UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

IGOR OLENICOFF, OLEN PROPERTIES CORP., **Plaintiffs,** **v.** **UBS AG, BRADLEY BIRKENFELD, MICHEL GUIGNARD, MARTIN LIECHTI, RAOUL WEIL, CHRISTIAN BOVAY, GILBERT BENZ, ROGER HARTMANN, JACQUES BEUCHAT, PETER KURER, RENE MARTY, NEUE BANK, AG, GEORG VOGT, HERMANN WILLE, PAUL BUCHEL, JOST PILGRIM, WILLI WOLFINGER, DR. STEPHAN LATERNSER, ARNOLD WILLE, NEW HAVEN TRUST COMPANY LTD, MARIO STAGGL, DR. JUR. KLAUS BIEDERMANN, SCOTT MACAW, NEIL SMITH, UNION CHARTER, LTD., DAVID A. SCHWEDEL, SYNTHESIS ENERGY SYSTEMS, INC., MICHAEL STOREY, TIMOTHY VAIL, DAVID EICHINGER, JAMES ALEXANDER MICHIE, GM CAPITAL PARTNERS, LTD., ROBERT KNIGHT, KNIGHT FINANCIAL, LTD., MARC ANGST, GESTRUST SA, MARTIN HOCHSCHORNER, JASON SUNDAR, HERB LUSTIG,** **Defendants.**	**CASE NO. SACV 08-1029 AG (RNBx)** **[IN CHAMBERS] OMNIBUS ORDER RE UBS' MOTIONS FOR SUMMARY JUDGMENT ONE THROUGH FIVE**

The old maxim, "two wrongs do not make a right," aptly fits this case. Here, Plaintiff Igor Olenicoff ("Olenicoff") plead guilty to knowingly and willfully failing to disclose off-shore accounts on his tax returns. Defendant UBS AG ("UBS") also plead guilty to tax fraud. Their crime was helping U.S. clients hide from the IRS up to $20 billion in off-shore assets. UBS' admission of guilt does not give Olenicoff the right to sue UBS for fraudulent tax advice. But that is one of Olenicoff's theories in this lawsuit. UBS now brings five well-founded Motions for Summary Judgment ("Motions") in its defense.

The irony of this lawsuit is apparent in UBS' Motions. To defend itself, UBS is forced to strenuously insist that its prior guilty plea only admitted to *assisting willing* clients with tax fraud, not forcing unsuspecting clients into tax evasion. While its argument is ironic, UBS is right. Even assuming that UBS gave Olenicoff fraudulent tax advice, that makes UBS a co-conspirator, not a defendant in this litigation. Olenicoff has already sworn that he was not an innocent dupe. He even received a sentence reduction for assuming responsibility for his tax fraud. It is directly inconsistent for him to now claim that he unwittingly relied on UBS' counsel. If Olenicoff wanted to claim he was misled by UBS, he had the option of pleading not guilty in the criminal proceedings. He plead guilty instead. Thus, his tax evasion claims against UBS are now barred. Olenicoff may not avoid the consequences of his own plea by getting UBS to indemnify him for his criminal acts.

Olenicoff's tax evasion claims, however, are only half of his lawsuit against UBS. The second half of Olenicoff's case, primarily developed after he appointed new counsel in late 2011, is based on an alleged "churning" scheme. Olenicoff claims that UBS funneled Olenicoff's money to risky accounts that were highly profitable for UBS, but sub-optimal for Olenicoff. Olenicoff complains that, due to UBS' mismanagement, he "only" made over a 2% profit, or $12 million dollars. Obviously, UBS is allowed to make a profit too. The question is whether UBS' self-interest eclipsed its duties to manage Olenicoff's accounts and illegally made money at his expense. So, to succeed on his claims, Olenicoff must show proof of non-speculative damages. He cannot. As risky as the bank's investment scheme may have been, Olenicoff fails to show that it actually caused him any measurable harm.

These two halves make up the whole of Olenicoff's case against UBS. Because neither half succeeds, all of Olenicoff's claims against UBS must fail.

Defendant Bradley Birkenfeld ("Birkenfeld"), an employee of UBS during the alleged time-period and responsible for servicing Olenicoff's accounts, filed a Joinder in all of UBS's Motions ("Joinder"). Plaintiff did not oppose the Joinder. Olenicoff's theories and claims against Birkenfeld are identical to those raised against UBS, and fail for the same reasons.

1. BACKGROUND

Olenicoff is President of Olen Properties Corp, a multi-million dollar real estate company. ("Olen"). (UBS's Reply to Plaintiffs' Statement of Genuine Issues ("RSGI") ¶¶ 1-3.) (Note: For convenience the Court cites to the comprehensive summary of the parties' factual disputes in the RSGI as the basis for its factual findings.) Defendant UBS is a global integrated investment firm. (RSGI ¶ 6.) Birkenfeld was an employee with UBS from 2001 through 2005. (RSGI ¶ 5.)

In 2001, Birkenfeld contacted Olenicoff and suggested that he open accounts with UBS. (PRDF ¶ 102); (Declaration of Kristoper Diulio "Diulio Decl." Ex. 71, p. 15:2-5.) In total, Olenicoff had five accounts with UBS that were either in his name or for his benefit: Accounts 096, 812, 933, 937, and 949 (collectively, the "UBS Accounts"). (RSGI ¶¶ 21, 25-56.) In total, Olenicoff deposited over $180 million into the UBS Accounts. (RSGI ¶¶ 21, 25-56.) Olenicoff closed his UBS Accounts in 2005. (RSGI ¶ 74.)

Olenicoff's current lawsuit over UBS is grounded on two distinct factual bases. The first half of Olenicoff's case concerns the tax history of both Olenicoff and of UBS. The second half of Olenicoff's case concerns UBS' management of Olenicoff's UBS Accounts. For ease of reference, the Court structures the remainder of the factual review into two parts, the first discussing the tax issues, and the second discussing the management issues.

1.1 TAX ISSUES

1.1.2 Olenicoff's Tax Issues

As early as 1992, Olenicoff owned, controlled, and had signatory authority over financial accounts outside of the United States. (RSGI ¶¶ 14, 15.) During 1998 through 2000, Olenicoff had a financial interest in anywhere from 15 to 18 foreign accounts. (RSGI ¶¶ 16-18.) In 2001, Olenicoff had a financial interest in 22 foreign accounts. (RSGI ¶ 19.) In 2002, Olenicoff had a financial interest in 25 foreign accounts, 5 of which were with UBS. (RSGI ¶ 20.)

Since tax year 1998, Stephen Newman ("Newman") has been responsible for Olenicoff's personal tax returns and the tax returns for Olen. (RSGI ¶ 119.) Newman would send Olenicoff a tax organizer to obtain relevant information to prepare his taxes. (RSGI ¶ 141.) Newman produced tax organizers for the years 1998 through 2001. (RSGI ¶ 141.) Each year, the tax organizers included a question asking (in varying terms) Olenicoff to disclose any foreign income, foreign taxes, or foreign bank and financial accounts. (RSGI ¶ 141.) Each year, Olenicoff stated that he had none. (RSGI ¶ 141.)

Olenicoff underwent IRS audits as early as 1998. (RSGI ¶ 80.) On September 28, 2001, the IRS sent Olenicoff a Notice of Deficiency, claiming in part that Olen and the Bahamanian company Sovereign Bancorp. Ltd. ("Sovereign") were owned or controlled by the same interests. (RSGI ¶ 84.) The IRS claimed that because Olen controlled the Sovereign account, it had a duty to report its income, and could not claim any related interest expense deductions. (RSGI ¶ 84.) Olen responded by filing a complaint in United States Tax Court contending that Olen had no interest in Sovereign. (RSGI ¶ 85.)

On September 19, 2003, the IRS sent a second Notice of Deficiency, this time to Olenicoff personally, claiming that Sovereign was a sham company and that Olenicoff controlled the Sovereign accounts. (RSGI ¶ 88.) Olenicoff responded by filing a complaint in United States Tax Court, arguing that he had never had ownership or control over Sovereign, never benefitted from the company, and never had taxable disbursements from any of its accounts. (RSGI ¶ 91.) Rather, Olenicoff claimed that Sovereign was a company formed by a Russian

agency at the request of Boris Yeltsin. (RSGI ¶ 91.) A Forbes news article covering the story reported that when the IRS asked Olenicoff for records establishing the ownership of Sovereign, Olenicoff responded that the documents were permanently lost when a truck skidded off a bridge in Russia, falling into the river below. (RSGI ¶ 92.) To support his claim that Sovereign was not under this control, Olenicoff convinced a former Russian army general to meet with the IRS on his behalf. (RSGI ¶ 93.) During his meeting with the IRS agent, the general became frustrated and told the agent that several years ago he was in charge of pushing the button that would have wiped the IRS off of the Washington map. (RSGI ¶ 93.)

In November 2004, Olenicoff became aware that the IRS was criminally investigating him for his failure to disclose his interest in several foreign accounts, including accounts held by Sovereign and a company called Guardian Guarantee Co. Ltd. ("Guardian"). (RSGI ¶¶ 95, 100); (RSGI ¶ 97.) Guardian was the signatory on certain off-shore accounts containing funds which Olenicoff later transferred over to UBS. (RSGI ¶ 65.)

In December 2004, Olenicoff emailed Birkenfeld and told him that he did not want to discuss the IRS audit over email, but that "as I had thought may happen some day, we will have to defend the ownership issue[.]" (RSGI ¶ 98.) Olenicoff told Birkenfeld that they should have a "guarded discussion" about the issue via cell phone. (RSGI ¶ 98.)

In late May 2005, IRS agents executed a search warrant on one or more of Olenicoff's homes and Olen's offices. (RSGI ¶ 100.) The search warrant specified 31 categories of documents to be seized, including documents regarding Sovereign and Guardian. (RSGI ¶ 100); (RSGI ¶ 97.)

In Olenicoff's 2005 individual tax return, he asserted the Fifth Amendment privilege and refused to specify whether he had any interest in foreign accounts or income from foreign accounts. (RSGI ¶ 102.)

On October 17, 2007, Olenicoff entered into a Plea Agreement ("Plea Agreement") with the U.S. government. (RSGI ¶ 103.) In that Plea Agreement, Olenicoff admitted the following:

- From 1992 through 1994, he "owned, controlled, and had signatory authority over

financial accounts outside of the United States."

- He filed individual tax returns for the years 1998 through 2004 under penalty of perjury.
- Each one of those tax returns asked at line 7a: "At any time during [calendar year], did you have an interest in or a signature of other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account?"
- "On each one of the 1998 through 2004 Form 1040s, **[Olenicoff] falsely answered 'No' to line 7a . . . even though, as he then well knew and understood, he had an interest in, signatory authority, and other authority over financial accounts in foreign countries during these years."**
- Olenicoff answered "No" to line 7a on his 2002 tax return, which **"as [Olenicoff] then and there well knew and believed, was a false statement**, as defendant had ownership, control, and signatory authority over financial accounts in England, Switzerland, the Bahamas, and Lichtenstein."
- "**When [Olenicoff] signed his 2002 Form 1040 in April 2003, [Olenicoff] knew that it contained false information as to a material matter**, and in filing the false 2002 Form 1040, **[Olenicoff] acted willfully."**

(RSGI ¶ 104) (emphasis added). When he signed the Plea Agreement, Olenicoff acknowledged that:

> "I have read this agreement and carefully discussed every part of it with my attorney. I understand the terms of this agreement, and I voluntarily agree to those terms. My attorney had advised me of my rights, of possible defenses, of the Sentencing Guideline provisions, and of the consequences of entering into this agreement . . . I am satisfied with the representation of my attorney in this matter."

(RSGI ¶ 105.) At the Plea Agreement hearing, Olenicoff orally confirmed under oath that he had discussed the Plea Agreement with his attorney before signing, that all the facts set forth as the factual basis for the Plea Agreement were true, that he did not dispute any of those facts, that he was guilty of the charge, and that he was pleading guilty voluntarily of his own free will. (RSGI ¶¶ 108-109.) In exchange for assuming responsibility in the Plea Agreement, Olenicoff received a two-point reduction under the United States Sentencing Guidelines. (RSGI ¶ 106.)

After his guilty plea was entered, Olenicoff filed with the IRS a Report of Foreign Bank and Financial Accounts, agreeing that he had an interest in various foreign entities for the years 1998 through 2004, including Sovereign and Guardian. (RSGI ¶ 111.) Ultimately, Olenicoff paid tens of millions of dollars in back taxes, penalties, and interest for the tax years 1998

through 2004 to resolve the issue. (RSGI ¶ 139.) The largest tax deficiency, for $5.2 million, was for the tax year 1998, before Olenicoff ever opened a UBS account. (RSGI ¶ 139.)

At Olenicoff's deposition in this case, UBS asked him to confirm the statement in his Plea Agreement that Olenicoff "then and there well knew and believed that his [2002 tax return] line 7a response was a false statement." (RSGI ¶ 138.) Olenicoff replied: "No, I didn't know it at the time . . . I didn't know that existed at that time I signed my tax return." (RSGI ¶ 138.) Olenicoff now submits a Declaration opposing UBS' Motions, claiming that: "I believed, based upon which I had been told by UBS, that I did not have to report the income generated by the offshore monies to the IRS for tax purposes," and that: "I did believe, however, at all times prior to 2007 that based upon everything I was told by UBS, the structure it established . . . meant that I did not owe income taxes on the money generated from the UBS accounts." (Olenicoff Decl. ¶ 30.) Similarly, Olenicoff claims that UBS told him that "the return achieved from UBS's management of the offshore monies would not be taxable until the funds were brought back to the United States. I believed them." (RPDF ¶ 108); (Olenicoff Decl. ¶ 16.)

1.1.2 Olenicoff's Post-Plea Financing

Olenicoff claims that he suffered $2.7 billion in damages, discounted to present value of $1.5 to $1.7 billion, for damages related to his guilty plea for criminal tax fraud. (RSGI ¶ 142.) The damages theory is that Olen has been unable to get a loan since Olenicoff became a felon, and that as a result Olen will be forced to liquidate its real estate holdings and cease to be a viable company. (RSGI ¶ 142.)

But in a February 15, 2010 Orange County Business Journal article discovered by UBS, Olenicoff was quoted discussing the terms of a $70 million loan with U.S. Bancorp. (RSGI ¶ 75.) In the article, Olenicoff stated that: "I believe there will be long-term debt available again in about three years." (RSGI ¶ 75.)

UBS set out to question Plaintiff and his witnesses about the loans. At his October 4, 2011 deposition, Olenicoff asserted that his company "Olen has not been able to get a single

loan because lenders won't deal with Olen, won't deal with me . . . We've not been able to get any loan . . . ." (RSGI ¶ 75.) UBS issued Interrogatory Questions, asking Olenicoff list any businesses who "has refused to do business" with them. (RSGI ¶ 79.) In their January 23, 2012 response, Olenicoff listed Fannie Mae as one of those businesses. (RSGI ¶79.)

On January 27, 2012, Olenicoff's Rule 30(b)(6) designee, Steve Jacoby, admitted that Olen had received an approximately $ 240 million loan through Fannie Mae in 2011, but denied the existence of any other loans. (RSGI ¶ 75.)

On February 1, 2012, Olenicoff's mortgage broker, Don Curtis, stated that he did not know whether Olenicoff closed a $70 million dollar loan in late 2009 or early 2010. (RSGI ¶ 75.)

Finally, on March 13, 2012, Plaintiff's expert Gary London admitted that in or about February 2010, Olen had closed a $70 million loan with U.S. Bancorp. (RSGI ¶ 75.) London testified that he learned about both of the loans sometime between December 15, 2011 and January 11, 2012, from conversations with Olenicoff and Curtis. (RSGI ¶ 75.)

Now for the first time, in his Genuine Statement of Facts, Olenicoff admits that Olen Properties obtained a $250 million dollar loan in May 2011 from Fannie Mae. (RSGI ¶ 76.) Olenicoff further admits that he was personally extensively involved in the loan negotiations. (RSGI ¶ 76.) The Fannie Mae loan application lists Olenicoff as the Key Principal on that loan. (RSGI ¶ 77.)

1.1.3 UBS' Tax Issues

UBS has had its own issues with tax reporting and tax fraud. This history centers around two agreements that UBS entered into with the US government.

First, on January 1, 2001, UBS entered into a Qualified Intermediary Agreement ("QI Agreement") with the U.S. government. (Diulio Decl. Ex. 79, p. 3) As part of the QI Agreement, UBS agreed to provide tax reporting and withholding on accounts held by U.S.

clients that meet certain criteria. (Diulio Decl., Ex. 79, p. 3-5.) UBS did not include Olenicoff's UBS Accounts in its QI reporting. (Diulio Decl., Ex. 79, p. 6-10.)

Second, on February 2009, UBS entered into a Deferred Prosecution Agreement ("DPA") with the U.S. Government regarding the operation of its U.S. cross-border business. (RSGI ¶¶ 132, 133.) A bank engages in "cross-border" business when it manages the financial accounts of a resident of another country. (UBS' Response to Plaintiffs' Disputed Facts "RPDF," ¶ 2) (Note: For convenience the Court cites to the comprehensive summary of the parties' factual disputes in the RPDF as the basis for its factual findings.) The DPA stated that UBS participated in a scheme to defraud the U.S. and the IRS by actively assisting or otherwise facilitating U.S. taxpayers in establishing accounts at UBS in a manner designed to conceal the U.S. taxpayers' ownership or beneficial interest in these accounts. (RSGI ¶ 133.) Under the DPA, UBS agreed to pay the US government $780 million, with $380 million attributable to disgorgement of profits from its cross-border business. (RSGI ¶ 134.) UBS also agreed to exit the cross-border business, submit to monitoring by a special risk committee, provide special compliance reports to the U.S. government, and implement additional internal controls. (RSGI ¶¶ 135-137.)

Birkenfeld is currently serving a 40 month sentence in a federal penitentiary for his participation in UBS' cross-border conspiracy. (RPDF ¶ 11.)

1.2 UBS' MANAGEMENT OF OLENICOFF'S ACCOUNTS

The Court now turns to a discussion of the facts concerning the second part of Olenicoff's case: the alleged mismanagement of his UBS Accounts.

1.2.1 General Management of Olenicoff's UBS Accounts

Olenicoff, along with his son Andrei Olenicoff, directed and authorized investment activity in the UBS Accounts. (RSGI ¶ 66.) They routinely made these investment decisions with Birkenfeld's counsel, sometimes signing documents at his request. (RSGI ¶ 66.)

In total, Olenicoff deposited over $180 million into the UBS Accounts. (RSGI ¶ 56.) Olenicoff wanted the bulk of his money in highly liquid, highly secure investments. (RSGI ¶ 62.) Olenicoff's financial objective for his UBS accounts was to earn a conservative 2 to 3% interest return on his money. (TAC ¶ 55); (RSGI ¶ 24.) Between November 2001 and October 2005, the value of the UBS Accounts increased by at least $12.8 million. (RSGI ¶ 57.) The annual internal rate of return on the UBS Accounts was over 2%. (RSGI ¶ 59.)

UBS and Olenicoff agreed that one flat fee of .7% would be charted on Olenicoff's entire portfolio. (RSGI ¶ 60); (TAC ¶ 71.) Olenicoff was annually charged between approximately .014% to .347% of the cumulative funds transferred into the UBS Accounts. (RSGI ¶ 61.) Olenicoff's proft and rate of return are net of these fees. (RSGI ¶ 61.)

1.2.2 DOCU Investments

Olenicoff specifically challenges the management of the money held in certain types of investments called Double Currency Units, or "DOCUs." (RSGI 64.) DOCUs are a structured product with a high fixed interest rate and a currency option component. (RSGI ¶ 62.) Most of the DOCUs had maturity dates of 30, 60, or 90 days. (RPDF ¶ 82.)

Olenicoff authorized the placement of his funds into DOCUs. (RSGI 64.) Birkenfeld, Olenicoff's Client Advisor, had a reputation for exclusively recommending DOCUs to his clients. (RPDF ¶ 83.) Olenicoff had at least a basic understanding of how those accounts worked. (RPDF ¶ 114.)

Only two of Olenicoff's five UBS Accounts, Account 812 and Account 096, held DOCUs. (RSGI ¶¶ 62, 63). Account 812 was in Olenicoff's name. (RSGI ¶ 32.) Account 096 was in the name of New Haven Treeuhand Ag ("New Haven Trust"), with Dr. Jur. Klaus Bierdermann and Mario Staggl as Trustees ("New Haven Trustees"), and Olenicoff as the Beneficial Owner. (RSGI ¶¶ 26-27.) In 2002, Olenicoff instructed UBS to "[t]ransfer all existing DOCU instruments and any other remaining funds out of the current [812] account and consolidate them with the DOCU and funds in the recently formed Trust account [096.]" (RSGI

¶ 64.) On March 27, 2005, two days after the IRS and DOJ executed search warrants, Olenicoff instructed one of the New Haven Trustees to close the 096 Account. (RSGI ¶ 71.)

In total, Olenicoff made over $9 million dollars on the DOCU investments, for a total annual rate of return of 2.32%. (RSGI ¶ 64.)

2. PRELIMINARY MATTERS

2.1 EVIDENTIARY OBJECTIONS

The parties submitted voluminous evidence supporting their papers. While much of the evidence was undisputed, there were also a substantial number of objections. On motions with voluminous objections "it is often unnecessary and impractical for a court to methodically scrutinize each objection and give a full analysis of each argument raised." *Capitol Records, LLC v. BlueBeat, Inc.*, 765 F. Supp. 2d 1198, 1200 n.1 (C.D. Cal. 2010) (a summary judgment case quoting *Doe v. Starbucks, Inc.*, 2009 WL 5183773, at *1 (C.D. Cal. Dec. 18, 2009)). This is especially true where, as here, many of the objections did not actually dispute the essential facts at issue, but instead merely kick up some argumentative dust. *See, e.g., Burch v. Regents of Univ. of Cal.*, 433 F. Supp. 2d 1110, 1118, 1119 (E.D. Cal. 2006) (refusing to rule on argumentative objections). For example, many of UBS' objections begin with: "Undisputed that . . ." and then proceed to give UBS' version of the facts. (*See, e.g.*, RPDF ¶ 121.) These half-objections do not appear to require a ruling from this Court. The Court also notes that many of the so-called facts submitted by Olenicoff are rife with argument and speculation. Such statements "are not facts and [] will not be considered on a motion for summary judgment." *Burch*, 433 F. Supp. 2d at 1119. Objections to such argumentative facts "are simply superfluous in this context." *Id.*

The parties also raised a substantial number of objections to the form of the evidence. For example, Olenicoff objected to the admission of his signed tax documents because they lacked foundation under Federal Rule of Evidence 602. (*See* RGIF ¶ 102.) Here, objections as

to the form of the evidence are "misguided" because "to survive summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Federal Rules of Civil Procedure 56." *Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir.2003) (citing *Block v. City of L.A.*, 253 F.3d 410, 418-19 (9th Cir.2001)); *see also* Fed. R. Civ. P. 56 (summary judgment motions only need to set forth facts in a format that "would be admissible"). "In other words, when evidence is not presented in an admissible form in the context of a motion for summary judgment, but it may be presented in an admissible form at trial, a court may still consider that evidence." *Burch*, 433 F. Supp. 2d at 1120 (citing *Fraser*, 342 F.3d at1037). Evidence such as Olenicoff's own signed tax documents would be admissible at trial.

The Court does find it helpful to address a few objections here. First, Olenicoff claims that this Court cannot take judicial notice of the Plea Agreement because it would "undermine the doctrine of collateral estoppels [*sic*]." (RSGI ¶ 103) (citing *Taylor v. Charter Med.*, 162 F.3d 827, 830 (5th Cir. 1998)). In *Taylor*, the court refused to take judicial notice of a factual finding of another court. *Id.* at 830. The Plea Agreement is not a factual finding of another court. It is a court filing proper for judicial notice. It is also a party-admission under Federal Rule of Evidence 801(d)(1).

Second, UBS objects to the report of Plaintiff's expert, Jeffrey L. Gottfredson, because his report was submitted over two months after the Court's deadline for expert opinions. (*See, e.g.*, RPDF ¶ 52.) It appears that discovery ran until mid-March, and that is the reason for the late report. The Court declines to rule on this issue at this time. Ultimately, Gottfredson's testimony was not dispositive.

Third, UBS objects to the report of Plaintiff's expert on the QI Agreement, James Dowling. (RPDF ¶ 86.) Apparently, when UBS asked Dowling if he was an expert on the QI Agreement, he said he was not. (RPDF ¶ 86.) While UBS' objection is powerful, this issue was not fully briefed. The Court declines to make a ruling at this time. Ultimately, Dowlings' testimony was not dispositive.

The remaining objections are largely moot, because the Court did not rely on most of the

evidence under objection. *See, e.g., Smith v. County of Humboldt*, 240 F. Supp.2d 1109, 1115-16 (N.D. Cal. 2003) (refusing to rule on the evidentiary objections in defendant's reply because "even if the evidence submitted by plaintiff is considered by this Court, plaintiff fails to state a colorable claim"). To the extent that the Court relied upon any evidence in this Order, the relevant evidentiary objections are overruled. *See Burch*, 433 F. Supp. 2d at 1118 (condemning the prevalent and time-consuming practice of "fil[ing] objections on all conceivable grounds" and concluding that "the court will [only] proceed with any necessary rulings on defendants evidentiary objections").

3. LEGAL STANDARD

Summary judgment is appropriate only where the record, read in the light most favorable to the non-moving party, indicates that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Material facts are those necessary to the proof or defense of a claim, as determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id*. at 264.

The burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If, and only if, the moving party meets its burden, then the non-moving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. *Id.* at 322-23. If the non-moving party meets this burden, then the motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000).

4. ANALYSIS

After the Motion to Dismiss, the following claims remain against UBS, numbered as follows: (1) fraudulent misrepresentation and concealment; (2) constructive fraud; (3) negligent misrepresentation; (9) breach of fiduciary duties; (10)- (11) violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"); (12) professional malpractice; (13) disgorgement of unethical excessive and illegal fees; (14) civil conspiracy; (15) unfair business practices in violation of California Business and Professional Code §§ 17200 et seq. ("UCL"); (16) -(17) breach of contract; (18) conversion; and (20) accounting.

UBS now brings five Motions for Summary Judgment. The first Motion is against all claims except Claims Ten and Eleven for RICO, on the grounds that no reasonable jury could find that UBS failed to provide tax advice or mismanaged Olenicoff's UBS Accounts ("Motion One"). The second Motion is against all claims, on the grounds that they are barred by the statute of limitations ("Motion Two"). The third Motion is against all claims for failure to state damages ("Motion Three"). The fourth Motion is against Claims Ten and Eleven for RICO ("Motion Four"). The fifth Motion is against all claims brought by Olen, on the grounds that it is not a proper plaintiff ("Motion Five").

Olenicoff opposes all of the Motions exception Motion Five. The Court GRANTS Motion Five, and DISMISSES all claims brought by Olen.

To analyze the four remaining Motions, the Court finds it most efficient to use the same two-part structure it used in the factual discussion. Although most claims rely on both factual grounds, the issues relating to each are distinct and better discussed together rather than repeated in a discussion of each separate Motion or Claim. First, the Court will discuss the Motions regarding the claims that UBS provided Olenicoff with bad tax advice. Second, the Court will discuss the Motions regarding the claims that UBS mismanaged Olenicoff's funds by "churning" them, or placing them into risky investments that benefitted UBS at his expense.

4.1 OLENICOFF'S TAX-RELATED CLAIMS

Olenicoff's tax claims against UBS are built upon a simple premise: UBS gave Olenicoff bad tax advice, which Olenicoff believed. Or as Olenicoff states in his Declaration: "I believed, based upon which I had been told by UBS, that I did not have to report the income generated by the offshore monies to the IRS for tax purposes." (Olenicoff Decl. ¶ 30.) "[UBS told me that] the return achieved from UBS's management of the offshore monies would not be taxable until the funds were brought back to the United States. I believed them." (RPDF ¶ 108); (Olenicoff Decl. ¶ 16.) Because Olenicoff believed what UBS told him, he did not disclose his off-shore accounts on his tax returns, was eventually charged with criminal tax fraud, had to pay a hefty fine, and now can no longer get financing for his company.

There is a major problem with this story. Olenicoff has already plead guilty to his crime. The Plea Agreement was not a complicated document. In fact, it charged Olenicoff with lying about a simple yes or no question. The question was whether, during the years 1998 through 2004, Olenicoff had "an interest in or a signature of other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account?" (RSGI ¶ 104.) In his Plea Agreement, Olenicoff swore, under penalty of perjury, that from 1998 through 2004, he "falsely" answered 'No' to that question, even though "as he then well knew and understood" he did have an interest in off-shore bank accounts. (RSGI ¶104.) Olenicoff also swore that when he signed his 2002 tax return, he "then and there well knew and believed" that he was making a material false statement, and thus acted "willfully." (RSGI ¶104.) Olenicoff swore that he read the agreement carefully, "discussed every part of it" with his attorney, understood the terms, voluntarily agreed to them, knew his rights and defenses, and the "consequences of entering into the Plea Agreement." (RSGI ¶ 105.) In exchange for signing the Plea Agreement, Olenicoff avoided the risk of a criminal trial and got a two-point sentence reduction for assuming responsibility. (RSGI ¶ 106.)

4.1.1 Judicial Estoppel (Tax-Related Claims 1-3)

Like a bad foundation undermining a building's structure, Olenicoff's Plea Agreement

places nearly every room of his legal house of cards into jeopardy. To begin, it makes it impossible for Olenicoff to prove justifiable reliance, which is a necessary element of Claims One through Three (fraudulent misrepresentation and concealment, constructive fraud, and negligent misrepresentation). *See, e.g. City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 68 Cal. App.4th 445, 481 (1998) (holding that fraud requires showing of justifiable reliance); *Gold v. L.A. Democratic League*, 49 Cal. App. 3d 365, 374 (1975) (holding that justifiable reliance is an element of a cause of action for negligent misrepresentation and constructive fraud). Olenicoff cannot claim that he justifiably relied on UBS' statements that he would not have any taxable income from his off-shore UBS accounts, because he has already sworn that he knew, *at that time*, that he had a disclosable interest. *See*, *e.g.*, *Furia v. Helm*, 111 Cal. App. 4th 945, 958 (2003).

In *Furia*, the court found that there was a "fundamental problem" with plaintiff's case because plaintiff previously asserted that he did not rely on defendant's advice in a prior administrative proceeding, and won on that basis, but was now asserting the entirely inconsistent claim that he did rely on defendant's advice in the present lawsuit. *Id.* The court found that the doctrine of judicial estoppel prevented plaintiff from asserting inconsistent positions in two different lawsuits. *Id.* (citing *Jackson v. County of Los Angeles*, 60 Cal. App. 4th 171, 182 (1997) (stating that "[j]udicial estoppel is designed to maintain the purity and integrity of the judicial process"). Generally, judicial estoppel applies when: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." *Id.* at 183 (quotations and citations omitted). Applying the doctrine of judicial estoppel, the court found that plaintiff could not sue the defendant for any expenses related to the first lawsuit, because his prior testimony required him to admit that "he did not rely" on defendants' advice. *Id.*

The judicial estoppel analysis in *Furia* applies with even more force here. The prior proceeding was not merely an administrative hearing. It was a criminal case. Olenicoff did not

merely take the stand and make an off-hand remark. He submitted a sworn statement under oath, which he carefully reviewed with his attorney, with full knowledge of the consequences, and no evidence of ignorance, fraud, or mistake. As a result, Olenicoff did not win merely a civil case like in *Furia*. He convinced the United States government and a District Court to grant him leniency for his criminal actions. The purity and integrity of the judicial process will not allow Olenicoff to say one thing to get leniency in a criminal trial, and the exact opposite here to get money from UBS.

Olenicoff wrongly asserts that this Court already ruled against judicial estoppel in its prior March 16, 2010 Omnibus Order on UBS' Motion to Dismiss ("March 16, 2010 Order"). In reality, this Court simply found that it was not appropriate to decide the issue on a motion to dismiss. (March 16, 2010 Order, 24:1-26:5) (noting that these affirmative defenses "may be better suited for summary judgment.").) Also, the Court refused to decide the issue because UBS raised it as an affirmative defense against Olenicoff's (and at that time, Olen's) entire case. (*Id.*) UBS now only asserts this defense against Olenicoff's tax claims, acknowledging that the Plea Agreement does not affect Plaintiff's mismanagement claims.

Again reviewing this issue at summary judgment, the Court is convinced that Olenicoff is judicially estopped from claiming justifiable reliance here. Olenicoff's claim that he justifiably relied on UBS tax advice is entirely inconsistent with his Plea Agreement. The tension between these two inconsistent statements can be felt throughout Olenicoff's case. Indeed, at deposition, Olenicoff specifically disavowed Plea Agreement in an effort to state his claim. When asked about his false line 7a statement, Olenicoff stated: "No, I didn't know it at the time . . . I didn't know that existed at that time I signed my tax return." (RSGI ¶ 138.) If he had said that to the judge at his plea hearing, the judge would not have been able to accept the Plea Agreement.

UBS also raises the strong point that Olenicoff not only admitted that he knowingly lied about his off-shore accounts, but that he was also doing so long before he became a UBS client in 2001. In the Plea Agreement, Olenicoff admitted that he had been lying on his taxes since 1998. (RSGI ¶ 105.) In fact, the largest tax deficiency, for $5.2 million, was for the tax year 1998. (RSGI ¶ 139.) From 1998 through 2000, Olenicoff's tax advisor Newman would ask

Olenicoff if he had any foreign income, taxes, or bank accounts to disclose. (RSGI ¶ 141.) And each year, Olenicoff stated that he had none. (RSGI ¶ 141.) After Olenicoff entered into a relationship with UBS in 2001, he continued to answer No to Newman's requests. And that continued to be a lie. Olenicoff did not justifiably rely on UBS' advice. Olenicoff knew that he had a duty to report his off-shore income before he started banking with UBS, and he knew he had a duty to do so after. The only arguable mistake he could have made was to believe that UBS hid his money so well that the IRS would not find it and his lie would go undiscovered.

Olenicoff's nonsensical opposing arguments only further prove that his lawsuit against UBS is entirely inconsistent with his Plea Agreement. First, Olenicoff points to the DPA as evidence that he was duped by UBS. The DPA stated that UBS participated in a scheme to defraud the U.S. and the IRS by actively assisting or otherwise facilitating U.S. taxpayers in establishing accounts at UBS in a manner designed to conceal the U.S. taxpayers' ownership or beneficial interest in these accounts. (RSGI ¶ 133.) The DPA simply establishes that UBS might have been a co-conspirator. It does not allow Olenicoff to disavow his own statements of guilt. Also, the DPA shows that the U.S. government had already held UBS responsible for its participation in the tax fraud scheme, to the tune of $780 million. (RSGI ¶ 134.)

Second, Olenicoff awkwardly argues that the Plea Agreement is distinguishable from the present lawsuit because there he only plead guilty to a failure to disclose his off-shore accounts, not a failure to pay taxes. He insists that this case is different because here, he is suing UBS for telling him that he did not have to pay. The Court is not sure why Olenicoff thinks this helps. All Olenicoff has done is get UBS off the hook. Under his scenario, it would be entirely possible for UBS to have told Olenicoff that he did not owe any money on his off-shore accounts, without instructing him not to disclose those accounts. In fact, UBS might have assumed that he *would* disclose them as required under the law. That would mean that UBS did not make any actionable statement at all. This whole line of reasoning makes even less sense considering that, in the end, Olenicoff is seeking damages resulting from his guilty plea. Olenicoff's damages claim makes it crystal clear that the Plea Agreement and this lawsuit concern the exact same false statements–statements that Olenicoff has already admitted he made with full knowledge

and willful intent. Olenicoff attempts to dance around the elephant in the room, only to invite it at the end to tango.

Olenicoff's third and final major argument is also illogical. Olenicoff asserts that UBS lied to him by not disclosing their duty to report his income under the QI Agreement. The QI Agreement was UBS' agreement with the U.S. government to provide tax reporting and withholding on accounts held by U.S. clients that meet certain criteria. (Diulio Decl., Ex. 79, p. 3-5.) Olenicoff's expert asserts that UBS violated the QI reporting provisions by not disclosing Olenicoff's income as required. As already noted, Olenicoff's expert is arguably not qualified to opine on this issue. UBS' expert, who does appear to be qualified, opined that Olenicoff's accounts did not have to be disclosed under the QI Agreement. But in the end, it makes no difference. Even assuming that UBS lied to the U.S. government and withheld QI reporting, that does nothing to help Olenicoff assert justifiable reliance. Such an argument boils down to: because you lied to the U.S. government, the U.S. government did not discover my lie until later, which led me to pay much more money than if my lie had been discovered earlier. Whatever UBS chose to do with its QI reporting, that does not make them responsible for what Olenicoff falsely and knowingly wrote down on line 7a of his tax statements.

Having completed its lengthy judicial estoppel analysis, the Court also notes that the related doctrines of unclean hands and *in pari delicto* also bar Olenicoff's suit because the facts demonstrate that he is co-equally responsible for any damages arising from his tax fraud. *See, e.g., Chapman v. Superior Court*, 130 Cal. App. 4th 261, 276-77 (2005); *Precision Instrument Mfg. Co. v. Auto Maint. Mach. Co.*, 324 U.S. 806, 814 (1945) (stating that unclean hands is "a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant"); Black's Law Dictionary (8th ed. 2004) (the doctrine of *in pari delicto* stands for the "principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing"). The analysis is largely duplicative, apart from certain exceptions which bar *in part delicto* defenses against securities claims (which are not at issue for any of Olenicoff's tax-based claims). *Berner v. Lazzaro*, 730

F.2d 1319 (9th Cir. 1984) (defense of *in pari delicto* was inappropriate in private action for securities fraud). To avoid repeating itself, the Court will not fully analyze those separate doctrines here, except to note that they lead to the same result.

4.1.2 Judicial Estoppel (All Tax-Related Claims Except 1-3)

Because Olenicoff must abide by his prior statement in this Plea Agreement, the same "fundamental problem" that plagues Olenicoff's fraud claims applies to the rest of Olenicoff's tax-based claims. *See Furia*, 111 Cal. App. 4th at 958.

For example, Olenicoff's breach of fiduciary duty claim fails because he cannot establish a triable issue of fact regarding UBS' breach. Olenicoff is not asserting that UBS told him to lie on his tax returns. (Opp. 11:3.) Stymied by his assumption of responsibility under the Plea Agreement, Olenicoff is also not arguing that UBS told him that he had no duty to disclose his accounts, because he has already admitted that he knew that was not the case. Rather, Olenicoff asserts that UBS breached their duty to him by (1) failing to tell him about the QI Agreement, and (2) telling him that "the account structures they set up were legal, safe, and effective." (Opp. 11:3-8.) As already discussed, the QI Agreement–which was an agreement between UBS and the U.S. government–has no bearing on UBS' duties to Olenicoff. Second, Olenicoff submits no evidence supporting his contention that the UBS Account structure was not legal. Rather, the evidence shows that those structures would have been perfectly legal as long as Olenicoff disclosed them on his tax returns. Thus, Olenicoff cannot establish breach.

The rest of the claims similarly fail because Olenicoff cannot prove that UBS committed any wrongful act without running headlong into his own admission of criminal guilt. The tangential arguments Olenicoff makes to side-step his own culpability do not establish triable issues of material fact.

4.1.3 Damages (All Tax-Related Claims)

Olenicoff's Plea Agreement also means that he cannot prove damages on any of his tax-based claims. To prove damages, Olenicoff must establish that UBS' wrongful acts were the proximate cause of his injury. Cal Civ. Code § 333 (tort damages are measured as the amount that will compensate for harm "proximately caused" by wrongful conduct by the defendant); *see also North Am. Chem. Co. v. Sup. Crt.*, 59 Cal. App. 4th 764, 786 (1997) (stating that tort damages compensate plaintiff for injuries suffered "as a legal result of the defendant's wrongful conduct"); *Piscitelli v. Friedenberg*, 87 Cal. App. 4th 953, 989 (2001) (noting that in cases seeking damages for future business earnings, "recovery is allowed if claimed benefits are reasonably certain to have been realized but for the wrongful act of the opposing party"). Again, Olenicoff cannot establish that UBS is the cause of his tax-related damages because he has already assumed independent responsibility for this failure to disclose. Also, back taxes, interest, and penalties are not recoverable as damages because they are payments rightfully due to the IRS. *See, e.g., DCD Programs, Ltd. v. Leighton*, 90 F.3d 1442, 1449 (9th Cir. 1996) ("The [plaintiffs'] tax liabilities resulted from the ineluctable requirements of the Internal Revenue Code, rather than from any wrongful conduct on the part of the defendants."). Finally, UBS cannot be responsible for a large chunk of Olenicoff's tax-related damages because they arise out of 1998-2000, when Olenicoff was not even a customer of UBS.

In addition, any damage relating to Olen fail because Olen is no longer a party to this lawsuit and Olenicoff cannot assert damages on its behalf, and because damages are entirely speculative. *Mozzetti v. City of Brisbane*, 67 Cal. App.3d 565, 577 (1977) ("It is black-letter law that damages which are speculative, remote, imaginary, contingent or merely possible cannot serve as a legal basis for recovery."). Olenicoff's theory is that Olen has been unable to get a loan since Olenicoff became a felon, and that as a result Olen will be forced to liquidate its real estate holdings and cease to be a viable company. (RSGI ¶ 142.) But UBS has introduced evidence that in fact Olen has gotten two multi-million dollar loans since then. Not only that, UBS has also established that Olenicoff and his witnesses repeatedly *lied* about these loans in their depositions. Although it is not this Court's job to make credibility determinations on summary judgment, this coordinated blatant lie does not go unnoticed. At the very least, it

underscores that Olenicoff has no viable evidence of these damages sufficient to meet his burden and establish a triable issue of fact.

4.1.4 Statute of Limitations (All Tax-Related Claims)

Finally, all of Olenicoff's tax-related claims fail on statute of limitations grounds. Olenicoff filed his complaint on September 16, 2008. The longest statute of limitations for any of the claims is on the RICO conspiracy claims, for four years. *Rotella v. Wood*, 528 U.S. 549 (2000). The next longest statute of limitations is for all of the fraud claims, which have a three-year statue of limitations. Cal. Civ. Proc. § 338(d).

On all claims (except arguably for those under the Unfair Business Practices Act), a cause of action accrues when a reasonable plaintiff (1) is aware of circumstances that put him on inquiry notice to investigate potential claims or (2) has the opportunity to obtain knowledge from sources open to his investigation. *See, e.g., Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1120 (9th Cir. 1994) (statute of limitations begins to run when the plaintiff has "notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to her investigation").

Thus, all of Olenicoff's tax-related claims are barred if, by September 16, 2004, a reasonable person would have been aware of circumstances putting them on notice that they should investigate their claims. Here, Olenicoff has admitted that he was knowingly lying about his off-shore accounts as early as 1998. By the time Olenicoff came into contact with UBS in 2001, he thus had ample reason–although perhaps no motive–to investigate UBS' tax advice and his own duty to disclose. Not only was he aware of circumstances suggesting that his taxes were incorrect, he actually knew that they were false. Thus, all of Olenicoff's tax-related claims are barred.

UBS presents ample additional facts meeting its burden to show that a reasonable person would have been on notice before September 16, 2004. These additional facts paint a vivid

picture of Olenicoff's IRS tax troubles beginning in September 2001. During its investigation, the IRS alerted Olenicoff that they believed that he was not truthfully disclosing his interest in certain foreign accounts. Olenicoff vigorously defended his assertion that he had no interest in his off-shore accounts, going so far as to ask a former high-ranking Russian general to come to his defense. Olenicoff knew that this investigation implicated his UBS Accounts because he contacted Birkenfeld and told him that "as I had thought may happen some day, we will have to defend the ownership issue[.]" (RSGI ¶ 98.) In the Plea Agreement, Olenicoff admitted that this had all been a lie, and that he had been lying since at least 1998. He acknowledged that he did in fact have ownership interest over the disputed accounts.

In response, Olenicoff does not dispute these essential facts. Instead, he argues that the statute of limitations should be tolled "even after the fraud is discovered, for so long as the sheer economic duress or undue influence imbedded in the fraud continues to hold the victim in place." *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 779 (1979). Olenicoff argues that the statute of limitations should be tolled here until he left UBS on September 30, 2005. Olenicoff claims that his account trustees were unresponsive until that point, and he was effectively 'held' in his relationship with UBS against his will. The facts show otherwise. For example, Exhibit 33 to the Diulio Declaration is a short, hastily-scrawled handwritten note from Olenicoff instructing his trustees to the 096 Account, and to immediately send Olen the liquidated sum of $21 million dollars. (RSGI ¶ 71.) They did. Olenicoff fails to raise any triable issue of fact sufficient to toll the statute of limitations.

4.1.5 Conclusion (All Tax-Related Claims)

The tax-related portion of Olenicoff's case cannot stand. It is wounded by his prior inconsistent statements in the Plea Agreement. It is hobbled by his inability to prove damages. It is crippled by his failure to comply with all applicable statutes of limitations. These injuries are fatal as to the tax-related portions of all of his claims. The Court GRANTS UBS' Motions 1-3 as to all of Olenicoff's claims against UBS to the extent those claims rely on tax-related facts.

The Court VACATES Motion 4 (which needlessly gets into the entirely separate issue of RICO allegations) as MOOT.

4.2 OLENICOFF'S ACCOUNT MISMANAGEMENT CLAIMS

Now, for the second portion of Olenicoff's case against UBS. Here, Olenicoff asserts that Birkenfeld, with full support of his superiors, improperly caused Olenicoff to invest in highly-risky DOCUs and then "churned" those investments to increase UBS' own profits in complete disregard of the risk to Olenicoff and his account directives. Again, DOCUs are a structured investment with a high fixed interest rate and a currency option component. (RSGI ¶ 62.)

Although here Olenicoff does not face the issue of prior inconsistent statements or unclean hands, his theory is still flawed. The documents establish that Olenicoff authorized the placement of his funds into DOCUs. (RSGI 64); (RSGI ¶ 64.) Olenicoff further admits that he had a basic understanding of how those accounts worked. (RPDF ¶ 114.) But oddly, Olenicoff claims that he–an experienced billionaire businessman–did not understand the basic risk associated with that investment structure because UBS somehow "hid" these facts from him. Having discovered UBS' profit, he now claims that UBS "churned" his investment. "Churning" occurs when a "broker engages in excessive trading for the purpose of generating commissions, without regard to the customer's investment objectives." *Armstrong v. McAlpin*, 699 F.2d 79, 90 (2d Cir.1983) (citing Hazard & Christie, The Investment Business 68 (1964)). Technically, this definition does not apply to DOCUs, because the revenue to UBS is calculated on a per annum basis, not a per trade basis. (*See* Reply Motion 3, 18:4-18.) DOCUs were by their very nature short-term, meaning that the volume of trades was built into the investment structure–which Olenicoff knew. (Opp. to Motion 1, 6:16-27.) Although these trades might have been profitable for UBS, there is no evidence that UBS excessively traded these investments to generate commissions. The short-term structure might have been attractive and profitable for UBS, but Olenicoff was well aware that these were short-term. Plaintiff's own "churning" expert

acknowledged that his analysis only worked in instances where additional profits accrue as a result of additional transactions. (Jeffrey L. Gottfredson Deposition, 268:19-269:6.)

Despite the obvious holes in Olenicoff's broader case, this Court will only address one issue here: damages. Olenicoff did not lose any money. In fact, Olenicoff made over $9 million dollars on the DOCU investments, for a total annual rate of return of 2.32%. (RSGI ¶ 64.) This is consistent with his stated conservative investment goals, as alleged in the TAC, of 2-4%. (TAC ¶ 55.) Olenicoff now tries to claim that he meant 2-4% before taxes, or 4-5% after taxes. (Olenicoff Decl., pp. 5-6.) But here Olenicoff runs smack into the other portion of his case, where he vigorously asserts that he did not believe that he had to pay taxes on his UBS Accounts. (Olenicoff Decl. ¶ 30.) Olenicoff is bound by his own pleadings. Olenicoff fails to establish a triable issue of fact regarding his investment goals.

Also, there is no evidence that any so-called churning led to excessive investment fees or charges. UBS and Olenicoff agreed that one flat fee of .7% would be charted on Olenicoff's entire portfolio. (RSGI ¶ 60); (TAC ¶ 71.) Olenicoff was annually charged between approximately .014% to .347% of the cumulative funds transferred into the UBS Accounts. (RSGI ¶ 61.) Olenicoff's proft and rate of return are net of these fees. (RSGI ¶ 61.)

At most, Olenicoff can only assert that he should have made *more* money: $9 million was not enough. Olenicoff relies on *Twomey v. Mitchum, Jones & Templeton, Inc.*, 262 Cal. App. 2d 690 (1968) to claim that he is entitled to "benefit of the bargain" damages, or the difference between what he would have made through competent investments with a dutiful advisor and what he actually made with UBS. *Id.* at 732-33. In other words, the plaintiff not only recoups his actual losses, he gains the value he would have otherwise made. In *Twomey*, the court found that a widow who lost two-thirds of her $50,000 nest egg due to her broker's recommendations was entitled to benefit of the bargain damages. *Id.* Thus, the widow was entitled to the approximately additional $10,000 dollars she would have made had she kept the funds in her original investments.

Again, unlike the widow in *Twomey* who lost most of her life savings, Olenicoff did not actually suffer a loss. He made over $9 million dollars. *Twomey* can be further distinguished

because there was a "but for" causal link between the mismanagement and the loss of alternative investment vehicle. But for the advice of her broker, the widow would have kept her money in her original investment. Olenicoff attempts to analogize his situation to *Twomey* by claiming that but for the advice of Birkenfeld, he would have kept his money in a UBS-managed equity portfolio. Thus, Olenicoff seeks to recover the difference between the return from his DOCU accounts and the return from his equity portfolio. The problem with this argument is that Olenicoff admitted at his own deposition that he was the one who demanded–from the beginning of his relationship with UBS–that the bulk of his money be placed in highly liquid investments such as DOCUs. (RSGI ¶ 62.) Having demanded that the bulk of his investments be placed in liquid investments, not in equities, he cannot now claim that he should receive the value of his equities account. Olenicoff's argument can be further distinguished from *Twomey* since the equity portfolio was actually managed by UBS–the very entity he is claiming violated his trust. If UBS really breached its duty to Olenicoff or committed fraud, an account managed by them would not be an appropriate alternative measures of damages. Olenicoff's "benefit of the bargain" damages argument thus belies his original assertion of mismanagement.

The Court thus finds that Olenicoff has failed to establish that he would have invested in UBS' equities portfolio but for UBS' bad advice. Stripped of this artificial reference point, Olenicoff's "benefit of the bargain" damages claim is "speculative, remote, imaginary, [and] contingent" and thus "cannot serve as a legal basis for recovery." *See Navellier v. Sletten*, 262 F.3d 923, 939 (9th Cir. 2001). Olenicoff wanted a liquid investment with a rate of return over 2%, and that is exactly what he got. His hind-sight claim that he should have made more money are just that–imaginary hindsight.

Olenicoff also asserts that UBS should disgorge the profits it made off of his DOCU accounts, because it violated its fiduciary duties in managing the account. See, *e.g.*, *County of Can Bernardino v. Walsh*, 158 Cal. App. 4th 533, 543 (2007); *see also* Cal. Civ. Code § 2224 (allowing constructive trust to compensate for wrongful acts of a party committing fraud). UBS meets its burden and successfully argues that no triable issues of fact exist warranting such a remedy here. Olenicoff asked UBS to place his money into liquid short-term investments

earning him over a 2% fee. They did. Although those investments made UBS a sizeable profit, there is no evidence that Olenicoff's own interests were compromised as result. Also, UBS correctly points out that Olenicoff is precluded from recovering any profits that UBS already paid to the government in its $380 million dollar disgorgement related to its cross-border business. (RSGI ¶¶ 134-137); *see also Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 734 F. Supp. 1071, 1076 (S.D.N.Y. 1990); ("[O]nce ill-gotten gains have been disgorged [], there remains no unjust enrichment and, therefore, no basis for further disgorgement in a private action.") Also, Olenicoff's claim for disgorgement under the UCL fails because the UCL does not allow nonrestitutionary disgorgement. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134 (2003). Here, Olenicoff had already gotten back his principal plus $9 million dollars in profit.

In opposition, Olenicoff insists that he should be entitled to the equitable remedy of disgorgement because of the sheer amount of profits UBS made off of his investments. If this Court allowed disgorgement claims to go forward every time that a client claimed that a bank made too much money off of his investment–clients who themselves made millions of dollars–the courts would be flooded with comparable claims. There must be more to Olenicoff's claim. But the only additional argument Olenicoff offers is that he did not know how risky the DOCUs were. This argument is belied by his own admission that he understood the basic structure of the investments. And again, Olenicoff was not harmed by that risk. The Court finds that Olenicoff fails to raise a triable issue of fact on the issue of disgorgement. The Court notes that ultimately, disgorgement is an equitable remedy subject to its discretion. *Fairchild v. Raines*, 24 Cal. 2d 818, 826 (1944).

Banks are not non-profit organizations, and it is not a tort for a bank to make revenue off of a client's investments. A bank's management of a client's funds only become actionable if the client can demonstrate that the bank's desire to make a profit came at the client's expense or warranted disgorgement. Here, Olenicoff has failed to show any genuine issue of fact establishing that he was harmed by UBS' management of his accounts, that he is entitled to "benefit of the bargain" damages, or any facts warranting disgorgement of UBS' profits. Thus,

the Court GRANTS UBS' Motion 3 as to all claims based on account mismanagement. The Court VACATES UBS' Motions 1, 2, and 4 as to all claims based on account mismanagement as MOOT.

5. CONCLUSION

With five summary judgment motions at issue, the filing was voluminous. The Court fully considered all arguments and papers submitted, although it did not find it necessary to rule on each one.

The Court GRANTS Defendant UBS' Motions for Summary Judgment 3 and 5 in their entirety as to all claims against it. The court GRANTS UBS' Motion for Summary Judgment 1 and 2 as to the tax-related portion of all of Olenicoff's claims. The Court VACATES UBS' Motion for Summary Judgment 4 as MOOT.

The Court GRANTS Birkenfeld's Joinder, and dismisses all claims against him in their entirety.

Based on the representations of counsel, this Order dismisses all claims against UBS and Birkenfeld, the only remaining Defendants in this case, and this concludes this case. UBS and Birkenfeld should promptly submit a combined proposed judgment consistent with this Order.

IT IS SO ORDERED.

DATED: April 10, 2012

Andrew J. Guilford
United States District Judge