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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**

REPLY MEMORANDUM OF LAW IN SUPPORT OF LLOYD'S CROSS-MOTION TO DISMISS THE COMPLAINT

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Defendant The Society of Lloyd's ("Lloyd's") respectfully submits this reply memorandum in further support of its motion to dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(3) and 12(b)(6).[1]

INTRODUCTION

Tropp's Reply Memorandum ("Pl. Reply Mem.") does not — because it cannot — rebut the central points underlying Lloyd's motion to dismiss and its opposition to Tropp's motion for partial summary judgment — that the choice of law and forum agreement between Tropp and Lloyd's (the "Choice Clause") bars Tropp from litigating (or re-litigating) his substantive disputes with Lloyd's in this Court; and that, quite apart from the Choice Clause, Tropp's disagreement with the substantive rulings underlying the English judgment against him provide no grounds for this Court to decline to enforce that judgment.[2] Instead, Tropp merely repeats the mantra that he was improperly "precluded" from pursuing claims and defenses against Lloyd's in the English courts.

Because Tropp does not dispute that he had notice and an opportunity to be heard prior to the entry of the Judgment, he makes the convoluted, and completely meritless, argument that principles of due process and New York public policy require this Court to act, in effect, as an appellate court reviewing the substantive legal rulings of the English courts underlying the grant of summary judgment against Tropp on both Lloyd's claim against him, and his counterclaims

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1 Lloyd's Reply Memorandum primarily replies to Tropp's opposition to Lloyd's motion to dismiss, rather than Tropp's motion for partial summary judgment because (1) granting Lloyd's motion will necessarily moot Tropp's motion; and (2) the reasons why Tropp's motion must be denied have already been addressed in detail in Lloyd's opening Memorandum of Law ("Opening Brief" or "Opening Br.") and Rule 56.1 Statement. Unless otherwise specified, capitalized defined terms are used herein with the same meanings as given in the Opening Br.

2 In addition to his reply brief, Tropp submits a document purporting to be a "Reply Declaration" of 36 pages which attaches a 16 page Exhibit A titled "What this case is really all about." Both of these documents consist primarily of legal arguments, making their submission a clear violation of this Court's Order, dated April 9, 2007, that reply briefs are not to exceed 15 pages in length; they should therefore be disregarded. In any event, these documents (1) add no support for Tropp's contention in his moving papers that his disagreement with the substantive rulings of the English courts establishes that there are "undisputed facts" supporting his partial summary judgment motion; (2) may not be considered for purposes of Lloyd's motion to dismiss pursuant to Rule 12(b)(6), as they are completely outside the scope of the pleadings; and (3) are irrelevant to Lloyd's motion to dismiss pursuant to Rule 12(b)(3), given that Tropp does not dispute that he voluntarily agreed to the Choice Clause.

against Lloyd's. The *de facto* appellate review sought by Tropp is barred both by binding Second Circuit precedent affirming the validity of the Choice Clause, and by controlling New York state precedent (followed by a sister court in this District) rejecting virtually identical arguments made against enforcement of similar English judgments pursuant to New York's Recognition Act. Neither principles of due process nor New York public policy guaranteed Tropp litigation success in the English courts, or a second bite at the apple in the New York courts. The Complaint should be dismissed, and Tropp's motion for partial summary judgment should be denied.

ARGUMENT

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

A. The Choice Clause is Enforceable Against Tropp

Nearly two decades ago, as a condition of becoming a Name in the English insurance market regulated and administered by Lloyd's, Tropp expressly agreed that (1) the English courts would have exclusive jurisdiction to settle any dispute with Lloyd's "relating to or arising from his membership of or underwriting at Lloyds," (2) English law would govern any such disputes, and (3) any judgment delivered by the English courts resolving such disputes would be conclusive and binding on each party, and "may be enforced in the courts of any other jurisdiction." *See* Demery Decl. Ex. 1 ¶ 2.1, 2.2. He also agreed to comply with applicable English law governing insurers, and all regulations and by-laws enacted by the Council of Lloyd's. *See* Demery Decl. Ex. 1 ¶ 1.

Tropp's commencement of this action — in which he seeks to litigate disputes with Lloyd's "relating to or arising from his membership of or underwriting at Lloyd's" — directly contravenes the Choice Clause. The Second Circuit has held not once, but twice, that the Choice Clause is enforceable and requires dismissal of any and all attempts by Names to sue Lloyd's in the United States on claims related to their participation in the Lloyd's market. *See Stamm v.*

Barclays Bank of N.Y., 153 F.3d 30 (2d Cir. 1998); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993).[3] Tropp has given this Court no basis to ignore the controlling authority of *Stamm* and *Roby*, which conclusively rejected arguments identical to Tropp's against the enforceability of the Choice Clause based on the purported inadequacy of English remedies. Like other Names who have attempted to sue Lloyd's in the U.S. courts, Tropp's real complaint is that English remedies are not *identical* to remedies that he contends would be available under U.S. law. As the Second Circuit made clear in *Roby,* however,

> It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement.

996 F.2d at 1360. Thus, the *Roby* court held that Names' inability, in light of Lloyd's immunity to non-fraud claims, to assert claims against Lloyd's for acts not "done in bad faith," did not mean that Names lacked adequate remedies under English law because Names could assert claims of breach of contract, and knowing, negligent or even innocent misrepresentation against their Members' and Managing Agents, and for knowing misrepresentation against Lloyd's itself. *Id.* at 1365. The Second Circuit did not assume, in ruling that English remedies were adequate, that Names (much less any particular Name) would be successful in pursuing any of these remedies. *Id.* (acknowledging that Names might have greater chance of success under U.S. law). *See also Stamm,* 153 F.3d at 33 ("English law remains adequate to discourage fraud and misrepresentation, and to provide Plaintiff with a remedy *should a fraud be proven"*) (emphasis added).[4]

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3 Every other circuit to consider the issue has likewise determined that the Choice Clause is enforceable and requires dismissal of any and all attempts by Names to sue Lloyd's in the United States on claims related to their participation in the Lloyd's market. *See* Opening Br. at 9 fn. 8 (collecting cases).

4 Even in motions to dismiss for forum non conveniens, rather than a contractual choice of law and forum, an outcome-determinative difference in the substantive law of the foreign forum does not necessarily render the foreign forum inadequate. In *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981), for example, the Supreme Court approved dismissal in favor of litigation in Scotland even though Scottish law did not recognize strict liability in tort, which was the basis of the plaintiff's claim against the defendant. Tropp's situation is no different; he has been unable to make out a fraud claim against Lloyd's and has declined to pursue claims against his Agents, who have no immunity from negligence-based claims.

Tropp denies the adequacy of the English remedies available to him against his allegedly negligent Members' and Managing Agents, on the grounds that English law requires that any such recoveries must be credited against the amount of the Judgment (and any other outstanding underwriting liabilities) before the remainder, if any, is paid to him directly, making these remedies "worthless." Pl. Reply Mem. at 5. Quite apart from the obvious fact that even a partial offset against the outstanding amount of the Judgment would not be "worthless," the U.S. courts have held that the adequacy of English remedies is established by the *availability* of causes of action against Agents, regardless of whether financial recovery from them is likely or practicable. For example, the Ninth Circuit rejected Names' arguments that claims against Agents could not be considered an adequate remedy due to the insolvency of many Agents: "If so, this is truly unfortunate. It does not, however, affect our analysis of the adequacy of English law." *Richards v. Lloyd's of London,* 135 F.3d 1289, 1296 n.6 (9th Cir. 1988) (*en banc*).[5] In short, it is Tropp's *ability* to sue his Agents, rather than an actual recovery from them, that matters for purposes of the enforceability of the Choice Clause. That Tropp chose not to sue his Agents is completely irrelevant to the Choice Clause's enforceability.

B. There is No "Declaratory Judgment" Exception to the Choice Clause

While Tropp essentially concedes that his claim for an accounting is subject to the Choice Clause, Pl. Reply Mem. at 2 n.4, he insists that his claim for a declaratory judgment refusing recognition of the Judgment is somehow exempt from its application. Pl. Reply Mem. at 3. However, there is no declaratory judgment exception to forum selection clauses generally, and the Choice Clause itself contains no such limitation.[6] Furthermore, Tropp's claim for a

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5 Tropp's argument that this aspect of English law effectively deprives him of any remedy from his Agents is particularly specious given the fact that the provisions of CPLR § 5201(a) permit, under certain circumstances, the seizure or garnishment of causes of action belonging to a judgment debtor (such as Tropp) for purposes of satisfying an unpaid money judgment (such as the Judgment). These procedures do not "deprive" New York judgment debtors of the value of their claims against third parties; they simply ensure that such claims, if successful, will be used to liquidate obligations previously reduced to judgment.

6 *See YWCA of the United States v. HMC Entm't, Inc.,* 1992 U.S. Dist. LEXIS 14713 (S.D.N.Y. Sept. 25, 1992) (dismissing declaratory judgment action for improper venue finding choice of forum clause enforceable). *See also Rockwell Int'l Corp. v. Gross Graphic Syst., Inc.,* 2001 U.S. Dist. LEXIS 3268 (S.D.N.Y. Mar. 27, 2001)

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declaratory judgment is based on his assertion that the Judgment is unenforceable because the English courts held that his claims and defenses were not cognizable as a matter of English law, including without limitation:

- That Lloyd's was obligated, but failed, to disclose that his syndicates had assumed the liabilities of earlier syndicate years of account that carried asbestos-related liabilities pursuant to the reinsurance-to-close, and that such liabilities should be excluded from this Finality Amount (Compl. ¶¶ 117, 118);

- That Lloyd's partial statutory immunity from non-fraud-based claims by Names does not apply to claims seeking to enforce purported contractual rights against Lloyd's seeking allegedly "equitable" relief such as specific performance or an accounting (Compl. ¶¶ 150-152);

- That Lloyd's improperly failed to accept or honor his attempt to resign from Lloyd's in 1990 (Compl. ¶ 125);

- That in calculating his Finality Amount, Lloyd's improperly failed to credit him for his share of syndicate reserves (Compl. ¶¶ 116(b)-(d), 117, 126-129); and

- That Lloyd's did not properly appoint a substitute agent for purposes of binding him to the Equitas reinsurance contract (Compl. ¶¶ 87, 88, 114, 115).

In short, Tropp asks this Court to act as a *de facto* court of appeal with the power to overturn or overrule substantive rulings of the English courts on the legal sufficiency of his claims and defenses.[7] Repackaging these unsuccessful claims and defenses as objections to the enforcement of the Judgment does not shield them from the application of the Choice Clause.

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(enforcing forum selection clause in declaratory judgment action); *Lobatto v. Berney,* 1999 U.S. Dist. LEXIS 13224 (S.D.N.Y. Aug. 25, 1999) (dismissing claim for declaratory judgment finding forum selection clause enforceable).

7 In arguing that the Choice Clause is inapplicable to his declaratory judgment claim, Tropp asserts that one of the prior cases enforcing English judgments in favor of Lloyd's "never mentioned" the Choice Clause. Pl. Reply Mem. at 3. This argument completely misses the point. Those cases were commenced by *Lloyd's* to enforce the judgments of the English courts (after the defendant Names failed to satisfy them voluntarily or from assets held in England), and did not seek judicial resolution of a new dispute; instead the suits commenced by Lloyd's merely sought ministerial relief in the form of recognizing and converting an English judgment into a New York judgment. *See CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.,* 100 N.Y. 2d 215, 222 (2003). Lloyd's commencement of these cases was thus completely consistent with the Choice Clause, which expressly contemplates and permits action in a non-contractual forum where a judgment debtor's assets are located to enforce an English judgment. By contrast, Tropp seeks substantive judicial relief in a non-contractual forum in the form of *de facto* appellate review

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Furthermore, Tropp's Complaint seeks much more than declaratory relief as to the enforceability of the Judgment. Tropp's claim for an accounting and specific performance appears to seek a net award of money from Lloyd's to him. Compl. ¶¶ 6, 152. Tropp's reply brief explicitly asks this Court to apply English law to permit Tropp to pursue these claims for financial relief "to the extent possible consistent with due process," Pl. Reply Mem. at 4 n.6, ignoring the fact that the English courts have already applied English law and held that Tropp's claims and defenses have no legal merit. Thus, while Tropp claims he "does not expect this Court to replace UK law with US law *in its entirety*," *id.* (emphasis added), it is clear that what Tropp actually wants this Court to do is replace English law with American law to whatever extent might be necessary to reverse the outcome of the litigation. To do so would violate the Choice Clause, which has repeatedly been held to render venue improper in a U.S. court of any claim against Lloyd's by a U.S. Name. Accordingly the Complaint should be dismissed in its entirety under FRCP 12(b)(3).

II. ALTERNATIVELY, THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UNDER THE RECOGNITION ACT

A. No Claim is Stated that the Judgment was not Rendered Under a System which has "Procedures Compatible with Due Process of Law"

The English courts from the Queen's Bench Division to the Court of Appeal fully considered Tropp's arguments and by fully reasoned written decisions dismissed Tropp's claims and defenses as without merit under English law. Under the guise of an objection to enforcement under CPLR § 5304(a)(1), Tropp now invites this Court to second-guess the English courts' construction of English statutes, English contract law and other English authorities in determining that Tropp had not asserted legally cognizable claims and defenses. This Court

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of the English courts' substantive legal and factual rulings. *See Soc'y of Lloyd's v. Siemen-Netto*, 457 F.3d 94, 104 (D.C. Cir. 2005) (dismissing Names' counterclaims asserted in judgment recognition action, pursuant to the Choice Clause). The Choice Clause would be a complete nullity if every substantive ruling of the English courts were subject to such appellate review in the many different countries in which Names reside.

should decline this invitation. CPLR § 5304(a)(1) does not require that a foreign judgment, to be deemed "final and conclusive," must reach the same substantive outcome that would have been reached if the dispute had been litigated in a New York court under New York law. CPLR § 5304(a)(1) only mandates basic procedural fairness, not substantively correct results (which could never be determined without relitigating the case all over again), and certainly not a victory for Tropp.

1. The Recognition Act does not Permit Tropp's Attempted Sub-classification of the English Legal System

CPLR § 5304(a)(1) expressly prohibits enforcement of a foreign judgment if it was rendered under a "system" which fails to provide "procedures compatible with" the due process of law. The New York Court of Appeals has expressly held that the English judicial system *does* provide procedures compatible with due process of law, specifically citing and relying on the First Department's decision in *Soc'y of Lloyd's v. Grace,* 718 N.Y.S. 2d 327 (1st Dep't 2000) and other decisions enforcing judgments in favor of Lloyd's against U.S. Names. *See CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y. 2d 215, 222 (2003) (citing *Grace* and *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 476 (7th Cir. 2000)).

Tropp attempts to circumvent this dispositive authority by arguing that the "thousands of Lloyd's cases [against Names] constitute a sub-system of the UK judicial system" (Pl. Reply Mem. at 6) employing "singularly different...law and procedure" than that envisioned by the U.S. courts when they held that the English judicial system provides procedures compatible with principles of due process. *Id.* at 7. He cites absolutely no authority, however, that applies either CPLR § 5304(a)(1) or an analogous provision of another state's recognition statute to a purported judicial "sub-system."[8] This is not surprising, since under the Recognition Act, either a foreign judicial system *as a whole* meets this test, or it does not. Tropp's "sub-system"

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8 The Vietnam-era cases Tropp cites addressing the doctrines of abstention and exhaustion of remedies as applied to federal court review of proceedings in the separate U.S. military court system (Pl. Reply Mem. at 7 n.10) have absolutely no relevance to Tropp's claim under the Recognition Act that the Judgment — which was rendered by a court in the same judicial system in which English civil cases unrelated to Lloyd's are litigated pursuant to the same procedures — should not be recognized and enforced.

argument was rejected in *CIBC*, in which the Court of Appeals, New York's highest state court, held that the fact that the availability of so-called "*Mareva* injunctions" in certain English cases did not mean that the English judicial system, as a whole, employed procedures incompatible with principles of due process.[9] Moreover, Tropp's sub-system argument is fundamentally inconsistent with his repeated insistence (Compl. ¶¶ 16, 18, 19; Pl. Mem. at 4, 5) that he is uniquely situated because he made arguments and submitted purported evidence to the English courts that none of the other Names did — suggesting that his "sub-system" is really a sub-system of one.

2. Tropp Improperly Seeks Appellate Review of the Judgment by this Court

While Tropp repeatedly denies that he seeks to re-litigate his English claims and defenses in this Court — asserting that he never got a chance to litigate his claims and defenses in the English courts, Pl. Reply Mem. at 9-11 — this denial is belied by Tropp's repeated assertion that the English courts misapplied governing English law to dismiss his claims and defenses.[10] In particular, Tropp asserts that the prior English precedents on the meaning of "manifest error" and the scope of Lloyd's statutory immunity were improperly expanded by the English courts to dismiss Tropp's counterclaims against Lloyd's as a matter of law. Pl. Reply Mem. at 7, 8. But Tropp's criticisms of the English courts' rulings are completely irrelevant because an alleged misapplication of English law by English courts is not a ground for non-recognition under the Recognition Act. *See Clarkson Co. v. Shaheen,* 544 F.2d 624, 631 (2d Cir. 1976) (foreign judgment may not be denied recognition "upon the mere assertion of the party that the judgment

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9 *See CIBC*, 100 N.Y. 2d at 222 ("While we have expressed concern regarding the power and potential commercial disruption of *Mareva* orders, the use of this device, standing alone, does not render the English *system* as a whole incompatible with our notions of due process") (emphasis added). *See also Siemon-Netto,* 457 F.3d at 105 (rejecting argument that alleged judicial bias of English courts in favor of Lloyd's precludes recognition pursuant to "due process" prong of Recognition Act); *Ashenden* 233 F.3d.at 477; *Soc'y of Lloyd's v. Reinhart*, 402 F.3d 982, 994 (10th Cir. 2005).

10 *See* Pl. Reply Mem. at 9-10. *See also* Opening Br. at 9-10 (cataloguing Tropp's allegations in the Complaint which were examined and dismissed by the English courts).

was erroneous in law or in fact").[11] Courts enforcing English judgments against U.S. Names under the recognition statutes of other states have reached the same conclusion. *See e.g. Ashenden*, 233 F.3d at 477 (rejecting arguments "which would in effect give the judgment creditor a further appeal on the merits" because "[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").

Moreover, Tropp's attack on the English court's allegedly improper "expansion" of Lloyd's partial statutory immunity flies in the face of the Second Circuit's rulings that Lloyd's immunity from claims other than those alleging "acts done in bad faith" does not deprive Names of adequate English remedies. *See, e.g., Stamm,* 153 F.3d at 33; *Roby,* 996 F.2d at 1366. Tropp's attempt to distinguish these cases on the ground that the Second Circuit was unaware that the English courts would "expand" Lloyd's immunity is unavailing, as he does not and cannot point to anything in *Stamm, Roby* or any of the other Choice Clause cases that suggests that these decisions were based on an assumption that U.S. Names could circumvent Lloyd's immunity by artfully pleading non-fraud claims for damages in the form of claims for equitable relief.[12] Nor does Tropp point to anything in any of the other cases enforcing English judgments against Names — which necessarily were rendered *after* the English courts had construed the "conclusive evidence" clause — which suggests that the courts believed that Names would be able to assert post-judgment counterclaims under that clause against Lloyd's.

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11 As the New York Court of Appeals has emphasized, the Recognition Act "was designed to codify and clarify existing case law on the subject and, more importantly, to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here." *CIBC,* 100 N.Y. 2d at 221. Such "streamlined enforcement" neither contemplates nor permits relitigation of the substantive disputes that either were or could have been resolved by the foreign court that rendered the judgment. *See also Pariente v. Scott Meredith Literary Agency*, 771 F. Supp. 609 (S.D.N.Y. 1991) (rejecting "due process" and "public policy" objections to enforcement of French judgment and refusing to conduct *de facto* appellate review of correctness of French tribunal's rulings under French law).

12 The grant of immunity to entities that perform market regulatory functions is not unique to English law. For example, the New York Stock Exchange and similar entities enjoy *absolute* immunity from private suits challenging their exercise of regulatory power, even from suits alleging fraud. *See DL Capital Group v. NASDAQ Stock Mkt.,* 409 F.3d 93 (2d Cir. 2005); *D'Alessio v. New York Stock Exchange, Inc.,* 258 F.3d 93 (2d Cir. 2001). *See also Roby,* 996 F.2d at 1356 (analogizing Lloyd's to the New York Stock Exchange).

Tropp's contention that the English courts' application of Lloyd's immunity to his so-called "equitable" counterclaims against Lloyd's precludes enforcement of the Judgment also ignores a key fact: even though Tropp did not explicitly plead a counterclaim in fraud, both the Queen's Bench Division and the Court of Appeal considered whether his claim that Lloyd's had deliberately failed to exercise its regulatory authority pleaded a cognizable claim in fraud not barred by Lloyd's partial immunity. *See* Demery Decl. Exs. 9 & 10. Thus, Tropp's claims and defenses were not dismissed solely on the basis of Lloyd's immunity; they were dismissed because, even if construed as claims in fraud, the pleadings did not allege facts from which the requisite elements of knowledge and intent could reasonably be shown or inferred. Demery Decl. Ex. 9 at ¶¶ 17, 18.[13]

Simply put, any possible question that the English judicial system provides procedures "compatible with principles of due process" has been put to rest by the First Department in *Grace*, and the Court of Appeals' decision in *CIBC,* which cites *Grace* with approval. This Court is obligated under the *Erie* doctrine to apply those rulings.[14] The persuasive force of the unbroken string of decisions from other jurisdictions rejecting "due process" objections raised by other Names (Opening Br. at n. 11) underscores the dispositive effect of *Grace* and *CIBC.*

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13 Likewise, a number of Tropp's defenses to liability, such as his contention that a purported prior settlement agreement barred Lloyd's claims, were adjudicated on the merits, rather than rejected on the basis of immunity. *See* Demery Decl. Ex. 6 ¶¶ 31, 46, 50-53, 56; Demery Decl. Ex. 8 ¶ 20.

14 This Court is bound to apply New York law as interpreted by the First Department in *Grace. Kramer v. Schloss,* 92 Fed. Appx. 815, 817 (2d Cir. 2004) ("We are bound, as was the district court, to apply the law as interpreted by New York's intermediate appellate courts ... unless we find persuasive evidence that the New York Court of Appeals, which has not ruled on this issue, would reach a different conclusion."). Since the Court of Appeals in *CIBC* expressly cited and relied on *Grace,* 100 N.Y. 2d at 222, there can be no plausible claim that *Grace* is not controlling.

Tropp cannot evade the binding force of *Grace* by claiming that his specific "due process" arguments were not expressly discussed in the First Department's opinion. Pl. Reply Mem. at 11. In *Grace*, the First Department affirmed a much lengthier decision (attached hereto as Ex. A) by the trial judge, Justice Herman Cahn. Justice Cahn's opinion expressly rejected, for example, the argument that the conclusive evidence provisions of the reinsurance contract with Equitas rendered the judgments in Lloyd's favor unenforceable on due process grounds. Ex. A at 17, 22 and 23. The First Department thus necessarily rejected all of the Names' allegations of error in the decision below, and was under no obligation to describe each rejected argument in detail.

3. Tropp Got Much More Than "A Day in Court"

While Tropp argues that he "never had his day in Court to prove he was not liable for the UK Judgment against him," Pl. Reply Mem. at 8, Tropp's own pleadings establish that he had *many* days in court, and therefore had both notice and an opportunity to present his defenses prior to the entry of the Judgment, and to present his counterclaims thereafter to four separate judges, at both the trial and appellate levels. Each of these judges wrote a reasoned opinion (together totaling almost fifty pages) addressing Tropp's legal arguments and evidence. Demery Decl. Exs. 6, 8, 9 & 10.[15]

Tropp's claim that he was denied his "day in court," despite this plethora of proceedings, boils down to an assertion that he was entitled to a full-blown trial on the merits of his claims and defenses regardless of the substantive English law that made his proffered evidence legally insufficient. *See* Pl. Reply Mem. at 9-11. It is completely ridiculous to assert, as Tropp does, that a foreign judicial system lacks procedures consistent with principles of due process because its courts, after reviewing the pleadings, briefs, affidavits and other documentary evidence, and hearing oral argument, are permitted to apply their own law and dismiss a complaint or counterclaim on the pleadings or on summary judgment. By that measure, the New York state and federal courts likewise lack procedures compatible with principles of due process. CPLR § 5304(a)(1) does not require that a foreign court hold a trial before it renders a judgment that may be enforced in a New York court; it merely requires that the defendant be given an opportunity to

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15 Moreover, the English courts bent over backwards to give plaintiff every benefit of the doubt because he was proceeding *pro se*. For example:

- Following the hearing at which it issued the Judgment against Tropp, the court indulged Tropp as a *pro se* litigant by accepting and giving "careful regard" to a lengthy letter from Tropp inviting the court "to reconsider and vary" certain matters in the Judgment. Demery Decl. Ex. 6 at ¶ 63;
- The Court denied Tropp's application to join numerous third parties as counterclaim defendants on its merits, rather than as a result of his failure to file a formal application for the joinder of various third parties to his counterclaim. Demery Decl. Ex. 9 at ¶ 27; and
- Although Tropp did not plead explicitly a claim in fraud, the court "assume[d] in Mr. Tropp's favour that he sought to make a claim in fraud ..." since such a claim, if viable, would enable Tropp to avoid Lloyd's limited statutory immunity. Demery Decl. Ex. 10 at ¶¶ 8, 28.

oppose the entry of judgment. Tropp clearly had such an opportunity, and he availed himself of it. The Recognition Act requires nothing more.

B. The Judgment is Not Based on a Cause of Action which "is Repugnant to Public Policy" of the State of New York

Tropp's reply brief ignores that the discretionary basis for non-enforcement provided by CPLR § 5304(b)(4) requires the *cause of action* underlying the foreign judgment to be repugnant to New York public policy. The fact that the substantive foreign law applied by a foreign tribunal leads to a ruling on a cause of action that is arguably different than the ruling that might be obtained under New York law does *not* render the cause of action itself repugnant.[16] Just last year, New York's Court of Appeals reaffirmed the well-established principle that recognizing a foreign judgment does not violate New York's public policy simply because the substantive foreign law (in that case, the tort law of South Korea) permitted recovery under facts that would not have supported a recovery under New York tort law. *See Sung Hwan Co. v. Rite Aid Corp.*, 7 N.Y.3d 78 (2006).[17]

The First Department in *Grace* and a sister court in this District in *Edelman* have already considered and resolved the question of whether the cause of action for breach of contract underlying the Judgment is repugnant to New York public policy, and have held that it is not. *Grace*, 718 N.Y.S.2d at 328 (concluding that "since the underlying English judgments . . . *do not violate any public policy of New York or the United States*, they are entitled to comity") (emphasis added); *Soc'y of Lloyd's v. Edelman, et al,* 2005 U.S. Dist. LEXIS 4231 at *15-16

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16 Tropp mischaracterizes Lloyd's position by asserting that, "Lloyd's conclusorily states that New York contract law and UK Lloyd's law are the same as it has done in the whole line of US Lloyd's cases." (Pl. Reply Mem. at 11) Lloyd's has never asserted that New York contract law and English contract law are the same in all respects, nor does the Recognition Act mandate that the law of contract in these jurisdictions be identical.

17 *See also Ackerman v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986) (reversing district court which had erroneously refused to recognize German judgment as allegedly repugnant to New York public policy because of differences in relevant substantive law, noting that the standard for non-enforcement on that ground is "high and infrequently met"). New York's refusal to treat even outcome-determinative differences in substantive law as precluding recognition of foreign judgments on public policy grounds goes back at least to Judge Cardozo's ruling in *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 110-111 (1918) that "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."

("English Judgments are enforceable and *consistent with public policy.*") (emphasis added) As noted above, the decision in *Grace* is binding on this Court under the *Erie* doctrine, and *Edelman* follows *Grace.* Tropp offers this Court no basis upon which it may distinguish or avoid *Grace* and *Edelman*, or any of the other decisions enforcing English judgments against U.S. Names.[18] Tropp cannot distinguish himself from the Names in *Grace* and *Edelman* who were found to have "effective and viable remedies in the English courts." Pl. Reply Mem. at 11. As already shown above (at 8, 9), Tropp's self-serving claim of inadequate remedies merely repackages arguments already rejected by every other court in which Names have sought to raise them.[19] Tropp's attempt to distinguish himself from other Names by virtue of his unsuccessful post-judgment assertion of counterclaims against Lloyd's ignores the fact that he chose *not* to pursue the remedies repeatedly cited by U.S. courts in holding English remedies adequate: he chose not to pursue a fraud claim against Lloyd's (although the English courts attempted to give him the benefit of the doubt on that score) and he chose not to pursue any claims against his Agents.[20] These unilateral decisions by Tropp do not render the cause of action for breach of contract underlying the Judgment repugnant to New York public policy.

Finally, Tropp contends that the cause of action on which the Judgment is based is repugnant to New York public policy because the English courts improperly rejected his argument that the insurance-law doctrine of "uberrimae fidae" provided him with a viable defense or counterclaim against Lloyd's as a matter of English law. (Pl. Reply Mem. at 12-13.)

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18 *See* Opening Br. at 20 (collecting cases expressly rejecting repugnant-to-public-policy defenses raised by Names seeking to avoid recognition of English judgments in favor of Lloyd's).

19 Indeed, both *Grace* and *Edelman* necessarily rejected any claim that the Lloyd's right to apply Names' litigation recoveries against Agents toward the Names' unsatisfied judgments rendered the remedies available against Agents inadequate, since both decisions were rendered *after* the House of Lords affirmed Lloyd's right to do so in 1999. *See Soc'y of Lloyd's v. Robinson,* 1999 WL 477643 (House of Lords, 25 March 1999)

20 The *Grace* court's discussion of effective remedies, 718 N.Y.S.2d at 328, cites *Richards*, 135 F.3d at 1296, which reads in pertinent part "We disagree with the dramatic assertion that 'the available English remedies are not adequate substitutes for the firm shields and finely honed swords provided by American securities law.' ...The Names have recourse against both the Member and Managing Agents for fraud, breach of fiduciary duty, or negligent misrepresentation. Indeed, English courts have already awarded substantial judgments to some of the other Names."

Once again, Tropp asks this Court to second-guess the substantive rulings of the English courts, but even an erroneous application of English law on this issue would not render the underlying cause of action repugnant to New York's public policy.[21]

C. Enforcement of the Judgment Pursuant to the Recognition Act Does Not Violate the U.S. Constitution

Tropp's reply brief repeats the remarkable contention that, to the extent the Recognition Act permits recognition of the Judgment, the Recognition Act violates the Due Process clause of the Fifth Amendment. Pl. Reply Mem. at 13-14. Tropp does not explain how such an "as applied" constitutional challenge to the statute could possibly be supported by the English courts' rulings, on motions to dismiss and for summary judgment, that Tropp's defenses and counterclaims were insufficient as a matter of English law. CPLR §§ 5303, 5304(a)(1). Nothing in either *Boddie v. Connecticut*, 401 U.S. 371 (1971) or *Hilton v. Guyot,* 159 U.S. 113 (1895) holds that the Due Process Clause requires that a judgment, either foreign or domestic, must be rendered following a "trial on the merits," rather than a motion to dismiss or a motion for summary judgment. *See, e.g., Boddie,* 401 U.S. at 378 (in requiring notice and an opportunity to be heard, the due process clause does not fix the form of the hearing or proceeding at which that opportunity is provided).

The Supreme Court has consistently rejected contentions that an unsuccessful litigant's due process rights under the 14th Amendment were violated by the alleged misapplication of state law by a state court. *See Engle v. Isaac*, 456 U.S. 107, 120-121 (1982); *Gryger v. Burke,* 334 U.S. 728, 731 (1948). As the Court observed in *Gryger*, "We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous

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21 Tropp's generic complaints about alleged "non-mutuality of rights and remedies" under English insurance law (Pl. Reply Mem. at 13) make no sense, and are in any event unsupported by any citation of any kind. He does not, and could not, for example, contend that he should not be liable for the Equitas premium because Equitas has failed to fully honor any of its contractual obligations to provide reinsurance to Tropp.

decision by a state court on state law would come here as a federal constitutional question." 334 U.S. at 731.

The Supreme Court has likewise rejected attempts to repackage dissatisfaction with unfavorable substantive law as procedural due process claims. *See Lindsey v. Normet*, 405 U.S. 56, 68 (1972) (summary eviction procedure did not violate tenants' federal due process rights by refusing to permit submission of certain evidence when the state's substantive landlord-tenant law did not regard the facts sought to be established to constitute a valid defense to eviction).

In sum, nothing in the Due Process Clause of either the 5th or 14th Amendment requires a U.S. court to review the substantive rulings of a sister or foreign court on the merits prior to recognizing that court's judgments.

CONCLUSION

For all the reasons stated above and in its opening papers, Lloyd's respectfully requests that this Court grant its Motion, dismissing the Complaint in its entirety, and deny plaintiff's motion for partial summary judgment. Since Tropp has not even suggested that he could cure the fatal flaws in the Complaint by amendment and it is in any event clear that amendment would be futile, dismissal should be with prejudice and without leave to amend.

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