

9th Circuit Ruling (ECF Dkt. 12)

FILED AUG 1 2019 MOLLY C.  
DWYER, CLERK U.S. COURT  
OF APPEALS Case: 19-15756

Before: SCHROEDER, CANBY, and CHRISTEN,  
Circuit Judges.

A review of the record and the opening brief indicates that the questions raised in this appeal are so insubstantial as not to require further argument. See *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard). Accordingly, we grant appellee's motion for summary affirmance (Docket Entry No. 5).

Appellant's motions for appointment of counsel and for a declaratory judgment and injunctive relief (Docket Entry Nos. 2, 7) are denied as moot.

Appellee's motion for sanctions (Docket Entry No. 6) is denied.

**AFFIRMED.**

9th Circuit Ruling (ECF Dkt. 14) 10/10/2019

Appellant's motion for reconsideration (Docket Entry No. 13) is denied. See 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

**District Court Rulings:**

(1.) **District court amended ruling** (Complete in verbatim. No. C 11-02076 WHA; ECF Doc. 94)

ORDER RE MOTIONS FOR RECONSIDERATION, SUMMARY JUDGMENT, TRANSFER OF JURISDICTION, SANCTIONS, AND TO DECLARE PLAINTIFF A VEXATIOUS LITIGANT

**INTRODUCTION**

This order arises from a putative class action dismissed in August 2011. *Pro se* plaintiff moves for reconsideration of a prior order and defendant moves to declare plaintiff a vexatious litigant. For the reasons explained below, all motions are DENIED.

**STATEMENT**

The background of this action is set forth in prior orders (Dkt. Nos. 35, 69). In brief, plaintiff Daru K. "Ken" Hsu entered into a wrap agreement with defendant UBS Financial Services, Inc. for investment and advisory services. Prior to this federal action, Hsu, proceeding with counsel, filed a claim with the Financial Industry Regulatory Authority. After the arbitration panel dismissed all claims over which it had jurisdiction, Hsu commenced this action under the Investment Advisers Act, alleging that defendant provided services "in its capacity as an investment advisor," but that a "hedge clause" in his agreement with defendant impermissibly required Hsu to waive certain rights under the Act (see Dkt. No. 17).

An August 2011 order dismissed Hsu's first amended complaint for failure to state a claim. Although the dismissal order permitted Hsu an opportunity to propose a second amended complaint, Hsu did not amend and judgment was entered in favor of

defendant. Shortly thereafter, Hsu appealed. During the appeal process, Hsu terminated counsel and has since proceeded *pro se*. In February 2013, our court of appeals affirmed the dismissal for failure to state a claim, and later denied an en banc hearing. The Supreme Court denied a petition for a writ of certiorari in October 2013 (Dkt. Nos. 35, 41, 49 50, 54).

In 2014, again proceeding *pro se*, Hsu moved to set aside the judgment pursuant to FRCP 60(b)(6) and FRCP 60(d)(3). The essence of Hsu's motion was that defendant had committed fraud on the court by falsifying two documents that it proffered for judicial notice on June 3, 2011: (1) a signed agreement between Hsu and Horizon, independent of the wrap contract, and (2) the FINRA arbitration panel ruling. A March 2014 order denied Hsu's motion, finding that there was no evidence that the August 2011 dismissal order was undermined by the June 3 documents, nor was there evidence that the dismissal order restricted Hsu's access to proper judicial review. Specifically with respect to plaintiff's claim of falsification, the 2014 order found that plaintiff had failed to clearly and convincingly demonstrate fraud on the court under FRCP 60(d)(3) because, among other things, the 2011 dismissal order did not rely on either document in dismissing Hsu's complaint. Our court of appeals affirmed the denial of the motion, and the Supreme Court denied a petition for writ of certiorari (Dkt. Nos. 57, 69, 74 79).

In February 2018, Hsu again moved to set aside the judgment, this time pursuant to FRCP 60(b)(4), but primarily based on the same argument that defendant falsified documents submitted in

connection with its motion to dismiss and that the 2011 dismissal order had improperly relied on these materials without converting the motion to dismiss into a motion for summary judgment. Defendant, in turn, moved to have Hsu declared a vexatious litigant. An April 2018 order denied both motions, finding that Hsu had failed to establish that relief from judgment was warranted and that the record failed to demonstrate that Hsu was vexatious litigant (Dkt. Nos. 80 81, 87).

Hsu now brings a motion for reconsideration of the April 2018 order, rearguing the same arguments he raised in his motion to set aside the judgment pursuant to FRCP 60(b)(4). He also moves to “transfer jurisdiction” and to disqualify the undersigned judge. Defendant again moves to declare Hsu a vexatious litigant (Dkt. Nos. 89 92). This order follows full briefing and oral argument.

## ANALYSIS

### 1. MOTION FOR RECONSIDERATION.

This order treats Hsu’s motion for “reconsideration and summary judgment” as a motion for reconsideration. Hsu’s motion merely repeats arguments that have already been rejected in prior orders, namely that (1) the Court lacked subject-matter jurisdiction over the complaint, (2) defendant falsified two documents submitted in connection with its motion to dismiss, and (3) the 2011 dismissal order relied on these falsified materials and improperly failed to convert defendant’s FRCP 12(b)(6) motion into a motion for summary judgment. Because Hsu merely repeats arguments previously rejected and fails to show “an intervening change of controlling law, the availability of new evidence, or

the need to correct a clear error or prevent manifest injustice,” *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 369 n.5 (9th Cir. 1989), the motion for reconsideration is **DENIED**.

## 2. MOTION TO DISQUALIFY.

Under Section 455 of Title 28 of the United States Code, a judge must disqualify himself “in any proceeding in which his impartiality might reasonably be questioned,” or, among other circumstances, where he has a “personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.” The applicable standard is whether “a reasonable person with knowledge of all the facts would conclude that the judge’s impartiality might reasonably be questioned.” *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993) (citation omitted). Hsu fails to provide any basis on which a reasonable person would conclude that the undersigned’s impartiality might reasonably be questioned or otherwise indicate any bias or prejudice. The motion to disqualify is **DENIED**.

## 3. MOTION TO TRANSFER.

Hsu next seeks to “transfer jurisdiction,” although it is unclear to which court he would like this action to be transferred. Because Hsu fails to provide an appropriate basis to transfer this closed action, the motion is **DENIED**.

## 4. MOTION TO DECLARE PLAINTIFF A VEXATIOUS LITIGANT.

This is defendant’s second request to declare Hsu a vexatious litigant. The April 2018 order denied defendant’s first request on the ground that the record failed to demonstrate that Hsu’s motions were

so numerous and abusive so as to require a pre-filing order. The April 2018 warned Hsu, however, “that he ha[d] no right to file frivolous and harassing motions, and that doing so violates FRCP 11.” The order also warned Hsu that if he “continue[d] with unmeritorious litigation, he [would] soon be declared a vexatious litigant.”

Since that time, nearly a year has passed and the only motions filed by Hsu are those addressed herein. Although Hsu’s latest filing is certainly duplicative and repetitive, this order cannot conclude that Hsu’s conduct has been sufficiently abusive to warrant a pre-filing order. This, however, will be Hsu’s final warning. Should he file any new filings that are duplicative of those that have already been definitively resolved in this case, he will be declared a vexatious litigant and will be required to submit for pre-filing review any pro se papers filed in this district against or having to do with defendant or any of its current or former employees.<sup>1</sup>

### CONCLUSION

Based on the foregoing, Hsu’s motion for reconsideration, to transfer, and to disqualify, as well as his request for sanctions against defense counsel, are **DENIED**. Defendant’s motion to declare Hsu a vexatious litigant is also **DENIED**.

IT IS SO ORDERED.

Dated: March 21, 2019.

WILLIAM ALAUP  
UNITED STATES DISTRICT JUDGE

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<sup>1</sup> In opposing defendant’s motion to declare him a vexatious litigant, Hsu moves for sanctions against defense counsel. The request for sanctions is unmeritorious and is **DENIED**.

(2.) **Transcript of Proceedings** (ECF Doc. 100)

Thursday - March 21, 2019

8:06 a.m.

P R O C E E D I N G S

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THE CLERK: Calling Civil Action 11-2076, Hsu versus UBS Financial Services, Inc.

Counsel and plaintiff, please step forward and state your appearances for the record.

MR. McGUIRK: Good morning, Your Honor.

THE COURT: Good morning.

MR. HSU: Good morning, Your Honor.

THE COURT: Please make your appearances.

MR. McGUIRK: Justin McGuirk. I'm with the law firm Reed Smith representing defendant UBS Financial Services, Incorporated.

THE COURT: Thank you. And you're Mr. Hsu?

MR. HSU: Yes.

THE COURT: All right.

MR. HSU: Nice to see you again.

THE COURT: Good to see you. Please go ahead. I've read your materials, but you may summarize your argument, Mr. Hsu.

MR. HSU: The key of this is about using the fake document, legal document for the defense.

THE COURT: I know you say that and I know I've dealt with that issue before, but do you have the forged document right there?

MR. HSU: Yes.

THE COURT: All right. Please hand that up. Show counsel first. (Document was shown to the counsel.)

THE COURT: And then let me see the forged document.

MR. HSU: I didn't have it last time. This is the -- in Your Honor's ruling was the --

THE COURT: All right. Look. This is getting too complicated. Just hand it to me. The record won't be clear. (Whereupon document was tendered to the Court.)

THE COURT: What has been handed to me --

MR. HSU: The top is what is in the Court record. And the clearly printed copy is from the copy which I signed, my wife and I signed, because there are two accounts.

THE COURT: What was forged here?

MR. HSU: What's forged is the purpose of this document. If you look at the fax transmittal toward the end of the page, okay, that is from UBS to HIC, which I highlighted there and that is for the account opening authorization. Because that is, in fact, required by FINRA for discretionary accounts.

It's required, for example, for some elderly who needs to have a third party who care for the account with authorizations, and FINRA requires that direct authorization. That was the signature for that purpose.

THE COURT: Wait. First of all, a large part of this is impossible to read because it's such a poor copy.

MR. HSU: The copy, the clear legible copy is the actual copy.



THE COURT: I want you to tell me in this document which is the forged signature? That's what you have been saying.

MR. HSU: It's the forged purpose.

THE COURT: Forged purpose?

MR. HSU: Purpose, yes. For the submission for the Motion to Dismiss.

THE COURT: So I -- I guess I misunderstood.

MR. HSU: Okay.

THE COURT: I thought you were trying to say that there had been falsified documents in the case.

MR. HSU: Falsified documents for this purpose, intended purpose.

THE COURT: Mr. Hsu, you see here where it has your signature? I guess it's your signature. Is that you?

MR. HSU: Yes.

THE COURT: Are you saying that's forged?

MR. HSU: No, no. The signature is correct. The purpose is for the FINRA authorization based upon that rule, which is for the -- this -- the authorization to open the discretionary account.

THE COURT: All right. Thank you. I'll let you say a few more things and then I've got other cases out there. What else would you like to say?

MR. HSU: After, Your Honor, this Court identified the federal question of jurisdiction, point of that question, I started to do the research, whether that document is falsified for its purpose or not for the federal question jurisdiction as a defense.

Investment Advisor Act does not -- does not allow that as a defense. Just simple as that.

THE COURT: All right. What would you like to say?

MR. McGUIRK: I don't have much to add, other than what was in the moving papers.

THE COURT: All right. Then the Motion for Reconsideration is denied. Motion to Transfer Jurisdiction is denied.

The Motion to Declare Plaintiff a Vexatious Litigant is denied. However, you have had so many tries at this, Mr. Hsu, that I probably should grant the motion on vexatious litigant, but I'm not yet.

Your next step, if you want to pursue any of this, is to go to the Court of Appeals. I'm going to ask the Clerk to take these documents that you've handed me and these will be marked as Plaintiff's Exhibit No. 1 for the purposes of the record.

Okay. The hearing is at an end. I'll get out a written order, Mr. Hsu, probably tomorrow, that will explain in more detail why your motions are denied.

MR. HSU: So Your Honor will explain that?

THE COURT: I will. I have a draft right here, but it's not yet final.

MR. HSU: Okay.

THE COURT: I will get it out and you will have the benefit of that order.

MR. HSU: Thank you.

THE COURT: Thank you. Have a good day.

MR. McGUIRK: Thank you, Your Honor.

**(Proceedings adjourned.)**

(3.) Exhibit-1 for the minute order (ECF Doc. 96)

United States District Court  
Northern District of California

## Document Locator

Case Number: 11-2676 WMA

Date Filed: 3/26/2019

**Document:**

- ☐ Reporter's Transcript: \_\_\_\_\_
- ☐ Trial Exhibits: \_\_\_\_\_
- ☐ Lodged Documents: \_\_\_\_\_
- ☐ Sealed Documents: \_\_\_\_\_
- ☐ Declaration(s): \_\_\_\_\_

☒ Other: Plaintiff Exhibit #1

**Location:**

- ☐ Expando File (Next to Case File)
- ☐ Overflow Shelf: \_\_\_\_\_
- ☐ Vault
- ☐ Other: Shelf 91

Document Number: \_\_\_\_\_

ORDER DENYING PLAINTIFF'S MOTION FOR  
RELIEF FROM JUDGMENT AND DENYING  
DEFENDANT'S MOTION TO DECLARE  
PLAINTIFF A VEXATIOUS LITIGANT

INTRODUCTION

This order arises from a putative class action dismissed in August 2011. *Pro se* plaintiff moves to set aside the judgment in favor of defendant on the ground that the judgment is void. For the foregoing reasons, plaintiff's motion is DENIED. Defendant's motion to declare plaintiff a vexatious litigant is also DENIED.

STATEMENT

The background of this action is set forth in prior orders (Dkt. Nos. 35, 69). In brief, in 2007 plaintiff Daru K. "Ken" Hsu entered into a wrap agreement with defendant UBS Financial Services, Inc. for investment and advisory services. Hsu then chose Horizon Asset Management as its investment manager from a list that UBS had compiled.

Prior to this federal action, Hsu, proceeding with counsel, filed a claim with the Financial Industry Regulatory Authority. After the arbitration panel dismissed all claims over which it had jurisdiction, Hsu commenced this action against defendant under the Investment Advisers Act. Hsu's complaint alleged that defendant provided services "in its capacity as an investment advisor," but that a "hedge clause" in his agreement with defendant impermissibly required Hsu to waive certain rights under the Act (see Dkt. No. 17).

An August 2011 order dismissed Hsu's first amended complaint for failure to state a claim. Although the

dismissal order permitted Hsu an opportunity to propose a second amended complaint, Hsu did not amend and judgment was entered in favor of defendant (Dkt. No. 35).

Shortly thereafter, Hsu appealed. During the appeal process, Hsu terminated counsel and has since proceeded *pro se*. In February 2013, our court of appeals affirmed the dismissal for failure to state a claim, and later denied an en banc hearing. The Supreme Court denied a petition for a writ of certiorari in October 2013 (Dkt. Nos. 41, 49–50, 54).

In 2014, again proceeding *pro se*, Hsu moved to set aside the judgment pursuant to FRCP 60(b)(6) and FRCP 60(d)(3). The essence of Hsu's motion was that defendant had committed fraud on the court by falsifying two documents that it proffered for judicial notice on June 3, 2011: (1) a signed agreement between Hsu and Horizon, independent of the wrap contract, and (2) the FINRA arbitration panel ruling. A March 2014 order denied Hsu's motion, finding that there was no evidence that the August 2011 dismissal order was undermined by the June 3 documents, nor was there evidence that the dismissal order restricted Hsu's access to proper judicial review. Our court of appeals affirmed the denial of the motion, and the Supreme Court denied a petition for writ of certiorari (Dkt. Nos. 57, 69, 74–79).

Through the instant motion, Hsu again moves to set aside the judgment, this time pursuant to FRCP 60(b)(4). Defendant, in turn, moves to have Hsu declared a vexatious litigant (Dkt. Nos. 80–81). This order follows full briefing and oral argument.

#### ANALYSIS

1.      MOTION TO SET ASIDE JUDGMENT.

FRCP 60(b)(4) allows federal COURTS to vacate judgments which are “void.” A final judgment is “void” for purposes of FRCP 60(b)(4) “only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.” *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010).<sup>2</sup>

Through the instant motion, Hsu maintains that his complaint should not have been dismissed and attacks the March 2014 order denying his motion to set aside the judgment pursuant to FRCP 60(b)(6) and 60(d)(3). Although difficult to understand, Hsu sets forth three primary arguments as to why the judgment is void.

*First*, Hsu argues that dismissing this action violated his Seventh Amendment and due process rights. As in his prior motion to set aside the judgment, Hsu alleges that defendant falsified two documents submitted in connection with its motion to dismiss — the Horizon Agreement and the FINRA arbitration panel ruling — and argues that the 2011 dismissal order improperly relied on these materials. Hsu also appears to contend that the dismissal order improperly considered these materials without converting defendant’s FRCP 12(b)(6) motion into a motion for summary judgment. As a result of this additional failure, Hsu argues, he lacked standing and the district court “lost Article III jurisdiction.”

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<sup>2</sup> Although FRCP 60(c)(1) generally requires that motions under FRCP 60(b) be brought “within a reasonable time,” there is no time limit on a motion to set aside a judgment as void. *Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir.1987).

These contentions are incorrect. As explained in the March 2014 order denying Hsu's first motion to set aside the judgment, although defendant submitted a request for judicial notice in connection with its motion to dismiss, the dismissal order neither explicitly noticed the documents nor relied on them in dismissing the complaint. Moreover, Hsu wholly fails to explain how this purported error relates to Article III standing.

*Second*, Hsu contends that the dismissal order violated his due process rights by "shift[ing] the burden to plaintiff for proving the wrong in a re-pleading order." Not so. As also explained in the March 2014 order, the dismissal order did not shift any burden to Hsu that was not already there.

*Third*, Hsu contends that the dismissal order "eliminated the regulatory compliance documents" attached to the complaint and, as a result, the district court lacked subject-matter jurisdiction under the Investment Advisors Act. Hsu cites no authority to support his claim that subject-matter jurisdiction was lacking. Hsu filed his claims pursuant to a federal statute and the district court therefore had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331.

For these reasons, Hsu has failed to establish that relief from judgment is warranted. His motion to set aside the judgment as void is accordingly DENIED.<sup>3</sup>

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<sup>3</sup> In his motion, Hsu also requests that (1) "the court [ ] decide a presiding judge and jury trial for this FRCP 60(b)(4) motion," (2) "the court [ ] exercise the criminal jurisdiction under Sec. 11 of the Judiciary Act of 1789," and (3) defendant be ordered to produce various records related to wrap agreements entered into with third parties. Because these requests do not concern the district court's jurisdiction or its authority to

2.      MOTION TO DECLARE PLAINTIFF A VEXATIOUS LITIGANT.

A request to declare a party a vexatious litigant entails consideration of four factors: (1) the party must have had adequate notice and a chance to be heard; (2) there must be an adequate record for review, including a list of all cases and motions that led the court to conclude that a vexatious litigant order was necessary; (3) the court must make a substantive finding as to the frivolous or harassing nature of the litigant's actions; and (4) the order must be narrowly tailored to fit the particular problem involved. *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007). Under the third factor, courts must examine "both the number and content of the filings as indicia of the frivolousness of the litigant's claims." *Id.* at 1059. An injunction cannot issue merely upon a showing of litigiousness. The plaintiff's claims must be both numerous and patently without merit. *Ibid.*

Defendant moves to declare Hsu a vexatious litigant based on his filings in this action and related appellate proceedings. Defendant contends that Hsu continues to file frivolous motions despite the fact that final judgment has been entered against him. As examples, defendant cites miscellaneous motions Hsu has filed in our court of appeals, such as a complaint for judicial misconduct and a motion for "manifest injustice."

While some of Hsu's filings are difficult to comprehend and he has consistently sought final appellate review of this Court's orders, the current



Appendix B      Addendum:      Doc. 87 (6 of 6)

record fails to demonstrate that these motions were so numerous and abusive so as to require declaring Hsu a vexatious litigant. Defendant's motion is accordingly DENIED.

Hsu is warned, however, that he has no right to file frivolous and harassing motions, and that doing so violates FRCP 11. Hsu is further advised that FRCP 11 applies equally to attorneys and pro se litigants alike. *Warren v. Guelker*, 29 F.3d 1386, 1390 (9th Cir. 1994). If Hsu continues with unmeritorious litigation, he will soon be declared a vexatious litigant.

#### CONCLUSION

Based on the foregoing, Hsu's motion to set aside the judgment is DENIED. Defendant's motion to declare Hsu a vexatious litigant is also DENIED.

IT IS SO ORDERED.

Dated: April 6, 2018.

WILLIAM ALSUP

**UBS** MICROFILM I.D. UBS Financial Services Inc.  
 WC NUMBER PLEASE FAX ORIGINAL FORMS  
 TO ICS AT 201-352-5969. DO NOT  
 MAIL TO NEW ACCOUNTS.  
 FULL ACCOUNT BRANCH ACCOUNT BROKER SOCIAL  
 NAME NUMBER SECURITY/TAX NO  
 Daru K. Hsu OA 33042 N8 [omitted]  
 And Gina T. Hsu  
 Living Trust

**Managed Accounts Consulting  
 Wrap Fee Services Agreement (Client)**

Account Type: Advisory

Please read the important disclosures entitle Conducting Business with UBS: Guide to Investment Advisory and Broker Dealer Services contained below in the Managed Accounts Consulting Wrap Fee Services Agreement for a summary of the main distinctions between investment advisory and brokerage services and our respective duties and obligations.

***Our Obligations, Your Agreement and Your Account/ Program Selection***

Following this section, you will find your investment advisory agreement. If you are establishing an investment advisory account with us (for example, ACCESS, Managed Accounts Consulting Programs, PACE, Strategic Advisor, UBS Strategic Wealth Portfolios, Portfolio Management Program or SELECTIONS), you will be required to execute both an investment advisory agreement and a brokerage account agreement, so that your advisor account will have trading capability and custody services. When you execute a brokerage agreement as part of the process of establishing an investment advisory account, the brokerage agreement supplements your advisory agreement, and all, collectively govern your

relationship with us. In this case, your account will be designated as “advisory” and our obligation to you as they pertain to that account will be that of an investment advisor as described in our Form ADV Disclosure Brochure under the section “Conducting Business with UBS Investment Advisory and Broker-Dealer Services” and in your investment advisory program agreement and application.

If you open an investment advisory account with us, both you and UBS Financial Services Inc. will have the right to terminate your account from the investment advisory program. You should note that termination will end our investment advisory fiduciary relationship with you as it pertains to that account and, depending on the terms of your specific investment advisory agreement with us, will cause your account to be converted to, and designated as “brokerage” account only. Your investment advisory agreement will no longer apply to that account and it will be governed solely by the terms and conditions of your brokerage account agreement.

### **For More Information**

Understanding the ways in which we can conduct business under applicable laws and regulations is essential to the relationship between “You and Us”. The investment advisory programs and brokerage accounts we offer differ in other ways than those summarized above. It is important that you carefully read the agreements and disclosures that we provide to you with respect to the products or services under consideration.

While we strive to make sure the nature of our services is clear in the materials we publish. If any time you would like clarification on the nature of your accounts or the services you are receiving, please

Speak with your Financial Advisor or call 201-353-0000. For more information, please visit our web site at [www.ubs.com/workingwithus](http://www.ubs.com/workingwithus)  
**Investment Advisory Agreement**

**1. SELECTION OF INVESTMENT MANAGER**

The undersigned ("Client") hereby retains UBS Financial Services Inc. ("UBS Financial Services") to provide, under the terms and conditions of this agreement ("Agreement") as set forth below, certain brokerage, execution and other non-advisory services. Prior to implementation of this Agreement, Client will have selected his own Investment Manager, who may be selected from a list of investment managers provided by UBS Financial Services Inc. to the Client solely for his convenience.

Client will have no obligation to select or to use any Investment Manager listed by UBS Financial Services Inc. However, Client understands that the Investment Manager selected by Client must enter into a separate agreement with UBS Financial Services Inc. regarding the brokerage and execution services to be rendered by UBS Financial Services Inc. and the advisory services and responsibility to be rendered by Investment Manager. Client further understands that Investment Manager will be solely responsible for investing all securities and cash that Client may from time to time deposit in the Client's account ("Account") specifically established at UBS Financial Services Inc. to implement this Agreement.

The Investment Manager selected by Client is

Horizon Asset Management

Selected Investment Style Core

☒ Equity      ☐ Balanced      ☐ Fixed Income

If you wish to impose any restrictions on this Account including the investments that your Investment Manager may make for you, you must specify these restrictions directly to your Investment Manager. You also acknowledge that it is your responsibility to monitor compliance with your specific investment restrictions and that neither UBS Financial Services nor your Financial Advisor will be under any obligation to monitor such compliance.

Purchases and sales may be made by the Investment Manager on behalf of Client in securities of any kind, including, but not limited to corporate common or preferred stocks, options, warrants, rights, and corporate or government bonds or notes ("securities"), except for mutual funds and other companies (other than closed-end investment companies, "WEBS" and money market funds), insurance products, limited partnership interests, commodities and futures (collectively, "Non-covered Products"), which are expressly excluded from this Agreement and not permitted as investments in this Account. It is understood that all or a portion of the Account may be held in cash.

## **2. SERVICES OF UBS FINANCIAL SERVICES INC.**

UBS Financial Services may or may not have researched the Investment Manager you selected. If we researched the Investment Manager, we cannot assure you that we will continue our research or keep it current. The level of research we undertake varies depending on whether the manager is non-Researched, which includes managers in our "MAC Reviewed" list or is in our "MAC Researched" universe. The due diligence can range from a limited general review of the manager's organizational structure for non-Researched managers to an in-depth review of investment strategies, performance

data and management for MAC Researched managers. For non-Researched managers, our review is limited in scope and does not provide enough information for us to express an opinion on or about the investment capabilities of those firms.

UBS Financial Services Inc. will provide all brokerage and execution services for the purchase and sale of securities for the Account. However, in no event will UBS Financial Services Inc. be obligated to execute any transaction which it believes in good faith might be in violation of applicable federal or state law or regulations, or of applicable regulations of any self-regulatory body of which UBS Financial Services Inc. is a member.

UBS Financial Services Inc. will furnish Client with confirmation of Account transactions and periodic Account Statements.

UBS Financial Services Inc. will credit the Account with dividends and interest paid on securities held in the Account, and maintain custody of securities in the Account.

It is understood that cash balances in the Client's Account may be invested in money market funds including, as permitted by law, those affiliated with UBS Financial Services Inc. for which it and its affiliates receive compensation for services rendered.

UBS Financial Services Inc. recommends that you hold only managed Eligible Securities (as defined below) in your Account. Your Investment Manager may effect purchases and sales on your behalf in securities of any kind, including, but not limited to corporate common or preferred stocks, options, warrants rights, ADRs, exchange traded funds, certain mutual funds and corporate or government bonds or notes (collectively "Eligible Securities"), except for

insurance products, limited partnership interests, unit investment trusts, commodities and futures (collectively "Ineligible Securities"), which are expressly excluded from this Agreement and not permitted as investments in the Account. The list of Ineligible Securities may change from time to time. To the extent you decide hold Ineligible Securities or non-managed Eligible Securities in your Account, you do so against our recommendation and with the understanding that the value of those securities may be included for purposes of calculating and reporting the performance of your Account and calculating the MAC Program Fee resulting in a higher fee to us and your Investment Manager. Since Ineligible Securities are not considered managed assets, the inclusion of such securities may distort the actual performance of your Account and your Investment Manager.

### **3. FEES**

The compensation you will pay to UBS Financial Services for services under the MAC Program ("UBS Financial Service Portion") is payable under either a "wrap fee" option or a commission-based option. By executing this Agreement you acknowledge that you have discussed the available payments options with your Financial Advisor and have selected the wrap-fee option for your Account.

Client will pay UBS Financial Services Inc. for its services and for the services of Client's Investment Manager (if applicable) in advance on a quarterly basis ("Quarterly Fee") according to the fee schedule below. The "Initial Fee" payment will be due on the date the account is approved by UBS Financial Services Inc. and will be based on the beginning asset value of the Account on that date. The "Initial Fee" will be prorated from the approval date through the end of the next full calendar quarter. Thereafter, the

"Quarter Fee" will be based on the Account asset value on the last business day of the previous calendar quarter and will be due on the first business day of the current quarter.

Assets received into the Account during any fee period will be charged a pro-rated fee ("Contributory Fee") based on the number of days remaining in the fee period. No adjustments will be made to the fee for any withdrawals, appreciation or depreciation in the value of securities held in the Account during any fee period. The Investment Manager's fee (pursuant to the terms of the investment management entered into between the Client and the Investment Manager) will be remitted to the Investment Manager by UBS Financial Services Inc., if applicable. Should this agreement be terminated by either party, a pro-rata refund will be made, if applicable.

The following fee schedule will apply:

ANNUAL FEE: UBS FINANCIAL SERVICES INC. PORTION			
Account Asset Value	Equity/Balanced Accounts	Fixed Accounts	Income
On the first \$500,000	<u>1.3</u>	2.05%	0.90%
On the next \$500,000	<u>1.3</u>	1.50%	0.75%
On the next \$4,000,000	<u>.95</u>	0.95%	0.65%
Assets over \$5,000,000	<u>.80</u>	0.80%	0.45%
For equity or balanced accounts, UBS Financial Services Inc. is entitled to a minimum fee, calculated for each calendar quarter based on an annual fee of \$2,050 or 2.05%, whichever is less. For fixed income accounts, the comparable annual fee is \$900 or 0.9%, whichever is less.			
ANNUAL FEE: INVESTMENT ADVISOR PROTION			
Account Asset Value	Investment Advisor Fee		
On the first <u>500,000</u>	<u>0.5</u>	%	
On the next <u>500,000</u>	<u>0.5</u>	%	
On the next <u>4,000,000</u>	<u>0.5</u>	%	
On Assets over <u>5,000,000</u>	<u>0.5</u>	%	
Quarterly Minimum Fee (if applicable) \$			



Please note, the account will not be accepted by UBS Financial Services Inc. unless the above fee schedule is completed with the client at every asset level, regardless of the account value.

The fees will be automatically deducted from the Client's Account unless otherwise indicated below. For qualified plan accounts only, the client may elect for fees to be invoiced rather than have fees automatically deducted from the account. Any outstanding fees remaining after the invoice due will be automatically deducted from the Account. If a qualified plan account, please indicate below what type of billing you desire for your account. IRA accounts may not elect the invoice feature.

X      Automatic Deduction                      Invoice

The UBS Financial Services Inc. fee covers UBS Financial Services Inc. transaction fees and custodian services. Neither the UBS Financial Services Inc. fee nor the Investment Manager's fee includes specialized charges to your account, such as those resulting from markups or mark-downs in principal transactions, retirement or RMA account services, wire transfer fees, margin interest (if applicable), exchange and SEC transaction fees and transfer taxes. In addition, commissions incurred for transactions directed by the Investment Manager to broker-dealers other than UBS Financial Services Inc. are not included.

**4. CLIENT DESIGNATION AND AUTHORITY**

If this Agreement is entered into by a corporate officer on behalf of his corporation or by Trustee or other fiduciary, such corporate officer or Trustee or other fiduciary represents that the Account is within the scope of the investments authorized by, and his power to delegate exists under, the governing in-

strument and applicable law, and that he is duly authorized to enter into this Agreement.

**If Your Account is Subject to ERISA:**

You hereby designate the Investment Manager to receive all proxy and other related materials (including offers and other corporate actions), to vote or take any action or render any advice with respect to the voting of proxies solicited by, or with respect to, the issuers of any investments held in your account, and to take or not take action on your behalf as it deems appropriate with respect to such proxies and related actions. You may rescind this designation by prior written notice to UBS Financial Services Inc. by designating these obligations to you or another properly authorized party.

You expressly retain the right and obligation to vote any proxies or take any action relating to the investments held in your account and shall receive all proxy and other related materials (including tender offers and other corporate actions). You may delegate said rights and obligations to a properly authorized agent upon prior written notice to UBS Financial Services Inc.

Class action lawsuits and bankruptcy proceedings involving an issuer whose equity or debt securities are purchased by the Investment Manager for your account will be your responsibility even in instances in which you delegated proxy voting authority to the Investment Manager. Correspondence with respect to such lawsuits will be mailed to you directly. Neither we nor the Investment Manager will be authorized to respond to such correspondence.

**4A. DATA DOWNLOADS**

The Investment Manager may require that we provide certain transaction data and information (such

as name, address, and tax identification number) about your UBS Financial services Inc. account(s) to them via a computer system download. We understand that, they will use the data to generate certain types of reports to analyze or otherwise reconcile your holdings and information with their records.

By signing below, you authorize and direct UBS Financial services Inc. to provide any and all information regarding your UBS Financial services Inc. account(s) to them, including information relating to transactions and holdings in your account(s) (the "Data"). We agree to provide the Data for your account(s) listed above, subject to the following conditions.

- UBS Financial Services Inc. does not assume or bear any responsibility or liability for the Data, its security during and after its transmission to the above referenced entity, the completeness and accuracy of the Data, the use of that Data by the above referenced entity or the outputs and reports that are prepared based on that Data.
- You acknowledge that the data made available to the above referenced entity is preliminary in nature and subject to change prior to being incorporated in your transaction confirmations, account statements and performance reports. The confirmations, statements and performance reports you receive from us are the only official records of your UBS Financial Services Inc. account(s). Consequently, the Data does not represent and cannot be construed as the official records of your account(s) with UBS Financial Services Inc. and may not be used for trading purposes or relied upon in making an investment or liquidation decision.

- You agree to hold UBS Financial Services Inc. harmless from any loss or damages incurred as a result of the data transmission and the use of such Data 9 (for any purpose) by the above referenced entity including the sharing of such Data with others by them.

Please note that pricing differences may exist if prices are changed on our books and records after the data is transmitted to the above referenced entity. Differences may exist for a variety of reasons including skipped or unprocessed data, trade cancellation, or missing information. The above referenced entity will be responsible for any reconciliation needed in their reports.

You may revoke this authorization at any time by providing written notice to your Financial Advisor and the Branch Office Manager. Termination of data sharing will be effective within 5 business days of the date we receive your new instructions. Please note that UBS Financial Services Inc. has the right to terminate the transmission of Data at any time and is not obligated by rule or regulation to continue to supply this information to the above referenced entity.

#### **5. OTHER SERVICES PROVIDED**

You will be sent confirmations of transactions in your account and monthly statements.

☒ Check this box to elect to receive your confirmations monthly. Doing so will waive your right to receive immediate trade confirmations for your account and will instruct UBS Financial Services Inc. to send trade confirmations to your MAC Manager. You may change this instruction at any time by giving UBS Financial Services Inc. written notice.

**6. NON-ASSIGNABILITY**

This Agreement shall not be assignable by either Client or UBS Financial Services Inc. without the prior consent of the other party.

**7. TERMINATION OF AGREEMENT**

This Agreement is a continuing one and shall remain in full force and effect until terminated by UBS Financial Services Inc. or by the Client or his legal representative(s). This Agreement may be terminated upon written notice by UBS Financial Services Inc. or Client to the other party at the addresses listed below, and termination will become effective upon receipt of such notice. In addition, this agreement will terminate if UBS Financial Services Inc. receives instructions to deliver the assets in this account to another firm and termination will become effective upon receipt of said instructions. Termination of this Agreement will not relieve Client of the responsibility for any obligations to UBS Financial Services Inc. arising before such termination and Client agrees to pay in full all amounts owing to UBS Financial Services Inc. Upon any termination, Client authorizes UBS Financial Services Inc. to withhold sufficient assets then in the Account as UBS Financial Services reasonably believes necessary to pay any amounts owing UBS Financial Services Inc. however and whenever arising Client agrees to pay UBS Financial Services Inc. the reasonable costs and expenses of collection, including attorney's fees for any unpaid debts. The Client may terminate this Agreement within five business days of its signing and receive a full refund all "wrap fees".

This Agreement shall insure to the benefit of any successor corporation of UBS Financial Services Inc. and shall be binding on the heirs, executors and legal representative of the Client. If, in the event of the

death, disability or incompetence of the Client, UBS Financial Services Inc. or Investment Manager in good faith and without actual notice, act under this authorization, any and all actions so taken shall be binding on Client's heirs and legal representatives.

You should note that termination will end our investment advisory fiduciary relationship with you as it pertains to that account and, will cause your account to be converted to and designated as a "brokerage" account only. Your investment advisory agreement will no longer apply to that account and it will be governed solely by the terms and conditions of your brokerage account agreement.

**8. LIABILITY OF UBS FINANCIAL SERVICES INC.**

Client acknowledges that the selection of the Investment Manager was his sole and exclusive responsibility. UBS Financial Services Inc. shall not be liable for and Client agrees to hold UBS Financial Services Inc. harmless against all losses to the Client from any error of judgment, mistake of law, negligence, willful misfeasance, or bad faith on the part of the Investment Manager or any other matter within the Investment Manager's control such as investment performance or compliance with applicable law.

**9. GOVERNING LAW**

This Agreement and enforcement shall be construed and governed by the law of the State of New York.

**10. ARBITRATION**

This agreement contains a predispute arbitration clause. By signing an arbitration agreement the parties agree as follows:

- Arbitration is final and binding on the parties. All parties to this agreement are giving up the right to sue each other in court, including the right to a tri-

al by jury, except as provided by the rules of the arbitration forum in which a claim is filed.

- The parties are waiving their right to seek remedies in court, including the right to jury trial. Arbitration awards are generally final and binding; a party's ability to have a court reverse or modify an arbitration award is very limited.
- Pre-arbitration discovery is generally more limited than and different from court proceedings. The ability of the parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.
- The arbitrator's award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited. The arbitrators do not have to explain the reason(s) for their award.
- The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.
- The rules of some arbitration forums may impose time limits for bringing a claim in arbitration. In some cases, a claim that is ineligible for arbitration may be brought in court.
- This rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this agreement.
- Client agrees, and by carrying an account for you UBS Financial Services Inc. agrees, that any and all controversies which may arise between you and UBS Financial Services Inc. concerning any account(s), transaction, dispute or the construction, performance, or breach of this or any other Agreement, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitra-

tion. Any arbitration under this Agreement shall be held under and pursuant to and be governed by the Federal Arbitration Act, and shall be conducted before an arbitration panel convened by the New York Stock Exchange, Inc. or the National Association of Securities Dealers, Inc. Client may also select any other national security exchange's arbitration forum upon which UBS Financial Services Inc. is legally required to arbitrate the controversy with Client, including, where applicable, the Municipal Securities Rulemaking Board. Such arbitration shall be governed by the rules of the organization convening the panel. Client may elect in the first instance the arbitration forum, but if Client fails to make such election, by registered letter or telegram addressed to UBS Financial Services Inc. at 1200 Harbor Boulevard, 10th Floor, Weehawken, NJ 07086, Attn: Legal Department, before the expiration of five days (5) after receipt of a written request from UBS Financial Services Inc. to make such election, then UBS Financial Services Inc. may make such election. The award of the arbitrators, or of the majority of them, shall be final, and judgment upon the award rendered may be entered in any court of competent jurisdiction.

- No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration Agreement against any person who has initiated in court a putative class action; who is a member of the putative class who has opted out of the class with respect to any claims encompassed by the putative class action until:
  - i. the class certification is denied;
  - ii. the class is decertified; or
  - iii. the customer is excluded from the class by the court.



- Such forbearance to enforce an Agreement to arbitrate shall not constitute a waiver of any rights under this Agreement except to the extent stated herein.
- Clint expressly agrees that service of process in any action shall be sufficient if served by certified mail, return receipt requested, at your last address known to UBS Financial Services Inc.

Client expressly waives any defense to service of process as set forth above.

#### 11. ENTIRE AGREEMENT

This Agreement represents the entire understanding between the parties with regard to the matters specified herein. The terms of this agreement may be modified subject to your receipt of prior written notice and your continued acceptance of services thereafter shall be deemed consent. Client expressly agrees that UBS Financial Services Inc. shall not be bound by any representation or agreement heretofore, hereafter made by any of its employees or agents which in any way purports to affect or diminish its rights under this Agreement.

#### 12. MISCELLANEOUS

For the purpose of referring to this Agreement, the date of this Agreement shall be the date of acceptance by UBS Financial Services Inc. As used herein, references to persons in the masculine gender shall include persons of the feminine gender. References in the singular shall, as and if appropriate, include the plural.

BY SIGNING THIS AGREEMENT THE CLIENT ACKNOWLEDGES: THAT I HAVE REVIEWED THE SECTION ENTITLED CONDUCTING BUSINESS WITH UBS: GUIDE TO INVESTMENT ADVISORY AND BROKER DEALER SERVICES AND UNDERSTAND THE MATERIAL

DISTINCTIONS BETWEEN ADVISORY AND BROKER-DEALER SERVICES; RECEIPT OF A COPY OF THIS AGREEMENT AND UBS FINANCIAL SERVICES INC.'S FORM ADV DISCLOSURE DOCUMENT; THIS AGREEMENT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE AT PARAGRAPH 10 ABOVE.

Agreed to this 17<sup>th</sup> day of July 20 07

Client Name Darryl K. Hsu Gina Hsu  
[Signature] [Signature]

Signature of Client

ACCEPTED BY: UBS Financial Services Inc. (Branch Manager)

By [Signature] Date: 8-13-07

**UBS** WC MICROFILM I.D. UBS Financial Services Inc.  
 NUMBER  
 FULL ACCOUNT BRANCH ACCOUNT BROKER SOCIAL  
 NAME NUMBER SECURITY/TAX N  
 Daru K. Hsu OA 33042 N8 [omitted]  
 and Gina T. Hsu  
 Living Trust

**Managed Accounts Consulting**  
**Wrap Fee Services Agreement** (Investment Manager)  
 Account Type: Advisory

The undersigned investment advisor ("Advisor") hereby agrees, under the terms and conditions herein, to perform the investment advisory services set forth below for certain clients ("Clients") of UBS Financial Services Inc. ("UBS Financial Services") who are enrolled in the account ("Account") established with UBS Financial Services Inc. pursuant to which the Client has selected Advisor to provide all investment advisory services and by which UBS Financial Services Inc. provides certain brokerage services pursuant to a Wrap Fee Services Agreement.

**1. INVESTMENT MANAGEMENT**

The Advisor agrees to invest, in accordance with the investment objectives of each client, all securities and cash that each such Client may from time to time deposit in the Client's Account at UBS Financial Services Inc.

**2. COMPENSATION**

UBS Financial Services Inc. as agent for Client, will forward the fee owed to the Advisor by Client according to the schedule below, if applicable.

**ADVISOR FEE SCHEDULE**

Account Asset Value	Annualized Fee
On the first \$ <u>500,000</u>	.5 %
On the next \$ <u>500,000</u>	.5 %

On the next \$ <u>4,000,000</u>	.5 %
On assets over \$ <u>5,000,000</u>	.5 %
\$ .00 Quarterly Minimum (if applicable)	

The above fees will be calculated by UBS Financial Services Inc. and will be based on the Account's asset value, payable in quarterly installments ("Quarterly Fee"). The initial fee ("Initial Fee") will be based on the beginning asset value of the Account on the day the account is approved by UBS Financial Services Inc. The "Initial Fee" will be prorated from the approval date through the end of the next full quarter. Thereafter, the "Quarterly Fee" will be based on the Account asset value on the last business day of the previous calendar quarter. Assets received into the Account during any fee period will be charged a prorated fee ("Contribution Fee") based on the number of days remaining in the fee period. No adjustments will be made to the fee for any withdrawals, appreciation, or depreciation in the value of the securities held in the Account during any fee period.

Should this agreement be terminated by either party, a prorated refund of the "Initial Fee" or "Quarterly Fee" and any "Contribution Fees" will be made, if applicable.

The fees will be automatically deducted from the Client's Account unless the account is an ERISA account and the client elects to be invoiced. Any outstanding fees remaining after the invoice due will be automatically deducted from the Account. The Investment Advisor will not receive payment from UBS Financial services Inc. until the fee is either remitted by the client or debited from the Account.

### 3. REPRESENTATION OF THE ADVISOR

Advisor represents to UBS Financial Services Inc. as follows:

- (A) Advisor has written agreements with each Client granting Advisor discretion in the investment and reinvestment of the Client's Account's assets and authorizing Advisor to purchase and sell securities for Client's Account and to act for the Client in all matters necessary or incidental to such purchases and sales. Advisor will provide UBS Financial Services Inc. with copies of all such written agreements.
- (B) Advisor is currently registered and will remain registered to the extent required as an investment advisor under the Advisers Act of 1940 and will operate in full compliance with the applicable laws and regulations in all applicable jurisdictions.

Advisor agrees that UBS Financial Services Inc. shall not be responsible for and holds UBS Financial Services Inc. harmless against any losses to the client from any error of judgment, mistake of law, negligence, willful misfeasance, or bad faith on the part of the advisor or any other matter within the Advisor's control.

#### **4. ANTI-MONEY LAUNDERING AND REPORTING RESPONSIBILITIES**

The Advisor is, and at all times while this agreement is in force, in compliance with all legal and regulatory requirements referred to in this Section. To the extent that the Advisor accepts all funds directly from the Client, the Advisor represents that it is aware of and in compliance with the United States and applicable international laws and regulations relating to currency reporting and money laundering, including, but not limited to (i) the United States Bank Secrecy Act and implementing regulations, and all applicable international anti-money laundering laws and regulations and to ensure compliance with-

in the MAC program with these laws, rules and regulations, the Advisor represents that it will not accept currency or bearer instruments from its clients. The Advisor also represents that it will adopt appropriate policies, procedures and internal controls to be fully compliant with any additional laws, rules or regulations, to which it may become subject.

The Advisor is aware of and complies with the United States regulations imposed by the Treasury Department's Office of Foreign Assets Control ("OFAC") including but not limited to the International Emergency Economic Powers Act, 50 U.S.C. section 1701 et. seq., The Trading with the Enemy Act, 50 U.S.C. App. 1 et seq., and any Executive Orders or regulations promulgated thereunder, which prohibit, among other things, the engagement in transactions with, holding the securities of, and the provision of services to certain embargoed foreign countries and specifically designated nationals, specifically designated narcotics traffickers, terrorist sanctions, and other blocked parties. The Advisor further represents that to the best of its knowledge any entity or individual with which it transacts business is (1) not currently identified on the Specially Designated Nationals and Blocked Persons List maintained by the Office of Foreign Assets Control, Department of the Treasury ("OFAC") and/or on any other similar list maintained by OFAC pursuant to any authorizing statute, executive order or regulation (collectively, the "List"), and (ii) not a person or entity with whom a citizen of the United States is prohibited to engage in transactions by any trade embargo, economic sanction, or other prohibition of United States law, regulation, or Executive Order of the President of the United States, and (iii) none of the assets of the Advisor have been derived from any unlawful activity,

and (iv) the Advisor has implemented procedures, and will consistently apply those procedures, to ensure the foregoing representations and warranties remain true and correct at all times.

**5. TERMINATION OF AGREEMENT**

This Agreement is to be terminated upon written notice by either Advisor or UBS Financial Services Inc. to the other at the addresses listed below.

Termination will become effective upon receipt of such notice. UBS Financial Services Inc. and Advisor agree to inform each other promptly in the event of a change in the name or address to which notification must be sent.

**6. NON-ASSIGNABILITY**

This Agreement shall not be assignable by either UBS Financial Services Inc. or the Advisor.

**7. GOVERNING LAW**

This agreement and its enforcement shall be construed and governed by the laws of the State of New York.

**8. ENTIRE AGREEMENT**

This Agreement represents the entire Agreement between the parties with regard to the matters specified herein and may not be modified or amended except by a writing signed by both parties. Advisor expressly agrees that UBS Financial Services Inc. shall not be bound by any representation or agreement heretofore or hereafter made by any of its employees or agents which in any way purported to affect or diminish its rights under the Agreement.

**9. MISCELLANEOUS**

UBS Financial Services Inc. reserves the right in its sole discretion and for any reason to cancel this agreement at any time.

3:11-cv-02076-WHA Document 102-1 Filed 09/16/19

Lead-plaintiff DARRU K. HSU, et al., files the Notice of Appeal for direct review on the exculpatory hedge clauses in the UBS wrap-fee contract prohibited by SEC Heitman No Action Letter under the Investment Advisers Act (IAA).

Supreme Court Rule 18 applies to this very rare occasion: The falsified evidence for FRCP 12(b)(6) defense voided 28 U.S.C. § 1331, but the district judge eliminated evidence in the complaint to impede interlocutory review on FRCP 23(f) certification. The 9th Circuit is deprived of 28 U.S.C. §1291 and §1292(a)(1) jurisdiction. (11-17131, 14-15588, 19-15745) 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) Notice of direct appeal does not exist in ECF system for Rule 18, except Manual Filing Notification.

<https://www.cand.uscourts.gov/ecf/paper>

Historically, Judicial Code of 1925 and 1948 maintained direct appeal in Section 238 for Section 2 of the Expediting Act of 1903 on “antitrust or interstate commerce laws, and so forth”.<sup>1</sup> “Interstate commerce” corresponds to Commerce Clause of the Constitution. It is in 15 U.S.C. §80b-1, 18 U.S.C. §§ 1961-68 and 18 U.S.C. § 1956. Section 238(a) for the Transfer Act<sup>2</sup>

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<sup>1</sup> See <https://www.loc.gov/law/help/statutes-at-large/68th-congress/session-2/c68s2ch229.pdf>

<sup>2</sup> See <https://www.loc.gov/law/help/statutes-at-large/67th-congress/Session%202/c67s2ch305.pdf> and *Swift & Co. v. United States*, 276 U.S. 311, at 323 (1928)



prohibits the Circuit's dismissal without transferring jurisdiction to the Supreme Court on the government authority over the above regulations. The 1st Circuit declined jurisdiction based on the Expediting Act,<sup>3</sup> but the 3rd Circuit did not.<sup>4</sup> Yet, the 9th Circuit dismissed the appeal with its jurisdiction voided by Defendant. (9th Cir. 19-15756, Dkt. 12) This Court applied "practical effects" rule to §1253 and the exception in §1292(a)(1) for direct review on permanent injunction. See *Abbott v. Perez*, 585 US (2018); *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 (1981).

28 U.S.C. §2106 enables the Court to determine the harmful defense which stripped away the regulatory context of a signed document and faked it as "separate agreement". 17 CFR 275.206(4)-7 imposes the burden on UBS for its representation. Authorizing ECF filing for *pro se* lead-plaintiff will aid the Court.

Plaintiff filed a Motion for Reconsideration on the Rule 60(b)(4) motion and requested for declining jurisdiction. (19-15756, Dkt. 13-1, dated August 12, 2019). It is uncertain that an amended decision is forthcoming, as the Circuit cast aside the prior appeal for two and half years. (14-15588, Dkt. 28-1, 12/22/2016)

Dated: September 15, 2019

Respectfully submitted,  
S/ Daru K. Hsu  
DARRU K. HSU, pro se  
408-270-6139

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<sup>3</sup> *United States v. Cities Svc. Co.*, 410 F.2d 662, 1st Cir. (1969)

<sup>4</sup> *United States v. Ingersoll-Rand Co.*, 320 F.2d 509

U.S. District Court; California Northern District

**Notice of Electronic Filing**

The following transaction was entered on 9/16/2019  
at 11:16 AM and filed on 9/16/2019

Case Name: Hsu v. UBS Financial Services, Inc.

Case Number: 3:11-cv-02076-WHA

Filer: Daru K Hsu

Document Number: 102

**Docket Text:**

EXHIBITS Notice of direct appeal to the Supreme  
Court filed by Daru K Hsu (Attachments: # (1) No-  
tice of direct appeal)(Hsu, Daru) (Filed on 9/16/2019)

3:11-cv-02076-WHA Notice has been electronically  
mailed to:

Ashley Lynn Shively ashley.shively@hklaw.com,  
tanya.boyce@hklaw.com

Daru K Hsu Khsu 01@sbcglobal.net

David Carlyle Powell dpowell@mcguirewoods.com,  
jtabisaura@mcguirewoods.com,  
mdylak@mcguirewoods.com,  
usdocket@mcguirewoods.com

David P. Meyer dmeyer@dmlaws.com,  
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ahenderson@reedsmith.com, april-henderson-  
6614@ecf.pacerpro.com, justin-mcguirk-  
6838@ecf.pacerpro.com, mrachel@reedsmith.com,  
reed-smith-2312@ecf.pacerpro.com

Supreme Court of the United States  
Office of the Clerk, Washington, DC 20543  
September 20, 2019

Darru K. Hsu  
5538 Morningside Drive  
San Jose, CA 95138  
RE: Darru K. Hsu

Dear Mr. Hsu:

The papers were received on September 20, 2019. These papers fail to comply with the Rules of this Court and are herewith returned.

You may seek review of a decision only by filing a timely petition for writ of certiorari. The papers you submitted are not construed to be a petition for writ of certiorari. Should you choose to file a petition for writ of certiorari, you must submit the petition within the 90 day time limit allowed under Rule 13 of the Rules of this Court. A Copy of the Rules of this Court and a sample petition for a writ of certiorari are enclosed.

Your case must first be reviewed by a United States court of appeals or by the highest state court in which a decision could be had. 28 USC 1254 and 1257.

Sincerely,  
Scott S. Harris, Clerk

BY: Clayton R. Higgins,  
(202) 479-3019

Supreme Court of the United States  
Office of the Clerk, Washington, DC 20543

November 7, 2019

Darru K. Hsu  
5538 Morningside Drive  
San Jose, CA 95138  
RE: Darru K. Hsu

Dear Mr. Hsu:

The notice of appeal received November 7, 2019 is herewith returned.

You may seek review of a decision only by filing a timely petition for a writ of certiorari. The filing of a notice of appeal is not a prerequisite for filing a petition for writ of certiorari and does not preserve the time for filing a petition for writ of certiorari. You must submit a petition for writ of certiorari within the 90 day time limit pursuant to Rule 13. A copy of the Rules of this Court and a sample petition are enclosed.

Your case must first be reviewed by a United States court of appeals or by the highest state court in which a decision could be had. 28 USC 1254 and 1257.

It appears that you have a final order from the U.S. Court of Appeals for the Ninth Circuit. Also enclosed is your check for \$300.00.

Sincerely,

Scott S. Harris, Clerk  
By: /Clayton R. Higgins,  
(202) 479-3019

## USPS Tracking

Tracking Number: 70190700000011594666

The delivery status of your item has not been updated as of November 9, 2019, 11:00 pm. We apologize that it may arrive later than expected.

Status Alert

November 9, 2019 at 11:00 pm  
Awaiting Delivery Scan

November 5, 2019, 9:18 am

Notice Left (No Authorized Recipient Available)  
SAN FRANCISCO, CA 94105

U.S. Postal Service<sup>™</sup>  
**CERTIFIED MAIL<sup>®</sup> RECEIPT**  
Domestic Mail Only

For delivery information, visit our website at [www.usps.com](http://www.usps.com).

**OFFICIAL USE**

Certified Mail Fee \$3.50

Postage \$7.35

Total Postage and Fees \$13.65

Extra Services & Fees (check box, add fee to postage)

<input type="checkbox"/> Return Receipt (hardcopy)	\$0.00
<input type="checkbox"/> Return Receipt (electronic)	\$0.00
<input type="checkbox"/> Certified Mail Restricted Delivery	\$0.00
<input type="checkbox"/> Adult Signature Required	\$0.00
<input type="checkbox"/> Adult Signature Restricted Delivery	\$0.00

Postmark: NOV 11 2019

Sent To: Raymond Cardozo  
Street and Apt. No., or PO Box No.: 101 Second St, Suite 1800  
City, State, ZIP+4: San Francisco, CA 94105

PS Form 3800, April 2015 PSN 7530-02-000-9000 See Reverse for Instructions

