Tab 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THE SOCIETY OF LLOYD'S Plaintiff, v. ROBERT C. BLACKWELL, ET AL. Defendants.	Civil No. 02CV448-J (AJB) **ORDER:** **(1) GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT,** [Doc. No. 38]; **(2) DENYING PLAINTIFF'S MOTION TO STRIKE,** [Doc. No. 98]; and **(3) DENYING DEFENDANTS' MOTION TO STRIKE.** [Doc. No. 119]

Before this Court are three substantive motions: two summary judgment motions filed by The Society of Lloyd's ("Lloyd's") and a motion to dismiss a counterclaim also filed by Lloyd's. The two summary judgment motions are against "the Blackwell defendants,"[1] [Doc. No. 38], and "the Johnston defendants," [Doc. No. 42]. The motion discussed herein relates to the motion for summary judgment against the Blackwell Defendants. The Court already denied the Blackwell Defendants' request to continue Lloyd's motion for summary judgment and engage in further

[1] The Blackwell Defendants are Robert C. Blackwell, Samme Jo Brady, John R. Dougery, Joseph Melvin Gagliardi, Harry Walter Gorst, Frederick Gordon Graeber, Michael Calvin Hirsch, Ivars Ralph Janicks, William Dobson Kilduff, Jane Elizabeth Lamb, Donald Rudolph Laub, Geoffrey O. Mavis, William Fenton Miller Jr., Robert Marshall Morton, Charles Webb Ott, Ronald George Speno, Stephen John Wilsey and Peter Francis Zinsli.

discovery pursuant to Rule 56(f). Having reviewed the papers submitted by both parties, the Court has determined that the issues presented herein are appropriate for decision without oral argument. *See* Civil Local Rule 7.1(d)(1). For the reasons addressed below, the Court GRANTS Lloyd's motion for summary judgment against the Blackwell Defendants and DENIES Plaintiff's and Defendants' motions to strike.

Undisputed Facts

Pursuant to the *Lloyd's Acts* 1871-1982 ("Lloyd's Acts"), the British Parliament granted Lloyd's the authority to regulate and oversee the English insurance market. (SSUMF ¶ 1). Lloyd's itself is not an insurer and does not insure risks. (*Id.*). Rather, insurance underwriters, which are organized into groups known as "syndicates," offer insurance and reinsurance of risks. (*Id.* ¶ 2). Each syndicate is controlled by a Managing Agent who is responsible for attracting capital to insure the underwritten risks and supervising all underwriting activities . (*Id.* ¶ 6). *See Richards v. Lloyd's of London*, 135 F.3d 1289, 1291 (9th Cir. 1998).

The money used to fund each syndicate comes from outside investors, commonly known as "Names." (SSUMF ¶ 2). Prior to becoming involved as a Name in the Lloyd's market, one must execute a contract known as the "General Undertaking." (*Id.* ¶ 5). Under this Agreement, each Name agrees (1) to comply with the provisions of the Lloyd's Acts, as well as any bylaws or regulations promulgated thereunder in connection with his or her membership of and underwriting at Lloyd's; and (2) to submit any dispute arising out of or relating to membership of and underwriting insurance business at Lloyd's for resolution by the English court pursuant to English law. (*Id.* ¶ 5, 6).

The Names do not deal directly with Lloyd's or any of the underwriters, but must rely on Members' Agents for investment advice within the market. *See Richards*, 135 F.3d at 1292. Despite being a passive investor, each Name "accepts a certain amount of the premium paid for an insurance policy and is also assigned a correspondent *pro rata* share of the insurance risk." *Soc'y of Lloyd's v. Webb*, 156 F. Supp. 2d 632, 634 (N.D. Tex. 2001). Although each Name is only responsible for a share of the syndicate's losses, "his [or her] liability is unlimited for that share." *Richards*, 135 F.3d at 1292. Nonetheless, so long as the amount paid for the *pro rata*

share of expenses and claims does not exceed the amount of premium and earned investment income, an investment in the Lloyd's market can be profitable. *See Webb*, 156 F. Supp. 2d at 634. As a result, approximately 10,000 United States residents, including the Blackwell Defendants, found underwriting in Lloyd's market to be an attractive investment opportunity and became Names in the mid 1980s. (SSUMF ¶ 3). *See Webb*, 156 F. Supp. 2d at 635.

Prior to the Blackwell Defendants' entry into the Lloyd's market, Lloyd's experienced an increase in asbestos and toxic tort claims in the early 1980s. *Id.* Apparently, Lloyd's never distributed the information about these claims to the Names. *Id.* Concurrent with the rise of these claims, Lloyd's successfully lobbied Parliament for passage of the Lloyd's Act, an act "grant[ing] Lloyd's and its governing body extraordinary bylaw-making powers and immunity." *Id.* In return, Lloyd's agreed to "provid[e] better quality information to prospective Names." *Id.* By the early 1990s, Lloyd's market incurred substantial losses, totaling approximately £8 billion. *Id.* Several Names either refused or became unable to satisfy their obligations to policyholders. (SSUMF ¶ 8).

Instead, numerous American Names, including many of the Blackwell Defendants, filed claims across the United States alleging fraud against Lloyd's based upon Lloyd's purported failure to disclose the growing number of asbestos claims. *See, e.g., Richards*, 135 F.3d at 1292; *Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285 (11th Cir. 1998); *Haynsworth v. Lloyd's of London*, 121 F.3d 956 (5th Cir. 1997); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Bonny v. The Soc'y of Lloyd's*, 3 F.3d 156 (7th Cir. 1993); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992). In *every* case, however, each circuit court of appeals, including the Ninth Circuit, enforced the forum selection and choice of law provisions and dismissed the actions.

In order to resolve the growing crisis relating to the "huge underwriting losses that threatened to destroy the London insurance market," *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 478 (7th Cir. 2000), Lloyd's established the Reconstruction and Renewal ("R&R") Plan in 1996. (SSUMF ¶ 8). Under the R&R plan, Lloyd's required Names to purchase reinsurance for any outstanding obligations prior to 1993 from a newly formed company, Equitas Reinsurance Ltd.

("Equitas"), through an appointed substitute agent. (*Id.* ¶ 9). While preserving the right of insureds "to collect the proceeds from their insurance policies," the reinsurance also "protect[ed] the names from unlimited personal liability for the underwriting losses." *Ashenden*, 233 F.3d at 478. According to Lloyd's, the cost of reinsuring each Name's pre-1993 liabilities was individually calculated and charged to a given Name. (SSUMF ¶ 9).

In accordance with Lloyd's by-law powers under the Lloyd's Acts, Lloyd's appointed a substitute agent to execute the Equitas reinsurance agreement on behalf of the Names. *See Webb*, 156 F. Supp. 2d at 636. Consequently, the Blackwell Defendants were contractually obligated to pay a premium to Equitas. In addition to the mandatory Equitas reinsurance, the R&R plan provided an *optional* offer of settlement ("Settlement Offer") to each Name with pre-1993 liabilities to terminate litigation and assist the Names with satisfying their obligations. (SSUMF ¶ 9, 10). The Settlement Offer included individually calculated credits that were to be used to offset any underwriter liabilities, including the Equitas premium. (*Id.* ¶ 9). Less than five percent of all Names, including the Blackwell Defendants, refused to accept the optional Settlement Offer. (*Id.* ¶ 12). Moreover, the Blackwell Defendants refused to make payments under the mandatory Equitas agreement, which were due no later than September 30, 1996. (*Id.*).

The contract with Equitas contained two significant and controversial provisions, the "pay now, sue later" and "conclusive evidence" clauses. First, the Equitas agreement precluded Names from bringing actions they might have had against Lloyd's as a set-off or counterclaim to the premium owed to Equitas. This is known as the "pay now, sue later" clause. *See Ashenden*, 233 F.3d at 478. Secondly, the reinsurance contract contained the "conclusive evidence" clause, which provided that Lloyd's determination of the Equitas premium was conclusive in the absence of manifest error. *Id.* The Blackwell Defendants contend that the "pay now, sue later" provision prevented them from raising their fraud defense and allege that payment of the premium to Equitas will render them financially unable to assert any separate fraud claims against Lloyd's. (*Id.* ¶ 19). Despite the existence of the "pay now, sue later" clause, the Names

were in fact permitted to file separate actions for fraud. *See Soc'y of Lloyd's v. Wilkinson & Others* (Q.B. 1997).

Because the Blackwell Defendants refused to comply with the Equitas agreement and pay their premiums, Lloyd's brought actions ("English Actions") against Names, including the Blackwell Defendants, in England in late 1996. (SSUMF ¶ 14). In the English Actions, Lloyd's sought payment of the Equitas premiums, as well as any unpaid interest and costs. (*Id.* ¶ 17). Each of the Blackwell Defendants received a writ of summons and acknowledged service of the summons. (*Id.* ¶ 16).

In response to Lloyd's claims, the Blackwell Defendants raised the following defenses: (1) that Lloyd's lacked the regulatory authority under the Lloyd's Acts to mandate that all Names purchase reinsurance coverage from Equitas; (2) that Lloyd's lacked the regulatory authority under the Lloyd's Acts; (3) that Names were entitled to rescind their membership of Lloyd's as a result of alleged fraud in the inducement of their membership of, or underwriting at, Lloyd's; (4) that Names were entitled to litigate claims of fraud in the inducement of their membership of, or underwriting at, Lloyd's as a defense or setoff to their obligation to pay the Equitas premium; and (5) that Names were not bound by certain provisions of the Equitas reinsurance contract, i.e., the "conclusive evidence" clause and the "pay now, sue later" clause. (*Id.* ¶ 19-24). The English courts considered and rejected all of the above-listed arguments and entered judgments for Lloyd's on various dates in 1998. (*Id.* ¶ 18-24).

Despite upholding the validity of the "pay now, sue later" clause, the English courts ruled that the Names were free to file fraud claims in a *separate* proceeding. *See Soc'y of Lloyd's v. Wilkinson & Others* (Q.B. 1997). Several Names other than the Blackwell Defendants brought separate fraud actions in England alleging that Lloyd's failed to disclose the nature and extent of the market's liability for asbestos-related claims. *See Soc'y of Lloyd's v. Jaffrey*, 2000 WL 1629463 (Q.B. 2000), *aff'd* 2002 WL 1654876. The Names, however, failed to prove that Lloyd's acted fraudulently. *See id.*

///

///

Although payment of the Equitas premium was not a condition precedent to bringing a separate action against Lloyd's, Defendants chose not to participate in *Jaffray*. Because the Names lost their suit in *Jaffray*, the Blackwell Defendants allege that English law does not provide an "effective remedy against Lloyd's for fraudulent non-disclosure because English law does not recognize Lloyd's duty to disclose material facts of which Lloyd's had exclusive knowledge." (Doc. No. 76 ("Opp'n"), p. 8-9, fn. 7). Despite Defendants' contention, English law does recognize a remedy for fraud. The Names in *Jaffray*, however, "failed to prove that Lloyd's did not believe the representations to be true or that they either knew that they were or became untrue or were reckless as to whether they were true or untrue." *Jaffray* at ¶ 587.

All appeals involving the judgments against the Blackwell Defendants have been exhausted. (SSUMF ¶ 25). The Blackwell Defendants, however, refuse to satisfy the judgments. Accordingly, on March 8, 2002, Lloyd's filed a complaint in this Court to enforce the English judgments pursuant to the Uniform Foreign Money-Judgments Recognition Act, Cal. Civ. Proc. Code §§ 1713 et seq. [Doc. No. 1]. In fact, Lloyd's has filed identical actions across the Nation. *See Soc'y of Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002); *Ashenden*, 233 F.3d 473; *Soc'y of Lloyd's v. Grace*, 278 A.D.2d 169 (N.Y. App. Div. 2000). On August 13, 2002, Plaintiff filed a motion for summary judgment against the Blackwell Defendants. [Doc. No. 38]. For the foregoing reasons, this Court GRANTS Plaintiff's motion for summary judgment and enforce the foreign money-judgments.

Discussion

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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." Fed. R. Civ. P. 56(c). One of the principal purposes of the rule is to dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

A moving party who bears the burden of proof at trial is entitled to summary judgment only when the evidence indicates that no genuine issue of material fact exists. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 324. If the moving party does not bear the burden of proof at trial, he may discharge his burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the non-moving party's case." *Id.* at 325. The moving party is not required to produce evidence showing the absence of a genuine issue of material fact on such issues, nor must the moving party support its motion with evidence negating the non-moving party's claim. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 885 (1990). Instead, "the motion may, and should, be granted so long as whatever is before the District Court demonstrates that the standard for the entry of judgment, as set forth in Rule 56(c), is satisfied." *Id.* (quoting *Celotex*, 477 U.S. at 323).

Once the moving party demonstrates that either no genuine issue of material fact remains or that there is an absence of evidence to support the non-moving party's case, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). It is not enough for the party opposing a properly supported motion for summary judgment to "rest on mere allegations or denials of his pleadings." *Id.* Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250.

Application

Following a review of the papers submitted by both parties, Lloyd's has demonstrated that no genuine issue of material fact remains. Similarly, the Blackwell Defendants have not met their burden in establishing the existence of material facts. Accordingly, the Court may make a determination as a matter of law. The question before this Court is whether the English judgments should be enforced pursuant to the Uniform Foreign Money-Judgments Recognition Act ("UFMJRA"). The Blackwell Defendants, however, contend that the English judgments should not be enforced because (1) the choice of law and forum selection clauses located within the General Undertaking violate state substantive law; (2) they were denied due process under

California standards; and (3) the cause of action underlying the English judgments is repugnant to California public policy. (Opp'n at 10-13).

Regarding the first argument, the Blackwell Defendants raise issues similar to those considered by the Ninth Circuit in *Richards*. Specifically, the Opposition alleges that the forum selection and choice of law provisions violate the public policy of California, as reflected in the anti-waiver provisions contained in Cal. Civ. Code § 3513 and Cal. Corp. Code § 25701. (Opp'n at 13-14). Such provisions prohibit the waiver of any "law established for a public reason," Cal. Civ. Code § 3513 (West 1997), and void any provision "waiv[ing] compliance" with California securities laws. Cal. Corp. Code § 25701 (West 1977).

In support of the due process argument, the Opposition alleges that the Blackwell Defendants' inability to obtain discovery and raise affirmative defenses violated procedural due process. (Opp'n at 21-23). Regarding the public policy argument, the Opp'n alleges that public policy protects California citizens from enforcement of unconscionable contracts, as codified in Cal. Civ. Code § 1670.5(a), and safeguards investors from fraudulent investment schemes. (Opp'n 19-21; 13-14). State and federal courts have already recognized English judgments against U.S. Names under identical circumstances construing statutes substantively identical to California's enactment of the UFMJRA. *See Soc'y of Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002); *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000); *Soc'y of Lloyd's v. Grace*, 278 A.D.2d 169 (N.Y. App. Div. 2000).

A. Choice of Law and Forum Selection Clauses

In an attempt to relitigate the holding in *Richards*, the Opposition alleges that the forum selection and choice of law provisions infringe upon rights granted by Cal. Civ. Code § 3513 and Cal. Corp. Code § 25701. (Opp'n at 13-14). Specifically, section 3513 states that "a law established for a public reason cannot be contravened by a private agreement," Cal. Civ. Code § 3513 (West 1997), while section 25701 voids any provision "waiv[ing] compliance" with California securities laws. Cal. Corp. Code § 25701 (West 1977). Although the Ninth Circuit upheld the validity of the choice of law and forum selection provisions and dismissed the fraud actions against Lloyd's, *Richards*, 135 F.3d at 1297, the Blackwell Defendants argue that "[t]he

Richards court ruling was a matter of federal procedural law," and has "no res judicata or collateral estoppel effect under California state substantive law." (Opp'n at 12).

The Blackwell Defendants find support for this argument in a California appellate case where franchisees sought to invalidate a forum selection clause in a contract with a franchisor that had been enforced by a federal district court. *See Wimsatt v. Beverly Hills Weight Loss Clinics Int'l, Inc.*, 38 Cal. Rptr. 2d 612, 613 (Ct. App. 1995). There, the court held that the franchisees were not collaterally estopped from challenging the forum selection clause in state court. *Id.* at 619. Moreover, the court ruled that the only issue determined by the federal district court involved the franchisees' right to sue in *federal* court, such that the plaintiffs failed to meet their burden under federal procedural law. *Id.* at 615. As a result, the court concluded that the franchisor bears the burden of demonstrating that a forum selection clause in a franchise agreement does not violate the anti-waiver provision of California's Franchise Investment Law, Cal. Corp. Code § 31512.[2] *Id.* at 613.

Wimsatt, however, is distinguishable from the current action. There, the issue before the court concerned the plaintiff's ability to adjudicate the validity of a forum selection clause, not the recognition of a foreign money-judgment. Unlike *Wimsatt*, the present action does not involve the Blackwell Defendants' ability to bring an action in a California court seeking to vindicate fundamental rights effectively waived in a forum selection clause.[3] Even if the Defendants had not contractually agreed to apply English law, the fact remains that a foreign judgment was entered in favor of Lloyd's by the English court. As a result, the choice of law and forum selection clauses of the General Undertaking are not relevant to the present enforcement action.

---

[2] This statute "void[s] any provision of a franchise agreement which forces a franchisee to give up any of the protections afforded by the law." *Id.* at 1514.

[3] In addition to *Wimsatt*, Defendants reliance on *Hall* and *AOL* is also misplaced. The issue in both those cases involved the validity of choice of law and forum selection clauses, rather than enforcement of foreign money-judgments. *See generally Hall v. Superior Court*, 197 Cal. Rptr. 757 (Ct. App. 1983); *AOL v. Superior Court*, 108 Cal. Rptr. 2d 699 (Ct. App. 2001).

Moreover, contrary to the Blackwell Defendants' insistence, the Ninth Circuit already ruled that the differences between English and U.S. law do not violate public policy embodied in state and federal securities law. *Richards*, 135 F.3d at 1294-96. Accordingly, the Court adheres to the Ninth Circuit's enforcement of the forum selection and choice of law clauses and limits its analysis to the recognition of the foreign money judgments. Specifically, the Court restricts its inquiry to (1) whether the English system comports with due process, and (2) whether the cause of action underlying the English judgments is repugnant to California public policy.

B. Uniform Foreign Money-Judgment Recognition Act

The UFMJRA ensures that United States money-judgments are recognized abroad because enforcement in several foreign nations depends upon reciprocity. *See* Jay M. Zitter, Annotation, *Construction and Application of Uniform Foreign Money-Judgments Recognition Act*, 88 A.L.R. 5th 545, 561 (2001). Accordingly, the majority of states have adopted the UFMJRA. Many states, including California, Texas, and Illinois, utilize substantially similar, if not identical, language. *See* Cal. Civ. Proc. Code §§ 1713 *et seq.* (West 1982); Tex. Civ. Prac. & Rem. Code Ann. § 36.001 *et seq.* (Vernon 1997); 735 Ill. Comp. Stat. Ann. 5/12-618 *et seq.* (West 1992).

Because jurisdiction in this Court rests upon diversity of citizenship, the substantive law of California should be applied to determine the effect of the foreign judgment. *See Bank of Montreal v. Kough*, 430 F. Supp. 1243, 1246 (N.D. Cal. 1977) (citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)). Under California's adoption of the UFMJRA, "[a] foreign judgment [that is final and conclusive] is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit." Cal. Civ. Proc. § 1713.2 (West 1982). A foreign judgment is not conclusive, however, if "[t]he judgment was rendered under a *system* which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." *Id.* § 1713.4(a)(1) (emphasis added). Moreover, a foreign judgment need not be recognized if "[t]he cause of action or defense on which the judgment is based is repugnant to the public policy of [California]." *Id.* § 1713.4(b)(3).

The Ninth Circuit has not resolved who carries the burden in foreign judgment enforcement actions. *See Pahlavi*, 58 F.3d at 1409 (holding that "while the issue is extremely interesting, we need not resolve at this time . . . whether [the defendant] had to put in sufficient evidence to sustain a defense or whether [the defendant] had only to point to weaknesses in the [plaintiff's] case . . .."). Nonetheless, the court noted that "a strong argument can be made that a claimed lack of due process should be treated as a defense[,] . . . [which] would be consistent with the view of the leading commentary." *Id.* (citing 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1271 (2d ed. 1990)). Accordingly, the Court finds that the Blackwell Defendants carry the burden of demonstrating that the English judgments should not be enforced.

1) England's judicial system comports with due process

It is well-recognized that "a foreign judgment cannot be enforced if it was obtained in a manner that did not accord with the basics of due process." *See Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410 (9th Cir. 1995) (citing *Hilton v. Guyot*, 159 U.S. 113, 205-06 (1895)). In order for a court to enforce a foreign judgment, the judgment must come from "a *system* of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries." *Hilton*, 159 U.S. at 202 (emphasis added). Enforcement of foreign judgments should not be refused "unless a foreign country's judgments are the result of outrageous departures from our own motions of 'civilized jurisprudence.'" *British Midland Airways Ltd. ("BMA") v. Int'l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (citing *Hilton*, 159 U.S. at 205).

Cal. Civ. Proc. § 1713.4(a)(1) requires only that the *system* in which the foreign judgment was entered be "compatible with the requirements of due process of law." Applying the plain and unambiguous language of the statute, there can be little doubt that the English *system* comports with due process. The Ninth Circuit has noted that "[it] must decline, absent grave procedural irregularities or allegations of fraud, to impugn the lawfulness of the judgment of that judicial system from which our own descended." *In re Hashim*, 213 F.3d 1169, 1172 (9th Cir. 2000).

Because the United States "inherited major portions of their judicial traditions and procedure from the United Kingdom," *BMA*, 497 F.2d at 871, the English system "has procedures and goals which closely parallel our own." *In re Hashim*, 213 F.3d at 1172 (noting that "it could not be claimed that the English system is any other than one whose 'system of jurisprudence [is] likely to secure an impartial administration of justice'"). In fact, the origins of due process of law are located in English law. *See Dent v. West Virginia*, 129 U.S. 114, 123 (1889); *Hurtado v. California*, 110 U.S. 516, 528-32 (1884). As a result of the United States' deep roots in the English system, United States courts "are hardly in a position to call the Queen's Bench a kangaroo court." *BMA*, 497 F.2d at 871. *See also Ashenden*, 233 F.3d at 477 (holding that "whether England has a civilized legal system . . . is not open to doubt").

Similar to the defendants in *Ashenden* and *Webb*, the Blackwell Defendants wish to ignore the actual language of the UFMJRA.[4] Accordingly, they contend that the appropriate focus is that of the particular foreign judgment, rather than the system as a whole. (Opp'n at 15-17). Specifically, the crux of the Blackwell Defendants' argument is that the English courts' enforcement of the "pay now, sue later" and "conclusive evidence" clauses located within the Equitas Agreement deprived the Blackwell Defendants of their due process.

Pursuant to the "pay now, sue later" clause, the Blackwell Defendants were precluded from bringing actions they might have had against Lloyd's as a set-off or counterclaim to the premium owed to Equitas. Despite this limitation on the Blackwell Defendants' ability to assert fraud as a defense, Names were permitted to file fraud claims in *separate* proceedings. *See, e.g., Jaffrey*, 2000 WL 1629463 (Q.B. 2000), *aff'd* 2002 WL 1654876. Under the "conclusive evidence" provision, absent "manifest error," the amount of the assessment against the Blackwell Defendants is conclusive. According to the Opposition, the "cumulative effect" of both provisions precluded the Blackwell Defendants from obtaining discovery regarding the

---

[4] It should be noted that the particular English proceedings questioned by the Blackwell Defendants were found by both the Seventh and Fifth Circuits to have comported with due process. *See Ashenden*; 233 F.3d at 476-77; *Soc'y of Lloyd's v. Turner*, 303 F.3d 325, 329-30 (5th Cir. 2002).

amount of Lloyd's assessment, challenging the calculation of this amount, and asserting their fraud defense. (Opp'n at 10, 21-22). *See Webb*, 156 F. Supp. 2d at 639.

In furtherance of this argument, the Blackwell Defendants allege that the substantive differences between California and English law constitute a denial of the Blackwell Defendants' due process, such that England's application of due process in this particular proceeding must comport with the requirements of due process in California. (Opp'n at 15-16). Such a "retail approach" was explicitly rejected by the Seventh Circuit in *Ashenden*. 233 F.3d at 478. The Blackwell Defendants, however, argue that California does not adhere to the *Ashenden* approach because *Ashenden* did not address "whether the [foreign] judgments offend[ed] California public policy interests." (Opp'n at 16). Although California law does require that the underlying cause of action not be repugnant to public policy, the Seventh Circuit did not address that issue because the plaintiffs in *Ashenden* abandoned that claim on appeal. 233 F.3d at 480.

In *Ashenden*, where the Names attempted to avoid recognition of English judgments in Illinois, Judge Posner noted that "[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 . . .." *Id.* at 477 (citation omitted). If such a "retail approach" was adopted for recognition of foreign judgments, every foreign court system would need to "adopt[] every jot and title of American due process." *Id.* at 478. Such an approach would "be inconsistent with providing a streamlined, expeditious method for collecting [foreign] money judgments . . .." *Id.* at 477.

Due process in foreign judgment enforcement actions merely requires that the "foreign procedures are 'fundamentally fair' and do not offend against 'basic fairness.'" *Id.* The *Ashenden* court labeled this the "international concept of due process." *Id.*; *see also Webb*, 156 F. Supp. 2d at 641. This Court, as did the courts in *Ashenden* and *Webb*, finds that the English courts' interpretation of the "pay now, sue later" and "conclusive evidence" clauses did not violate the "international concept of due process."

Due to the immense increase in asbestos-related claims, it was essential that Lloyd's procure sufficient funding from the Names in a timely manner. Without the "pay now, sue later" clause, the Names could have delayed the funding through endless litigation. *See Ashenden*, 233

F.3d at 479. Pursuant to the General Undertaking, the Blackwell Defendants "authorized Lloyd's to take measures unilaterally to prevent the society from falling," *Ashenden*, 233 F.3d at 479, including the provisions contained within the Equitas Agreement. In essence, by executing the General Undertaking, the Blackwell Defendants waived procedural due process. *See D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972) (holding that "[t]he due process rights to notice and hearing prior to a civil judgment are subject to waiver").

Furthermore, the Blackwell Defendants received numerous procedural safeguards in accordance with "international due process." The Blackwell Defendants were properly served with a writ of summons concerning the English Actions. (SSUMF ¶ 15). Following receipt of such summons, the Blackwell Defendants filed an acknowledgment of service and appeared in English court to contest Lloyd's claims. (*Id.* ¶ 16). The Blackwell Defendants presented numerous defenses to the English court and challenged Lloyd's broad authority. (*Id.* 19-24). Additionally, the Blackwell Defendants were permitted to file an appeal contesting the trial court's enforcement of the "pay now, sue later" and "conclusive evidence" clauses. Because the Blackwell Defendants received proper notice and had ample opportunities to be heard, the Blackwell Defendants were not deprived due process of law.

2) **The English judgments are not repugnant to California public policy**

Pursuant to Cal. Civ. Proc. Code § 1713.4(b)(3), it is within the Court's *discretion* to decline recognition foreign money-judgments if "[t]he *cause of action* or defense on which the judgment is based is repugnant to the public policy of [California]." An underlying cause of action is contrary to public policy if it "violate[s] some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.'" *Metro. Creditors Serv. of Sacramento v. Sadri*, 19 Cal. Rptr. 2d 646, 648 (Ct. App. 1993).[5] The Ninth Circuit has noted that "the [public policy] exception should be interpreted narrowly, [] for 'few

[5] Although *Metro.* dealt with California's application of Nevada law, the court recognized that, like sister state causes of actions, foreign judgments are subject to the public policy exception. 19 Cal. Rptr. 2d at 648. Unlike sister state judgments, foreign judgments are not entitled to full faith and credit. *Id.*

judgments fall in the category of judgments that need not be recognized because they violate the public policy of the forum.'" *In re Hashim*, 213 F.3d at 1172. *See also Webb*, 156 F. Supp. 2d at 643 (stating that "the level of contravention of [state] law has to be high" in order to "deny a judgment based on a public policy argument"). Accordingly, California courts have found foreign judgments and causes of actions to be in violation of public policy in very limited circumstances.

In *Pentz*, a California appellate court held that a Mexican judgment awarding alimony to a divorced wife for a period following her remarriage was "manifestly contrary to California public policy." *Pentz v. Kuppinger*, 107 Cal. Rptr. 540, 545 (Ct. App. 1973). There, pursuant to former Cal. Civ. Code § 139, a husband was no longer liable for his wife's support upon her remarriage.[6] *See id.* Moreover, in *Metro.*, where the plaintiff attempted to bring a cause of action in California under a Nevada law allowing licensed persons to recover gambling debts, the court held that the Nevada law violated California's strong public policy against enforcement of gambling debts. 15 Cal. Rptr. 2d at 647-48. Similarly, a California appellate court held that an action for recovery of gambling losses resulting from alleged cheating was barred by strong public policy. *See Kelly v. First Astri Corp.*, 84 Cal. Rptr. 2d 810, 826-27 (Ct. App. 1999). Nonetheless, no court in the Ninth Circuit nor California has held a contract claim to be repugnant to public policy.[7]

In an attempt to urge this Court to utilize its *discretion* to not recognize the English judgments, the Blackwell Defendants allege that (1) public policy demands that investors be protected from fraudulent investment schemes; and (2) public policy protects California citizens from enforcement of unconscionable contracts. (Opp'n at 19). Although the Blackwell Defendants accurately portray the public policy of California regarding fraud, their focus on this policy is somewhat misplaced. The Blackwell Defendants' arguments relating to the non-

---

[6] This statute has since been modified. *See* Cal. Fam. Code § 3651 (West 1994).

[7] *See Bank of Montreal v. Kough*, 430 F. Supp. 1243 (N.D. Cal. 1977) (recognizing a foreign money-judgment finding the defendant in breach of a guarantee contract). There, however, Cal. Civ. Proc. § 1714.4(b)(3), was not at issue.

waivable protections of consumers from fraud, as codified in Cal. Civ. Code § 3513 and Cal. Corp. Code 25701, are irrelevant. *See Turner*, 303 F.3d at 333.

The underlying *cause of action* in England was breach of the Equitas reinsurance contract. Under the contract, executed by a substitute agent on behalf of the Blackwell Defendants, Lloyd's sought payment of the unpaid premium. Such contract claims do not violate the public policy of California. *See Turner*, 303 F.3d at 333 (holding that "a breach of contract action is not contrary to Texas public policy); *Grace*, 278 A.D.2d at 169 (concluding without analysis that "the underlying English judgments . . . do not violate any public policy of New York or the United States"). Public policy requires enforcement of contracts "entered into freely and voluntarily by parties who have negotiated at arms length." *See Nedlloyd Lines B.V. v. Superior Court*, 11 Cal. Rptr. 2d 330, 332 (Cal. 1992).

The Blackwell Defendants, however, claim that the Equitas contract violates public policy because it is "unconscionable" and "unduly oppressive." (Opp'n at 19-21). If a court determines that a contract or any clause is unconscionable, "the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Cal. Civ. Code § 1670.5(a) (West 1985). The Blackwell Defendants, however, have failed to provide this Court with any precedent for non-recognition of a foreign judgment based upon an underlying unconscionable contract.

Moreover, the Ninth Circuit has already held that the choice of law and forum selection provisions found in the General Undertaking were valid. *See Richards*, 135 F.3d at 1297. In the General Undertaking, the Blackwell Defendants explicitly agreed to have English law govern any and all disputes with Lloyd's. In *Richards*, the court ruled that the differences between English and U.S. law did not violate public policy embodied in state and federal securities law. 135 F.3d at 1294-96. Despite these differences, the court noted that English law provided adequate remedies to the Names. *Id.* Consequently, the Blackwell Defendants' claims that the

application of English law violates public policy were already rejected by the Ninth Circuit.[8] Because the Blackwell Defendants have failed to meet their burden, the Court GRANTS Lloyd's motion for summary judgment and enforces the foreign money-judgments.

C. **Additional Matters**

1) **Lloyd's Motion to Strike Defendants' Declarations**

In support of the Blackwell Defendants' opposition to Lloyd's motion for summary judgment, the Blackwell Defendants included the declarations of defendants Blackwell, Brady, Dougery, Freeman, Gagliardi, Gorst, Graeber, Grippo, Hirsch, Kilduff, Lamb, Laub, Mavis, Miller, Morton, Ott, Speno, and Zinsli. Lloyd's filed a motion to strike the above-listed declarations on the grounds that they are irrelevant under Fed. R. Evid. 401, consist of allegations made without personal knowledge, constitute hearsay, and are comprised of legal conclusions, argument, and opinions. (Pls. ['] Mem. in Supp. Of Mot. To Strike at 2). "[O]pposing affidavits shall be made on personal knowledge, shall set forth such as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). Because the facts contained in the Blackwell Defendants' opposing affidavits are irrelevant in the present action and fail to demonstrate the existence of any genuine issues for trial, this Court need not rely upon the information contained therein.

2) **Defendants' Motion to Strike Lloyd's Citation to Unpublished Cases**

Regarding the Blackwell Defendants' motion to strike citations to unpublished cases pursuant to Ninth Circuit Rule 36-3, this Court has not relied on any unpublished decisions as precedent. Although the Blackwell Defendants allege that *Webb* and *Turner* are unpublished, both cases have been published. Nonetheless, each case is cited by the Court as persuasive

---

[8] "Enforcement of a judgment of a foreign court based on the law of the foreign jurisdiction does not offend the public policy of the forum simply because the body of foreign law is more favorable to the judgment creditor than the law of the forum would have been had the original suit been brought at the forum. The very idea of a law of conflicts of law presupposes differences in the laws of various jurisdictions and that different initial results may be obtained depending upon whether one body of law is applied or another." *Turner*, 303 F.3d at 332-33.

authority, not binding precedent. Similarly, concerning the Blackwell Defendants' motion to dismiss Lloyd's letter of submission of an unpublished order from the District of Utah, such request is irrelevant due to the fact the order has not been cited by this Court.

Conclusion

For the reasons set forth above, the Court GRANTS Lloyd's motion for summary judgment, enforces the foreign money-judgments and DENIES the motions to strike as moot.

IT IS SO ORDERED.

Dated: 2-24-03

NAPOLEON A. JONES, JR.
United States District Judge

cc: Magistrate Judge Battaglia
All Counsel of Record