No. _____

In The

Supreme Court of the United States

MARTIN STONER,

Petitioner,

v.

YOUNG CONCERT ARTISTS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

MARTIN STONER, Pro Se
900 West End Avenue
New York, New York 10025
(212) 866-5447

QUESTIONS PRESENTED

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).* In the context of procedural rights due to pro se litigants in civil matters, the questions presented are as follows:

1.) Is a pro se litigant in a civil matter entitled to the same due process and equal protection under the Fifth and Fourteenth Amendments to the U.S. Constitution as a party represented by a licensed attorney?

2.) Did the district court and the court of appeals err and abuse their discretion in permitting a premature motion to dismiss to go forward without first granting a "fair" and "meaningful" hearing and a minimum level of due process to a pro se litigant in a civil matter?

3.) Did the Second Circuit's denial of Petitioner Pro Se Martin Stoner's Writ of Mandamus contradict the Supreme Court's holdings in *La Buy v. Howes Leather Co*., 352 U.S. 249 (1957), and *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), in failing to exercise supervisory control of the district court via mandamus?

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* Cited in *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

QUESTIONS PRESENTED – Continued

4.) Did the court of appeals and the district court abuse their discretion in denying Petitioner's requests for a stay, an evidentiary hearing, a motion to amend, and a motion for preliminary injunctive relief and thereby demonstrate prejudice against a pro se litigant?

5.) Did the actions of the Second Circuit in sanctioning the prejudicial conduct of the district court towards pro se litigants merit the recusal or disqualification of all the appellate justices in addition to the district court judge?

6.) Did the Second Circuit and the district court both err and abuse their discretion in failing to construe a pro se plaintiff's pleadings "liberally"?

7.) Did the Second Circuit and the district court both err and abuse their discretion in failing to grant an evidentiary hearing (to decide material issues of fact) prior to denying motions for preliminary injunctive relief and sanctions?

8.) Do the policies of the Second Circuit and Southern District of New York conflict with 28 U.S.C. § 2072 and this Court's procedural requirements for pro se litigants?

9.) Did the Second Circuit err, abuse its discretion, and usurp its power when it failed to take the "extraordinary" step of disqualifying the chief district court judge due to her bias against a pro se litigant?

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OTHER AUTHORITIES

OPINIONS BELOW

The Second Circuit's opinion filed October 3, 2012, the subject of the petition, appears at Appendix 1. The decision was not reported.

The district court's orders dated May 8, 2012, and May 15, 2012, the subject of the Second Circuit's opinion dated October 3, 2012, appears at Appendix 5 and Appendix 19 respectively. Copies of letters from both the defendant and the plaintiff filed with the district court opinions are also included in the appendix as attachments to these orders. The opinions of the United States District Court were not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner seeks review of the judgment of the Second Circuit Court of Appeals entered on October 3, 2012, denying an interlocutory appeal, a writ of mandamus and an appeal of a denial of a preliminary injunction in the district court.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The basis for federal jurisdiction in the court of first instance was pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1334(4) and 28 U.S.C. § 1367.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

A. Federal Constitutional Provisions

The Due Process Clause of the Fifth Amendment of the United States Constitution

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

The Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any

> person within its jurisdiction the equal protection of the laws.

The Privileges and Immunities Clause of the United States Constitution, Article 4, § 2

> The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

B. Statutory Provisions

42 U.S.C. § 1985(3)

> (3) Depriving persons of rights or privileges
>
> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States;

or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Age Discrimination Act of 1975, 42 U.S.C.

Section 6101. Statement of purpose

It is the purpose of this chapter to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance.

Section 6102. Prohibition of discrimination

Pursuant to regulations prescribed under section 6103 of this title, and except as provided by section 6103(b) of this title and section 6103(c) of this title, no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

"All Writs Statute," 28 U.S.C. § 1651

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 2106

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 455

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Rules of procedure and evidence; power to prescribe, 28 U.S.C. § 2072

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92 (1789) provides that "the parties may plead and manage their own causes personally."

C. Canons and Rules

Code of Conduct for United States Judges, Canon 3(C)(1)(a)

> C. Disqualification
>
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

American Bar Association Model Code of Judicial Conduct (2007) Canons 1, 2

CANON 1

A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY

RULE 1.1

Compliance with the Law

A judge shall comply with the law, including the Code of Judicial Conduct.

RULE 1.2

Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

RULE 2.2

Impartiality and Fairness

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially

CANON 2

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

RULE 2.3

Bias, Prejudice, and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

Supreme Court Rule 10

* * *

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; . . . .

Federal Rule of Civil Procedure 60

RULE 60. RELIEF FROM A JUDGMENT OR ORDER

* * *

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its

legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Federal Rule of Civil Procedure 83

RULE 83. RULES BY DISTRICT COURTS; JUDGE'S DIRECTIVES

(a) Local Rules.

(1) In General. After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with – but not duplicate – federal

> statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. . . .

"Individual Rules and Practices in Civil *Pro Se* Cases," Judge Jesse M. Furman, Southern District of New York

* * *

4. Motions

* * *

> E. Oral Argument. Unless otherwise ordered by the Court, oral argument will not be heard in pro se matters.

"Individual Rules and Practices in Civil Cases," Judge Jesse M. Furman, Southern District of New York

* * *

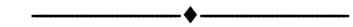
3. MOTIONS

* * *

B. Special Rules for Motions to Dismiss.

> i. Prior to filing a motion to dismiss, . . . the defendant shall communicate with the plaintiff by letter not exceeding three single-spaced pages, either seeking a more definite statement or setting forth the specific pleading deficiencies in the complaint and other reasons or controlling authorities that defendant contends would warrant dismissal.

> The plaintiff shall respond by similar letter within seven calendar days indicating the extent, if any, to which plaintiff concurs with defendant's objections and the amendments, if any, to be made to the complaint to address them, or the reasons and controlling authority that support the pleadings as filed. . . . The plaintiff may seek leave to amend the complaint to address deficiencies identified in the defendant's letter if the time to do so as of right has expired. Under these circumstances, the Court will liberally grant the plaintiff leave to amend and will grant the defendant an extension of time to answer the complaint as appropriate.



STATEMENT OF THE CASE

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean,* 234 U.S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965) [cited in *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970)].

The American Bar Association has long held as a core value the principle that society must provide equal access to justice. As one of the Association's most distinguished former Presidents, Justice Lewis Powell, once observed:

> Equal justice under law is not just a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our

> society . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status. . . .

Petitioner, Martin Stoner, is a 60-year-old, classically-trained violinist and a graduate of both Stanford University and the Juilliard School, who claims that he was discriminated against on the basis of age by Young Concert Artists, Inc. (YCA), a not-for-profit organization headquartered in New York City that receives federal funds. For 50 years YCA has had a written policy that limits the benefits of its programs to classical musicians "between the ages of 16 and 26." Mr. Stoner alleges in his complaint that YCA has failed to remove age restrictions from all of its programs and activities and also refused to take affirmative steps to ensure that Mr. Stoner could receive a "fair" and "meaningful" hearing at its annual auditions.

Petitioner first filed his action, *Stoner v. Young Concert Artists*, 10 Civ. 8025 (S.D.N.Y.), in October 2010 in the Southern District of New York. That action was subsequently dismissed "without prejudice" for Petitioner's alleged failure to exhaust administrative remedies.

Petitioner refiled his action as *Stoner v. Young Concert Artists*, 11 Civ. 7279 (S.D.N.Y.), in October 2011. Defendant immediately filed a second motion to dismiss. Petitioner argues that the district court erred and abused its discretion in failing to grant even a limited amount of discovery to a pro se litigant and permitting a premature motion to dismiss to go

forward. Petitioner has not been permitted by the district court to have any discovery whatsoever since his case was first filed, despite the fact that information which is essential to his case is solely in the possession of the Defendant.

The case was then re-assigned to Chief District Court Judge Loretta A. Preska on or about May 22, 2012. When Judge Preska refused to disqualify herself, Petitioner appealed to the Second Circuit for interlocutory relief.

While the appeal was still pending, on or about September 26, 2012, Judge Preska granted Defendant's third motion to dismiss and Petitioner filed a notice of appeal and a Rule 60 motion. The appeal has been stayed by the Second Circuit pending the district court's determination of the Rule 60 motion. Petitioner asserts that because Judge Preska decided the motion to dismiss before the mandate from the Second Circuit was issued on October 11, 2012, Judge Preska lacked jurisdiction to decide the case and that, therefore, the judgment is void and should be stricken from the record. Petitioner, therefore, respectfully requests that the case be remanded to a different district court judge for discovery prior to allowing any further motions to dismiss to be considered.

Despite repeated pleas from Petitioner, both the district court and the Second Circuit have failed and refused to address the issue of due process and equal protection for civil pro se litigants in any substantive way. In fact, in the opinion of the Second Circuit that is the subject of the instant writ of certiorari,

the Court does not even mention the word "pro se." Therefore, due to the extraordinary pattern and practice of bias towards civil pro se litigants in both the Southern District of New York and the Second Circuit, it is necessary for the Supreme Court to review this case before Petitioner's Rule 60 motion and appeal are decided by the lower courts.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT AND DISTRICT COURT ABUSED THEIR DISCRETION BY FAILING TO ADHERE TO THIS COURT'S IMPORTANT HOLDINGS ON THE RIGHT OF PRO SE LITIGANTS TO DUE PROCESS AND A "FAIR" AND "MEANINGFUL" HEARING

Pro se litigants are entitled to adequate, effective, and meaningful access to the courts because such access is a fundamental right. See *Bounds v. Smith*, 430 U.S. 817, 828 (1977); *Johnson v. Avery*, 393 U.S. 483, 485 (1969); *United States v. Wilkins*, 281 F.2d 707, 716 (2d Cir. 1960) (stating that any procedure adopted by court in handling pro se litigants should be calculated to provide meaningful access). This access applies not only to inmates but to civil pro se litigants as well.

The Privileges and Immunities Clause of the United States Constitution serves as one constitutional basis for the right of access to the courts.

See *Chambers v. Baltimore & Ohio Railway Co.*, 207 U.S. 142, 148 (1907).

The history of bias and prejudice against pro se litigants within the Courts is long. Stephen Elias, of Nolo Press, the nation's leading publisher of self-help law books, in an unpublished article from 1997, "Bias Against Pro Per Litigants," stated:

> From the moment they first contact the court system, most people who want to represent themselves, without a lawyer, encounter tremendous resistance. Within the closed universe of the courts, this bias is as pernicious as that based on race, ethnic origins or sex. . . . People who cannot afford a lawyer are a rebuke to the organized bar's monopoly.
>
> * * *
>
> Until and unless the courts make fundamental changes in their handling of unrepresented litigants, these litigants will continue to forfeit important legal rights due to their lack of representation.
>
> Quoted in Russell Engler, "And Justice For All – Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks." 67 Fordham L. Rev. 1987 (April 1999).

The Second Circuit's October 3, 2012 opinion demonstrates evidence of bias against pro se litigants by twice referring to arguments in Petitioner's papers as "frivolous." Petitioner argues that routinely branding a pro se litigant's arguments as "frivolous" constitutes a derogatory stereotype similar to a degrading

comment against a racial minority or other protected group. As stated in "Access Denied: Limitations on Pro Se Litigants' Access to the Courts in the Eighth Circuit," Candice K. Lee, 36 U.C. Davis L. Rev. 1261 (2002-2003):

> "Accordingly legal professions and laypersons alike assume that all pro se litigation is frivolous." Hon. Jon O. Newman, Pro Se Prisoner Litigation: Looking for Needles in Haystacks, 62 Brook. L. Rev. 519, 519 (1996), remarking that, of large number of inmates' civil rights cases filed annually in federal district courts, the majority are dismissed as frivolous.

Petitioner contends that it was an abuse of discretion and a gross error for the Second Circuit to conclude that Petitioner's legal and factual arguments were "frivolous," when in fact they were very well written, cogently presented, and backed up by both case law and precedent.

II. THE SECOND CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND ALSO SANCTIONED SUCH A DEPARTURE BY THE LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER (SEE U.S. SUPREME COURT RULE 10)

In *Weixel v. Board of Education of New York,* 287 F.3d 138, 151 (2d Cir. 2002), the Second Circuit

reversed the district court's dismissal of claims by a pro se plaintiff under 42 U.S.C. § 1983, the ADA, Section 504 of the Rehabilitation Act, and the IDEA and re-instated a conspiracy claim. The Court reasoned:

> Accordingly, the plaintiffs' allegations in this case must be read so as to "raise the strongest arguments that they suggest." *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999) (internal quotation marks omitted).

It cannot be said from a careful reading of the Second Circuit's opinion dated October 3, 2012, that when referring to Petitioner's submissions, the Second Circuit "[raised] the strongest arguments that [his pleadings suggested]." There is no mention, at all, in fact, of Petitioner's arguments, let alone a reasoned discussion of them. This shows a lack of due consideration and respect for a pro se litigant while demonstrating favoritism to a represented party.

Petitioner argues that it is ripe for the Supreme Court, in its supervisory role via mandamus over the Second Circuit and the Southern District of New York, to undertake a review of current pro se practices in order to improve the quality of services to pro se litigants, who make up an increasing percentage of cases in the federal courts. Lacking any other and further remedies, Petitioner files this unusual writ in order to receive a "fair" and "meaningful" hearing on his pending appeal in the Second Circuit and pending Rule 60 motion in the district court.

As this Court stated in *Los Angeles Brush Corp. v. James, District Judge*, 272 U.S. 701, 706 (1927):

> "[W]e think it clear that where the subject concerns the enforcement of the . . . Rules which by law it is the duty of this Court to formulate and put in force . . . it may . . . deal directly with the District Court. . . ." See *McCullough v. Cosgrave*, 309 U.S. 634 (1940).

A. THE SECOND CIRCUIT AND DISTRICT COURT ABUSED THEIR DISCRETION BY FAILING TO PERMIT A PRO SE PLAINTIFF TO AMEND HIS COMPLAINT

In *Maty v. Grasselli Chemical Co.*, 303 U.S. 197 (1938), this Court stated:

> Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end.

Within the various federal circuits there are conflicting views of what constitutes due process for a pro se litigant in order to amend the complaint. The Supreme Court needs to insure that across all circuits civil pro se litigants have equal access to the courts and that at least minimum standards of due process are uniformly observed.

In the Ninth Circuit, we have, "Rule 15's policy of favoring amendments to pleadings should be applied

with 'extreme liberality,'" *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981), and "[t]his policy is applied even more liberally to pro se litigants." *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987). "[T]here exists a presumption under Rule 15(a) in favor of granting leave to amend." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). The party opposing amendment bears the heavy burden of overcoming this presumption. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).

In light of the Ninth Circuit's extremely liberal policy favoring leave to amend in the pro se context, the Second Circuit clearly abused its discretion in sanctioning the district court's denial of leave to amend. Because Mr. Stoner's appeal raised the likelihood that he would be "irreparably harmed" if he were not permitted to amend prior to responding to Defendant's motion to dismiss, the Second Circuit should have reasoned carefully before simply throwing together a few phrases of legal boilerplate. It is clear from the brevity and paucity of details in the Second Circuit Court's opinion that it failed to show "due consideration" and grant a "meaningful" hearing to a pro se litigant.

It is undisputed that there was no mention of Mr. Stoner's arguments or case law throughout the entire October 3, 2012, decision of the Second Circuit. Since the Second Circuit condoned the district court's blatant prejudice, absent intervention from the Supreme Court, Petitioner would be wasting his time as a pro

se plaintiff by continuing to pursue any appeal with the Second Circuit.

B. THE SECOND CIRCUIT AND DISTRICT COURT ABUSED THEIR DISCRETION BY FAILING TO HOLD AN EVIDENTIARY HEARING ON THE ISSUE OF STANDING TO PURSUE INJUNCTIVE RELIEF

Judge Preska abused her discretion and erred by not holding an evidentiary hearing to decide disputed material issues of fact. The Second Circuit also erred and abused its discretion in concurring with Judge Preska without even the slightest discussion of the issues involved.

Most circuits have held that a district court cannot decide disputed factual questions or make findings of credibility essential to the question of standing on the paper record alone but must hold an evidentiary hearing. In *Barrett Computer Services, Inc. v. PDA, Inc.*, 884 F.2d 214 (5th Cir. 1989), the Fifth Circuit made clear that disputed factual issues material to standing must be determined not on the record but with an evidentiary hearing. Similarly, the First Circuit in *Munoz-Mendoza v. Pierce*, 711 F.2d 421 (1st Cir. 1983), made clear that a district court must resolve disputed questions of fact relevant to standing either at trial or through a pretrial evidentiary hearing.

Judge Preska then abused her discretion and erred when she failed to hold an evidentiary hearing

on the question of standing before she denied Petitioner's request for a preliminary injunction. She also abused her discretion and erred by failing to hold an evidentiary hearing re: sanctions.

C. THE SECOND CIRCUIT AND DISTRICT COURT ABUSED THEIR DISCRETION BY FAILING TO GRANT A STAY OF PROCEEDINGS PENDING APPEALS

Both the district court and the Second Circuit erred and abused their discretion when they failed to grant a stay. While courts may have the discretion to control their own dockets, the relevant question is whether the Court abused that discretion in unreasonably denying Petitioner's various motions due to bias against a pro se litigant.

Petitioner met all the standards required for a stay as he outlined with case law and facts relevant to his motion. The district court didn't even give a reason for denying a stay, which is an abuse of discretion. It also demonstrates the strong bias that the district court maintained against civil pro se litigants.

D. THE SECOND CIRCUIT ERRED AND ABUSED ITS DISCRETION IN FAILING TO DISQUALIFY CHIEF JUDGE LORETTA A. PRESKA VIA MANDAMUS FOR HER BIAS AGAINST A PRO SE LITIGANT IN A CIVIL MATTER

The American Bar Association's Model Code of Judicial Ethics and the Code of Conduct for United

States Judges require judges to apply the law fairly and impartially to ensure the right to be heard. Thus there is a compelling reason for a writ of certiorari to issue in this case.

The Second Circuit violated its own standards in denying a pro se litigant's petition for a writ of mandamus. The applicable standards of the Second Circuit were clearly expressed in Petitioner's brief. Citing *In re International Business Machines Corporation*, 45 F.3d 641 (2d Cir. 1995), Petitioner stated:

> Mandamus is a drastic remedy, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought. *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655, 661-62 (1978); *Kerr v. United States District Court,* 426 U.S. 394, 402-03 (1976); *In re NLO, Inc.,* 5 F.3d 154, 155-56 (6th Cir. 1993); *In re Glass Workers Int'l Union Local 173,* 983 F.2d 725, 727 (6th Cir. 1993).
>
> There must be a demonstrable abuse of discretion or conduct amounting to usurpation of judicial power for the writ to issue. *Mallard v. United States District Court,* 490 U.S. 296, 309 (1989); *In re NLO, Inc.,* 5 F.3d at 156; *United States v. Ford* (*In re Ford*), 987 F.2d 334, 341 (6th Cir.), *cert. denied,* 113 S. Ct. 180 (1992). . . .
>
> However, mandamus can be "*used to confine an inferior court to a lawful exercise of its prescribed jurisdiction* or to compel it to exercise its authority when it is its duty to do

so." *Kerr*, 426 U.S. at 402 (citations omitted) (emphasis added); *see In re General Motors Corp.,* 3 F.3d 980, 983 (6th Cir. 1993). "'The general principle which governs proceedings by mandamus is [that] . . . It lies only where there is practically no other remedy.'" *In re NLO, Inc.,* 5 F.3d at 156 (quoting *Helstoski v. Meanor,* 442 U.S. 500, 505 (1979)).

1. Advisory Mandamus

The stringencies of traditional mandamus standards admit of a limited exception for what has been termed "advisory mandamus" – the use of mandamus to provide guidance on a novel question of general or exceptional importance to the administration of justice that should not await review by appeal from a final judgment.

In *Schlagenhauf v. Holder,* 379 U.S. 104 (1964), the Supreme Court "departed in some degree" from the traditional mandamus standards to countenance the use of the writ for such advisory purposes. The Court indicated that mandamus may be used to settle important questions of first impression where there is a "substantial allegation of usurpation of power" by the district court, as here.

Petitioner argues that he has more than met the requirements for a writ of mandamus, contrary to the Second Circuit's opinion that "extraordinary" circumstances must be demonstrated.

2. Disqualification

The Due Process Clauses of the Fifth and Fourteenth Amendments entitle a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process. See *Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267 (1978). See also *Marshall v. Jerrico*, 446 U.S. 238 (1980).

The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. Indeed, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

Section 455(a) of the Judicial Code provides that "[any] justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding

in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

A second statute, 28 U.S.C. § 2106, is not a disqualification statute as such, but has been employed to serve a comparable purpose. The statute authorizes the Supreme Court of the United States and circuit courts to "remand the cause and . . . require such further proceedings to be had as may be just under the circumstances." This provision effectively enables an appellate court to disqualify a district judge by remanding a matter to a different judge for further proceedings if the appellate court doubts the original judge's impartiality.

E. THE SECOND CIRCUIT AND DISTRICT COURT ABUSED THEIR DISCRETION BY FAILING TO ADHERE TO THIS COURT'S VIEW OF "LIBERAL CONSTRUCTION" FOR CIVIL PRO SE LITIGANTS. SUCH PROCEDURAL PROTECTIONS FOR PRO SE LITIGANTS ARE NOT VOIDED BY THIS COURT'S SUBSEQUENT RULINGS IN *TWOMBLY* AND *IQBAL*

Both the right to proceed pro se and liberal pleading standards reflect the modern civil legal system's emphasis on protecting access to courts. Self-representation has firm roots in the notion that all individuals, no matter their status or wealth, are entitled to air grievances for which they may be entitled to relief. Access, then, must not be contingent

upon retaining counsel, lest the entitlement become a mere privilege denied to certain segments of society. Similarly, because pleading is the gateway by which litigants access federal courts, the drafters of the Federal Rules of Civil Procedure purposefully eschewed strict sufficiency standards. In their place, the drafters instituted a regime in which a complaint quite easily entitled its author to discovery in order to prevent dismissal of cases before litigants have had an adequate opportunity to demonstrate their merit.

Far from just articulating a common systemic value, though, the right to prosecute one's own case without assistance of counsel in fact depends significantly upon liberal pleading standards. The ability to file a "short and plain statement of the claim" mitigates the impact that the choice to proceed pro se has on litigants' access to discovery by reducing the number of technicalities and requirements the satisfaction of which demands legal expertise. However, recognizing that transsubstantive pleading standards do not sufficiently account for the capability differential between represented and unrepresented litigants, the Supreme Court fashioned a rule of special solicitude for pro se pleadings. Accordingly, "pro se complaint[s], 'however inartfully pleaded,' [are] held to 'less stringent standards than formal pleadings drafted by lawyers.'"

Notably, however, the Court granted such leniency, or "liberal construction," to pro se pleadings against the backdrop of *Conley v. Gibson*'s (355 U.S. 41 (1957)) undemanding "no set of facts" standard.

The Court's failure to explain how pro se pleadings are to be liberally construed indicates its belief that the standard was already lenient enough to render a detailed articulation of the practice unnecessary to prevent premature dismissal of meritorious cases. However, with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), retiring the "no set of facts" standard and ratifying the means by which lower courts dismissed more disfavored cases under *Conley*, liberal construction as presently practiced is not – if it ever was – sufficient to protect pro se litigants' access to courts.

The new plausibility standard with which courts now determine the adequacy of complaints disproportionately harms pro se litigants. First, the Supreme Court's instruction that "conclusory" facts not be presumed true when determining a claim's plausibility will affect those who (1) lack the resources to develop facts before discovery, (2) bring claims requiring them to plead information exclusively within the opposition's possession, or (3) rely on forms in drafting complaints. Pro se litigants typify the parties who demonstrate all three behaviors. Second, determining whether the remaining allegations permit a plausible inference of wrongdoing, as per the Supreme Court's instruction, is a wildly subjective endeavor. Courts are likely – no doubt unintentionally – to draw inferences that disfavor pro se litigants because their "judicial common sense" judgments of what is plausible result from a drastically different set of background experiences and values. The admixture of

these two steps portends serious trouble for pro se litigants, who, even before the plausibility standard, did not fare well despite the leeway afforded their complaints.[1]

III. REVIEW IS WARRANTED TO CLARIFY THAT CIVIL PRO SE LITIGANTS ARE ENTITLED TO THE SAME DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW AS LICENSED ATTORNEYS

This case is a good vehicle for addressing a recurring issue of national importance. With pro se cases comprising upwards of 20% of federal court cases, it is vitally important that this Court ensure that pro se litigants in civil matters receive a "fair" and "meaningful" hearing and procedural and substantive due process.

It is undisputed that each federal circuit and district court is permitted to fashion its own rules. The question is whether or not those rules provide adequate due process for civil pro se litigants equally across every circuit and every district.

Rule 83 of the Federal Rules of Civil Procedure states:

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[1] The preceding four paragraphs were copied from Rory K. Schneider's excellent article, "Illiberal Construction of Pro Se Pleadings," University of Pennsylvania L. Rev., Vol. 195, pg. 511 (2011).

> (1) In General. After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice.

Petitioner alleges that while the American Bar Association and other professional legal groups receive repeated notices to such public hearings, pro se litigants are not given any notice or opportunity to attend hearings relating to civil procedure and the rules for pro se litigants.

The Second Circuit Judicial Conference, in accordance with 28 U.S.C. § 333, is periodically convened by the chief judge to consider the business of the courts and to advise means of improving the administration of justice within the circuit. There are no pro se litigants who are invited to participate in Second Circuit Judicial Conferences, only judges and lawyers. Under IOP I(c)(2):

> **(2) Composition.** The chief judge may invite only judges to the conference, or may also invite members of the bar in accordance with rules established by the circuit judicial council.

Thus, the American Bar Association, a registered lobbyist, and others in the legal community, including judges, are regularly given preferential treatment by the courts in making sure that their opinions are incorporated into the formulation of all rules. This is a fundamental violation of a pro se litigant's right

to due process, a "meaningful" hearing, and equal protection.

In an article by Jodi S. Balsam about the Judicial Conference's 2010 wholesale revision of the Second Circuit's Rules, spearheaded by Ms. Balsam in her capacity as counsel to the Clerk of the Second Circuit Court of Appeals, the words pro se are only mentioned once in passing in her entire report.[2] This article provides a general account of the origins, accretion, and renewal of local rules in the Second Circuit, after Ms. Balsam was engaged to oversee a comprehensive review and rewrite of the local rules by Chief Justice Dennis Jacobs, for whom she clerked. The fact that no pro se litigants were ever consulted in the comprehensive rewrite of the rules that specifically affects their procedural and substantive due process rights, is itself a denial of due process and a "fair" and "meaningful" hearing.

In the Spring of 2012, Petitioner presented the Second Circuit a number of matters for consideration: a writ of mandamus, an appeal of the denial of a motion for a preliminary injunction, and an interlocutory appeal. These matters were both merits related and procedural. Yet, the Second Circuit assigned Petitioner's pro se case to a motions panel and refused to grant oral argument to a pro se litigant. Petitioner

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[2] Jodi S. Balsam, "The New Second Circuit Local Rules: Anatomy and Commentary," 19 Brooklyn Journal of Law and Policy 101 (2011).

alleges that this is evidence of bias by the Second Circuit.

According to the official calendar of the Second Circuit for the week of September 10, 2012, available at the Court's website, the vast majority of cases listed permitted oral argument for represented parties, while no pro se parties were ever given oral argument. On Wednesday, September 12, 2012, the day that Petitioner's case was scheduled to be heard by the panel, every case listed on the calendar involving represented parties was granted oral argument. Yet, Petitioner pro se was denied oral argument. In fact, his case was not even listed on the court calendar. This demonstrates both a lack of transparency by the Second Circuit and a failure to give a pro se litigant a "meaningful" hearing at a "meaningful" time and place. It is also additional evidence of bias against pro se litigants.

In the district court, there are different rules for pro se litigants in civil cases than for represented parties, including a prohibition on oral argument for pro se litigants. See the "Individual Rules and Practices in *Pro Se* Civil Cases," Judge Jesse M. Furman, Southern District of New York. Judge Furman's "Individual Rules and Practices in Civil Cases" for represented parties also demonstrates a policy that is more lenient towards represented parties than for pro se parties when it comes to motions to dismiss. Judge Furman's rules for represented civil parties state:

> Prior to filing a motion to dismiss, . . . the defendant shall communicate with the plaintiff by letter not exceeding three single-spaced pages, either seeking a more definite statement or setting forth the specific pleading deficiencies in the complaint and other reasons or controlling authorities that defendant contends would warrant dismissal. . . . The plaintiff may seek leave to amend the complaint to address deficiencies identified in the defendant's letter if the time to do so as of right has expired. Under these circumstances, the Court will liberally grant the plaintiff leave to amend and will grant the defendant an extension of time to answer the complaint as appropriate.

There is no comparable "motion to dismiss" section, however, in Judge Furman's Individual Rules for Civil *Pro S*e litigants. Thus, we see a rule that is very lenient towards represented parties but without similar protection for pro se litigants. This lack of similar language in Judge Furman's rules for pro se litigants encourages represented parties to target pro se litigants for premature dismissal and denies them equal protection. The resulting inequality is just the opposite of the Supreme Court's holdings on "liberal construction" for pro se pleadings as expressed in *Haines v. Kerner*, 404 U.S. 519 (1972). This is further evidence of a double standard that pervades the Southern District of New York and contradicts 28 U.S.C. § 2072 as well as Supreme Court precedent.

Petitioner alleges that Judge Preska adopted Judge Furman's "illiberal construction" of pro se pleadings by refusing to permit this pro se plaintiff to amend his pleadings to include a cause of action under 42 U.S.C. § 1985(3) or to cure any pleading deficiencies. Judge Preska also failed and refused to permit oral argument by this pro se plaintiff, and also failed and refused to hold any conferences whatsoever with this pro se plaintiff. Judge Preska therefore denied a pro se litigant the fundamental right of due process granted to pro se litigants at the very founding of our country under the Judiciary Act of 1789. Judge Preska states in her official biography that she is a member of the Federalist Society, which places a premium on individual liberty, traditional values, and the rule of law. Clearly, Judge Preska, by her own actions in this case, is no federalist!

Additionally, Petitioner accuses Judges Pooler, Parker and Wesley of the Second Circuit of retaliating against a pro se litigant after Petitioner filed a motion for reconsideration and recusal on September 6, 2012, and a Complaint of Judicial Misconduct against the three judges on September 21, 2012, before they ruled against Petitioner on each and every matter on October 3, 2012.

Therefore, because I have no other alternative, I am filing this Petition to confine both the court of appeals and the district court to their lawful jurisdictions.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

MARTIN STONER, Pro Se
900 West End Avenue
New York, New York 10025
(212) 866-5447

Dated: December 27, 2012

S.D.N.Y.-N.Y.C.
11-cv-7279
Preska, C.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of October, two thousand twelve.

Present:

Rosemary S. Pooler,
Barrington D. Parker,
Richard C. Wesley,
Circuit Judges.

In re Martin Stoner,

Petitioner.

12-2110

Martin Stoner,

Petitioner,

v.

Young Concert Artists, Incorporated,

Respondent.

12-2199

Petitioner, *pro se,* moves to consolidate these two matters. Upon due consideration, it is hereby ORDERED that the motion is GRANTED, and the matters are CONSOLIDATED for the purposes of this order.

In the proceedings docketed under 12-2110, Petitioner petitions for a writ of mandamus. In the proceedings docketed under 12-2199, Petitioner has filed a motion for leave to appeal from the district court's May 8, 2012, and May 15, 2012 orders. In both docket numbers, Petitioner has filed motions to expedite, for a stay of the district court proceedings pending a decision in this Court, for an order enjoining the Respondent from going forward with scheduled auditions, for an evidentiary hearing, for reconsideration of this Court's September 6, 2012 order denying his motion for oral argument on his motions, and for the recusal of this panel. Respondent has filed a cross-motion to preserve its right to respond to Petitioner's motion for injunctive relief, and later submitted a response. Respondent's motion for leave to respond is GRANTED.

Upon due consideration, it is hereby ORDERED that the mandamus petition in 12-2110 is DENIED because Petitioner has not demonstrated that exceptional circumstances warrant the requested relief. *See In re von Bulow,* 828 F.2d 94, 96 (2d Cir. 1987). Further, it is ORDERED that Petitioner's motion for leave to appeal is DENIED to the extent Petitioner seeks to appeal from those portions of the district court's orders denying his motions for conferences or

for leave to amend his complaint, as those orders are non-final, non-appealable orders. *See Schwartz v. City of New York,* 57 F.3d 236, 237 (2d Cir. 1995) (regarding finality generally); *Kahn v. Chase Manhattan Bank, N.A.,* 91 F.3d 385, 387-89 (2d Cir. 1996) (holding that an order denying leave to amend the complaint was not immediately appealable).

It is further ORDERED that Petitioner's motion for leave to appeal from those portions of the district court's orders denying his motion for a preliminary injunction is DENIED as unnecessary. That portion of the district court order is immediately appealable, and no leave to appeal is required. *See* 28 U.S.C. § 1292(a)(1). However, this Court has determined that the appeal lacks an arguable basis in law or fact. Therefore, it is hereby ORDERED that the appeal is DISMISSED. *See Pillay v. INS,* 45 F.3d 14, 17 (2d Cir. 1995) (regarding this Court's inherent authority to dismiss an appeal as frivolous); *see also Neitzke v. Williams,* 490 U.S. 319, 327 (1989) (defining when an appeal is frivolous).

It is further ORDERED that Petitioner's motions to expedite the appeal, for a stay of the district court proceedings pending appeal, for reconsideration of the Court's September 6, 2012 order, for recusal of this panel, for an order restraining Respondent from conducting auditions or for an evidentiary hearing are DENIED. Petitioner has not met his burden of establishing that he is entitled to a stay, injunction, expedited proceedings, or an evidentiary hearing, *see Louis Vuitton Malletier S.A. v. LY USA, Inc.,* 676 F.3d

83, 97 (2d Cir. 2012), and has not demonstrated that recusal is necessary, *see ISC Holding AG v. Nobel Biocare Finance AG,* 688 F.3d 98, 107 (2d Cir. 2012).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe
[SEAL]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARTIN STONER, Plaintiff, v. YOUNG CONCERT ARTISTS, INC., Defendant.	11 Civ. 7279 (LAP) Order (Filed May 8, 2012)

LORETTA A. PRESKA, Chief United States District Judge:

Based on the parties' letters, attached, Plaintiff may file a sur-reply on Defendant's motion to dismiss [dkt. no. 32] no later than May 23, 2012.

Plaintiff's remaining requests are denied without prejudice to renewal following disposition of Defendant's motion to dismiss.

SO ORDERED.

Dated: New York, New York
May 8, 2012

/s/ Loretta A. Preska
LORETTA A. PRESKA
Chief U.S. District Judge

MARTIN STONER
900 West End Avenue
New York, New York 10025
(212) 866-5447

Via Facsimile (212) 805-7941

May 2, 2012

Hon. Loretta A. Preska, U.S.D.C.J.
Southern District of New York
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: Stoner v. Young Concert Artists, 2011 Civ. 7279 (LAP)

Dear Judge Preska:

I write to respectfully request a pre-motion conference. There are several reasons for this request. First, I'd like to file a motion to request a revised scheduling order that would allow Plaintiff to submit a Sur Reply to Defendant's Reply Memorandum of Law in Support of Defendant's Motion to Dismiss the Second Amended Complaint. Defendant has raised new arguments that were not contained in its original Memorandum of Law and justice requires that Plaintiff be given an opportunity to respond. Additionally, I wish to add to the record that I have now formally applied to the 2012 Young Concert Artists International Auditions and therefore have "standing" to pursue injunctive relief under the Age Discrimination Act of 1975 (see attached). Thus, as required under Your Honor's rules, prior to submitting a new motion I am entitled to a pre-motion conference.

According to the case law that Defendant submitted in its Reply Memorandum of Law, *Long v. Fulton County,* 807 F. Supp. 2d 1274; 2011 U.S. Dist. LEXIS 85700, 2011:

> Accordingly, the Court concludes that the Longs have alleged "a real and immediate – as opposed to a merely conjectural or hypothetical – threat of future injury." *Wooden v. Bd. of Regents of Univ. Sys. of Ga.,* 247 F.3d 1262, 1284 (11th Cir. 2001) (emphasis omitted). They therefore have standing to seek injunctive relief on their ADA claim.

Plaintiff therefore claims that he now has standing to seek injunctive relief under the ADA because he has applied to compete in the 2012 Young Concert Artists Competition. In this regard, Plaintiff Pro Se further continues to allege that he cannot receive a fair hearing by the very same Young Concert Artists officials who denied him a fair hearing in 2010 and 2011 (see *Long v. Fulton,* supra). Therefore, Plaintiff now faces a "real and immediate – as opposed to a merely conjectural or hypothetical – threat of future injury", an injury of fact.

Moreover; in the interests of justice, Plaintiff should now be given "freely" leave to amend his complaint to add the fact of his applying for the 2012 International Auditions according to FRCP Rule 15. Additionally, Plaintiff Pro Se should be permitted to amend his complaint to add specificity where required by the pleadings, "in the interests of justice".

One new argument that defendant adds to its Reply Memorandum is that Defendant isn't covered under 42 U.S.C. § 6727. That is nowhere to be found in Defendant's original Memorandum of Law. Thus, Plaintiff must be given a chance to respond to that new argument. Also, in defendant's Reply Memorandum, Defendant cites *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60 (1882) in arguing that monetary damages are not permitted under the ADA. However, Defendant fails to include the case law cited below from Gwinnett that states that where intentional discrimination is alleged, as here, monetary damages are permitted.

> Moreover, the notion that Spending Clause statutes do not authorize monetary awards for intentional violations is belied by the unanimous holding in *Darrone, supra,* 465 U.S. at 628. P. 74-75. *Gwinnett, Id.*

Finally, it is now plaintiff's turn to submit a new motion for injunctive relief that would require Young Concert Artists to give Plaintiff a fair hearing in 2012 and take such other affirmative steps that would change the way that Young Concert Artists listened to and judged Plaintiff in 2010 and 2011. I therefore ask that in your revised scheduling order that you stay any further consideration of Defendant's Motion to Dismiss until after my Motion for Injunctive relief can be filed and also until Plaintiff can both Amend his Complaint to include the fact of his re-applying to the 2012 International Auditions and submit a Sur-Reply.

Thank you very much for your consideration in this matter.

Sincerely,

/s/ Martin Stoner
Martin Stoner, Pro Se

Enclosures

Marjorie Kaye, Jr., Jackson Lewis (Via facsimile to (212) 972-3213)

APPLICATION FORM [LOGO]

2012 YOUNG CONCERT ARTISTS INTERNATIONAL AUDITIONS

Please print legibly in block letters or type, and answer all questions.

OFFICE USE ONLY
☐ Fee received
☐ 2 Recommendations
☐ Repertoire approved
☐ Management letter, as applicable
☐ Application Processed

App. 10

Mr./Ms. (circle one)

NAME (first) Martin Stoner (last) INSTRUMENT/VOICE Violin

STREET ADDRESS [Omitted In Printing]

STATE/PROVINCE New York POSTAL CODE 10025 COUNTRY U S A

TELEPHONE (212) 866-5447 E-MAIL [Omitted In Printing]

AGE 62 DATE OF BIRTH [Omitted In Printing] COUNTRY OF BIRTH U S A PRESENT CITIZENSHIP U S A

(Ensembles: list ages separately)

My Preliminary Audition will be (check one): ☒ Live Audition in New York City
☐ Recorded Audition

Have you applied previously to the YCA Auditions? ☐ NO ☒ YES If YES, WHEN? 2010, 2011

DO YOU HAVE PROFESSIONAL MANAGEMENT? ☒ NO ☐ YES (give name, address, phone, email): _____ *If yes, enclose the required management letter.*

APPLICATION FEE
☐ I have enclosed a bank check in U.S. dollars drawn on a U.S. bank.
☐ I have enclosed U.S. $75 in cash.
☒ Please charge my ☐ VISA ☐ MC ☒ AMEX Credit Card # [Omitted in Printing]
Exp. date: [Omitted In Printing]
☐ I have enclosed an international money order. ☐ I have paid online at www.yca.org/auditions.

RECOMMENDATIONS Name, position (if applicable) and email address of two musicians providing letters for you.
2 letters already on file since 2008

LIVE AUDITION REPERTOIRE (Please add timings of all pieces. Make a copy of this repertoire for your reference.)

Composer	Work	Length	Composer	Work	Length
Bach:	Partita in E Major	15 minutes			
Franck:	Sonata for violin & Piano	20 minutes			
Beethoven:	Kreutzer Sonata	25 minutes			
Mendelssohn:	Violin Concerto	25 minutes			
Fossi:	Three American Pieces	10 minutes			
Kreisler:	Preludium & Allegro				

AWARDS WON (If applicable)
See resume

HIGH SCHOOL, CONSERVATORY, UNIVERSITY

Juilliard	From	1971	To	76	Degree	M.M.
Stanford Univ	From	1967	To	71	Degree	A.B.

MAJOR TEACHERS
Ivan Galamian, David Nadien

MAJOR PERFORMANCES Please list recitals, concerto or opera appearances with dates. You may attach a complete resume, or write presenters and dates here continuing on separate sheet as necessary.
My resume on file from prior YC competitions

THE DEADLINE FOR MAILING APPLICATIONS FOR A LIVE AUDITION IS FRIDAY, AUGUST 17, 2012 AND FOR MAILING A RECORDED AUDITION IS MONDAY, AUGUST 17, 2012

Send this application form, accompanied by two letters of recommendation and your $75 application fee to: YOUNG CONCERT ARTISTS, INC., 250 West 57 St., NY, NY 10107 USA

PLEASE CALL (212) 307-6656 BETWEEN AUGUST 27 AND AUGUST 30 TO SCHEDULE A LIVE PRELIMINARY AUDITION IN NEW YORK.

MARJORIE KAYE Jr.
JACKSON LEWIS LLP
666 Third Avenue
New York, New York 10017
Tel. (212) 545-4000
Fax (212) 972-3213
www.jacksonlewis.com

May 4, 2012

VIA FACSIMILE (212-805-7941)

Judge Loretta A. Preska
Southern District Of New York
United States Courthouse
500 Pearl Street, Room 2220
New York, NY 10007

Re: *Martin Stoner v. Young Concert Artists, Inc.*
Case No. 11-CV-7279

Your Honor:

We represent Defendant Young Concert Artists, Inc. hereinafter ("Defendant") in connection with the above referenced matter. We write to respond to Plaintiff's May 2, 2012 letter to the Court.

Plaintiff's request for injunctive relief is unnecessary since he will be permitted to audition in Defendant's 2012 competition, but will be required to comply with Defendant's standard requirements with respect to his audition. We mention this last point because we received a letter from Mr. Stoner today that indicates he has attached certain conditions to his audition, specifically that he "reserve[s] the right to perform the same repertoire as I did in the previous

auditions if my case against Young Concert Artists . . . takes up too much of my practice time, or . . . if I choose to appeal the case to the Second Circuit." A copy of Mr. Stoner's letter is attached hereto (without enclosures).

Finally, we oppose Plaintiff's application to *further* amend his Second Amended Complaint on the grounds that such amendment will be futile. Specifically, since Plaintiff will be permitted to participate in Defendant's 2012 International Competition and because Defendant has eliminated its age limitations for the 2012 International Audition, Plaintiff *still* lacks standing to challenge Defendant's allegedly illegal age restrictions in connection with Defendant's 2010 and 2011 International Competition.

Thank you for your attention to this matter.

Very truly yours,

JACKSON LEWIS LLP

/s/ Marjorie Kaye, Jr.
Marjorie Kaye, Jr.

cc: Gena Usenheimer, Esq.
Martin Stoner (by email & regular mail)

MARTIN STONER
900 West End Avenue
New York, New York 10025
(212) 866-5447

VIA CERTIFIED MAIL

May 2, 2012

Marjorie Kaye Jr.
Jackson Lewis
666 Third Avenue, 29th Floor
New York, New York 10017

Dear Ms. Kaye,

Attached please find my application and fee for the 2012 Young Concert Artists International Auditions. I reserve the right to perform the same repertoire as I did in the previous auditions if my case against Young Concert Artists continues in the District Court and takes up too much of my practice time, or in the alternative, if I choose to appeal the case to the Second Circuit.

Very truly yours,

/s/ Martin Stoner
Martin Stoner

enclosures

MARTIN STONER
900 West End Avenue
New York, New York 10025
(212) 866-5447

Via Facsimile (212) 805-7941

May 4, 2012

Hon. Loretta A. Preska
United States Courthouse
500 Pearl Street
New York, New York 10007

Dear Judge Preska,

Re: Stoner v. Young Concert Artists, 2011 Civ. 7279 (LAP)

I write to respond to the letter of May 4, 2012 by the Defendant.

It is not futile for Plaintiff to amend his complaint as Plaintiff has standing for injunctive relief. Defendant did not refute my argument contained in my letter to Your Honor dated May 2, 2012 that:

> Plaintiff Pro Se further alleges that he cannot now receive a fair hearing due to a history of past age discrimination by the very same officials of Young Concert Artists that denied him a fair hearing in 2010 and 2011. Therefore, Plaintiff now faces a "real and immediate – as opposed to a merely conjectural or hypothetical – threat of future injury".

YCA's Director, Susan Wadsworth, has presided over a 50 year history of past age restrictions. Plaintiff is still "disadvantaged" by YCA's current policies that

promote age discrimination. This does not mean that "Plaintiff admits he played poorly". Plaintiff has not yet even performed at the 2012 International Auditions! Discrimination is not wiped away in a single stroke. Plaintiff has stated in the past that it is necessary for YCA to take affirmative steps to make its auditions fair and unbiased for older musicians such as this 62 year old Plaintiff.

Although YCA now claims that it has done away with age limits, age restrictions are still in place in the brochure for the 2012 Young Concert Artists Auditions in Europe. "Instrumentalists must be between 16 and 26 years old", the 2012 brochure states (see attached). So really, nothing has changed. YCA is just pretending that it has changed its discriminatory age policies, figuring the Court would never bother to check on this. Plaintiff therefore requests sanctions against the Defendant and its attorneys for filing a materially false statement with the Court and misleading the Court for its own selfish purposes.

As Plaintiff has already noted in his Memorandum of Law In Opposition to Defendant's Motion to Dismiss the Second Amended Complaint, the Civil Rights Restoration Act prohibits Age Discrimination in all other "programs" and "activities" of a recipient of federal aid. Thus, YCA is still violating the ADA as amended by having age restrictions for its 2012 European Auditions. This is direct proof that YCA has not abandoned its discriminatory age policies. And this gives Plaintiff standing to seek injunctive relief. It doesn't matter that YCA has permitted Plaintiff to

audition. The Audition Procedure discriminates against older musicians and Defendant has not refuted that. YCA's "elimination of age restrictions" is a lie!

As Susan Wadsworth stated to Washington Post reporter Anne Midgette, in a December 8, 2010 article referencing my Age Discrimination lawsuit, "We do what is appropriate for a certain age". (Please take judicial notice of this article as per the Rules)

Finally, even if this Court refuses to grant Plaintiff permission to amend his complaint, Plaintiff respectfully requests that the Court, according to Rule 201 of the Federal Rules of Evidence, take judicial notice of all of the facts contained in my May 2, 2012 and May 2014 letters to the Court.

> Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. The rule requires the granting of that opportunity upon request.

Therefore, by copy of this letter I renew my request for a pre-motion conference prior to ruling on Defendant's Motion to Dismiss. Additionally, I add a further request, to address the propriety of taking judicial notice of my re-application to the 2012 YCA auditions.

Thank you very much for your consideration in this matter.

Sincerely,

/s/ Martin Stoner
Martin Stoner, Pro Se

Enclosures

cc. Marjorie Kaye, Jr., Jackson Lewis
(Via facsimile to (212) 972-3213

September 2012 European Young Concert
Artists Auditions, Leipzig, Germany

The Prizes

First Prize Winners of the European Auditions in Leipzig are given a round-trip air ticket between a European capital city and New York City to participate in the *Final Rounds* of the Young Concert Artists International Auditions from November 5-10, 2012 in New York City, and will be provided with private housing.

First Prize Winners of the Final Auditions in New York are presented in debut concerts in New York, Washington D.C. (Kennedy Center), and Boston (Gardner Museum). Winners receive a YCA management contract for three or more years, which brings concert engagements throughout the United States, publicity, promotional materials, and career guidance.

* * *

Rules and Procedures

1. ELIGIBILITY: Instrumentalists must be between 16 and 26 years old and singers between 20 and 28 years old at the time of the auditions.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARTIN STONER, Plaintiff, v. YOUNG CONCERT ARTISTS, INC., Defendant.	11 Civ. 7279 (LAP) Order (Filed May 15, 2012)

LORETTA A. PRESKA, Chief United States District Judge:

The Court is in receipt of Plaintiff's letters to the Court dated May 11, 2012 and May 14, 2012, attached. The Court addresses them in turn.

First, Plaintiff complains of the return of certain documents mailed directly to Chambers on or about May 9, 2012. At the outset, Plaintiff is reminded that while he is required to mail courtesy copies of all filed motions and responsive pleadings directly to Chambers, an original document is *not* filed with the Court and entered onto the docket in this case by so doing. Rather, Plaintiff is required to file his original motions and other responsive pleadings and papers in the normal course directly with the Pro Se Office. The Pro Se Office and the Clerk of the Court then undertake a review of any such submission for completeness and procedural sufficiency before it may be

docketed and submitted *sub judice*. Beyond this procedural error, the documents at issue essentially sought to add claims for injunctive relief already denied by the Court in its May 8, 2012 Order, without prejudice to renewal. The injunctive relief Plaintiff seeks is inextricably bound up with a merits decision on Defendant's pending motion to dismiss, which is not yet fully briefed. Thus, in its May 8, 2012 Order, the Court denied Plaintiff's request to add claims for injunctive relief without prejudice to renewal upon resolution of the motion to dismiss. That Plaintiff had at that time characterized this request as a request for leave to amend his Complaint does not alter the nature of the relief sought: an injunction relating to his participation in the 2012 Young Concert Artists Competition. It also appears to the Court that Plaintiff mailed his most recent papers prior to receiving his copy of the Court's May 8, 2012 Order. For these reasons, his papers were returned to him by U.S. Certified mail as a courtesy.

Second, in his letter dated May 14, 2012, Plaintiff requests an extension of one week to May 30, 2012 to file the sur-reply granted in the May 8, 2012 Order. The Court observes that Plaintiff is in no way prejudiced by receiving notice of the Order by U.S. Certified Mail mailed to him on the same day the Order is docketed. Plaintiff concedes in his May 14, 2012 letter that he received a copy of the Order on May 11, 2012, a full ten days prior to the ordered due date for his papers and more than the seven days typically provided for such replies. Moreover, Plaintiff has had the

benefit of Defendant's full briefing since on or about April 27, 2012. In light of these facts, the Court cannot agree that Plaintiff is in any way prejudiced *in fact* by receiving a hard copy of the Order by U.S. Certified Mail two days after it is filed by the Court in contrast to Defendant's ECF notification. Notwithstanding the absence of any prejudice and in the interest of achieving a cogent and ultimately productive submission, however, Plaintiff's request is granted. Plaintiff's sur-reply is due May 30, 2012. It is the Court's express expectation that Plaintiff's sur-reply be confined to the specific arguments he asserts Defendant raised for the first time in its reply brief.

In criticizing Defendant's receipt of the Court's Order by ECF and his later receipt of the Order by U.S. Certified Mail, Plaintiff writes: "It is unacceptable for me to receive notice at a later time than the defendant. Nothing in the rules authorizes the Court to do this." Contrary to Plaintiff's statement, Section 9.2 of the Electronic Case Filing Rules & Instructions specifically requires service on a pro se litigant by hard copy. Thus, the Court was complying with a rule of Court in serving Plaintiff with a hard copy of the Order. Moreover, the Court continues to serve all Orders on Plaintiff by certified rather than regular mail pursuant to Judge Patterson's Order in this case dated March 19, 2012 [dkt. no. 56].

Third, to the extent Plaintiff's May 11, 2012 letter contains a second request for my recusal from this case, [*see also* dkt. no. 60], that request is denied as meritless.

Finally, the Court finds that Plaintiff's request in his May 11, 2012 letter for certification of an interlocutory appeal from the May 8, 2012 Order pursuant to 28 U.S.C. § 1292(b) is without merit and it is therefore denied.

SO ORDERED.

Dated: New York, New York
May 15, 2012

/s/ Loretta A. Preska
LORETTA A. PRESKA
Chief U.S. District Judge

MARTIN STONER
900 West End Avenue
New York, New York
212 866-5447

Via Facsimile

May 11, 2011

Hon. Loretta A. Preska, U.S.D.C.J.
Southern District of New York
500 Pearl Street
New York, New York 10007

Stoner v. Young Concert Artists, 2011 Civ. 7279 (LAP)

Dear Judge Preska:

I write to complain about your poor handling of this pro se case. Today I received from your office the following handwritten note: "These papers are being

returned to you as per Judge Preska's 5/8/12 order", i.e., "Plaintiff's remaining requests are denied without prejudice to renewal following disposition of defendant's motion to dismiss".

If you had bothered to read my letters dated May 2, 2012 and May 4, 2012, you would have learned that I did not ask for the Court's permission to file for injunctive relief. That is because I read Your Honor's individual rules which clearly state that no pre-motion conference is required to file for a TRO or motion for injunctive relief. Therefore, since I didn't ask for your permission to file for injunctive relief in my letter, the fact of the matter is that your order of 5/8/2012 does not apply to my motion for injunctive relief. Your arbitrary conduct therefore, will not be tolerated by this plaintiff. This Court cannot simply make up the rules as it goes along. As Chief Judge, you set a very poor example for others.

It is also clearly prejudicial to this Plaintiff Pro Se to delay consideration of what the Court may properly consider on a motion to dismiss until after the motion is fully submitted by failing to consider my request for a conference re: judicial notice. You have abused your discretion and usurped your powers.

The Clerk's Office told me that it is unheard of for a sitting federal judge to return a motion for injunctive relief until whenever you get good and ready to deal with it. A motion for injunctive relief is an extraordinary measure re: irreparable harm. You show no respect for the law or for this pro se litigant by returning my papers.

I hereby ask you again to resign from this case and notify you that I shall be filing a second complaint of judicial misconduct against you for demonstrating continued bias against a pro se litigant. I also ask that you certify an interlocutory appeal to the Second Circuit by Monday May 15, 2012 at 5:00 PM.re: your May 8, 2012 ruling since it is clearly prejudicial to a pro se plaintiff. I am tired of your games.

Sincerely,

/s/ Martin Stoner
Martin Stoner

cc. Marjorie Kaye Jr., Jacskon Lewis

MARTIN STONER
900 West End Avenue
New York, New York 10025
(212) 866-5447

Via Facsimile (212) 805-7941

May 14, 2012

Hon. Loretta A. Preska
United States Courthouse
500 Pearl Street
New York, New York 10007

Dear Judge Preska,

Re: Stoner v. Young Concert Artists, 2011 Civ. 7279 (LAP)

I write to request an extension of one week until May 30, 2012 to file my Sur Reply. Defendant has consented to this extension.

I need more time to complete this document as I did not receive a copy of your Order until late Friday afternoon, May 11th, several days after Defendant apparently received a copy. The Court's current method of notifying the parties at different times discriminates against all pro se litigants in general and me in particular.

It is unacceptable for me to receive notice at a later time than the defendant. Nothing in the rules authorizes the Court to do this. That is not only prejudicial, but it is simply prejudice against an entire class of persons, i.e., pro se litigants. It is up to this Court to fix this problem for all pro se litigants, not just myself, once and for all. To date, you have failed miserably. Once again, I ask you to address the larger problem of eliminating blatant discrimination towards pro se litigants from the federal bench.

Very truly yours,

/s/ M. Stoner
Martin Stoner

cc. Marjorie Kaye, Jr., Jackson Lewis
(via facsimile to (212) 972-3213)