.S. decisions enforcing the Choice Clause were based on an assumption that U.S. Names would be able to pursue remedies against Lloyd's in the English courts, and that Tropp's unsuccessful assertion of defenses and counterclaims against Lloyd's in the English courts demonstrates that this assumption was incorrect. The Complaint further alleges that the English courts' rejection of his defenses and counterclaims against Lloyd's demonstrates that the English judgment should not be enforced because it (a) was rendered by a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law; or, alternatively, (b) is based on a cause of action that is repugnant to the public policy of the state of New York.

However, Tropp's circumstances are indistinguishable from those of the hundreds of U.S. Names who have unsuccessfully tried to void the Choice Clause or block enforcement of substantially identical English judgments against them. In numerous proceedings in more than fourteen states, including New York, the U.S. courts have unanimously rejected U.S. Names' contentions that the English judicial system's procedures are incompatible with due process principles or that the cause of action underlying the English judgments is repugnant to the public policies of their respective states.

Tropp's attempt to sue Lloyd's in the U.S. is not exempt from the Choice Clause simply because it follows, rather than precedes, litigation in England. The Choice Clause by its express terms requires all disputes between Tropp and Lloyd's to be resolved in the English courts; those disputes have already been resolved, finally and conclusively; Tropp also agreed, in writing, that any English judgments in connection with his underwriting in the Lloyd's market would be conclusive and enforceable in any jurisdiction.

Even if the Choice Clause did not exist, Tropp would have no right to ask this Court to resolve his disputes with Lloyd's. Tropp's allegations that the English courts did not permit him to contest Lloyd's claims against him, or to pursue his counterclaims against Lloyd's, are contradicted on the face of the Complaint, which incorporates by reference the numerous rulings and decisions rendered in the English proceedings between Lloyd's and Tropp. These decisions make clear that Tropp had ample opportunity to present his defenses and counterclaims, which were deemed factually and legally insufficient to survive motions for summary judgment or dismissal in light of the parties' submission of documentary evidence, witness statements, legal memoranda and oral argument. Tropp's unhappiness with the English courts' rulings does not mean that the English judicial system lacks procedures consistent with principles of due process — a contention that U.S. courts have repeatedly and unanimously rejected.

Accordingly, in light of the Choice Clause and controlling Second Circuit precedent, the Complaint should be dismissed pursuant to FRCP 12(b)(3). Alternatively, the Complaint should be dismissed pursuant to FRCP 12(b)(6) because it fails to plead any of the grounds set forth in the applicable New York statute for not enforcing the English judgment. To the extent that it is

not mooted by dismissal of the Complaint, Tropp's motion for partial summary judgment on his claim for pre-emptive declaratory relief should be denied.

STATEMENT OF FACTS[1]

The general background of this litigation — the structure of the Lloyd's market, the crises it faced in the 1990's and their resolution, and the series of disputes between Lloyd's and the minority of Names who were not willing to accept that resolution — has been set forth in numerous prior federal court decisions, including this Court's decision in *Soc'y of Lloyd's v. Edelman, et al,* 2005 U.S. Dist. LEXIS 4231, at **1-7 (S.D.N.Y. Mar. 22, 2005) (Pauley, J.). *See also Soc'y of Lloyd's v. Reinhart*, 402 F.3d 982, 988 (10th Cir. 2005) ("numerous courts have summarized the basic facts applicable to the underlying litigation, and these facts are not in dispute").[2] We set forth briefly only the most salient facts, as well as those relevant to Tropp's specific history and litigation with Lloyd's in England, below.

The Parties. Defendant Lloyd's was incorporated pursuant to a special Act of Parliament in 1871; it does not have shareholders. Demery Decl. ¶ 3; Lloyd's Act 1871. Pursuant to Lloyd's Acts 1871-1982, Lloyd's administers and regulates the well-known international insurance market located in London, England commonly known as "Lloyd's of London." Compl. ¶ 4; Demery Decl. ¶ 2. Lloyd's itself is not an insurer, does not insure risks, and does not earn underwriting profits or incur underwriting losses. Compl. ¶ 20; Demery Decl.

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1 For purposes of Lloyd's motion under Rule 12(b)(3) to dismiss the Complaint for improper venue pursuant to the Choice Clause, the Court may consider, in addition to documents incorporated by reference or relied on in the Complaint (*San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Co.*, 75 F.3d 801, 809 (2d Cir. 1996)), documents outside the pleadings that are relevant to the question of venue. *New Moon Shipping Co., Ltd. v. MAN B & W Diesel AG*, 121 F.3d 24, 30 (2d Cir.1997) (considering forum selection clause in materials beyond the pleadings on a motion to dismiss under Rule 12(b)(3)). Moreover, the decisions of the English courts in Tropp's litigation with Lloyd's, as well as applicable English statutes, are subject to judicial notice. *Lady Nelson, Ltd. v. Creole Petrol Corp.*, 286 F.2d 684, 686 (2nd Cir. 1961) (taking judicial notice of an English statute). For purposes of Lloyd's alternative Rule 12(b)(6) motion only, well-pled allegations of fact are assumed to be true. However, conclusory allegations and legal conclusions disguised as facts are not entitled to any presumption of truth. *See De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65,69 (2d Cir. 1996). Documents that may be considered for any of the aforementioned reasons are attached to the Declaration of Nicholas P. Demery ("Demery Decl.") submitted herewith.

2 *See also Haynsworth v. The Corp.*, 121 F. 3d 956, 958-961 (5th Cir. 1997); *Allen v. Lloyd's*, 94 F.3d 923, 929-931 (4th Cir. 1996); *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 478 (7th Cir. 2000), and *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1357 (2d Cir. 1993) as particularly helpful overviews.

¶ 4. *See also Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 478 (7th Cir. 2000). Insurance is underwritten in the Lloyd's market by individual or corporate underwriting members, or "Names," who underwrite insurance policies in groups known as syndicates. Names' obligations to policyholders to pay claims is several, not joint; no Name shares either profits or losses with another, not even with those on the same syndicates. Demery Decl. ¶ 4; Lloyd's Act 1982. Under English law, individuals are permitted to underwrite insurance only if they are members of Lloyd's; membership of Lloyd's thus functions as a "license" to conduct an individual insurance business in the United Kingdom. Demery Decl. ¶ 5.

The plaintiff, Richard A. Tropp, is a U.S. Name who actively underwrote insurance in the Lloyd's market during the years 1988 through 1991. Compl. ¶¶ 3, 61.

The General Undertaking. As a condition of membership of Lloyd's, all Names (including Tropp), were required to execute certain agreements governing their membership of and underwriting in the Lloyd's market. Demery Decl. ¶ 6; *Roby*, 996 F.2d at 1357-58. In the most important of those agreements, the General Undertaking, Tropp agreed to comply with the provisions of the Lloyd's Acts 1871-1982 and any bylaws, regulations, etc., duly promulgated by the Council of Lloyd's thereunder in connection with his membership and underwriting at Lloyd's. Demery Decl. Ex. 2 ¶ 1. By signing the General Undertaking, Tropp also consented to the personal jurisdiction of the English courts, and agreed that

> the courts of England shall have exclusive jurisdiction to settle 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 ... and further irrevocably agrees that a judgment in any Proceeding brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.

Id. ¶ 2.2 (emphasis added).

The Lloyd's Acts require Names to conduct their underwriting business at Lloyd's through Members' Agents and Managing Agents (together "Agents"), who contractually assume management responsibilities over Names' underwriting activities. Compl. ¶¶ 26, 34; *Roby*, 996 F.2d at 1357. Lloyd's Act 1982 §14(3) limits Lloyd's monetary liability to Names for acts or omissions taken in "bad faith," and expressly bars claims for negligence. However, Agents owe

their Names contractual and fiduciary duties of care and loyalty under English law, and many Agents have been held liable by the English courts for breaches of these duties to their Names.[3]

Reconstruction & Renewal Plan. In the late 1980s and early 1990s, Names in the Lloyd's market incurred aggregate underwriting losses of over £8 billion. Demery Decl. ¶ 14; *Edelman*, 2005 U.S. Dist. LEXIS 4231, at *3. Uncertainty as to contingent liabilities for long tail claims made it difficult or impossible for Agents to close their syndicate accounts, leaving their Names exposed to ongoing liabilities. As a result, many Names either refused or became unable to satisfy their obligations to policyholders to make payment of valid claims, and a significant amount of litigation began to embroil the Lloyd's market. Demery Decl. ¶ 14; *Edelman*, 2005 U.S. Dist. LEXIS 4231, at *3.[4]

These developments threatened the viability of the Lloyd's market and placed policyholders who had paid premiums to Names at risk of non-payment of their claims. To avoid market insolvency, protect the interests of insureds, assist Names in meeting their underwriting losses, and settle the intra-market litigation, in 1996 Lloyd's implemented a program called Reconstruction and Renewal ("R&R"). Compl. ¶ 84; Demery Decl. ¶ 15; *Edelman*, 2005 U.S. Dist. LEXIS 4231, at *3. The R&R plan had two separate components:

(1) the requirement that each Name (in addition to paying his outstanding underwriting obligations, including all previously incurred called and uncalled losses) purchase reinsurance for his "open" (*i.e.*, not yet fully reserved or reinsured, permitting them to close) underwriting obligations for 1992 and prior years of account from a newly formed company, Equitas Reinsurance Ltd. ("Equitas"), and

(2) an offer of settlement to each Name with outstanding liabilities on 1992 and prior years of account to end litigation and to assist the Name in meeting his or her liabilities and the premium for the Equitas reinsurance (the "R&R Settlement Offer").

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3 *See Richards v. Lloyd's of London*, 135 F.3d 1289, 1296 (9th Cir. 1998)(*en banc*) (discussing successful Names' litigation in England against Agents). Like the General Undertaking, Tropp's agreements with his Agents contained a consent to jurisdiction in England and English forum selection and governing law provisions. Demery Decl. ¶ 7; Tropp Decl. Ex. ¶¶ 22-24.

4 Tropp expressly admits that, beginning in approximately 1995, he began to refuse to honor cash calls (made upon him by his Agents) in order to pay his insureds' claims. Compl. ¶¶ 105, 108. Although he blames his Agents for exposing him to greater losses than he anticipated (Compl. ¶¶ 117, 121, 122), he apparently did not take any action to recover damages from those Agents.

Demery Decl. ¶ 15; *Edelman*, 2005 U.S. Dist. LEXIS 4231, at *3. Based on a massive, two year long reserving exercise monitored by British government authorities, Lloyd's calculated the premium needed by each Name, in addition to his or her existing reserves, to purchase reinsurance from Equitas; this amount (the "Equitas Additional Premium") was set forth in a "finality statement" (the "Finality Statement"); the Finality Statement also set forth the aggregate amount required to satisfy each Name's prior unpaid underwriting liabilities (if any) and the Equitas Additional Premium (the "Finality Amount"). Compl. ¶ 85; Demery Decl. ¶ 15; Demery Decl. Ex. 4. In addition, the Finality Statement set forth the individually calculated package of "settlement credits" that each Name who accepted the R&R Settlement Offer could use to reduce his Finality Amount. Demery Decl. ¶ 15; *Allen*, 94 F.3d at 927.[5]

Although Names were not required to accept the R&R Settlement Offer, Demery Decl. ¶ 18; *Allen*, 94 F.3d 923 at 927; *Edelman*, 2005 U.S. Dist. LEXIS 4231, at *3, Lloyd's exercised its regulatory authority to require that all Names reinsured their outstanding 1992 and prior obligations with Equitas, regardless of whether they accepted the R&R Settlement Offer. Demery Decl. ¶ 18; *Soc'y of Lloyd's v. Turner,* 303 F.3d 325, 327-28 (5th Cir. 2002); *Edelman*, 2005 U.S. Dist. LEXIS 4231, at *3. As a non-accepting Name, Tropp forfeited the settlement credits that would have reduced his Finality Amount by over 75%. Demery Decl. ¶ 17 ; Compl. ¶¶ 105, 112, 114. Fewer than ten percent of all Names rejected the R&R Settlement Offer (Compl. ¶ 104), and a still smaller number, Tropp included, refused to pay their Equitas Additional Premium and other liabilities. The R&R plan became effective on September 4, 1996. Demery Decl. ¶ 17; *Edelman*, 2005 U.S. Dist. LEXIS 4231, at *4.

English Litigation. Following the implementation of R&R, a small number of non-accepting, non-paying Names litigated a number of issues against Lloyd's in the English courts in opposition to Lloyd's efforts (pursuant to an assignment from Equitas) to obtain judgments for

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5 All Names who accepted the R&R Settlement Offer were required to grant broad releases not only to Lloyd's, but also to their Agents and other market participants, in consideration of their receipt of settlement credits funded in part by certain of these market participants. Demery Decl. ¶ 15.

their unpaid liabilities.[6] Demery Decl. ¶ 22. The English courts rejected each of these challenges, in extensive motion practice, written and oral argument, and interlocutory appeals that lasted over 22 months, holding that:

- the "pay now, sue later" clause of the Equitas reinsurance contract was enforceable and prohibited Names from asserting counterclaims in set-off of their unpaid underwriting obligations, but did not bar the subsequent assertion of counterclaims against Lloyd's permitted by Lloyd's Act 1982 §14;
- Names could not compel Lloyd's to rescind their underwriting obligations to policyholders even if they successfully pursued counterclaims in fraud, as Lloyd's lacked the legal authority to grant rescission;
- Lloyd's had the statutory authority to make the Equitas reinsurance transaction compulsory, and to appoint substitute agents to bind Names to the Equitas reinsurance contract;
- Lloyd's had standing to sue for payment of the Equitas Additional Premium and other outstanding underwriting obligations pursuant to an assignment from Equitas; and
- the "conclusive evidence" clause of the Equitas reinsurance contract prohibited attacks on the calculation of Names' Equitas Additional Premium absent proof of "manifest error."

See Demery Decl. ¶ 22.[7] These rulings became final prior to any litigation between Lloyd's and Tropp's.

Despite its commencement of proceedings against other Names beginning in 1996, Lloyd's continued to discuss settlement with Tropp for several years thereafter. By mid-2002, however, these discussions had reached an impasse due to Tropp's refusal to agree to release various market participants, in addition to Lloyd's, as all other settling Names had done. Demery Decl. ¶ 23; Compl. ¶¶ 113, 114. Accordingly, in 2002, Lloyd's commenced proceedings in the High Court of Justice, Queens Bench Division against Tropp (the "English

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6 Equitas assigned Lloyd's the right to sue non-settling Names for their unpaid underwriting liabilities in connection with Lloyd's advance to Equitas of £285 million to cover unpaid Equitas Additional Premium owed by non-accepting Names, including Tropp. *See Reinhart*, 402 F.3d at 991; *Siemon-Netto*, 457 F.3d at 98. *See also* Demery Decl. ¶ 20.

7 This Court may take judicial notice of these decisions, which are offered not for purposes of legal argument, but to demonstrate the history of litigation between Names and Lloyd's in the English courts.

Action") for payment of Tropp's unsatisfied underwriting liabilities, including his unpaid Equitas Additional Premium, plus unpaid interest and costs. Demery Decl. ¶ 23; Compl. ¶¶ 113, 114. On May 24, 2004, the Queen's Bench — after Tropp's submission (acting *pro se*) of affidavits, documentary evidence, written argument and oral argument — granted Lloyd's motion for summary judgment on Lloyd's claims against Tropp and Tropp's defenses, and ordered Tropp to pay Lloyd's £463,881.28, which included the principal amount owed of £296,811.16 plus prejudgment interest and costs (the "Judgment"). Compl. ¶¶ 147, 149; Demery Decl. Ex. 6 (decision of Gross, J.); Demery Decl. Ex. 7 (Order). Tropp's request for permission to appeal the Judgment to the Court of Appeal was denied, pursuant to a lengthy, reasoned opinion, following Tropp's further written submissions and oral argument by Tropp before the appellate court. Compl. ¶ 149; Demery Decl. Ex. 8 (decision of Waller, J.)

Following entry of the Judgment, Tropp pursued many of his unsuccessful defenses in the form of counterclaims against Lloyd's. Compl. ¶ 149. The Queen's Bench granted Lloyd's motion to dismiss Tropp's counterclaims, following further written submissions of testimony, documentary evidence, written argument and oral argument, in a reasoned decision explaining why the counterclaims had no reasonable prospect of success on the pleaded facts and applicable English law. Demery Decl. Ex. 9 (decision of Gloster, J). Tropp's request for permission to appeal from this dismissal was denied, following still more written submissions and oral argument, for the same reason. Compl. ¶¶ 150, 151; Demery Decl. Ex. 10, (decision of Rix, J.). Further discretionary review from the House of Lords was sought but not granted. Compl. ¶ 153. Tropp admits that he has not paid the Judgment. Compl. ¶ 154.

ARGUMENT

I. CONTROLLING SECOND CIRCUIT PRECEDENT REQUIRES DISMISSAL OF THE COMPLAINT PURSUANT TO THE CHOICE CLAUSE

Under controlling Second Circuit precedent, the Complaint should be dismissed in its entirely under Rule 12(b)(3) because plaintiff's claims against Lloyd's — that the Judgment is unenforceable in New York, and that his underwriting liabilities should be recalculated, reduced, set-off or forgiven due to Lloyd's alleged acts or omissions — are governed by the Choice

Clause, which requires them to be litigated in the English courts pursuant to English law. *Stamm v. Barclays Bank of N.Y.*, 153 F.3d 30, 32-33 (2d Cir. 1998); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir.1993). Seven other federal appellate courts have likewise dismissed Names' suits against Lloyd's pursuant to the Choice Clause.[8]

The English courts have explained that "[t]he clear and simple purpose of [the General Undertaking] was to ensure that upon becoming a [N]ame, [the Name] became subject to the regulatory regime of Lloyd's. The clauses governing the choice of law and venue are ancillary to that object." *Soc'y of Lloyd's v. Clementson* [1995] C.L.C. 117, 122. For the same reason, Tropp also expressly and "irrevocably agree[d] that a judgment in any Proceeding brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction." Demery Decl. Ex. 1 ¶ 2.2 (emphasis added).[9]

Tropp is barred by the Choice Clause from relitigating in this Court the very same claims and defenses to the Judgment that he asserted unsuccessfully in the English courts. These claims and defenses include the following:

Claim Unsuccessfully Asserted in England	Reasserted Claim
The assignment from Equitas did not give Lloyd's standing to sue Tropp for the Equitas Additional Premium. Demery Decl. Ex. 6 ¶ 23; Demery Decl. Ex. 8 ¶ 23.	Compl. ¶ 146
Lloyd's did not have authority to appoint a substitute agent to bind him to the Equitas reinsurance contract. Demery Decl. Ex. 5 ¶¶ 41, 42, Demery Decl. Ex. 8 ¶¶ 12, 13.	Compl. ¶¶ 87, 88, 114, 115
There was manifest error in the calculation of his Equitas Additional Premium, including Lloyd's alleged failure to account for reserves that	Compl. ¶¶ 116(b)-(d), 117, 126-129

[8] *E.g.*, *Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285 (11th Cir. 1998); *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998) (*en banc*); *Haynsworth v. Corp. of Lloyd's*, 121 F.3d 956 (5th Cir. 1997); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156 (7th Cir. 1993); *Riley v. Kingsley Underwriting Agencies Ltd.*, 969 F.2d 953 (10th Cir. 1992).

[9] While Tropp claims to have brought this action to pre-empt an imminent attempt by Lloyd's to enforce the Judgment in New York, Compl. ¶¶ 154, 159, 168, Lloyd's has not yet decided whether or when to seek recognition and enforcement of the Judgment against Tropp in the United States. Demery Decl. ¶ 27. In any event, Tropp was in no imminent danger from enforcement of the Judgment in any event because Lloyd's could not enforce the Judgment without commencing judicial proceedings pursuant to New York's version of the Uniform Foreign Country Money-Judgments Recognition Act, CPLR §§ 5301-5309 (the "Recognition Act"). *See* CPLR §5303 (a foreign money judgment is enforceable "by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense").

should have been credited to plaintiff's Finality Amount. Demery Decl. Ex. 6 ¶ 22; Demery Decl. Ex. 8 ¶¶ 9, 14-17.	
Alleged failure to make profit distributions from Tropp's syndicates and credit personal stop-loss recoveries was manifest error. Demery Decl. Ex. 6 ¶¶ 22, 25; Demery Decl. Ex. 8 ¶¶ 20.	Compl. ¶¶ 129,131
Tropp is entitled to an inspection of records used to calculate his Judgment amount and to an accounting. Demery Decl. Ex. 8 ¶¶ 1, 22; Demery Decl. Ex. 9 ¶¶ 2, 5, 7; Demery Decl. Ex. 10 ¶¶ 6, 27.	Compl. ¶¶ 117, 118, 127, 139, 140, 146, 161-163
Lloyd's negligently or deliberately failed to supervise and regulate the insurance market, in violation of duties it owed to Tropp. Demery Decl. Ex. 9 ¶¶ 5, 6; Demery Decl. Ex. 10 ¶¶ 5, 22, 23	Compl. ¶¶ 53-59
Lloyd's statutory immunity did not apply to Tropp's claims for so-called "equitable" relief such as an accounting or recalculation of underwriting obligations. Demery Decl. Ex. 9 ¶¶ 16, 17, Demery Decl. Ex. 10 ¶ 6.	Compl. ¶¶ 150-152
Tropp purportedly relied on an undocumented settlement agreement with Lloyd's, which should be equitably enforced. Demery Decl. Ex. 6 ¶¶ 31, 46, 50-53, 56; Demery Decl. Ex. 8 ¶ 20.	Compl. ¶¶ 108-114
Tropp was entitled to unwind certain syndicates in which he was "improperly placed" by his Members' Agent. Demery Decl. Ex. 6 ¶¶ 19, 20; Demery Decl. Ex. 8 ¶¶ 15, 16	Compl. ¶ 118
Tropp's submission of a letter of resignation to his Members' Agent in August 1990 should be given effect and should absolve him of liability for losses in the 1991 year of account. Demery Decl. Ex. 6 ¶¶ 16, 18, 21; Demery Decl. Ex. 8 ¶ 20.	Compl. ¶ 125
Fees earned by Agents on the "Triple Profit Release" increased Tropp's Equitas Additional Premium. Demery Decl. Ex. 6 ¶ 19; Demery Decl. Ex. 8 ¶ 22; Demery Decl. Ex. 10 ¶ 7.	Compl. ¶ 137, 138

Tropp suggests that this Court may ignore the Choice Clause because the English courts' adverse rulings on his defenses and counterclaims show that the English courts did not provide him with adequate remedies against Lloyd's, contrary to the courts' expectations in *Stamm*, *Roby* and the other Choice Clause cases. Compl. ¶¶ 150, 152. However, Tropp's apparent belief that he might have had greater success in a U.S. court applying American law does not mean that the English legal system did not provide him with adequate legal remedies, or that he is entitled to a "do over." As the U.S. courts, including the Second Circuit, have repeatedly recognized, international forum selection and choice of law clauses like the Choice Clause are enforceable even where the substantive law of the chosen forum is substantially different than U.S. law. *See*

e.g., Stamm, 153 F.3d at 729, 733; *Roby,* 996 F.2d at 1363.[10] These controlling precedents require dismissal of the Complaint in its entirety.

II. EVEN IF THE CHOICE CLAUSE DID NOT REQUIRE DISMISSAL OF THE COMPLAINT, THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

Even if the General Undertaking did not contain the Choice Clause, as well as Tropp's agreement that the Judgment is enforceable in this jurisdiction, the Complaint would still be legally deficient because it fails to plead the statutory grounds for not enforcing a foreign money judgment set forth in the Recognition Act. Tropp's inflammatory attacks on the English proceedings do not substitute for the specific allegations necessary to plead one of the enumerated grounds for non-recognition of the Judgment set forth in CPLR §5304 has been met. The Complaint should be dismissed as a matter of law pursuant to FRCP 12(b)(6).

A. The Recognition Act Strictly Limits the Grounds for Declining to Recognize the Judgment

CPLR §§5302-5303 provide that any "foreign country judgment which is final, conclusive and enforceable where rendered" is, as a matter of New York law, "conclusive between the parties to the extent that it grants or denies recovery of a sum of money" unless one of the specifically enumerated mandatory or discretionary grounds for non-recognition in CPLR §5304 applies. The Complaint alleges the applicability of only two of these exceptions: the mandatory exception for judgments "rendered by a system which does not provide impartial tribunals or lacks procedures compatible with the requirements of due process of law" set forth in CPLR §5304(a)(1) (Compl. ¶¶ 156, 165); and the discretionary exception for judgments based on "a cause of action repugnant to the public policies of New York" set forth in CPLR §5304(b)(4). Compl. ¶¶157, 166.

Both this Court and the First Department have previously granted summary judgment recognizing English judgments in favor of Lloyd's against Names for the Equitas Additional

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[10] *See also Lipcon,* 148 F.3d at 1297; *Richards,* 135 F.3d at 1292-1296 (*citing The Bremen v. Zapata Off-Shore Co.* 407 U.S. 1 (1972), *and Scherk v. Alberto-Culver Co.,* 417 U.S. 506 (1974); *Haynsworth,* 121 F. 3d at 970; *Allen,* 94 F.3d at 929; *Shell,* 55 F. 3d at 1230; *Bonny,* 3 F.3d at 162; *Riley,* 969 F.2d at 958.

Premium and other unpaid underwriting obligations, rejecting the same defenses asserted here by Tropp. *Soc'y of Lloyd's v. Grace,* 718 N.Y.S. 2d 327 (1st Dep't 2000) (enforcing the English judgments as "procedurally sound and do not violate any public policy of New York or the United States"); *Soc'y of Lloyd's v. Edelman, et al,* 2005 U.S. Dist. LEXIS 4231, at ** 13-17 (S.D.N.Y. Mar. 22, 2005) (Pauley, J.) (ruling that "the English judicial system comports with principles of due process" and that English judgments did not violate New York public policy). An unbroken string of decisions by courts across the country have likewise recognized judgments in favor of Lloyd's against Names under both state statutes similar to the Recognition Act and general common law principles.[11]

B. The English Judicial System "Provide[s] Impartial Tribunals or Procedures Compatible with the Requirements of Due Process of Law"

Tropp acknowledges that all prior challenges to the enforceability of English judgments Names have failed, Compl. ¶¶ 16-18, 104, but contends that this Court should ignore these precedents because he is "the first U.S. defendant in a Lloyd's case to be able to make a showing to a U.S. court of his U.K. court record that no U.K. remedy was available to him, not only in defense to a judgment, but also after entry of a judgment." *Id.* ¶ 16. However, Tropp is not the first Name to pursue affirmative post-judgment remedies against Lloyd's in the English courts.

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[11] *See e.g., Soc'y of Lloyd's v. Siemon-Netto*, 457 F.3d 94 (D.C. Cir. 2005); *Lloyd's v. Reinhart*, 402 F.3d 982 (10th Cir. 2005), *cert. denied,* 126 S. Ct. 366 (2005); *Soc'y of Lloyd's v. Blackwell*, 127 Fed. Appx. 961 (9th Cir. 2005); *Soc'y of Lloyd's v. Borgers,* 2005 U.S. App. LEXIS 6404 (9th Cir. 2005); *Soc'y of Lloyd's v. Fuerst*, 138 Fed. Appx. 873 (8th Cir. 2005); *Soc'y of Lloyd's v. Cohen*, 108 Fed. Appx. 126 (5th Cir. 2004); *Soc'y of Lloyd's v. Mullin*, 2004 U.S. App. LEXIS 8968 (3d Cir. May 5, 2004); *Collins v. Soc'y of Lloyd's*, 874 So.2d 672 (Fla. App. 4 Dist., 2004); *Soc'y of Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002), *aff'd, Soc'y of Lloyd's v. Webb,* 156 F. Supp. 2d 632 (N.D. Tex. 2001); *Soc'y of Lloyd's v. Shields*, 2004 U.S. App. LEXIS 24105 (6th Cir. Nov. 17, 2004); *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000); *Soc'y of Lloyd's v. Campbell-White*, 2005 U.S. Dist. LEXIS 22403 (D. Mass. Aug. 23, 2005); *Soc'y of Lloyd's v. Anderson*, 2004 U.S. Dist. LEXIS 7351 (N.D. Tex. Apr. 27, 2004); *Soc'y of Lloyd's v. Byrens*, 2003 U.S. Dist. LEXIS 26719 (S.D. Cal. May 29, 2003); *Soc'y of Lloyd's v. Hudson*, 276 F. Supp. 2d 1110 (D. Nev. 2003).

See also Unpublished Orders enforcing English judgments against Names (copies of these Orders are included in the Appendix of Unreported Decisions filed concurrently herewith): *Soc'y of Lloyd's v. Ellis*, No. 05-159-CA (Fla. Dist. Ct. 4th Dist. 2005); *Soc'y of Lloyd's* v. *Almond*, No. 03CP406076 (S.C. Cir. Ct. Richland 2005); *Soc'y of Lloyd's v. Tufts*, No. 03-2316 (E.D. Mo. May 18, 2004); *Soc'y of Lloyd's v. McCarthy*, No. 03-80247-CJV (S.D. Fla. July 16, 2003); *Soc'y of Lloyd's v. Blackwell*, No. 02 CV 0448 (S.D. Cal. Feb. 26, 2003); *Soc'y of Lloyd's v. Evnen*, 02-CV-118 (D. Neb. Apr. 28, 2003); *Soc'y of Lloyd's v. Davies*, No. 02-CV-1602-GET (N.D. Ga. Apr. 23, 2003), *aff'd Soc'y of Lloyd's v. Davies*, No. 03-13794 (11th Cir. May 21, 2004); *Soc'y of Lloyd's v. Bennett*, 02-CV-204-TC (D. Utah Nov. 12, 2003); *Soc'y of Lloyd's v. Rosenberg*, No. 02-1195 (E.D. Pa. Aug. 12, 2002).

Demery Decl. ¶ 32. In 2000, following 64 days of trial (including 40 days of oral testimony and the submission of massive amounts of documentary evidence), the Queen's Bench rendered judgment in the *Jaffray* litigation in favor of Lloyd's on the claim by approximately 200 non-accepting Names (a number of whom were U.S. Names) that Lloyd's had made fraudulent misrepresentations to them about, among other things, the efficacy of its regulation, because the Names had failed to prove, *inter alia*, fraudulent intent. *Soc'y of Lloyd's v. Jaffray*, 2000 WL 1629463 (Queen's Bench, Nov. 3, 2000) (Cresswell, J.); *aff'd* 2002 WL 1654876 (Court of Appeal, July 26, 2002).

Because Tropp's defenses and counterclaims — including many of his claims of "manifest error" — were primarily based on his allegation that Lloyd's regulatory failures exposed him to losses for which he should not be liable, *see* Demery Decl. Ex. 9 ¶¶ 5, 6; 10 ¶¶ 5, 22, 23. Tropp's procedural posture is no different than that of the *Jaffray* Names, and provides no basis to distinguish the many cases rejecting U.S. Names' contention that English judgments against them were not rendered by a judicial system with procedures compatible with due process principles. *See Reinhardt,* 402 F.3d at 991-92 (noting that all non-accepting Names, including those in the U.S., were given written notice of the opportunity to join the *Jaffray* case as claimants).

1. The Statutory Test Looks to the Adequacy of English Court System as a Whole, Not to the Specific Litigation at Issue

The express language of CPLR § 5304(a)(1) refers to a "system which does not provide impartial tribunals or procedures compatible with the due process of law," (emphasis added), and does not permit relitigation of the particular case at hand; instead CPLR §5304(a)(1) requires examination of foreign country's judicial system as a whole. In *Ashenden,* the Seventh Circuit — interpreting identical language in the applicable Illinois statute — found "[a]ny suggestion that [the English] system of courts 'does not provide impartial tribunals or procedures compatible with the requirements of due process of law' borders on the risible." 233 F.3d. at 476, *citing British Midland Airways Ltd. v. Int'l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) ("United States courts which have inherited major portions of their judicial traditions and

procedure from the United Kingdom are hardly in a position to call the Queen's Bench a kangaroo court"). The Seventh Circuit thus rejected Names' argument that they could avoid recognition by challenging the fairness of the English proceedings against them:

> Rather than trying to impugn the English legal system en gross, the defendants argue that the Illinois statute requires us to determine whether the particular judgments that they are challenging were issued in proceedings that conform to the requirements of due process of law as it has come to be understood in the case law of Illinois and other American jurisdictions. The statute, with its reference to 'system,' does not support such a retail approach, which would moreover be inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdictions—which would in effect give the judgment creditor a further appeal on the merits. The process of collecting a judgment is not meant to require a second lawsuit, [citations omitted], thus converting every successful multinational suit for damages into two suits....

Id. at 477 (emphasis added). *See also Reinhardt*, 402 F.3d at 994 ("Although the New Mexico Name would prefer to have us focus on this particular judgment, rather than the English system,... we are not permitted to do so.") (emphasis in original). "The procedures the English courts afforded need not be identical to ours, they must only be compatible in that they do not offend the notion of basic fairness." *Id., citing Turner,* 303 F.3d at 331.

Consistent with these precedents, in *Edelman*, Judge Pauley of this District, in recognizing English judgments against similarly situated New York Names, held that "the Recognition Act directs this Court to examine the fairness of the English system, rather than evaluate the individual action," 2005 U.S. Dist. LEXIS 4231 at *12, and that it is "incontrovertible that the English judicial system provides impartial tribunals and 'procedures compatible with the requirements of due process of law.'" *Id.* at *9, *citing Roby,* 996 F.2d at 1363. In the earlier *Grace* case, New York's Appellate Division, First Department reached the same conclusion. *Grace*, 718 N.Y.S.2d at 328 ("While defendants maintain that the English courts, in rendering judgments upon which plaintiff now predicates its right of recovery, deprived them of property without due process, the record indicates that they were afforded notice and an opportunity to be heard in the underlying English action and, accordingly, that the basic requisites of due process were met").

In an attempt to disguise the improper "retail" nature of his due process challenge, Tropp alleges that "the U.K. courts have ... created a uniquely prejudicial judicial system for the class of Lloyd's cases that completely lacks due process for plaintiff" and other Names. Compl. ¶ 15. This argument has already been rejected by two federal appellate courts. In *Turner,* the Fifth Circuit explicitly rejected Texas Names' assertion that the "special self-regulatory 'Lloyd's-created system deprived [them] of due process,'" holding that the English courts had simply "applied typical English law" to the R&R transactions. *Turner,* 303 F.3d at 331n.22. In *Siemon-Netto,* the D.C. Circuit rejected the dissident Names' argument that they had been deprived of due process because the English "have a 'bias and prejudice' in favor of Lloyd's under circumstances which make it impossible for a Name to win[,]" observing that the Names' lack of litigation success was not evidence of unfairness. *Siemon-Netto,* 457 F.3d at 105. Accepting this contention would require the conclusion that the federal courts are also biased and prejudiced in favor of Lloyd's since the Names did not have any litigation success before the federal courts. *See Siemon-Netto,* 457 F.3d at 106.

Even if the Recognition Act permitted a "retail" inquiry into the specific procedures used in Tropp's case — which it does not — it is clear that Tropp has not pleaded, and could not possibly plead, facts showing that he was denied a full opportunity to litigate the merits of his defenses and counterclaims. Tropp's repeated allegation that he "was not allowed to present" evidence of alleged errors in the calculation of his Finality Amount to the English courts, or that the courts "refused to hear" such evidence, *see e.g.,* Compl. ¶¶ 9,11,147, is factually contradicted by his own pleadings, which incorporate by reference five separate reasoned decisions detailing how Tropp availed himself of the opportunity to present both evidence and argument in support of his defenses and claims. *See* Demery Decl. Exs. 6 ¶¶ 7-15; 9 ¶¶ 4-9. Tropp suffered no procedural deprivation merely because the English courts found his evidence insufficient or irrelevant as a matter of substantive English law. As Judge Pauley held in *Edelman*:

> Even considering defendants' specific challenges to the English proceedings, defendants have not demonstrated that the English courts failed to provide them due process. The undisputed evidence shows that defendants were provided with specific notice of the claims against them as well as an opportunity to present their arguments in defense.

Edelman, 2005 U.S. Dist. LEXIS at **12 - 13. *See also Soc'y of Lloyd's v. Webb*, 156 F. Supp. 2d 632, 642 (N.D. Tex. 2001), *aff'd sub nom, Soc'y of Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002) ("These numerous [English] proceedings cannot be said to be lacking in due process. The Names had ample opportunities for hearings and appeals and lawsuits ..."). Tropp's claim for non-recognition pursuant to CPLR §5304(1) fails as a matter of law.

2. Tropp's Attempt to Relitigate the English Court's Substantive Rulings Is Not Permitted by the Recognition Act

The Complaint, on its face, concedes that Tropp seeks to relitigate factual and legal determinations by the English courts with which he disagrees. For example, the Complaint expressly alleges that the Judgment is based on an incorrect application of the "manifest error" standard, Compl. ¶ 148, and the scope of Lloyd's immunity, *id.* ¶ 150, and asks this Court, in effect, to reverse those decisions. The Recognition Act does not permit *de facto* appeals from foreign judgments in the New York courts. *See Canadian Imperial Bank of Commerce v. Saxony Carpet Co.*, 899 F. Supp. 1248, 1254 (S.D.N.Y. 1995) ("Defendant may not now raise an affirmative defense involving the merits of the original action"), *aff'd*, 104 F.3d 352 (2d Cir. 1996).[12]

Because Tropp is not entitled to relitigate the English courts' findings of fact or conclusions of law in this Court, we address only a few of the Complaint's more egregious attempts to recharacterize substantive rulings by the English courts as "procedural" deprivations.

a. Tropp Cannot Relitigate the Amount of the Judgment

The Recognition Act expressly prohibits attacks on a foreign money judgment based on an alleged error in calculating its amount. Under the plain language of the Recognition Act, the Judgment is "conclusive between the parties to the extent that it grants or denies recovery of a

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12 *See also Siemon-Netto*, 457 F.3d at 102 (refusing to consider merits of arguments that English courts had erred in failing to agree with Names that Lloyd's had failed to comply with certain bylaws, that the assignment of claims from Equitas to Lloyd's was allegedly ineffective, and that the amount of the judgments was allegedly incorrectly determined); *Ashenden*, 233 F.3d at 477 ("[t]he process of collecting a judgment is not meant to require a second lawsuit . . . thus converting every successful multinational suit for damages into two suits"); *Soc'y of Lloyd's v. Mullin*, 255 F. Supp. 2d 468, 473 (E.D. Pa. 2003), *aff'd*, 2004 U.S. Dist. LEXIS 8968 (3d Cir. May 5, 2004) (dismissing complaint as "a repackaging of arguments already considered and rejected by several English courts").

sum of money." CPLR §5303. Prior attempts by U.S. Names to avoid enforcement of English judgments by complaining about the substantive English law underlying the manifest error standard or its application in their particular cases have been uniformly rejected. *See e.g., Siemon-Netto,* 475 F.3d at 103-04; *Ashenden*, 233 F.3d at 480; *Webb*, 156 F. Supp. 2d at 637.

Many of Tropp's "due process" allegations concerning the English court's adverse rulings on his claims of "manifest error" are a clear attempt to relitigate the proper amount of the Judgment, in contravention of CPLR §5303. For example, the Complaint seeks to relitigate Tropp's unsuccessful assertions that (i) his Statement of Reinsurance from Equitas showed that Lloyd's failed to give him credit for £269,893 in syndicate-level reserves in calculating his Equitas Additional Premium Compl. ¶ 116;[13] (ii) Lloyd's failed to credit the proceeds of Tropp's personal stop-loss insurance against his Finality Amount *Id.* ¶ 129;[14] (iii) underwriting agents deducted commissions on the "triple profit release" (the early release of anticipated surpluses from the reserves of syndicates underwriting in 1993, 1994 and 1995) that increased his Equitas Additional Premium Compl. ¶¶ 137, 138;[15] and (iv) his aggregate underwriting obligations should have been reduced by excluding losses allegedly incurred due to his Agents'

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13 Ironically, even a quick review of the relevant documents incorporated by reference in the Complaint reveals that the only "manifest error" relating to the transfer of Tropp's reserves is Tropp's own failure to recognize the difference between the total Equitas premium — against which his reserves were credited — and the Equitas Additional Premium, which is all he is obligated by the Judgment to pay. *Compare* Tropp Decl Ex. Z [Statement of Reinsurance](showing transfer of reserves reduced premium still owed to Equitas to £114,439) *with* Demery Decl. Ex. 4 [Finality Statement] (showing same amount, £114,439, as Equitas Additional Premium) *and* Demery Decl. Ex. 6 (showing £114,439 of the principal Judgment amount allocated to Equitas Additional Premium). Tropp unsuccessfully asked the English courts, and now asks this Court, to deduct the value of his reserves twice, once from his total Equitas premium, and again from his Equitas Additional Premium.

14 The English courts found that Tropp's personal stop loss recoveries had not been credited on Tropp's Finality Statement because he had failed to sign a necessary assignment, and that these recoveries would be available to him once he signed such an assignment. Demery Decl. Exs. 6 ¶¶ 22; 8 ¶¶ 20; Demery Decl. ¶ 20.

15 This claim was rejected by the English courts because only those Names who, unlike plaintiff, underwrote during the 1993, 1994 and 1995 years of account were eligible for the "triple profit release." Demery Decl, Ex 6 ¶ 19; 8 ¶ 22; 10 ¶ 7; Demery Decl. Ex. 3 at 36-38. Because Tropp did not underwrite in those years, Compl. ¶ 3, no commissions for the triple profit release were deducted from his reserves.

failure to comply with his instruction to avoid long tail asbestos risks, *id.* ¶ 119, and Lloyd's allegedly inadequate regulation. *Id.* ¶¶ 53-59.[16]

While Tropp contends that the rejection of his "manifest error" defenses constituted a failure of process, both the enforceability of the "conclusive evidence" clause of the Equitas reinsurance contract, and the narrow meaning of "manifest error," were extensively litigated by in the English courts prior to Tropp's assertion of these claims. *See* Demery Decl. ¶ 22. While Tropp may disagree with the English courts' application of these precedents to his own "manifest error" defenses, he may not relitigate those issues.

b. Tropp Cannot Relitigate the Dismissal of His Counterclaims

Tropp asserts that the English courts improperly construed Lloyd's Act 1982 §14(3) to find that Lloyd's was immune from his non-fraud counterclaims that purportedly sought "equitable" relief. Compl. ¶¶ 9, 150-53. Tropp may not relitigate, in the guise of a "due process" challenge, the English courts' rulings that Tropp's requests for an "accounting" and "specific performance" of Lloyd's regulatory duties — *i.e,* recalculation of the Judgment to exclude obligations and losses incurred due to Lloyd's alleged improper regulation, and the recoupment of funds that were purportedly withheld from him — sought money damages and thus were statutorily barred by Section 14(3). Demery Decl. Ex 6 ¶¶ 15-17; Demery Decl. Ex. 10 ¶¶ 21-22.[17]

Quite apart from the fact that Tropp improperly asks this Court to overrule the English courts' rulings on the proper application of an English statute, Tropp also asks this Court to overrule the English courts' rulings on the pleading requirements for fraud under English law.[18]

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16 This argument constitutes a *de facto* appeal from the English courts' rulings that Lloyd's was not responsible for losses arising from Tropp's Agent's alleged failure to follow instructions, and that Tropp's claims against Lloyd's were either barred by immunity or were inadequate to plead fraud. Demery Decl. Exs. 6, 9, 10.

17 This ruling is consistent with U.S. law. *See, e.g. Soc'y of Lloyd's v. Almond,* No. 03CP406076, at 9 (S.C. Cir. Ct. 2005) (dismissing counterclaim for an accounting against Lloyd's as "nothing more than a request that [the] court second guess the English Court's mathematical calculation of [defendant's] outstanding debt").

18 In his motion for partial summary judgment, Tropp argues that even where a party has agreed to litigate counterclaims in a separate or subsequent action, "due process does require the existence of that separate action." Pl. Mem. at 20. Tropp confuses the ability to assert a counterclaim — which he had — with his desire for litigation

Footnote continued

Although Tropp did not explicitly plead a counterclaim in fraud, the English courts liberally construed his claim that Lloyd's had deliberately failed to exercise its regulatory authority as a claim in fraud that, if adequately pleaded, would not have been barred by Lloyd's partial immunity. *See* Demery Decl. Ex. 9. Tropp's implicit fraud claim was dismissed not because of Lloyd's immunity, but because, in light of applicable precedents, Tropp's allegations of fraudulent intent were legally insufficient. *Id.* 17, 18.

The English courts, in dismissing Tropp's counterclaims, noted that many of Tropp's allegations might well have supported claims against his Agents, who are not protected by Lloyd's own limited statutory immunity and are subject to claims in negligence, breach of fiduciary duty and breach of contract. Demery Decl. Ex. 8 ¶ 16.[19] Yet, in the Complaint, Tropp once again attempts to hold Lloyd's liable for acts or omissions by his Agents. S*ee e.g.,* Compl. ¶¶ 3, 61, 62, 64. As justification, Tropp argues that suits against his Agents would afford him no meaningful remedy because "the proceeds of UK court awards in such lawsuits would be "confiscated" by Lloyd's. Plaintiff would receive nothing of any cash award ordered by a UK court against his individual agents." Compl. ¶ 13. However, Tropp's unilateral decision not to sue his Agents — apparently, so that he would not have to use his recoveries to pay the obligations he claims the Agents improperly caused him to assume — does not permit him to relitigate claims against Lloyd's.[20]

Footnote continued from previous page

success. Neither principles of due process nor the public policies of New York (or any other jurisdiction) entitle litigants to rulings in their favor.

19 In *Roby,* the Second Circuit found that England provided adequate remedies to Names in part because of the "low scienter requirements under English Misrepresentation law" and the contractual obligations imposing fiduciary duties on Agents in finding the available remedies to Names adequate. *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir.1993). Names have in fact been awarded substantial judgments against Agents by English courts. *Richards v. Lloyds of London*, 135 F.3d 1289, 1296 (9th Cir. 1998) (collecting cases).

20 Under English law, Names' recoveries from their Agents are underwriting receipts, which must be deposited in their premiums trust funds with their other reserves and applied to satisfy any outstanding underwriting obligations before the remainder, if any, may be distributed to the Names. *See, e.g., Soc'y of Lloyd's v Robinson*, 1999 WL 477643 (House of Lords, 25 March 1992); Demery Decl. ¶ 35. Tropp would thus receive the benefit of any such recoveries because they would reduce the amount of his unpaid underwriting obligations and would receive any excess, if and when outstanding obligations are satisfied. Id.

C. The Judgment Is Not Based On a Cause of Action Repugnant to New York Public Policy

Tropp's conclusory allegations (Compl. ¶¶ 157, 166) that the Judgment is "based on a cause of action repugnant to the policies of the State of New York," are insufficient to invoke the discretionary ground for non-recognition set forth in CPLR §5304(b)(4).[21] As both the First Department and this Court have held, the English judgments against U.S. Names are based in contract, and causes of action for breach of contract do not violate any public policy of this state. *Grace*, 718 N.Y.S.2d at 328 (English judgments against Names for non-payment of underwriting losses and Equitas premium "do not violate any public policy of New York or the United States."); *Edelman*, 2005 U.S. Dist. LEXIS 4231, at *16 (holding under New York law that "the English Judgments are enforceable and consistent with public policy"). Virtually identical public policy arguments have been rejected by numerous courts that enforced English judgments against Names. *See, e.g., Siemon-Netto*, 457 F.3d at 99-103 (rejecting claim that judgments were based on cause of action repugnant to public policy of District of Columbia).[22] That plaintiff is dissatisfied with the English courts' rulings as to the proper construction of the Equitas reinsurance contract, the efficacy of Equitas' assignment to Lloyd's, the validity of Lloyd's bye-laws or Lloyd's lack of statutory, contractual or fiduciary duties of care to Names, does not make the Judgment — or the underlying claim for breach of contract — repugnant to New York's public policy.[23]

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21 Tropp argues in support of his motion for partial summary judgment that "New York has a strong public policy of permitting claims to be heard on their merits," even though this policy "does not require claims to be heard in the same action as other claims." Pl. Mem. at 20. This argument misses the point, and the cases cited in support of it are inapposite, because Tropp's counterclaims were heard on the merits. The grant of motions for summary judgment or to dismiss does not deprive the losing party of a chance to have the merits of their claims or defenses heard.

22 *See also Soc'y of Lloyd's v. Shields*, 2004 U.S. App. LEXIS 24105 (6th Cir. Nov. 17, 2004) (affirming district court's decision that English proceedings did not violate Tennessee public policy "in any way"); *Soc'y of Lloyds v. Turner*, 303 F.3d 325 (5th Cir. 2002) (affirming district court's enforcement of English judgments where underlying cause of action did not violate Texas public policy)

23 The U.S. courts have held that self-regulatory organizations such as the New York Stock Exchange likewise do not owe duties of care in regulating their markets to persons who buy or sell securities traded in those markets. *See, e.g., D'Alessio v. New York Stock Exchange*, 258 F.3d 93, 105 (2d Cir. 2001).

D. The Recognition Act Is Not Unconstitutional As Applied to the Judgment

Tropp contends that if this Court determines that the Recognition Act permits enforcement of the Judgment, the Recognition Act, as applied, violates the Due Process Clause of the Fifth Amendment. Compl. ¶¶ 158, 167; Pl. Mem. at 22. This argument is not only illogical, it is frivolous. Because the Recognition Act prohibits recognition of any foreign money judgment rendered by a judicial system lacking in procedures consistent with principles of due process, CPLR §5304(a)(1), the Recognition Act cannot possibly be applied in a manner inconsistent with the Due Process Clause. The Recognition Act does not require that foreign judgments be rendered by judicial systems with procedures identical to our own in order to be enforceable. *Ashenden*, 233 F.3d at 477 ("The statute requires only that the foreign procedure be '*compatible* with the requirements of due process of law'....")(emphasis in original); *Reinhardt*, 402 F.3d at 994, *citing Turner*, 303 F.3d at 330.[24]

III. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE DENIED

As explained above, Lloyd's is entitled under Rules 12(b)(3) and 12(b)(6) to dismissal of the Complaint as a matter of law even assuming the truth of Tropp's well-pleaded factual

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[24] Tropp argues in his motion for partial summary judgment that application of the Recognition Act to enforce the Judgment would be unconstitutional pursuant to *D.H. Overmyer v. Frick Co.*, 405 U.S. 174, 180 (1972) and *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). *See* Pl. Mem. at 22-23 & n.6. However, virtually identical arguments have been rejected by other courts that have recognized English judgments against U.S. Names. *See, e.g., Soc'y of Lloyd's v. Blackwell*, No. 02 CV 0448 (S.D. Cal. Feb. 26, 2003), *aff'd*, 127 Fed. Appx. 961 (9th Cir. 2005); *Lloyd's v. Reinhart*, 402 F.3d 982, 997-998 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 366 (2005); *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 479 (7th Cir. 2000).

Tropp also argues in support of his motion that decisions declining to enforce English libel judgments support his claim of procedural deprivation. *See* Pl. Mem. at 23 (*citing Bachchan v. India Abroad Publ'n., Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. 1992)). However, the *Bachchan* court's ruling was not based on any purported inconsistency with the Due Process Clause, but on significant substantive differences in English and New York libel law that raised serious First Amendment issues, permitting the court to decline to enforce the English libel judgment on the discretionary public policy ground set forth in CPLR §5304(b). *Id.* at 664. Similar arguments by Names against enforcement of English judgments for their underwriting obligations have been rejected by U.S. courts because the substantive differences between English and U.S. contract law do not have the public policy implications of the differences between English and U.S. libel law. *See, e.g., Soc'y of Lloyd's v. Siemon-Netto*, 457 F.3d 94, 101-102 (D.C. Cir. 2005) (holding that D.C. Circuit's decision not to enforce English libel judgment did not support public policy challenge to enforcement of English judgment against U.S. Name); *Richards*, 135 F.3d at 1231 (rejecting the Name's contention that the enforcement of the Choice Clause to dismiss federal and state securities claims violated a strong public policy of the United States in light of the anti-waiver provisions of the federal securities laws).

allegations. Because dismissal on either basis would moot Tropp's motion for partial summary judgment, Lloyd's will address his motion only briefly.

"Summary judgment is properly granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Markus v. Teachers Ins. & Annuity Assoc. College Retirement Equities Fund*, 2005 U.S. Dist. LEXIS 4928, at * 17-18 (S.D.N.Y. Mar. 29, 2005) (Buchwald. J). In determining whether there are issues of material fact, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party bears the burden of showing the absence of a genuine issue of material fact. *See e.g., Major Oldsmobile, Inc. v. Gen. Motors Corp.*, 1995 U.S. Dist. LEXIS 7418, at *6 (S.D.N.Y. May 31, 1995) (Buchwald. J.).

Quite apart from his baseless legal arguments, Tropp's motion for partial summary judgment is fatally undermined by his Rule 56.1 Statement of Undisputed Facts (the "Tropp Statement"). The Tropp Statement is rife with improper assertions of law contending that the English courts incorrectly applied English law to Tropp's proffered "evidence" and legal arguments.[25] *See, e.g.* Tropp Statement ¶¶ 32, 56, 63, 69, 75, 85, 92, 102, 109, 111; Lloyd's Rule 56.1 Statement in Opposition (the "Lloyd's Statement") ¶¶ 32, 56, 63, 69, 75, 85, 92, 102, 109, 111. Moreover, Tropp's repeated assertion in his Rule 56.1 Statement that the English courts "refused" to permit him to submit evidence, or "precluded" such evidence is contradicted by his own declaration, in which he acknowledges that such evidence was submitted.[26] Lloyd's disputes most of Tropp's allegations of actual fact, such as plaintiff's contention that Lloyd's

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25 "Such legal arguments ... belong in briefs, not Rule 56.1 statements, and so are disregarded in determining whether there are genuine issues of material fact." *Alliance Sec. Prods., Inc. v. Fleming Constitutional*, 471 F.Supp.2d 452, 454 (S.D.N.Y. 2007) (relying on *Jessamy v. City of New Rochelle*, 292 F.Supp.2d 498, 509 n. 12 (S.D.N.Y. 2003) (no heed given to legal conclusions in Rule 56.1 statement). *See also, Major Oldsmobile*, 1995 U.S. Dist. LEXIS 7418, at *22 n.7 ("It is unhelpful and altogether inappropriate for an affidavit submitted in the context of a summary judgment motion to contain legal argument[s] and conclusions").

26 *See, e.g.*, Tropp Decl. ¶¶ 42, 43, 52, 54, 56, 58, 61, 64, 70, 73, 81, 88, 92, 93, 112, 113.

(a) failed to give him credit for syndicate-level reserves in calculating the total amount of his Finality Amount, *see* Tropp Statement ¶ 96; Lloyd's Statement ¶ 96, (b) improperly denied him credit for his personal stop-loss recoveries, Tropp Statement ¶ 62; Lloyd's Statement ¶ 60-62, and (c) improperly failed to accept his resignation. Tropp Statement ¶ 67; Lloyd's Statement ¶ 12, 67.[27] Almost all the alleged facts in Tropp's statement are in any event immaterial as a matter of law to any of the Recognition Act's grounds for non-enforcement. *See, e.g.,* Tropp Statement ¶ 11-17, 54-55, 58-62; Lloyd's Statement ¶ 11-17, 54-55, 58-62. Accordingly, the motion for summary judgment should be denied.

Because plaintiff has failed, under FRCP 56(c), to demonstrate "that there is no genuine issue as to any material fact," and for all of the reasons discussed in Section II, plaintiff's motion for partial summary judgment should be denied.

CONCLUSION

For all the reasons stated above, Lloyd's respectfully requests that this Court deny plaintiff's motion for partial summary judgment, and grant its Motion, dismissing the Complaint in its entirety.

Dated: New York, New York
May 29, 2007

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[27] Out of Tropp's 114 assertions of "undisputed fact," Lloyd's disputes or objects to, in whole or in part, all but eight. *See* Lloyd's Statement ¶¶ 1, 10, 11, 13, 28, 58, 59, 60.