

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI**

THE SOCIETY OF LLOYD’S,)

Plaintiff,)

v.)

Case No. 4:03CV1113 HEA

ROBERT W. FUERST, HORD HARDIN,)

HAROLD F. ILG, WALTER A. KLEIN,)

MEADE M. McCAIN, JOHN J.)

SHILLINGTON, CYNTHIA J.)

TODOROVICH and MICHAEL B.)

TODOROVICH)

Defendants.)

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF ITS
MOTION FOR A PROTECTIVE ORDER**

This Memorandum is submitted in support of Lloyd’s Motion for a Protective Order preventing counsel for defendants Robert Fuerst, Walter Klein, Meade McCain, Hord Hardin, Michael Todorovich and Cynthia Todorovich from conducting a deposition of Nicholas Demery. Lloyd’s is requesting a protective order from the Court because Defendants’ request to depose Mr. Demery is premature, unnecessary and defendants’ counsel has not provided reasonable notice to Lloyd’s Chicago counsel or to Mr. Demery, who resides in England. Additionally, Lloyd’s is requesting a protective order because defendants are not entitled to conduct discovery about well-established facts in an attempt to re-litigate issues which have already been decided by the English Courts. In seeking Mr. Demery’s deposition, defendants’ counsel also ignores the fact that defendants’ discovery request is contrary to their agreement that English Courts would hear “all disputes relating to their membership at Lloyd’s” pursuant to their signed General Undertakings. Accordingly, Lloyd’s requests that this Court enter a protective

order preventing defendants from taking the deposition of Mr. Demery so that this case may proceed to a decision on Lloyd's Motion for Summary Judgment.

I. Defendants Gave Notice To Lloyd's of Mr. Demery's Deposition Less Than One Week Before They Scheduled It to Take Place

Defendants' Notice of Deposition of Mr. Demery states that it is set for February 20, 2004, in St. Louis. (A copy is attached as Exhibit A.) Lloyd's counsel received the Notice on February 13th and promptly responded by letter that defendants were not entitled to take Mr. Demery's deposition for a number of reasons. (A copy of Lloyd's counsel's letter is attached as Exhibit B.) In response, defendants' counsel stated that "I assume you realize the need for Mr. Demery's deposition for use in our Reply to your Motion for Summary Judgment." (A copy of defendants' counsel's letter is attached as Exhibit C.)

II. The Notice For Mr. Demery's Deposition Does Not Comply with the Federal Rules of Civil Procedure

The Notice of Deposition for Mr. Demery does not comply with Federal Rule Civil Procedure 30(b)(1) which requires that a party provide "reasonable notice" to all parties. One week's notice for Mr. Demery, who resides in London, England, and Lloyd's Chicago counsel, to travel to St. Louis for his deposition is not "reasonable." Additionally, Lloyd's Motion for Summary Judgment, including Mr. Demery's Declaration, was filed on January 22, 2004, yet Defendants waited over three weeks to serve Lloyd's counsel with a Notice of Deposition for Mr. Demery. Accordingly, defendants should not be allowed to ignore the *Federal Rules of Civil Procedure* and this Court should enter a protective order preventing them from conducting a premature deposition of Mr. Demery before responding to Lloyd's Motion for Summary Judgment.

Defendants have also filed two motions regarding discovery, a Motion to Compel and a Motion for an Extension of Time to Respond to Lloyd's Motion for Summary Judgment Pending Completion of Discovery, which are currently pending before the Court. Lloyd's has filed briefs in opposition to both motions and respectfully refers the Court to them and incorporates them by reference. Therefore, Defendants' Notice of Deposition for Mr. Demery is also premature for this reason alone.

III. Defendants' Tactic Is To Delay Lloyd's Collection Action

As more fully explained in the Memorandum of Law filed in support of Lloyd's Motion for Summary Judgment, Lloyd's is entitled to judgment, as a matter of law against each defendant. Accordingly, Lloyd's respectfully refers the Court to its Motion for Summary Judgment and supporting brief and incorporates them by reference in support of its Motion for a Protective Order. There is overwhelming judicial precedence in the United States recognizing and enforcing Lloyd's English Judgments against Names identical to the Defendants in this case. In fact, eight Circuit Courts of Appeals have unanimously held that the forum selection and choice of law, clauses in the General Undertakings signed by the Names, including defendants, are valid and enforceable. See e.g., *Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285 (11th Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999); *Stamm v. Barclay's Bank of N.Y.*, 153 F.3d 30 (2d Cir. 1998); *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998), *cert. denied*, 525 U.S. 943 (1998); *Haynsworth v. Lloyd's of London*, 121 F.3d 956 (5th Cir. 1997), *cert. denied*, 523 U.S. 1072 (1998); *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. The Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); *Roby v. Corporation of Lloyd's*, 996

F.2d 1353 (2d Cir. 1993), *cert. denied*, 510 U.S. 945 (1993); and *Riley v. Kingley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992), *cert. denied*, 506 U.S. 1021 (1992).

In addition, numerous district courts have also ruled in Lloyd's favor and enforced the English Judgments. See, e.g., *The Society of Lloyd's v. Mullin*, 255 F.Supp.2d 468 (E.D.P.A. 2003); *The Society of Lloyd's v. Hudson*, 276 F.Supp.2d 1110 (D.NV. 2003); *The Society of Lloyd's v. Shields, et al.*, No. 3:03-0032 slip op. (M.D.TN. Oct. 1, 2003); *The Society of Lloyd's v. Lebolt, et al.*, No. 02CV449-J (AJB), slip op. (S.D. Cal. May 29 2003); *The Society of Lloyd's v. Evnen*, No. 8:02CV118, slip op. (D. Neb. April 28, 2003); *The Society of Lloyd's v. Davies, et al.*, No. 1:02-cv-1602-GET, slip op. (N.D. Ga. April 23, 2003); *The Society of Lloyd's v. Borgers, et al.*, No. CV-02-0423-PHX-FJM slip op. (D. Az. March 28, 2003); *The Society of Lloyd's v. Blackwell, et al.*, No. 02CV448-J (AJB), slip op. (S.D. Cal. Feb. 26, 2003); *The Society of Lloyd's v. Bennett, et al.*, No. 2:02-CV-204TC, slip op. (D. Utah. Nov. 12, 2002); *The Society of Lloyd's v. Reinhart, et al.*, No. 02-264 LFG/WWD-ACE, slip op. (D. N.M. Sept. 30, 2002); *The Society of Lloyd's v. Grace*, 718 N.Y.S. 2d 327 (N.Y. App. Div. 2000); *The Society of Lloyd's v. Baker*, 673 A.2d 1336 (Me. 1996). Lloyd's attached copies of the slip opinions as Exhibits 1-8 to Lloyd's Brief in Support of its Motion for Summary Judgment. In the face of the numerous cases which have held in favor of Lloyd's and against the Names, defendants in this case are seeking an immaterial deposition of Nicholas Demery to delay the inevitable – namely the collection of the English Judgments against them. Defendants' delay tactic is improper and this Court should enter

a protective order preventing them from conducting an unnecessary deposition of Mr. Demery.

IV. Defendants Are Not Entitled to Additional Discovery Because All of the Facts Material to Lloyd's Motion for Summary Judgment Are Well-Established and Beyond Dispute

There is no absolute right to additional discovery under Fed. R. Civ. P. 56(f) in the face of a motion for summary judgment. *Lewis v. ACB Business Servs., Inc.*, 135 F.3d 389, 409 (6th Cir. 1998). Rather, the non-moving party is required to demonstrate by affidavit that he cannot “for reasons stated present by affidavit *facts essential to justify [his] opposition*” to the motion. Fed. R. Civ. P. 56(f) (emphasis added). Defendants are required to offer more than vague assertions that additional discovery would produce needed, but unspecified facts. *See Woods v. Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1415 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). Instead, to comply with Rule 56(f), defendants have to specifically identify a genuine issue of material fact that justifies further discovery. *Id.*

In this case, defendants have not and cannot satisfy their burden under Rule 56(f) to show why Mr. Demery's deposition is necessary. As demonstrated in its Motion for Summary Judgment and in the plethora of cases from around the country addressing the enforceability of the English Judgments, all of the facts material to Lloyd's motion are well-established and beyond dispute. Recognizing that they cannot dispute any of those facts, defendants now seek to collaterally attack the English judgments. The requested deposition of Mr. Demery is simply an extension of that improper strategy because it does not relate to any issue properly before this Court. This case is the collection phase of an action which defendants lost in England and they are not entitled to re-litigate

issues that were raised and resolved against them in English Courts. As such, Mr. Demery's deposition is not needed to enable defendants to respond to Lloyd's Motion for Summary Judgment.

V. Other United States' Courts Have Denied Names' Requests For Discovery On the Same Issues Raised By Defendants

Although defendants' counsel had an opportunity to identify what type of discovery he would seek in the deposition of Mr. Demery, he has declined to do so and stated that he "assume[d] [Lloyd's counsel] realize[s] the need for Mr. Demery's deposition for use in [defendants] Reply to [Lloyd's] Motion for Summary Judgment." To the contrary, Lloyd's counsel does not realize any need for Mr. Demery's deposition in this case. Assuming *arguendo*, that defendants are seeking the same type of discovery in Mr. Demery's deposition, which they stated in their Motion to Compel, this Court should reject defendants request for the same reasons that other United States Courts have rejected other Lloyd's Names' discovery requests.

In another Lloyd's collection case, virtually identical to the one here, a Utah District Court denied other Lloyd's Names' requests for additional discovery to respond to Lloyd's Motion for Summary Judgment. *See, The Society of Lloyd's v. Bennett, et al.*, No. 2:02-CV-204TC, slip op. (D. Utah. Nov. 12, 2002). (Previously submitted with Lloyd's Summary Judgment materials) The *Bennet* defendants argued unsuccessfully that they needed additional discovery - regarding how the English Judgments were calculated, Lloyd's appointment of a substitute agent to sign the Equitas contract and Lloyd's intent in entering into the General Undertaking. It is noteworthy that defendants in this case have identified the same types of discovery in their Motion to Compel (and presumably they would seek to question Mr. Demery about in a deposition) that the

Bennett defendant Names in sought and that court denied. (See, Defendants' Memorandum In Support of Their Joint Motion to Compel, pp. 8-9.) In denying the *Bennett* defendants' discovery requests, the court stated:

The Defendants seek three types of discovery. First, the Defendants seek discovery about the basis and amount of the alleged liability on which the English judgments were based. The Defendants "expect to show that the amounts were completely arbitrary and therefore in violation of due process and public policy." Second, the Defendants seek discovery related to Lloyd's appointment of a substitute agent as well as the facts and circumstances surrounding the formation and execution of the Equitas contract. Third, the Utah Names seek discovery concerning Lloyd's contractual intent in entering into the General Undertaking.

The discovery sought by the Defendants goes to the validity of the underlying Equitas contracts and the appointment of a substituted agent to sign those contracts. The discovery sought by Defendants is not relevant in light of the limited scope of this enforcement action. The Defendants' motion for discovery under Rule 56(f) is DENIED. Opinion at p. 23. (emphasis added.)

See also *The Society of Lloyd's v. Blackwell*, No. 02CV448-J at 3 (S.D. Cal. Oct. 17, 2002) (denying Rule 56(f) request by defendants on grounds that Lloyd's "summary judgment motion presents a very narrow legal issue" and that the defendants had failed to demonstrate any need for the requested discovery) (A copy of which is submitted as Exhibit D); *The Society of Lloyd's v. Borgers*, No. CV-02-0423-PHX-FJM at 6 (D. Ariz. Mar. 26, 2003) (denying defendant Names' Rule 56(f) request for discovery regarding: (1) the underlying premium liability; (2) the terms of their agent agreement; and (3) Lloyd's contractual intent in entering into the General Undertaking, on grounds that the requested discovery was not "material to the narrow legal issue before the court"); *The Society of Lloyd's v. Reinhart*, No. 02-264 LFG/WWD-ACE (AJB) (D.N.M. Sept. 30, 2002) (rejecting defendant Names' request for additional time for discovery under Rule 56(f) and entering summary judgment in favor of Lloyd's); *The Society of Lloyd's v.*

Davies, No. 1:02-CV-1602-GET (N.D. Ga. Apr. 23, 2003) (“[T]he scope of this lawsuit is very narrow as it only involves plaintiff’s request for this court to enforce a foreign money judgment. Since defendants request discovery on issues that will not impact the case, defendants’ motion to compel discovery . . . is denied.”) Accordingly, there is no legally-relevant basis for defendants to depose Mr. Demery and this Court should enter a protective order to prevent them from deposing him.

In *The Society of Lloyd’s v. Blackwell*, No. 02CV448-J at 2 (S.D. Cal. Oct. 21, 2002), Defendant Names filed a Rule 56(f) motion seeking to depose Nicholas P. Demery “regarding each fact upon which Lloyd’s relies to support its Motion for Summary Judgment, and for time to obtain responses to written discovery.” (A copy is attached as Exhibit 1). Defendants claimed that such discovery would enable them to present a laundry list of Affirmative Defenses. *Id.* However, the *Blackwell* court denied the motion and held that “[t]he summary judgment presents a very narrow legal issue. Any evidentiary objections to Mr. Demery’s declaration and the evidence it references should be submitted with defendants’ opposition brief.” *Id.* at 3. Subsequently, the *Blackwell* court entered summary judgment in favor of Lloyd’s. *The Society of Lloyd’s v. Blackwell*, No. 02CV448-J (S.D. Cal. Feb. 26, 2003).¹ Like the cases discussed above, Lloyd’s Motion for Summary Judgment here presents a narrow legal issue, namely the recognition and enforcement of the English Judgments under Missouri’s Uniform Recognition and Enforcement Act. Finally, like the *Blackwell* case held, Defendants can and should respond to Mr. Demery’s Declaration in their response to Lloyd’s Motion for Summary Judgment.

¹ A copy of this opinion is attached as Exhibit 6 to Lloyd’s Brief in Support of its Motion for Summary Judgment.

Conclusion

For the foregoing reasons, the Society of Lloyd's respectfully requests that the Court enter a protective order preventing defendants Robert Fuerst, Walter Klein, Meade McCain, Hord Hardin, Michael Todorovich and Cynthia Todorovich from conducting a deposition of Nicholas Demery.

Respectfully submitted,

s/ Nicholas A. Pavich
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CERTIFICATE OF SERVICE

I certify that on the 19th day of February, 2004, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following: Ted F. Frapolli, Esq., 275 North Lindbergh, Suite F, St. Louis, MO 63141, Attorney for Certain Defendants; Alan C. Kohn, Esq., One US Bank Plaza, Suite 2410, St. Louis MO 63101, Attorney for Defendant Shillington and Harold F. Ilg, 100 L'Ambiance Circle, Unit 202, Naples, FL 34108 and 16401 Ranchester Drive, Chesterfield, MO 63005.

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