UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DARRU K. HSU,

Plaintiff,

v.

UBS FINANCIAL SERVICES, INC.,

Defendant.

No. C 11-02076 WHA

ORDER RE PREFILING REVIEW AS TO PLAINTIFF DARRU K. HSU

INTRODUCTION

This order arises from a putative class action dismissed in August 2011. For the reasons that follow, this order designates *pro se* plaintiff a vexatious litigant and ORDERS PRE-FILING REVIEW to the extent stated herein of future filings by plaintiff and about defendant.

STATEMENT

The background of this case is set forth in our prior orders (Dkt. Nos. 35, 69, 94, 110, 116). In brief, plaintiff Darru K. Hsu entered into a wrap agreement with defendant UBS Financial Services, Inc. for investment and advisory services. Hsu brought this action under the Investment Advisers Act, alleging that USB provided services "in its capacity as an investment advisor," but that a "hedge clause" in his agreement with USB impermissibly required Mr. Hsu to waive certain rights under the Act (*see* Dkt. No. 17).

An August 2011 order dismissed Mr. Hsu's first amended complaint for failure to state a claim. Although the dismissal order permitted Mr. Hsu an opportunity to propose a second amended complaint, Mr. Hsu did not amend, and judgment was eventually entered in favor of USB. Shortly thereafter, Mr. Hsu appealed. During the appeal process, Mr. 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 January 2014, Mr. Hsu moved to set aside the judgment pursuant to FRCP 60(b)(6) and FRCP 60(d)(3). The motion was denied by a March 2014 order. In May 2017, our court of appeals denied an en banc rehearing, and noted that no further filings will be entertained in this closed case. The Supreme Court denied a petition for rehearing in December 2017 (Dkt. Nos. 57, 69, 74–79).

In February 2018, Mr. Hsu again moved to set aside the judgment pursuant to FRCP 60(b)(4). USB, in turn, moved to have Mr. Hsu declared a vexatious litigant. An April 2018 order denied both motions, finding that Mr. Hsu had failed to establish that relief from judgment was warranted and that the record failed to demonstrate that Mr. Hsu was a vexatious litigant. The order, however, warned Mr. Hsu that he would soon be declared a vexatious litigant if he continues with unmeritorious litigation (Dkt. Nos. 80–81, 87).

In January 2019, Mr. Hsu moved for reconsideration of the April 2018 order, and to "transfer jurisdiction" and to disqualify the undersigned judge. USB again moved to declare Mr. Hsu a vexatious litigant (Dkt. Nos. 89–92). A March 2019 order denied both

motions, but also sent a final warning: should Mr. Hsu file *any* new filings that are duplicative of matters that have already been definitively resolved in this case, he would be declared a vexatious litigant (Dkt. No. 94). In October 2019, our court of appeals denied Mr. Hsu's motion for reconsideration, and again noted that no further filings will be entertained in this closed case. In April 2020, the Supreme Court denied a petition for writ of certiorari (Dkt. Nos. 97, 101–106).

In August 2020, Mr. Hsu moved for a writ to certify a class and appoint class counsel under the All Writs Act. A September 2020 order denied the motion (Dkt. Nos. 107, 109–110). An order filed on the same day entered judgment in favor of USB and against Mr. Hsu (Dkt. No. 111). Mr. Hsu moved for leave to file a motion for reconsideration of the order denying his motion for writ. A November 2020 order denied the motion (Dkt. No. 113).

In July 2021, Mr. Hsu moved for entry of judgment pursuant to FRCP 54(b) (Dkt. No. 114). A November 2021 order denied the motion and requested Mr. Hsu to show cause why he should not be deemed a vexatious litigant, to which Mr. Hsu filed his response (Dkt. Nos. 116, 117).

A hearing was held in person on November 29, 2021. Defense counsel did not appear despite having received notice of the hearing. Mr. Hsu appeared on time and made a statement to the Court. After the hearing, this Court ordered the defense counsel to file a declaration to explain whether Mr. Hsu's statement at the hearing is persuasive or not (Dkt. No. 119). The order further noted that Mr. Hsu may reply in writing within 14 days of the defense filing. USB timely filed a response. So did Mr. Hsu (Dkt. Nos. 123, 124).

USB correctly notes that Mr. Hsu raises issues that were brought or could have been brought before final judgment and that he "does not address the fact that the judgment became final after plenary exhaustion of all available appeals from the judgment, does not address the res judicata bar, does not address the interest in the finality of judgment, and does not state any reason why he should not be declared a vexatious litigant" (Dkt. No. 123). In response, Mr. Hsu raises the same issues as before.

ANALYSIS

When a litigant's filings are numerous and frivolous, districts courts have the inherent power under 28 U.S.C. Section 1651(a) to declare the litigant vexatious and enter a prefiling order requiring that future complaints be subject to an initial review before they are filed. *See Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007). Our court of appeals has cautioned that "such pre-filing orders are an extreme remedy that should rarely be used" because of the danger of "tread[ing] on a litigant's due process right of access to the courts." *Ibid.* Exuberant *pro se* litigation does not suffice for a prefiling order. The litigant's claims must prove both numerous and patently meritless. *See Molski*, 500 F.3d at 1059. A prefiling order becomes appropriate when "[f]lagrant abuse of the judicial process . . . enables one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants." *De Long v. Hennessey*, 912 F.2d 1144, 1148 (9th Cir. 1990).

Our court of appeals requires: (1) notice to the litigant, (2) an adequate record for review, (3) substantive findings of frivolousness, and (4) narrowly-catered orders. *De Long*, 912 F.2d at 1147–48; *see also Ringgold-Lockhart v. Cty. of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014).

First, a litigant must have adequate notice and a chance to be heard before being declared a vexatious litigant. Here, Mr. Hsu received notice when the Court twice warned him that he was at risk of being declared a vexatious litigant (Dkt. Nos. 87, 94). Mr. Hsu was given the opportunity to file response and attend hearing to show cause why he should not be deemed a vexatious litigant (Dkt. Nos. 116, 117). He attended. Defense counsel did not, so after the hearing, counsel got an opportunity to respond in writing and explain the absence, and Mr. Hsu received an opportunity to reply (Dkt. No. 119). Mr. Hsu was afforded sufficient procedural due process. *See Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000). Accordingly, the first element has been satisfied.

Second, a district court must create a record for review which, at least, shows in some manner that the litigant's activities were numerous or abusive. Mr. Hsu's activities were numerous. Over the past ten years, Mr. Hsu filed many motions to reargue his closed case (in 2014, 2018, 2019, 2020, and 2021), relying on repetitive and incomprehensible arguments that the Court had already rejected. He has gone up on appeal six times: three times to our court of appeals (in 2011, 2014, and 2019) and three times to the Supreme Court (in 2013, 2017, and 2019), all without success.

Third, a district court must make substantive findings as to the frivolous or harassing nature of the litigant's actions. The November show-cause order detailed how Mr. Hsu was twice warned of the risk of the being declared a vexatious litigant (Dkt. No. 116). To reiterate, the April 2018 order had warned Mr. Hsu that he had no right to file frivolous and harassing motions, and that he would soon be declared a vexatious litigant if he continued with

unmeritorious litigation (Dkt. No. 87). The order from March 2019 gave Mr. Hsu a final warning that should he file *any* new briefs that duplicated arguments already definitively addressed in this case, he would be declared a vexatious litigant and will be required to submit for pre-filing review (Dkt. No. 94).

Mr. Hsu continued to file new motions with duplicative and repetitive arguments. For example, in his response to the show cause order and at the hearing, instead of explaining why he should not be deemed a vexatious litigant, Mr. Hsu again argued issues that were rejected many times before by the Court, including that defense counsel had falsified documents, USB's contract terms were deceptive, and that the Court lacked jurisdiction over this dispute (Dkt. Nos. 117, 124). Further, on reply, Mr. Hsu reargued various points about the existence of fraud, that a class should be certified, that the case should not have been subject to arbitration, that the Court should have deferred to agency interpretation, and that his motion for all writs should have prevailed (*see* Dkt. No. 124). Our record shows that meritless filings have consumed significant judicial resources.

Fourth, the prefiling order must be narrowly tailored to closely fit the specific abuse encountered. Here, this order will restrict its scope to restrain Mr. Hsu from "reopen[ing] litigation based on the facts and issues decided in" previous lawsuits brought against the same or nearly the same group of defendants. *Wood v. Santa Barbara Chamber of Commerce*, 705 F.2d 1515, 1526 (9th Cir. 1986).

Hsu has had full and fair opportunity to litigate his case. This order finds his response and statements at the hearing unpersuasive. If he decides to bring a future action, whether *pro se* or represented by counsel, he must satisfy the prefiling requirements

and clearly and succinctly explain why his claims sidestep *res judicata*.

CONCLUSION

For the reasons stated above, this order requires that future lawsuits against USB by Mr. Hsu first be screened by the undersigned judge in accordance with this prefiling order.

The Clerk of the Court is instructed not to automatically accept any further filings from Mr. Hsu, whether via counsel or himself, if they are:

(1) brought against UBS Financial Services, Inc., any of its current or former parents, subsidiaries, or affiliate companies, any of its current or former officers, directors, or employees; or

(2) brought against any of the attorneys or law firms that formerly or presently represent any of the parties in this or in past litigation.

IT IS SO ORDERED.

Dated: February 8, 2022

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DARRU K HSU,

Plaintiff,

v.

UBS FINANCIAL SERVICES, INC.,

Defendant.

No. C 11-02076 WHA

ORDER RE SHOW-CAUSE HEARING

A show-cause hearing was held in person on November 29, 2021. *Pro se* plaintiff Darru Hsu appeared on time and made a statement to the Court concerning why the arbitration agreement at issue was fraudulent and why a class should be certified. The hearing was delayed for 15 minutes for counsel for defendant to appear. Neither defendant nor its counsel appeared at any time despite having received notice of the hearing. It is distressing that defendant failed to appear. While the Court has been working to resolve this issue, the defense has spurred the opportunity to assist the Court.

Our docket record shows that counsel for defendant is Justin E. McGuirk of the law firm Reed Smith. Counsel are hereby ORDERED to read the transcript of yesterday's proceeding and file a declaration under oath within 14 DAYS of this order, to explain whether plaintiff's statement at the hearing is persuasive or not, including his comments as to why the arbitration was fraudulent. Counsel shall also in the declaration cover everything brought up by plaintiff Hsu in his briefing on the order to show

cause. Meanwhile, this order will hold the order to show cause in abeyance. The Court will later decide whether or not to impose any pre-filing requirement upon plaintiff. Within 14 DAYS of the defense filing, plaintiff may reply in writing.

IT IS SO ORDERED.

Dated: November 30, 2021

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DARRU K HSU,

Plaintiff,

v.

UBS FINANCIAL SERVICES, INC.,

Defendant.

No. C 11-02076 WHA

ORDER TO SHOW CAUSE AND ORDER RE PLAINTIFF'S FRCP 54(b) MOTION

INTRODUCTION

In this putative class action, which a prior order dismissed in August 2011, *pro se* plaintiff once again moves for relief. For the reasons that follow, *pro se* plaintiff's motion under FRCP 54(b) is DENIED. Plaintiff is ORDERED TO SHOW CAUSE why he should not be deemed a vexatious litigant.

STATEMENT

The background of this case is set forth in our prior orders (Dkt. Nos. 35, 69, 94, 110). In brief, plaintiff Darru Hsu entered into a wrap agreement with defendant UBS Financial Services, Inc. for investment and advisory services. Hsu brought this action under the Investment Advisors 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 eventually 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 January 2014, Hsu moved to set aside the judgment pursuant to FRCP 60(b)(6) and FRCP 60(d)(3). The motion was denied by a March 2014 order. In May 2017, our court of appeals denied an en banc rehearing, and noted that no further filings will be entertained in this closed case. The Supreme Court denied a petition for rehearing in December 2017 (Dkt. Nos. 57, 69, 74–79).

In February 2018, Hsu again moved to set aside the judgment pursuant to FRCP 60(b)(4). 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 a vexatious litigant. The order, however, warned Hsu that he would soon be declared a vexatious litigant if he continues with unmeritorious litigation (Dkt. Nos. 80–81, 87).

In January 2019, Hsu moved for reconsideration of the April 2018 order, and to "transfer jurisdiction" and to disqualify the undersigned judge. Defendant again moved to declare Hsu a vexatious litigant (Dkt. Nos. 89–92). A March 2019 order denied both motions,

but also sent a final warning: should Hsu file any new filings that are duplicative of matters that have already been definitively resolved in this case, he would be declared a vexatious litigant (Dkt. No. 94). In October 2019, our court of appeals denied Hsu's motion for reconsideration, and again noted that no further filings will be entertained in this closed case. In April 2020, the Supreme Court denied a petition for writ of certiorari (Dkt. Nos. 97, 101–106).

In August 2020, Hsu moved for a writ to certify a class and appoint class counsel under the All Writs Act. A September 2020 order denied the motion (Dkt. Nos. 107, 109–110). An order filed on the same day entered judgment in favor of defendant and against plaintiff (Dkt. No. 111). Hsu moved for leave to file a motion for reconsideration of the order denying his motion for writ. A November 2020 order denied the motion (Dkt. No. 113).

Hsu now files a motion under FRCP 54(b) (Dkt. No. 114). The defendant, if served, has not filed any opposition.

ANALYSIS

1. FEDERAL RULE OF CIVIL PROCEDURE 54(b).

Similar to many of plaintiff's previous motions, the essence of the current motion is that defendant falsified documents submitted in connection with its motion to dismiss, and that the 2011 dismissal order relied on falsified materials and improperly failed to convert defendant's FRCP 12(b)(6) motion into a motion for summary judgment.

FRCP 54(b) provides that a district court may enter final judgment on individual claims in multiple claim actions upon an express determination that there is no just reason for delay. *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 954 (9th Cir. 2006). Hsu's FRCP 54(b) motion, however, requests the

Court to revise its earlier rulings and to certify a class. The motion is incomprehensible and is not cognizable as an FRCP 54(b) motion. Even if brought properly under FRCP 54(b), the motion would still fail because final judgment has been entered in this case.

Because the motion merely repeats arguments previously rejected by the Court and fails to show that it has any merit under FRCP 54(b), the motion is DENIED.

2. Order To Show Cause.

When a litigant's filings are numerous and frivolous, districts courts have the inherent power under 28 U.S.C. § 1651(a) to declare him or her a vexatious litigant and enter a pre-filing order requiring that future complaints be subject to an initial review before they are filed. See *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir 2007). Our court of appeals has cautioned that "such pre-filing orders are an extreme remedy that should rarely be used" because of the danger of "tread[ing] on a litigant's due process right of access to the courts." *Ibid.* Nevertheless, such pre-filing orders are sometimes appropriate because "[f]lagrant abuse of the judicial process . . . enables one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants." *De Long v. Hennessey*, 912 F.2d 1144, 1148 (9th Cir. 1990).

Defendant twice before moved for a pre-filing order. Despite rejecting both motions, the Court did warn Hsu, repetitively, about the risk of declaring him a vexatious litigant. The April 2018 order had warned "that [Hsu] ha[d] no right to file frivolous and harassing motions, and that doing so violates FRCP 11." That order also warned Hsu that if he "continue[d] with unmeritorious litigation, he [would]

soon be declared a vexatious litigant." (Dkt. No. 87). The March 2019 order issued a final warning, that "[s]hould [Hsu] 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." (Dkt. No. 94). Hsu, however, continues to file new motions with duplicative and repetitive arguments that have been rejected before. These filings are frivolous as well as indecipherable and incomprehensible and have unnecessarily consumed judicial time and resources.

Plaintiff is hereby ORDERED TO SHOW CAUSE why he should not be deemed a vexatious litigant subject to a pre-filing order. Responses, if any, to this order to show cause shall be due NOVEMBER 24, 2021, AT 5:00 P.M.. A hearing shall be held in person in Courtroom 12 on the 19th floor of 450 Golden Gare Avenue, San Francisco, CA 94102 on NOVEMBER 29 AT 1:30 P.M.

IT IS SO ORDERED.

Dated: November 10, 2021

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE