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

|                      |   |                              |
|----------------------|---|------------------------------|
| CARL L. JIMENA,      | ) | No. CV-F-07-367 OWW/SKO      |
|                      | ) |                              |
|                      | ) | ORDER DEEMING PLAINTIFF'S    |
|                      | ) | OBJECTIONS FILED ON          |
| Plaintiff,           | ) | SEPTEMBER 18, 2010 (Doc.     |
|                      | ) | 264) TO BE REQUEST FOR       |
| vs.                  | ) | RECONSIDERATION BY DISTRICT  |
|                      | ) | COURT OF MAGISTRATE JUDGE'S  |
|                      | ) | RULING AND DENYING IN PART   |
| UBS AG BANK, et al., | ) | AND GRANTING IN PART REQUEST |
|                      | ) | FOR RECONSIDERATION AND      |
|                      | ) | REMANDING MOTION TO COMPEL   |
| Defendants.          | ) | PRODUCTION OF EXHIBIT 15 AND |
|                      | ) | 16 TO MAGISTRATE JUDGE FOR   |
|                      | ) | FURTHER PROCEEDINGS          |

By Order filed on August 27, 2010, (Doc. 262), United States Magistrate Judge Oberto denied Plaintiff's "motion to compel UBS AG to give its consent for Yahoo Inc. to disclose Clive Standish two email addresses", (Doc. 211), and Plaintiff's "motion to compel UBS AG for production of Exhibit 15 and 16", (Doc. 212).

On September 8, 2010, Plaintiff, who is proceeding *in pro per*, filed "Objections to Doc. 262," wherein Plaintiff "registers

1 his objections to Doc. 262 for use in future proceedings.”

2 The Magistrate Judge hears all discovery motions in civil  
3 cases, Rule 302(c)(1), Local Rules of Practice. Discovery orders  
4 issued by the Magistrate Judge are final unless a party files a  
5 “Request for Reconsideration by the District Court of Magistrate  
6 Judge’s Ruling.” Rule 303(b) & (c), Local Rules of Practice.  
7 Consequently, Plaintiff cannot “register his objections” to the  
8 Magistrate Judge’s Order “for use in future proceedings” because  
9 the Order is final absent a request for reconsideration of the  
10 Order by the District Court. Although misdesignated, the Court  
11 deems Plaintiff’s objections to be a timely request for  
12 reconsideration.

13 “No oral argument shall be allowed in the usual civil action  
14 unless the assigned Judge specifically calendars such argument,  
15 either on request of a party or sua sponte.” Rule 303(e), Local  
16 Rules of Practice. The standard of review is the “clearly  
17 erroneous or contrary to law” standard set forth in 28 U.S.C. §  
18 636(b)(1)(A). Rule 303(f), Local Rules of Practice.

19 A. Motion to Compel UBS AG to Consent to Yahoo Inc.’s  
20 Disclosure.

21 Plaintiff argues that the Magistrate Judge erred in denying  
22 Plaintiff’s motion to compel UBS AG to give consent to Yahoo  
23 Inc.’s disclosure of Clive Standish’s email addresses to the  
24 extent the Magistrate Judge deemed Plaintiff’s motion to be one  
25 to enforce the subpoena Plaintiff issued to Yahoo Inc. pursuant  
26 to Rule 45, Federal Rules of Civil Procedure. Plaintiff notes

1 that his motion was brought pursuant to Rule 34, Federal Rules of  
2 Civil Procedure.

3 On May 20, 2010, Plaintiff served a subpoena duces tecum on  
4 Yahoo, Inc.:

5 The electronically stored information is to  
6 be produced out of the two email addresses of  
7 Clive Standish namely,  
8 [clive\\_standish@yahoo.com](mailto:clive_standish@yahoo.com) and  
9 [customerservices@privateclientsubs.cjb.net](mailto:customerservices@privateclientsubs.cjb.net)  
10 are as follows:

11 1. complete account information details from  
12 the time the two accounts were opened until  
13 they were closed such as for example, name,  
14 address, birthdate, home phone, work phone  
15 and other details identifying the account  
16 owner/user of the email address.

17 2. all changes in the entries of the two  
18 email accounts from the time they were opened  
19 until they were closed.

20 3. authorized users of the two email  
21 accounts or email address from the time  
22 opened until they were closed.

23 4. all exchanges of email messages on the  
24 two email address [sic] between Carl L.  
25 Jimena and Clive Standish from the time the  
26 same two email address [sic] was opened until  
closed.

5. all exchanges of email messages on the  
above two email addresses of Clive Standish  
between Atty. Ademola Adeshina and Clive  
Standish concerning transferring 19 million  
dollars in which Carl L. Jimena is the  
beneficiary, from UBS AG to Rabo Bank,  
Purmerend, Netherlands.

6. all exchanges of email messages on the  
above two email address [sic] of Clive  
Standish between Standard Trust Bank and  
Clive Standish concerning transfer of 19  
million dollars from Standard Trust Bank to  
Carl L. Jimena or to Carl L. Jimena's account  
at Washington Mutual Bank located at

1 California, USA, passing through UBS AG of  
2 Zurich, Switzerland.

3 7. all exchanges of email messages on the  
4 above to email address [sic] of Clive  
5 Standish, between the Financial Action Task  
6 Force (FATF) and Clive Standish concerning  
7 transfer of 19 million dollars from Standard  
8 Trust Bank to Carl L. Jimena or to Carl L.  
9 Jimena's account at Washington Mutual Bank  
10 located at California, USA, passing through  
11 UBS AG of Zurich, Switzerland.

12 8. identity of the computer used by Clive  
13 Standish in sending emails, if retrievable  
14 from Yahoo's system.

15 9. location of the computer of Clive  
16 Standish from where messages are being sent  
17 to Carl L. Jimena, if traceable by Yahoo in  
18 its system. This may require a backward  
19 trace of the connecting computers on which  
20 Clive Standish [sic] outgoing mail passes  
21 through.

22 (Doc. 227, Exh. A). By letter dated May 25, 2010 to Plaintiff,  
23 Yahoo, Inc. advised Plaintiff in relevant part:

24 At this time, Yahoo! does not have any  
25 information pertaining to the ... Yahoo!  
26 subscriber ID specified in the Subpoena:  
27 [clive\\_standish@yahoo.com](mailto:clive_standish@yahoo.com)". Therefore no  
28 responsive documents can be produced ...."

29 Additionally, at this time, Yahoo! does not  
30 have any information pertaining to the  
31 following account specified in the Subpoena:  
32 [customerservices@privateclientsubs.cjb.net](mailto:customerservices@privateclientsubs.cjb.net).

33 Furthermore, we were unable to connect the  
34 following name to a specific Yahoo!  
35 subscriber: Clive Standish. A Yahoo!  
36 subscriber ID is required in order to search  
37 our systems accurately. Therefore no  
38 responsive documents can be produced for  
39 Clive Standish.

40 (Doc. 227, Exh. B). Yahoo Inc. advised Plaintiff that, if a  
41 subpoena is served on Yahoo! regarding a valid subscriber ID, it

1 is precluded by the Stored Communications Act, 18 U.S.C. §§ 2701  
2 et seq. from disclosing the contents of electronic  
3 communications, with certain exceptions, and that the primary  
4 exception for which disclosure is permitted is subscriber  
5 consent. (Doc. 227, Exh. B). On June 6, 2010, Plaintiff filed  
6 his "motion to compel UBS AG to give its consent for Yahoo Inc.  
7 to disclose Clive Standish two email addresses," in which he  
8 moved pursuant to Rule 34, Federal Rules of Civil Procedure, to  
9 compel UBS AG to give its consent for Yahoo! to release the  
10 information described in the subpoena duces tecum issued to  
11 Yahoo! (Doc. 211). Plaintiff asserted in his motion:

12 4. UBS AG can be compelled to give its  
13 consent because under Rule 34, FRCP, UBS AG  
14 is now and before in 'control' of ex-Chief  
15 Financial Officer Clive Standish's office  
16 email address  
17 [customerservices@privateclientsubs.cjb.net](mailto:customerservices@privateclientsubs.cjb.net)  
18 which is linked to his home email address  
19 [clive\\_standish@yahoo.com](mailto:clive_standish@yahoo.com) also used by Clive  
20 Standish in UBS AG's business ... Plaintiff's  
21 authority that UBS AG can be compelled to  
22 give its consent for Yahoo Inc. to disclose  
23 information out of Clive Standish [sic] two  
24 email address is Flagg v. City of Detroit,  
25 252 F.R.D. 346 (E.D.Mich.2008) ... wherein  
26 the Court held that 'control' under Rule 34,  
FRCP, include the legal right to obtain  
documents on demand' and also a party's  
'affirmative duty to seek that information  
reasonably available to him from his  
employees, agents or others subject to its  
control', id at p.353. It is admitted that  
Clive Standish was the Chief Financial  
Officer of UBS AG, an employee of UBS AG  
during the time Clive Standish was using the  
above two email address [sic] so that UBS AG  
has the legal right to obtain documents on  
demand from Clive Standish out of the above  
office email address including the home email  
address of Clive Standish being used for UBS

1 AG's business.

2 5. The Court's authority now is established  
3 to order UBS AG to give its consent for Yahoo  
4 Inc. to disclose the information ... and  
5 likewise Yahoo Inc. be ordered to produce the  
6 documents ... which was formerly served to  
7 Yahoo Inc. by subpoena. In order for the  
8 Court to verify Yahoo Inc. disclosure, the  
9 latter must activate or reopen Clive Standish  
10 two email accounts and provide the court with  
11 a password to those two email accounts.

12 Yahoo! responded to the motion to compel, asserting that Yahoo!  
13 does not have any records responsive to Plaintiff's subpoena.  
14 (Docs. 226-229, 256). UBS AG responded that it "has no  
15 opposition to Yahoo! producing any documents in its possession or  
16 control that are responsive to Plaintiff's subpoena."

17 In the Order, the Magistrate Judge ruled that the May 2010  
18 subpoena was not enforceable under Rule 45, and that, even if it  
19 could be enforced, Yahoo! has not found any responsive documents.

20 The Magistrate Judge then ruled:

21 To the extent that Plaintiff is seeking to  
22 compel UBS's consent for Yahoo to disclose  
23 electronic records and information related to  
24 the subscriber IDs identified by Plaintiff in  
25 his subpoena to Yahoo, the Court denies the  
26 motion as moot. UBS has stated that it will  
consent to disclosure by Yahoo of any  
responsive electronic correspondence relevant  
to the subscriber IDs identified by  
Plaintiff.<sup>2</sup> Therefore, Plaintiff has  
received everything that he seeks from UBS  
regarding its consent to disclosure. Whether  
UBS's consent is operative under the SCA is a  
separate question. The Court expressly  
declines to decide whether any consent on the  
part of UBS is effective to allow disclosure  
of electronic communications under the SCA  
related to the subscriber IDs identified by  
Plaintiff. The parties did not brief the  
issue and, as there are no documents

1 responsive to the subpoena in any case, the  
2 Court's decision in this regard would amount  
to nothing more than obiter dictum.

3 <sup>2</sup>The Court notes, without deciding, that it  
4 is unlikely that UBS's consent is effective  
5 for purposes of an exemption to disclosure  
6 under the SCA for the subscriber IDs that are  
7 at issue in the subpoena to Yahoo; in order  
words, it is not clear that UBS has any  
authority to consent to disclosure of the  
communications related to the subscriber IDs  
identified by Plaintiff.

8 In his deemed request for reconsideration, Plaintiff asserts  
9 that the Magistrate Judge's ruling "denying enforcement of a  
10 subpoena did not resolve at all the grounds and the relief of the  
11 motion in Doc. 211 with the result that Doc. 211 remains  
12 undecided under Rule 34, FRCP, and is still pending."

13 Plaintiff's contention is without merit. UBS AG agreed to  
14 give its consent to Yahoo! to disclose the documents requested by  
15 the subpoena. As the Magistrate Judge noted, however, granting  
16 Plaintiff's motion to compel is moot because Yahoo! has  
17 established that it does not have any documents responsive to the  
18 subpoena.

19 Plaintiff has not established that the Magistrate Judge's  
20 ruling was clearly erroneous or contrary to law.

21 B. Motion to Compel Production of Exhibits 15 and 16.

22 In his deemed request for reconsideration, Plaintiff argues  
23 that the Magistrate Judge erred in denying his motion to compel  
24 production of Exhibit 15 and 16.

25 Plaintiff served a Demand for Production of Documents dated  
26 May 3, 2010, on UBS AG, demanding production on June 4, 2010 of:

1 1. The original copy or copy of the document  
2 received by UBS AG (Zurich, Switzerland  
3 Headquarters) of the payment order/slip for  
4 19 million US dollars, dated April 28, 2006  
5 issued in favor of the plaintiff as  
6 beneficiary and sent to UBS AG (Zurich,  
7 Switzerland Headquarters) on the same date  
8 for acceptance, and deliver of the funds to  
9 the plaintiff. Plaintiff's copy is attached  
10 by incorporation as Exhibit 15 of the Third  
11 Amended Complaint but is not a well readable  
12 copy. Plaintiff request [sic] that you admit  
13 the genuineness of a copy of this document  
14 obtained from you.

15 2. The original copy or copy of the document  
16 from UBS AG computer of the UBS AG's  
17 acceptance of the payment order specified in  
18 paragraph 1 above. UBS AG in its document of  
19 acceptance dated April 28, 2006 had obligated  
20 itself to deliver to plaintiff the 19 million  
21 US dollars after 96 sleep hours. A copy of  
22 the UBS AG acceptance as received by Standard  
23 Trust Bank PLC is attached by incorporation  
24 to the Third Amended Complaint as Exhibit 16  
25 but is not a well readable copy. Plaintiff  
26 needs a readable copy to be read by the  
Court. Plaintiff request [sic] that you  
admit the genuineness of this acceptance  
document obtained from you.

On May 11, 2010, counsel for UBS AG served its response to  
the Demand for Production, responding to both requests: "UBS AG  
has no documents in its possession responsive to this request,  
and further denies the genuineness of the 'copy' referenced  
above." (Doc. 204, Exh. A).

In the motion to compel, Plaintiff argued that UBS AG's  
responses to the Demand for Production were given in bad faith  
because the record in this case proves that UBS AG is in  
possession of the originals. Plaintiff's motion to compel  
referred to Rule 26(a)(1)(A), Federal Rules of Civil Procedure,



1 pertaining to initial disclosures, and cited *In re Homestore.com,*  
2 *Inc. Securities Litigation*, 347 F.Supp.2d 769, 781  
3 (C.D.Cal.2004), holding that documents produced during discovery  
4 by a party-opponent are deemed authentic.<sup>1</sup> Plaintiff argued that  
5 "Exhibits 25, to 58, 6, 7, 8, 12, 13, 19, 20 all emails of Clive  
6 Standish are admissions of a party opponent ... and a vicarious  
7 admission of UBS AG under Rule 801(d) (2) (D), Federal Rules of  
8 Evidence." Plaintiff argued:

9           2. ... Exhibit 16 is an automatic response of  
10           UBS AG's computer, not a declaration of a  
11           person (not hearsay). Exhibit 16 below  
12           'Acknowledgment' states 'network response to  
13           SW 280406 FMMRA' which is readable by the  
14           naked eye and the rest of the numbers are  
15           made clear by Clive Standish emails Exhibits  
16           25 to 58 when all of them stating in the  
17           subject matter at the top 'RE: Swift Message  
18           dated 28/04-06 under FMMRA3008083500 kindly  
19           refers". Defendants cannot contest Exhibit  
20           25 to 58 to support this motion based on  
21           plaintiff's explanation in paragraph 1 above.  
22           The same subject matter is the subject of all  
23           emails of the following: Exhibits 25, to 58,  
24           6,7,8, 12, 13, 19, 20 all emails of Clive  
25           Standish; Exhibits 59-64, Exh. 11, 11a with  
26           its attachment, Exhibit 15, 16, 59.1C, 59.1D,  
27           15.1 and 16.1 (the latter two attached to  
28           plaintiff's opposition to summary judgment)  
29           all emails of Standard Trust Bank; Exhibits  
30           65, 66, 74 emails of Atty. Smith Coker;  
31           Exhibits 9 and 10 emails of APGML; Exhibits  
32           25.2, Exhibit 25.3 email of Atty. Ademola  
33           Adeshina. The emails of the latter non-  
34           parties to this case contain a discussion of  
35           identifiable matter which is the fund  
36           transfer of 19 million dollars authorizing  
37           themselves as to content and substance.

3. All the preceding documents militate

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<sup>1</sup>Plaintiff's motion to compel actually cited the case as 347  
F.Supp.2d 769, n.20. There is no such footnote in the opinion.

1 against defendants [sic] denial that they  
2 [sic] don't have a copy of Exhibit 15 in 6 16.  
3 All the emails of the nonparties to this case  
4 contain the identifiable subject matter of  
5 the fund transfer of the 19 million dollars  
6 in the Account Coded Escrow in Exhibit 16  
7 authenticating Exhibit 16 and mutually  
8 authenticating each other. As already  
9 explained in paragraph 1 above, defendants  
10 [sic] cannot contest the exhibits supporting  
11 this motion and are bound to produce Exhibit  
12 15 and 16 as demanded by plaintiff.

13 UBS AG responded to the motion to compel, submitting the  
14 Declaration of Sauyma Bhavsar and Patrick Mathieu, an Executive  
15 Director and Director, respectively, of UBS AG. They aver that  
16 they have reviewed Plaintiff's motion to compel and the copies of  
17 Exhibits 15 and 16 attached as exhibits to Plaintiff's Third  
18 Amended Complaint:

19 4. Exhibits 15 and 16 (which are barely  
20 legible) do not appear to be forms used by  
21 UBS AG in Zurich.

22 5. We have also reviewed UBS AG's records in  
23 Zurich, and confirmed that there was never a  
24 deposit or transfer in the amount of US \$19  
25 million made to an account relationship in  
26 the name of or to the benefit of Mr. Jimena  
maintained with UBS AG in Zurich, at any time  
in April 2006, from a bank called 'Standard  
Trust Bank PLC.'

6. To the best of our knowledge and after  
the reasonable investigation described above,  
UBS AG in Zurich does not possess any copies  
of Exhibits 15 and 16 associated with an  
account relationship in the name of or to the  
benefit of Mr. Jimena maintained with UBS AG  
in Zurich other than those it has received  
from Mr. Jimena as attachments to his  
pleadings in this lawsuit.

27 In denying Plaintiff's motion to compel, the Magistrate  
28 Judge ruled that Plaintiff appeared to be arguing that, because

1 Plaintiff has copies of these documents, UBS AG must have the  
2 original documents but failed to produce them voluntarily under  
3 Rule 26(a):

4 UBS AG ... maintains that it does not have  
5 these documents in its possession. To  
6 support this, UBS filed the joint declaration  
7 of Sauyma Bhavsar and Patrick Mathieu,  
8 employees of UBS AG. Plaintiff filed  
9 objections to the declaration. Among other  
10 arguments, Plaintiff challenges the joint  
11 declaration ... on the basis that these  
12 witnesses were not disclosed to him by UBS  
13 voluntarily as required by Federal Rule of  
14 Civil Procedure 26(a). Plaintiff argues that  
15 UBS is precluded from submitting declarations  
16 from witnesses not initially disclosed to  
17 him.

18 First, Rule 26(a) requires the disclosing  
19 party to provide information and identify  
20 witnesses, among other things, that it may  
21 use to support its claims or defenses ...  
22 Even assuming that UBS has the originals of  
23 Exhibits 15 and 16, it was not required to  
24 disclose these documents voluntarily unless  
25 it planned to use them to support its claims  
26 or defenses ... The exhibits were not the  
types of documents that would have been  
subject to voluntary disclosure by UBS in the  
first place. This is not a situation where  
UBS is attempting to introduce Exhibits 15  
and 16 as evidence in support of its claims  
or defenses without ever having disclosed its  
possession of these documents to Plaintiff.

Second, Plaintiff does not reference a  
particular discovery request to which UBS has  
refused to respond or produce documents.  
(See Doc. 212). In Plaintiff's motion, he  
states that he served a demand for production  
of Exhibits 15 and 16 and states that the  
copy of this request for production is  
attached to his motion as Exhibit 1. (Doc.  
212 at ¶ 2). There is no exhibit attached to  
Plaintiff's motion. Further, it appears that  
there are several outstanding discovery  
requests about which the parties have not yet  
met and conferred and are not the subject of

1 this motion to compel. It appears that  
2 Plaintiff's reference to a 'Demand for  
3 Production' is not one of the outstanding  
4 discovery requests in Plaintiff's June 7,  
5 2010 Motion to Compel that is presently  
6 before the Court. Other than the required  
7 initial disclosures under Rule 26(a), UBS has  
8 no duty to produce documents absent a  
9 specific discovery request by Plaintiff.

6 The Court finds no evidence that UBS violated  
7 its initial disclosure obligations by failing  
8 to produce the originals of Exhibits 15 and  
9 16. The Court also finds no evidence that  
10 UBS has wrongfully failed or refused to  
11 produce Exhibits 15 and 16 pursuant to a  
12 specific discovery request.

10 Plaintiff did not attach as an exhibit to the motion to  
11 compel a copy of the Demand for Production. However, on June 23,  
12 2010, Plaintiff filed a "Notice of Errata in Doc. 212", (Doc.  
13 221), to which he attached a copy of the Demand for Production  
14 "with the request to the Deputy Clerk to attach the same Exhibit  
15 1 to Doc. 212." It is apparent that the Notice of Errata was not  
16 brought to the Magistrate Judge's attention before the ruling on  
17 the motion to compel. Although it is a party's obligation to  
18 ascertain that the Court is fully briefed on a pending motion, it  
19 is also clear that the basic premise for the denial of the motion  
20 to compel is not supported by the actual record in the action.

21 Consequently, that portion of the Magistrate Judge's Order  
22 denying the motion to compel production of Exhibits 15 and 16 is  
23 VACATED. The motion to compel production of Exhibits 15 and 16  
24 is remanded to the Magistrate Judge for ruling on the merits of  
25 Plaintiff's motion, including Plaintiff's evidentiary objections  
26 to the Declaration of Sauyma Bhavsar and Patrick Mathieu.

1 IT IS SO ORDERED.

2 **Dated: September 23, 2010**

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE

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