EXHIBIT 7

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

THE SOCIETY OF LLOYD'S, Plaintiff, vs. WALLACE R. BENNETT, GRANT R. CALDWELL, CALVIN P. GADDIS, DAVID L. GILLETTE, STEPHEN M. HARMSEN, KELLY C. HARMSEN, JAMES R. KRUSE, EDWARD W. MUIR, and KENT B. PETERSEN, Defendants.	ORDER Case No. 2:02-CV-204TC

Plaintiff The Society of Lloyd's ("Lloyd's") filed this lawsuit to enforce money judgments it had obtained against the Defendants in England. Lloyd's has now filed the present Motion for Summary Judgment. For the reasons explained below, Lloyd's Motion for Summary Judgment is hereby GRANTED.

Various parties have also filed a number of motions, all of which are collateral to the Motion for Summary Judgment. The court's decision as to each of these motions is set forth in this Order.

BACKGROUND

I. Factual Background

Through Parliamentary Acts—the *Lloyd's Acts* 1871–1982—the United Kingdom

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Parliament has created and authorized Lloyd's to regulate the English insurance market. Lloyds promulgates and enforces regulations under the *Lloyd's Acts*, and exercises disciplinary authority over persons in the Lloyd's markets.

In Lloyd's, individual and corporate members known as "Names" underwrite insurance. The U.K. *Insurance Companies Act* permits Names to conduct insurance business only as long as they become and remain subject to Lloyd's regulatory jurisdiction.

As a condition of becoming members of Lloyd's, Names, including the Defendants, entered into agreements governing their membership in Lloyd's and underwriting in the Lloyd's market. Among these agreements and central to the issues in this lawsuit is the General Undertaking. In the General Undertaking, Defendants agreed, in part, (1) that they would comply with the provisions of the *Lloyd's Acts* 1871–1981 and any bylaws or regulations promulgated thereunder in connection with their membership of and underwriting at Lloyd's; and (2) that any dispute arising out of or relating to their membership of and underwriting insurance business at Lloyd's would be resolved in English courts pursuant to English law. Pursuant to the *Lloyd's Acts*, Names could only participate in the Lloyd's market through an underwriting agent, who would contractually assume management responsibilities over Names' underwriting activities.[1]

Names underwrite insurance by forming groups known as "syndicates." Names' liability is several rather than joint. Each of the Defendants incurred liabilities with respect to insurance commitments that he or she undertook by assuming a portion of a syndicate's risk in the Lloyd's market. In order to close the syndicate at the end of each underwriting year of account,

[1]This underwriting agent is not to be confused with the substituted agent, discussed below, whom Lloyd's appointed to implement its reconstruction and renewal ("R&R") plan.

reinsurance is purchased to cover any outstanding liabilities as well as liabilities that have been incurred but not reported.

Underwriting in the Lloyd's market was historically a profitable venture. In the late 1980s and early 1990s, however, Names in the Lloyd's market incurred substantial losses. As a result of these losses, Names underwriting in those years were unable to purchase affordable reinsurance for their outstanding liabilities, thus facing open-ended liabilities. Many Names defaulted on their underwriting obligations as they came due, putting policyholders at risk of non-payment.

To address these issues, Lloyd's devised the reconstruction and renewal ("R&R") plan. The R&R plan provided reinsurance otherwise unavailable to each Name in respect to his or her pre-1993 underwriting obligations through a newly formed company, Equitas Reinsurance Ltd. ("Equitas"). The R&R plan also provided an offer of settlement (the "Settlement Offer") to each Name with pre-1993 underwriting liabilities to end litigation and assist the Names in meeting their underwriting obligations. According to Lloyd's, the cost of reinsuring each Name's pre-1993 liabilities (the "Equitas Premium") was individually calculated and charged to the particular Name. Names who wished to resign their membership in Lloyd's would be able to do so upon payment of their Equitas Premium and other outstanding obligations. Names who did not accept the Settlement Offer did not receive credits to offset their Equitas premiums. The non-settling Names, however, could continue to litigate with Lloyd's and others who did business in the Lloyd's market. If the Settlement Offer was not accepted, a Name was still required to pay the full amount of his underwriting obligations, including the Equitas Premium.

Lloyd's, in implementing the R&R plan, required each Name to become a party to the Equitas reinsurance contract through an appointed, substituted agent. This substituted agent

signed the contract on behalf of the Name.

The Equitas policy contained two key provisions, both at issue in this case. First, the Equitas reinsurance contract contained a "pay now, sue later" clause that precluded Names from asserting claims they might have had against Lloyd's as a set-off or counterclaim. The Equitas reinsurance contract also contained a "conclusive evidence" clause which provided that, "in the absence of manifest error," Lloyd's determination of a Name's Equitas premium was conclusive.

According to Lloyd's, less than five percent of all Names did not accept the Settlement Offer. A still smaller number, including the Defendants, refused to pay the Equitas Premium. The R&R plan became effective on September 3, 1996, and the Equitas Premium became due and payable on September 30, 1996. Equitas subsequently assigned the right to recover payment of the Equitas premium to Lloyd's.

Beginning in late 1996, Lloyd's brought separate actions in England against the Defendants and other Names who had not paid the Equitas Premium. In the English Actions, Lloyd's sought payment of each of the Defendants' respective Equitas Premiums plus unpaid interest and costs. The English Actions were commenced by filing a Writ of Summons in the English Court against each of the Defendants.

Lloyd's notified each of the Defendants of the commencement of the English Action against him or her by serving each Defendant through his or her agent, duly appointed to accept service, with a writ of summons. Each of the Defendants filed an Acknowledgment of Service of Writ of Summons through their solicitors of record, the firm of Epstein Grower and Michael Freeman. By filing the Acknowledgment, each Defendant appeared in the English Court and notified Lloyd's of his or her intent to contest the claim.

In lengthy hearings, the Names raised several defenses to entry of the judgments by the

English Court. The defenses included the following, all of which were rejected: (1) that Lloyd's lacked the regulatory authority under the *Lloyd's Acts* 1871–1982 to mandate that all Names purchase reinsurance coverage from Equitas; (2) 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; (3) 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 set-off to their obligation to pay the Equitas premium; and (4) that the Names were not bound by certain provisions of the Equitas reinsurance contract, namely the "pay now, sue later" clause and the "conclusive evidence" clause. See Society of Lloyd's v. Dennis Hugh Fitzgerald Leighs and Others, [1997] (Demery Aff., Ex. J); Society of Lloyd's v. Wilkinson & Ors. (Q.B. 1997) (Demery Aff., Ex. J); Society of Lloyd's v. Lyon; v. Leighs; v. Wilkinson, (C.A. 1997) (Demery Aff., Ex. J) (affirming rulings of lower court); Society of Lloyd's v. Fraser & Ors. (C.A. 1998) (Demery Aff., Ex. K).

The English Court entered judgments in favor of Lloyd's against the Names on March 11, 1998. (See Demery Aff. Exs. A–I.) A three judge panel of the United Kingdom Court of Appeal heard argument on the application for leave to appeal by Names from June 15–19, 1998. Leave to appeal was denied on July 31, 1998. See Society of Lloyd's v. Fraser & Ors. (C.A. 1998) (Demery Aff., Ex. K). All appeals from the entry of the Judgments have been exhausted.

The Defendants have not satisfied their judgment debts. On March 8, 2002, the Society of Lloyd's filed a Complaint in this court to enforce the English judgments against the Defendants.

II. Pending Motions

The following substantive motions are pending before the court:

(1) Wallace Bennett's motion to declare a particular foreign writ to be subject to Utah substantive law and unenforceable;

(2) Lloyd's motion for summary judgment;

(3) Lloyd's motion to dismiss the counterclaim of Stephen and Kelly Harmsen;

(4) Mr. Bennett's motion for certification of state law questions;

(5) The Caldwell Defendants'[2] motion for certification; and

(6) The Caldwell Defendants' motion for discovery under Federal Rule of Civil Procedure 56(f).

Additionally, the following procedural motions are pending:

(7) Lloyd's motion to strike paragraph 6(g) of motion to declare a foreign writ unenforceable;

(8) Lloyd's motion to strike affidavit of Wallace Bennett;

(9) The Caldwell Defendants' motion to strike declaration of Nicholas Demery;

(10) Lloyd's motion to strike portions of the affidavit of Stephen Harmsen; and

(11) Lloyd's motion to strike exhibits in support of the Caldwell Defendants' combined memorandum in opposition to motion for summary judgment and in support of motion in the alternative for discovery under Rule 56(f).

ANALYSIS

I. Motions for Summary Judgment

The Plaintiff moves for summary judgment. Defendant Wallace R. Bennett moves to declare a particular foreign country writ to be (1) subject to Utah substantive law and (2) unenforceable. Mr. Bennett's motion is, in essence, a motion for summary judgment and the court will treat it as such.

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[2]The "Caldwell Defendants," who are represented by the same counsel, consist of Grant R. Caldwell, Calvin P. Gaddis, David L. Gillette, James R. Kruse, Edward W. Muir, and Kent B. Peterson.

A. Legal Standard

Under Federal Rule of Civil Procedure 56, a court may enter summary judgment "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); see Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986); Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). The party moving for summary judgment bears the initial burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp., 477 U.S. at 323; Adler, 144 F.3d at 670–71. A movant "may make its prima facie demonstration simply by pointing out to the court a lack of evidence for the nonmovant on an essential element of the nonmovant's claim." Adler, 144 F.3d at 671. In applying this standard, the court views the factual record and must construe all facts and reasonable inferences therefrom in the light most favorable to the nonmovant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Aramburu v. Boeing Co., 112 F.3d 1398, 1402 (10th Cir. 1997).

Once the moving party has carried its initial burden, Rule 56(e) requires the nonmovant to "go beyond the pleadings and 'set forth specific facts' that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." Adler, 144 F.3d at 671 (quoting Fed. R. Civ. P. 56(e)). The specific and pertinent facts put forth by the nonmovant "must be identified by reference to an affidavit, a deposition transcript or a specific exhibit incorporated therein." Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024 (10th Cir. 1992). Mere allegations and references to the pleadings will not suffice. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

B. Discussion

1. Can the English Judgments be Enforced under Principles of Comity?

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 164 (1895).

The court's jurisdiction is based on diversity of citizenship. Utah law therefore applies concerning whether to enforce foreign judgments. See Smith v. Toronto-Dominion Bank, 166 F.3d 1222 (10th Cir. 1999), available at 1999 WL 38160, at **2 (applying Utah law when determining whether to recognize a Canadian judgment) (unpublished decision).

The Utah legislature, unlike many other states' legislatures, has not adopted the Uniform Foreign Money Judgments Recognition Act (the "Uniform Act"). See Smith, 1999 WL 38160, at **2. In Mori v. Mori, the Utah Supreme Court indicated that in Utah, "[a]bsent a treaty or statute, a foreign country judgment can be enforced only under principles of comity." 931 P.2d 854, 856 (Utah 1997) (citing Hilton, 159 U.S. at 163–64). General principles of comity require a court to recognize a foreign judgment if

> there has been an opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment.

Smith, 1999 WL 38160, at **2 (quoting Hilton, 159 U.S. at 202). Determining whether to enforce another country's judgment is a matter of "judicial discretion." Mori, 931 P.2d at 856 (quoting Pan Energy v. Martin, 813 P.2d 1142, 1146 (Utah 1991)).

In an unreported decision, the Tenth Circuit has provided guidance regarding the proper analysis of comity under Utah law. See Smith, 1999 WL 38160, at **2. In Smith, a diversity action in which the Tenth Circuit applied Utah law, the court determined whether Utah courts would recognize a Canadian judgment. Id. at **2. No Utah court had yet "been called upon to recognize a Canadian Judgment." Id. The court, however, found it "reasonable to believe the Utah courts would [] recognize a Canadian judgment if that judgment satisfied the requirements outlined in Hilton and otherwise comported with Canadian law." Id. In making its finding, the court relied upon "the Utah Supreme Court's statements in Mori, as well as the long history of other courts recognizing Canadian judgments under principles of comity." Id.

a. The English system of jurisprudence

In Hilton, the Supreme Court required that a foreign judgment sought to be enforced come from a country with "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. As stated by the Ninth Circuit in a decision recognizing an English judgment, "[i]t has long been the law that unless a foreign country's judgments are the result of outrageous departures from our own motions of 'civilized jurisprudence,' comity should not be refused." British Midland Airways Ltd. v. Int'l Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974) (citing Hilton, 159 U.S. at 205).

There is little argument that the English courts are part of a judicial system that has procedures compatible with American standards of due process and impartial tribunals. See Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 958 (10th Cir. 1992) ("We have been shown nothing to suggest that an English court would not be fair, and in fact, our courts

have long recognized that the courts of England are fair and neutral forums."). As stated by Judge Posner for the Seventh Circuit in an opinion upholding the lower court's decision to enforce judgments against American Names, "[a]ny suggestion that [the English] system of courts 'does not provide impartial requirements of due process of law' borders on the risible." Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 476 (7th Cir. 2000).

b. Opportunity for a full and fair trial

The Defendants contend that they were not given an opportunity for a full and fair trial. According to the Defendants,[3] they were denied due process in a number of ways. Specifically, they contend that (1) they were unlawfully bound to unlawful contracts because an appointed substitute agent signed the Equitas contracts, (2) they could not assert affirmative defenses in the English proceedings, and (3) they could not engage in discovery or present evidence to challenge the existence or amount of liability. These alleged deficiencies all stem from the "pay now, sue later" and "conclusive evidence" provisions in the Equitas contract and the fact that an appointed agent signed the contract for the Defendants.

As a threshold matter, in cases in which the particular proceedings that are being challenged by the Defendants here were at issue, both the Seventh and Fifth Circuits have found that English courts provided adequate 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). These courts were deciding cases from jurisdictions which had passed the Uniform Foreign Money-Judgments Recognition Act. The

[3]Although the various Defendants filed separate memoranda and raised a number of independent arguments, the court will treat all Defendants and their arguments collectively, unless otherwise indicated.

courts' analyses, however, apply here, even though Utah has not adopted the Uniform Act.[4] In Ashenden, the court explained that the Uniform Act merely required that a foreign country's due process doctrines must be "compatible" with American doctrines. 233 F.3d at 477. This meant that foreign procedures must be "fundamentally fair" and not offend "basic fairness." Id. (quoting Ingersoll Milling Machine Co. v. Granger, 833 F.2d 680, 687–88 (7th Cir. 1987), and citing Hilton, 159 U.S. at 202–03). The court emphasized that "[h]ow much process is due depends on the circumstances." Ashenden, 233 F.3d at 479. The "pay now, sue later" clause "enable[d] Equitas to be fully funded immediately," which "would work to the benefit of the names by giving them surer, earlier, and fuller reinsurance." Id. The conclusive-evidence clause "extinguishe[d]" claims by the Names. Id. at 480. The Seventh Circuit found that these clauses did not constitute procedural due process offenses. See id. at 479–80. The court also found that the English court's holding that Lloyd's could appoint agents to bind the Names without the Names' permission was not impermissibly unreasonable. See id. at 480–81.

In Turner, as in Ashenden, the Defendants raised many of the same arguments raised by the Defendants here, including a claim that the "pay now, sue later" clause and the "conclusive evidence" clause violated due process. See Turner, 303 F.3d at 327–28; see also Soc'y of Lloyd's v. Webb, 156 F. Supp. 2d at 639 (N.D. Tex. 2001), aff'd sub nom. Soc'y of Lloyd's v.

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[4] Although not determinative, the court finds Ashenden, 233 F.3d at 482, and Turner, 303 F.3d at 329–30, to be persuasive. Like the Uniform Act, the operative and often cited language in Hilton, the Supreme Court decision cited with approval by the Utah Supreme Court in Mori, 931 P.2d at 856, emphasizes the soundness of a foreign country's "system of jurisprudence" and "system of laws." Compare Smith, 1999 WL 38160, at *2 (quoting Hilton, 159 U.S. at 202), with Ashenden, 233 F.3d at 476 (emphasizing the Illinois Uniform Act's reference to a foreign country's "system" of courts). Additionally, the Seventh and Fifth Circuits in Ashenden, 233 F.3d at 478–80, and Turner, 303 F.3d at 331 n.22, respectively, analyzed the underlying facts and the foreign proceedings sought to be enforced.

Turner, 303 F.3d at 333. The Fifth Circuit rejected their arguments, noting that "[Defendants] Webb and Turner [had] provided no evidence that the English court proceedings [] were unfair." Turner, 303 F.3d at 331 n.22.

It is also important to recognize that the English courts have considered and rejected the Defendants' claims. In Society of Lloyd's v. Wilkinson & Others, at 17, 21 (Q.B. 1997) (Demery Aff., Ex. J), the court considered and rejected the Names' challenge of the "pay now, sue later" clause. This decision left the Names free to pursue claims of fraud against Lloyd's in a separate proceeding.[5] See id. at 21 (stating that the clause could "[i]n no sense . . . be described as excluding or restricting the remedy by way of damages for fraudulent misrepresentation"). In Society of Lloyd's v. Fraser & Others, at 27 (C.A. 1998) (Demery Aff., Ex. K), the court rejected the Names' challenge of the "conclusive evidence" clause. The court found that the provision was "not an unusual type of clause and [was] in principle appropriate to [the] contract." Id. The court also stated that "[n]o issue ha[d] been raised which [was] sufficient to justify going behind the figures produced under [the "conclusive evidence" clause] nor have the Applicants succeeded in making out a case of manifest error in those figures." Id. at 28. Finally, the court in The Society of Lloyd's v. Dennis Hugh Fitzgerald Leighs and Others, [1997], at 5–10, 31 (Demery Aff., Ex. J), considered and rejected the argument that the Names should not be bound by the Equitas contract.

In sum, Defendants were given a full and fair opportunity to litigate their claims in the

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[5]Many Names did bring fraud claims against Lloyd's in a separate action in England. See Society of Lloyd's v. Jaffray, 2000 WL 1629463 (Q.B. Nov. 2, 2000), aff'd, 2002 WL 1654876 (C.A. July 26, 2002). The English courts determined that the Names had not met their burden of proving that Lloyd's alleged misrepresentations were made fraudulently.

English courts.

2. *Public Policy Challenge*

The Defendants claim that the English Judgments conflict with Utah public policy. Their arguments in support of this claim are basically the same as those supporting their due process claim. According to the Defendants, (1) the English Judgments violated public policy by binding the Utah Names to an unconscionable contract which was signed by an unauthorized agent; (2) the "pay now, sue later" provision in the Equitas contract violated public policy by not allowing the Names to raise affirmative defenses; and (3) the "conclusive evidence" clause violated public policy by preventing the Names from discovering or presenting evidence to refute the existence or amount of liability. In addition, Mr. Bennett contends that enforcing the Equitas contract would violate the anti-waiver provision of the Utah Uniform Securities Act.[6] See Utah Code Ann. § 61-1-22(9) (2000) (stating that "[a] condition, stipulation, or provision binding a person acquiring a security to waive compliance with this chapter or a rule or order hereunder is void").

The district court in Webb rejected arguments similar to the Defendants' here. See Webb, 256 F. Supp. 2d at 643–44. Although its analysis was based on the Texas Uniform Act, the analysis is helpful here. The court distinguished between the cause of action on which the judgment is based and the judgment itself. The court stated that if *the cause of action* on which the judgment is based is repugnant to public policy, a court could refuse to recognize it. See id. at 643; see also Turner, 303 F.3d at 332. But if the judgment itself offends public policy, that fact, in and of itself, is not grounds for a court to refuse to recognize it. Webb, 156 F. Supp. 2d at

[6]The effect of Utah Code Annotated section 61-1-22 in this case is one of the issues Mr. Bennett urges the court to certify to the Utah Supreme Court. (See Mem. Supp. Mot. for Certification of State Law Questions by Def. Wallace Bennett, at 10–12.)

643. Additionally, the court in Webb noted that to refuse to enforce a foreign country judgment on public policy grounds, "[t]he level of contravention would have to be high," such that the foreign law was "inimical to good morals, natural justice, or the general interests of the citizen [sic] of this state." Id. at 644 (quoting Hunt v. BP Exploration Co., 492 F. Supp. 885, 899 (N.D. Tex. 1980), and Gutierrez v. Collins, 583 S.W.2d 312, 322 (Tex. 1979)); see also Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 443 (3rd Cir. 1971); Restatement (Third) of Foreign Relations § 482 cmt. f (1987) (stating that "[c]ourts will not recognize or enforce foreign judgments based on claims perceived to be contrary to fundamental notions of decency and justice").

As in Webb, Lloyd's cause of action in this case—for breach of contract—is not repugnant to Utah public policy. See Webb, 156 F. Supp. 2d at 643–44; see also Turner, 303 F.3d at 332. Additionally, the Defendants' claims of conflicting public policy, which focus primarily on the "pay now, sue later" and "convincing evidence" provisions in the Equitas contract and the appointment of a substitute agent, do not rise to levels that would require the court to not enforce the foreign judgment. See Webb, 156 F. Supp. 2d at 644; Turner, 303 F.3d at 331–32.

Finally, when the Names signed Lloyd's General Undertaking, they agreed that English law, not Utah law, would govern disputes arising between them and Lloyd's. See Webb, 156 F. Supp. 2d at 643 (rejecting public policy arguments because the Fifth Circuit had upheld the choice of law and choice of forum clause). The Tenth Circuit has upheld the choice of law and choice of forum clauses contained in the General Undertaking. See Riley, 969 F.2d at 958; see also Richards v. Lloyd's of London, 135 F.3d 1289, 1294 (9th Cir. 1998) (following the court's

"six sister circuits that have ruled to enforce the choice clauses"). Implicit in the Tenth Circuit's decision in Riley was an understanding that the resulting English Judgments could differ from decisions rendered in American courts. See Riley, 969 F.2d at 958 (stating that "[t]he fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement, provided that the law of the chosen forum is not inherently unfair").

Based on the above, the court concludes that the Defendants' arguments that enforcement of the Lloyd's judgments would violated Utah public policy are not persuasive.

In addition, authority from both the Tenth Circuit and elsewhere also weighs against Mr. Bennett's claim that enforcing the English Judgments would conflict with Utah Code Annotated section 61-1-22. Section 61-1-22 provides that "[a] condition, stipulation, or provision binding a person acquiring a security to waive compliance with this chapter or a rule or order hereunder is void." Utah Code Ann. § 61-1-22(9). To date, no reported decision appears to have discussed the scope of this anti-waiver provision. It follows that no decision has discussed whether Lloyd's General Undertaking, which calls for the application of English law, and the Lloyd's Act of 1982, which immunizes Lloyd's from many American securities laws, violate the public policy expressed in section 61-1-22. See Richards, 135 F.3d at 1296 (discussing the Lloyd's Act of 1982). There is no reason to believe, however, that Utah law would deal with this question any differently than the Ninth and Tenth Circuits have in recent years. See id.; Riley, 969 F.2d at 959.

In Richards, the Ninth Circuit determined that Lloyd's choice of law and choice of forum clauses did not "contravene a strong public policy embodied in federal and state securities laws."

135 F.3d at 1294–95. In that case, the Names relied upon Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634 (1985), to "argue that federal and state securities laws are of 'fundamental importance to American democratic capitalism.'" Richards, 135 F.3d at 1295. Relying on what the Ninth Circuit referred to as "dictum in a footnote regarding antitrust law," id., the Names "claim[ed] that enforcement of the choice clauses [would] deprive them of important remedies provided by our securities laws." Id. The court, however, emphasized that the Supreme Court had recognized "that parties to an international securities transaction may choose law other than that of the United States, . . . yet [had] never suggested that this affected the validity of a forum selection clause." Id. (discussing Scherk v. Alberto-Culver Co., 417 U.S. 506, 508 (1974)).

The court in Richards recognized that "the Lloyd's Act immunizes Lloyd's from many actions possible under our securities laws." 135 F.3d at 1296. It explained, however, that "Lloyd's is not immune from the consequences of actions committed in bad faith, including fraud." Id.; see also Riley, 969 F.2d at 958 (stating that "English law does not preclude Riley from pursuing an action for fraud and we agree with the Defendants that the Lloyd's Act does not grant statutory immunity for such claims"). In part because such remedies were available, the court held that the anti-waiver provisions in the Securities Act of 1933 and the Securities Exchange Act of 1934 did not void the choice clauses in Lloyd's transaction with the Names. See Richards, 135 F.3d at 1296; see also Riley, 969 F.2d at 957 (giving effect to Lloyd's choice provisions and rejecting argument that the defendant was "being deprived of all substantive rights under the federal securities laws").

Mr. Bennett points outs that one California appellate court decision has declined to

dismiss a claim against Lloyd's on the basis of the choice of forum and law clauses. (See Mem. Supp. Mot. to Declare Particular Foreign-Country Writ Unenforceable at 9); West v. Lloyd's, No. B095440, 1997 WL 1114662, at *8–9 (Cal. Ct. App. Oct 23, 1997) (unpublished opinion). The court in West voided Lloyd's choice clauses because the clauses "violat[ed] California's fundamental public policy against waivers of the protections afforded by its securities laws." See 1997 WL 1114662, at *1. This case, however, is not good law. The California appellate court in West relied on the Ninth Circuit's first opinion in Richards v. Lloyd's, 107 F.3d 1422 (9th Cir. 1997). See West, 1997 WL 1114662, at *6 n.8, *8 n.11. The first Richards decision was subsequently withdrawn by the Ninth Circuit sitting *en banc* in Richards v. Lloyd's, 135 F.3d at 1291.

As Lloyd's explains, in Richards, the plaintiffs specifically referenced state securities laws—including Utah's—in Appendix D to their Amended Complaint, and argued that these laws constituted a public policy against the choice of law and forum clauses. See Richards, 135 F.3d at 1295–96 (discussing the effect of federal and state securities laws on Lloyd's choice clauses). In this case, Mr. Bennett makes the same public policy argument that both the Ninth and Tenth Circuits rejected in Richards and Riley, respectively. See Richards, 135 F.3d at 1295–96; Riley, 969 F.2d at 957–58. The only apparent difference is that the provision Mr. Bennett relies upon, Utah Code Annotated section 61-1-22, has not been singled out and specifically discussed in either decision. Given the fact that the Richards and Riley decisions dealt with the same underlying transactions at issue here, Mr. Bennett's public policy argument should not defeat Lloyd's motion for summary judgment.

Based on the above, the court concludes that all the requirements set forth by the Court in

Hilton have been met and the Lloyd's judgments are entitled to recognition. Accordingly, Lloyd's Motion for Summary Judgment is GRANTED.

II. Related Matters

A. Lloyd's Motion to Dismiss the Harmsens' Counterclaim

The Harmsens' counterclaim alleges fraud in the inducement and negligent misrepresentation by Lloyd's. The Harmsens seek an accounting and a declaratory judgment. These claims concern the underlying transaction involving Lloyd's. Lloyd's argues that the forum selection and choice of law provisions signed by the Harmsens preclude litigation of their counterclaim in this court.

In opposition to Lloyd's motion to dismiss, the Harmsens make the following arguments: (1) the choice clauses should not apply here because Lloyd's availed itself in a United States court to enforce an English judgment; (2) Lloyd's is exempt from fraud claims in England, making any opportunity to bring such a claim in English courts illusory; and (3) the counterclaim is required as a mandatory counterclaim under Utah Rule of Civil Procedure 13(a). But the Harmsens provide no law in support of their arguments.

As discussed in detail above, the agreements between Lloyd's and each of the Defendants, including the Harmsens, contain forum selection and choice of law clauses that obligate the Defendants to litigate any claims they may have against Lloyd's in the courts of England under English law. Section 2.2 of the General Undertakings signed by Mr. and Mrs. Harmsen, respectively, states in part that the parties agreed "that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at,

Lloyd's." (See Demery Aff. Ex. E, Ex. F.) The Tenth Circuit in Riley found these provisions to be valid. See 969 F.2d at 958. In addition, at least seven other circuits have held these same clauses to be valid. See Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285 (11th Cir. 1998); Richards, 135 F.3d at 1294; Haynsorth v. The Corporation, a/k/a Lloyd's of London, 121 F.3d 956 (5th Cir. 1997); Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996); Shell v. R.W. Sturge, Ltd., 55 F.3d 1227 (6th Cir. 1995); Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993); Roby v. Corp. of Lloyd's, 996 F.2d 1353 (2d Cir. 1993). Because no reported case law indicates that the court should disregard the choice clauses merely because Lloyd's is a plaintiff in this enforcement action, the court GRANTS Lloyd's motion to dismiss the Harmsens' counterclaim.

B. Motions for Certification of State Law Questions

Mr. Bennett and the Caldwell Defendants move to certify state law questions. Under Utah Rule of Appellate Procedure 41, a United States court, either on a motion or *sua sponte*, may certify certain questions of Utah law to the Utah Supreme Court. Utah R. App. P. 41(b) (2002).

Certification of legal questions to the state court is appropriate only where there is doubt about the application of state law in a federal case. See Houston v. Hill, 482 U.S. 451, 471 (1987). The Tenth Circuit has stated that "[c]ertification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law." Copier v. Smith & Wesson Corp., 138 F.3d 833, 838 (10th Cir. 1998) (quoting Armijo v. Ex Cam, Inc., 843 F.2d 406, 407 (10th Cir. 1988)). Instead, certification should be invoked only in "exceptional cases" because the federal courts must "decide questions of state law whenever necessary to the rendition of a

judgment." Copier, 138 F.3d at 838 (quoting Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943)).

The questions that the Defendants seek to certify are as follows:

> *1. Does Utah Substantive Law Apply in a Jurisdictional Diversity of Citizenship Case Seeking Enforcement of an English Judgment?*

Mr. Bennett seeks to certify to the Utah Supreme Court the question of what substantive law applies in this enforcement action. As discussed in detail above, the Utah Supreme Court has stated that, absent a treaty or statute, "principles of comity" determine whether foreign country judgments are enforceable in Utah. See Mori, 931 P.2d at 856. Mori favorably cited Hilton, 159 U.S. at 163–64, one of the Supreme Court's seminal comity decisions. Further, the Tenth Circuit, applying Utah law, recently employed principles of comity with respect to the *res judicata* effect of a Canadian judgment. See Smith, 1999 WL 38160, at **2. This decision applied Utah law with respect to whether the foreign judgments should be given effect, id., but noted that "questions regarding the validity of a foreign judgment 'should be tested by the law of the jurisdiction where the judgment was rendered.'" Id. at **2, n.2 (quoting Rocky Mountain Claim Staking v. Frandsen, 884 P.2d 1299, 1300–01 (Utah Ct. App. 1994)). These decisions provide clear answers to Mr. Bennett's proposed question for certification.

> *2. Would Enforcement of Lloyd's English Judgments Against the Utah Names Violate Article 1, Section 11 of the Constitution of Utah (the "Open Courts Provision")?*

Defendants contend that the applicability of the Utah Constitution's open courts provision in the context of enforcing a foreign country judgment presents a question of first impression in Utah. They also claim that this question is potentially dispositive in this case and that

certification is therefore necessary. Although Defendants are correct that this issue has not yet been considered by a Utah court, the court believes that certification is not appropriate..

The Utah Constitution's open courts provision is similar to its due process provisions. Article I, section 11 states that

> [a]ll courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Const., art. I, § 11. In Brown v. Wightman, the Utah Supreme Court stated that Utah's open court's provision did not create new rights or remedies. 151 P. 366, 366–67 (1915). Instead, this provision "plac[ed] a limitation upon the Legislature to prevent that branch . . . from closing the doors of the courts against any person who has a legal right which is enforceable in accordance with some known remedy." Id. at 366–67; see also Laney v. Fairview City, No. 981729, 2002 WL 1822152, at *7–8 (Utah Aug. 9, 2002) (discussing Brown, 151 P. at 366–67); Berry v. Beech Aircraft Corp., 717 P.2d 670, 686 (Utah 1985) (declaring that a products liability statute of repose violated Article I, section 11 of the Utah Constitution).

This case does not involve a legislative limitation on the Names' ability to enforce their legal rights. As such, Article I, section 11 of the Utah Constitution is not relevant, much less potentially dispositive, in this case. Cf. Berry, 717 P.2d at 676 (discussing the open courts provision in the context of a legislative limitation on remedies). Additionally, the Defendants have not been barred from defending Lloyd's claims. Under Mori, the Defendants have been able to challenge the enforcement of the English Judgments under common law principles of comity. See Mori, 931 P.2d at 856.

3. Would Enforcement of Lloyd's English Judgments Violate Article I, Section 7 of the Utah Constitution, Utah's Due Process Clause?

The court has considered Defendants' due process challenges in this decision. The same analysis applies to the due process clause contained in Article I, Section 7 of the Utah Constitution.

4. Would Enforcement of Lloyd's English Judgments Violate Article I, Section 27 of the Utah Constitution?

Mr. Bennett moves to certify the question of whether Article I, section 27, the "fundamental rights" section, precludes enforcement of the English Judgments. Section 27 of Article I of the Utah Constitution states that "[f]requent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." Utah Const., art. I, § 27.

As Lloyd's explains, its action is an ancillary proceeding to collect a money judgment. Mr. Bennett has not identified any fundamental rights or principles at issue, other than due process. This is not an appropriate basis for certification.

5. Does Section 61-1-22(9) of the Utah Code Annotated Override the Forum Selection and Choice of Law Provisions in the General Undertaking?

The court has dealt with this issue above. As discussed, no Utah case appears to have directly discussed whether section 61-1-22(9) of the Utah Code Annotated would void a choice of law or forum selection clause that precludes application of Utah securities laws. However, substantial case law from both the Tenth Circuit and elsewhere provide adequate guidance for the court on this question.

C. Motion for Discovery Under Federal Rule of Civil Procedure 56(f)

The Defendants move the court to grant the Utah Names the opportunity for discovery under Federal Rule of Civil Procedure 56(f). Under Federal Rule of Civil Procedure 56(f), a court may delay ruling on a motion for summary judgment or refuse summary judgment outright "where the non-moving party has not had the opportunity to discover information that is essential to his opposition." Int'l Surplus Lines Ins. Co. v. Wyoming Coal Refining Sys., Inc., 52 F.3d 901, 905 (10th Cir. 1995); see Fed. R. Civ. P. 56(f). The party opposing a motion for summary judgment must provide affidavits indicating why that party cannot "present by affidavit facts essential to justify the party's opposition" to summary judgment. Lewis v. City of Fort Collins, 903 F.2d 752, 758 (10th Cir. 1990) (quoting Fed. R. Civ. P. 56(f)); Int'l Surplus Lins Ins. Co., 52 F.3d at 905.

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 the 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.

D. Motions to Strike

The parties' have filed various motions to strike materials submitted to the court. Those motions are DENIED AS MOOT.

IT IS SO ORDERED.

DATED this 12 day of November, 2002.

BY THE COURT:

TENA CAMPBELL
United States District Judge