

14-1509

No. _____

Supreme Court, U.S.
FILED

JUN 21 2015

OFFICE OF THE CLERK

In The
Supreme Court of the United States

——
JOHN LACERTOSA,

Petitioner,

v.

BLACKMAN PLUMBING SUPPLY CO., INC., RICHARD
BLACKMAN, ISLANDWIDE RECEIVABLES INC., MICHAEL
SCHIRANO, PAUL BEDFORD, STEVEN SUNDACK, JON
SUNDACK, SUNDACK C.P.A., P.C., F.D.R.P. INCORPORATED,
F.V.A., INC., CONFLICT ECONOMICS, INC.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

JOHN LACERTOSA

Petitioner Pro Se

13-61 144th Place

Whitestone, New York 11357-2408

(718) 357-3842

QUESTIONS PRESENTED

1. Whether the District Court for the Eastern District of New York and the 2nd Circuit Court of Appeals erred in their judgment by rendering such judgment with reliance and reference to *Manson v. Stacescu*, 11 F.3d 1127, 1131 (2d Cir. 1993).
2. Whether the 2nd Circuit Court of Appeals erred in not recognizing the “special duty” exception when considering the petitioner’s individual standing.
3. Whether the District Court for the Eastern District of New York and the 2nd Circuit Court of Appeals erred in their judgment by ordering their judgment without considering the evidence the petitioner referenced in his allegations and pleadings.

LIST OF PARTIES

All parties to this proceeding are listed on the cover.

TABLE OF CONTENTS

	<i>Page</i>
Questions	i
List of Parties	ii
Table of Authorities	iv
Appendix Index	v
INTRODUCTION	1
OPINIONS BELOW.....	3
JURISDICTION	3
STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE AND PROCEEDINGS.....	4
REASONS FOR GRANTING THE WRIT OF CERTIOARI	6
1. Individual Standing	6
2. The “Special Duty” Exception.....	10
3. Evidence	12
Conclusion	15

TABLE OF AUTHORITIES

	<i>Page</i>
<i>Brass v. Am. Film Technologies, Inc.</i> , 987 F.2d 142, 150 (2d Cir. 1993)	4, 12, 13
<i>Ceribelli v. Elghanayan</i> , 990 F.2d 62, 63-65 (2d Cir. 1993)	4, 10, 12
<i>Holmes v. Securities Investor Protection Corp.</i> , supra, 503 U.S. at, 112 S. St. at 1318	7
<i>Manson v. Stacescu</i> , 11 F.3d 1127, 1131 (2d Cir. 1993)	6, 7, 8, 9, 10
<i>Ruotolo v. City of New York</i> , 514 F.3d 184, 188 (2d Cir. 2008).....	14

APPENDIX INDEX

	<i>Page</i>
Order from the United States Court of Appeals for the Second Circuit, dated January 22, 2015	1a
Summary Order from the United States Court of Appeals for the Second Circuit, dated November 6, 2014.....	3a
Judgment from the United States District Court Eastern District of New York, dated July 15, 2013	8a
Memorandum and Order from the United States District Court Eastern District of New York, dated July 12, 2013	10a

INTRODUCTION

The petitioner respectfully seeks a writ of certiorari for the Supreme Court to review the United States Court of Appeals for the 2nd Circuit's affirmation of the United States District Court for the Eastern District of New York's Memorandum and Order whereby the petitioner's complaint was dismissed with prejudice pursuant to Fed.R.Civ.P. 12(b)(6). The District Court's dismissal of the complaint and the Court of Appeals affirmation of the dismissal was made with reference and reliance under generalizations that were set forth in established cases, stated herein, that do not apply to the petitioner's individual standing. Further, the District Court and the Court of Appeals issued their orders without taking into their discretion the evidence the petitioner had referenced as well as relied upon in bringing this action.

The District Court's and the Court of Appeals' dismissal of the complaint and indiscretion of the evidence that the petitioner referenced is a perfect example as to why The Open Access to Courts Act of 2009, codified as H.R.4115, was introduced to the 111th Congress on November 19th, 2009 by Representative Jerrold Nadler [D-NY-10]. The bill proposed to amend Chapter 131 with 28 U.S.C. § 2078 Limitation on Dismissal of Complaints "(a) A court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint under one of those subdivisions on the basis of a

determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.”

Thus, The United States Supreme Court's intervention is required, as the petitioner asserts the arguments stated herein, wherefore, the petitioner's complaint should not have been dismissed pursuant to Fed.R.Civ.P. 12(b)(6) because the District Court as well as the Court of Appeals failed to take the evidence the petitioner referenced and relied upon into their discretion prior to issuing their orders. The inapplicable generalizations applied to the petitioner by the District Court and Court of Appeals and further, the lack of discretion of the evidence has only caused an injustice to the petitioner.

It should be recognized that the continuation of dismissing complaints pursuant to Fed.R.Civ.P. 12(b)(6) will only cause further injustices to those who have sustained injuries by the alleged misconduct of the accused without giving the victims of the misconduct a rightfully owed day in court especially in considering the Court's lack of discretion of the evidence the petitioner referenced and relied upon in bringing the action.

If the Courts consider the evidence the petitioner references before the Court considers the technicalities that Fed.R.Civ.P. 12(b)(6) provides, the petitioner will prove and fortify the merits as well as the sets of facts to support his claim that the defendants are in fact responsible for the misconduct

alleged and that petitioner is entitled to the relief being sought.

OPINIONS BELOW

The United States Court of Appeals for the 2nd Circuit denied the petitioner's petition for rehearing and rehearing *en banc* by Order on January 22nd, 2015 (App. 1a-2a). The United States Court of Appeals for the 2nd Circuit affirmed the Memorandum and Order of the United States District Court for the Eastern District of New York by Mandate on January 30th, 2015 (App. 3a-7a). The United States District Court for the Eastern District of New York granted the defendant's motion to dismiss by Memorandum and Order on July 12th, 2013 (App. 8a-23a).

JURISDICTION

The United States Court of Appeals for the 2nd Circuit denied the petitioner's petition for rehearing and rehearing *en banc* by Order on January 22nd, 2015. The United States Court of Appeals for the 2nd Circuit issued the Mandate on January 30th, 2015, affirming the Memorandum and Order of the United States District Court for the Eastern District of New York which was ordered on July 12th, 2013. Accordingly, the United States Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) which provides: Cases in the court of appeals may be reviewed by the Supreme Court by the following methods (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions consist of 1) the “Special Duty” Exception within the context of RICO actions pursuant to 18 U.S.C. § 1961-1964 which was recognized in *Ceribelli v. Elghanayan*, 990 F.2d 62, 63-65 (2d. Cir. 1993) 2) the Court of Appeals’ and District Court’s indiscretion of the evidence the petitioner referenced and relied upon in bringing this action as related to *Brass v. Am. Film Technologies, Inc.*, 987 F.2d. 142, 150 (2d. Cir. 1993) and 3) 28 U.S.C. § 2078 Limitation on Dismissal of Complaints as it relates to Fed.R.Civ.P. 12(b)(6).

STATEMENT OF THE CASE AND PROCEEDINGS

1. The petitioner commenced this case on May 3rd, 2010 by filing a complaint in the United States District Court for the Eastern District of New York alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) pursuant to 18 U.S.C. § 1961-1964.
2. On September 23rd, 2011, an oral argument was held before the Honorable District Court Judge Sandra L. Townes whereby Judge Townes granted the defendants’ motion to dismiss but, granted leave to the petitioner to amend the complaint.
3. The Amended Complaint, recognized by the Court as the 2nd Amended Complaint was filed February 6th, 2012.
4. On September 26th, 2012 an oral argument was held before Magistrate Judge Vera M. Scanlon to hear the petitioner’s request to discharge his

attorney whereby the discharge of the petitioner's attorney was granted.

5. In a status report filed with the District Court on October 24th, 2012, the petitioner informed the court that he would be proceeding as pro se.

6. On January 21st, 2013, all motion papers were filed as per the ordered briefing schedule.

7. On July 12th, 2013, the Honorable District Judge Sandra L. Townes, through a Memorandum and Order, granted the defendant's motion to dismiss.

8. On August 13th, 2013, the petitioner filed a Notice of Appeal with the District Court.

9. On September 10th, 2013, the petitioner filed a motion in the District Court to Un-Seal a Document of the minute order for the proceedings of September 24th, 2012 held before Magistrate Judge Vera M. Scanlon to discharge the petitioner's attorney for the purpose of assisting the petitioner's appeal.

10. On November 14th, 2013, the petitioner's motion to Un-Seal a Document was granted by the District Court.

11. On March 6th, 2014, the petitioner filed the appeal with the United States Court of Appeals for the 2nd Circuit.

12. On November 6th, 2014, the Court of Appeals denied the petitioner's appeal by Summary Order.

13. On November 19th, 2014, the petitioner filed for a rehearing and a rehearing en banc.

14. On January 22nd, 2015, the Court of Appeals denied the petitioner's request for rehearing and rehearing *en banc*.

15. On January 30th, 2015, the Court of Appeals issued the Mandate.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. INDIVIDUAL STANDING

The petitioner (hereafter referred to as Lacertosa) respectfully asserts that the United States Supreme Court should consider that the District Court for the Eastern District of New York (hereafter referred to as the District Court) and the 2nd Circuit Court of Appeals (hereafter referred to as the Court of Appeals) have erred in their Summary Orders by referencing and relying their judgments under an umbrella of generalizations set forth in *Manson v. Stacescu*, 11 F.3d 1127, 1131 (2d Cir. 1993).

It should be recognized that there are distinct differences between Manson and Lacertosa whereby it should be found that Manson can not be relied upon nor referenced to the issue of Lacertosa's individual standing.

In *Manson v. Stacescu*, Manson chose to operate his business as a corporation to gain certain advantages. Therefore, the court found that Manson could not avoid the consequences of the corporate structure. Further, Manson's corporation was rendered bankrupt for which Manson was seeking relief from the injury of the corporation's bankruptcy as a shareholder, obligor, and employee of the corporation.

A significant difference between Manson and Lacertosa is recognized when considering the existence of a corporate structure. In *Manson v. Stacescu*, the corporation still provided protection of a corporate veil even though Manson's corporation was bankrupt. Unlike Manson, Lacertosa's corporation was not rendered bankrupt. As alleged in the initial allegations of the 2nd Amended Complaint and further asserted in Lacertosa's principal brief to the Court of Appeals, Lacertosa's corporation was shut down by the intentional act of the appellees when the RICO enterprise initially commenced, thereby removing the existence of a corporate veil that would have protected Lacertosa.

It should be recognized, that unlike *Manson v. Stacescu*, the shut down of Lacertosa's corporation was not the ending result but, the initial result of the appellees' participation in the RICO enterprise. It is due to the appellees' initial participation in the RICO enterprise that caused Lacertosa's corporation to cease to exist thereby directly exposing Lacertosa, individually.

As the District Court and the Court of Appeals make reference to *Manson v. Stacescu* and *Holmes v. Securities Investor Protection Corp.*, supra, 503 U.S. at, 112 S. Ct. at 1318, it should be considered that these cases do not reference a corporation that was intentionally shut down by the appellees at the commencement of the RICO enterprise which removed the existence of a corporate veil.

Therefore, Lacertosa should not be profiled as well as held under the generalizations set forth in *Manson v. Stacescu* and *Holmes v. Securities*

Investor Protection Corp., as such generalizations do not apply and are inaccurate with respect to Lacertosa's individual standing.

Further, the court found in *Manson v. Stacescu* that Manson's injuries were related to the decline in Manson's shares in his corporation. Unlike Manson, Lacertosa's injuries have nothing to do with Lacertosa's investment in the corporation. It should be recognized that the injuries to Lacertosa were incurred as individual injuries that were directly inflicted upon Lacertosa's personal profession and his ability to perform his personal profession whereby the appellees deprived Lacertosa of his ability to provide for his family and his own well being as alleged in the initial allegations in the 2nd Amended Complaint, the initial pleadings of Lacertosa's response and surreply to the District Court, as well as asserted in the principal brief to the Court of Appeals.

It should be recognized that unlike Manson, without the existence of a corporate structure, Lacertosa was now individually and directly exposed to liabilities that a corporate veil would have protected Lacertosa from. Therefore, such injuries are not only separate and distinct from an injury to the corporation but, further, such injuries were not derived from Lacertosa's title or employment with the corporation because a corporation ceased to exist for the injuries to be derived from.

Therefore, Lacertosa's standing should only be seen as an individual, for which Lacertosa was the "primary victim" by reason that injuries were incurred by Lacertosa, individually and his ability to

perform his personal profession. The aforementioned challenges the Court of Appeals conclusion in their Summary Order that the “special duty” exception is inapplicable, as Lacertosa alleges no “injury that is separate and distinct from the injury sustained by the corporation.”

Further, the court found that the threats made against Manson were due to his place with the corporation. It should be recognized, that Lacertosa’s initial allegations assert that the appellees threatened Lacertosa, personally by calling Lacertosa at his personal home due to the appellees knowing the corporation ceased to exist by their own execution, as stated herein. The threats were directed at Lacertosa, personally as the appellees make reference to a debt naming Lacertosa personally responsible. Such threats were made by voicemail and were retrieved, recorded, and certified by a professional recording company for which the evidence of such voicemails remain in Lacertosa’s possession.

Due to the District Court’s and the Court of Appeals’ reliance upon *Manson v. Stacescu*, a case that cannot be relied upon and should not be referenced when addressing the issue of Lacertosa’s individual standing due to such case not being relevant nor related to Lacertosa, it should be recognized that a statute of law nor a case with respect to the law was properly referenced to affirm the District Court’s Memorandum and Order and to justify the Court of Appeals’ Summary Order.

Therefore, the District Court and the Court of Appeals erred in their judgment when considering

Lacertosa's individual standing which has caused an injustice to Lacertosa.

2. THE "SPECIAL DUTY" EXCEPTION

Further to the inaccurate comparison of Manson to Lacertosa, Lacertosa's individual standing should be further recognized in considering a proper comparison of Lacertosa to *Ceribelli v. Elghanayan*, 990 F.2d 62, 63-65 (2d. Cir. 1993) with respect to the "special duty" exception.

In *Manson v. Stacescu*, it was found that unlike Ceribelli, Manson failed to allege that any of the appellees owed an independent duty that was distinguishable from a duty owed to the corporation. Therefore, the court found that the "special duty" exception did not apply to Manson.

It should be recognized that what Manson failed to allege, Lacertosa has successfully alleged by fulfilling the requirements recognized in *Ceribelli v. Elghanayan* as asserted in the principal brief to the Court of Appeals with references to Lacertosa's initial pleadings. It should be recognized that Lacertosa's allegations contain sufficient and significant facts for the Supreme Court to recognize that the Court of Appeals erred in their judgment by stating that the "special duty" exception is inapplicable to Lacertosa's individual standing.

Unlike Manson, but in compliance with the standards set forth in *Ceribelli v. Elghanayan*, Lacertosa has asserted that the appellees did in fact owe independent duties to Lacertosa, individually for which such duties are distinguishable from duties owed to Lacertosa's corporation.

Such independent duties consist of but, are not limited to, the appellees' execution of the shut down of Lacertosa's corporation, for which the appellee's intentionally removed the existence of a corporate veil that a corporation would have provided. Now, with the absence of a corporate structure, the duty owed of reorganization as alleged in Lacertosa's initial pleadings, was owed to Lacertosa, as an individual, with respect to Lacertosa's personal profession.

Further, without a corporate structure, the independent duty of the appellees was owed to Lacertosa personally, beyond Lacertosa's title or employment with the corporation due to the corporation having ceased to exist through the intentional actions of the appellees. Further, the appellees assuming such independent duties that Lacertosa had relied on but, intentionally failing to exercise such duties with due care has further caused injury to Lacertosa by exposing Lacertosa, individually without the protection of a corporate veil as stated herein.

The aforementioned fortifies that the independent duties owed to Lacertosa by the appellees were in fact owed to Lacertosa, individually for which such duties are separate and distinguishable from the duties owed to the corporation.

Significant facts pertaining to the independent duties owed by the appellees to Lacertosa, individually have been asserted in Lacertosa's principal brief to the Court of Appeals and further, have been alleged in the initial allegations and pleadings in the 2nd Amended Complaint, Response

and Sur-Reply to the District Court, wherefore, it should be recognized that such independent duties have been asserted prior to the time of Lacertosa's appeal.

The initial pleadings consisting of but, not limited to independent duties owed to Lacertosa which have been raised prior to the time of Lacertosa's appeal challenges the Court of Appeals' order that the "special duty" exception is forfeited as Lacertosa failed to raise it before the District Court when given the opportunity to brief the issue of his standing.

The aforementioned further challenges the Court of Appeals statement in their Summary Order that Lacertosa lacks standing substantially for the reasons stated in the District Court's thorough memorandum and order and that the District Court's dismissal for lack of standing was proper.

Therefore, the Court of Appeals erred in their judgment by failing to recognize the relevance of the similarities between Ceribelli and Lacertosa when considering the "special duty" exception which has caused a further injustice to Lacertosa. Therefore, it should be recognized that the "special duty" exception should be applied to Lacertosa's individual standing.

3. EVIDENCE

In the District Court's order (18a), reference is made to *Brass v. Am. Film Technologies, Inc.*, 987 F 2d. 142, 150 (2d Cir. 1993) for which it is quoted "a court can consider documents attached to the complaint as an exhibit or incorporated in it by reference,... matters of which judicial notice may be taken,

or...documents either in plaintiff's possession or of which plaintiff's had knowledge and relied on in bringing suit."

It should be recognized that although reference to *Brass v. Am. Film Technologies, Inc.* was made, the precedents that were set forth in *Brass v. Am. Film Technologies, Inc.* have been ignored when considering Lacertosa's individual standing.

Lacertosa directs the Supreme Court's attention to the specific language used in *Brass v. Am. Film Technologies, Inc.* that a court can consider documents incorporated in a complaint by reference or documents either in plaintiff's possession or of which plaintiff's had knowledge and relied on in bringing suit.

Beginning with the 2nd Amended Complaint, continued through Lacertosa's Response and Sur-Reply to the District Court, as well as in Lacertosa's principal brief and reply brief to the Court of Appeals, each individual allegation, pleading, argument, and statement of fact was referenced by Lacertosa to evidence in the form of numerous documents as well as tape recordings for which Lacertosa asserted repetitively that such evidence is and remains in Lacertosa's possession.

Such evidence that is referenced in Lacertosa's pleadings further proves and fortifies 1) Lacertosa's individual standing 2) the application of the "special duty" exception 3) Lacertosa's initial pleadings that independent duties were owed by the appellees to Lacertosa, individually 4) that there are injuries to Lacertosa, individually that are separate and distinct from the corporation 5) Lacertosa's injuries

are not derivative of the corporations' injuries. Further, such evidence ultimately reveals the appellees' actions of shutting down Lacertosa's corporation thereby causing the non-existence of the corporation.

The District Court's order (18a), made reference to *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008) which set forth in considering a motion to dismiss pursuant to Rule 12 (b)(6), a court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor.

However, it is evident that the District Court and the Court of Appeals failed to draw all reasonable inferences in the plaintiff's favor by reason that the evidence has been ignored and not considered, whereby, should the evidence had been taken into the District Court's discretion, the appellees' motion to dismiss should have been denied. Further, such evidence that Lacertosa has referenced in his pleadings was never deemed as inadmissible.

The Court of Appeals concluding in their Summary Order that "We conclude that Lacertosa lacks standing substantially for the reasons stated in the district court's thorough memorandum and order" and "We conclude that the district court's dismissal for lack of standing was proper..." has further caused an injustice to Lacertosa as it relates to a judgment being issued prematurely without considering the factual, physical evidence that Lacertosa has in his possession.

With the consideration of the evidence accompanied with the reconsideration of the factual pleadings and

allegations, it should be recognized that Lacertosa does have standing in his individual capacity and Lacertosa has alleged injuries separate and distinct from the injury of the corporation.

Therefore, the District Court and the Court of Appeals erred in ordering a judgment without considering the evidence Lacertosa has referenced as well as relied upon to bring this action which has caused an injustice to Lacertosa by reason that the evidence is of great significance as such evidence can further prove and fortify Lacertosa's individual standing.

CONCLUSION

The aforementioned in sum further asserts that Lacertosa's action should not have been dismissed and furthermore should not have been dismissed with prejudice.

Lacertosa's application for a Writ of Certiorari should be granted in all aspects as per the aforementioned arguments to prevent any further injustice to be caused upon the petitioner, Lacertosa.

Respectfully submitted,

JOHN LACERTOSA
Petitioner Pro Se
13-61 144th Place
Whitestone, NY 11357-2408
(718) 357-3842