

**ACM Advanced Currency Mkts., S.A. v Bauer**

2008 NY Slip Op 33176(U)

November 21, 2008

Supreme Court, New York County

Docket Number: 601554/07

Judge: Judith J. Gische

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE  
Justice

PART 10

ACM Advanced Currency

INDEX NO. 601554/07

- v -

MOTION DATE \_\_\_\_\_

Bauer

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**  
NOV 26 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**motion (a) and cross-motion(a)  
decided in accordance with  
the annexed decision/order  
of even date.**

Dated: 11/21/08

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----X  
ACM ADVANCED CURRENCY MARKETS, S.A.,  
Plaintiff

-against-

RACHEL BAUER,

Defendant.  
-----X

**DECISION/ORDER**  
Index No.: 601554/07  
Seq. No.: 001

Present:  
Hon. Judith J. Gische  
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

<b>Papers</b>	<b>Numbered</b>
Def n/m (compel) w/ PTG affirm, exhs . . . . .	1
Pltf SSA affirm opp, exhs . . . . .	2
Def PTG reply affirm, exh . . . . .	3
Transcript, 9/25/08 . . . . .	4
Pltf's amended answers to int . . . . .	5

**FILED**  
NOV 26 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

*Upon the foregoing papers the court's decision is as follows:*

This is an action arising from an alleged breach of contract. Specifically, plaintiff commenced this action against defendant as a result of plaintiff's allegedly mistaken overpayment to defendant, in May 2005, in the amount of \$195,333.53, after defendant had closed her account with plaintiff (the "ACM account"). Defendant now moves pursuant to CPLR 3124 for an order directing the plaintiff to furnish further responses to certain interrogatories. Plaintiff opposes the motion and has provided to the court a copy of its amended answers to certain interrogatories at issue. Defendant has provided an affirmation that a good faith effort was made to resolve the issues raised in this motion.

The interrogatories at issue are numbered 13 through 22, 24, and 26 and contained in the Defendants' Interrogatories dated and served on May 29, 2008 and corrected for a typographical error by letter dated and served on July 18, 2008. The interrogatories at issue fall into two general categories: [1] interrogatories seeking information concerning plaintiff's former employee, Patrick Meier ("Meier") which plaintiff claims it is barred from disclosing under Swiss law (interrogatories numbered 18-22 and 26); and [2] other interrogatories which plaintiff maintains it has answered to the best of its ability. The court will address the former category first.

Plaintiff responded to these interrogatories by disclosing that it employed Meier pursuant to a written contract, in the Sales Department, from May 13, 2004 through early February 2008, and that Meier was terminated "by reason of his prolonged absence from work for approximately four months." Plaintiff otherwise maintains that because Meier opposed the disclosure of his employment file and personal information to third parties, under Swiss Federal Act of 19, June 1992 on Data Protection ("FADP"), plaintiff is prohibited from disclosing any further information to defendant.

Defendant argues that its interrogatories are material and relevant discovery requests and that this foreign law does not apply to this case. Defendant also maintains that plaintiff has not made a sufficient showing under the CPLR for this court to take judicial notice of the FADP.

Under CPLR 4511 (b), the court must take judicial notice of the law of a foreign country if the party requesting judicial notice furnishes the court sufficient information to enable it to comply with the request. CPLR 4511 (d) requires that "a printed copy of a

statute or other written law... purporting to have been published by a government or commonly admitted as evidence of the existing law in the judicial tribunals of the jurisdiction where it is in force is prima facie evidence of such law”

Here, plaintiff has failed to meet its burden of proof. The plaintiff has offered an unofficial copy of the FADP, which does not appear to be from an official publication nor is it properly attested to and accompanied by a final certification as to the genuineness of the signature and official position (see CPLR 4542). The copy of the statute provided by plaintiff also bears a legend on the top of the first page that states:

English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and has no legal force.

The expert affidavit provided by plaintiff of Mr. Raoul Jacot-Descombes as to how the FADP impacts the instant discovery dispute is also deficient in several material ways. Mr. Jacot-Descombes is the Head of Compliance of plaintiff and is an attorney duly licensed to practice law in Switzerland. Mr. Jacot-Descombes was also a fact witness produced by plaintiff for deposition. Mr. Jacot-Descombes maintains that plaintiff is prohibited by the FADP from disclosing any of the information about Meier that defendant now seeks. Assuming *arguendo* that no issues of bias exist, and that Mr. Jacot-Descombes is in fact an expert on this aspect of Swiss law, this affidavit does not provide the court with sufficient information (see i.e. Warin v. Wildenstein & Co., Inc., 293 AD2d 348 [1st Dept 2002] order recalled and vacated 297 AD2d 214). Mr. Jacot-Descombes does not cite any Swiss cases which support his legal conclusions nor does he identify any other official support from the Swiss Government for his

respective conclusions.

Moreover, the court is not persuaded that Mr. Jacot-Descombes has offered an independent opinion since Mr. Jacot-Descombes' conclusions may be tainted by bias given his involvement in this action and any potential stake in its outcome he might have as one of plaintiff's direct employees. Plaintiff could have overcome the appearance of bias by providing an opinion letter by an independent Swiss law firm or attorney supporting Mr. Jacot-Descombes' conclusions.

Moreover, a review of the FADP itself reveals that by its own plain language, its restrictions safeguarding privacy would not apply to this action. Article 2 of the translated FADP (Exhibit "E" to plaintiff's opposition papers) states in pertinent part:

This Act applies to the processing of data pertaining to natural persons and legal persons by:

- a. private persons;
- b. federal bodies.

It does not apply to ... pending civil proceedings...

The court notes that Mr. Jacot-Descombes' expert affidavit does not explain why this action does not fall under Article 2, thereby taking the relevant discovery requests out of the ambit of the FADP.

Accordingly, defendant is entitled to an order directing plaintiff to furnish complete responses to interrogatories 18 through 22 and 26 contained in the Defendants' Interrogatories dated and served on May 29, 2008 and corrected for a typographical error by letter dated and served on July 18, 2008.

The court next turns to the remaining interrogatories. CPLR § 3101 (a) broadly defines the scope of disclosure as "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . ." Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d 403 (1968). The words, "material and necessary," are interpreted liberally so as to require disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. . ." Allen v. Crowell-Collier Pub. Co., supra at 407. The test is one of "usefulness and reason." Id. The burden of showing that the disclosure sought is improper is upon the party seeking the protective order. Roman Catholic Church of the Good Shepherd v. Tempco Systems, 202 A.D.2d 257, 258 (1<sup>st</sup> Dept 1994).

Interrogatories numbered 13 through 16 request information about plaintiff's relationship with a particular money manager employed by plaintiff and named Robert Rivera ("Rivera") and with money managers in general.

Plaintiff has provided the court with certain portions of defendant's transcript of her deposition testimony. At her deposition, defendant testified that she hired Rivera to be her money manager on her ACM account. She claims that Rivera defrauded her because he told her she "couldn't lose money, that [she] could make enormous amounts of money and that [her] money was only used for leverage purposes, etc., etc." However, there are no claims asserted against Rivera in the complaint.

Defendant argues that plaintiff's response to interrogatory number 13 is incomplete. This interrogatory states: "Please state the qualification(s) required by the Plaintiff for a money manager to conduct currency transactions on behalf of other

persons or entities." Defendant then requests plaintiff to provide further information "if the qualifications are in writing." Plaintiff has stated the necessary qualifications, and inasmuch as defendant's further request for information is based on these qualifications being "in writing", the court is unable to determine what it is that defendant is seeking. Therefore, the court finds that plaintiff has answered this portion of interrogatory number 13 to the best of its ability.

In part (d) of the same interrogatory, defendant requests that plaintiff identify other money managers that were terminated by plaintiff, the facts and circumstances surrounding these terminations, and any related documentation. To the extent that defendant has not shown how the information sought by these requests will potentially lead to relevant and material information in this action, the court finds that this request is overbroad. Moreover, this request is burdensome because, for example, it has not even been tailored via a time, geographical or other reasonable restriction.

Similarly, the portions of defendant's interrogatories numbered 14, 15 and 16 which forms the subject of this motion are also overbroad. In interrogatory number 14, defendant seeks dates related to when Rivera commenced and ceased conducting trades for plaintiff, the identity of persons and/or entities for which Rivera conducted trades and the identification of trades made by Rivera resulting in a net loss at the time the account was closed. In interrogatories numbered 15 and 16, defendant primarily seeks a calculation of the fees paid to Rivera by plaintiff and the fees received by Rivera for trades for others than defendant, respectively. In interrogatory number 17, defendant seeks a description of the procedures and guidelines used by plaintiff to

8 ]

prevent "excessive trading, unethical trading and/or "churning." These interrogatories concern information that is unrelated to the issues at bar and defendant has not stated any basis as to how any of this information may impact on claim or defense in this action. Therefore, defendant is not entitled to an order compelling the plaintiff to provide further responses to interrogatories numbered 14, 15, 16 and 17.

Interrogatory number 20 requests that plaintiff identify "every person in plaintiff's management that participated in the decision by plaintiff to the effect that [Meier] would not appear and/or submit to a deposition by the defendant." Plaintiff has identified Mr. Jacot-Descombes "and the members of [its] senior management" as the persons who participated in this decision. To the extent that it is unclear to the court how this interrogatory will lead to any material and relevant information, defendant has failed to demonstrate entitlement to an order compelling further responses thereto.

Finally, interrogatory number 24 seeks the identification of person(s) with knowledge and understanding concerning the technical system utilized by plaintiff to insure that all information regarding client transactions are accurate. Plaintiff's initial response is that "various persons in the IT Department who maintain and regularly test the computer system." Plaintiff has subsequently amended this response to identify those persons responsible for maintaining the technical systems, Alex Callea, Head of Corporate and Interactive Services for plaintiff. This amended response appears to be complete.

Interrogatory number 24 further requests information concerning whether these technical systems have been audited by Ernst & Young or some other entity. In its

amended response, plaintiff has identified SGS Societe Generale de Surveillance ("SGS") as the auditor who audited plaintiff's computer systems in 2007 and plaintiff has produced copies of a short form audit report and certification produced by SGS. This response also appears to be sufficient and complete.

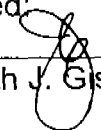
**Conclusion**

In accordance herewith, defendant's motion to compel discovery is granted to the extent provided in this decision/order, and otherwise is denied.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
November 21, 2008

So Ordered:  
  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**  
NOV 26 2008  
COUNTY CLERK'S OFFICE  
NEW YORK