No.

In the Supreme Court of the United States

DARRU K. "KEN" HSU, individually, and as trustee of THE DARRU K. HSU and GINA T. HSU LIVING TRUST U/A 05/05/03, individually and on Behalf of All Others Similarly Situated,

Petitioner,

v.

UBS FINANCIAL SERVICES, INC.

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question-1: Whether the Supreme Court should grant the judgment for the violation of *SEC Heitman Capital No Action Letter* in UBS MAC wrap-fee investment contract using exculpatory hedge clause. Interlocutory review on this "controlling question of law" will bring the class action to finality. (See p. 14)

Question-2: Whether the Court must determine that the falsified defense failed to acquire 28 U.S.C. § 1331 Jurisdiction and deprived the 9th Circuit of §1291 and §1292(a)(1) jurisdictions. This Court has established §1253 jurisdiction for these exceptions. **The violation of the above SEC regulation was never adjudicated.** The district court raised the falsified evidence for appellate review. (App. B) 28 U.S.C. 1254 cannot resurrect the jurisdictions voided by the self-incriminated defense. (See p. 9)

Question-3: Whether the Court shall review the statutory violations under 15 U.S.C. § 29. This Court applied Expediting Act and Transfer Act for direct review. See *Swift & Co. v. United States*, 276 U.S. 311, 322 (1928) The 1st Circuit denied its appellate jurisdiction based on the Act,[1] while the 3rd Circuit overlooked the § 1292(a)(1) exception.[2] Here, the 9th Circuit granted summery affirmance without jurisdiction. Upon challenge, the Circuit disclaimed its supervisory court jurisdiction. (See p. 12)

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[1] *United States v. Cities Svc. Co.*,410 F.2d 662, 1st Cir. (1969)

[2] *United States v. Ingersoll-Rand Co.*, 320 F.2d 509 (1963)

Question-4: Whether the Court should mend the vulnerability in the judicial system, and harmonize with the SRO infrastructure (*i.e.*, FINRA) under 15 U.S.C. § 78o 3 (Maloney Act) in the 21st Century to uphold the purpose of Federal Arbitration Act for reducing the court dockets. (See p. 18)

Question-5: Whether the clerk staff of this Court violated S. Ct. Rule 7 in practicing as an attorney to deny the docketing under Rule 18. Instead, the staff imposed Rule 10-16 for §1254. (App. D and E) The Court never applied the non-delegation doctrine in *Wayman v. Southard*, 23 U.S. 1, 22 (1825) to Rule 18 in light of Rule 7. The staff brought forth the jurisdictional conflict for review: §1254 lacks the jurisdictional predicate which the Circuit had disclaimed. While the district court raised the evidence tampering for appellate review (App. B), but had no jurisdiction to vacate the non-jurisdictional rulings (jurisdictional defects) of higher courts including this Court. (No. 13-74 and 17-157)

PARTIES TO THE PROCEEDING

Petitioner and plaintiff is DARRU K. HSU, individually, and as Trustee of the DARRU K. HSU AND GINA T. HSU LIVING TRUST U/A05/05/03, individually and on behalf of all others similarly situated.

Respondent is UBS FINANCIAL SERVICES INC. The parent company is UBS AG, Switzerland.

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*Note: All decisions are "drive-by jurisdictional rules" resting on void *Federal Question Jurisdiction.*

TABLE OF AUTHORITIES

CASES:

Other Authorities:

Exchange Act:

Investment Advisers Act, 15 USC § 80b-1, et seq.:

OTHER STATUTES AND RULES:

FEDERAL COURT STATUTES:

OPINIONS AND ORDERS BELOW

(1) District Court finally provided an evidentiary hearing and issued a *minute order* on the falsification of UBS's own regulatory compliance document in opening a new account for the MAC wrap-fee investment contract, and yielded to a 3-judge appellate review. (App. B-2)

On appeal (9th Cir. **19-15756**, Dkt. 12, 8/1/2019), the Panel granted summary affirmation. Appellant timely filed a motion-for-reconsideration to challenge the void 28 U.S.C. § 1291 and § 1292 jurisdictions. The Panel finally responded and closed all the appeals. (Dkt. 14, 10/10/2019)

(2) Ninth Circuit (**14-15588**, Dkt. 28-1, 12/22/2016)[3] – The decision was based on 28 U.S.C. § 1291 jurisdiction that the Circuit did not have.

(3) Ninth Circuit (**11-17131**, 4/15/2013)[4] – The decision was based on 28 U.S.C. § 1291 jurisdiction that the Circuit did not have and without finality.

* All district court decisions on *Darru K. Hsu v. UBS Financial Services, Inc.*, 3:2011-cv-02076[5]

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[3] Available at: https://law.justia.com/cases/federal/appellate-courts/ca9/14-15588/14-15588-2016-12-22.html

[4] Available at: https://law.justia.com/cases/federal/appellate-courts/ca9/11-17131/11-17131-2013-02-11.html

[5] Unpublished district court docket available at: https://dockets.justia.com/docket/california/candce/3:2011cv02076/240024/

STATEMENT OF JURISDICTION

The petition for writ of certiorari is from Ninth Circuit's disclaimed supervisory jurisdiction on the district court's *minute order* in which preserved the tampering of regulatory compliance document for appellate review. (See App. A & B)

28 U.S.C. §1292, §1253, and 15 U.S.C. §29 are all acts of Congress for direct review under S. Ct. Rule 18-1. For *Carson v. American Brands, Inc.*, 606 F.2d 420, 4th Cir. (1979), this Court affirmed §1253 jurisdiction for the interlocutory exception of §1292(a)(1). *Carson*, 450 U.S. 79, 83. The Expediting Act of 1903,[6] as amended,[7] 15 U.S.C. §29 provides direct review on the fraudulent contract and defense.

Jurisdictional defect is not subject to waiver or forfeiture – including "discretionary" review under §1254 to restore the good name of judges. The non-jurisdictional "defects" need 28 U.S.C. §2106 for vacatur, and §2105 abatement for the government jurisdictions to enforce the laws. However, the clerk staff directed to re-file under § 1254. (App. E) The Congress enacted Judicial Code §238 (including §238(a) - the Transfer Act) was repealed (1925) and reorganized into Title 28 (1948) for direct review.[8] The *non-delegation doctrine* should ban clerk staff from violating S. Ct. Rule 7. This petition must be reverted to direct review on the statutory violations. The decision belongs to Hon. Justices.

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[6] Title 15, §29 https://www.govinfo.gov/content/pkg/USCODE-1995-title15/pdf/USCODE-1995-title15-chap1-sec29.pdf

[7] See *Historical and Revision Notes* for Chap. 3, §41, 2nd ¶: https://www.govinfo.gov/content/pkg/USCODE-2011-title28/html/USCODE-2011-title28.htm

[8] See *Appendix to Rules* (1925, Chapter 229); Sec. 238, p. 4 https://www.supremecourt.gov/ctrules/rules/rules_1948.pdf

STATUTORY PROVISION INVOLVED

(1) 15 U.S.C. § 80b-15 Validity of contracts:

(a) Waiver of compliance as void

Any condition, stipulation, or provision binding any person to waive compliance with any provision of this subchapter or with any rule, regulation, or order thereunder shall be void.

(b) Rights affected by invalidity:

Every contract made in violation of any provision of this subchapter and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this subchapter, or any rule, regulation, or order thereunder, shall be void

(1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and

(2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision.

(2) SEC Heitman Capital No Action Letter (Ref. No. 200463918, File No. 801-15473)[9] - Verbatim of the "Legal Analysis":

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[9] SEC No Action Letter is available at: https://www.sec.gov/divisions/investment/noaction/2007/heitman021207.pdf

> Sections 206(1) and 206(2) of the Advisers Act make it unlawful for any investment adviser to employ any device, scheme, or artifice to defraud, or to engage in any transaction, practice, or course of business that operates as fraud or deceit on clients or prospective clients. *Those antifraud provisions may be violated by the use of a hedge clause or other exculpatory provision in an investment advisory agreement which is likely to lead an investment advisory client to believe that he or she has waived non-waivable rights of action against the adviser that are provided by federal or state law.*

(3) 17 CFR 275.206(4)-7: Compliance Procedure and Practices (verbatim of relevant text):

> If you are an investment adviser registered or required to be registered under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3), it shall be unlawful within the meaning of section 206 of the Act (15 U.S.C. 80b-6) for you to provide investment advice to clients unless you:
>
> (a) Policies and procedures. Adopt and implement written policies and procedures reasonably designed to prevent violation, by you and your supervised persons, of the Act and the rules that the Commission has adopted under the Act;
>
> (b) Annual review ...; and
>
> (c) Chief compliance officer. Designate an individual (who is a supervised person) responsible for administering the policies and procedures that you adopt under paragraph (a) of this section.

(4) Gramm-Leach-Bliley Act, a/k/a: GLB Act (15 U.S.C. §§ 6821 – 6827)

(5) RICO Act (18 U.S.C. §§ 1961- 1968)

STATEMENT OF THE CASE

Jurisdictional defect is not subject to waiver or forfeiture and may be raised at any time in the court of first instance and on direct appeal. See *Hamer v. Neighborhood Housing Services of Chicago*, 583 U.S. ___ (2017)

In 2011, plaintiff filed this class action against UBS Financial Services Inc. ("UBS") after FINRA arbitration for fraud in its *Managed Account Consulting* investment contract ("MAC contract") violating Investment Advisers Act ("IAA") – using exculpatory hedge clauses. The pleading included UBS's own regulatory compliance documents which are the **injury-in-effect** of the class. These documents are regulated by the IAA.

UBS filed a motion-to-dismiss supported by a judicial notice containing **two falsified documents that only appear genuine on the face.** The defense relied on *Parrino v. FHP, Inc.*146 F.3d 699, 9th Cir. (Doc. 22 and 23) for the policy prohibiting a complaint that hides "extrinsic" evidence in the pleading to evade summary judgment conversion under Rule 12(d). This policy is explained in a FRAP 28(j) Letter (Supplemental Authority).[10]

One document (Doc. 23, Exhibit A) is "*Horizon Agreement*" which the defense claimed as a "separate"

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[10] See 9th Cir. 14-15588, Dkt. 30-2, p. 125. Also available at https://digitalcommons.tourolaw.edu/lawreview/vol31/iss1/10/

agreement that lead-plaintiff Hsu entered with the 3rd-party manager. The other "*FINRA Arbitration Panel Ruling*" (Doc. 23, Exhibit B) claimed that the complaint is time-barred due to the prior FINRA arbitration. The defense relied on *Ashcroft v. Iqbal*, 556 U.S. 662 that the pleading fell short of entitling to relief for failing to allege enough facts (*i.e.*, factual insufficiency).

The signed "separate" agreement is unprovable with the genuine regulatory purpose stripped away. (App. B-2) But the judge eliminated the pleaded regulatory compliance documents and turned the class action into an individual complaint. The combination of evidence tampering deprived appellate court of 28 U.S.C. § 1291 and § 1292(a)(1) jurisdictions. However, federal courts have limited "federal question jurisdiction" (28 U.S.C. § 1331), for which litigating parties must satisfy "*well-pleaded complaint rule*". (See Doc. 89-1, p.4) The Rule is not satisfied by a defense based on federal law, including a defense of federal preemption, or by anticipation of such a defense in the complaint. It does not allow a district court to deviate from the "arising under the Constitution, laws..." To rule otherwise would contravene the face-of-the-complaint principle. See *Phillips Petroleum Co. v. Texaco Inc.*, 415 US 125, 128 (1974). In *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1 (2003), the dissenting opinion cautioned that "*the rejection of a federal defense as the basis for original federal-question jurisdiction applies with equal force when the defense is one of federal preemption.*" (*Id.* at 12) Chief Justice delivered the opinion in *Gunn v. Minton*, 133 S.Ct. 1059, 1065 (2013) citing four elements for well-pleaded complaint rule based on *Grable*, 545 U.S. 308. These precedents reject UBS's defense, as the IAA does not

reach the garden-variety *"Horizon Agreement"* regardless falsified or not. (See Doc. 89, p. 2) **The defense failed to acquire "federal question jurisdiction", and caused all "drive-by jurisdiction" rulings.**

DIRECT REVIEW UNDER 28 U.S.C. § 1253

(1) Practical Effective Rule under 28 U.S.C. §1253

The Court applied "practical effect rule" to §1253 to ensure jurisdiction relying on *Carson v. American Brands*, 450 US 79, 83. *Carson* was a class action case and the Court flexibly applied a 3-judge appellate panel. The Court also interpreted the harm from non-jurisdictional claim processing that caused "permanent injection" for immediate review. See *Abbott v. Perez*,17-586, 17-626, S.Ct., p. 11-14. Here, jurisdictional defect from the direct attack on the gatekeeping duty of the district court is not subject to waiver or forfeiture and may be raised at any time in the court of first instance and on direct appeal. See *Hamer v. Neighborhood Housing Services of Chicago*, 583 U.S. ___ (2017)

(2) Interlocutory appeal from granting or denying class certification

The *Interlocutory Appeals Act of 1958* was codified in 28 U.S.C. § 1292(b) to modify the final judgment rule (§ 1291). – The Act provides: (1) both the district court judge and the court of appeals are given absolute discretion whether to allow the appeal; and (2) approval of the appeal requires a determination that the certified order *"involves a controlling question of law as to which there is substantial ground for difference of opinion."*

Because by the terms of Rule 23(c)(1) a class certification order "may be altered or amended before the decision on the merits," post-certification order discovery or other developments could require revision of the original order. **Yet**, district court should make an early decision whether a case should proceed as a class action. The inherent conflict between discovery fairness and discovery abuse for settlement presented a unique challenge for the courts and lay-investors alike on all wrap-fee investment contracts regulated by 15 U.S.C. § 80b-2(a)(11)(C), which is quite complex.

Interlocutory Review (page 14) provided the fraudulent scheme in MAC contract. Below focuses on *"non-jurisdictional claim-processing rulings"* caused by the fraudulent defense. Being the supervisory court, the Circuit voided own jurisdiction on all prior appeals, **but** without providing the causation from evidence tampering. (App. A) **28 U.S.C. § 1253 or § 1292 exception is satisfied.**

A. MAC contract itself raised the controlling question of law

(a.) 15 U.S.C. § 80b-2(a)(11)(C) of the IAA regulates a broker *(e.g.*, UBS Financial Services Inc.) who sponsors a 3rd-partry investment adviser *(e.g.*, Horizon Asset Management Inc.) as the investment manager for the broker. The falsified document is part of opening a new exclusive account along with the amount invested. It is for sharing advisory fees with Manager based on the on-going investment activities in the account. (See App. C, p. 13 and p. 25) Thus, UBS requires its client to sign an authorization on behalf of the Manager and send via FAX the account number and the invested amount to

the sponsored Manager in compliance with 15 U.S.C. § 80b-2(a)(11)(C).

(b.) Part-2, §3(A) and §3(B) distorted the role of "Advisor" under § 80b-2(a)(11)(C), because a client enters the contract with UBS for "Advisor" to **make** investment decisions and **shared** wrap-fee with UBS. (See App. C, p. 27 and p. 25) On a different regulation, FINRA Rule 2510(b) requires direct authorization from the account owner for discretionary management. This Rule is for someone to aid elderly or disabled person to manage any asset types (*e.g.*, cash) held in the account. The rule does not call out the purpose of §3(B) for "Advisor" to comply with § 80b-2(a)(11)(C).

B. The direct attack on the district court with evidence tampering

This class certification was defeated by the rare combination of evidence tampering between defendant-UBS and the district judge. (See ECF Doc. 35 and Doc. 22-23)

(a.) The falsified defense stripped away the FAX transmittal and obscured the account opening information in order to misrepresent the signed authorization as a "separate" agreement with the sponsored manager (*i.e.*, Horizon). (See the *minute order* in App. B) It severed the regulatory bound between §3(A) and §3(B); but deprived the Circuit of 28 U.S.C. § 1291 jurisdiction without finality.

(b.) Facing with the un-provable defense, the district judge chose to eliminate the regulatory compliance documents in the complaint and only applied 15 U.S.C. § 80b-15(a) to the complaint and cast aside judicial deference to *SEC Heitman Capital No Action Letter*. (Doc. 35, p. 9, L: 13) The eliminated

documents represent the *injury-in-fact* of all investors who signed MAC contract for opening new accounts required by 15 U.S.C. § 80b-2(a)(11)(C). The appellate *de novo* review echoed the eliminated Exhibits and the canceled jury trial. *"we will not consider arguments that are raised for the first time on appeal"*. See the decisions in Fn. 4 & 5.

The judge turned the class action into individual complaint, which steered appellate jurisdiction to § 1291 and blocked interlocutory review under § 1292 for Rule 23(c)(1). (ECF 9th Cir. 11-17131, Dkt. 38)

C. The line between error and misconduct

FRCP 1 is the basis for *Code of Conduct for United States Judges* and *Judicial Misconduct Rules.* This case shows the overwhelming challenge to correct the non-jurisdictional drive-by rulings.

(a.) After the first appeal (11-17131), plaintiff Hsu positively identified the falsification scheme and filed a Rule 60(d)(3) motion to explain the complex regulatory scheme and the attack on the judicial system. (See Doc. 57, 57-1, et al., and 58); and filed another motion for the newly discovered shutdown of entire MAC Reviewed program (Doc. 70) during the pendency of appeal (Doc. 71). The shutdown is judicial admission, dispense with the need of proof.

However, the judge discarded FINRA as the SRO under 15 U.S.C. § 78o 3; treated the juridical notice of the regulatory scheme and the arbitration as "irrelevant"; and shifted the burden of proof on "*Horizon Agreement*" and "*FINRA Arbitrator Panel Ruling*" to Hsu. (See Doc. 69, p. 6, L: 22 p. 7, L: 14)

(d.) Hsu filed a misconduct complaint. (Doc. 89, 89-1, 89-2, 89-3) The complaint showed that

demurrer-to-evidence of the Seventh Amendment should have stopped the fraudulent defense. But the 9th Circuit chief judge applied an ancient precedent well before 28 U.S.C. § 352(b)(1)(A)(ii) for "cognizable misconduct"; and the Judicial Council "agreed".

(e.) The Rule 60(b)(4) motion challenged the void 28 U.S.C. § 1331 jurisdiction and the absence of jurisdiction during the pendency of appeal from Rule 60 motions based on the FRCP 62.1 - FRAP 12.1 pair. (Doc. 80, 89 and 93) The judge finally held a hearing and documented the falsification in the *minute order* and directed appellate review. (App. B-2) The *minute order* clearly indicated that district court does not have appellate jurisdiction to affirm, modify, vacate, set aside or reverse any judgment. (28 U.S.C. § 2106)

The amended judgment (App. B-1) is correctable. The first dismissal cited "*sword and shield*". (Doc. 35, p. 6, L: 7-22) The 2 Exhibits for the defense and 6 Exhibits (with arbitration agreement) for the complaint all belong to UBS. Hsu related to Chinese "*sword and shield*".[11] (Doc. 80, p. 4, L:18) The legendary Chinese judiciary and *Judgment of Solomon* converge to *Federal Rule of Evidence* §301 and the deleted demurrer-to-evidence (Rule 7(c)). The burden of proof for all Exhibits rests with UBS under the IAA. The defense failed the burden of producing evidence but went forward to void *Federal Question Jurisdiction.*

D. Appellate responses to Rule 23(c)(1)

The Circuit was confronted with Rule 23(C)(1) and 28 U.S.C. §1292 at the onset (11-17131) between

[11] See http://chinesegarden101.blogspot.com/2011/08/story-of-spears-and-shields.html

the falsified defense and the judge's eliminated evidence in the complaint. (Doc. 35)

Hsu appealed from the Rule 60(d)(3) motion. (14-15588) The Circuit dismissed the motion and cast away three FRAP 28(j) Letters vital to the class certification: (1) the Law Review on this precedent-setting case for the *No Action Letter*, (2) the Law Review on the exception to Rule 12(d) in all circuits, and (3) FINRA regulation that required the court to vacate the fraudulent arbitration under 9 U.S.C. § 2. (14-15588, Dkt. 20-1; 27-1; 30-1). See Fn. 3. But the reviewing procedure for demurrer-to-evidence made the falsified documents "invisible". The Circuit should have remanded for a jury trial. See *Baltimore & Carolina Line, Inc. v. Redman*, 295 US 654.

Hsu appealed again. (19-15756) Despite the explicit jurisdictional challenge, the Panel used nonexistent judicial power to **moot** *Declaratory Judgment Act*; then finally disclaimed all prior jurisdictions and closed all appeals. (App. A). But 28 U.S.C. § 2106 disallows the close of this bona fide Article III class action case after years of non-jurisdictional "paralysis" that blocked direct review by this Court. See *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21.

E. The Expediting Act and the Transfer Act

The Court should bring consistency to appellate jurisdiction for the century-old Expediting Act for fraud on the IAA and other "interstate commerce" laws. The contract and the defense impeded Money Laundering regulations.[12]

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[12] See Congressional Research for the applicable categories. https://fas.org/sgp/crs/misc/RL33315.pdf

(a.) Judicial Code §238(a) for the Transfer Act of 1922 was repealed in 1925 (*See* Fn. 7). The Expediting Act of 1903 was amended to 15 U.S.C. § 29 in 1974 (Pub. Law 93-528).[13] The 9th Circuit disclaimed its supervisory jurisdiction, thus §29(b) affirmed direct review on the interpretation of the *interstate commerce laws*. The laws in this case are dispersed in 15 U.S.C. §80b-1, 18 U.S.C. §§ 1961-68 and 18 U.S.C. § 1956.

The Court recognized the Expediting Act and the Transfer Act. See *Swift & Co. v. United States*, 276 U.S. 311, 323 (1928) The Court affirmed the jurisdiction on 15 U.S.C. § 29. See *Brown Shoe Co. v. U.S.*, 370 US 294, 305 & 355 (1962) The 3rd Circuit overlooked the exception in 28 U.S.C. 1292(a)(1).[14] The 1st Circuit disagreed, and declined jurisdiction based on the Expediting Act.[15] *Stare decisis* requires the transfer to this Court for direct review.

(b.) Separation of powers prohibits the denial of the docketing under S. Ct. Rule 18. Congress entrusted the *non-delegation doctrine* with the Court for applying the laws and regulations to the non-jurisdictional "drive-by" rulings. And the district court preserved the tampered regulatory document along with the fake FINRA arbitration agreement (detailed in **page 18)** for vacatur. (See App. B, p. 2-7) The fraudulent contract and the defense must be disposed of via government agency jurisdictions under 28 U.S.C. §2105.[16]

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[13] See https://www.govinfo.gov/content/pkg/STATUTE-88/pdf/STATUTE-88-Pg1706.pdf

[14] *U.S. v. Ingersoll-Rand Co., et al.*, 320 F.2d 509, 3rd Cir. (1963)

[15] *U.S. v. Cities Svc. Co.*, 410 F.2d 662, 1st Cir. (1969)

[16] *Coastal Steel v. Tilghman*, 709 F.2d 190, 196, 3d Cir. (1983)

INTERLOCUTORY REVIEW

A. Permanent injunction from the defense

The dual evidence tampering blocked the class certification and caused *res judicata* on all investors of MAC contract. This is permanent injunction. The Circuit finally accepted the jurisdictional challenge (Dkt. 13-1), and closed all appeals. (App. A) But the evidence for the class action remains untouched for the question of law. The case is ripe for direct review on all non-jurisdictional "drive-by" rulings and the formally documented *minute order*.

B. Fraud in the MAC Wrap-fee contract

The class action complaint contains 6 exhibits. (Doc. 17) Exhibit A and B are the contract and the disclosure brochure. Exhibit D and F are UBS's **internal** policies and procedures which require UBS Financial Advisor to **only** sell from MAC Reviewed Advisors List (Exhibit E) and **must** obtain a signed waiver for non-waivable fiduciary duty from Client (Exhibit C). ***Note**: Excerpts of Record in 9th Cir. 11-17131, Dkt. 8 for the Opening Brief provides easier references in the Exhibits.

(Client)		(Investment Manager)
§1. Selection of Investment Manager §8. Liability of UBS Financial Services Inc. §10. Arbitration		§3. Representations of the Advisor §4. Anti-money laundering and Reporting responsibilities §8. Entire agreement Re: Advisor expressly agrees that UBS Financial Services Inc. shall not be bound by any representation or agreement heretofore or hereafter...

The table and *Venn* diagram above summarizes the exculpatory hedge clauses in the contract that violated *SEC Heitman Capital No Action Letter*. The signed MAC contract is in Doc. 57-1, Exhibit A: 1-4. It is reformatted verbatim in Appendix C.

Client (Part-1) and Manager (Part-2) show the sponsoring relationship.[17] UBS does receive "*special compensation*" **not** "*incidental to*" its brokerage business, thus is regulated by 15 U.S.C. § 80b-2(a)(11)(C). (See App. C, p. 13, §3 and p. 25, §2)

(a.) Investors only signed the contract with the broker (*e.g.*, UBS) not the "sub-contracted" Manager (*e.g.*, Horizon). (App. C, p. 24) Part-1, §1 severed the prior advisory relation with UBS financial advisor. (See Doc. 57-2) and shifted the responsibility to UBS's Client for selecting a Manager from MAC Reviewed Advisors List. (See App. C, p. 10) The gray area of the intersection shows the **sole responsibility** of UBS's Client for the contract.

(b.) Part-2, §3(B) requires the Manager registered under the IAA to deliver a separate Disclosure Brochure (17 CFR 275.204-3) and obtain a direct authorization from UBS's Client for opening new account.

(c.) Part-2, §4 requires the UBS Client to comply with the regulations on anti-money laundering and embargoed commerce with the Manager. But the Manager is only sub-contracted for

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[17] ***Note**: "Client" means "investor" in the MAC wrap-fee contract. Please don't be confused with broker as the client of Investment Manager in *SEC Heitman Capital No Action Letter*.

the investment decision, **not** monetary transactions. UBS does. (App. C, p. 27)

(d.) Part-1, §8 (App. C, p. 20) shifted the liability of selection to Client, while Part-2, §8 (App. C, p. 29) disclaims the liability of selling the contract by UBS Financial Advisors. This leaves UBS Clients solely liable for the criminal statutes in Part-2, §4.

(e.) Part-1, §10 is the tailor-made arbitration prohibited by FINRA Rule 3110(f)(6). (App. C, p. 20) This is a "divide and conquer" scheme to compel investors into arbitration and defeat Rule 23(c)(1) class certification in court. See page 20, §E

C. Where are the regulatory violations

SEC based on the No Action Letter submitted by *Heitman Capital Management LLC* (*Heitman*) to establish the policy that SEC will not take enforcement actions on the circumstance raised in the Letter. *Heitman* is an Investment Manager sponsored by a broker, who defines the sponsor-broker as a "Client" (financial intermediary) of the Manager. (See p. 2, ¶ VI of the Letter in Fn: 9) "***Client Indemnification***" is at issue for violating this No action Letter. 15 U.S.C. § 80b-15(b) regulates all agreements made beyond the main contract before and after - including the arbitration agreement. The fiduciary waiver letter (Exhibit C) waived the non-waivable fiduciary duty to shift the following compliance duties to UBS clients:

(a.) Part-1, §1 states that the selection is Client's responsibility and the use of the List is optional. (App. C, p. 10) **But** 17 CFR 275.206(4)-7 requires broker-sponsor to implement and comply with *Compliance Procedure and Practices* under 15 U.S.C. § 80b-2(a)(11)(C). They are Exhibit D and F in

the class action complaint. (Doc. 17) They require UBS financial advisors **must** use the List and **must** obtain signed fiduciary waiver from UBS clients. However, Part-1, §1 states the selection is UBS Client's responsibility - including ERISA. (App. C, p. 16) The terms violated § 80b-2(a)(11)(C).

(b.) **Both** broker (*e.g.*, UBS) **and** Manager (*e.g.*, Horizon) must separately provide their Form ADV II (17 CFR 279.1, a/k/a, "Disclosure Brochure") to the investor (*e.g.*, UBS Client) and obtain the signature to confirm delivery before signing the contract. This delivery scheme is regulated by 17 CFR 275.204-3 and subsection 204-3(f). Subsection 204-3(d) and (e) define a wrap-fee program's brochure and delivery. This is the signatory purpose of all wrap-fee contracts. (See Doc. 57, p. 5)

The UBS policy is in Doc. 17, Exhibit D, bates # 0002429-432; or see 9th Cir. 11-17131, Dkt. 8, p. 78-81. UBS manager must approve the signed contract with the new account (App. C, p. 24) together with the signed fiduciary authorization for the sponsored Manager. (Doc. 57-1, Exhibit A: 9)

(c.) Manager is only "sub-contracted" for investment-reinvestment decisions **not** "incidental-to" purchases-sales of securities. §3(A) violated 15 U.S.C. § 80b-2(a)(11)(C) together with §3(B). And Part-1, §1 (App. C, p. 10) **severed** UBS's liability between Part-1, §8 and Part-2, §8.

(d.) UBS created a conduit to circumvent criminal laws in Part-2, §4 (App. C, p. 27) to sell MAC contract worldwide and made Client solely responsible. The shaded blank intersection area in the *Venn* diagram depicts the unlawful exculpatory hedging practice. This contract violated *SEC*

Heitman Capital No Action Letter **and** bypassed U.S. criminal regulations under the *Commerce Clause.*

In summary, the eliminated regulatory documents in the complaint sufficed Rule 23(c)(1). The contrasting pages in App. B, **p. 7** were copied from Doc. 57-1, Exhibit A: 8 - 12 and Doc. 23-1, Exhibit A, p. 4 7. Without the disproving pages from FINRA arbitration discovery, there is little chance to prove the falsification. (See UBS bates # on the pages)

D. Vulnerability in Supreme Court precedents

The judicial process is not in harmony with the regulatory authority of 21st Century. See Doc. 89-1, Pp. 4-6, ¶ III (a)-(d).

(1) FINRA arbitration is mandatory for every financial account or agreement. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 US 477, 484 (1989) overruled *Wilko v. Swan*, 346 US 427, 432 (1953). The Court decided that the non-waivable right in arbitration agreements do not contradict that in 15 U.S.C. § 77n (Securities Act) and 15 U.S.C. § 78cc (Exchange Act). Nevertheless, 15 U.S.C. § 78c(a)(10) in Exchange Act[18] includes "investment contracts" in connection with 15 U.S.C. § 80b-2(a)(11). **No precedent seems to exist for the non-waivable fiduciary right under 15 U.S.C. § 80b-15 of the IAA,** which Congress enacted to protect investors. The right under § 215(a) covers the investment contract and the arbitration agreement herein; and the right under § 215(b) covers agreements made outside of the main contract - before and after. "*Client Acknowledgment Letter for use with a MAC Reviewed Advisor*" falls

[18] See https://www.gpo.gov/fdsys/granule/USCODE-2010-title15/USCODE-2010-title15-chap2B-sec78c

under this sub-section. (Doc. 17, Exhibit C) Moreover, under 28 U.S.C. § 2072(b), violating non-waivable rights would void the entire contract over the life of the contract, during which the investment adviser (*i.e.*, UBS) continuously receives compensation **not** "incidental to" its business. (App. C, p. 13; Part-1, §3) But the "continuing violations" doctrine is repeatedly affirmed in securities fraud cases. See e.g., *SEC v. Huff*, 758 F. Supp. 2d 1288, 1340-41 (S.D. Fla. 2010), *SEC v. Kelly*, 663 F. Supp. 2d 276, 287-88 (S.D.N.Y. 2009), *SEC v. Pentagon Capital Mgmt. PLC*, 612 F. Supp. 2d 241, 267 (S.D.N.Y. 2009).

(2) Federal Arbitration Act and Maloney Act are not in harmony. They no longer reduce the courts' dockets. Maloney Act of 1938 was codified into 15 U.S.C. § 78c(a)(39) for "statutory disqualification"[19] in violating any securities laws. It gave the Self Regulatory Organization ("SRO") the authority to regulate its member firms. FINRA is the only SRO in the 21st Century who holds Arbitration and Enforcement under the same roof, but in separate divisions: FINRA Arbitration and FINRA Enforcement.[20] Parties to FINRA arbitration must sign the Submission Agreement ("SA"). The SA imposes the burden on the parties to abide by FINRA By-laws and all FINRA rules when in arbitration thus liable for lawyer's representation. (See Doc. 57-3, Exhibit C: 1-5) The FAA is even older. Modern-day arbitrators need not be lawyers. FINRA cannot require arbitrators to enforce

[19] See https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78c.pdf

[20] See FINRA organization http://www.finra.org/industry/enforcement

securities laws, nor can investors oblige arbitrators to do so. Worse, FINRA Enforcement does not interfere with an on-going arbitration proceeding.

(3) Statutory disqualification "should" enable FINRA to regulate financial firms for the violations of the securities laws, and reduce the courts' dockets. **This is no longer true with the plausibility standard under *Ashcroft v. Iqbal.*** The standard actually adds insult to injury, when an investor takes a case to court on the save clause of 9 U.S.C. § 2 under the FAA. The statute of limitation becomes the insurmountable hurdle, regardless whatever had happened in arbitration. This is because the defense only needs to show *prima facie* of the arbitrator's ruling which may not follow the laws, and the "individualized" defense can claim time-bar from the inception of each contract agreement. It disabled *SEC v. Capital Gains Research Bureau*, 375 U.S. 186-195 in a lawsuit against the investment adviser.

E. MAC contract is crafted to defeat Rule 23(f)

The extortionary defense is integral to the contract Part-2, §3 (advisor) and Part-1, §10 (arbitration agreement) to defeat the U.S. judiciary system including FINRA.

(1) "*Horizon Agreement*" is un-provable.

The regulatory bound (15 U.S.C. § 80b-2(a)(11)) between Part-2, §3(A) and §3(B) is concealed. The FAX transmission from UBS to Horizon (by way of Horizon's solicitor HRC) of the **signed** account opening documents (*i.e.*, MAC contract, the private account # and confidential invested amount, plus the authorization for the Adviser to manage and share wrap fees) was for the compliance with § 80b-2(a)(11).

UBS must do so for **every** client of MAC contract. The falsified defense stripped away the regulatory context and use "*Horizon Agreement*" as the evidence for "separate agreement" based on §3(A). (Compare Doc. 23, Exhibit-A and App. B-2) This is confession to the regulation violation of Part-2, §3. The fiduciary relation recognized by Congress under *SEC v. Capital Gain*, 375 U.S. 180, 194 (1963) does not impose the burden of proof on lay-client to "disprove" the terms. But there was not a single citing of the controlling *Capital Gains* in the last 8 years.

(2) The tailor-made arbitration agreement is a personalized "divide and conquer" scheme.

FINRA Rule 3110(f) prohibits class action. The tailor-made arbitration agreement in Part-1, §10 is faked hedging and violated FINRA Rule 3110(f). (See Doc. 57, p. 14, L: 5 and App. C, p. 20) In short, the fake arbitration agreement hedged for ***"waiver of any rights"***. (App. C, p. 23) In arbitration, UBS signed FINRA Submission Agreement (a/k/a, SA) for itself and lawyers to abide by FINRA By-laws and Rules. (See Doc. 57-3, Exhibit C: 3-5) Then conspired with the lawyer by providing the accounts of Hsu's family members which are irrelevant and confidential. (See Doc. 57-3, Exhibit C: 12-22) The purpose is to evade FINRA Rule 2111 for suitability in selling to seniors.

The chair-arbitrator violated *SEC Regulation S-P* upon demand by UBS lawyer. (Doc. 57-3, Exhibit C: 41) Hsu filed a Motion for an Amended Pleading based on: (1) the violation of the FINRA Rule 3110(f) on the tailor-made arbitration agreement in the MAC Wrap-Fee contract, and (2) the violation of *SEC Heitman Capital No Action Letter* using unlawful exculpatory hedge clauses in the contract. (Doc. 57-3,

Exhibit C: 3-5, 12-22, 23-27) Hsu requested FINRA Enforcement Group to intervene. But the repeated requests were denied. (*Id.*, Exhibit C: 36-38)

VP of Arbitration apologized and provided audio recording of the hearing for court action. (Doc. 88-1) The defense claim time-bar. (See Doc. 22-23) And the judge dismissed the case based on one- and three- year time-bar. (See Doc. 35, Pp. 7-8). The compliance documents from FINRA discovery could not overcome the Rule 23(c)(1) decision.

Equitable tolling of fraud applies to all past and current investors who entered the contract with the arbitration clause herein. RICO Act and Sarbanes-Oxley Act apply.

F. The cruelty in stealing own clients' private account information

FINRA Rule 2510(b) underlies all investment products of financial firms. The "divide and conquer" scheme can use the Rule to defeat complaints in court. Without going through arbitration, lead-plaintiff Hsu could not have obtained the evidence to "defend" the chilling attack on the vulnerable group which Hsu is part of.

(a.) FINRA Rule 2510(b) is for the fabric of our society. When people get older (*e.g.*, Hsu) or become incapacitated; this rule allows a family member or an executor for the discretionary authority to assist. (See explanation in Doc. 57, p. 5 and Doc. 89-1, p. 6, ¶ d) The assets in the account may or may not (*e.g.*, cash) be regulated by the securities laws. On the other hand, this kind of wrap-fee contracts requires dedicated accounts to hold the transactions of the 3rd-party manager to share advisory fees, as it is

unlawful to charge fees on unrelated assets held in the account. (See Part-2, §2 in App. C, p. 25)

(b.) SEC's support for Gramm-Leach-Bliley Act (GLB Act) is SEC Regulation S-P (17 CFR § 248.30(a)). 17 CFR 275.206(4)-7 of the IAA requires "Policies and Procedures" and "Chief Compliance Officer". (See Doc. 57, p. 10, L: 1 and Doc. 89, p. 4, ¶ D) 17 CFR § 248.30(a) requires:

> "Every broker, dealer and every investment adviser registered with the SEC must adopt written policies and procedures that address administrative, technical, and physical safeguards for the protection of customer records and information."

Financial firms cannot provide Nonpublic Personal Information to Non-Affiliated Third Party (*i.e.*, lawyers) 15 U.S.C. §6823(b) of the Act provides:

> Whoever violates, or attempts to violate, section 6821 of this title while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period shall be fined twice the amount provided in subsection (b)(3) or (c)(3) (as the case may be) of section 3571 of title 18, imprisoned for not more than 10 years, or both.

(c.) For the second time, UBS conspired with the lawyers by providing the private account opening documents to the Non-Affiliated lawyers, who then falsified them to alter the court decision.

Each Managed Accounts Consulting (MAC) contract starts at $100,000 minimum. (See Doc. 17, Exhibit B, or Doc. 70-2, p. 13, bates #: UBS 0002415 of the Disclosure Brochure) Hsu alone lost several times over the minimum. This is the actual injury

regardless for class action or not. The scope is enormous. UBS sponsors 500+ MAC Reviewed managers. (See Doc 70-2, FINRA: 5, bates # UBS 0002415) This amounts to $Bs from which UBS collected hundreds of $Ms in wrap-fee annually. This MAC contract was started around 2001 (See Doc. 57-1, Exhibit A: 21-23, Bates #. UBS-I/Oe 000771718, 19, 21), and sold by over 7,300 Financial Advisors (according to UBS 2004 report).

THE GATEKEEPING DUTY OF DISTRICT COURT

All broker sponsored wrap-fee contracts must comply with 15 U.S.C. § 80b-2(a)(11)(C) in opening new accounts. This UBS contract and the defense are crafted to obligate the judge to entertain the misrepresented document bearing Hsu's signature, and make a decision for Rule 23(c)(1) to prevent discovery abuse. Now, the district court documented the *minute order* on evidence tampering and directed appellate review. (App. B, p. 6) All barriers are removed for direct interlocutory review by this Court.

A. The harm on the gatekeeping duty

California still uses demurrer-to-evidence. Its appellate review explains the "procedural blindness" as to why 9th Circuit never "saw" the faked Exhibits for the defense. (See ECF Doc. 89-1, 89-2) The defense failed the burden of production for *Federal Rules of Evidence* § 301 under the IAA, but went forward to void 28 U.S.C. § 1331, and deprived appellate §1291 and §1292 jurisdictions.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) would not insist on the gatekeeping duty of district courts because the low quality of evidence in the pleading stage. But Rule 23(c)(1) requires an

early decision whether a case should proceed as a class action. The conflict in timeline before discovery led to the dire consequence. – The *doctrine of Constitutional avoidance* was compromised by the dual evidence tampering.[21] (See Doc. 89, p. 5 and the 3'rd reference, p. 9 & p. 20) **The shutdown of entire "MAC Reviewed" program (Doc. 70, et al.) is a judicial admission to which equitable tolling of fraud applies.** The remaining "MAC Researched" program provides the same conduit for money laundering and embargoed commerce, etc.

B. The serial attacks on the judiciary

The grant of certiorari is very much the exception. The allure precipitated systemic attacks on the entire judicial system – by using falsified evidence in FRCP 12(b)(6) defenses at district courts. "Evidence of absence" is not provable, as it is impossible to prove a negative - unless a law prohibits. Neither a judge nor a plaintiff can know the falsification with the law concealed. A falsified defense can practically secure a "final decision", but on the wrong side of the law - along with a judge.

(a.) Summary judgment will not lie if the dispute about a material fact is "genuine." See *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 248 and Fn. 4 - 6 on the burden of proof. A trial judge must apply the evidentiary standard of proof governed by a substantive law. **Here**, 15 U.S.C. § 80b-2(a)(11)(C) confers the jurisdiction and regulatory compliance on **all** broker-sponsored contracts. But it is concealed in this contract and the fake arbitration agreement. The FRCP 60(d)(3) motion raised this "*truth needs no disguise*". The judge is barred by Article III of the

[21] Based on *Ashwander v. TVA*, 297 U.S. 288, 346-48

Constitution to discard this regulation and shift the burden of statutory compliance to investors. (See Doc. 57, p. 4 vs. 69) Another challenge on the absence of jurisdiction during the pendency of appeal (Doc. 93) obligated the judge to finally conduct a hearing. UBS admitted to falsifying the regulatory document and the judge accepted his error. (App. B, p. 5) It firmly rejects the preconceived **"fix"** for **no** FRCP 12(d) conversion to summary judgment.[22] (See Doc. 35, p. 9, L: 13) All rulings are non-jurisdictional and **void**. (Doc. 35, 69, 72, 87, 94) Even "bias" or "vexatious" needs jurisdiction. (App. B, p. 2, c - e) In *Henderson v. Shinseki*, 131 S. Ct. 1197, the Court corrected an erred jurisdiction, citing *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. __, 130 S. Ct. 1237 (2010) and *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) et al. There was no precedent to **restate** and **return** the jurisdiction to the Executive Branch.

(b.) Two lawyers (Shively and Powell) at Reed Smith LLP falsified the account opening document supplied by UBS (Doc. 22-23) and colluded in the 1'st appeal. (11-17131, Dkt. 11) Then Cardozo misled the Circuit into §1291 jurisdiction (14-15588, Dkt. 10-1, p. 2) and contradicted the district court that the finality for §1291 was **not** met. See "*Hsu was offered an opportunity to amend his complaint, but instead sought immediate appellate review.*" (Doc. 69, p. 7, L: 26-28) Again, he co-filed an illicit non-jurisdictional summary affirmance motion (19-15756, Dkt. 5) to preempt direct review under 28 U.S.C. §1253. UBS is estopped to contradict own confession to the falsified defense. (App. B, p. 5) The Circuit initially granted the motion; then abandoned its shoddy supervisory

[22] For procedural guard: How Judges Judge, by Timothy Capurso; https://scholarworks.law.ubalt.edu/lf/vol29/iss1/2

duty upon jurisdictional challenge. (9th Cir. Dkt. 13, Dist. Ct. Doc. 93 and 89-1, -2, -3) That nullified the jurisdictional predicate for §1254.

(c.) California Supreme Court regulates fraud by licensed lawyers. CA Civ. Code § 1714.10(c) does not protect attorney-client privilege for conspiring with client. CA Civ. Code §3294 provides punitive damages under oppression, fraud, or malice. And CA Securities Act of 1968 protects investors in the State. (*i.e.*, CA Corp. Code §§ 25009.1, 25400, 28880, 28900) They apply to the defense. (28 U.S.C. § 1652)

UBS and the lawyers colluded to violate RICO Act (18 U.S.C. §§ 1961- 1968), GLB Act (15 U.S.C. §§ 6821 6827), IAA (15 U.S.C. § 80b-11 and § 80b-17), and 18U.S.C. § 1956 (Money laundering). Sarbanes-Oxley Act is to combat aiding-and-abetting fraud in the securities industry. Reed Smith LLP aided and abetted with the fraudulent defense. 28 U.S.C. § 1292(b) reaches grand jury proceedings, as the case is "hybrid", civil and criminal. UBS Financial Services Inc. has own *Chief Compliance Officer* for 17 CFR 275.206(4)-7 to face Hon. Justices.

CONCLUSION

The district judge lost the dueling in the dual evidence tampering between UBS and the judge. But it denied the appellate jurisdiction for not final - 28 U.S.C. §1291, and not interlocutory - §1292(a)(1); and obliterated government's 15 U.S.C. §29 jurisdiction for enforcing the law and turned away the inquest by Senator and FBI who honor the Separation of Powers. Only Supreme Court has the authority under §1253 to review the "*interlocutory or permanent injunction*" caused by the dual evidence tampering, and apply 28 U.S.C. §2106 to vacate the non-jurisdictional rulings,

and use 28 U.S.C. §2105 abatement to restore the jurisdiction of the Executive Branch and protect the liberties. This is fundamental to the Separation of Powers. See *Federalist Papers: No. 78*. A reasoned decision based on §1253 should make public the attack on the entire judicial system including FINRA arbitration and this Court.

"Notice of direct appeal" was filed in the court of first instance (district court) following S. Ct. Rule 18 (App. D, p. 30-32). But a staff signed the letters on behalf of the chief of Clerk Office which denied the docketing (App. E, p. 33) and rigged 40-copies of booklets for direct appeal into "notice of appeal". (App. E, p. 34) And Reed Smith LLP refused to sign the certified USPS delivery (App. E, p. 35). No docketing, no case for Hon. Justices, and no record for oversight. Clerk staffs are no match for attorneys who prey on judges. §1254 cannot rest on void jurisdiction. Two prior petitions (See Question-5) for this case were denied, while the courts below adamantly rejected their independent obligation to determine whether jurisdiction exists. See *Arbaugh*, 546 U.S. at 514. The Court should set boundary that honors the *non-delegation doctrine* and institutes oversight for being preyed upon.

28 U.S.C. §1631 allows transferring to another district court. *Chambers v. Nasco*, 501 US 32 (1991) provides the inherent power against UBS and Reed Smith LLP for preying on the entire judicial system and the investment public.

Dated: February 4, 2020

Respectfully submitted,

/S/ Darru K. Hsu
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