No. 24-_____

SUPREME COURT OF THE UNITED STATES

Yuri Starostenko, Irina Tsareva-Starostenko,

Petitioners,

vs.

UBS AG, (A Swiss Bank and Brokerage Firm),
UBS (Bahamas) LTD (In voluntary liquidation),
(An Offshore Bank and and Brokerage Firm),

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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Appellants

I. Questions Presented

(1) Whether a District Court's decisions and findings of fact must be accorded deference on appeal?

(2) Whether a Court of Appeals may depart *sua sponte* from a District Court's findings of fact without adversarial briefing and without any reasons being stated, without relying on any departure factors or particular facts of a case, and without an opinion or alternative findings of fact?

(3) Whether the Court of Appeals, exercising its discretion to determine whether this civil appeal brought by *pro se* litigants and filed *in forma pauperis* "lacks an arguable basis either in law or in fact" under *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) and 28 U.S.C. § 1915(e), owes deference to the District Court's finding that the Fed. R. App. P. 24(a)(1) motion for leave to proceed *in forma pauperis* "satisfies each of the Rule 24 criteria and presents non-frivolous issues for appellate consideration" of the appeal taken in good faith under 28 U.S.C § 1915(a)(3) based on a wide range of facts that were more readily available to the District Court than to the Court of Appeals?

(4) Whether the Court of Appeals accurately stated and applied the legal standard under *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) and 28 U.S.C. § 1915(e) used to determine that this civil appeal brought by *pro se* litigants and filed *in forma pauperis* "lacks an arguable basis either in law or in fact" when reviewing the District Court's dismissal of this civil action without prejudice for lack of personal jurisdiction, subsequent to screenings under 28 U.S.C. §§ 1915(a), 1915(e) and 1915A?

(5) Whether a trial Court may strike allegations brought by *pro se* litigants that were present in prior pleadings and reincorporated into an amended pleading by reference?

(6) Whether, despite the continued existence of the Exchange Act of 1934 and ongoing Congressional concern for investor trust in U.S. regulated markets, can U.S. registered brokers or dealers, such as UBS AG (a publicly traded entity on the New York Stock Exchange subject to FINRA Rule 4311(a)(2)), engage in "material misrepresentations and misleading omissions" in securities transactions, even if such actions violate Rule 10b-5's prohibition against such activity and undermine market integrity, public confidence, and national revenue, particularly when orders are not sent to the established U.S. exchanges, in doing so legalizing fictitious trading?

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Yuri Starostenko and Irina Tsareva-Starostenko, were Bahamas-based securities traders, who secured a five-year loan from Respondent UBS (Bahamas) LTD, as an offshore bank, for their home in the Bahamas Lyford Cay exclusive gated community to fund their trading through Respondent UBS (Bahamas) LTD, as a brokerage firm, and deposited $729,749 United States dollars in loan proceeds into Respondent UBS (Bahamas) LTD, as a brokerage firm, to be used for trading on the United States public markets. Mr. and Mrs. Starostenko respectfully petition this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

V. Opinions Below

The order by the United States District Court for the Southern District of New York granting Mr. and Mrs. Starostenko's application to appeal *in forma pauperis* was docketed on January 6, 2023 as "Case 1:19-cv-09993-KPF Document 140". The orders by the United States Court of Appeals for the Second Circuit dismissing *sua sponte* Mr. and Mrs. Starostenko's appeal filed *in forma pauperis* were docketed on June 8, 2023 as "Case 23-20, Document 50" and "Case 23-20, Document 51". The Mandate was docketed on August 9, 2023 as "Case 23-20, Document 79". The orders by the Court of Appeals denying Mr. and Mrs. Starostenko's motion for reconsideration were docketed on July 12, 2023 as "Case 23-20, Document 65" and "Case 23-20, Document 66". The order by the Court of Appeals denying Mr. and Mrs. Starostenko's motions for review *de novo* the lower Court's interpretation of the appellate mandate and/or for a recall of the appellate mandate was docketed on October 27, 2023 as "Case 23-20, Document 89". The Court of Appeals returned Mr. and Mrs. Starostenko's motion for *en banc* consideration under Fed. R. App. P. 35(a)(1) without adequate due process because the "appeal is closed, and this Court no longer has jurisdiction" by "notice of

document returned", which was docketed on November 13, 2023 as "Case 23-20, Document 91-1". The orders and notice above are attached at Appendix.

VI. Jurisdiction

Mr. and Mrs. Starostenko's motion for *en banc* consideration under Fed. R. App. P. 35(a)(1) timely filed by them in the United States Court of Appeals for the Second Circuit was returned on November 13, 2023. Mr. and Mrs. Starostenko invoke this Court's jurisdiction under 28 U.S.C. §§ 1254, 2101(c) and 2106, having timely filed this petition for a writ of certiorari within ninety days of the last Court of Appeals' decision, the date of the return or denial of the motion for *en banc* consideration.

VII. Statement of the Case

Almost 70 years ago, this Court held in *McAllister v. United States*, 348 U.S. 19, 20, 75 S.Ct. 6, 99 L.Ed. 20 (1954) 'crucial finding of the trial court' should have been accepted by an appellate court unless clearly erroneous.

In *Cooter Gell v. Hartmarx Corp.*, 496 U.S. 384, 403, 404 (1990), this Court held: "Two factors the Court found significant in *Pierce* are equally pertinent here. First, the Court indicated that "'as a matter of the sound administration of justice,'" deference was owed to the "'judicial actor . . . better positioned than another to decide the issue in question.'" 487 U.S., at 559-560, quoting *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985). . . Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation." (Some cites omitted)

In *Sygma Photo News, Inc. v. High Soc. Magazine*, 778 F.2d 89, 95-96 (2d Cir. 1985), the United States Court of Appeals for the Second Circuit held: "The Advisory Committee on Rules, however,

has declared that considerations turning on the nature of the evidence were "outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts." See Fed.R.Civ.P. 52 advisory committee note. The Advisory Committee continued, "To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate re-trial of some factual issues, and needlessly reallocate judicial authority." Id. Thus the 1985 amendment states that findings of fact, whether based upon oral or documentary evidence, shall not be set aside "unless clearly erroneous"; the amendment adopts the view of Professor Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn.L.Rev. 751, 769-70 (1957), and returns to the views of the original draftsman of Rule 52, Charles E. Clark (later Chief Judge of this court), as set forth in 5A J. Moore J. Lucas, Moore's Federal Practice ¶ 52.04 at 52-107 n. 15 (2d ed. 1985)."

This case, in a nutshell, involves the question of whether a District Court's decisions and findings of fact must be accorded deference on appeal?

A. Fraudulent Statements under Sections 10(b)

Mr. and Mrs. Starostenko alleged in their third complaint that Respondents have engaged in acts, practices, schemes and courses of business that constitute violation under Sections 10(b) (15 U.S.C. § 78j) and Section 20(a) of the Securities Exchange Act of 1934, Rule 10b–5(b) (17 C.F.R. § 240.10b-5(b)) and Section 17(a) of the Securities Act of 1933 (15 U.S.C. § 77q(a)).

B. Appeal

On appeal, Mr. and Mrs. Starostenko were to argue that the facts set out in the record show that the case was dismissed without evidence, a hearing, or the benefit of discovery, with no reasonable opportunity for them, acting *pro se*, to effectively argue their case and their application for *pro bono*

counsel was denied by the United States District Court for the Southern District's order docketed on April 7, 2022 as "Case 2:19-cv-09993-KPF Document 122". Furthermore, the District Court's Opinion and Order and Judgement docketed on January 4, 2023 as "Case 1:19-cv-09993-KPF Document 135" and "Case 1:19-cv-09993-KPF Document 136" strongly indicate that the District Court proceeded on inadequate facts, for it is unlikely that any of Respondents could have proven any of Mr. and Mrs. Starostenko's allegations of securities fraud through discovery, since they failed to produce requested documents on numerous occasions, dating back to November 2019.

Further, Mr. and Mrs. Starostenko were to argue that the District Court was wrong when it first permitted them to file a third amended complaint "to (i) ensure that certain claims that were alleged in the First Amended Complaint but omitted from the Second Amended Complaint are reincorporated into Plaintiffs' pleading" by the memo dated February 4, 2022 docketed as "Case 2:19-cv-09993-KPF Document 108", but consequently the District Court struck "the TAC's incorporation by reference of the FAC and the SAC" and did not permit the Petitioners "to incorporate the 99-page FAC or the 42-page SAC by reference, leaving Defendants [Respondents] and the Court to wade through the pleadings and their associated affidavits and exhibits for the relevant factual allegations that Plaintiffs [Petitioners] were ordered to put forward in the TAC. The Court therefore strikes paragraph 13 from the TAC" by the order dated April 7, 2022 docketed as "Case 2:19-cv-09993-KPF Document 122". (Square brackets added)

Also, Mr. and Mrs. Starostenko were to argue that the District Court was wrong when it dispensed of their following arguments:

1. as to doctrines "relevant to the due process specific jurisdiction inquiry" and whether or not "compliance with New York's long-arm statute", jurisdiction in the District Court was also premised on subdivision (a) of section 302 of the New York Civil Practice Law and Rules (N.Y. C.P.L.R. § 302(a)), which provides the statutory authority for reliance purposes of

specific personal jurisdiction on "[a]cts which are the basis of jurisdiction" "causing injury to person or property within the state" and having "consequences in the state and derives substantial revenue from interstate or international commerce", authorizing a court to exercise personal jurisdiction over any non-domiciliary, who in person or through an agent, transacts any business within the state or contracts anywhere to supply services in the state, especially, over Respondent UBS AG (A Swiss bank) which is inherently engaged in interstate commerce and derived "substantial revenue from interstate or international commerce";

2. as to securities fraud perpetrated by Respondents, that "the impact of Defendants' actions on the U.S. economy writ large are simply not relevant to the minimum contacts analysis" and "effects of the purported fraud on the U.S. economy cannot be the basis for specific jurisdiction" referred to in the Opinion and Order, at pages 15 to 16 and 20; footnote 5 at page 16 (*see* Case 1:19-cv-09993-KPF Document 135);
3. as to contacts with New York, even if the evidence added by Mr. and Mrs. Starostenko is from 2010–2011, *infra,* it would justify altering the District Court's decision of January 4, 2023, because Respondent UBS AG is still a *"frequent issuer"* in New York; and
4. as "to use of New York banks" by Respondents who should have maintained correspondent accounts at a United States bank(s) to effect transactions in lawful money of the United States, under the NSCC's[1] rules for the purposes of:

    — making the clearing fund contributions due for calculating the contribution requirements at the start of each day and intraday in volatile markets; and

[1] This data was to be sent to the National Securities Clearing Corporation (NSCC), with address at 55 Water St., New York, NY 10041, USA, for clearinghouse and settling services — for the cash and the securities to be electronically exchanged — i.e., for the transactions to be cleared and settled at NSCC, which guarantees the delivery of cash and securities to its members, collects clearing fund contributions, or margin, from clearing members at the start of each day and intraday in volatile markets, under the rules for calculating the contribution requirements and the timing of collection of contributions known to every clearing member; and which provides reporting tools, calculators, and documentation to allow the members to monitor their risk in near real-time and estimate clearing fund contribution requirements.

— trading limits in the 51 securities transactions, which are the subject of the instant litigation, expressed in United States dollars in United States exchange-traded fund shares (“ETFs”) publicly traded on the Trading Places of New York Stock Exchange ("NYSE”), with address at 11 Wall St., New York, NY 10005, USA, and National Association of Securities Dealers Automated Quotations System ("NASDAQ”), with address at 4 Times Square (43rd & Broadway), New York, NY, USA.

Also, Mr. and Mrs. Starostenko were to argue that the District Court and the Court of Appeals were wrong when they refused to consider evidence of Respondents’ contacts with New York establishing the geographic jurisdiction of New York State over allegations of securities fraud based on Respondent UBS AG’s acts documented in the United States Securities Exchange Commission (SEC) via EDGAR and messenger, and the acts of its wholly owned Bahamian subsidiary, Respondent UBS (Bahamas) LTD, both transacting in securities in New York, showing additional conduct for the purposes of personal jurisdiction under N.Y. C.P.L.R. § 302(a), out of many examples of such evidence:

1. in 2018, its annual revenue was USD Mln 35,383, of which USD Mln 5,664 was derived from New York State;
2. UBS AG’s Registration Statements in its PROSPECTUS ADDENDUM (to Prospectus Supplement dated February 4, 2022 and Prospectus dated May 27, 2022) related to various series of outstanding Exchange Traded Access Securities (collectively, “ETRACS”) previously issued by UBS AG that are part of a series of debt securities entitled “Medium Term Notes, Series B” (“Securities”): (i) the use in New York of “Agent: UBS Securities LLC” and (ii) “the corporate trust office of the trustee in New York City”; (iii) the “substantial revenue from interstate or international commerce” of United States dollars “$25,000,000 aggregate Stated Principal Amount of Securities (1,000,000 Securities) of each series”, by UBS AG who (iv) offered, and (v) sold securities to and through UBS

Securities LLC, as agent, to United States investors, including "fiduciar[ies] of a pension, profit-sharing or other employee benefit plan subject to the U.S. Employee Retirement Income Security Act of 1974" and U.S. holders having U.S. Federal Income Tax Consequences, and to dealers acting as principals for resale to the investors, most of whom are likely to be New York State residents; and (vi) effected the swap or related hedge transactions, including (vi) lending the Securities to broker-dealers and other persons in the United States making short sales of the Securities subject to their obligation to repurchase such Securities at a later date to (vii) "earn additional income" in New York State (docketed by the District Court on January 18, 2023 as "Case 1:19-cv-09993-KPF Document 141-2"); and

3. UBS AG's Registration Statements in its PROSPECTUS ADDENDUM (to Prospectus Supplement dated February 4, 2022 and Prospectus dated May 27, 2022) which read at cover page 6: "Application has been made to list the Securities on NYSE Arca. There can be no assurance that such application will be approved or that an active secondary market will develop; if it does, we expect that investors will purchase and sell the Securities primarily in this secondary market"; at cover page 12: "Security Calculation Agent: UBS Securities LLC [with address at 1285 Avenue Of The Americas New York, NY 10019, USA]" (square brackets added); at cover page 13: "On the Initial Trade Date, we sold $25,000,000 aggregate Stated Principal Amount of Securities (1,000,000 Securities) of each series to UBS Securities LLC at 100% of their aggregate Stated Principal Amount"; at page 142 marked S-128: "Any payment on or delivery of the Securities at maturity or upon early redemption or call will be made to accounts designated by you and approved by us, or at the corporate trust office of the trustee in New York City, but only when the Securities are surrendered to the trustee at that office. We also may make any payment or delivery in accordance with the applicable procedures of the depositary" and "[t]he DTC participants

that hold the Securities through DTC [with address at 55 Water St., New York, NY 10041, USA] on behalf of investors will follow the settlement practices applicable to equity securities in DTC's settlement system with respect to the primary distribution of the Securities and secondary market trading between DTC participants"; at page 145 marked S-131 as to Material U.S. Federal Income Tax Consequences: "(i) a U.S. holder will not recognize income, gain or loss with respect to the Securities prior to the sale, redemption or maturity of the Securities and (ii) a U.S. holder will generally recognize capital gain or loss upon the sale, redemption or maturity of the Securities in an amount equal to the difference between the amount that it realizes at such time and the amount that it paid for the Securities (including the creation fee, if any, payable by institutional investors transacting directly with UBS Securities LLC)"; and at page 153 marked S-139 as to Supplemental Plan of Distribution: "Additional Securities may be offered and sold from time to time through UBS Securities LLC, as agent, to investors and to dealers acting as principals for resale to investors . . . UBS and/or its affiliates may earn additional income as a result of payments pursuant to these swap or related hedge transactions" (some cites omitted) (docketed by the District Court on January 18, 2023 as "Case 1:19-cv-09993-KPF Document 141-2"); and, additionally,

4. UBS AG's letter dated February 18, 2011, signed by Louis Eber, Group Managing Director, Deputy General Counsel of UBS AG, and John Cusack, Managing Director, Head of AML Compliance of UBS AG, and sent via EDGAR and messenger, to Mr. Michael Seaman, Special Counsel, Division of Corporation Finance, United States Securities and Exchange Commission, which reads at page 2: "In 2010, we completed about 230 separate takedowns[2] under the registration statement. We would ask the Staff to consider the

[2] With an effective shelf registration statement, when the issuer wants to offer securities, it takes them "off the shelf." These "shelf takedowns" are usually offered pursuant to a base prospectus (contained in the registration statement) and a prospectus supplement. Securities are usually

substantial time and cost burdens involved in preparing and filing both U.S. and Swiss opinions on a nearly daily basis for a frequent issuer like UBS" (underline added) (docketed by the Court of Appeals on October 6, 2023 as "Case 23-20, Document 84-3").

VIII. Reasons for Granting the Writ

This case presents this Court with an opportunity to clarify the reviewing standard for appeals that violate the rule that appellate courts must "accord due deference to the trier of fact" and to secure and maintain uniformity of this Court's decisions. Absent intervention by this Court, the United States Court of Appeals for the Second Circuit's decision will work to undermine the carefully-crafted procedural safeguards that this Court has spent almost the past 70 years developing.

Also, this case presents this Court with an opportunity to clarify whether the District Court may strike allegations that were present in the Petitioners' prior pleadings and reincorporated into an amended pleading by reference? Absent intervention by this Court, the United States District Court for the Southern District's decision dated April 7, 2022 docketed as "Case 2:19-cv-09993-KPF Document 122" will undermine the procedural safeguards and avoid the use of common law principles law principles of procedural fairness, including Fed.R.Civ.P. 12, to defeat litigants' claims based on a federal law designed for their protection such as in *Neor v. Acacia Network, Inc.*, 22-cv-04814 (ER), 12 (S.D.N.Y. Oct. 19, 2023) ("The Court may strike new allegations that were not present in prior pleadings. *Starostenko v. UBS AG*, No. 19-cv-9993 (KPF), 2022 WL 1082533, at *3 (S.D.N.Y. Apr. 7, 2022).").

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registered for sale either on a continuous or a delayed basis, although a portion of the securities may be offered immediately. An issuer is considered "primarily eligible" to use "shelf takedowns" if the aggregate market value of its voting and non-voting common equity held by non-affiliates (its "public float") is at least $75 million.

Finally, this case presents a defining moment for the Supreme Court to decisively address the insidious issue of fictitious trading. Its unchecked proliferation inflicts a severe challenge to the very foundations of fair and efficient markets, undermines investor confidence, distorts price discovery, blatantly violates existing regulations and causes widespread financial harm far exceeding the devastating Madoff scandal. By firmly condemning this illegal activity, the Court can send a clear message of zero tolerance for fictitious trading, bringing an end to this long-standing, corrosive, and illegal practice and safeguarding the integrity of U.S. markets for future generations.

IX. Conclusion

For the foregoing reasons, Mr. and Mrs. Starostenko respectfully request that this Court issue a writ of certiorari to review the orders of the United States Court of Appeals for the Second Circuit dismissing their appeal.

Dated this 30th day of January, 2024.

Respectfully submitted,

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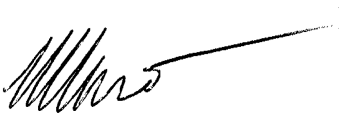

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X. Appendix

Date, Decision Docketed As **By The Court**

February 4, 2022, "Case 2:19-cv-09993-KPF Document 108" ……..…..….. the District Court

April 7, 2022, "Case 2:19-cv-09993-KPF Document 122" …… the District Court

January 4, 2023, "Case 1:19-cv-09993-KPF Document 135" …… the District Court

January 4, 2023, "Case 1:19-cv-09993-KPF Document 136" …… the District Court

January 6, 2023, "Case 1:19-cv-09993-KPF Document 140" …… the District Court

January 18, 2023, "Case 1:19-cv-09993-KPF Document 141-2" ……...…… the District Court

June 8, 2023, "Case 23-20, Document 50" ……...… the Court of Appeals

June 8, 2023, "Case 23-20, Document 51" ……...… the Court of Appeals

July 12, 2023, "Case 23-20, Document 65" ……...… the Court of Appeals

July 12, 2023, "Case 23-20, Document 66" ……..……..… the Court of Appeals

August 9, 2023, "Case 23-20, Document 79" …… the Court of Appeals

October 6, 2023, "Case 23-20, Document 84-3" ……..… the Court of Appeals

October 27, 2023, "Case 23-20, Document 89" ……..……..……. the Court of Appeals

November 13, 2023, "Case 23-20, Document 91-1" …… the Court of Appeals