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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
)	
)	MEMORANDUM DECISION AND
Plaintiff,)	ORDER DENYING PLAINTIFF'S
)	REQUEST FOR RECONSIDERATION
vs.)	BY THE DISTRICT COURT OF
)	MAGISTRATE JUDGE'S RULING
)	(Doc. 270)
)	
UBS AG BANK, et al.,)	
)	
Defendants.)	
)	
)	

Plaintiff Carl L. Jimena, proceeding *in pro per*, has timely filed a request for reconsideration by the District Court of the Magistrate Judge's Order Denying Plaintiff's Motion to Compel (Doc. 267).

The standard of review is the "clearly erroneous or contrary to law" standard set forth in 28 U.S.C. § 636(b)(1)(A). Rule 303(f), Local Rules of Practice. The "clearly erroneous" standard applies to a Magistrate Judge's findings of fact. *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 623 (1993). "A findings is 'clearly erroneous' when

1 although there is evidence to support it, the reviewing [body] on
2 the entire evidence is left with the definite and firm conviction
3 that a mistake has been committed." *Id.* at 622. The "contrary
4 to law" standard allows independent, plenary review of purely
5 legal determinations by the Magistrate Judge. *FDIC v. Fidelity &*
6 *Deposit Co. of Md.*, 196 F.R.D. 375, 378 (S.D.Cal.2000); *Haines v.*
7 *Liggett Group, Inc.*, 975 F.2d 81, 91 (3rd Cir.1992). "An order
8 is contrary to law when it fails to apply or misapplies relevant
9 statutes, case law, or rules of procedure." *DeFazio v. Wallis*,
10 459 F.Supp.2d 159, 163 (E.D.N.Y.2006).

11 A. Timeliness of UBS's Responses to Discovery.

12 Plaintiff argues that the Magistrate Judge erred in ruling
13 that UBS's responses to discovery were timely, even though they
14 were not served until Monday, July 12, 2010.

15 The record establishes that Plaintiff dropped off his
16 discovery requests addressed to UBS's counsel at an OfficeMax
17 FedEx drop off location on Sunday, June 6, 2010. Plaintiff did
18 not complete a proof of service for these discovery requests, but
19 retained a receipt showing that he dropped the package off on
20 June 6, 2010. The package was shipped to UBS's counsel by FedEx
21 on Monday, June 7, 2010. Plaintiff refers to his Declaration,
22 (Doc. 248, Exh. 5):

23 2. On June 23, 2010, at about 3:15 p.m., I
24 had a telephone conversation with Atty. Jacob
25 S. Kreilkamp on the subject of when I served
26 UBS AG with the Request for Admission,
Interrogatories, Demand for Production of
Documents, all Set No. 1. He asked me when I
served UBS AG with the latter discovery

1 papers, I answered him, it was on June 6,
2 2010, a Sunday, the day proceeding the
3 hearing of the above entitled case on June 7,
4 2010. I recorded this conversation on the
5 attached Exhibit 1, 'Notes on Conversation
with Atty. Jacob S. Kreilkamp' which I hereby
declare to be true and correct under penalty
of perjury under federal law and California
Laws.

6 The Magistrate Judge ruled:

7 Pursuant to the Federal Rules of Civil
8 Procedure, discovery responses must be served
9 30 days following service of the requests.
10 See Fed. R. Civ. P. 33(b)(2). The deadline
11 is extended by an additional three days if
the discovery was served by mail. See Fed.
R. Civ. P. 6(d). Therefore, if the discovery
was served on June 6, 2010, the deadline for
serving a response was July 9, 2010.

12 UBS asserts that, without the benefit of a
13 proof of service, it had to ascertain when
service was completed by Plaintiff. UBS
14 contends that, based on FedEx tracking
information, the date of service appeared to
15 be Monday, June 7, 2010, the date FedEx's
tracking records show that the package was
16 shipped. Counting from June 7, 2010, the
thirty-third day falls on Saturday, July 10,
2010. According to Fed. R. Civ. P.
17 6(a)(1)(C), UBS's responses were, therefore,
due on Monday, July 12, 2010. UBS argues
18 that, if it miscalculated the response
deadline, it was due to Plaintiff's failure
19 to include a proof of service.

20 Plaintiff counters that pursuant to *Russell*
21 *v. City of Milwaukee*, 338 F.3d 662, 665-67
(7th Cir.2003), 'the absence of a certificate
22 [of service] does not require the
invalidation of the paper' where actual
23 service has been accomplished. (Joint
Statement at 8.)

24 *Russell* supports the proposition that
25 Plaintiff's discovery requests are not
necessarily invalidated due to a lack of
26 proof of service. In other words, UBS would
not have been entitled to ignore the

1 discovery requests based on this procedural
2 error. Here, neither party disputes that the
3 discovery requests were actually received by
4 UBS - the question is when they were served
5 for purposes of triggering the response
6 deadline. Because the discovery requests
7 were actually served and received - a fact
8 not in dispute - the Court will consider
9 Plaintiff's motion to compel on its merits.
10 *Cf. Willis v. Mullins, . . ., 2006 WL 2792857,*
11 *at *2-3 (E.D.Cal.2006) (proof of service is*
12 *largely irrelevant when service was completed*
13 *in accord with Rule 5(b)).*

8 Without a proof of service as to the date of
9 mailing, however, the Court will not
10 entertain Plaintiff's argument that UBS's
11 responses to these discovery requests were
12 one day late. It appears that UBS attempted,
13 in the absence of a proof of service, to
14 determine the deadline for responses to the
15 discovery in good faith and did, in fact,
16 serve discovery responses on the date that
17 fell 33 days from the date it ascertained
18 service of the requests was accomplished.

14 The Court acknowledges Plaintiff's argument
15 that, despite the absence of a proof of
16 service, he can show by other means that
17 service was actually accomplished on June 6,
18 2010. Plaintiff points to a receipt
19 indicating that he dropped off a package with
20 FedEx on June 6, 2010, addressed to UBS's
21 counsel and that the discovery itself is
22 dated June 6, 2010. There is no dispute that
23 Plaintiff served the discovery requests, and
24 the Court is entertaining Plaintiff's motion
25 on its merits. Nevertheless, this does not
26 obviate the need for a proof of service if
27 Plaintiff wishes to enforce the 33-day
28 response deadline under the Federal Rules of
29 Civil Procedure. See Fed. R. Civ. P.
30 33(b)(2), 6(d). Plaintiff cannot use the
31 Federal Rules of Civil Procedure as both a
32 sword and a shield against UBS by demanding
33 timely responses to discovery requests that
34 are not accompanied by a proof of service
35 necessary to calculate the response deadline.
36 Under the circumstances, the Court cannot
37 determine that UBS's responses were one day
38 late.

1 Plaintiff argues that he completed service of the discovery
2 requests to UBS when he delivered the package to the FedEx drop
3 off location on June 6, 2010, equating this delivery to
4 depositing a document in the U.S. Mail. Therefore, Plaintiff
5 contends, UBS incorrectly calculated the 33-day period as
6 commencing on June 7, 2010, the date FedEx shipped the package.

7 Although not addressed by the parties, in the Ninth Circuit,
8 service of documents by delivery to FedEx does not constitute
9 service by mail within the meaning of Rule 5. See *Magnuson v.*
10 *Video Yesteryear*, 85 F.3d 1424, 1430-1431 (9th Cir.1996).
11 Consequently, Plaintiff's contention that service was complete
12 when he delivered the package to the FedEx drop off location,
13 thereby starting the 33-day period, is incorrect as a matter of
14 law. Here, Plaintiff's failure to serve his discovery requests
15 by U.S. Mail as required by Rule 5 and his failure to include a
16 proof of service lead to UBS's confusion about the time to
17 respond to the discovery requests. UBS AG in good faith
18 attempted to ascertain the date FedEx shipped the package and in
19 good faith provided discovery responses within the appropriate
20 time period. UBS was under no obligation to accept Plaintiff's
21 statement that Plaintiff delivered the package to FedEx on June
22 6, 2010. As a party, Plaintiff is not authorized to serve
23 discovery and FedEx did not commence its service until June 7,
24 2010.

25 Further, even if UBS's discovery responses were one day
26 late, the Court would not exercise its discretion to sanction UBS

1 by ruling that any objections to Plaintiff's discovery requests
2 are waived and that Plaintiff's Request for Admission is deemed
3 admitted. The record establishes that UBS attempted in good
4 faith to timely respond to the discovery requests. Plaintiff has
5 not demonstrated that the Magistrate Judge's ruling is clearly
6 erroneous or contrary to law.

7 B. Interrogatory No. 1, Set 1.

8 Plaintiff's Interrogatory No. 1, Set 1, requested:

9 IDENTIFY yourself which includes if telephone
10 no. 411234111, fax no. 4113553864, physical
11 address Gessneralle 3, CH-8001, Zurich,
Switzerland, belongs to UBS AG (Zurich,
Switzerland Headquarters.

12 UBS responded as follows:

13 Defendant objects that this Request is
14 directed in part to UBS Financial Services,
15 Inc. ... which is no longer a party to this
16 case, and Defendant will not respond on UBS
17 FS's behalf. Subject to the foregoing
18 objection, Defendant responds that Defendant
19 is a global firm providing financial services
20 to private, corporate and institutional
21 clients, with an office at Gessneralle 3, CH-
22 8001, Zurich, Switzerland.

18 The Magistrate Judge ruled:

19 Plaintiff states UBS's response is inadequate
20 because it does not confirm whether the phone
21 number and facsimile number listed in the
22 interrogatory are correct. UBS agreed to
23 supplement its answer, and on September 2,
24 2010, did so by providing the address, phone
25 number, and facsimile number associated with
26 both UBS and UBS FS, despite its objection
with regard to UBS FS. As Defendant
supplemented this response, Plaintiff's
motion to compel further responses is DENIED.

Plaintiff contends that the ruling is clear error: "There is

1 a specific question that call for specific answer. there is no
2 specific answer to the question either denial or admission."

3 Plaintiff's objection is without merit. UBS provided the
4 information to Plaintiff in its supplemental response.

5 C. Interrogatory No. 4, Set 1.

6 Plaintiff's Interrogatory No. 4, Set 1 requested: "Where
7 does the operating expenses and money paid as salaries to
8 employees of UBS FS ultimately come from?" UBS responded:

9 Defendant objects that this interrogatory is
10 vague and ambiguous in its entirety, and also
11 overbroad, irrelevant, and not reasonably
12 calculated to lead to the discovery of
13 admissible evidence. Without waiving the
14 foregoing objection, Defendant states that
15 UBS FS's operating expenses, including
16 salaries, are funded through UBS FS's
17 business operations.

18 The Magistrate Judge ruled:

19 Plaintiff claims that UBS must submit a copy
20 of the budget allocation for salaries and a
21 copy of financial statements submitted to the
22 Internal Revenue Service for the 2009 tax
23 year as to both UBS FS and UBS AG. UBS
24 objects to the request on grounds that the
25 information is not relevant to Plaintiff's
26 claims which only involve UBS AG and its
prior CFO. UBS argues that UBS FS has been
dismissed from this action. Further, UBS
states that it is under no obligation to
produce documents in response to an
interrogatory.

First, UBS cannot be compelled to produce
documents in response to an interrogatory.
The proper procedure is to serve a Rule 34
request for production of documents
concurrently with the interrogatories, asking
for production of any documents identified in
the interrogatory answers ... Second, UBS
FS's financial and tax information is
irrelevant since that party was dismissed

1 from this lawsuit. Plaintiff's motion to
2 compel document production in response to
this interrogatory is DENIED.

3 Plaintiff argues that this ruling is clear error:

4 The expected answer to the Interrogatory is
5 the operating expenses and salaries coming
6 from UBS AG and therefore plaintiff asked for
7 budget allocation and financial statements
8 submitted to the IRS for the tax year 2009
for both UBS AG and UBS FS. The plaintiff
will be unable to file a motion required by
the Court if UBS FS is to be included as
party-defendant.

9 Plaintiff's contention is baseless. UBS responded to the
10 interrogatory. Plaintiff's expectations as to what UBS's answer
11 should be does not negate the fact that UBS answered the
12 interrogatory. UBS cannot be compelled to provide further
13 information concerning UBS FS and cannot be compelled to produce
14 documents in response to an interrogatory.

15 D. Interrogatory No. 7, Set 1.

16 Plaintiff's Interrogatory No. 7, Set 1, requested:

17 On or about April 28, 2006[,] and continuing
18 thereafter up to the present date, did you
19 discuss or engage in communications by
20 electronic means, telex advise, telephone, or
email, including oral or written, with
Standard Trust Bank PLC of Lagos, Nigeria
concerning a fund transfer to the plaintiff,
Carl L. Jimena of 19 million US dollars?

21 UBS responded, "No." The Magistrate Judge ruled:

22 Plaintiff argues that this answer is false,
23 and UBS should be sanctioned for failing to
24 answer truthfully. Plaintiff points to the
many emails that he purportedly received from
25 UBS's former CFO, Clive Standish, showing
26 that there were communications between UBS
and Standard Trust Bank regarding the alleged
\$19 million transfer of funds to Plaintiff.

1 However, none of these documents are
2 conclusive to establish that Defendant has
3 falsified its response.

4 UBS has always maintained that the documents
5 that Plaintiff received via email are
6 fraudulent, and UBS never had communications
7 with Standard Trust Bank regarding a \$19
8 million transfer to Plaintiff. There is
9 simply no evidence that UBS is not being
10 forthright. Although Plaintiff may be
11 convinced that the emails he received show
12 evidence of communication between UBS and
13 Standard Trust Bank regarding a \$19 million
14 dollar transfer of funds to him, this belief
15 does not make it true or establish that UBS's
16 response is false. Plaintiff's motion for
17 sanctions against UBS is DENIED.

18 Plaintiff argues that this ruling is clear error "because
19 there is a complete misunderstanding on the use of documents
20 produced at mandatory initial disclosure." Plaintiff asserts
21 that UBS made no "mandatory initial disclosure" when the parties
22 exchanged such information between June 19 and July 3, 2007, and
23 is now precluded from submitting evidence that was not disclosed.

24 Plaintiff contends:

25 Therefor, when plaintiff submits in evidence
26 documents produced at mandatory initial
27 disclosure to support a motion it will be
28 unopposed. Hence, the duty of the Magistrate
29 Court [sic] is to grant the motion since it
30 is unopposed and this is one of the after
31 effect [sic] of failure to make mandatory
32 initial disclosure which is a new provision
33 of the Federal Rules of Civil Procedure.

34 Documents produced at initial disclosure,
35 such as Exhibits 1-75 here, are authorized as
36 commented by the Advisory Committee on Rule
37 26, Fed. R. of Civ. P 'to support motions'
38 and also used to comply with the requirement
39 that motions be 'accompanied by evidentiary
40 support' (2 Moor's [sic] Federal Practice 3d
41 [2008 ed.] § 7.03[4][a][3] p. 7-15). Hence,

1 the function of the Magistrate Court [sic] is
2 to determine if the motion is supported by
3 evidence. If it is, then it is mandatory,
4 and there is no discretion, to grant the
5 motion since the supporting evidence is
6 unopposed. It is not the function of the
7 Magistrate Court [sic] to determine the
8 credibility of the evidence presented as
9 stated in the instant questioned Order
10 because credibility of the evidence is a
11 function reserved to the jury. So then when
12 the Magistrate Court [sic] said 'None of
13 these documents are conclusive to establish
14 that Defendant has falsified its response.'
[sic] it is determining the credibility of
the evidence. It is elementary that the
difference between the functions of the Court
and Jury is the Court decides questions of
law, and the Jury decides questions of fact.
Here, the evidence submitted by plaintiff is
support of the motion is to discover the
evidence and the reaction of the Magistrate
Court is determining the credibility of the
evidence. Hence, it is clear error for the
Magistrate Court to deny Interrogatories
supported by documents produced at mandatory
initial disclosure.

15 Plaintiff's objection is without merit. Rule 26(a)(1)(a),
16 Federal Rules of Civil Procedure, requires the following initial
17 disclosures, among others:

18 (i) the name and, if known, the address and
19 telephone number of each individual likely to
20 have discoverable information - along with
21 the subjects of that information - that the
disclosing party may use to support its
claims or defenses, unless the use would be
solely for impeachment;

22 (ii) a copy - or a description by category
23 and location - of all documents,
24 electronically stored information, and
25 tangible things that the disclosing party has
26 in its possession, custody, or control and
may use to support its claims or defenses,
unless the use would be solely for
impeachment.

1 Although Plaintiff's documents produced as initial disclosures
2 may be attached to a motion, such as his motion for sanctions
3 against UBS for an allegedly false interrogatory response, the
4 fact that UBS did not provide documents to Plaintiff in support
5 of its defense that the communications upon which Plaintiff
6 relies are fraudulent and did not originate from UBS does not,
7 *ipso facto*, establish that Plaintiff's documents are dispositive.
8 UBS AG cannot provide information about matters that it asserts
9 did not happen. Here, UBS AG responded that it had no
10 communications with Standard Trust Bank PLC of Lagos, Nigeria
11 concerning a fund transfer to the plaintiff, Carl L. Jimena of
12 \$19 million US dollars. That Plaintiff believes his documents
13 establish the contrary does not make UBS AG's response false.
14 Secondly, *Plaintiff* asked the Magistrate Judge to impose
15 sanctions for UBS's allegedly false response; Plaintiff raised
16 the question of credibility to the Magistrate Judge solely for
17 the purpose of resolving his request for discovery sanctions.

18 Plaintiff objects that UBS cannot contend that the documents
19 he produced in initial disclosure are fraudulent because UBS did
20 not allege fraud with particularity as required by Rule 9(b),
21 Federal Rules of Civil Procedure, in its Answer to the Third
22 Amended Complaint. Plaintiff cites no authority that Rule 9(b)
23 has any application to a defense based on fraud or forgery.
24 Independent research indicates that Plaintiff's position is
25 baseless. See *Eastover Corporation v. Rhodes*, 1992 WL 245568 at
26

1 *4-5 (E.D.La., Sept. 8, 1992).¹

2 E. Item 7, Legal Issue.

3 Plaintiff objects that "Item 7, Legal Issue" was not decided
4 by the Magistrate Judge and requests a ruling on "this issue."
5 Given Plaintiff's lack of specification as to what "Item 7, Legal
6 Issue" is, Plaintiff's objections are overruled and his request
7 is denied.

8 F. Demand for Production, Items No. 8, 8.1, 8.2 of Doc.
9 258.

10 Referring to "Plaintiff's demand for production, Item No. 8,
11 8.1, 8.2 of Doc. 258," Plaintiff objects to the Magistrate Judge's
12 ruling.

13 Plaintiff's objections are unclear because neither his
14 motion to compel, (Doc. 258), or the Order refer to these
15 specific items. However, the "Joint Statement on Doc. 258,"
16 filed on September 8, 2010, (Doc. 265), stated:

17 8. REQUEST FOR PRODUCTION NO. 5. The latter
18 demands production of the following:
(Plaintiff's Demand for Production is
19 attached as Exhibit Three)

20 '5. All correspondence, memos,
21 messages, corporate minutes
(corporate board of director
22 minutes), executive board of
23 director minutes, auditor's
findings and recommendations,
Accounting Department entries and
summaries on the escrow account and

24
25 ¹Rule 9(b) does apply to a defendant's counterclaim against a
26 plaintiff. See *NCR Credit Corp. v. Repton Electronics, Inc.*, 155
F.R.D. 690, 693 (M.D.Fla.1994). Here, however, UBS has not alleged
any counterclaims against Plaintiff.

1 fund transfer involved in this case
2 or other written communications
3 concerning funds transfer to the
4 plaintiff.' (Note: 'corporate
5 board of directors minutes' was
6 inserted by Notice of Errata served
7 on UBS AG on June 26, 2010 under
8 certified receipt no. 7008 1830
9 0005 6872)

10 Defendants [sic] response was, quote:

11 'RESPONSE TO REQUEST FOR PRODUCTION
12 NO. 5

13 Defendant responds that it has no
14 documents in its possession
15 responsive to this request.

16 8.1 Corporate minutes or Executive Board of
17 Directors minutes

18 Defendants [sic] response to Plaintiff's
19 Request for Production No. 5 is false since
20 it is contrary to Plaintiff's Exhibits 6, 7
21 and 8 produced at mandatory initial
22 disclosure which could be used as commented
23 by the Advisory Committee to support [sic]
24 motions. Exhibits 6, 7, 8, shows that the
25 Board of Directors, corporate or executive
26 board of directors are involved in making
27 decisions regarding the fund transfer of the
28 19 million dollars from Standard Trust Bank
29 to Washington Mutual Bank, now Chase. In
30 Exhibit 6, same as Exhibit 53, in the 2nd
31 paragraph, Clive Standish said:

32 'At the end of several meetings
33 held to resolve and conclude this
34 transaction it was decided that you
35 have to pay the requested Marginal
36 Fluctuation Deficit of US\$21,780.00
37 before the US\$19 M will be credited
38 to your account.'

39 In Exhibit 7, same as Exhibit 52, paragraph
40 1-2, Clive Standish said:

41 Your messages are acknowledged and
42 I wish to inform you that the UBS
43 is looking into them with a view

1 toward resolving the whole
2 situation.'

3 We shall get back to you as soon as
4 the special meeting conveyed to
5 look into your request/messages
6 conclude their deliberations.'

7 In Exhibit 8, same as Exhibit 46, paragraph
8 1, Clive Standish said:

9 `Your messages are acknowledged and
10 I wish to inform you that the
11 Management and Board of the UBS is
12 not happy with what is happening in
13 this transaction because the delay
14 in concluding this transaction is
15 kind of tarnishing the image of the
16 bank.' (underlining mine)

17 Hence, there is a record of the minutes of
18 the Board of Directors, Corporate or
19 Executive, that defendants have to produce.

20 8.2 Auditor's findings and recommendations:

21 In Exhibit 48.1, 17th line from the top,
22 Clive Standish said:

23 `Several payments go through the
24 UBS and the Auditors have commenced
25 full-scale investigation on the
26 movement/whereabouts of the
27 payment.' [of the \$51,000]

28 In Exhibit 49.1, paragraph 1: Clive Standish
29 said:

30 `the Auditors used the information
31 you provided to track the payment.'

32 (refers to Exhibit 18) (A copy of Defendant's
33 Responses and Objections to Plaintiff's
34 Demand for Production is attached as Exhibit
35 Four)

36 In Exhibit 48.1, about 23rd line from the
37 top, Clive Standish stated another
38 participation of Auditors in this transaction
39 both on the \$76,000 and the 19 million
40 dollars:

1 'It will be wise to inform you that
2 the Auditors here monitors all
3 transaction.'

4 All of the above quotations from the Exhibits
5 show the Auditors have findings and
6 recommendations that UBS AG must produce and
7 UBS AG's response is false.

8 The Magistrate Judge ruled:

9 UBS responded that 'it has no documents in
10 its possession responsive to this request.'
11 ... Plaintiff argues that this response is
12 false because he has documents that were
13 emailed to him that purport to show a fund
14 transfer between Standard Trust Bank and UBS.
15 As explained above, Plaintiff's possession of
16 those documents does not prove that they are
17 actually authentic bank documents of either
18 UBS or Standard Trust Bank, or that UBS is
19 perpetrating a fraud by asserting that it
20 does not have documents responsive to this
21 request. UBS cannot be sanctioned for a
22 false response based on Plaintiff's assertion
23 that it is false. Further, the documents
24 Plaintiff received by email do not establish
25 that UBS has responded falsely, especially
26 since UBS contends the documents Plaintiff
received via email are fraudulent. There is
simply no evidence that UBS has failed to
produce documents that it has in its
possession that are responsive to Plaintiff's
request. UBS cannot produce documents that
it does not have. Plaintiff's motion to
compel further documents responsive to this
request is DENIED WITH PREJUDICE.

Plaintiff objects to this ruling, contending:

Plaintiff had authenticated all of his email
evidence consisting of Exhibits 25, to 58, 6,
7, 8, 12, 13, 19, 20 all emails of Clive
Standish; Exhibits 59-64, Exh. 11, 11a with
its attachment, Exhibits 15, 16, 59, 1C, 59,
1D, 15.1 and 16.1 (the latter two attached to
plaintiff's opposition to summary judgment)
all emails of Standard Trust Bank; Exhibits
65, 66, 74 emails of Atty. Smith Coker;
Exhibits 9 and 10 emails of APGML; Exhibits
25.2, Exhibit 25.3 email of Atty. Ademola

1 Adeshina, (1) the authentication appearing in
2 plaintiff's Opposition to Defendants [sic]
3 Motion for Summary Judgment, Doc. 195, pages
4 7 to 19 thereof; all the emails authenticated
5 on the method demonstrated in U.S. v.
6 Safavian, 435 F.Supp.2d 36, 40-41 (2) the
7 authentication also appearing on the instant
8 Doc. 212, page 2, line 27 to 28, page 3 line
9 1 to 2; (3) Presumed authentic under Sec.
10 1307, California New Civil Code [sic] in
11 relation to Rule 902(9) FRE. (4)
12 authentication appearing in Doc. 78; which
13 include authentication of Exhibit 1 to 75 as
14 data compilation; the foundation of which was
15 laid down, in paragraph 1 of Doc. 78,
16 pursuant to Rule 803(6) making them
17 admissible even in trial; more so at summary
18 judgment.

19 Whether or not the exhibits upon which Plaintiff relies are
20 properly authenticated is not a relevant issue to resolution of
21 Plaintiff's motion to compel and the Magistrate Judge did not err
22 by failing to address the issue of authentication. At issue is
23 whether UBS can be compelled to produce documents it asserts
24 under oath it does not have. Plaintiff's exhibits do not
25 conclusively establish that UBS's contention is false, especially
26 given the responses by Yahoo! to Plaintiff's subpoena that it had
no documents responsive to Plaintiff's subpoena and has no
information that the accounts clive_standish@yahoo.com or
customerservices@privateclientsubs.cjb.net ever existed.
Plaintiff has not demonstrated that the Magistrate Judge's ruling
is clearly erroneous or contrary to law.

For the reasons stated:

1. Plaintiff's request for reconsideration of the the
Magistrate Judge's Order Denying Plaintiff's Motion to Compel

1 (Doc. 267), is DENIED.

2 IT IS SO ORDERED.

3 Dated: October 12, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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