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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
)	REQUESTS FOR RECONSIDERATION
vs.)	BY DISTRICT COURT OF
)	MAGISTRATE JUDGE'S RULING
)	(Docs. 285 and 286)
UBS AG BANK, et al.,)	
)	
Defendants.)	
)	
)	

On November 1, 2010, Plaintiff Carl L. Jimena, proceeding *in pro per*, filed two requests for reconsideration by the District Court of Magistrate Judge Oberto's Order Denying Plaintiff's Motion for Sanctions, (Doc. 284), filed on October 26, 2010.

On October 7, 2010, Plaintiff filed a motion "to sanction disobedience to Court Order Doc. 267." (Doc. 274). In his motion, Plaintiff argued that UBS AG should be sanctioned because of its alleged failure to comply with that portion of the Order Denying Plaintiff's Motion to Compel filed on September 22, 2010, (Doc. 267), addressing Plaintiff's Interrogatory No. 24, Set 1:

1 In Interrogatory No. 24, Plaintiff seeks the
2 following information:

3 INTERROGATORY NO. 24:

4 IDENTIFY the person, Clive Standish.

5 RESPONSE TO INTERROGATORY NO. 24:

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

10 Plaintiff argues that the period of time
11 Clive Standish was employed by UBS as well as
12 his email addresses should have been
13 disclosed in UBS's response. Plaintiff seeks
14 to compel UBS to supplement this answer. On
15 September 2, 2010, after the parties met and
16 conferred regarding Plaintiff's motion to
17 compel, UBS supplemented its response to
18 Interrogatory No. 24, providing Clive
19 Standish's birth date, positions he held
20 prior to his tenure at UBS AG, the date he
21 joined UBS AG and his positions within the
22 company, his office address, and the date he
23 retired. (Doc. 265, Ex. 1.) The
24 supplemental response also provided that
25 UBS's counsel expected 'to supplement this
26 letter shortly to provide the requested
email, direct phone and fax information for
Mr. Standish during his tenure at UBS AG.'
(Doc. 265, Exhibit B.) As Defendant has
agreed to supplement its response, the motion
to compel further answers is DENIED.
Defendant shall make the supplemental
response it agreed to provide on or before
October 1, 2010.

21 In his motion for sanctions, Plaintiff argued that UBS AG should
22 be sanctioned because "[o]n October 1, 2010, or thereafter, UBS
23 AG failed to notify this Court of compliance with the Order in
24 Doc. 267" Plaintiff moved the Magistrate Judge to declare
25 "established that the two email address [sic] of Clive Standish
26 are (1) 'clive_standish@yahoo.com', his personal or home email

1 address and (2) customerservices@privateclientsubs.cjb.net, his
2 office email address which is an appropriate sanction."

3 In denying Plaintiff's motion for sanctions, the Magistrate
4 Judge ruled that UBS AG was not required to file any notice of
5 its compliance with the Order with the Court. The Magistrate
6 Judge further ruled:

7 Plaintiff's motion references the fact that
8 he received correspondence from two email
9 addresses:
10 customerservices@privateclientsubs.cjb.net
11 and clive_standish@yahoo.com, which he
12 believes are Clive Standish's personal and
13 business email addresses. Plaintiff argues
14 that UBS failed to adequately supplement its
15 answers to Interrogatory No. 24 - i.e., UBS
16 failed to provide the personal email address
17 of Clive Standish during his tenure at UBS.
18 (Doc. 279, 2:5-7.)

19 UBS's September 8, 2010 supplemental response
20 provided a business email address associated
21 with Mr. Standish during his tenure with UBS.
22 (Doc. 275, Ex. A.) [clive_standish@ubs.com]
23 The language contained in the 'Definitions'
24 section of the Interrogatories requesting
25 email office and home address' can be
26 construed as requesting an office email
27 address and a physical home address. Thus,
28 the request itself was inherently ambiguous.

29 More important, however, UBS's counsel stated
30 at the hearing on October 21, 2010, that UBS
31 did not have Clive Standish's personal email
32 address in its records; thus, it was not
33 included in UBS's responses to Plaintiff's
34 interrogatory. As the Court has previously
35 explained, UBS cannot be compelled to provide
36 information that it does not have. Further,
37 UBS cannot be sanctioned for failing to
38 produce information that it does not have.

39 The Court finds that UBS has sufficiently
40 responded to Interrogatory No. 24 by
41 providing two supplemental responses on
42 September 2 and 8, 2010. UBS has stated that

1 it has provided all the information
2 responsive to the Interrogatory, and there is
3 nothing further to compel. Therefore, UBS's
4 response was in compliance with the Court's
5 September 22, 2010, order.

6 ...

7 Plaintiff requests that UBS be sanctioned for
8 failing to adequately comply with the Court's
9 September 22, 2010, order. Further,
10 Plaintiff insists that the appropriate
11 sanction is to 'deem established' the
12 information he seeks from UBS.

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

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

To clarify whether either of the two e-mail
addresses Plaintiff asserts belong to Clive
Standish are actually associated with Mr.
Standish, the Court directed UBS to provide
additional information regarding whether Mr.
Standish has ever been associated with these
email addresses. (See Doc. 281, Ex. C.) UBS
has confirmed that Clive Standish 'did not
open, use or have any knowledge of the email
accounts' that Plaintiff asserts belong to
Mr. Standish. (Doc. 281, Ex. C.)

At the hearing, Plaintiff objected to the
Court's order that UBS provide any statement
further assuring Plaintiff of its diligence
and good faith in responding to Plaintiff's
request. The discovery rules were designed
to provide the parties with tools to fully

1 and fairly litigate cases on the merits.
2 Fed. R. Civ. P. 1 ('[These Rules] should be
3 construed and administered to secure the
4 just, speedy, and inexpensive determination
5 of every action and proceeding.'). The Rules
6 in place, and the various discretionary
7 sanctions available to the Court to enforce
8 the Rule, are meant to encourage fairness and
9 to avoid obstructionism, gamesmanship, and
10 tactical maneuvering intended to drive up the
11 costs of litigation and unfairly harass the
12 other party.

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

23 The Court denies Plaintiff's request for
24 sanctions against UBS for the alleged failure
25 to comply with the Court's September 22,
26 2010, order. Sanctions are within the
discretion of the Court under its inherent
power to sanction a party who acts 'in bad
faith, vexatiously, wantonly, or for
oppressive reasons.' *Chambers v. NASCO,
Inc.*, 501 U.S. 32, 45-46 (1991). Likewise,
sanctions for discovery abuses pursuant to
Fed. R. Civ. P. 37 are within the
discretionary province of the Court to
impose. This Court will neither impose
sanctions against UBS nor recommend to the
District Court the imposition of sanctions
for discovery conduct on the part of UBS
that, on the face of the record, has been
diligent and forthright.

27 The standard of review is the "clearly erroneous or contrary
28 to law" standard set forth in 28 U.S.C. § 636(b)(1)(A). Rule
29 303(f), Local Rules of Practice. The "clearly erroneous"
30 standard applies to a Magistrate Judge's findings of fact.

1 *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508
2 U.S. 602, 623 (1993). "A findings is 'clearly erroneous' when
3 although there is evidence to support it, the reviewing [body] on
4 the entire evidence is left with the definite and firm conviction
5 that a mistake has been committed." *Id.* at 622. The "contrary
6 to law" standard allows independent, plenary review of purely
7 legal determinations by the Magistrate Judge. *FDIC v. Fidelity &*
8 *Deposit Co. of Md.*, 196 F.R.D. 375, 378 (S.D.Cal.2000); *Haines v.*
9 *Liggett Group, Inc.*, 975 F.2d 81, 91 (3rd Cir.1992). "An order
10 is contrary to law when it fails to apply or misapplies relevant
11 statutes, case law, or rules of procedure." *DeFazio v. Wallis*,
12 459 F.Supp.2d 159, 163 (E.D.N.Y.2006).

13 Plaintiff asserts that he made an objection to Magistrate
14 Judge Oberto during the October 21, 2010 hearing on his motion
15 for sanctions that "the proceedings is [sic] already academic
16 because Plaintiff on October 20, 2010 filed by U.S. Postal
17 Express Mail Doc. 282 entitled 'OBJECTIONS TO DOC. 273 WITH A
18 REQUEST TO *SUA SPONTE* MODIFY OR RECONSIDER IT.'" Plaintiff
19 contends:

20 Plaintiff during the hearing of October 21,
21 2010, entered an objection that plaintiff
22 filed an objection to Doc. 273, now
23 identified as Doc. 282 but at the time of the
24 hearing of October 21, 2010 plaintiff does
25 [sic] not have the docket number 282 yet
26 because plaintiff mailed his objections to
Doc. 273 on October 20, 2010. The objection
and information given to the Magistrate Court
at the hearing of October 21, 2010 is the
fact that Plaintiff's Request for Admission
was deemed admitted when UBS AG filed to
respond timely by being late five days

1 counted from July 7, the last day for filing
2 of its responses to July 12, 2010 when the
3 responses were actually served. Included in
4 the Request for Admission is the above
5 mentioned office/business email address and
6 personal email address of Clive Standish,
7 particularly in paragraph 2 above (See
8 Request for Admission No. 1.1, Plaintiff's
9 Request for Admission, attached as Exhibit
10 ONE to Doc. 248 entitled 'JOINT STATEMENT ON
11 Doc. 212') which are admitted and could be
12 used, in fact were not used and ignored, in
13 the Magistrate's [sic] Court making its
14 decision on Doc. 284.

15 Plaintiff is referring to his "Objections to Doc. 273, With
16 Request to *Sua Sponte* Modify It or Reconsider It" filed on
17 October 21, 2010, the day of the hearing before the Magistrate
18 Judge regarding Plaintiff's motion for sanctions against UBS.
19 That motion is under submission to the District Court and seeks
20 reconsideration by Plaintiff of this Court's Memorandum Decision
21 and Order denying Plaintiff's request for reconsideration by the
22 District Court of the Magistrate Judge's Order Denying
23 Plaintiff's Motion to Compel (Docs. 270 & 273). To the extent
24 that Plaintiff's request for reconsideration of the denial of his
25 motion for sanctions is comprehensible, Plaintiff appears to be
26 contending that the Magistrate Judge erred in resolving his
motion for sanctions because he filed a subsequent motion seeking
reconsideration of the denial of his request for reconsideration.
This presents no basis for reconsideration of the denial of his
motion for sanctions. If Plaintiff believed that his motion for
reconsideration of the denial of his request for reconsideration
mooted the motion for sanctions, Plaintiff could have withdrawn

1 the motion for sanctions. Further, Plaintiff's motion for
2 sanctions sought to declare facts established merely because
3 Plaintiff erroneously asserted that UBS AG failed to comply with
4 the Magistrate Judge's Order and because Plaintiff believes that
5 UBS AG's responses to his discovery requests are untrue. As the
6 Magistrate Judge correctly ruled, Plaintiff's motion for
7 sanctions on these grounds is without merit.

8 In his request for reconsideration, Plaintiff asserts:

9 Accompanying this motion for reconsideration
10 of Doc. 284, is plaintiff [sic] OBJECTIONS TO
11 DOC. 281 which is hereby incorporated by
12 reference and forms an integral part of this
13 motion for reconsideration of Doc. 284.
14 Plaintiff request [sic] that Doc. 281 be
15 considered in deciding this motion for
16 reconsideration of Doc. 284.

17 Specifically, Plaintiff objects to Exhibit C to Doc. 281 on
18 various grounds.

19 Doc. 281, filed on October 22, 2010, is the "Declaration of
20 Jacob S. Kreilkamp in Response to the Court's Request at the
21 October 21, 2010 Hearing." Mr. Kreilkamp avers:

22 4. Attached hereto as Exhibit C is an email
23 forwarded to me by Patrick Mathieu, a
24 Director at UBS AG, dated April 5, 2007, in
25 which Clive Standish confirms that he did not
26 open, use or have any knowledge of the email
accounts clive_standish@yahoo.com or
customerservices@privateclientsubs.cjb.net.
Although I did not personally receive this
email, it was forwarded to me from Mr.
Mathieu, who was one of the recipients, on
April 5, 2007.

Exhibit C to Doc. 281 is a copy of an email:

From: Standish, Clive

1 Sent: Donnerstag 5 April 2007 09.55

2 To: Kurth, Christoph

3 Cc: Mathieu, Patrick

4 Subject: RE Carl L. Jimena vs UBS AG and
5 Clive Standish

6 Dear Christoph

7 I confirm that I did not open, use or have
8 any knowledge of the email accounts - clive
9 standish@yahoo.com [sic] or
10 customerservices@privateclientsubs.cjb.net.

11 On November 1, 2010, Plaintiff filed "Objections to Doc.
12 281", wherein Plaintiff asserts he did not receive a copy of Doc.
13 281 until October 25, 2010, the day before the Order Denying
14 Plaintiff's Motion for Sanctions was filed.

15 Plaintiff argues that Exhibit C, Patrick Mathieu and
16 Christoph Kurth were not disclosed as evidence or witnesses by
17 UBS AG at the mandatory initial disclosure held between June 19,
18 2007 and July 3, 2007 and is, therefore, subject to the rule of
19 preclusion under Rule 26(a)(1)(A), Federal Rules of Civil
20 Procedure.

21 Rule 26(a)(1)(A) sets forth categories of information that
22 must be disclosed by a party to other parties without awaiting a
23 discovery request, including:

24 (i) the name and, if known, the address and
25 telephone number of each individual likely to
26 have discoverable information - along with
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;

(ii) a copy - or a description by category

1 and location - of all documents,
2 electronically stored information, and
3 tangible things that the disclosing party has
4 in its possession, custody, or control and
5 may use to support the claims or defenses,
6 unless the use would be solely for
7 impeachment.

8 Rule 26(a) (1) (A) (i) & (ii). Rule 26(a) (1) (C) and (E) provides:

9 (C) A party must make the initial disclosures
10 at or within 14 days after the parties' Rule
11 26(f) conference unless a different time is
12 set by stipulation or court order, or unless
13 a party objects during the conference that
14 initial disclosures are not appropriate in
15 this action and states the objection in the
16 proposed discovery plan. In ruling on the
17 objection, the court must determine what
18 disclosures, if any, are to be made and must
19 set the time for disclosure.

20 ...

21 (E) A party must make its initial disclosures
22 based on the information then reasonably
23 available to it. A party is not excused from
24 making its disclosures because it has not
25 fully investigated the case or because it
26 challenges the sufficiency of another party's
disclosures or because another party has not
made its disclosures.

Rule 37(c) (1), Federal Rules of Civil Procedure, provides:

If a party fails to provide information or
identify a witness as required by Rule 26(a)
..., the party is not allowed to use that
information or witness to supply evidence on
a motion, at a hearing, or at a trial, unless
the failure was substantially justified or is
harmless. In addition to or instead of this
sanction, the court, on motion and after
giving an opportunity to be heard:

(A) may order payment of the reasonable
expenses, including attorney's fees, caused
by the failure;

(B) may inform the jury of the party's
failure; and

1 (C) may impose other appropriate sanctions,
2 including any of the orders listed in Rule
37(b) (3) (A) (i) - (vi) .

3 Plaintiff cites *Salgado v. General Motors Corp.*, 150 F.3d
4 735 (7th Cir.1998). In *Salgado*, the Seventh Circuit affirmed the
5 District Court's exclusion of plaintiff's expert witnesses and
6 the granting of summary judgment for defendant. In so holding,
7 the Seventh Circuit stated:

8 Not only do we believe that the violation of
9 Rule 26 is clearly established but we also
10 believe that the district court acted well
11 within its discretion when it decided to
12 impose the sanction of precluding the
13 witnesses from testifying. As we noted in
14 *Finley v. Marathon Oil Co.*, 75 F.3d 1225,
1230 (7th Cir.1996), the sanction of
15 exclusion is automatic and mandatory unless
16 the sanctioned party can show that its
17 violation of Rule 26(a) was either justified
18 or harmless.

19 150 F.3d at 742. The Ninth Circuit in *Yeti by Molly Ltd. v.*
20 *Deckers Outdoor Corporation*, 259 F.3d 1101, 1106-1107(9th
21 Cir.2001), applied the same standard as well as holding that the
22 party facing sanctions under Rule 37(c) (1) has the burden of
23 establishing that the violation was either justified or harmless.

24 Here, the Court does not know exactly what or who was
25 disclosed by UBS AG as its initial disclosures. Rule 26(e)
26 provides:

(1) A party who has made a disclosure under
Rule 26(a) - or who has responded to an
interrogatory, request for production, or
request for admission - must supplement or
correct its disclosure or response:

(A) in a timely manner if the party learns
that in some material respect the disclosure

1 or response is incomplete or incorrect, and
2 if the additional or corrective information
3 has not otherwise been made known to the
4 other parties during the discovery process or
5 in writing; or

6 (B) as ordered by the court.

7 The Court will not exclude Exhibit C, Mathieu or Kurth in this
8 action absent an opportunity to UBS AG to address Plaintiff's
9 objections on the merits.

10 Plaintiff further objects that Exhibit C "does not have the
11 appearance and does not qualify to be an email." Relying on
12 *United States v. Safavian*, 435 F.Supp.2d 36, 40 (D.D.C.2006),
13 wherein the District Court, addressing authentication under Rule
14 901, Federal Rules of Evidence, stated:

15 The e-mails in question have many distinctive
16 characteristics, including the actual e-mail
17 addresses containing the '@' symbol, which is
18 widely known to be part of an e-mail address,
19 and certainly a distinctive mark that
20 identifies the document in question as an e-
21 mail.

22 Plaintiff contends that, because Exhibit C does not set forth the
23 "@ symbol, it is not an email:

24 It is a simple letter that is so easily
25 fabricated that it would require a
26 handwritten signature of Clive Standish to be
27 identified under oath. Exhibit C is not an
28 authentic or unauthentic document. It has
29 the appearance of an eleventh hour
30 fabrication since it was not disclosed at the
31 mandatory initial disclosure. In addition
32 ..., it is inadmissible hearsay since Clive
33 Standish and Christoph Kurth cannot be cross-
34 examined and the best evidence would be their
35 testimony if and only if their identity was
36 disclosed at the mandatory initial
37 disclosure. Since Exhibit C of Doc. 281 has
38 no email address on 'From:' [sender] and

1 'To:' [recipient] it is impossible to send
2 Exhibit C of Doc. 281 by email, an earmark of
3 fabrication. It is extremely unfair for the
4 Magistrate Court to rely on Exhibit C of Doc.
5 281 in its decision while on the other hand
6 ignoring Exhibit 32, paragraph 1 and 2
7 thereof and ignoring the fact that the
8 Request for Admission is already admitted
9

10 Again, the Court cannot address Plaintiff's objections to
11 Exhibit C in the absence of a response by UBS AG. However, it is
12 noted that Exhibit C is a copy of an email to Patrick Mathieu
13 purportedly sent by Clive Standish to Christoph Kurth. Whether
14 or not such a copy would have an "@" symbol attached to it is not
15 known. Further, Plaintiff provides no explanation why either
16 Clive Standish or Christoph Kurth cannot be cross-examined.
17 Clive Standish is a named defendant in this action, although
18 Plaintiff has yet to effect service of process on him.

19 Plaintiff's contention that the Magistrate Judge should not
20 have rendered the Order Denying the Motion for Sanctions without
21 first giving Plaintiff the opportunity to object to Mr.
22 Kreilkamp's declaration does not make the Order contrary to law
23 or clearly erroneous under the circumstances of this action. UBS
24 AG has represented throughout this litigation that the email
25 addresses for Clive Standish upon which Plaintiff's case largely
26 hinges are false and fraudulent. Discovery from Yahoo!
 substantiates this assertion. Plaintiff has not demonstrated
 that these representations are false and that UBS AG in fact has
 evidence that will support Plaintiff's claims as to these email
 addresses. Plaintiff was seeking sanctions against UBS AG for

1 its responses to Interrogatory No. 24.

2 Plaintiff argues that UBS AG is estopped to present "further
3 evidence, such as Exhibit C of Doc. 281, that the office/business
4 email address of Clive [sic]
5 customerservices@privateclientsubs.cjb.net, and his personal
6 email address 'clive_standish@yahoo.com' were never used by Clive
7 Standish because both email addresses were already admitted by
8 UBS AG to be the true office/business and personal email address
9 [sic] of Clive Standish when UBS AG was late by five or six days
10 in responding to plaintiff's Request for Admission." Plaintiff
11 asserts that further ground for estoppel "is the fact that in
12 Exhibit 32, paragraph 1 and 2, Clive Standish already admitted
13 that his personal email address 'clive_standish@yahoo.com' and
14 his office/business email address
15 customerservices@privateclientsubs.cjb.net, both belong to him or
16 used both email addresses."

17 Plaintiff's List of Exhibits to the Third Amended Complaint
18 is set forth in Doc. 49 filed in August 2007, i.e., his exhibits
19 are not actually attached to the Third Amended Complaint.
20 Exhibit 32 purports to be an email to Plaintiff from the
21 clive_standish@yahoo.com email address. It is materially
22 disputed in this litigation whether this is a valid email address
23 for Defendant Clive Standish, or whether it is an email address
24 used by an imposter. Whether or not UBS AG has admitted
25 Plaintiff's Requests for Admission because of the untimely
26 response to them is addressed in the "Memorandum Decision and

1 Order Denying Plaintiff's 'Objections to Doc. 273, With Request
2 to *Sua Sponte* Modify or Reconsider it' (Doc. 282)", filed on
3 November 3, 2010. (Doc. 289).

4 Plaintiff also argues that the Magistrate Judge's minute
5 order, (Doc. 280), directing UBS AG to file by October 26, 2010
6 "a declaration or supplemental discovery response addressing
7 whether UBS AG possesses Mr. Clive Standish's personal email
8 address in its records and/or whether any email address UBS has
9 related to Mr. Clive Standish conforms to either of the two email
10 addresses identified by Mr. Jimena in his Motion to Sanction
11 Disobedience." Plaintiff contends:

12 This is an abuse of discretion considering
13 the time for UBS AG to provide the same
14 information closed after 30 days after
15 service and the hearing of October 21, 2010
16 was for a sanction. Nobody gets a sanction
if the Magistrate Court extend [sic] the time
to file responses on the day of the hearing
of the sanction. Objection on this ground was
also raised by plaintiff during the hearing.

17 Plaintiff's objection is without merit. The Magistrate Judge has
18 the discretion to issue such an order, especially when Plaintiff
19 is seeking discovery sanctions based on UBS's response. This
20 discretion which was exercised to permit adjudication of this
21 case on its merits was not abused.

22 For the reasons stated:

23 1. Plaintiff's requests for reconsideration by the District
24 Court of the Magistrate Judge's Order Denying Plaintiff's Motion
25 for Sanctions, (Doc. 284), filed on October 26, 2010, are DENIED.

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IT IS SO ORDERED.

Dated: November 5, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE