No. ___

IN THE

Supreme Court of the United States

KEVIN CARROLL ANDERSON,

Petitioner,

v.

ARTHUR B. GREENE, ARTHUR B. GREENE & COMPANY, P.C.,
MARKS, PANETH & SHRON LLP,

Respondents,

and

DOES 1-10, INCLUSIVE,

Defendants.

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

PETITION FOR A WRIT OF CERTIORARI

HILLEL I. PARNESS
PARNESS LAW FIRM, PLLC
Attorneys for Petitioner
136 Madison Avenue, 6th Floor
New York, New York 10016
212-447-5299

September 18, 2019

QUESTIONS PRESENTED

1. Were the Second Circuit's decisions, approving the District Court's application of the summary judgment standard to all of the *pro se* and uneducated Petitioner's claims, when the District Court said it would apply it solely as to Respondents' statute of limitation defense, and retain the motion to dismiss standard as to the balance of Petitioner's claims, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

2. Were the Second Circuit's decisions, approving the District Court's refusal to acknowledge that the *pro se* and uneducated Petitioner had pled a breach of contract claim, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

3. Were the Second Circuit's decisions, approving the District Court's refusal to apply equitable tolling to Petitioner's claims, where the *pro se* and uneducated Petitioner acted with reasonably diligence in the face of extraordinary circumstances, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

IN THE

Supreme Court of the United States

No. _____

KEVIN CARROLL ANDERSON,

Petitioner,

v.

ARTHUR B. GREENE, ARTHUR B. GREENE & COMPANY, P.C.,
MARKS, PANETH & SHRON LLP,

Respondents,

and

DOES 1-10, INCLUSIVE,

Defendants

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

PETITION FOR A WRIT OF CERTIORARI

DECISIONS BELOW

The May 12, 2016 Order of the United States District Court for the Southern District of New York, converting Respondents' motion to dismiss the Third Amended Complaint into a motion for summary judgment, **solely as to Respondents' statute of limitations defense and not to the balance of the claims and defenses**, is included in the Appendix at Exhibit A (Appendix to the Petition ("Pet. App.") 1a).

The August 10, 2016 Opinion and Order of the United States District Court for the Southern District of New York, granting in part and denying in part Respondents' motion to dismiss the Third Amended Complaint, and **finding that Petitioner had not alleged facts sufficient to support a breach of contract claim, or equitable tolling of his claims,** is included in the Appendix at Exhibit B, Pet. App. 4a.

The May 28, 2019 Summary Order of the United States Court of Appeals for the Second Circuit, affirming the underlying decisions of the United States District Court for the Southern District of New York, is included in the Appendix at Exhibit C, Pet. App. 79a.

The June 20, 2019 Order of the United States Court of Appeals for the Second Circuit, denying Petitioner's petition for panel rehearing, is included in the Appendix at Exhibit D, Pet. App. 86a.[1]

JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit, affirming the decisions below, was entered on May 28, 2019. Pet. App. 79a-85a. The Order of the United States Court of Appeals for the Second Circuit, denying Petitioner's petition for panel rehearing, was entered on June 20, 2019. Pet. App. 86a-87a. The jurisdiction of this Court rests upon 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which states as follows (emphasis added):

> **No person shall** be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor **be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.

[1] The Third Amended Complaint filed by Petitioner in the Southern District of New York is included in the Appendix at Exhibit E, Pet. App. 88a.

STATEMENT OF FACTS

Petitioner Kevin Anderson is a 59-year-old career stage, film and television actor. Anderson has starred in over 30 films in major leading and supporting roles alongside some of the biggest actors and directors of our time, including Tom Cruise (in *Risky Business*), Julia Roberts (in *Sleeping with the Enemy*), Richard Gere, Albert Finney, Vanessa Redgrave, Al Pacino, Jack Nicholson, Peter Hall, Trevor Nunn, Andrew Lloyd Webber, Brian Dennehy, Alan Pacula, Norman Jewison, Laurie Metcalfe, Joan Allen, Bob Falls, Anna Shapiro, Michelle Pfeiffer and Colin Firth. He is a Tony- and Golden Globe-nominated actor, winner of a Drama Desk award, Outer Critics Circle award, Theatre World award, and was selected as Best Actor in Viewers for Quality Television and also Best Actor for the Online TV Critics Association. Anderson has starred in approximately 10 Broadway productions between 1985 and 2008, London West End productions in 1986, 1994 and 2010, countless other Off-Broadway productions, and in shows at the best regional theatres across this country, and he is set to return to Broadway in a production in 2020. He is a 36-year ensemble member of the esteemed Steppenwolf Theatre in Chicago.

Due in substantial part to his early acting success, Anderson was not educated beyond high school, he never attended college, and he never received any education regarding accounting or finance. In 1985, when Anderson was 25, he hired Respondent, accountant Arthur Greene, to prepare and file his taxes. By virtue of his access to Anderson's finances, Greene saw the money young Anderson was making on high-profile film projects. In November and December 1990, Greene sought to expand his relationship with Anderson, and proposed that they enter into a broad-based arrangement whereby Greene would not only continue to prepare and file Anderson's taxes, but Greene would assume control of all of Anderson's financial interests

and legal affairs. **Greene convinced Anderson to have Greene and his colleagues assume this role, in exchange for 5% of all of Anderson's income, and Anderson agreed to the arrangement, forming an oral contract.** Pet. App. 6a, 52a, 97a-98a, 108a, 120a, 135a-164a. Respondents received all of Petitioners' mail and payments, exactly as Respondent Greene had proposed in their initial meetings in 1990. Pet. App. 6a-7a, 65a, 92a, 94a, 96a, 102a, 157a-158a, 161a. Greene had legal control over Anderson as the Secretary Treasurer of Anderson's business entity, and the trustee of his pension/investment account, exercising his individual and durable powers of attorney. Pet. App. 7a-8a, 12a-13a, 53a, 55a, 92a, 94a, 95a-99a, 106a-107a, 168a.

As a result of Respondents' unusual and complete control over Petitioner's financial and business affairs, Petitioner did not begin to discover Respondents' wrongdoing until November 3, 2010. Pet. App. 7a, 14a, 69a, 96a, 109a. **Respondents purported to terminate their contract in writing with Petitioner on January 6, 2012, effective December 31, 2011.** Pet. App. 8a, 53a, 61a-62a, 99a, 166a.

Petitioner estimates that he earned an average of $300,000 a year for most of his career, and $1 million in 1997-1998 alone. Pet. App. 129a. He estimates that he made approximately $7 million over the course of his career (Pet. App. 11a, 103a), but claims that nearly all of it was diverted or otherwise lost by the Respondents during the period that they managed Anderson's financial and legal affairs, leaving Anderson with nearly nothing to show for his nearly 40 years of acting work.

STATEMENT OF THE CASE

The United States District Court for the Southern District of New York dismissed nearly all of Anderson's Third Amended Complaint, and the United States Court of Appeals for the Second Circuit affirmed that decision in its entirety, and denied Anderson's petition for panel

rehearing. Petitioner seeks a Writ of Certiorari from this Court to address three fundamental errors made by the Court of Appeals in its affirmance of the District Court:

First, the Court of Appeals erred by failing to recognize that in connection with Respondents' motions to dismiss the Third Amended Complaint, the District Court erroneously applied the wrong legal standard – the summary judgment standard under Fed. R. Civ. P. 56 – to most of *pro se* Petitioner's claims and defenses, even though the District Court said it would only be applying the summary judgment standard to Respondents' statute of limitations defense.

Second, the Court of Appeals erred by affirming the District Court's erroneous finding that Petitioner (acting *pro se*) had not pled a claim for breach of contract, where, *inter alia*, Petitioner explained in detail the terms of, and the circumstances of the formation of, the oral contract in December 1990 (Pet. App. 6a, 52a, 97a-98a, 108a, 120a, 135a-164a), and produced evidence of Respondents' written termination of that contract in January 2012. Pet. App. 8a, 53a, 61a-62a, 99a, 166a.

Third, the Court of Appeals erred by failing to recognize that the District Court had erroneously denied Petitioner's request for equitable tolling of his claims, where the *pro se* and uneducated Petitioner acted with reasonable diligence in the face of extraordinary circumstances, to wit, where at Respondents' urging Petitioner had turned over complete control of his business and financial affairs to Respondents in exchange for a 5% commission on his earnings.

REASONS FOR GRANTING THE PETITION

Rule 10 of this Court provides that the Court will grant petitions for certiorari "only for compelling reasons," and that among the indicia of the character of the reasons the Court considers is "a United States court of appeals…has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." U.S. Sup. Ct. R. 10(a).

Thus, when a district court issued an order allowing cameras in the courtroom in violation of federal statutes and policy, this Court cited Rule 10(a), explaining that "[t]he Court's interest in ensuring compliance with the proper rules of judicial administration is particular acute when those rules relate to the integrity of the judicial process." *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010). In 2015, Justice Alito dissented from a denial of a petition for writ of certiorari, where in the Justice's view the Sixth Circuit had "so far departed from the accepted an usual course of judicial proceedings" when it found a plaintiff to have suffered an adverse employment action when his employer granted the transfer that the plaintiff had himself requested. *Kalamazoo County Rd. Comm. v. Deleon*, 135 S. Ct. 783 (2015). In *Nguyen v. U.S.*, the Court granted certiorari pursuant to Rule 10(a), finding that the Ninth Circuit had "so far departed from the accepted and usual course" when it placed a non-Article III judge (a judge of the District Court for the Northern Mariana Islands) on an appellate panel. *Nguyen v. U.S.*, 539 U.S. 69, 75 (2003).

The District Court in this case likewise veered from the norms of the Federal Courts when (a) in the context of motions to dismiss, over-applied the summary judgment standard to all of Petitioner's claims when it said it would only be doing so to Respondents' statute of limitations defenses; (b) it refused to recognize that the *pro se* Petitioner had plainly and clearly

pled the formation and breach of an oral contract with Respondents; and (c) it refused to grant Petitioner's request for equitable tolling of his claims, when at Respondents' request Petitioner had placed control of his entire financial and business affairs in the hands of the Respondents, preventing him from discovering Respondents' bad acts until years later.

I. THE SECOND CIRCUIT'S DECISIONS, SANCTIONING THE DISTRICT COURT'S MISAPPLICATION OF THE SUMMARY JUDGMENT STANDARD, RATHER THAN THE MOTION TO DISMISS STANDARD, SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

On May 12, 2016, the District Court wrote the following in its Order **partially** converting Respondents' motion to dismiss into a motion for summary judgment:

> Given the focused nature of Defendants' statute of limitations defenses, resolution of those defenses may greatly affect evaluation of Plaintiff's claims. In the interest of efficiency and economy, the Court exercises its discretion to convert this motion to dismiss to a motion for summary judgment, **only insofar as it pertains to Defendants' statute of limitations defenses, and to consider the evidence provided by the parties**.

Pet. App. 2a (emphasis added).

Notwithstanding this very specific self-imposed limitation, the District Court failed to read Petitioner's claims – especially his breach of contract claim – with the full deference required under Rule 12(b)(6):

- The District Court injected its subjective judgment that Greene's alleged reticence to enter into written contracts "cast[s] significant doubt on whether Greene intended to enter any verbal contract," Pet. App. 52a, when Petitioner pled clearly that a verbal agreement was made;[2]

[2] This reading of the Complaint was itself erroneous on its face. Anderson did not allege that Greene did not enter into contracts, but that he did not enter into **written** contracts. Anderson affirmatively alleged the formation of an oral contract. Pet. App. 98a ¶ 23.

- The District Court faulted Anderson for failing to "**prove** an alleged oral contract" in his Complaint, *id*. (emphasis added), when all Anderson had to do (and did) was **allege** the formation and violation of an oral contract;

- The District Court rejected the documents submitted by Anderson to further support his allegations that an oral contract was formed for failing to **evidence**[] **any mutual intent** to enter a binding agreement," *id.* (emphasis added), when – once again – all Anderson had to do to survive a motion to dismiss was **allege** the existence and breach of an oral contract;

- The District Court ignored documentary evidence that Respondents sent Anderson a written **termination** email, which Anderson posits is evidence of Respondents' belief in the existence of a contract (Pet. App. 155a-56a); and

- The District Court erred (or reflected its error) by citing only *Cleveland Wrecking Co. v. Hercules Constr. Corp*., 23 F. Supp. 2d 287 (E.D.N.Y. 1998) in support, a district court decision on a **motion for summary judgment**, not a motion to dismiss.

The District Court erred when it held Petitioner to a standard of **proof**, when the proper inquiry was one of **pleading**. A correct ruling here would have changed the landscape of the case as it would have extended the period for viable claims to a minimum of six years prior to the commencement of the action, or December 31, **2008**.

Section IV of the Summary Order reads – in full – as follows:

> Anderson next contends that the District Court erred by converting defendants' motion to dismiss into a motion for summary judgment. When documents outside the pleadings are presented on a motion to dismiss and are "not excluded by the court, the motion must be treated as one for summary judgment under Rule 56" and each party must be given an opportunity to present all relevant materials. Fed. R. Civ. P. 12(d). If the plaintiff is *pro se*, the District Court must provide prior notice before converting the motion. *See Hernandez v. Coffey*, 582 F.3d 303, 307-08 (2d Cir. 2009).
>
> Anderson does not dispute that the parties submitted ample documents outside of the pleadings, but argues that the District Court did not provide sufficient notice to him of the conversion. But the District Court expressly informed Anderson, then proceeding *pro se*, that the motion would be converted into a motion for summary judgment and gave Anderson three weeks to submit additional materials, including additional briefing. Following this order, counsel appeared on

> Anderson's behalf and requested a further extension of time; the Court granted an additional week.
>
> Anderson's opposition brief to defendants' motion reflected a clear understanding of summary judgment. We conclude that the District Court provided adequate notice and did not err in converting the motion to dismiss into a motion for summary judgment.

Pet. App. at 81a-82a.

Petitioner never challenged the District Court's power to convert Respondents' motion to dismiss into one for summary judgment. Rather, Anderson appealed the District Court's violation of its own restriction – its application of the summary judgment standard to all of Anderson's claims and all of Respondents' defenses – rather than "only insofar as it pertains to Defendants' statute of limitations defenses." Pet. App. 2a.

Nowhere in Section IV does the Second Circuit note that the District Court's Order converting the motion to dismiss into a motion for summary judgment was a limited, partial conversion, as opposed to a complete conversion to summary judgment, suggesting that the Second Circuit either overlooked or misapprehended Anderson's argument as to how the District Court erred.[3] We submit that this is a further indicator of the Second Circuit's failure to properly address or understand Anderson's argument, and we respectfully request that this Court grant certiorari to address it.

[3] The opening paragraph of the Summary Order (Pet. App. 80a) does recite that "the District Court *sua sponte* converted the motion into a motion for summary judgment for the purposes of defendants' statute of limitations defense," but this limitation is not reflected anywhere in Section IV.

II. THE SECOND CIRCUIT'S DECISIONS, SANCTIONING THE DISTRICT COURT'S REFUSAL TO ACKNOWLEDGE *PRO SE* PETITIONER'S BREACH OF CONTRACT CLAIM, SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

As the Second Circuit noted in Section V of the Summary Order (Pet. App. 82a), Anderson pled that an oral contract was formed on December 4, 1990 and that it was subsequently breached. However the Second Circuit repeated the mistake of the District Court when it concluded wrote that "a complaint must plead the specific provisions of the contract that were allegedly breached and the specific actions of the defendants that constituted that breach," and concluded that "[t]he District Court did not err in concluding that the third amended complaint failed to meet this standard." Pet. App. 82a (citing *Sud v. Sud*, 621 N.Y.S.2d 37, 38 (1st Dep't 1995)).

As noted above, the District Court applied the incorrect standard altogether, and therefore could not have reached the right conclusion as to the sufficiency of Anderson's breach of contract allegations. Whereas the District Court found that Anderson could not "**prove**" or "**evidence**" the existence of or breach of an oral contract, he certainly did enough to **allege** the existence and violation of that contract, especially when one recalls that he was acting *pro se* at the time:

> 23. Less than one month after receiving the prospectus, Mr. Anderson and Mr. Greene engaged in a verbal contract December 4, 1990. The verbal contract was recorded and subsequently transcribed (Exhibit B). Mr. Greene did not provide a written contract in the beginning of tenure, stating he didn't have written contracts with any of his clients, which is why Mr. Anderson recorded the contractual meeting with Mr. Greene's consent.
>
> 24. In the contract and the prospectus, Mr. Greene states he agrees to be responsible for planning the financial future of Mr. Anderson, contract negotiations, receipt of all income, deposit all earnings, drawing checks to pay bills, maintaining records, all tax returns, wills, trusts, estate planning, insurance, supervision of investment program, determination of asset purchases, and all

financial planning for an annual fee of 5% of yearly gross professional earnings. Mr. Greene failed at all of these services.

….

1. Mr. Greene, ABG&Co, and MPS, having full custodial control of all Mr. Anderson's accounts, failed to manage Mr. Anderson's corporation, Joe Coyote Inc. ("JCI"), and Mr. Andersons personal finances leaving Mr. Anderson financially damaged.

….

18. The Defendants breached their fiduciary duty of care by primarily showing an outrageous, reckless, abusive, and egregious disregard for their client Mr. Anderson by routinely mismanaging Mr. Anderson's finances, by not preparing, sending to him, or filing his taxes on time or at all, by failing to invest funds carefully, prudently, and promptly, by not changing or recommending a new investment strategy where warranted by a change in circumstances, by not retaining his personal documents which are Mr. Anderson's property without his permission to discard them, by dismissing his many requests, and by diverting and draining his investments and pension account leaving him essentially homeless and almost completely bankrupt. These abuses contributed to Mr. Anderson's divorce, affected his standing and reputation in the entertainment industry, forced him to tum down acting jobs to pursue justice without a lawyer, forced him to sacrifice his privacy, isolated him from and affected his relationships with his friends and fellow associates including the Steppenwolf Theater Ensemble, and most painfully, Mr. Anderson was not able to provide for his recently deceased mother who could have had the kind of excellent care his earnings would have provided if not for the defendant's destructive and cancerous presence in his life.

….

21. Mr. Greene under the doctrine of continuous representation, failed to perform the terms stated in the oral contract by not completing specified jobs (e.g., taxes), not paying funds/gross earnings in full or on time, and failing to invest Mr. Anderson's monies (e.g., pension fund growth).

….

29. Mr. Greene did not file or send Mr. Anderson's personal taxes in 1994, or 2004 through 2011 resulting in IRS delinquencies, liens, levies, and garnishment warnings which were issued without Mr. Anderson's knowledge. Even with notices sent by the IRS to Mr. Greene, the prepared tax returns were still not filed or sent to Mr. Anderson. Mr. Greene did not file corporate taxes and required reports and forms for Joe Coyote Inc. ("JCI") for at least 10-12 years.

….

136. Mr. Greene prepared Mr. Anderson's tax returns (and then failed to file them).

Pet. App. 91a, *et seq*.

III. THE SECOND CIRCUIT'S DECISIONS, SANCTIONING THE DISTRICT COURT'S REFUSAL TO APPLY EQUITABLE TOLLING, WHERE THE *PRO SE* AND UNEDUCATED PETITIONER ACTED WITH REASONABLY DILIGENCE IN THE FACE OF EXTRAORDINARY CIRCUMSTANCES, SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

Separate and apart from the question of **which** limitations period should be applied (and Petitioner maintains it should be the six-year period for contract-based claims), the District Court erred in its application of the doctrine of equitable tolling, which the Second Circuit has explained as follows:

> Where defendant is responsible for concealing the existence of plaintiff's cause of action, this Court has held equitable tolling appropriate. While we have frequently referred to this doctrine as "fraudulent concealment," defendants' conduct need not be actually fraudulent. "The doctrine has been applied...where the facts show that the defendant engaged in conduct, often itself fraudulent, that concealed from the plaintiff the existence of the cause of action." The relevant question is not the intention underlying defendants' conduct, but rather whether a reasonable plaintiff in the circumstances would have been aware of the existence of a cause of action.

Veltri v. Bldg. Serv. 32B-J Pension Fund, 393 F.3d 318, 323 (2d Cir. 2004) (*quoting Cerbone v. International Ladies' Garment Workers' Union*, 768 F.2d 45, 48 (2d Cir.1985) and *citing Pearl v. City of Long Beach*, 296 F.3d 76, 80 n. 3 (2d Cir. 2002) (collecting cases) and *Cada v. Baxter Healthcare Corp*., 920 F.2d 446, 451 (7th Cir.1990)). *See also Kosakow v. New Rochelle Radiology Assocs., P.C*., 274 F.3d 706, 725 (2d Cir. 2001) ("The doctrine of equitable estoppel is

properly invoked where the enforcement of the rights of one party would work an injustice upon the other party due to the latter's justifiable reliance upon the former's words or conduct.").

Thus, in *Veltri*, the Second Circuit Court of Appeals concluded that a pension plan's failure to provide notice to the beneficiary was enough to warrant tolling:

> The notice regulation assumes that a reasonable beneficiary would not otherwise be aware of the existence of a cause of action, and the congressional policy favors placing a burden of disclosure on pension plans and adopting an approach of caution before closing the courthouse door. In light of the regulation and Congress's express policy, we hold that failure to comply with the regulatory obligation to disclose the existence of a cause of action to the plan participant whose benefits have been denied is the type of concealment that entitles plaintiff to equitable tolling of the statute of limitations.

Id. at 324. Although the case before the Court does not involve a statutory failure, Petitioner's reasonable and complete reliance on Respondents, and their abject failure to serve Petitioner, is completely analogous.

Under the Fed. R. Civ. P. 12(b)(6) standard (as the sufficiency of Petitioner's underlying claims was **not** a statute of limitations issue, and thus not converted to a summary judgment motion), the District Court was required to recognize that Petitioner had alleged a broad-based relationship with the Respondents under which Respondents agreed to take 5% of Petitioner's earnings, in exchange for taking complete control of Petitioner's financial, accounting and legal affairs. This oral agreement, and the degree to which Petitioner turned over the reins of his entire business dealings, is reflected in both the "prospective" and "transcript" documents attached to the Third Amended Complaint.[4]

[4] Petitioner alleged formation of an **oral** agreement. The "prospectus" and "transcript" corroborate those allegations, but neither one was offered, nor should either be construed, as being the contract itself.

In fact, Respondent Greene is shown to have specifically assured and reassured Anderson, over Anderson's stated concerns, that it was in Anderson's best interest to allow Respondents to take control:

> Greene: I think it's a good idea. I think it's something that will make sense. I think you'll be … you'll be pleased, and I think ... uh ... you'll be relieved of some responsibilities and ... uh ... uh ... you'll still know everything that's going on, and, uh ...
>
> Anderson: Yeah. It's a big deal for me 'cause I've tried to ... over the years ... tried to avoid ... I think part of my success as an actor is I've kept ... I pretty much know what I'm doing even though it may appear that I don't know what I'm doing, but -
>
> Greene: I think you know what you're doing.
>
> Anderson: – I try to avoid ... I've tried to avoid the machinery, the ... uh ... machinations of ... uh ... stardom ... you know, whatever that is.
>
> Greene: Yes.
>
> Anderson: I see a lot of actors that I know . .. or a lot of actors I've observed that accumulate so much baggage ... so many people do . . . have various responsibilities for them that they kind of lose touch with themselves?
>
> Greene: Yes.
>
> Anderson: And I've been trying to avoid that so that's why I've always –
>
> Greene: Well, you won't ... you won't lose touch. And as far as, uh ... uh ... well ...
>
> Anderson: That's why I've always been a bit wary about it 'cause it seems like –
>
> Greene: Yes.
>
> Anderson: – I always want to have control of what happens to me.

Pet. App. 159a (emphasis added).

Equitable tolling is available when a court is presented with both "extraordinary circumstances" and a demonstration that the plaintiff acted with "reasonable diligence under the

circumstances." The Second Circuit has already clarified that "extraordinary" refers to circumstances "far enough outside the range of behavior that reasonably could be expected by a client." *Baldayaque v. United States*, 338 F.3d 145, 152 (2d Cir. 2003) (remanding case to address series of questions tailored to the specific facts of the case). "The term 'extraordinary' refers not to the uniqueness of a party's circumstances, but rather to the severity of the obstacle impeding compliance with a limitations period." *Harper v. Ercole*, 648 F.3d 132, 137 (2d Cir. 2011) (*citing Bolarinwa v. Williams,*593 F.3d 226, 231-32 (2d Cir.2010); *Diaz v. Kelly,* 515 F.3d 149, 154 (2d Cir. 2008); *see also Martinez v. Superintendent of E. Corr. Facility*, 806 F.3d 27, 34 (2d Cir. 2015), as corrected (Nov. 12, 2015) (finding "significant indications that Martinez acted with reasonable diligence and that these indications justified a more detailed inquiry and findings by the district court."); *Dai Hua Huang v. Bd. of Immigration Appeals*, 245 F. App'x 47, 49 (2d Cir. 2007) ("degree of oversight expected may vary with the purposes of the representation and the client's ability to evaluate the performance at issue or to act on his own") (*citing Doe v. Menefee*, 391 F.3d 147, 175 (2d Cir. 2004)); *Indoafric Exports Private Co. v. Citibank, N.A*., 696 F. App'x 551, 552 (2d Cir. 2017) ("Where a defendant has a 'duty to speak,' however, and fails to do so, a plaintiff's reliance on a defendant's silence can provide grounds for equitable tolling.") (*quoting Gaia House Mezz LLC v. State St. Bank & Tr. Co*., 720 F.3d 84, 90 (2d Cir. 2013)).

A concurring opinion in *Baldayaque* framed the argument as one of agency, and this reasoning is equally applicable here:

> The corollary to this rule is that when an "agent acts in a manner completely adverse to the principal's interest," the "principal is not charged with [the] agent's misdeeds." Here, unlike in *Smaldone,*there is an evidentiary basis for concluding that the petitioner's lawyer was not acting as agent: he took a $5,000 retainer without undertaking the requested service; set aside his client's interests in favor

> of his own; and undertook a futile, unresearched, and frivolous initiative for the sole purpose of keeping the fee.

Baldayaque, 338 F.3d at 154 (*quoting Nat'l Union Fire Ins. Co. v. Bonnanzio*, 91 F.3d 296, 303 (2d Cir.1996) and referencing *Smaldone v. Senkowski*, 273 F.3d 133 (2d Cir. 2001)). There is no question that under the facts alleged throughout the Third Amended Complaint, Respondents acted against the interests of Petitioner, time and again.

Once "extraordinary circumstances" are shown, courts should consider the diligence level of the specific party in question under those specific circumstances:

> The standard is not 'extreme diligence' or 'exceptional diligence,' it is **reasonable** diligence. On remand, the district court should ask: did the petitioner act as diligently as reasonably could have been expected **under the circumstances**?"

Baldayaque, 338 F.3d at 152-53 (emphases in original). Had the District Court properly considered this question, and judged Anderson based on the facts he alleged, layered over the court's clear understanding of who Anderson actually is, the answer would have been a resounding "yes."

Thus, acting on the assumption that Respondents did indeed offer to take over all of Petitioner's financial and accounting (and perhaps legal) affairs in perpetuity in exchange for an ongoing 5% commission, and Petitioner agreed to that deal, and furthermore that Respondents somehow managed to fail to file Petitioner's tax returns for six or more years, and furthermore that Respondents somehow managed to fail to act on the numerous notices they received alerting them to the fact that their client had failed to file his tax returns for six or more years, extraordinary circumstances are demonstrated.

Similarly, the facts as pled are that Petitioner put all of his faith and trust in Respondents to handle his financial and accounting affairs, assumed they were doing everything they needed

to if he did not hear from them, and did not get **any** information to the contrary until he walked into a bank in November 2010 on his own accord and got the first scrap of information suggesting that something was wrong. He acted promptly on this information to inquire of Respondents, who were less than helpful and forthcoming, and he eventually brought suit as a *pro se* plaintiff a reasonable time later.

Petitioner claims that Respondents were acting as his lawyers, in addition to serving as his financial and accounting managers, making *Baldayaque* and the cases that follow it particularly applicable, but nothing in these cases suggests that an attorney-client relationship need exist for a court to find either "extraordinary circumstances" or "reasonable diligence…under the circumstances." It is a case-by-case analysis that always turns on the particular facts before the court. Regardless of the particular role in which Greene and the other Respondents were serving, Petitioner alleges that the particular circumstances of his relationship with them were such that he handed the reins of his life to them for the express purpose of giving them control, that they assumed that control in exchange for ongoing commissions, and then failed to live up to their assumed obligations. This, coupled with Petitioner's limited education and lack of training presents "extraordinary" circumstances, under which we maintain Petitioner acted with the "reasonable diligence" required for a court to impose equitable tolling.

In *Torres v. Barnhart*, 417 F.3d 276 (2d Cir. 2005), the Second Circuit Court of Appeals came to a similar conclusion, finding that the district court had failed to give the proper deference to the facts as alleged by the *pro se* plaintiff:

> What the district court failed to appreciate is that, if Torres' averments are credited, he presents the case of a legally-ignorant, linguistically-challenged *pro se* claimant who nonetheless did everything possible to try to assert his claim in timely fashion and was only stymied from so doing by being seriously misled by an attorney in whom he placed his trust. This states at least enough to warrant an evidentiary hearing into whether equitable tolling should be invoked.

Id. at 280 (reversing grant of motion to dismiss and remanding case). Petitioner asks for the same level of review here, and a remand to the District Court with instructions for moving the case forward on the broadest set of claims permitted by proper application of these doctrines.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

September 18, 2019

Respectfully submitted,

/s/

HILLEL I. PARNESS
PARNESS LAW FIRM, PLLC
136 Madison Ave., 6th Floor
New York, New York 10016
(212) 447-5299
hip@hiplaw.com
Counsel for Petitioner
Kevin Carroll Anderson

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 33 of the United States Supreme Court, I hereby certify that the foregoing brief was produced using the Times New Roman 12-point typeface and contains 5,341 words.

/s/
Hillel I. Parness

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY,** pursuant to Supreme Court Rule 29.5(b), that on this 18th day of September, 2019, true copies of the Motion for Leave to Proceed *In Forma Pauperis* and Petition for Writ of Certiorari were sent via FedEx to the following:

Clerk of the Court
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543
(10 copies)

Sari E. Kolatch, Esq.
Jackson Sidney Davis, Esq.
Cohen Tauber Spievack & Wagner, P.C.,
420 Lexington Avenue
New York, NY 10170
(212) 381-8729
(2 copies)

Peter Joseph Larkin, Esq.
Rebecca Rose Gelozin, Esq.
Thomas R. Manisero, Esq.
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
1133 Westchester Avenue
White Plains, NY 10604
(914) 872-7847

All parties required to be served have been served.

EXECUTED this 18th day of September 2019.

/s/

HILLEL I. PARNESS
PARNESS LAW FIRM, PLLC
136 Madison Ave., 6th Floor
New York, New York 10016
(212) 447-5299
hip@hiplaw.com
Counsel for Petitioner
Kevin Carroll Anderson