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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA – FRESNO DIVISION

CARL L. JIMENA,

Plaintiff,

v.

UBS AG BANK, INC., SWITZERLAND  
HEADQUARTERS, et. al.,

Defendants.

CASE NO. 1:07-cv-00367-OWW-SKO

**ORDER DENYING PLAINTIFF'S  
MOTION FOR SANCTIONS**

(Docket No. 274)

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**I. INTRODUCTION**

Plaintiff Carl L. Jimena ("Plaintiff") filed this action on February 5, 2007. Plaintiff alleges that he was defrauded in a variant of the "Nigerian advance fee scheme" by Clive Standish, the Chief Financial Officer ("CFO") of UBS AG Bank, Inc. ("UBS"), who sent Plaintiff an email from an email address identified as "[clive\\_standish@yahoo.com](mailto:clive_standish@yahoo.com)." Via this email, 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, to satisfy a purported "Anti-Drug/Terrorist Clearance" fee required for transfers from Nigeria. Plaintiff also asserts that he received electronic correspondences regarding this transaction from an email bearing the address of "[customerservices@privateclientsubs.cjb.net](mailto:customerservices@privateclientsubs.cjb.net)." Plaintiff alleges that he never

1 received the \$19 million.

## 2 II. DISCOVERY DISPUTE

3 In June 2010, Plaintiff propounded various discovery requests to UBS including  
4 (1) Interrogatories, Set 1; (2) Request for Admissions, Set 1; and (3) Demand for Production of  
5 Documents. UBS served responses to these discovery requests in July 2010. On August 20, 2010,  
6 Plaintiff filed a Motion to Compel further production of documents and further responses to  
7 interrogatories from UBS. (Doc. 258.) One of the interrogatories that Plaintiff desired to compel  
8 further responses from UBS included Interrogatory No. 24. Plaintiff argued that, pursuant to  
9 Interrogatory No. 24, UBS should have disclosed the period of time Clive Standish was employed  
10 by UBS as well as Clive Standish's email addresses.

11 Specifically, Plaintiff's Interrogatory and UBS's response are as follows:

### 12 **INTERROGATORY NO. 24:**

13 IDENTIFY the person, Clive Standish.

### 14 **RESPONSE TO INTERROGATORY NO. 24:**

15 Clive Standish is the former Chief Financial Officer of Defendant. The most  
16 recent address Defendant possesses for Mr. Standish is New Street 225, 3186  
Brighton, Australia.

17 (Doc. 258, Ex. 2.)

18 The Interrogatories, Set 1 that contained Interrogatory No. 24 provided a definition of the  
19 term "IDENTIFY." Section Four ("Sec. 4") of the Interrogatories, entitled "Definitions," provided  
20 the following:

21 CC. In any of the following interrogatories in which you are asked to "IDENTIFY"  
22 A "PERSON[.]" the word "person" shall be understood to refer equally to natural  
23 person [sic], corporations, partnerships, limited liability companies, firms, joint  
24 ventures, associations or other entities. Further a request to "identify" a "person"  
25 shall be understood to include the period of time he was employed by UBS AG and  
26 to include as well a request for the person's full name, present address including  
27 physical office and home address, telephone number, fax number, **email office and**  
28 **home address**, present or last known position and business affiliation, title, business  
telephone number, and, if employed or retained by you, each position he or she has  
held during the period in question, a general description of the duties of each such  
position, the specific period in which the position was held, and the office or location

1 where the position was held.<sup>1</sup>

2 (Docs. 265, 3:17-28; 272 at 6 (emphasis added).)

3 On September 2, 2010, after the parties met and conferred regarding Plaintiff's motion to  
4 compel, UBS supplemented its response to Interrogatory No. 24, providing Clive Standish's birth  
5 date, positions he held prior to his tenure at UBS AG, the date he joined UBS AG and his positions  
6 within the company, his office address, and the date he retired. (Doc. 265, Ex. 1.) The supplemental  
7 response also stated that UBS's counsel expected "to supplement this letter shortly to provide the  
8 requested email, direct phone and fax information for Mr. Standish during his tenure at UBS AG."  
9 (Doc. 265, Ex. 1.)

10 On September 22, 2010, the Court issued an order regarding Plaintiff's August 20, 2010,  
11 Motion to Compel. (Doc. 267.) With regard to Interrogatory 24, the Court found that UBS had  
12 agreed to supplement its response, and, as such, the motion to compel a further response was denied.  
13 The Court ordered that UBS "make the supplemental response it agreed to provide on or before  
14 October 1, 2010." (Doc. 267, 7:11-12.)

15 On October 7, 2010, Plaintiff filed a "Motion and Memorandum to Sanction Disobedience  
16 to Court Order Doc. 267" ("Motion for Sanctions"). (Doc. 274.) Plaintiff reiterates the argument  
17 he made with regard to his motion to compel a supplemental response from UBS regarding  
18 Interrogatory No. 24:

19 One important information [sic] being elicited from Interrogatory No. 24 above is  
20 Clive Standish email office address and Clive Standish email home or personal  
21 address, during the 'period of time he was employed by UBS AG' as underlined on  
22 definition 'CC' above.

23 Plaintiff then states in his Motion for Sanctions that "[o]n October 1, 2010, or thereafter,  
24 UBS AG failed to notify this Court of compliance with the Order in Doc. 267 quoted in paragraph  
25 1 above." (Doc. 274, ¶3.)

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28 <sup>1</sup> In Doc. Nos. 265 and 272, the definition provided contains a bracketed notation: "[The underlined portion was inserted as a correction of error due notice of which was given to UBS AG by a notice of errata dated June 26, 2010[,] by certified mail under certified receipt no. 7008 1830 0005 0458 6872.]" Apparently, then, Interrogatories, Set 1 filed with the Court is not an original copy of the Interrogatories initially propounded to UBS, but a corrected copy of the Interrogatories served.

1 On October 13, 2010, UBS filed an opposition to Plaintiff's Motion for Sanctions. (Doc.  
2 275.) UBS states that it supplemented its response to Interrogatory No. 24 on September 8, 2010,  
3 and UBS, therefore, "complied with both its agreement and the Order by the time the Order was  
4 issued." (Doc. 275, 2:28-3:1-3.) Attached to its opposition, UBS provided a copy of its September  
5 8, 2010, supplemental response. (Doc. 275, Ex. A.) The September 8, 2010, supplemental response  
6 provides Mr. Standish's business mailing address, his telephone and facsimile number, and his  
7 business email address during his tenure at UBS AG. (*Id.*) UBS also states that the Court's  
8 September 22, 2010, order did not require UBS to notify the Court of compliance with its order.  
9 Therefore, UBS asserts that there is no basis for sanctions.

10 On October 18, 2010, Plaintiff filed a reply to UBS's opposition. (Doc. 279.) Plaintiff argues  
11 that UBS had failed to adequately supplement its response because it had failed to provide the  
12 personal email address of Mr. Standish. (Doc. 279, 2:5-7 ("The latter information given by UBS AG  
13 is still incomplete and not in compliance with the subject Order of the Court because it failed to  
14 provide information on the personal email address of Clive Standish."))

### 15 III. DISCUSSION

#### 16 A. Notice of Compliance with the Court's September 22, 2010, Order

17 To the extent that Plaintiff is asserting that UBS was in compliance with the Court's  
18 September 22, 2010, order but failed to notify the Court of such compliance, this is not a basis for  
19 sanctions. It appears that UBS provided the supplemental response it agreed to provide even before  
20 the September 22, 2010, order to do so was in place. Thus, UBS did not fail to supplement its  
21 responses. Further, the Court did not order UBS to file any notice of its compliance, so UBS did not  
22 fail to comply with the Court's order in that regard.

#### 23 B. Substantive Compliance with the Court's September 22, 2010, Order

24 Plaintiff's motion references the fact that he received correspondence from two email  
25 addresses: [customerservices@privateclientsubs.cjb.net](mailto:customerservices@privateclientsubs.cjb.net) and [clive\\_standish@yahoo.com](mailto:clive_standish@yahoo.com), which he  
26 believes are Clive Standish's personal and business email addresses. Plaintiff argues that UBS failed  
27 to *adequately* supplement its answers to Interrogatory No. 24 – i.e., UBS failed to provide the  
28 personal email address of Clive Standish during his tenure at UBS. (Doc. 279, 2:5-7.)

1 UBS's September 8, 2010, supplemental response provided a business email address  
2 associated with Mr. Standish during his tenure with UBS. (Doc. 275, Ex. A.) The language  
3 contained in the "Definitions" section of the Interrogatories requesting "email office and home  
4 address" can be construed as requesting an office email address and a physical home address. Thus,  
5 the request itself was inherently ambiguous.

6 More important, however, UBS's counsel stated at the hearing on October 21, 2010, that UBS  
7 did not have Clive Standish's personal email address in its records; thus, it was not included in UBS's  
8 responses to Plaintiff's interrogatory. As the Court has previously explained, UBS cannot be  
9 compelled to provide information that it does not have. Further, UBS cannot be sanctioned for  
10 failing to produce information that it does not have.

11 The Court finds that UBS has sufficiently responded to Interrogatory No. 24 by providing  
12 two supplemental responses on September 2 and 8, 2010. UBS has stated that it has provided all the  
13 information responsive to the Interrogatory, and there is nothing further to compel. Therefore, UBS's  
14 response was in compliance with the Court's September 22, 2010, order.

### 15 **C. Plaintiff's Request for Sanctions**

16 Plaintiff requests that UBS be sanctioned for failing to adequately comply with the Court's  
17 September 22, 2010, order. Further, Plaintiff insists that the appropriate sanction is to "deem  
18 established" the information he seeks from UBS.

19 First, as explained above, the Court finds that UBS did not fail to comply with the Court's  
20 September 22, 2010, order by failing to notify the Court that it had served its supplemental response.  
21 The Court did not order UBS to notify the Court of service of its supplemental response to Plaintiff.

22 Second, UBS did not fail to adequately supplement its response that was served on Plaintiff  
23 on September 8, 2010. UBS's supplemental response provided Plaintiff with the information  
24 responsive to Plaintiff's request, and UBS maintains that it has provided the email address in its  
25 records that relates to Mr. Standish. Therefore, there is nothing further to compel.

26 To clarify whether either of the two e-mail addresses Plaintiff asserts belong to Clive  
27 Standish are actually associated with Mr. Standish, the Court directed UBS to provide additional  
28 information regarding whether Mr. Standish has ever been associated with these email addresses.

1 (See Doc. 281, Ex. C.) UBS has confirmed that Clive Standish "did not open, use or have any  
2 knowledge of the email accounts" that Plaintiff asserts belong to Mr. Standish. (Doc. 281, Ex. C.)

3 At the hearing, Plaintiff objected to the Court's order that UBS provide any statement further  
4 assuring Plaintiff of its diligence and good faith in responding to Plaintiff's request. The discovery  
5 rules were designed to provide the parties with tools to fully and fairly litigate cases on the merits.  
6 Fed. R. Civ. P. 1 ("[These Rules] should be construed and administered to secure the just, speedy,  
7 and inexpensive determination of every action and proceeding."). The Rules in place, and the  
8 various **discretionary** sanctions available to the Court to enforce the Rules, are meant to encourage  
9 fairness and to avoid obstructionism, gamesmanship, and tactical maneuvering intended to drive up  
10 the costs of litigation and unfairly harass the other party.

11 The Court has inherent discretion to allow UBS to provide a statement or other assurances  
12 of its diligence in responding to the discovery, especially when Plaintiff has repeatedly questioned  
13 the veracity of UBS's discovery responses in this matter. UBS's conduct in responding to and  
14 supplementing its responses to the discovery requests evidences UBS's good faith and continued  
15 attempts to work with Plaintiff.

16 The Court denies Plaintiff's request for sanctions against UBS for the alleged failure to  
17 comply with the Court's September 22, 2010, order. Sanctions are within the discretion of the Court  
18 under its inherent power to sanction a party who acts "in bad faith, vexatiously, wantonly, or for  
19 oppressive reasons." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991). Likewise, sanctions  
20 for discovery abuses pursuant to Fed. R. Civ. P. 37 are within the discretionary province of the Court  
21 to impose. This Court will neither impose sanctions against UBS nor recommend to the District  
22 Court the imposition of sanctions for discovery conduct on the part of UBS that, on the face of the  
23 record, has been diligent and forthright.

24 Accordingly, Plaintiff's "Motion and Memorandum to Sanction Disobedience to Court Order"  
25 is DENIED.

26 IT IS SO ORDERED.

27 **Dated:** October 25, 2010

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE