

1 UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF CALIFORNIA  
3

4 CARL. L. JIMENA,

5 Plaintiff,

6 v.

7 UBS AG BANK, INC., SWITZERLAND  
8 HEADQUARTERS; UBS AG BANK, INC.,  
9 MANHATTAN, NEW YORK BRANCH; UBS  
10 FINANCIAL SERVICES, INC.,  
11 BAKERSFIELD, CALIFORNIA BRANCH;  
12 AND UBS FINANCIAL SERVICES, INC.,  
13 WEEHAWKEN, NEW JERSEY BRANCH;  
14 CLIVE STANDISH,

15 Defendants.

1:07-cv-00367 OWW SKO

MEMORANDUM DECISION AND ORDER  
RE PLAINTIFF'S MOTION TO  
VACATE, PLAINTIFF'S MOTION IN  
LIMINE, AND DEFENDANT UBS  
AG'S MOTION FOR SUMMARY  
JUDGMENT

(DOC. 304, 305, 311)

14 I. INTRODUCTION

15 Plaintiff Carl L. Jimena ("Plaintiff") proceeds with this  
16 action for fraud, violation of state and federal commercial  
17 codes, and intentional tort.  
18

19 Before the court is Defendant UBS AG's ("UBS") renewed  
20 motion for summary judgment (Doc. 311). Plaintiff filed an  
21 opposition, to which UBS replied (Doc. 314). The motion was heard  
22 June 20, 2011.

23 Also before the court are two motions taken under submission  
24 without hearing: (1) Plaintiff's motion to vacate (Doc. 304), and  
25 (2) Plaintiff's motion in limine (Doc. 305). UBS filed  
26 oppositions to both motions (Docs. 309, 310).  
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II. FACTUAL BACKGROUND

Plaintiff alleges that he was defrauded in a variant of the "Nigerian advance fee scheme" by Clive Standish<sup>1</sup>, then Chief Financial Officer of UBS, who allegedly sent Plaintiff e-mails from [clive\\_standish@yahoo.com](mailto:clive_standish@yahoo.com) and [customerservices@privatelclientsubs.cjb.net](mailto:customerservices@privatelclientsubs.cjb.net). From these two e-mails, Clive Standish allegedly offered to transfer \$19 million to Plaintiff's bank account by convincing Plaintiff to wire \$51,000 via Washington Mutual Bank, Bank of New York, and UBS to an account at a fourth bank, HSBC, allegedly to satisfy a non-existent "Anti Drug/Terrorist Clearance" fee required for money transfers from Nigeria. Plaintiff alleges he wired \$51,000 to the banks. Plaintiff never received the \$19 million. Plaintiff alleges that UBS is in possession of his \$51,000 and the \$19 million allegedly wired to UBS by an alleged Nigerian bank, Standard Trust Bank PLC.

III. MOTION FOR SUMMARY JUDGMENT

A. Introduction

UBS moves for summary judgment on all of Plaintiff's remaining claims. Doc. 311. UBS contends that Plaintiff has not adduced any cognizable evidence to support his claims, and cannot meet his burden under Rule 56. Plaintiff filed an opposition (Doc. 313), which incorporates by reference: (1) Plaintiff's

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<sup>1</sup> Clive Standish was named as a Defendant in this lawsuit, but has never been served with a summons and complaint.

1 motion in limine (Doc. 305); (2) motion to vacate (Doc. 304); (3)  
2 opposition to UBS's motion for summary judgment (Doc. 195); (4)  
3 opposition to UBS's supplemental brief in support of motion for  
4 summary judgment (Doc. 253); (5) amended opposition to UBS's  
5 supplemental brief in support of summary judgment (Doc. 261); and  
6 (6) third supplemental brief to Plaintiff's opposition to UBS's  
7 motion for summary judgment (Doc. 288).<sup>2</sup> UBS filed a reply. Doc.  
8 314.  
9

10 B. Disputed Facts

11 UBS contends that any individual can sign up for a Yahoo.com  
12 email account bearing the name [FIRST NAME]\_[LAST NAME]@yahoo.com  
13 without providing any evidence that he or she is the person whose  
14 name is used in the email address, and without providing any  
15 evidence that the person whose name is used has consented to the  
16

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17  
18 <sup>2</sup> This court's Standing Order provides:

19 Unless prior leave of court seven days before the filing date is  
20 obtained, all briefs or memoranda in civil cases shall not exceed 25  
21 pages . . . Reply briefs filed by moving parties shall not exceed 10  
22 pages.

23 Doc. 3, 6. Plaintiff's opposition, including all six incorporated documents,  
24 far exceeds the allowable 25-page limit. Although Plaintiff is appearing in  
25 propria persona, Plaintiff is expected to familiarize himself with, and adhere  
26 to, all applicable rules, including the Local Rules and Standing Order.  
27 Plaintiff has been cautioned before and continues to disregard the rules. If  
28 Plaintiff exceeds the permissible page limits without timely prior leave, the  
court will disregard Plaintiff's brief or memorandum to the extent it exceeds  
the permissible page limit.

1 use of the name. UBS also asserts that if a user types  
2 privateclientsubs.cjb.net into a web browser, the user is  
3 directed to the home page for www.cjb.net, a service that offers  
4 subscribers the ability to (a) create email addresses that read  
5 [NAME]@[ENTITY].cjb.net, and (b) create "alias" domain names that  
6 read [ENTITY].cjb.net that redirect a web browser to some other,  
7 unrelated internet domain. Plaintiff disputes the bases for UBS's  
8 contentions, i.e., the declaration of its counsel, Jacob  
9 Kreilkamp.  
10

11 UBS contends that all of Plaintiff's allegations regarding  
12 the representations of UBS are based on unauthenticated and  
13 hearsay emails Plaintiff received bearing the addresses  
14 clive\_standish@yahoo.com and customerservices@privateclient  
15 subs.cjb.net. UBS further contends that no admissible evidence  
16 has been offered to support a finding that \$19,000,000 was wired  
17 from Standard Trust Bank PLC to UBS AG as is alleged in the Third  
18 Amended Complaint, or to support a finding that UBS holds any  
19 funds belonging to Plaintiff. Finally, UBS asserts no person in  
20 his right mind could reasonably expect to receive \$19 million in  
21 return for a \$51,000 fee payment, and the inherent implausibility  
22 of the scheme should have put Plaintiff on notice that the scheme  
23 was a fraud.  
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26 C. Legal Standard

27 Summary judgment is proper if "the pleadings, the discovery  
28

1 and disclosure materials on file, and any affidavits show that  
2 there is no genuine issue as to any material fact and that the  
3 movant is entitled to judgment as a matter of law." Fed. R. Civ.  
4 P. 56.

5  
6 The moving party bears the initial burden of "informing the  
7 district court of the basis for its motion, and identifying those  
8 portions of the pleadings, depositions, answers to  
9 interrogatories, and admissions on file, together with the  
10 affidavits, if any, which it believes demonstrate the absence of  
11 a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477  
12 U.S. 317, 323, 106 S.Ct. 2548 (1986) (internal quotation marks  
13 omitted). A fact is material if it could affect the outcome of  
14 the suit under the governing substantive law; "irrelevant" or  
15 "unnecessary" factual disputes are not considered. *Anderson v.*  
16 *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

17  
18 If the moving party would bear the burden of proof on an  
19 issue at trial, it must "affirmatively demonstrate that no  
20 reasonable trier of fact could find other than for the moving  
21 party." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9<sup>th</sup>  
22 Cir. 2007). In contrast, if the non-moving party bears the burden  
23 of proof on an issue, the moving party can prevail by "merely  
24 pointing out that there is an absence of evidence" to support the  
25 non-moving party's case. *Id.*

26  
27 When the moving party meets its burden, the "adverse party  
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1 may not rest upon the mere allegations or denials of the adverse  
2 party's pleadings, but the adverse party's response, by  
3 affidavits or as otherwise provided in this rule, must set forth  
4 specific facts showing that there is a genuine issue for trial."  
5 Fed. R. Civ. P. 56(e).

6  
7 In ruling on a motion for summary judgment, a court does not  
8 make credibility determinations or weigh evidence. See *Anderson*,  
9 477 U.S. at 255. Rather, "[t]he evidence of the non-movant is to  
10 be believed, and all justifiable inferences are to be drawn in  
11 his favor." *Id.* Only admissible evidence is considered in  
12 deciding a motion for summary judgment. *Soremekun*, 509 F.3d at  
13 984. "Conclusory, speculative testimony in affidavits and moving  
14 papers is insufficient to raise genuine issues of fact and defeat  
15 summary judgment." *Id.*

16  
17 D. Discussion

18 UBS moves for summary judgment based on the contention that  
19 Plaintiff has not produced any admissible evidence.

20 1. Clive Standish E-mails

21 Plaintiff's claims against UBS rest primarily on e-mails  
22 purportedly sent by "Clive Standish" from two e-mail addresses:  
23 [clive\\_standish@yahoo.com](mailto:clive_standish@yahoo.com) and  
24 [customerservices@privatelclientsubs.cjb.net](mailto:customerservices@privatelclientsubs.cjb.net). See Plaintiff's  
25 Exhibits 6-8, 12-13, 19-20, 25-58 (together, "Standish E-mails").

26  
27 a) Authenticity

28 Only admissible evidence is considered on a motion for

1 summary judgment. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773  
2 (9<sup>th</sup> Cir. 2002); see Fed. R. Civ. P. 56(e). Authentication is a  
3 "condition precedent to admissibility," and can be satisfied "by  
4 evidence sufficient to support a finding that the matter in  
5 question is what its proponent claims." Fed. R. Evid. 901(a). At  
6 the summary judgment stage, the focus is not on the admissibility  
7 of the evidence's form, but on the admissibility of its contents.  
8 *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9<sup>th</sup> Cir. 2003).

9  
10 A party seeking admission of evidence need only make a prima  
11 facie showing of authenticity. *E.W. French & Sons, Inc. v. Gen'l*  
12 *Portland Inc.*, 885 F.2d 1392, 1398 (9<sup>th</sup> Cir. 1989). "The issue for  
13 the trial judge in determining whether the required foundation  
14 for the introduction of the evidence has been established is  
15 whether the proof is such that the jury, acting as reasonable  
16 [persons], could find its authorship as claimed by the  
17 proponent." *United States v. Smith*, 609 F.2d 1294, 1301 (9<sup>th</sup> Cir.  
18 1979) (quoting *Carbo v. United States*, 314 F.2d 718 (9<sup>th</sup> Cir.  
19 1963)). "It then remains for the trier of facts to make its own  
20 determination of the authenticity of the admitted evidence and  
21 the weight which it feels the evidence should be given."  
22 *Alexander Dawson, Inc. v. N.L.R.B.*, 586 F.2d 1300, 1301 (9<sup>th</sup> Cir.  
23 1978).

24  
25  
26 A proper foundation may be established through any manner  
27 permitted by Federal Rule of Evidence 901(b) or 902. *Orr*, 285  
28

1 F.3d at 774.

2 (1) Rule 902

3 Rule 902 lists twelve items that do not require extrinsic  
4 evidence of authenticity and are self-authenticating. Fed. R.  
5 Evid. 902 (public documents, certified copies of public records,  
6 official publications, newspapers and periodicals, acknowledged  
7 documents, commercial paper, presumptions under Acts of Congress,  
8 certified records of regularly conducted activity). Plaintiff  
9 does not contend that Rule 902 is applicable to authenticate any  
10 of his documents. There are no guarantees of trustworthiness to  
11 the two e-mail addresses which are generic addresses that can be  
12 personalized by anyone. There is nothing self-authenticating  
13 about the e-mail addresses.  
14

15 (2) Rule 901(b)(1)

16 Rule 901(b)(1) permits authentication through the testimony  
17 of a witness with personal knowledge. Fed. R. Evid. 901(b)(1). In  
18 a motion for summary judgment, documents authenticated through  
19 personal knowledge under Rule 901(b)(1) must be "attached to an  
20 affidavit that meets the requirements of [Rule] 56(e) and the  
21 affiant must be a person through whom the exhibits could be  
22 admitted into evidence." *Id.* (quoting *Canada v. Blain's*  
23 *Helicopters, Inc.*, 831 F.2d 920, 925 (9<sup>th</sup> Cir. 1987)).  
24

25 Here, Plaintiff provides an affidavit declaring that he  
26 received the Standish E-mails. See Doc. 78. Plaintiff's affidavit  
27 states:  
28

1 With the exception of some documents manually obtained or in  
2 some other way, I keep and compile these emails in  
3 electronic storage at my email address [mindoro123@yahoo.com](mailto:mindoro123@yahoo.com).  
4 I had this email address for over three years now and I am  
5 the custodian of these email records. All my emails are  
6 automatically recorded at or near the time of the  
7 transaction, that is from the date and time the email is  
8 sent to me and received by me at my In Box of my email  
9 address with Yahoo, Inc. The date of each email appears at  
10 the top of the letter/message. I have personal knowledge of  
11 these emails since I read them immediately after I receive  
12 them. Since the wire transfer transaction is important to me  
13 I take care that records of email are not deleted from the  
14 time they were sent to me up to the present time. Yahoo,  
15 Inc. has a very reliable electronic storage and equipment,  
16 where all my emails are received, and Yahoo Inc. has a good  
17 reputation around the world for trustworthiness and  
18 reliability of their equipment. My email address with Yahoo  
19 is password protected. I copied all my emails with Yahoo  
20 particularly with the wire transfer transaction to my  
21 notebook computer using Kinko's Copy Store internet  
22 connection. My notebook computer is password protected. From  
23 my notebook computer I printed the emails. Most of the  
24 emails were printed before filing this case.

15 Doc. 78, ¶ 1. Plaintiff's affidavit, by itself, is not sufficient  
16 authentication of the Standish E-mails. It does not provide any  
17 foundation that Plaintiff knows or had any prior communication  
18 with Clive Standish. There are no identifying characteristics  
19 that provide any foundation for linking the e-mails to Clive  
20 Standish. Plaintiff does not include an affidavit or deposition  
21 testimony from the purported author, Clive Standish, stating that  
22 he wrote the e-mails. *See Orr v. Bank of Am., NT & SA*, 285 F.3d  
23 764, 777 (9<sup>th</sup> Cir. 2002) (concluding that letters and memoranda  
24 were not authenticated because Plaintiff did not submit an  
25 affidavit from the author stating that he wrote the letters and  
26 memoranda). Plaintiff also does not declare that he witnessed the  
27  
28

1 writing of the Standish E-mails, only that he received them. See  
2 *id.* ("Mirch's affidavit does not lay a foundation for Exhibit C.  
3 Mirch neither wrote the memo nor witnessed Geerhart do so, and he  
4 is not familiar with Geerhart's signature."). The Standish E-  
5 mails are not authenticated through personal knowledge under Rule  
6 901(b)(1).  
7

8 (3) Rule 901(b)(4)

9 E-mails and other electronic records are most frequently  
10 authenticated under Rule 901(b)(4), which permits authentication  
11 by "[a]ppearance, contents, substance, internal patterns, or  
12 other distinctive characteristics, taken in conjunction with  
13 circumstances." *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534,  
14 546 (D. Md. 2007). The Advisory Committee Notes to Rule 901(b)(4)  
15 observe:  
16

17 The characteristics of the offered item itself, considered  
18 in the light of circumstances, afford authentication  
19 techniques in great variety. Thus a document or telephone  
20 conversation may be shown to have emanated from a particular  
21 person by virtue of its disclosing knowledge of facts known  
22 peculiarly to him; similarly, a letter may be authenticated  
23 by content and circumstances indicating it was in reply to a  
24 duly authenticated one. Language patterns may indicate  
25 authenticity or its opposite.

26 Fed. R. Evid. 901(b)(4), Advisory Committee Notes (1972)  
27 (citations omitted). Here, there are no unique circumstances that  
28 link the printed e-mails to Clive Standish.

Citing *In re Homestore.com, Inc. Sec. Litig.*, 347 F.Supp.2d  
769, 781 (C.D. Cal. 2004), Plaintiff contends that because his

1 exhibits were "produced during discovery," they are presumptively  
2 authenticated. *Homestore.com* applied the rule set forth in *Orr*,  
3 285 F.3d at 777, i.e., that documents produced by a party in  
4 discovery are deemed authentic when offered by the party-  
5 opponent. *In re Homestore.com*, 347 F.Supp.2d at 781. Here,  
6 neither UBS nor Clive Standish produced Plaintiff's exhibits  
7 during discovery; rather, Plaintiff produced them. No party-  
8 opponent offered these documents in discovery so as to permit  
9 attribution of the identity and authenticity of the e-mails to  
10 Clive Standish or UBS. *Homestore.com* and *Orr* are inapplicable.

11  
12 Plaintiff further argues that a proper foundation has been  
13 laid for the Standish E-mails because: (1) they include UBS's  
14 phone number and address, which have been conclusively connected  
15 to Clive Standish; and (2) the e-mail addresses from the sender  
16 in the Standish E-mails, [clive\\_standish@yahoo.com](mailto:clive_standish@yahoo.com) and  
17 [customerservices@privatelclientsubs.cjb.net](mailto:customerservices@privatelclientsubs.cjb.net), authenticate the e-  
18 mails. Plaintiff cites *United States v. Safavian*, 435 F.Supp.2d  
19 36, 40-41 (D.D.C. 2006), in support of his argument:  
20

21  
22 Exhibit 100 is also an e-mail sent from that address, but  
23 the signature within the e-mail gives the defendant's name  
24 and the name of his business, Janus-Merritt Strategies,  
25 L.L.C., located in Washington, D.C. (as well as other  
26 information, such as the business' address, telephone and  
27 fax numbers), thereby connecting the defendant to that e-  
28 mail address . . . .

26 . . . .

27 The e-mails in question have many distinctive  
28 characteristics, including the actual e-mail addresses

1 containing the "@" symbol, widely known to be part of an e-  
2 mail address, and certainly a distinctive mark that  
3 identifies the document in question as an e-mail. *See United*  
4 *States v. Siddiqui*, 235 F.3d 1318, 1322 (11<sup>th</sup> Cir. 2000). In  
5 addition, most of the e-mail addresses themselves contain  
6 the name of the person connected to the address, such as  
7 "abramoffj@gtlaw.com," "David.Safavian@ mail.house.gov," or  
8 "david.safavian @gsa.gov." See, e.g., Exhibits 101, 105,  
9 106. Frequently these e-mails contain the name of the sender  
10 or recipient in the bodies of the e-mail, in the signature  
11 blocks at the end of the e-mail, in the "To:" and "From:"  
12 headings, and by signature of the sender.

13 A district court decision is not binding on other district  
14 courts. *Hart v. Massanari*, 266 F.3d 1155, 1163 (9<sup>th</sup> Cir. 2001)  
15 (explaining that no trial court decisions are precedential).

16 "When a letter, signed with the purported signature of X, is  
17 received 'out of the blue,' with no previous correspondence, the  
18 traditional 'show me' skepticism of the common law prevails, and  
19 the purported signature is not sufficient as authentication,  
20 unless authenticity is confirmed by additional facts." 2 KENNETH  
21 S. BROWN, MCCORMICK ON EVIDENCE § 224 (6<sup>th</sup> ed. 2006). The same rule  
22 applies to self-identification by a speaker in an unsolicited  
23 telephone call. Fed. R. Evid. 901 Adv. Comm. Note (b), Ex. 6  
24 ("The cases are in agreement that a mere assertion of his  
25 identity by a person talking on the telephone is not sufficient  
26 evidence of the authenticity of the conversation and that  
27 additional evidence of his identity is required."); *United States*  
28 *v. Puerta Restrepo*, 814 F.2d 1236, 1239 (7<sup>th</sup> Cir. 1987); *United*  
*States v. Pool*, 660 F.2d 547, 560 (5<sup>th</sup> Cir. 1981). Likewise,  
"[w]hen the recipient of an e-mail attempts to prove that the

1 message was authored by a particular individual whose name  
2 appears in the header, such self-identification by designated  
3 sender is insufficient to establish authorship." PAUL R. RICE,  
4 ELECTRONIC EVIDENCE: LAW & EVIDENCE 348 (2d ed. 2008). Self-  
5 identification in an unsolicited e-mail supports authenticity,  
6 but is not, by itself, considered sufficient. *Id.* Here there is  
7 no signature of Clive Standish which any person with familiarity  
8 with the signature purports to identify.

10 The Standish E-mails begin with the following address block:

11 CUSTOMER SERVICES DEPARTMENT  
12 UBS, ZURICH  
13 GESSNERALLE 3  
14 CH- 8001 ZURICHWEBSITE: [www.ubs.com](http://www.ubs.com)  
15 EMAIL: [customerservices@privateclientsubs.cjb.net](mailto:customerservices@privateclientsubs.cjb.net)  
16 [clive\\_standish@yahoo.com](mailto:clive_standish@yahoo.com)  
17 Tel: 411234111  
18 Fax: 4113553864

16 They are all signed in type:

17 CLIVE STANDISH  
18 UBS, ZURICH

19 Although the address and telephone number of UBS could assist  
20 authentication, all this information is publicly available  
21 information, which could be provided by anyone.

22 The e-mail addresses used by the author of the Standish E-  
23 mails, [clive\\_standish@yahoo.com](mailto:clive_standish@yahoo.com) and  
24 [customerservices@privateclientsubs.cjb.net](mailto:customerservices@privateclientsubs.cjb.net), are also self-  
25 serving. In contrast to the e-mails discussed in *Safavian*, 435  
26 F.Supp.2d at 40-41, the e-mail addresses here are not work e-mail  
27  
28

1 addresses which are issued by an employer and include the  
2 employee's name in the e-mail address. Rather, they are from  
3 publicly available e-mail providers, available to and sendable by  
4 anyone.

5           The substance of the Standish E-mails does not support  
6 authenticity. Plaintiff argues that because one of the Standish  
7 E-mails uses the word "enquiry," an English spelling of the  
8 American "inquiry," it "could only be attributed to Clive  
9 Standish, an Englishman" (Doc. 194, 9); this argument is  
10 unconvincing as it is unsupported by any identifying information  
11 about Clive Standish. Plaintiff also contends that the Standish  
12 E-mails are authenticated because they contain discussions of  
13 identifiable matters, including: diverting \$19 million dollars  
14 from UBS to Rabo Bank in Holland; demanding an Anti-  
15 Drug/Terrorist Clearance Certificate Fee; and promising to  
16 transfer \$19 million to Washington Mutual Bank after payment of  
17 \$51,000. There is no evidence outside the Standish E-mails,  
18 however, that Clive Standish had any knowledge of or participated  
19 in any of the subject matter.

20           Considering the totality of the characteristics, Plaintiff  
21 has not laid a sufficient foundation nor evidentiary reliability  
22 to justify admission of the Standish E-mails. The Standish E-  
23 mails were unsolicited, contain only publicly available, self-  
24 serving information, and do not contain any substantive or unique  
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1 information that supports authenticity.

2 b) Hearsay

3 Hearsay is generally not admissible. Fed. R. Evid. 802.

4 "Hearsay" is a statement, other than one made by the declarant  
5 while testifying at the trial or hearing, offered in evidence to  
6 prove the truth of the matter asserted. Fed. R. Evid. 801(c). A  
7 "statement" includes a written assertion. Fed. R. Evid. 801(a).  
8 The Standish E-mails, which are out of court written statements  
9 offered to prove the truth of the matter asserted, are hearsay,  
10 and are inadmissible unless they fit within a hearsay exception.

11 Citing *In re Homestore.com, Inc. Securities Litigation*, 347  
12 F.Supp.2d 769, 781 (C.D. Cal. 2004), Plaintiff contends that the  
13 Standish E-mails are not hearsay because they are admissions of a  
14 party opponent.  
15

16 Federal Rule of Evidence 801(d)(2) provides that a statement  
17 is not hearsay if it is offered against a party and is "the  
18 party's own statement, in either an individual or representative  
19 capacity", Fed. R. Evid. 801(d)(2)(A), or "a statement by the  
20 party's agent or servant concerning a matter within the scope of  
21 the agency or employment, made during the existence of the  
22 relationship," Fed. R. Evid. 801(d)(2)(D).  
23

24 Here, Clive Standish is a Defendant and was an employee of  
25 UBS during the period the Standish E-mails were written. However,  
26 there is inadequate foundation to support Plaintiff's contention  
27  
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1 that Clive Standish authored the Standish E-mails. Only  
2 statements made by and attributable to Clive Standish could  
3 constitute admissions of a party-opponent.

4  
5 2. Other E-mails

6 Plaintiff also submits other e-mails, including e-mails from  
7 "Chika Umeh" at "Standard Trust Bank," and "Attorney Smith  
8 Coker." Plaintiff advances the same arguments for authentication,  
9 e.g., that the e-mails are authenticated by the "@" symbol, and  
10 by the person's name in the e-mail address. For the reasons  
11 above, this self-serving information is not sufficient to lay the  
12 foundation for these documents. These e-mails are also  
13 inadmissible hearsay under Federal Rules of Evidence 801 and 802.

14  
15 3. Exhibits 15 and 16

16 UBS attacks Exhibits 15 and 16. Plaintiff labels Exhibit 15  
17 as a "Standard Trust Bank PLC as original sender issued payment  
18 order/slip" and Exhibit 16 as an "UBS AG Bank acceptance of the  
19 payment order for wire transfer to beneficiary plaintiff."  
20 Document 305, 100. Exhibits 15 and 16 are completely illegible  
21 photocopies. As they cannot be read, it cannot be determined  
22 whether they can be authenticated under Federal Rules of Evidence  
23 901 and 902 and whether they are relevant under Federal Rules of  
24 Evidence 401 and 402. *See, e.g., Curtis v. Clarian Health-Indiana*  
25 *Neurology Clinic*, 2011 U.S. Dist. LEXIS 18753, \*15 n.2 ("[T]he  
26 Court will not consider illegible portions of the exhibits.");  
27 *Morrison v. Jordan*, 2010 U.S. Dist. LEXIS 103226, \*10-11  
28

1 (disregarding illegible drawing). The Exhibits are also  
2 inadmissible hearsay; as they cannot be read, it cannot be  
3 determined whether they fit into a hearsay exception. *See United*  
4 *States v. Pintado-Isiordia*, 448 F.3d 1155, 1157 (9<sup>th</sup> Cir. 2006).

5 E. Conclusion

6 There is an absence of admissible evidence to create a  
7 triable issue of material fact as to UBS's liability.

8 UBS's motion for summary judgment is GRANTED.

9  
10 IV. MOTION IN LIMINE

11 Plaintiff moves in limine to admit Plaintiff's exhibits  
12 (Doc. 77) and exclude UBS's evidence.

13 UBS contends that Plaintiff's motion is premature, as no  
14 scheduling order has been issued and the initial scheduling  
15 conference is scheduled for August 26, 2011. UBS cites three  
16 unpublished, non-citable district court cases: *Harper v. Harmon*,  
17 2007 WL 4219434, \*1 (E.D. Cal. 2007) ("Motions in limine must be  
18 filed seven days prior to the trial. This motion will be denied  
19 without prejudice to its renewal closer to trial."); *Rodriguez v.*  
20 *Merez*, 2007 WL 954758, \*1 (E.D. Cal. 2007) (motion in limine  
21 filed before court had issued scheduling order with dates for  
22 motions in limine is premature); *Reed v. Edmonds*, 2006 WL 435453  
23 (S.D.N.Y. 2006) ("Discovery is not yet complete and dispositive  
24 motions have not yet been made. In view of the fact that so  
25 little is currently known about what the trial will ultimately  
26  
27  
28

1 look like, I conclude that consideration of plaintiff's motion in  
2 limine is premature at this time." ).

3 To the extent that Plaintiff seeks to determine the  
4 admissibility of evidence for purposes of trial, Plaintiff's  
5 motion, filed before the court has issued a scheduling order, is  
6 premature. The admissibility of evidence relevant to the  
7 disposition of UBS's motion for summary judgment was discussed  
8 above.

9  
10 Plaintiff's motion in limine is DENIED, without prejudice.

11  
12 V. MOTION FOR RECONSIDERATION

13 A. Introduction

14 Plaintiff moves to vacate: (1) the February 8, 2011  
15 memorandum decision granting UBS's motion to be relieved from  
16 deemed admissions (Doc. 302); and (2) the November 3, 2010  
17 memorandum decision and order denying Plaintiff's objections to  
18 Doc. 273 and request to modify or reconsider it. Doc. 289.  
19 Plaintiff's motion to vacate is in essence a motion for  
20 reconsideration. UBS filed an opposition. Doc. 309.

21  
22 B. Legal Standard

23 A motion for reconsideration may be brought under Rule 60(b)  
24 if a moving party can show: (1) mistake, inadvertence, surprise,  
25 or excusable neglect; (2) newly discovered evidence; (3) fraud,  
26 misrepresentation, or other misconduct; (4) a void judgment; (5)  
27 a satisfied or discharged judgment; or (6) any other reason  
28

1 justifying relief from operation of judgment. Fed. R. Civ. P.  
2 60(b); *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).  
3 Relief under exception (6) requires a finding of "extraordinary  
4 circumstances." *Id.*

5 A motion for reconsideration brought under Rule 59(e) is  
6 appropriate where the district court "(1) is presented with newly  
7 discovered evidence, (2) committed clear error or the initial  
8 decision was manifestly unjust, or (3) if there was an  
9 intervening change in controlling law." *School Dist. No. 1J v. AC*  
10 *& S, Inc.*, 5 F.3d 1255, 1263 (9<sup>th</sup> Cir. 1993). A reconsideration  
11 motion should not merely present arguments previously raised, or  
12 which could have been raised, in a previous motion. *See Backlund*,  
13 778 F.2d at 1388.

14  
15  
16 C. Discussion

17 Plaintiff moves for reconsideration of two previous  
18 memorandum decisions under Rule 60(b)(4), which permits a court  
19 to relieve a party from an order if "the judgment is void." Fed.  
20 R. Civ. P. 60(b)(4).

21 1. Reconsideration of November 3, 2010 Memorandum  
22 Decision (Doc. 289)

23 The memorandum decision and order dated December 3, 2010  
24 holds:

25 No further requests for reconsideration or objections to  
26 the rulings in connection with Plaintiff's motion to compel,  
27 Doc. 258), or the Court's rulings in Docs. 273, 289, or this  
28 Memorandum Decision and Order will be entertained by the  
Court.

1 Doc. 295, 3. The Court will not consider Plaintiff's motion to  
2 reconsider its November 3, 2010 memorandum decision (Doc. 289),  
3 as it has been raised for a third time after being previously  
4 denied.

5  
6 2. Reconsideration of February 9, 2011 Memorandum  
Decision (Doc. 302)

7 Plaintiff contends that the February 9, 2011 memorandum  
8 decision is void and should be reconsidered because it is based  
9 on Doc. 289, which is void. Plaintiff's attack of Doc. 289 has  
10 been rejected repeatedly and will not be further reconsidered.

11 Plaintiff further argues that the February 9, 2011  
12 memorandum decision is void because: (1) the court failed to  
13 apply estoppel; (2) the court failed to apply preclusion  
14 sanction; and (3) the court failed to apply the best evidence  
15 rule. Plaintiff's arguments are without merit. Even if they were  
16 valid attacks on the court's prior decision, they would not make  
17 it "void." A judgment is not void within the meaning of Rule  
18 60(b)(4) "merely because it is erroneous." *In re Sasson*, 424 F.3d  
19 864, 875 (9<sup>th</sup> Cir. 2005). The Ninth Circuit has "consistently"  
20 held that a "final judgment is 'void' for purposes of Rule  
21 60(b)(4) *only if* the court that considered it lacked  
22 jurisdiction, either as to the subject matter of the dispute or  
23 over the parties to be bound, or acted in a manner inconsistent  
24 with due process of law." *Id.* at 876 (quoting *United States v.*  
25 *Burke*, 170 F.3d 882, 883 (9<sup>th</sup> Cir. 1999)).  
26  
27  
28

1 Plaintiff further has failed to present any newly discovered  
2 evidence or shown any intervening change in controlling law to  
3 justify reconsideration of the prior memorandum decision. *School*  
4 *Dist. No. 1J*, 5 F.3d at 1263.

5 Plaintiff's motion for reconsideration is DENIED.

6  
7 VI. CONCLUSION

8 For the reasons stated:

- 9 1. UBS's motion for summary judgment is GRANTED.  
10 2. Plaintiff's motion for reconsideration is DENIED.  
11 3. Plaintiff's motion in limine is DENIED, without prejudice.  
12 4. UBS shall submit a proposed form of order consistent with  
13 this memorandum decision within five (5) days following  
14 electronic service of this memorandum decision.

15 SO ORDERED.

16 DATED: June 24, 2011

17  
18 /s/ Oliver W. Wanger  
19 Oliver W. Wanger  
20 United States District Judge  
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