No. 21-1316

In the Supreme Court of the United States

***In re* DARRU HSU, et al.**

Petitioner,

ON PETITION FOR WRIT OF MANDAMUS
To the United States District Court for the Northern District of California
No. 3:11-cv-02076-WHA

PETITION FOR WRIT OF MANDAMUS

DARRU HSU, *et al.*, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC.

Defendant.

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QUESTIONS PRESENTED

Federal Arbitration Act (FAA) contradicts Investment Advisers Act (IAA) when fraud is **inside** an investment contract. All investors therefor are entitled to a Rule 23(b)(2) class action. However, Rule 23(b)(1 or 2) bars opt out of a mandatory class, while FINRA excludes class action and bars bifurcation. A faked "arbitration agreement" therein can displace courts and coerce individual investors into arbitration. The "bifurcated" outcome can never let a court to deliver "finality" for 28 U.S.C. §1291. Courts must reject such a Rule 12(b)(6) defense under Rule 81(a)(6)(B). ***See*** 15 U.S.C. § 78o, subsec. (o) – [SEC] Authority to restrict mandatory pre-dispute arbitration.

The *Chevron* deference doctrine under *Chevron v. Natural Res. Defense Council*, 467 US 837 (1984) requires judicial deference to unambiguous agency authority. However, loopholes exist in Rule 52(a), 23(b) and 54(b) for a district judge using "findings of fact" to dispose of documentary evidence that requires deference and appellate review, thus block the authority of agencies under the Executive Branch that courts do not have. The questions presented are:

1. Whether this Court must reconcile the conflict between *Federal Arbitration Act* and FINRA – the only self-regulatory organization (SRO) in the 21st Century who is authorized to arbitrate disputes on all securities laws under 15 U.S.C. § 78c(a)(26) of the *Maloney Act* of 1938?

2. Whether the judge violated Rule 7 of *Ashwander v. TVA*, 297 US 288 (1936) and blocked the agency authorities, while never delivered the "finality" for 28 U.S.C. § 1291?

The pleaded documents were untouched. (*Cf.* Doc. 17, Exhibit C - F) Ultimately, the counsel for *UBS Financial Services, Inc.* (UBS) confessed to falsifying the signed contract including the faked mandatory "arbitration agreement". (*Cf.* Doc. 100)

3. Whether the judge violated the First Amendment by carrying out retaliatory judicial usurpation of power under 28 U.S.C. § 1651(a)? The sanction suppressed the right of class members to court access. UBS counsel's confession proved that the defense never acquired 28 U.S.C. § 1331 to sustain the long-running blockage by the judge.

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.

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

TABLE OF AUTHORITIES

OTHER STATUTES AND RULES:

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PETITION FOR WRIT OF MANDAMUS

As permitted under 28 U.S.C. § 1651(a) and S.Ct. Rule 20.2, Petitioner respectfully seeks a writ of mandamus and prohibition to review the pre-planned faked FINRA "arbitration agreement" in this investment contract that impersonated FINRA for the arbitration and blocked the SEC authority on the hedge clause practice, then extended to the court using a falsified contract for the Rule 12(b)(6) defense to defeat the Rule 23(b)(2) class action. The real FINRA Rule 3110(f) arbitration agreement excludes all class actions, while Rule 23(b)(2) bars opt out of a mandatory class.

The presiding judge exploited the loophole in Rule 52(a)(3): – NOT requiring a court to state findings or conclusions on a Rule 12 or 56 motion with documentary evidence – but only appears undisputable on the face. The judge eliminated the pleaded evidence for this Rule 23(b)(2) class action that requires *Chevron* Deference in appellate review, and never delivered a "final judgment" under 28 U.S.C. §1291 for the IAA (15 U.S.C. § 80b-1, et seq.). This Court must "confine the inferior court to a lawful exercise of its prescribed jurisdiction." *Will v. United States*, 389 U.S. 90, at 95 (1967)

OPINIONS AND ORDERS BELOW

15 U.S.C. §§78o and §§78c provide SEC and SRO the authority to regulate investment firms and protect investors. The district judge used the loopholes to block their regulatory authorities; but broke up the class action. Rule 54(b) provides the rare exception to correct the break-up of this "single

issue" class action and restore the right to 28 U.S.C. § 1291. Finally, the judge distorted 28 U.S.C. § 1651 for the power to end the class action plagued with fraud and misconduct. *Cf.* Appendix A

(1) Ninth Cir. # 11-17131: — The affidavit provided the evidence of fraud in the contract and the arbitrator misconduct in the prior FINRA arbitration. (9th Cir. ECF Dkt. 38 *cf.* Dkt. 34) However, the Circuit treated the cancelled hearing and the eliminated UBS documents as "not argued below". (Dkt. 38 *cf.* Dist. Ct. Doc. 35, p. 9)

(2) Ninth Cir. # 14-15588 — The district judge breached FRCP 62.1 – FRAP 12.1 to deny appellate jurisdiction; while UBS lawyers filed own Opening Brief to defeat the "*independent*" standard of review under Rule 60(d)(3). (Dkt. 10-1 *cf.* Dist. Ct. Doc. 71) **FRAP 28.1(c)(5) prohibits "cross-appeal" to obstruct the appellate proceeding.**

(3) Ninth Cir. # 19-15756 — On direct appeal to the Supreme Court (Dist. Ct. Doc. 102), UBS lawyers filed a Motion for summary affirmance (Cir. Dkt. 5) to preempt and distort the proceeding. (See the deleted Dkt. # 1 - 7 caused by the preemption *cf.* Cir. Dkt. 13-1 for the objection)

The Circuit never conducted Rule 52(b) review on UBS lawyer's confession and fraud in the contract. (Dist. Ct. Doc. 100 *cf.* Doc. 57-1, Exhibit A: 6-12)

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) - Verbatim of the "Legal Analysis":

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) FINRA Rule 3110(f)(6) [2005]: All agreements shall include a statement that *"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; or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; or (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."*

(4) 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:
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> **(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.

STATEMENT OF THE CASE

In 2011, plaintiff filed this class action against *UBS Financial Services Inc.* ("UBS") – shortly after FINRA arbitration in which plaintiff identified the unlawful hedge clause practice in the *Managed Account Consulting* investment contract ("MAC contract") and the faked [FINRA] "arbitration agreement" to compel unconditional arbitration. The pleading provided the UBS documents obtained in arbitration for a Rule 23(b)(2) class action, because all investors signed the same contract. It included six Exhibits (*cf.* Doc. 17). SEC Compliance Procedure regulation (17 CFR 275.206(4)-7) prohibits the practice: (a.) telling clients in §1 of the contract that selection is optional (*id.*, Exhibit A), (b.) from a list of 500+ 3rd-party managers in the Disclosure Brochure (*id.* Exhibit B); whereas, (c.) the internal procedures (*Id.*, Exhibit C - F) require UBS advisors to use the mandatory list and obtain client's fiduciary waiver.

UBS lawyers filed a Rule 12(b)(6) motion supported by two documents (Doc. 22 and 23). One document (Doc. 23, Exhibit A) is "*Horizon Agreement*" which is falsified from lead-plaintiff's signed contract containing the newly opened account # and $ amount invested for authorizing the UBS sponsored *Horizon Asset Management Inc.* the authority to manage. The "*FINRA Arbitration Panel Ruling*" (Doc. 23, Exhibit B) claimed that the complaint is time-barred. The defense relied on *Ashcroft v. Iqbal*, 556 U.S. 662 that the pleading fell short of entitling to relief. (*Cf.* Doc. 35, p. 9) However, in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, the Court stated that "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions..." (*Id.* at 2502)

Finally, the Rule 54(b) motion (*cf.* Doc. 114) exposed the issues in FRCP: **(a.)** the judge exploited the loophole in Rule 52(a)(3) to dismiss the Rule 23(b)(2) class action and keep away appellate review, and **(b.)** the faked [FINRA] "arbitration agreement" pre-planned in the contract can produce a bifurcated outcome to defeat a Rule 23(b)(2) class action filed at any district court in handling a broken up "single unit" class action. The motion down played the exploitation in "findings of fact"; and focused on the fraud-on-the-court for the Supreme Court to award a final judgment.

The judge declared the power under 28 U.S.C. § 1651(a) to deny the Rule 54(b) motion relying on the wrong *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir 2007), and issued an invalid "show cause" order against the lead-plaintiff (Appendix *cf.* Doc. 114) Under duress, Hsu filed a Response showing the judge's violation of Rule 7 in *Ashwander v. TVA*, 297 U.S. 288, 347, and the disposal of Rule 81(a)(6)(B) on arbitration. – FINRA Rule 3110(f) arbitration agreement excludes any class action, while Rule 23(b)(1 or 2) prohibits the break-up of a mandatory class. (*Cf.* Doc. 117) It also advised the correct use in *Ringgold Lockhart v. County of Los Angeles*, 761 F. 3d 1057, 1062 (9th Cir.)

The judge seized on *Ringgold Lockhart*, but distorted it to impose pre-filing sanction (*cf.* Doc. 125). That amounts to suppressing fraud-on-the-court and own violation of *Chevron* Deference. 28 U.S.C. § 1651(a) provides the last resort for this Court to root out fraud-on-the-court and misconduct; and award a true final judgment under the IAA.

ARGUMENT

This class action stemmed from the UBS investment contract using faked FINRA "arbitration agreement" to displace court on the administration of Rule 23(b)(1 or 2) mandatory class. Defense counsels already confessed to falsifying the signed contract with the faked "arbitration agreement" therein, (See Doc. 100 and Exhibit-1 in Doc. 96, as extracted from Doc. 57-1, Exhibit A: 1-12) The defense never acquired 28 U.S.C. §1331 jurisdiction.

Two critical causational judicial policy issues exit: – Exploiting Rule 52(a)(3) for Constitutional Avoidance can end a *bona fide* Rule 23(b)(1 or 2) class action. Attacking district court's gate-keeping duty for Rule 81(a)(6)(B) on SRO (FINRA) can block the enforcement authority of Article II agencies that Judicial Branch does not have.

A. THE JURISPRUDENCE FOR A RULE 23(B)(1 OR 2) MANDATORY CLASS ACTION

(a.) In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Court instructed that Rule 23(b)(2) certification must satisfy the "standing" requirement under Article III, and Rule 23(b)(1 or 2) bars opt out of a mandatory class; and an opposition must prove no "common questions of law or fact" in Rule 23(a). Thus, a dispositive class certification cannot go before [be antecedent to] the existence of Article III issues. (*Id.* at 361, citing *Amchem Products*, 521 U.S. 591, 613) The *Amchem* Court instructed that the administration of the procedural rules *"shall not abridge, enlarge or modify any substantive right, 28 U.S.C. § 2072(b); and shall not be construed to extend the [subject-matter] jurisdiction of the district courts (Rule 82)."* The Court also raised the inherent due

process violation under the 14th Amendment on unnamed class members. (*Id.* at 363)

(b.) In *Carey v. Piphus*, 435 U.S. 247, 259 (1978), the Court explained the Due Process Clause under the 14th Amendment for 42 U. S. C. § 1983:

> This Clause "raises no impenetrable barrier to the taking of a person's possessions," or liberty, or life. *Fuentes v. Shevin*, 407 U. S. 67, 81 (1972). Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process . . . ."

(c.) Rule 23(b)(2) shares the "injunction relief" for class action similarly to that in 28 U.S.C. § 1253 for which Congress authorized the procedure for direct appeal to reach a final judgment – **not** "rule of the law of the case". See *Ex Parte* decision in *United States v. U.S. Smelting Co.*, 339 U.S. 186, 199. Also see the "practical effect rule" in *Abbott, et al. v. Perez, et al.*, Nos. 17-586 & 17-626. Importantly, Rule 54(b) protects the right to 28 U.S.C. § 1291 for a "single unit" class action, and Supreme Court consistently protected that right and awarded a "final judgment" for a class action.

B. COURTS MUST UPHOLD SEC NO ACTION LETTER

(a.) As to "Constitutional Avoidance", Rule 7 of *Ashwander v. TVA*, 297 U.S. 288 (1936) provides:

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt

> of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (*Id.* at 348)

In *Chevron v. Natural Resources Defense Council*, 467 US 837 (at 842-43), the Court applied the two-step review on an agency's construction of the statute which it administers.

> "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress."

"*Chevron* Deference" requires district courts to conduct step-1 under Rule 52(a) for "findings of fact"; and NOT to dispose of the authority of federal agencies under the non-delegation doctrine of *Wayman v. Southard*, 23 U.S. 1 and *Mistretta v. United States*, 488 US 361.

(b.) SEC uses *No Action Letter* submitted by a financial firm to ensure that its new investment "product" will not violate the regulations, thus SEC will not take enforcement action. SEC does so to prevent fraud.[1]

Specific to SEC *Heitman Capital* No Action Letter,[2] it regulates hedge clauses on a broker-dealer

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[1] See https://www.sec.gov/regulation/staff-interpretations/no-action-letters

[2] SEC Heitman Capital No Action Letter (Ref. No. 200463918, File No. 801-15473 https://www.sec.gov/divisions/investment/noaction/2007/heitman021207.pdf

who sponsors and shares fees with a 3rd-party manager in an investment contract under 15 U.S.C. § 80b-2(a)(11)(C) of the IAA. It prohibits "*wrap accounts*" (*cf.* p. 2, §VI, §VIII) between financial "intermediaries" (*e.g.,* UBS as the broker-dealer) and *Heitman Capital Management LLC* (or, 500+ 3rd-party managers in this UBS contract who manage the investment for clients of the "intermediaries"). SEC recently withdrew this no action letter. But the withdrawal does not apply to "retail client" on fraud, because of the interpretation of fiduciary duty by Congress in *SEC v. Capital Gains*, 375 U.S. 180 (1963).[3] (*Cf.* Doc. 57, p. 8 – 9)

17 CFR §275.204-1, -2, -3 under 15 U.S.C. § 80b-2(a)(11)(C) regulates all broker-dealers who sponsor third-party managers; *Disclosure Brochure* rule (Form ADV, 17 CFR 279.1) regulates the content of brochure as a fiduciary. **This** Disclosure Brochure concealed this SEC No Action Letter in selling "*MAC Reviewed*" contracts. (*Cf.* Doc. 70-2, p. 5)

C. CLASSWIDE ARBITRATION

When an "investment contract" itself violated a securities law, all contract holders entitle the right to a Rule 23(b)(1 or 2) class. Rule 81(a)(6)(B) requires the gate-keeping duty of all district courts. The denial of the Rule 60(d)(3) exposed the systemic conflict between FAA and IAA.

(a.) In *Wilko v. Swan*, 346 US 427, the Court ruled that FAA cannot supersede 15 U.S.C. § 77n of the Securities Act which prohibits waiver of right in an investment contract containing a binding pre-dispute arbitration clause, because arbitration does

[3] SEC Release No. IA-5248; see p. 12, Fn. 32 and p. 10-11, fn. 30 & 31 https://www.sec.gov/rules/interp/2019/ia-5248.pdf

not provide comparable legal and procedural protections as courts do. (*Id.* at 435-438) *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 US 477, 484 overruled *Wilko v. Swan* that the non-waivable right in 15 U.S.C. § 78cc (Exchange Act) can be protected in arbitration.

Judicially important, the list of "security" for "investment contract" under 15 U.S.C. § 80b-2(a)(18) of the IAA is reminiscent of that in 15 U.S.C. § 78c(a)(10) of the Exchange Act, but for different laws (*e.g.* the Exchange Act, or Commodity Exchange Act). In contrast, Contracts under the IAA are **not** traded in any markets. The IAA provides the right for an "investment contract". – 15 U.S.C. §80b–15(a) covers the investment contract and the arbitration agreement herein; and §80b–15(b) covers agreements made outside of the contract – before and after.

(b.) In *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, the Court explained the "two goals" of the FAA – enforcement of private agreements and encouragement of efficient, speedy dispute resolution. Classwide arbitration cannot accomplish these goals, unless an arbitration forum adopted a rigorous procedure as courts. (*Id.* at 1750 - 1753). In *Hall Street Associates LLC v. Mattel, Inc.*, 128 S. Ct. 1396, the Court refused to expand the review of arbitral awards beyond the scope of 9 U.S.C. §§ 10-11. The Court applied the old rule of *ejusdem generis*:

> [W]hen a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows. Since a general term included in the text is normally so limited, then surely a statute with no textual hook for expansion cannot authorize contracting

> parties to supplement review for specific instances of outrageous conduct with review for just any legal error. "Fraud" and a mistake of law are not cut from the same cloth. (*Id.* at 1405)

The Law Review in the 2nd "Other authorities"[4] expanded the concern in *Hall Street*. See p. 275, fn. 10-16. In *Vaden v. Discover Bank*, S.Ct. 129 S.Ct. 1262, the Court ruled that Federal Arbitration Act does not provide the "*arise under*", and a court must apply "*look through*" for 9 U.S.C. § 4 on the "controversy between the parties" using the "well-pleaded complaint" rule.[5] Therefore, a Rule 12(b)(6) defense cannot predicate on arbitration to oppose a class action under the *Wal-Mart* guidance for Rule 23(b)(2) and Rule 81(a)(6)(B).

(c.) FINRA is the only SRO in the 21st Century for the *Maloney Act* of 1938 – 15 U.S.C. § 78c(a)(26). FAA did not anticipate FINRA today.[6] It contains the Arbitration Division for disputes on all securities laws. However, FINRA Rule 3110(f)(6) arbitration agreement excludes any class action and bars bifurcation. [7] Non-Bifurcation Provision protects investors against involuntary bifurcation using mandatory arbitration to displace the court. *See* p. 4. **This is what a faked "arbitration agreement" can do.** It can displace the court and finish off

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[4] Arbitration After *Hall Street v. Mattel*: What Happens Next?

[5] *Gunn v. Minton*, 133 S.Ct. 1059 (2013); *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1 (2003)

[6] Yale Law Journal, Vol. 48 Iss.4 (1939); Over-the-counter Trading and the Maloney Act; *See* p. 638 with no fiduciary duty.

[7] The original NASD NTD 05-09 is available at https://www.finra.org/rules-guidance/notices/05-09 SEC Release No. 34-51526 *Cf.* Doc. 57, p. 13, Fn. 14

investors in arbitration, one-by-one; and then obligates the court to adjudicate a bifurcated Rule 12(b(6) defense. This is what UBS lawyers did. (*Cf.* Doc. 22-23)

In FINRA Arbitration Division, arbitrators need NOT be lawyers or follow the law. Yet, FINRA Rules 13904(b) and 12904(b) require arbitrators and investors to follow the law in order for arbiter awards to become final. [8] FINRA also contains Enforcement Division to enforce the securities laws and FINRA rules.[9] Both divisions have NO rule for the fiduciary duty under the IAA or *SEC v. Capital Gains*. The faked arbitration agreement is not enforceable under 9 U.S.C. § 10 and requires the court to vacate the contract – not by arbitrator. (*cf.* Fn. 2 of the FINRA Rule 10304)

The foregoing contradictions requires a district court to follow the due process for Rule 23(b)(1 or 2). That imposes *res judicata*, and dispenses with the need for arbitration in any forums. **This is the significant judicial policy for Rule 81(a)(6)(B).**

D. HOW EXPLOITATION OF THE "FINDINGS OF FACT" DISABLED RULE 81(A)(6)(B)

Rule 52(a) was amended in 1985 for uniform appellate standard of review for "*clearly erroneous*" on "findings of fact". The Advisory Notes adopted the equity practice for *Documentary or Undisputed evidence* in 49 Va. L. Rev. 506, 536 (1963).[10] The

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[8] See https://www.finra.org/rules-guidance/rulebooks/finra-rules/12904

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

[10] See the 1985 Amendment on Rule 52(a) citing 49 Va. L. Rev. Vol. 49 (1963) in the 4th *Other Authority*.

loopholes in Rule 53(a)(3), 23(b)(2) and 54(b) violated the due process clause of the Fourteenth Amendment. It is affirmed in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338:

> [Similarly,] (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. (*Id.*, at 363)

(a.) Rule 52(a)(3) does not exclude Rule 23. Although a court is not required to state findings or conclusions when ruling on a motion under *Rule 12* or *56*; but it enables a loophole that a judge can dispose of documentary evidence to rule in favor of a motion which opposes to class action – while also block appellate review. Elimination of evidence violates the equable principle of Rule 23. The chain of causations imposes [faked] *res judicata* and gives no notice – **unless** the judge adheres to the *Wal-Mart* jurisprudence, requiring the defense to prove **no** existence of law or fact common to the class under Rule 23(a).

Here, well before a UBS attorney signed the "Submission Agreement" to abide by FINRA rules,[11] the faked "arbitration agreement" is already in the contract to dispose of SEC regulations, specifically this No Action Letter – in arbitration and court. The Rule 12(b)(6) defense misled the court to discard Rule 81(a)(6)(B) and to decide on the already individualized [bifurcated] arbitration that can never

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[11] See Doc. 57-1, Exhibit A: 21 and Doc. 57-3 *cf.* https://www.finra.org/sites/default/files/ArbMed/p196163.pdf

lead to "finality" for §1291. UBS lawyer confessed to falsifying the contract (Doc. 100 *cf.* Doc. 35), thus never acquired 28 U.S.C. § 1331. The Court now has the "occasion" to examine the "procedural morass" that blocked the agency's authority. **The Court should invite SEC and DOJ for *Ex Parte* intervention under *Chevron* Deference.**

(b.) The paper "*The Hidden Harmony of Appellate Jurisdiction*" from Department of Justice [12] pointed out two categories of exceptions to 28 U.S.C. 1291: – (a.) immediately executable decrees disposing of fraud based on the *Forgay* Doctrine under *Forgay v. Conrad*, 47 U.S. 201 (1848), and (b.) departure from procedural due process. See p. 363 Fn. 1 and p. 389-392 of the DOJ paper. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 addressed the "practical" construction for the right to 28 U.S.C. § 1291. The combination never rose to the Supreme Court since the original Rule 54(b) of 1938.

E. SUPREME COURT PROVIDES THE EXCEPTION FOR USING RULE 54(B) TO RESTORE "FINALITY"

In *Curtiss-Wright Corp. v. General Elec. Co.*, 446 US 1 (1980), the Court prescribed the two-step process for Rule 54(b):

(i) Finality of Judgment – A judgment is final for the purposes of Rule 54(b) when it "terminates the litigation between the parties . . . and leaves nothing to be done but to enforce by execution what has been determined." *Parr v. United States*, 351 U.S. 513, 518 (1956)

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[12] See the 1st paper in Other Authorities

(ii) No Just Reason for Delay – to balance the judicial administrative interests and the equities issues involved. *Curtiss–Wright*, 446 U.S. at 8-10.

Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) is a class action. The Court reversed a certified order for not conforming to the finality requirement under Rule 54(b). See *Wetzel*, 511 F.2d 199 (3d Cir.); but provided NO guidance for Rule 23(b)(2). *Wal-Mart* filled in with the guidance for Rule 23(b)(2) on the right under 42 U.S.C. § 1983. In *Gelboim v. Bank of America Corp,* 135 S. Ct. 897, the Court explained Rule 8(d)(3) and Rule 54(b) for the right in consolidated multi-party or multi-issue claims. (*Id.*, at 902-906); but did not foresee Rule 81(a)(6)(B) can displace Rule 23(b)(2).

F. THE "FINDINGS OF FACT" DISPOSED OF THE *CHEVRON* DEFERENCE DOCTRINE

UBS Financial Services Inc. is the largest wealth management firm in the world. "MAC Reviewed" contract was started in 2001 with the faked "FINRA" arbitration agreement pre-planned therein. (Doc. 117 *cf.* Doc. 57-1, Exhibit A: 21) The scheme can first coerce any investor of the contract into FINRA arbitration, and then defraud a court anywhere the class action is filed.

(a.) Investors who choose the investment manager from a list of 500+ 3rd-party managers **must** sign the authorization to manage the opened accounts and the invested $ amounts. (*Cf.* Exhibit A) This is to comply with FINRA Rule 2510(b) under 15 U.S.C. § 78c(35) for obtaining "investment discretion". The district judge discarded the documentary evidence on the hedge clause practice in the pleading which provided the standing and injury in fact of all investors in the contract under Article III for the

class action. The Ninth Circuit did not follow own precedent for Rule 52(a) in 9th Cir. # 11-17131. See *Lundgren v. Freeman*, 307 F. 2d 104 (9th Cir.).

(b.) In response to the dismissal of the class action based on two [falsified] exhibits in the Rule 12(b)(6) defense (Doc. 35 *cf.* Doc 22, 23), the Rule 60(d)(3) motion (Doc. 57, -1, -2, -3) provided the record including FINRA arbitration: – There, UBS lawyer compelled the chair-arbitrator to order the production of all family member accounts which are protected by SEC Regulation S-P[13]; then falsified the contract to mislead the "findings of fact".

For Rule 52(a), the Disclosure Brochure [Rule 17 CFR § 279.1 - Form ADV] prohibits this "MAC Reviewed" contract.[14] (Doc 57, p. 11, L: 5 *cf.* Doc. 70-2 or Doc. 17, Exhibit B, p. 5, "MAC Reviewed" – *Re: "UBS does not make initial or ongoing recommendations on MAC reviewed Managers to existing and/or prospective clients.*") The shutdown of the "MAC Reviewed" program requires findings of fact for appellate review on the FINRA arbitration where these law firms obtained the signed contract from UBS. (*Cf.* Doc. 70, -1, -2, -3) – NOT rehashing the conclusion of law from fraud to keep away appellate review, during the pendency of appeal. See FRCP 62.1 / FRAP 12.1 in Doc. 93 *cf.* Doc. 71.

Regulation S-P prohibits UBS to share private account information in the contract for unlawful representation. UBS counsels already confessed to the falsification of the contract with the faked

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[13] See FINRA Notice on Regulation S-P: https://www.finra.org/rules-guidance/notices/00-66

[14] See Item 4-D: wrap fee programs https://www.sec.gov/about/forms/formadv-part2.pdf

arbitration agreement therein for the Rule 12(b)(6) defense. The tandem of attacks are irrelevant to 28 U.S.C. § 1292 or Rule 23(f).

(c.) On appeal from the Rule 60(d)(3) motion (9th Cir. 14-15588), UBS lawyers filed own Opening Brief to block "*independent*" or "*de novo*" review required by Rule 60(d)(3). (*Cf.* Doc. 124, p. 6) **FRAP 28.1(c)(5) prohibits "cross-appeal" to obstruct circuit proceeding.** (Dkt. 16 *cf.* Dkt. 10-1 & the vanished prior filings). Upon a FRAP 3.6 motion for manifest injustice nearly 3 years later (Dkt. 23-1, -2, -3, -4 *cf.* Opening brief: Dkt. 6-1 & 7 for Notice of Appeal - Doc. 71), the Circuit applied "abuse of discretion" (*cf.* Dkt. 28-1), without the underlying 28 U.S.C. § 1291 and 28 U.S.C. § 1331. "*De novo*" review under *Lundgren*, 307 F. 2d 104 (at 114 – 115) should have reached the FINRA arbitration in the record.

(d.) The Supreme Court also denied petition for Certiorari three times. (Nos. 13-74, 17-157, 19-1013) However, the district court never delivered a final judgment to satisfy the §1291 prerequisite for §1254 jurisdiction. Of them the clerk of this Court refused to docket the last one under §1253 as required by Congress. – Because UBS lawyers preempted the *minute* order for [direct] appeal, despite their confession. (See Doc. 100, 102, 102-1 *cf.* Doc. 107-3, -4)

(e.) Lead-plaintiff filed a Rule 54(b) motion for the district court to correct the break-up of a single unit class action, and let the Supreme Court to bring "finality" to end the class action on the merit.

Hazel-Atlas v. Hartford, 322 U.S. 238, 248 provides "equity relief against fraud". Hon. Justice Roberts explained the odious fraud beyond Rule 60(b) (*Id.* at 258) for a "final judgment" by examining the "extrinsic" evidence (*Id.* at 261 & Fn. 18) that would

not have been considered in *United States v. Throckmorton*, 98 U.S. 61. The conspiracy and privacy violations between UBS and the law firms violated the civil right of all class members - 42 U. S. C. § 1983. GLB Act (15 U.S.C. § 6823) and RICO Act (18 U.S.C. § 1964) provide civil penalty **after** criminal conviction.

G. THE JUDGE USED 28 U.S.C. § 1651 TO ELIMINATE RULE 54(B) FOR THE RIGHT TO "FINALITY" UNDER 28 U.S.C. § 1291

The Supreme Court has concluded that judges must not interpret a federal statute "in a manner that would render it "clearly unconstitutional" if "another reasonable interpretation [is] available," even if that other interpretation entails reading a different federal statute to raise "a constitutional question". See *Edmond v. United States*, 520 U.S. 651, 658 (1997); *Blodgett v. Holden*, 275 U. S. 142 (1927); *United States v. Delaware & Hudson Co.*, 213 U.S. 366. "Avoiding *actual* unconstitutionally" is analyzed in the Harvard L. Rev. forum paper. See the 3rd "Other Authority". *Chevron* Deference requires district court to conduct the "findings of fact" at step one of the 2-step analysis, and NOT to obstruct the authority of agencies under Article II.

Here, the judge disposed of the pleaded UBS documentary evidence for the hedge clause violation (*cf.* Doc. 35), which invoked 15 U.S.C. §80b-14 for suits and offenses. (*Supra.* Harvard L. Rev.; Fn. 20)

(a.) Congress enacted Rule 54(b) and 28 U.S.C. § 1651 in Judicial Act of 1948. **Both** require the underlying "finality rule" for 28 U.S.C. § 1291. As to district court's power under § 1651, it is detailed in *Bauman v. United States Dist. Court*, 557 F. 2d 650 at 654-656 (9th Cir.) for whether a district court

should NOT subject to appellate §1651 mandamus. The *Bauman* case was about the authority to opt-in for a Rule 23(c)(1) class, while this case is a Rule 23(b)(2) mandatory class which bars opt-out.

(b.) The *Wal-Mart* jurisprudence imposes the burden on the defense to prove **no** existence of law or fact common to the class under Rule 23(a). Advisory Committee on Rule 23 repeatedly stated the equity principle of class action. *Amchem Products*, 521 U.S. 591, 613) instructed that Rule 23's requirements must be interpreted in keeping with Article III constraints. See *Wal-mart*, 564 U.S. 338 at 361. As FINRA Rule 3110(f) excludes any class action, Rule 81(a)(6)(B) cannot displace Rule 23(b)(1 or 2).

(c.) Rule 81(b) abolished writs of *scire facias* (show cause) and *mandamus* for the change to 28 U.S.C. §1651 in Judicial Act of 1948. See the consolidation of §§342, 376, 377.[15] Moreover, this Court established the usage of 28 U.S.C. § 1651 in *United States v. New York Tel. Co.*, 434 U.S. 159, at 172 – only as the gap-filler not available in statute. There is NO gap-filler for the IAA, or the agency authorities on the violations in the contract.

To oppose the duress of the [abolished] "show cause", the Response pointed directly to court record of the Rule 60(d)(3) Motion, *in verbatim*:

(i) FIRST, the Rule 60(d)(3) motion (Doc. 57, -1, -2, -3) provided the real FINRA Rule 3110(f) arbitration agreement to prove the faked "arbitration agreement" and the eliminated SEC authority under 15 U.S.C. § 80b-2(a)(11)(C) on *Heitman Capital* No Action Letter for the unlawful hedging practice of the

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[15] https://www.govinfo.gov/content/pkg/USCODE-2009-title28/html/USCODE-2009-title28-partV.htm

contract (Doc. 57, pp. 4 – 10 *cf.* Doc. 57-1, Part-2 - Investment Manager: §4 Anti-Money Laundering and Reporting Responsibilities) But the judge upheld two Exhibits for the falsified Rule 12(b)(6) defense and eliminated FINRA chair-arbitrator's misconduct. (Doc. 57-3, Exhibit C: 23 *for* Doc 57, p. 12-16) Also see Doc. 117 *cf.* Doc. 69, p. 13.

(ii) SECOND, Money laundering is NOT "narcotics trafficking" as the reason to eliminate the pleaded UBS documents. (Doc. 69, p. 9 *cf.* Doc. 35) *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2502 requires that "courts must consider the complaint in its entirety..." *See* Doc. 117.

(iii) THIRD, the judge contradicted own consent to falsification. See Doc. 117 *cf.* Doc. 116, 100

(d.) The Rule 54(b) motion called out the letter from VP of FINRA Arbitration who apologized for the arbitrator misconduct (Doc. 114 *cf.* Doc. 88 & 88-1 for Doc. 89). This letter and the UBS lawyer's confession and the faked arbitration agreement concluded the "clearly erroneous" review for Rule 52(a). This Court does NOT need a certified decision under Rule 54(b) to end the class action based on the eliminated UBS documents in the pleading. (Doc. 35, p. 9 *cf.* Doc. 17)

All rulings disposed of 15 U.S.C. § 80b-2(a)(11)(C) with NO "findings of fact" for step-1 of *Chevron* Deference (Doc. 35, 69, 72, 100, 103, 110, 113, 125 *cf.* Doc. 57, 80, 89, 107, 114). All investors for the contract were denied the right to fiduciary duty under *SEC v. Capital Gains*, 375 U.S. 180, and the right to an untainted court under *Hazel-Atlas v. Hartford*, 322 U.S. 238. **The Court needs *Ex Parte* intervention.**

MANDAMUS AND CONCLUSION

Declaring power under § 1651 using the [abolished] "show cause" affirmatively proved the violation of *Chevron* Deference. Judge Alsup does not have judicial power to suppress the fraud and the laws in the record. (*See Appendix*, Sanction, p. 7) It laid bare the judge's challenge: – Does the Supreme Court have the "discretion" NOT to protect the Separation of Powers and juridical integrity?

Bauman v. United States Dist. Court, 557 F. 2d 650 (9th Cir.) is the controlling precedent for 28 U.S.C. § 1651. The circuit panel analyzed the binding Supreme Court cases on five factors that a district court should NOT have the power under § 1651. (*Id.* at 654-656) All factors require the underlying "finality" for 28 U.S.C. § 1291; and **none** permits the presiding district judge to claim § 1651 *sua sponte*. Here is the record of judicial usurpation of power:

(1) The judge never delivered the "finality" under § 1291, because he exploited Rule 52(a)(3) to break up the "single unit" class action. Apparently, abolishing "show cause" for § 1651 is to stop circular reasoning fallacy: – The pre-filing sanction under § 1651 is self serving to deny the authority of Supreme Court to administer the due process for Rule 54(b).

(2) Hsu warned in good-faith that *Ringgold-Lockhart*, 761 F.3d 1057, 1062 (9th Cir.) does not authorize the power under § 1651, and would violate the First Amendment right of all victimized investors. (Doc. 125 *cf.* Doc. 117). See how *BE&K Constr. Co.*, 536 US 516, 525 was cited in *Ringgold-Lockhart*. And the defense lawyer's Response used "*on information and believe*" under order to circumvent the court record. (Doc. 123, 124 *cf.* Doc. 119)

This Court has the authority to initiate indictment, via DOJ, against UBS Financial Services Inc. who is a foreign subsidiary and conspired with the law firms to obstruct the enforcement of the US laws – 18 U.S.C. §1512(c), §241 and CA Civ. Code § 1714.10(c). *See* 15 U.S.C. § 78o: subsec. (k & m).

The Court must eliminate the systemic loopholes that undermined the judicial integrity; and should consider appointing a Special Committee that Ninth Circuit chose not to. (Case No. 21-90007) It seems proper to review the judge's case management history. The Court should appoint a qualified law firm to complete the class action – civil and criminal; and order UBS and Reed Smith LLP to pay all losses and costs under the inherent power of the Court, *Chambers v. Nasco, Inc.*, 501 U.S. 32, 43 (1991). And award punitive damages under California Civ. Code § 3294 designated for public interests.

Dated: March 23, 2022

Respectfully submitted,
/S/ Darru K. Hsu
DARRU K. HSU, ***pro se***