

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

CARL L. JIMENA,	)	No. CV-F-07-367 OWW/GSA
	)	
	)	ORDER DEEMING PLAINTIFF'S
	)	"OBJECTIONS AND
Plaintiff,	)	MANIFESTATIONS" FILED ON
	)	OCTOBER 27, 2009 (Doc. 168)
vs.	)	TO BE MOTION FOR
	)	RECONSIDERATION AND DENYING
	)	DEEMED MOTION FOR
UBS AG BANK, INC., et al.,	)	RECONSIDERATION
	)	
	)	
Defendants.	)	
	)	
	)	

The "Memorandum Decision and Order Denying in Part and Granting in Part Plaintiff's Amended Motion to Admit Third Amended Complaint, Striking Allegations Against UBS FS, and Directing Clerk of Court to File Third Amended Complaint," ("October 6 Memorandum"; Doc. 155), was filed on October 6, 2009.

The Court ruled:

There is no issue in this case concerning personal jurisdiction as to UBS AG or UBS FS. The issue is whether Plaintiff has pleaded facts to hold UBS FS liable for the alleged actions of its parent, UBS AG based on alter-ego liability. Plaintiff pleads no such

1 facts. Plaintiff has had ample opportunity  
2 to comply with the June 6, 2007 Memorandum  
3 Decision and the July 15, 2008 Memorandum  
4 Decision. The Court DENIES WITHOUT PREJUDICE  
5 Plaintiff's motion to 'admit' the TAC to the  
6 extent that the TAC alleges alter ego, fraud  
7 or agency liability as to UBS FS for the  
8 alleged actions of UBS AG. To facilitate the  
9 prosecution of this action, the Court STRIKES  
10 the allegations in the proposed TAC regarding  
11 alter ego, fraud or agency liability as to  
12 UBS FS and otherwise allows Plaintiff to file  
13 the TAC.<sup>1</sup> No further motions for  
14 reconsideration will be entertained on the  
15 issue of amendment of Plaintiff's pleadings  
16 as against UBS FS unless Plaintiff can first  
17 show cause that he has facts that can be  
18 alleged against UBS FS as to its liability  
19 for the alleged actions of UBS AG.

11 <sup>1</sup>Only if facts are ascertained through  
12 discovery or otherwise by which Plaintiff  
13 can, in compliance with Rule 11, Federal  
14 Rules of Civil Procedure, and the time limits  
15 that will be established in the Scheduling  
16 Order, allege that UBS FS is the alter ego of  
17 UBS AG, may Plaintiff then move the Court for  
18 leave to amend. Amendment will not be  
19 permitted before then. Plaintiff shall, if  
20 any such motion is made, include a  
21 declaration under penalty of perjury of the  
22 basis for and the person(s) having knowledge  
23 of alter ego facts.

18 On October 27, 2009, Plaintiff filed "Objections and  
19 Manifestations," (Doc. 168), in which Plaintiff "objects from  
20 being barred to file a motion for reconsideration on the denial  
21 in part of the TAC particularly referring to striking out the  
22 fraud, agency and alter ego theories of imputed liability of UBS  
23 FS."

24 The Court deems Plaintiff's "Objections and Manifestations"  
25 to be a motion for reconsideration and DENIES the deemed motion  
26 for reconsideration.

1            "[T]his Court's opinions are not intended as mere first  
2 drafts, subject to revision and reconsideration at a litigant's  
3 pleasure." *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123  
4 F.R.D. 282, 288 (N.D.Ill.1988). "Courts have distilled various  
5 grounds for reconsideration of prior rulings into three major  
6 grounds for justifying reconsideration: (1) an intervening change  
7 in controlling law; (2) the availability of new evidence or an  
8 expanded factual record; and (3) need to correct a clear error or  
9 to prevent manifest injustice." *Kern-Tulare Water Dist., id.*  
10 Pursuant to Rule 78-230(k)(3), Local Rules of Practice, the party  
11 seeking reconsideration has the duty to indicate "in an affidavit  
12 or brief, as appropriate," "what new or different facts or  
13 circumstances are claimed to exist which did not exist or were  
14 not shown upon such prior motion, or what other grounds exist for  
15 the motion," and "why facts or circumstances were not shown at  
16 the time of the prior motion."

17            Plaintiff argues that the Court's analysis of the standards  
18 governing resolution of a motion to dismiss pursuant to Rule  
19 12(b)(6), Federal Rules of Civil Procedure, at 26:21-28:13, is  
20 incorrect because it does not take into account that Plaintiff is  
21 proceeding *in pro per*. Plaintiff cites *Erickson v. Pardus*, 551  
22 U.S. 89, 93-94 (2007):

23            Federal Rule of Civil Procedure 8(a)(2)  
24            requires only 'a short and plain statement of  
25            the claim showing that the pleader is  
26            entitled to relief.' Specific facts are not  
             necessary; the statement need only "give the  
             defendant fair notice of what the ... claim  
             is and the grounds upon which it rests."

1           *Bell Atlantic Corp. v. Twombly* ... In  
2           addition, when ruling on a defendant's motion  
3           to dismiss, a judge must accept as true all  
          of the factual allegations contained in the  
          complaint. *Bell Atlantic Corp.* ....

4           *Erickson* reiterated that "[a] document filed *pro se* is 'to be  
5           liberally construed,' ... and a 'pro se complaint, however  
6           inartfully pleaded, must be held to less stringent standards than  
7           formal pleadings drafted by lawyers,' ...." *Id.* at 94.

8           Plaintiff complains that the October 6 Memorandum subjects him to  
9           "stricter standards than a member of the bar."

10           Plaintiff is not entitled to reconsideration on this ground.  
11           The Court is aware that the pleadings of a *pro se* plaintiff are  
12           to be liberally construed. As recently stated by the Ninth  
13           Circuit in *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9<sup>th</sup>  
14           Cir.2009):

15                   [F]or a complaint to survive a motion to  
16                   dismiss, the non-conclusory 'factual  
17                   content,' and reasonable inferences from that  
                  content, must be plausibly suggestive of a  
                  claim entitling the plaintiff to relief.

18           Even a *pro per* plaintiff must satisfy this standard, liberally  
19           construing the pleading.

20           Plaintiff argues that the allegations of the Third Amended  
21           Complaint allege facts from which the alter ego liability of UBS  
22           FS for the alleged actions of its parent, UBS AG: "1) use of the  
23           same attorney by UBS AG and UBS FS; 2) inadequate capitalization,  
24           UBS FS not only is inadequate but has zero capitalization because  
25           it is 100% owned by UBS AG 3) UBS FS is a marketing conduit of  
26           UBS AG." Plaintiff is not entitled to reconsideration on this

1 ground. The October 6 Memorandum considered the allegations  
2 pertaining to alter ego liability of UBS FS for the alleged  
3 actions of UBS AG and found them insufficient. Plaintiff's  
4 motion for reconsideration merely rehashes arguments already  
5 considered by the Court.

6 Plaintiff argues that the allegations of alter ego and  
7 agency liability at pages 16-19 of the Third Amended Complaint  
8 cannot be stricken because the jury will be deprived of "their  
9 right to see those facts," because the allegations "conform to  
10 the evidence," and because the "allegations are tied to other  
11 issues in this case."

12 Plaintiff is not entitled to reconsideration on this ground.  
13 The allegations of alter ego and agency liability of UBS FS for  
14 the alleged actions of UBS AG do not suffice to state a claim on  
15 those theories against UBS FS and are therefore irrelevant and  
16 immaterial to Plaintiff's action against UBS AG. If and when  
17 Plaintiff discovers any facts within the strictures of Fed. R.  
18 Civ. P. 11, he can seek to amend under Fed. R. Civ. P. 15. He  
19 has unnecessarily and vexatiously delayed the progress of this  
20 action by his continuing refusal to accept any ruling of the  
21 Court.

22 For the reasons stated:

- 23 1. Plaintiff's "Objections and Manifestations" is deemed to  
24 be a motion for reconsideration;
- 25 2. Plaintiff's deemed motion for reconsideration is DENIED;
- 26 3. The Court will not entertain any further motions for

1 reconsideration of the adequacy of pleading alter ego or agency  
2 liability of UBS FS for the alleged actions of UBS AG.

3 IT IS SO ORDERED.

4 Dated: November 9, 2009

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE

5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26