19-6112 ORIGINAL

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

IN RE LARRY POUNCY,

Petitioner

_____

ON EXTRAORDINARY WRIT OF MANDAMUS TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

_____

EXTRAORDINARY WRIT OF MANDAMUS

_____

LARRY POUNCY
131 EDGECOME AVENUE, #1D
NEW YORK, N.Y. 10030
Tel: 347-876-8306

TABLE OF CONTENT

APPENDIX INDEX

UNITED STATE COURT OF APPEALS SECOND CIRCUIT

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[Pouncy filed his federal complaint on November 5, 2015, Docket No. 15-8753-cv]

NEW YORK COURT OF APPEALS

APPELLATE DIVISION: FIRST DEPARTMENT

NY STATE SUPREME COURT, COUNTY OF N.Y.

February 7, 2012, Eileen A. Rakower [J.S.C.] denied to sign Pouncy's subpoena to transfer the State Supreme Court papers to the First Department in order to perfect Pouncy's appeal. Instead Judith J. Gische, [J.S.C.].....18a

September 16, 2011, Eileen A. Rakower, [J.S.C.] Order No. 4 denied Pouncy a Hearing on his Order to Show Cause motion to vacate and or renew/reargue.....19a

[May 23, 2011, Pouncy filed for state appeal with a poor person motion]

May 10, 2011, State Court Hearing held and Transcript - Orders No. 2 Denied & Pouncy's motion for Default Judgment and Order No. 3 Granted Solotaroff's Motion to Dismiss even though Solotaroff failed to answer and defaulted on their defense case. WL11166018 (NY Sup.).....21a, 22a & 23a

March 3, 2011, the State Court Order No. 1, Granted Solotaroff's request letter and withdrew as moot Solotaroff's OTSC motion to extend the time to answer Pouncy's complaint a day later, even though Solotaroff received the extra time to answer.....24a

February 28, 2011, Porter submit letter to Eileen A. Rakower [J.S.C.] for request to withdraw as moot Solotaroff's motion to extend the time to answer, and submit a motion to dismiss; and March 1, 2011,.....25a

January 25, 2011, Solotaroff made an emergency application to extend the time to answer Pouncy' complaint, with a return date February 22, 2011.....26a

December 15, 2010, State Court Granted Pouncy Poor Person status on his verified complaint with summons by Honorable Doris Ling-Cohan and served on January 6, 2011.....27a& 28a

UNITED STATES SUPREME COURT

[U.S. Supreme Court also denied Pouncy's Writ on his Rehearing motion. missing]
[U.S. Supreme Court denied Pouncy his Writ [Appeal 2013-432] missing]

UNDERLYING UNITED STATE COURT OF APPEALS SECOND CIRCUIT DECISIONS

Solotaroff represented Pouncy at the S.D.N.Y., then quit as Pouncy's attorney when the underlying Jury rendered a defective verdict and Pouncy appeal as pro se 5-1-07 to 8-9-09

November 12, 2010 Docket 09-4912-cv, the United States Court of Appeals Second

UNDERLYING UNITED STATE DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK DECISIONS

EVIDENCE OF MERIT FOR LEGAL MALPRACTICE, BREACH OF FIDUCIARY DUTY, FRAUD PURSUANT NY JUDICIAL LAW § 487 AND INTENTIONAL OF EMOTIONAL DISTRESS THAT WAS ERRONEOUSLY DISMISSED

To follow are documents that shows direct proof of claims against Solotaroff

Lastly, Pouncy sent letters and received response letters from both the U.S. Department of Justice [Civil Division] in Washington, D.C. Headquarters and David J. Kennedy, Chief, Civil Rights Unit [S.D.N.Y.].....61a

Pouncy has the following documents as further evidence but cannot afford to print them out at this time.

1. The NYC MTA Bid Contract Danka Denial Funding for Pouncy Email dated 10-31-02 from Greg Bell, Danka's corporate counsel on contracts, informing Pouncy Danka will not support Pouncy $3 million account in administrative and to finance the contract. Example of intent by Solotaroff, Solotaroff failed to furnish this document to the jury even though Judge Patterson stated this was evidence that denied Danka summary judgment and allowed Pouncy to move for trial. [See Appx. 39a, 'B.'& 40a]

2. Danka Email on Denial of Pouncy the Special Pricing List Email from Rick Pirrotta, dated 02-28-03, Danka allowed a Caucasian Rep to poach Pouncy's territory and use the City pricing and finance one of Pouncy's accounts, but denied Pouncy this list to fund the NYC MTA bid, see Appx. 30 shows disparate treatment. Solotaroff again intentionally failed to furnish this document to the underlying jury.

3. Racially Motivated Minority Business List on December 29, 2003, Lance Redder Sales Director sent Pouncy a racially motivated email of a list of minority business owners. And the only reason Redder sent this racial email was to offend Pouncy. Solotaroff failed to furnish to the jury and make the argument, these racially motivated accounts are all outside Pouncy's territory and Pouncy could not go after these accounts because these accounts are located out in Suffolk County, Long Island not Brooklyn.

4. Pouncy's Paychecks: (1) Dated 7-5-02, year to date $74,764.41 and (2) Dated 10-25-02, year to date $107,361.99. However, in 2003 and 2004 Pouncy income was cut in half and only average $60k to $61k a serious deduction do to discriminatory acts

5. Redder's retaliation after work letter. Danka's Sales Director sent on January 25, 2005, and after Pouncy was terminated by Danka, a false letter accusing Pouncyof working at Canon Business Solution, Inc. Claiming Pouncy going after Danka's clients. This letter was copy to Canon, Pouncy's potential employer. It turned out Canon reply letter on February 4, 2005 showed Pouncy did not work for Canon. Moreover, Reddler's letter was submitted into the court record, but this document was docketed, the bottom half of this document was depleted. See where the document stop half way down the page. However, there is a second page and Solotaroff did not bring this issue to the Judge.

6. Solotaroff Letter of Resignation to Robert P. Patterson, Jr. [U.S.D.J.] (1) March 26, 2009, Jason L. Solotaroff, Esq. wrote a letter to the underlying district court Robert P. Patterson, Jr. [U.S.D.J.] that Solotaroff and Schwartz & Thomasshower, LLP wanted to quit being Pouncy's attorney while Judge Patterson had Danka's summary judgment motion in front of him. Judge Patterson denied Solotaroff' request. Judge Patterson was very upset at Solotaroff wanting to quit inside a defendants' summary judgment motion. (2) Solotaroff again after the Jury was discharged Solotaroff sent Judge Patterson another

letter of withdrawal. Judge Patterson granted this request without assignment of another legal counsel for Pouncy for post-trial motion and on appeal.

7. The Second Circuit Conflicts on Plain Error Doctrine; see Romano v. Howarth et al., 998 F.2d 101; 1993 U.S. App. LEXIS 16260, in Pouncy's case, shows the Second Circuit made the opinion 'fundamental error' on the jury error, instead of 'Plain Error' as they did in *Romano v. Howarth et. al.*, 998 F.2d 101. The Second Circuit court sua sponte and addressed, considered and ruled on issues of fact on Romano's case. Where a Caucasian defendant's attorney failed to object to an error at trial, like Pouncy. However, the Second Circuit chose to site "Plain Error" under Rule 51and allow the Romano's appeal to be remand even though Romano's lawyer failed to object and preserve defendants' right to be heard on appeal with these issues. On the other hand, when Pouncy as pro se argued his appeal after Defendants-Solotaroff quit right after the discharge of the underlying jury, Pouncy was not given the same protection of the law. The Caucasian defendant [ex-con] received a more favorable decision than Pouncy, who is not a criminal nor have ever been an ex-con, was denied due process. Even when Pouncy fundamental rights and the courts public policy on plain error would allow Pouncy's appeal to moye forward and be considered. Pouncy believe his appeal was dismissed on account of Pouncy's race.

8. Solotaroff's admission of No Defense Evidence by Patrick J. Lawless, Esq. Solotaroff's attorney affirmation to the New York Court of Appeals, that Judge Rakower Opinion Stated Solotaroff Had Merit. But Solotaroff failed to show defense evidence in opposition to Pouncy's documentary evidence. The only evidence Solotaroff showed was Judge Rakower statement that there was evidence.

9. Pouncy Made Complaints To Various Agencies, The Department Disciplinary Committee First Department NYC District Attorney, NY State Attorney General. All responded except the State of New York Attorney General.

TABLE OF AUTHORITY

FEDERAL RULE CIVIL PROCEDURE

FEDERAL DOCKET

NEW YORK CONSTITUTION

N.Y. STATE STATUTES

N.Y. CIVIL PROCEDURE RULE LAW

INTRODUCTION

1. Petitioner petition this Court, the Supreme Court of the United States, for writ of mandamus because there is a need for extraordinary remedy of this Court's power to rectify erroneous Orders at United States Court of Appeals for the Second Circuit. In which, the Second Circuit [completely] ignored and failed to review the United States District Court for the Southern District of New York, Loretta A. Preska, [Chief U.S.D.J.] Order of reversal made sua spont and before enjoinment of Jason L. Solotaroff, Esq., Darnley Stewart, Esq. and Giskan, Solotaroff and Anderson, LLC [collectively] as Defendants, that denied Petitioner's in forma pauperis motion [IFP], pursuant to 28 U.S.C. § 1915(a) status. This all after the District Court granted Petitioner IFP status, one month prior to dismissal.

2. Therefore, Petitioner obtain subject-matter jurisdiction to the District Court against Defendants for Legal Malpractice, breach of Fiduciary Duty, Fraud [N.Y. Ct. Judiciary Law § 487] and Intentional Infliction of Emotional Distress on constitutional issues. Petitioner believe, the most important point to consider here on Petitioner's petition for writ of mandamus, these federal courts below, District Court and the Second Circuit lack of attention to a citizen's fundamental right to due process and equal protection of the law in seeking justice against a wrongdoer Defendants. See the Fourteenth Amendment of the U.S. Constitution. Also, Petitioner can obtain jurisdiction under the All Writ Act pursuant to 28 U.S.C. § 1651(a), on the facts (1) the legal malpractice, breach of fiduciary duty, fraud and intentional infliction of emotional distress claims were made to rectified the erroneous judgment filed against Petitioner at the underlying trial where Defendants caused Petitioner to lose by committing several errors themselves. And (2) Petitioner can also meet the burden under § 1651(a), on account the State Court refused to recognize Petitioner's legal malpractice and other claims at the State Court.

PROCEDURAL BACKGROUND

1. In the present action, on November 5, 2015, Petitioner filed a federal complaint against Defendants on state claims with a motion for in forma pauperis ["IFP"], 28 U.S.C. § 1915(a), at the United States District Court for the Southern District of New York, and Loretta A. Preska, Chief U.S.D.J. was assigned the case. Under All Writ Act, 28 U.S.C. § 1651(a); 28 U.S.C. § 2283 for a stay; 28 U.S.C. § 1331 on constitutional violations; and 28 U.S.C. § 1332.

2. The District Court, [at first] granted Petitioner's IFP on January 15, 2016, Docket No. 15-8753 [Appx. No. 11]. On account, the District Court recognized Petitioner complaint on constitutional issues needed to be address, consider, and rule on by the District Court. On the ground, Petitioner's state claims was erroneously dismissed which made no legal since. However, Petitioner believe on February 9, 2016, after Judge Preska [recognized Petitioner as an African-American Plaintiff-pro se suing Caucasians-attorneys], moved *sua sponte* and reversed the District Court's Order that granted Petitioner's IFP status. This was done prior to Defendants being enjoin with an answer, and a showing the state court entered judgment against Petitioner. [Appx. No. 5]

3. On August 4, 2016, Petitioner file a Notice of Appeal. On November 17, 2016, the Second Circuit [without any factual evidence of a state judgment] denied Petitioner's appeal, without a statement of legal standard of appellate review, de novo, or even whether they affirmed the District Court's order, [Appx. No. 4]. On January 20, 2017, Petitioner filed a motion for reconsideration. The Second Circuit also denied Petitioner's reconsideration motion, [App. No. 2]. And, on January 2, 2017, the Second Circuit mandated their order from November 17, 2017, [Appx. No. 2].

4. Petitioner learned of another case that recalled the circuit panel mandate, and Petitioner filed his motion to recall the mandate in his case. On April 17th, 2018, the Second Circuit denied Appellant, *pro se* motion to move to recall the mandate and for leave to submit an oversized motion

for reconsideration or reconsideration en banc, [App. No. 1]. Here Petitioner do not have any other jurisdiction except this Court for an extraordinary writ of mandamus petition.

STATE COURT PROCEDURE BACKGROUND

a. NEW YORK STATE SUPREME COURT, COUNTY OF N.Y.[1]

[1]In May 2006, Petitioner, pro se filed suit against his past employer Danka Office Imaging Co., Inc. n/k/a Konica Minolta Business Solutions, USA, INC. [2009 U.S. Dist. LEXIS 44752 (S.D.N.Y. 2009) "underlying trial"]. On April 2, 2007, Petitioner [as pro se] obtain a trial date for July 26, 2007. On the same date, Petitioner received a call from Defendants asking if Petitioner needed an attorney to handle his underlying case. Petitioner met with Defendants and after Defendants informed Petitioner of Defendants and his law firm background and resume, on or around May 1, 2007, Petitioner and Defendants agreed Defendants would represent Petitioner in the underlying trial. Defendants without Petitioner authorization, hired another law firm, Schwartz & Thomashower, LLP to take over Petitioner underlying suit against Danka. After noticing Rachel Schwartz handling of Petitioner's case, requested Defendants to take the case back from Schwartz, because Schwartz showed incompetent to handle the case. Defendants let Schwartz go, and became very hostile against Petitioner. More important, Defendants started to deplete Petitioner's evidence from the underlying federal case, and started lying to Petitioner about procedure matter Defendants was obligated to perform. Two years later, Petitioner went to trial and lost. But, there were several errors that was committed by Defendants. In particular, Defendants statement to the underlying jury, "...we did not get the evidence to you as we should..." and the fact the Judge gave his opinion that Petitioner proved his claims of discrimination and retaliation Defendants had committed malpractice. To show Petitioner had won, the underlying Judge also told Defendants he cannot just dismiss the case without damages and Defendants had a lot of work to do. This showed the "but for" Defendants intentional lack of due diligence is what caused Petitioner to loss his underlying trial. The jury asked the judge where in the record does it show Plaintiff filed his EEOC charge. This was one of the errors caused by Defendants in which was the result why Petitioner lost the trial. Moreover and what is most important, Defendants failed to inform the underlying court of the stipulation Defendants and the underlying defendants-Danka made that Petitioner had suffered an adverse employment action. Petitioner was unjustly terminated. The jury rendered a defective verdict that conflict with the facts of the stipulation, they stated Petitioner did not suffer an adverse employment action. Which is a serious error that a trained attorney would know to object to for post-trial motion and on appeal. Defendants failed to object. After the Jury was discharged, Defendants quit being Petitioner attorney, and Defendants failed to arrange for replacement counsel for Petitioner. Petitioner [as pro se] motion for [Post-trial Motion for New Trial, Fed. R. Civ. P. 50(a), 59 & 59(e) Alt or Amend] because Defendants failed to object to the several errors at trial and the depletion of evidence at trial, Petitioner's post-trial motion was DENIED. [App. No. 38-60]. Then appealed.

On appeal to the United States Court of Appeals for the Second Circuit, , Hon. Roger J. Miner, [J.] and Hon. Pierre N. Leval, [J.] and Hon. Richard C. Wesley [J.], made the Order dated September 21, 2010, that the Jury's verdict was affirmed; even though the Jury's verdict was erroneously made of inconsistencies of the facts at trial. [Appx. 30] In addition, because Defendants failed to object and reserve Petitioner's right on post-trial motion and on appeal before the jury was discharged Petitioner waived his right to make argument on post-trial motion and on appeal. [Appx. No. 33, bottom]

1. Petitioner filed legal malpractice, breach of fiduciary duty, fraud and intentional infliction of emotional distress, on account, Defendants committed misconduct and misrepresented Petitioner at the underlying federal trial [Docket No. 06-4777-cv] against Petitioner past employer on discriminated based on race, and retaliation. During the underlying trial, Defendants failed to submit a defense case that showed Petitioner lack merit for his case; and turned over this evidence to the jury. Defendants failed to submit Petitioner's evidence to the jury. In fact, Defendants made the assertion that Defendants failed to get the evidence to the jury as 'they' should. Which caused the Jury to become confused and rendered a defective verdict with inconsistencies of the facts at trial.

2. Further, Petitioner had submitted several documentary evidence of merit on the claims of legal malpractice when Defendants (1) failed to make a motion for directive verdict, when the underlying judge made the opinion Petitioner met his claims of discrimination and retaliation. [App. 58a, page 221, line 4] (2) When the judge made this opinion, it was time for Defendants to make a motion for directive verdict on Petitioner's behalf. However, Defendants mentioned on [page 394, line 22, App. 59a] that they should make the directive verdict, but Defendants failed to make the motion for the case to won on Petitioner's behalf. (3) Defendants failed to object to the jury's error, prior to the jury charged. When in fact, (4) Defendants and the underlying defendant-Danka had stipulated that Petitioner suffered an adverse employment action when Petitioner was terminated.

3. These actions above is proof Defendants intended to sabotage Petitioner's case at trial, behind Petitioner's back. As a result of this action of legal malpractice, and also proof of the claim of fraud Petitioner sued Defendants at the New York State Supreme Court, County of N.Y. Index

No. 403478/2010. The documentary evidence that shows proof of the claims Petitioner filed at the state court was omitted from the state Court's Opinion and Order, dated February 9, 2016, by Eileen A. Rakower, [N.Y.S. J.]. In addition, Judge Rakower help guide Defendants past Petitioner's default case.

b. STATE COURT ERRONEOUS PROCEDURE

1. Petitioner verified and filed his Complaint [Index No. 403478/2010] at the State Court. Served Defendants on January 6, 2011. In fact, at the state court, Defendants failed to answer and defaulted on their defense case on February 28, 2011, after failing to answer by January 26, 2011. Pursuant to N.Y. Civil Procedure Rule Law ["CPLR"] § 308, on service of complaint and § 3215, default. Defendants had until January 26, 2011 to answer, but didn't.

2. Defendants moved for extra time to answer with a request for judicial invention ["RJI"], [Appx 26]. The State Court Immediate Assign System, assigned Part 15, Eileen A. Rakower [J.] to Petitioner's case. Judge Rakower signed Defendants' OSC motion with a return date February 22, 2011, for a Hearing. On February 22, 2011, no Hearing was held. In fact, when Petitioner arrived early to Part 15, ready to argue in opposition to Defendants' OSC motion, notice Richard B. Porter, Esq.[2] Defendants' [first lead] attorney, talking with Judge Rakower, who was on the bench. As Petitioner walked in to Part 15 courtroom with his affidavit in hand, Petitioner was approached by Tom Hawkins, Clerk of the Court, Part 15. Hawkins eyes open wide as he looked at Petitioner's affidavit then looked at Iris Roberts, Part 15, Law Clerk. Roberts asked Petitioner to step outside the court room. Petitioner being a laymen in litigation went along with Roberts and Porter trialed behind. Once outside the court room Roberts informed Petitioner Judge Rakower ordered Defendants one more week to March 1, 2011, for oral argument. However, Porter had an

[2] Richard B. Porter, Esq., from Wilson, Elser, Moskowitz, Edelman & Dicker, LLP was terminated and replace by Patrick J. Lawless, Esq., same law firm.

ex parte meeting with Judge Rakower and Part 15 Law Clerk. Judge Rakower failed to inform Petitioner what was said at ex parte meetings. Judge Rakower failed to have a transcript of the ex parte meeting. [See NYCRR § 100] Here Petitioner not knowing what was going on felt something was fishing, but did not know what to do within a week.

3. On February 28, 2011, one day prior to the second return date for oral argument. Porter emailed Petitioner and informed Petitioner he was going to request from Judge Rakower to withdraw as moot Defendants' OSC motion to extend the time to answer Petitioner's Verified State Complaint, CPLR 2004, [Appx. No. 26], and move for a motion to dismiss[3], CPLR 3211. Porter also informed Petitioner he will not be at Part 15, on March 1, 2011, as scheduled. Petitioner, in return, told Porter Petitioner will be there, and if Defendants withdraw as moot Defendants would be in default of their defense case.

4. On March 1, 2011, Petitioner arrived to Part 15, and as Porter stated he was not there. Roberts notice Petitioner was present and stated to Petitioner, Judge Rakower did receive Porter's letter of request to withdraw as moot and move for a motion to dismiss. Roberts also informed Petitioner Judge Rakower ordered Defendants' letter, [Appx. No. 24 & 25]. Petitioner in return informed Roberts Petitioner will file a motion for a default judgment. On March 7, 2011, Petitioner filed his motion for default judgment.

5. On April 22, 2011, Roberts through an email request from Petitioner about a date for the hearing on both motions. The hearing is scheduled for May 10, 2011. On May 10, 2011, the hearing was held and Judge Rakower surprisingly denied Petitioner's default judgment motion, as moot and granted Defendants' motion to dismiss; without any facts. [Appx. No. 21, 22 & 23, see [*hand*

[3] At this time, Petitioner surely did not know what was going on and Judge Rakower or Iris Roberts, Law Clerk made no attempt to inform Petitioner on the law on these maneuver within litigation.

written] Orders No. 2 and No. 3, decided May 10, 2011, Index No. 403478/2010, 2011 WL11166018:

Order No. 2: "After oral argument the motion for default judgment is DENIED, as moot.

Order No. 3: "After oral argument the motion to dismiss is GRANTED

6. The State Court erred Petitioner move for reconsideration and made an order to show cause to vacate the order pursuant N.Y. CPLR §5015(a) (2) & (3). Judge Rakower not only denied Petitioner's motion to vacate, she did not even sign it and allow Petitioner 'procedural due process' with a hearing, [Appx. No. 19 & 20]. Petitioner made argument on constitutional issues of due process violation. On the ground, Petitioner was not being treated equally on the law, pursuant to the state statue on default judgment, a motion to dismiss and state court's power, see CPLR §§ 3215, 3211 & 2211; which these statue shows the State Court violated the Due Process and the Equal Protection of the Law Clauses of the New York Constitution Article I, §§ 1 & 11. Also the Fourteenth Amendment. Therefore, Judge Rakower committed a miscarriage of justice on the ground, Judge Rakower had no power to issue an order that granted Defendants a motion to dismiss after she granted Defendants' OSC motion to withdraw, as moot, on Defendants' extension of time to answer Petitioner's verified state complaint two months after the deadline pass to answer. See N.Y. CPLR § 2211, 'Orders', courts will not have the power to move forward with another party's motion once the previous motion was withdrawn. Then, Judge Rakower cannot allow Defendants to move with a second motion, when Defendants was in default.

c. <u>N.Y. APPELLATE DIVISION: FIRST DEPARTMENT</u>

1. On May 23, 2012, Petitioner appealed to the N.Y. Supreme Appellate Division: First Department. On November 8, 2012, the First Department unanimously affirmed Judge Rakower's Orders No. 2 & 3, [appeal No. 8421-8421A] [Appx. No. 15]; *100 A.D.3d 410 [Nov. 8. 2010]*.

However, the First Department failed to state the facts of Petitioner's case, but, modified Judge Rakower's Orders no. 2 & 3. Pursuant to N.Y. CPLR § 5712 (b) & (c) govern appeals to the Court of Appeals of New York from the First Department. Petitioner motion for rehearing and it was also denied, [Appx. No. 14][4]. Petitioner again had no legal advice and was unaware that under N.Y. CPLR § 5712(b) & (c), once the appellate division modified the lower court's order, the loser has as a matter of right, jurisdiction to appeal to the New York Court of Appeals. See also *N.Y. Constitution Article VI, § 3(b) (1).* Petitioner was not afforded the same protection of the law.

d. N.Y. COURT OF APPEALS

1. On June 4, 2013, Petitioner Appeal to the N.Y. Court of Appeals Order no. *2013-432.* Court of Appeals DENIED Petitioner's appeal motion, *21 NY 3D 857 (2013)*, [App. No. 13]. And on November 14, 2013, Petitioner's Motion for Reconsideration *2013-747* filed July 22, 2013 is Denied, *22 NY 3d. 970, 978 NYS 2d 113, 2013 NY Slip Op 91106* [App. No. 12], Justice Sheila Abdus Salaam - Took no part on both motions, on account, Justice Salaam was on the First Department panel below.

2. For these reasons, the State Court Appellate Division: First Department and the Court of Appeals, N.Y. committed decisions that made no legal since and therefore committed miscarriage of justice. This is why Petitioner brought his state claims to the District Court on Constitutional issues. Because the state courts failed to recognize Petitioner's state claims violated

[4] When Petitioner arrived to the First Department for oral argument on his appeal. Richard T. Andrais, [1st Dept. J.] made a few commons that seriously offended Petitioner. Judge Andrais stated "I see they sent you down here to deal with this big mess". In addition and when Defendants' attorney Patrick J. Lawless, Esq. was called to argue in opposition, failed to make an argument. In fact, when Lawless was asked the question, "what page is the Second Circuit order on" by Karla Moskowitz, [1st Dept. J.] Lawless looked at Judge Andrais and Judge Andrais leaned over to Judge Moskowitz and said something out of the way of the microphone. After Judge Andrais said something to Judge Moskowitz, she bowed her head and slid back in her chair and said nothing else. In fact, no other Judge made any common. However, Sheila Abdus Salaam was visibly upset at Judge Andrais.

the NY and federal Constitution laws, which gives Petitioner subject matter jurisdiction to the District Court.[5]

ISSUED PRESENTED

1. Whether an writ of mandamus can rectify an erroneous appellate review de novo with extraordinary remedy on a district court's erroneous sua sponte reversal ruling that barred and denied a plaintiff's motion for in forma pauperis, 28 U.S.C. § 1915(a) and dismissed the plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12 (h)(3) without any showing of essential issues of material fact that support the dismissal when a party finds itself out of jurisdiction to seek relief against defendant, with the All Writ Act 28 U.S.C. §§ 1651 in-aid of jurisdiction & Stay on a state judgment, pursuant to 28 U.S.C. § 2283, and the Constitutional issues was not address, considered and ruled on? Or,
2. Whether the constitutional or diversity issues of refusal by the New York State Supreme Court, County of N.Y. Judge certify subject-matter jurisdiction pursuant to § 1331, or § 1332 where the damages exceed $75k? Or,
3. Whether the second circuit panel can recall its mandate?

RELIEF SOUGHT

1. Petitioner seek from this Court, to grant Petitioner's writ of mandamus power and order with instruction to the lower Court of Appeals, to recall its mandate and reverse its decision that denied Petitioner his in forma pauperis status and dismissed his federal complaint. Furthermore, the Second Circuit to Order and instruct the Southern District of New York to vacate the erroneous Order and Judgment filed on February 9, 2016, and enjoin Defendants to file an answer. Once

[5] Appendix no. 27, New York State Supreme Court, Court of N.Y. Grant of Petitioner's Poor Person motion, December 15, 2011.

Defendants' answer, assemble a Jury for a Hearing on damages, and enter damages with Judgment for Petitioner.

Finally, when the instant Judgment is reverse, the Second Circuit should instruct the District Court to reverse the erroneous underlying Jury defective verdict and Judgment from 06-4777-cv, *Pouncy v. Danka Office Imaging Co., n/k/a Konica Minolta Business Solutions, USA, Inc.*

LEGAL STANDARD

This Court weighs five factors in determining whether to grant a writ of mandamus under the All Writ Act, 28 U.S.C. § 1651(a): (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief Petitioner desires, (2) The Petitioner will be damaged or prejudiced in a way not correctible on appeal. (3) The District Court's order is clearly erroneous as a matter of law. (4) The District Court's order is an often-repeated error, and manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, with issues of law of first impression.

ARGUMENT

I. AN WRIT OF MANDAMUS CAN RECTIFY AN ERRONEOUS APPELLATE REVIEW DE NOVO, ON THE GROUND, THE ACT OF CONGRESS WITH THE ALL WRIT ACT 28 U.S.C. § 1651 IN-AID OF JURISDICTION & STAY ON A STATE JUDGMENT, PURSUANT TO 28 U.S.C. § 2283 IS A PROPER EXTRAORDINARY REMEDY

1. In this Court, the standard for writ for mandamus: "Mandamus is, of cause, a proper means of securing compliance with a mandate, where a lower court has failed or refused to comply with the mandate of a higher court; indeed, this Court has described that as 'a high function of mandamus." See *United States v. United States District Court*, supra, 334 U.S. at 264; see also, *In re Potts*, 166 U.S. 263; *Gains v. Rugg,* 148 U.S. 228; *In re Washington & G.R. Co.,* 140 U.S. 91. Accordingly, mandamus is appropriate here if relief cannot be obtain by appeal."

A. Mandamus Review is Appropriate:

2. Although a writ of mandamus is an extraordinary remedy, it "has been used 'both at common law and in the federal courts...to confine the court against which mandamus is sought to a lawful exercise of its prescribe jurisdiction.'" *In re City of New York*, 607 F.3d 923, 932 (2d Cir. 2010) (citing *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004)). This Court has recognized that "mandamus provides a logical method by which to supervise the administration of justice within the Circuit" in cases in which "a discovery order presents an important question of law." *In re von Bulow*, 828 F.2d 94, 97 (2d Cir. 1987); see also *In re Nielson*, No. 17-3345, Dkt. No. 171, at 1 (2d Cir. Dec. 17, 2017) (mandamus is appropriate where a petition raises "a discovery question ... of extraordinary significance.

3. In both the state and the District Court, Petitioner's case never made it to discovery in order to determine what the facts are in Petitioner's complaint. For these reasons, Petitioner showed neither the state nor the District Court complied with 'procedure due process' and explained all the facts of Petitioner' case is sufficient reason for an extraordinary remedy for a writ of mandamus.

II. THE LEGAL STANDARD WILL EVADE APPELLATE REVIEW AND HARM PLAINTIFF-PRO SE PARTIES ABSENT EXTRAORDINARY MANDAMUS

1. This Courts will grant a petition for a writ of mandamus where the lower court abused its discretion, failed to make decision on the law of both parties' facts, when the decisions made no legal sense and where the petitioner has no other remedy. i.e. If a court refuse to acknowledge a party's [plaintiff-pro] **facts** and dismiss the case without a showing on the law that a plaintiff-pro se facts shows no way of winning, hits right to a violation of the doctrine of 'procedural due process'. *Snyder v. Massachusetts, 291 U.S. 97 (1934).*

2. Therefore, elements to establish mandamus is clearly establish here in Petitioner's petition. See *Chaney v. U.S. Dist. Court for D.C.* (03-475) 542 U.S. 369 (2004); 334 F.3d 1096. Also see, *McClellen v. Carland,* 217 U.S. 280; 30 S. Ct. 504 (1910).

3. A district court must acknowledge they heard plaintiff-pro se case by a showing the court addressed, considered and ruled on each *particular fact in a discussion* of what a plaintiff presented in his/her complaint on the law. In addition, the district court must also state what facts the defendant put forward as a defense case against the plaintiff complaint charge. *Denton v. Hernandez*, 504 U.S. 26 (1992). This process will, no doubt, satisfy the fundamental fairness doctrines of Due Process and the Equal Protection of the Law Clauses in the Fourteenth Amendment.

a. Pouncy Can Obtain Jurisdiction To The District Court Pursuant To The All Writ Act Pursuant To 28 U.S.C. § 1651, With State Claims Of Legal Malpractice, Breach Of Fiduciary Duty, Fraud Pursuant To N.Y. Ct. Judicial Law § 487 And Intentional Infliction Of Emotional Distress To Rectify The Errors Defendants Committed While Representing Petitioner At The Underlying Trial And The District Court Entered An Erroneous Judgment Against Petitioner When The Jury Rendered A Defective Verdict With Inconsistencies Of The Trial Facts.

1. For these reasons, Petitioner can obtain jurisdiction to the District Court with state claims only, pursuant 28 U.S.C. § 1331; and § 1332 with Diversity where the damages exceed $75k. And because the issues of state claims were committed at the District Court, and entered erroneous Judgment, also gives Petitioner jurisdiction with the All Writ Act pursuant to 28 U.S.C. § 1651(a) in-aid of its jurisdiction; and have a Stay under § 2283.

2. Petitioner notice that *Wyly* and *Amalfitano* used 28 U.S.C. § 1651 in-aid jurisdiction & § 2283 for an injunction for a stay, and both had state claims at the state court and federal court. The current Second Circuit Court paid no attention to the fact the District Court did not address whether Petitioner had jurisdiction pursuant to § 1651(a) when the District Court reviewed and determine

Petitioner was suing attorneys. And not under § 1651(a) and de novo. See *Amalfitano v. Rosenberg,* 533 F.3d 117 (2nd Cir. 2008), "Court of Appeals reviews district court's findings of fact after a bench trial for clear error and its conclusion of law de novo. See also, *Wyly v. Weiss,* 697 F.3d 131 (2d Cir. 2012), "The preclusive effect of a federal court's judgment issued pursuant to its federal-question jurisdiction is govern by the federal common law of preclusion." In these two cases the Second Circuit reviewed both state claims with de novo and federal judgment.

3. The All Writ Act, goes back to 1789, however, was first used in 1988 with the Second Circuit case *Yonkers Racing Corp., v. City of Yonkers,* 858 F.2d 855, 865 (2d Cir. 1988) ("Accordingly we hold removal was proper under the All Writ Act. We do so because removal was necessary to protect the integrity of the Consent Decree and because the issues raised by the Article 78 petitions cannot be separated from the relief provided by the Consent Decree.") Furthermore, in Yonkers the district court ordered the state court actions removed to federal court. The Second Circuit upheld removal of the state cases, observing that "the district court was confronted both with the need to vindicate the constitutional rights of those in Yonkers...the very real possibility that the City of Yonkers would be subjected to inconsistent orders from the state court and federal court." *Id.* at 863. Drawing on language from the Supreme Court's decision in *United States v. New York Telephone Co.*, 434 U.S. 159 (1977)."

4. Where the legal standard allow plaintiff who remove their state case to rectify an error on federal law at their district court, then these litigant can seek subject-matter to the District Court jurisdiction pursuant Section 1651(a). However, Petitioner was not afford the same protection of the law with subject-matter jurisdiction pursuant to Section 1651.

b. Petitioner Can Obtain An Injunction For A Stay On The State Court From Entering a State Judgment Against Petitioner Pursuant To 28 U.S.C. § 2283

1. Petitioner also filed for a Stay to prevent Defendants from filing a state judgment at the state court, pursuant to U.S.C. § 2283. See *Stephenson v. Dow Chemical Co.*, 273 F3d 249, C.A.2 (N.Y.) 2001, certiorari granted 123 S. Ct. 485, 537 U.S. 999, 154 L.ed.2d 393, *affirmed in part, vacated in part* 123 S. Ct. 2161, 539 U.S. 111, 156 L. Ed.2d 106, *on remand* 346 F.3d 19. Also see *Amalfitano v. Rosenberg,* 533 F.3d 117 (2d Cir. 2008)

III. THE COURTS BELOW DEPRIVED PETITIONER HIS FUNDAMENTAL RIGHT TO SEEK RELIEF AGAINST DEFENDANTS WHEN THE COURTS BELOW ABRIDGED PETITIONER'S COMPLAINT WHEN COURTS ERRONEOUSLY SUA SPONTE A REVERSAL MOTION WITHOUT EVIDENCE OF PROOF

1. Petitioner is a plaintiff-pro se who is African-American and believe the District Court made the decision in this case on race and not facts. The District Court reviewed Petitioner's state court facts and learned Petitioner has merit with his case of legal malpractice, breach of fiduciary duty, fraud and emotional distress against Defendant-attorneys; and on January 15, 2016, the District Court granted Petitioner's in forma pauperis motion. In fact and support of Petitioner's argument, the State Court through Doris Ling-Cohan, [N.Y.S.J.] also granted Petitioner a Poor Person Order, Index No. 403478/2010. Only to have the State Court Part 15, Eileen A. Rakower [N.Y.S.J.] to ignore Petitioner's facts of his case and Judge Ling-Cohan opinion of Petitioner's Verified state Complaint, once Judge Rakower notice it was an African-American civilian Plaintiff pro se suing Caucasian-attorneys she dismissed the case.

2. In the state court, a plaintiff-pro se must prove plaintiff's case and show facts of merit in order to be granted poor person status. This came up when Petitioner made his motion for poor person. Plaintiff presented his case to Judge Ling-Cohan and after three days she granted Petitioner poor person status. See *Rubens v. Mason* 527 F.3d 252 (2d Cir. 2008), "In a diversity action based on attorney malpractice, state substantive law, here that of New York, applies. *Barry v. Liddle,*

O'Connor, 98 F.3d 36 (2nd Cir. 1996); *see also Rubens I,* 387 F.3d at 186 n. 6. To prevail on such a claim, Rubens must demonstrate "that the attorney was negligent, that the negligence was a proximate cause of the injury and that she suffered actual and ascertainable damages." *Rubens I,* 387 F.3d at 189 (citing *McCoy v. Feinman,* 99 N.Y.2d 295, 301–02, (2002)). In order for a defendant to succeed on summary judgment, it must establish "that the plaintiff is unable to prove at least one of the essential elements." *Crawford v. McBride,* 303 A.D.2d 442, 442 (2d Dep't 2003)."

3. However, at the District Court Loretta A. Preska [Chief U.S.D.J.] failed to recognize the fact of Judge Ling-Cohan Order that granted Petitioner's state case with Petitioner's facts. On account, Judge Preska was not looking to justify Petitioner's federal case on the law for jurisdiction. Because, as soon as, Judge Preska acknowledged Petitioner is African-American, and after granting Petitioner IFP status, Judge Preska sua sponte a reversal motion, denied Petitioner's IFP, on the Rooker-Feldman doctrine, dismissed his federal Complaint and order Judgment against Petitioner.

VI. The District Court's Order Is Clearly Erroneous As a Matter of Law

LEGAL STANDARD ROOKER-FELDMAN DOCTRINE

(1) The federal-court plaintiff lost in state court; (2) the plaintiff "complain[s] of injuries caused by a state court judgment"; (3) the plaintiff invite[s] review and rejection of that judgment and (4) the state judgment was rendered before the district court proceedings commenced.

1. The District Court referenced *Vossbrinck v. Accrediated Home Leaders, Inc.,* 773 F.3d 423, 426 (2d Cir. 2014) on the Rooker-Feldman doctrine. In Vossbrinck court: "After determining that lack jurisdiction, the district court instead of dismissing them on the merits. We therefore

vacate the judgment ...they may be remanded to the state court." Most important, the District Court failed to allow Petitioner that same protection of the law as Vossbrinck, and show a State Court Judgment on State Court's Orders no. 2, and 3 exist. See NY Index No. 403478/2010. The federal statute Fed. R. Civ. P. 52 states, a court must show the facts to support its order. In Petitioner's case, even though Judge Preska stated there is a state judgment against Petitioner, failed to show the state judgment exist. This can be construe [at minimum] abuse of discretion.

2. Because no state court judgment exist, (1) the Rooker-Feldman doctrine, does not apply; (2) Petitioner did not adjudicate his state claims at the State Court, on the ground, (3) Defendants defaulted on their state defense case, prior to discovery. (4) Therefore, Petitioner can seek relief at the District Court, see *Amalfitano v. Rosenberg,* 533 F.3d 117 (2d Cir. 2008) and *Wyly v. Weiss*, 697 F.d 131 (2d Cir. 2012); (4) The District Court did not recognize Petitioner facts and sua sponte a reversal motion; (5) the District Court failed to review constitutional issues; and the fact the Second Circuit failed to review de novo and shows evidence to support the District Court's dismissal clearly erred. (6) The Second Circuit failed to comply with the appellate review with the "clear and convincing" evidence standard.

V. MANDAMUS POWER IS WARRANT BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT OPINION CONFLICTS WITH THIS COURT'S DECISIONS IN *DENTON, COPPLEDGE, NEITZKE,* AND WITH ITS OWN CIRCUIT OPINIONS IN *VOSSBRINK, YONKERS, NEW YORK TELEPHONE, AMALFITANO V. ROSENBERG,* 533 F.3d 117 AND FEDERAL CASE [DOCKET NO. 06-2364-CV] AND *WYLY V. WEISS,* 697 F3D 131 (2D CIR. 2015)

1. The Second Circuit conflict with this Court ruling with *Denton v. Hernandez*, 506 U.S. 25, 112 S. Ct. 1728 (1990) when the Second Circuit failed to (1) review whether the Circuit Court had jurisdiction to review the lower District Court's opinion to move sua sponte and reversed her own order. (2) Whether there was a New York State Supreme Court judgment against Petitioner

in order to determine if Petitioner is barred from jurisdiction to the SDNY pursuant to the Rooker-Feldman doctrine, and lacks subject matter jurisdiction pursuant to Fed. R. Civ. P. 12 (h) (3). Or (3) if the District Court should proceed with Petitioner's federal complaint on state issues or remand Petitioner's case back to the state court, instead of dismissing Petitioner federal complaint completely prior to Defendants being enjoined and servicing an answer to Petitioner's complaint.

In *Coppedge v. United States,* 369 U.S. 438, (1962) at 446 states:

> "During the past five Terms of the Court, we have found it necessary to vacate and remand for reconsideration 14 cases in which a Court of Appeals has applied an erroneous standard in passing on an indigent's application for leave to appeal...
>
> In considering such an application addressed to it, the Court of Appeals will have before it what is usually the *pro se* pleading of a layman and the certificate of a district judge that the applicant lacks 'good faith' in seeking appellate review. The District Court's certificate is not conclusive, although it is, of course, entitled to weight. However, we have recognized that the materials before the Court of Appeals at this stage of the proceedings are generally inadequate for passing upon the defendant's application.
>
> Nevertheless, if from the face of the papers he has filed, it is apparent that the applicant will present issues for review not clearly frivolous, the Court of Appeals should then grant leave to appeal in forma pauperis, appoint counsel to represent the appellant and proceed to consideration of the appeal on the merits in the same manner that it considers paid appeals.
>
> If, on the other hand, the claims made or the issues sought to be raised by the applicant are such that their substance cannot adequately be ascertained from the face of the defendant's application, the Court of Appeals must provide the would-be appellant with both the assistance of counsel and a record of sufficient completeness to enable him to attempt to make a showing that the District Court's certificate of lack of 'good faith' is in error and that leave to proceed with the appeal in forma pauperis should be allowed."

2. In *Neitzke v. Williams,* 490 U.S. 319, 325 (1989), the [present] Second Circuit conflicts with the *Coppedge* Court in their opinion that "Appellant pro se, moves for leave to proceed in forma pauperis. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." Also see 28 U.S.C. § 1915(e). However, the *Neitzke* Court states "A complaint filed in forma pauperis is not

automatically frivolous within the meaning of § 1915(d) because it fails to state a claim under Rule 12(b) (6). ...under § 1915(d)'s frivolousness standard -- which is intended to discourage baseless lawsuits – dismissal is proper only if the legal theory the factual contentions lack an arguable basis."

3. The [present] Second Circuit panel used the wrong common law case in referencing *Neitzke v. Williams*, on two points. (1) In Petitioner's case, the issues are whether Petitioner was barred by the Rooker-Feldman doctrine. On account, the District Court review was to determine if Petitioner had (i) a full and fair opportunity to adjudicate his state claims at the State Court; (ii) he lost his state case; and (iii) a judgment was entered against Petitioner. Also, (2) to see if there was a state judgment entered against Petitioner in order to show a lack of subject-matter jurisdiction, pursuant to Fed. R. Civ. P. 12(h) (3). At no time or in any of the District Court or the Second Circuit opinion did either Court express the fact Petitioner's federal complaint failed to state a cause of action. See *Bell Atlantic Corp., v. Twombly,* 550 U.S. 554 (2007), or *Ashcroft v. Igbal*, 556 U.S. 662 (2009), with the fact Petitioner cannot push his federal complaint past that plausible line. Or, the less burden claim Petitioner cannot proof no set of facts, see *Conley v. Gibson,* 355 U.S. 41 (1957).

4. Furthermore, because the issues of claims are malpractice and fraud from attorneys misrepresenting Petitioner in a federal court, Petitioner should have an opportunity to seek relief from Defendants with the All Writ Act pursuant to 28 U.S.C. § 1651(a). See *Wyly v. Weiss,* 697 F3d 131 (2nd Cir. 2015); also see *Amalfatino v. Rosenberg*, 533 F.3d 117 (2nd Circ. 2008).

5. Thereby, Petitioner has subject-matter jurisdiction to the District Court pursuant to 28 U.S.C. § 1331, on Constitutional issues. On account, attorneys violations of N.Y. Code of Responsibility [Conduct], [N.Y.C.R.R. § 1200 seq.] and N.Y. Ct. Judicial Law § 487, which

caused Petitioner a lost in the federal district court with money damages. And Petitioner can obtain an injunction for a Stay against Defendants from trying to enter a state judgment, 28 U.S.C. § 2283, until the result of this case. And finally, because Petitioner lives in the State of New York and at least one of the Defendants lives in another state, Petitioner can also reach the federal jurisdiction pursuant to 28 U.S.C. § 1332, where the damages exceed $75k.

6. Therefore, because there is no state judgment filed against Petitioner, Index no. 403478/2010, the Second Circuit not only conflicts with *Neitzke* Court, the Second Circuit is completely wrong on its opinion on Petitioner's facts and the law on appeal.

VI. EXTRAORDINARY REMEDY IS ALSO WARRANT IN PETITIONER'S CASE ON ACCOUNT THE CIRCUIT PANEL'S OPINION CONFLICT WITH ITS OWN CIRCUIT LEGAL STANDARD ON REMAND OF A DISTRICT COURT'S ORDER TO DISMISS STATE CLAIMS BACK TO STATE COURT WITH A SUA SPONTE MOTION

1. The Second Circuit treated Petitioner's appeal differently than the Second Circuit did in *Vossbrink v. Accredited Home Lenders, Inc.,* 773 F.3d 423 (2014); *Treistman v. Federal Bureau of Prisons*, 470 F.3d 471; *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998) and *Mitskovski v. Buffalo and Fort Erie Public Bridge Authority,* 435 F.3d 127. The Second Circuit conflict with these opinions made in the pass.

2. Furthermore, the following cases [except *Mitskovski*] were referred by Loretta A. Preska, Chief [U.S.D.J.] who dismissed Petitioner's federal complaint, Docket No. 15-8753-cv. And Judge Preska opinion that dismissed Petitioner's complaint instead of reviewing it or remanding Petitioner's case back to the N.Y. Court of Appeals, erred and failed to properly fulfill their official duties, *Cheney v. United States Dist. Court for D.C.* (03-475) 542 U.S. 367 (2004) from 334 F.d 1096. Therefore, Judge Preska's opinions conflicts with the cases reference below, and the Cheney case.

3. In *Vossbrink v. Accreditation Home Lender, Inc.,* 773 F.3d 423 (2d Cir.), the Second Circuit stated: "After determining that it lack jurisdiction, the district court should have remanded the barred claims to state court instead of dismissing them on the merits. We therefore vacate the judgment as to those claims so they may be remanded to the state court." Also see, *Bd. of Selectmen of Town of Grafton v. Grafton & Upton R. Co.*, 2013 WL 2285913, F. Supp.2d 2013 (D. Mass.) Judge Hillman, stated "the action is hereby remanded to Westchester Superior Court for further disposition."

4. In *Treistman v. Federal Bureau of Prisons*, 470 F.3d 471, at 472 stated: "We conclude the *Treistman's* submissions, construed "liberally" and "interpreted [so as] to raise the strongest arguments that they suggest," *Pabon v. Wright,* 459 F.3d 241, 248 (2d Cir. 2006) (quoting *Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir. 1994)), should be read to allege a theory of liability...the district court did not consider below. Because the district court has jurisdiction to consider this theory of liability, dismissal pursuant to Rule 12(b) (1) was inappropriate and, accordingly, we vacate and remand to the district court for further proceedings. In addition, we recommend that the district court appoint counsel to assist *Treistman* further pursuing his claims." The District Court review of Petitioner's complaint to determine jurisdiction to the SDNY conflict with the *Treistman* Circuit.

5. In *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998), the District Court moved sua sponte and reversed her own order, but failed to show supportive evidence.

> Loretta A. Preska, [Chief U.S.D.J.] stated: "The Court must dismiss an *in forma pauperis* complaint, or portion thereof, that is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief from defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); *see Livingston v. Adirondack Beverage Co.,* 141 F.3d 434, 437 (2d Cir. 1998). The Court must also dismiss a complaint, or portion thereof, when the Court lacks subject matter jurisdiction. See Fed. R. Civ. P. 12(h)(3). While the law mandates dismissal on any of these grounds, the Court is obligated to construe *pro se*

pleadings liberally, *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir 2009), and interpret them to raise the "strongest [claims] that they *suggest*," *Triestman v. Fed. Bureau of Prisons,* 470 F.3d 471, 474-75 (2d. Cir. 2006) (internal quotation marks and citation omitted) (emphasis in original).

6. However, in *Livingston* the Second Circuit made an outcome that favors Petitioner, and not Judge Preska Opinion and Order that dismissed Petitioner's complaint, but Circuit panel failed to apply it to Petitioner's appeal. They stated:

> "Analyzing Livingston's complaint under Borman[6]...the Magistrate Judge...improperly resolved an issue of fact. As the Supreme Court clearly stated in Denton, a sua sponte dismissal for frivolousness is not a vehicle for resolving factual questions. See *Denton*, 504 U.S. at 32, 112 S. Ct. at 1733. As long as Livingston set forth a viable claim of duress, his complaint should have been allowed to proceed. Moreover, the Magistrate Judge improperly relied upon his prediction that Livingston's chances of ultimately prevailing on the merits were "nil." A claim is frivolous not when a court doubts its validity, but rather when it lacks an arguable basis in law."
>
> The Livingston Court also stated: "District court improperly resolved issue of fact when, in dismissing in forma pauperis...complaint as frivolous, 28 U.S.C.A. § 1915(e)(2)(B)(I). Federal Civil Procedure...in forma pauperis proceedings sua sponte dismissal....for frivolousness is not a vehicle for resolving factual questions. 28 U.S.C.A. § 1915(e)(2)(B)(I)."

7. In the instance case, the District Court totally mischaracterized what the Second Circuit meant in Livingston. And in, *Mitskovski v. Buffalo and Forte Erie Public Bridge Authority,* 435 F.3d 127 (2d Cir. 2006) made the opinion, "the precise issues presented are whether Order is appealable; if so, whether noncompliance was proper; if improper, whether the Court of Appeals may consider the District Court had subject matter jurisdiction." Further, in *Mitskovski* at 129 states "we conclude that the...Order is appealable, that the...Order was erroneously issued; that with the...Order properly before us on appeal, we may consider subject-matter jurisdiction; and that the District Court's subject-matter jurisdiction was properly invoked. We therefore vacate the order remanding the case to the state court and remand to the district court for further proceedings.

---

[6]*Borman v AT&T Communication Inc.,* 875 F.2d 399, 403 (2d Cir. 1989)

See *Mohammed v. City NY Dep't of Corr.,* 126 F.3d 119, 122 (2d Cir. 1997) "we review issues of justifiability, including de novo. See *Adams v. Zarnel,* 619 F.3d 156, 161 (2d Cir. 2010)... "Review is limited to determining whether the district court properly concluded that as to each claim there was no genuine issue of material fact, and whether substantive law was correctly applied for identification of material facts." See *H. L. Hayden Co. v. Siemens Medical Sys.,* 879 F.2d 1005, 1011-12 (2d Cir. 1989).

8. Moreover, see each State IAS Court Orders No. 1, 2, 3, & 4, there was no mention of any facts or a state judgment on either order, [Appx. No. 13a, 14a & 15a]. There was none. In fact, the Appellate Division: First Department made no indication in their order of affirmance [Order No. 8421-8421A] that a state judgment was entered, [Appx. No. 15a].

VII. Petitioner Has No Other Adequate Means, Such As A Direct Appeal, To Attain The Relief Petitioner Desires

1. Petitioner has no legal rights to jurisdiction at any court, at this time. Petitioner first filed these state claims at the NYS Supreme Court and the State Court erroneously dismissed Petitioner's state case [Appx. 23a]. Petitioner appealed to the First Dep't with poor person motion and the First Dep't affirmed the State Court's orders, [Index No. 17a, 15a & 14a]. And lastly at the state level, the Court of Appeals N.Y. denied jurisdiction to Petitioner, [Index No. 13a & 12a]. Given this, Petitioner had no other state court jurisdiction when the Court of Appeals NY failed to allow Petitioner jurisdiction to their court.

2. Since the State Courts refused to allow Petitioner to adjudicate his state claims at the state court and answer Petitioner's constitutional questions presented, Petitioner filed for jurisdiction to the District Court with a in forma pauperis motion. The District Court [at first] granted Petitioner's IFP status, [Docket No.11a]. After the District Court acknowledge Petitioner is African-American suing Caucasian-attorneys, the District Court without legal reason erroneously sua sponte a

reversal order and denied Petitioner in forma pauperis and dismissed Petitioner's case, [Docket No. 5a]. And, the Second Circuit also denied Petitioner IFP status and dismissed his complaint, [Docket No. 4a]. Petitioner although motion for reconsideration both at the District Court and the Second Circuit both Courts denied Petitioner reconsiderations motions. Petitioner also motion to recall the Second Circuit mandate, [Docket No. 1a]. The District Court and the Second Circuit made these decisions failed to review the well settled state case law on surviving a motion to dismiss, See CPLR 4213(b) *Dougherty v. Lion Fire Insurance*, 183 NY 302 (N.Y. 1905); also 219 Broadway Corp. v. Alexander, Inc., 46 NY 504, at 509, "The sole question presented for our review is whether the plaintiff's complaint states a cause of action. As such, we accept, as we must, each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of facts. See e.g., *Becker v. Schwartz*, 46 N.Y. 2d 401, 408; *Cohn v. Lionel Corp.*, 21 N.Y.2d 559, 562; *Kober v. Kober,* 16 N.Y.2d 191, 193.) If we find that the plaintiff is entitled to a recovery upon any reasonable view of the stated facts, our judicial inquiry is complete and we must declare the plaintiff's complaint to be legally sufficient. See also *Dulberg v. Mock,* 1 N.Y.2d 54, 56; *Condon v. Associated Hosp. Serv.* Of N.Y., 287 N.Y. 411, 414.) Finally, in the instance case, Petitioner has run the jurisdiction line in State and in federal court, and has no other court to turn to for jurisdiction to adjudicate his claims against defendants.

VIII. The Petitioner Will Be Damaged Or Prejudiced In A Way Not Correctible On Appeal.

1. When the District Court made the indisputable erroneous opinion that there is a state judgment filed against Petitioner, Petitioner is damaged. On the ground, collateral estoppel has been attached to Petitioner legal malpractice and other claims against Defendants. Petitioner is prejudiced from bring this action again to any court, with federal judgment erroneously filed

against Petitioner. More important, there is no legal evidence to support the dismissal and judgment.

2. In other words, the State Courts did not want Petitioner to be heard on his case. The State Courts refused to answer Petitioner's questions presented. Which is a federal question [in itself] that was not answered, and reason for constitutional issues 1331, and § 1332 on diversity where the damages exceed $75k, therefore, Petitioner can obtain subject-matter jurisdiction to the District Court.

IX. REASON TO RECALL MANDATE AND GRANT PERMISSION FOR RECONSIDERATION

1. Petitioner's motion to recall mandate and permission to submit motion for reconsideration en banc should be granted on the ground, the United States Court of Appeals for Third Circuit made the opinion in *United States v. Parris Wall, Jr.*, [Docket nos. 04-2280 & 05-2019] "This appeal presents a question of appellate procedure. Specifically, it implicates our practice of permitting petitions for rehearing en banc to be filed "out of time" and recalling our mandate so that these petitions may be considered by the full court. The issues here can be reduced to this inquiry: Does an untimely petition for rehearing en banc become timely when we permit its filing "out of time," thus starting the clock a new for habeas petitions?

2. We conclude that it does, and hence, will reverse the District Court."

Petitioner argument here, pursuant to the Equal Protection of Law Clause of the Fourteenth Amendment of the United States Constitution, Petitioner civil appeal for continuation of his In Forma Pauperis status should be given the same as the Third Circuit's opinion.

X. THE EVIDENCE OF PETITIONER'S CLAIMS ARE CLEAR LEGAL MALPRACTICE, BREACH OF FIDUCIARY DUTY, FRAUD AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

1. Because the District Court made the opinion of conclusion [only] of this case, failed to review Petitioner's claims with his material facts of merit. That Defendants (1) failed to make motion on Petitioner behalf and ask for the underlying job action when the underlying defendant-Danka was denied their directive verdict motion. When the underlying Judge made the opinion "But at this stage, it seem to me the plaintiff has met the basic evidence of showing discrimination, and the basic evidence necessary to have a claim of retaliation". Continuing, "You may have a – you may have some – you got a lot of work to do, Mr. Solotaroff. You want to be able to prove the damages to the jury's satisfaction. There are some damages. And just his statement of emotional damages, et cetera." Defendants in return made the statement, "Judge, before we decide what we are going to do on rebuttal, it seem that it would be appropriate at this time for plaintiff to make a motion for a directed verdict." These statement of evidence of the underlying trial showed Petitioner met his burden of proof. Furthermore, the fact Defendants, on Petitioner's behalf, went into a stipulation with defendants-Danka that Petitioner suffered adverse employment action. Failed to include this evidence into the underlying trial for the jury to see. Because of this, the jury rendered a defective verdict by answering question number three of the interrogatories inconsistent with the facts of the trial on whether plaintiff suffered an adverse employment action. Because, both parties agreed Petitioner did suffer the adverse employment action, and the jury though Petitioner did not suffer adverse employment action conflict with the actual facts of the underlying trial. And formed a defective verdict on inconsistencies of the facts at trial. Defendants intentionally failed to object to this obvious error by the jury. Which is proof of legal malpractice. And because Defendants intentionally decided to sabotage Petitioner's federal trial also committed fraud, by deception. These facts along with other errors Defendants committed showed State and District Court are wrong on their facts of their opinions and orders.

2. Therefore, the District Court deprived Petitioner his fundamental right to seek relief against Defendants in a court of law. Being that these facts exist, and no court recognized them is reason for extraordinary remedy for a writ of mandamus to straighten out the erroneous orders from the Second Circuit and the District Court.

3. There is no legal reason for the District Court's and the Second Circuit's Orders, which showed, these federal Courts committed a miscarriage of justice when they abridged Petitioner's case and deprived Petitioner his fundamental right for relief in adjudication of his claims at a court of law.

XI. CONCLUSION

Bottom line, the Second Circuit failed to show by the 'clear and convincing' evidence standard Petitioner is barred by Rooker-Feldman doctrine, and lack subject-matter jurisdiction to the Southern District of New York. Pursuant to the 'clear and convincing' evidence standard, see *Colorado v. New Mexico,* 467 U.S. 310 (1984); also see more recent in *Microsoft v. i4i Ltd. Partnership,* 564 U.S. 91 (2011), the District Court failed to prove Petitioner is barred and lack subject matter jurisdiction. And, the Second Circuit failed to review de novo, which seriously harmed Petitioner for years, now. Petitioner produce sufficient argument of extraordinary remedy for a writ of mandamus petition.

WHEREFORE, Petitioner seek extraordinary writ of mandamus power.

Respectfully submitted,

Larry Pouncy, *pro se*
131 Edgecombe Avenue, #1D
New York, N.Y. 10030
Tele: 347-876-8306
Petitioner
Tele: 347-876-8306

Email:Larrypouncy@aol.com

To: Patrick J. Lawless, Esq.
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
150 East 42nd Street
New York, N.Y. 10007
Main: 212-490-3000
Direct: 212-915-6091
Attorneys for Defendant-respondents

Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Clerk of the Court
United State Court Of Appeals
for the Second Circuit
40 Foley Square
New York, N.Y. 10007

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

Pursuant to Supreme Court Rule 33.1(h), I hereby certify that the Petitioner's brief contains 8,999 words, excluding the parts of the document exempted by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct.

Executed September 26, 2019

Larry Pouncy
131 Edgecombe Avenue, #1D
New York, N.Y. 10030
(347)-876-8306
Petitioner, pro se

Sworn before me on the 26th day

Of September, 2019

Notary

JOSEPH K. EADY
Commissioner of Deeds
City of New York, No. 3-3593
Certificate Filed in Bronx County
Commission Expires Nov. 1, 2020

To: Patrick J. Lawless, Esq.
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
150 East 42nd Street
New York, N.Y. 10017
212 490-3000

Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Clerk of the Court
United States Court of Appeals
for the Second Circuit
40 Foley Square
New York, N.Y. 10007

No.

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE LARRY POUNCY, *Petitioner*

PROOF OF SERVICE

I Larry Pouncy, do swear that on this date, September 26, 2019, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PUPERIS* and ERXTAORDINARY WRIT OF MANDAMUS on opposing party's counsel, by depositing an envelope containing the above documents in the United States mail properly addressed to Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 150 E42nd Street, New York, N.Y. 10017, attention to Patrick J. Lawless, Esq. attorneys for Jason L. Solotaroff, Esq.; Darnley Stewart, Esq.; Giskan, Solotaroff, and Anderson LLP, Respondents with a first class postage prepaid for delivery within 3 calendar days. In addition, Petitioner will serve a copy up on the United States Court of Appeals for the Second Circuit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 26, 2019

Larry Pouncy
131 Edgecombe Avenue, # 1D
New York, N.Y. 10030
(347) 876-8306

Sworn before me on the 26th day
of September, 2019

JOSEPH K. EADY
Commissioner of Deeds
City of New York, No. 3-3593
Certificate Filed in Bronx County
Commission Expires Nov. 1, 2020

No. _____ ORIGINAL

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

IN RE LARRY POUNCY,
Petitioner

_____

ON EXTRORDINARY WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

_____

APPENDIX

_____

LARRY POUNCY
130 EDGECOMBE AVENUE #1D
NEW YORK, N.Y. 10030