

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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EDWARD MICHAEL OBRIEN  
and GOLF O'BRIEN COMPANY,  
Plaintiffs-Appellants,

v.

INTERNATIONAL BUSINESS MACHINES, INC.,  
Defendant-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
[ U.S. District Court Case No. CV 00-10778 R ]  
[ U.S. Court of Appeals Docket No. 01-55380 ]

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CAUSE FOR STAY OF SUMMARY JUDGMENT;  
REQUEST TO FILE OPENING BRIEF; AND  
REQUEST TO PAY FEES WITH INSTALLMENTS

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## I. OPENING STATEMENT

This response to an order by the United States Court of Appeals in the Ninth Circuit ["USCA9"], issued for this proceeding on May 23, 2001, requests (1) stay of USCA9 summary affirmation of an order issued by the United States District Court for the Central District of California ["CDC"] on February 5, 2001 dismissing Civil Action: CV 00-10778 R (RCx), (2) permission to file OPENING BRIEF presented for review herein as Proposed Opening Brief and Cause for Stay and, (3) permission to pay filing and docketing fees for this appeal via five (5) equal, monthly installments.

From a NOTICE OF DISCREPANCY issued by the Hon. Judge Manuel L. Real on February 5, 2001 in CDC, Plaintiff-Appellant, Edward Michael O'Brien ["P-A"], filed in district court and in USCA9 its NOTICE OF APPEAL AND REQUEST TO PROCEED IN FORMA PAUPERIS pursuant to the Federal Rules of Appellate Procedure ["FRAP"], Rule 3, 4 and 24, on February 10, 2001. Although not required by FRAP or Circuit Rule 3-4 (b)(1) to include a CIVIL APPEALS DOCKETING STATEMENT, P-A included STATEMENT OF ISSUES which briefly outlined *one* of the issues to be raised in the forthcoming Opening Brief. Inchoate list of issues to be raised on appeal from CDC's orders were concerned with CDC's improper denial of hearing re P-A's motion in opposition to Defendant-Appellee's ["D-A"] affirmative defense and motion for summary judgment, entitled MOTION FOR DENIAL OF DEFENDANT'S MOTION FOR SANCTIONS AND COLLATERAL ESTOPPEL, and FOR SUMMARY JUDGMENT PURSUANT TO RULE 56 (filed January 10, 2001). P-A, with admitted *pro se* ignorance, did not include notice of appeal from CDC's order of dismissal issued on same day as NOTICE OF DISCREPANCY. At time of Notice of Appeal, district court's ORDER GRANTING INTERNATIONAL BUSINESS MACHINES CORPORATION'S MOTION FOR SANCTIONS PURSUANT TO RULE 11 AND 28 U.S.C. SECTION 1927 did not exist because issued on March 13, 2001. P-A requests this court's indulgence for P-A's incomplete notice, and prays for Notice of Appeal to be amended to include, with appeal from NOTICE OF DISCREPANCIES, (1) appeal from CDC's order of dismissal on February 5, 2001, and (2) appeal from CDC's order for sanctions on March 13, 2001.

Cause for Stay of Judgment and Request to File Opening Brief, includes appeal from all three actions stated above.

On February 19, 2001, CDC denied P-A's motion to proceed on appeal *in forma pauperis*. CDC order of denial was on a photo-copied, standard form containing pat sentences and merely signed by Judge Real with black felt pen.

FRAP, Rule 24 (a) (2): "If the district court denies the motion, it must state its reasons in writing."

Phrase "...in writing", in context quoted above, is not tantamount to "standardized form content signed off by judge". What is clearly implied by "...in writing" are personally crafted sentences declaring judge's reasons brought forth as a result of lawful analysis of

the unique facts in case at hand. (ie. adjudication on the merits) Judge Real's dismissal via photo-copied form was not an act of personal, qualitative adjudication and does not conform to the spirit or letter of Congressional legislation creating Rule 24 (a) (2).

Therefore, CDC revoke of P-A's privilege to proceed *in forma pauperis* was not proper and is void on its face.

In early April 2001, P-A called CDC Appeals Clerk to inquire about his application to proceed *in forma pauperis* in USCA9, and was told that it was pending, and to wait for an order.

On May 23, 2001 (ninety-seven (97) days following P-A's Notice of Appeal) this court issued an Order which (1) denied P-A's request for *in forma pauperis* status (grounds not stated), (2) ordered payment of docketing and filing fees (totaling \$105.00) within 14 days of the order, or dismissal of the case pursuant to Cir. R. 42-1, and (3) ordered P-A to show cause, pursuant to Cir. R. 3-6, "...why the judgment challenged in this appeal should not be summarily affirmed.", and (4) stated in conclusion, "Briefing is suspended pending further order of this court." (no grounds stated)

Considering CDC's improper revoke of a magistrate judge's determination re *in forma pauperis* status without adequate reasons written, USCA9 should not have affirmed CDC's denial, and, for this reason and others stated below, summary affirmation of dismissal, pursuant to Circuit Rule 3-6, would be inappropriate and would deny this case due process of law.

P-A requests reinstatement of *in forma pauperis* status for this appeal and/or permission for disabled Veterans Administration pensioner, P-A, to pay filing and docketing fees for this appeal in five (5) consecutive, monthly cash payments of \$21.00 each.

P-A can prove on-going construction of, and intent to file, OPENING BRIEF pursuant to FRAP, Rule 28 on or before June 4, 2001, the due date supplied in a *pro se* packet mailed to P-A by USCA9 clerk. How can briefing be suspended by this court's order when P-A has not yet filed Opening Brief? How can P-A show cause why CDC's judgment "challenged in this appeal should not be summarily affirmed" when judgment has not been formally or comprehensively challenged heretofore?

Not required STATEMENT OF ISSUES in P-A's Notice of Appeal was not comprehensive statement of P-A's Opening Brief. Is that not obvious? Nevertheless, in compliance with this court's order to show cause why this appeal should not be summarily dismissed Plaintiff-Appellant submits within time limits, a Proposed Opening Brief as CAUSE FOR STAY OF JUDGMENT AND REQUEST FOR ACCEPTANCE OF OPENING BRIEF FOR APPELLANT.

"In our judgment petitioner has not yet been afforded an adequate opportunity to show the Court of Appeals that his claimed errors are not frivolous so as to enable that court to

review properly the District Court's certification that the appeal was in bad faith." [Farley v United States (1957), 354 US 521, L ed 1529, 77 S Ct 1371 ]

Supreme Court's decision above directly caused USCA9's order of May 23, 2001. P-A's *Notice of Appeal*, containing only one of two primary causes for appeal of district court's actions, an erroneous *Notice of Discrepancies*, did not adequately "...show the Court of Appeals that his claimed errors are not frivolous...", and USCA9 ordered more adequate showing or immediate dismissal of the appeal. Proposed Opening Brief contains sufficient showing that (1) Notice of Discrepancies and (2) CDC orders of dismissal and for sanctions were in error and require review and re-adjudication.

In Civil Case No. 00 -10778 R, P-A alleged D-A's violation of Section 1 and 2 of the Sherman Act, (15 U.S.C., sec. 1, 2) and Section 3 of the Clayton Act, (15 U.S.C., Section 14), was filed under, and jurisdiction was conferred upon, CDC by Section 4c of the Clayton Act, (15 U.S.C., sec. 15). Claims have been made for damages resulting from violations of 15 U.S.C., sec. 1, 2 and 14. P-A claims recovery from Defendants-Appellees ["D-A"] of damages in excess of \$75,000. trebled, payment of federal/state exemplary damages, costs and expenses of suit and reasonable attorneys' fees.

Because this civil action arose under the laws of the United States of America, CDC has jurisdiction over this matter pursuant to Title 28 U.S.C., section 1331. Because district court is within the Ninth Circuit of the United States Court of Appeals, jurisdiction in this court is proper.

Complaint in this case also includes allegations of California antitrust and unfair competition law violations, and seeks relief including damages for commercial and personal injuries sustained in California. State law claims are so related to federal law claims raised in this complaint that they form part of the same case or controversy under Article III of the United States Constitution. Therefore, CDC has supplemental jurisdiction over state law claims.

Defendant's anticompetitive practices complained of in this case directly and proximately caused antitrust injury (1) to plaintiff's public charity, business and person, (2) to numerous competitors in relevant markets, and (3) to the general welfare and economic status of large numbers of consumers in the United States and worldwide. This appeal is necessary to secure relief and recovery from same.

## II. STANDARDS OF REVIEW

"[D]ecisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for abuse of discretion)." [*Harman v. Apfel* , 211 F.3d 1172, 1174 (9th Cir. 2000) ]

"In reviewing dismissal of complaint filed in forma pauperis proceeding, Court of Appeals employs abuse of discretion standard." [*Van Meter v. Morgan (1975, CA8 ND)*, 518 F2d 366 ]

"An abuse of discretion is 'a plain error', discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." [*Wing v. Asarco Inc.*, 114 F.3d 986, 988 (9th Cir. 1997); *International Jensen, Inc. v. Metrosounc U.S.A., Inc.*, 4F.3d 819, 822 (9th Cir. 1993) ]

"Under the abuse of discretion standard, a reviewing court cannot reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. [*Valley Eng'rs, Inc. v. Electric Eng'g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998); *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994) ]

"In order to satisfy test of frivolousness under 28 USCS, sec. 1915(d), it is essential for court to find beyond doubt and under any arguable construction, both in law and in fact, of substance of claim, that plaintiff would not be entitled to relief. [*Boyce v Alizaduh (1979, CA4 Md)*, 595 F2d 948 ]

"In forma pauperis complaint should not be dismissed under 28 USCS, sec. 1915(d) if court is not convinced that plaintiff can prove no set of facts that would entitle plaintiff to relief; pro se plaintiff should be given benefit of doubt as to whether complaint sufficiently states claim. [*Munz v Parr (1985, CA8 Iowa)*, 758 F2d 1254 ]

"Recusal statute, 28 USCS, sec. 455(a) and (b), requires mandatory disqualification of judge in any proceeding in which his impartiality might reasonably be questioned or where he has personal bias or prejudice concerning party." [ *United States v. Brown (1976, CA5 La)*, 539 F2d 467 ]

## III. ISSUES RAISED ON APPEAL

Plaintiff-Appellant appeals the following issues, and seeks remand of this case to District Court for continued process of law including summary judgment, discovery and trial.

A. Whether or not District Court abused discretion by denying Plaintiff-Appellant leave to appeal *pro se* and *in forma pauperis* via sub-issues,

1. Whether or not P-A's appeal has been taken in good faith under 28 U.S.C. 1915(a).

2. Whether or not P-A's appeal is frivolous.

3. Whether or not P-A's appeal is without merit.

4. Whether or not P-A's appeal presents a substantial question within the meaning of 28 U.S.C. 753(f).

B. Whether or not District Court's identical dismissal of prior case prejudiced dismissal of this case, and was, therefore, unlawful.

C. Whether or not District Court abused discretion by dismissing this case without providing adequate reasons (opinion) especially in regard to (1) P-A's claims upon which relief can be granted, (2) uphold of D-A's claim for res judicata bar, and (3) D-A's claim for sanctions from *pro se* P-A.

D. Whether or not District Court abused discretion by denying Plaintiff-Appellant hearing on its motion for summary judgment and/or opposition thus denying due process of law prior to dismissal of the case.

E. Whether or not District Court Judge, Hon. Manuel L. Real, performed acts that warrant a change of presiding judge when this case is remanded to District Court.

#### IV. ARGUMENT

A. District Court abused discretion by denying Plaintiff-Appellant leave to appeal *pro se* and *in forma pauperis* via sub-issues, ( P-A cannot append a copy of the order of denial because the copy sent by clerk to P-A on February 19, 2001 was misplaced and records of this case, when personally accessed on June 4, 2001 at the Central District of California records section, did not contain the original or a copy of the order. P-A includes a blank order that is an exact duplicate of the form filled in by Judge Real. See documents.)

1. P-A's appeal has been taken in good faith under 28 U.S.C. 1915(a). "Good faith" is not subjective determination under 28 USCS, sec. 1915; rather, good faith must be measured by objective standards. *Schweitzer v Scott (1979, CD Cal)*, 469 F Supp 1017, 4 Fed Rules Evid Serv 964 ]

Because Judge Real used only a standard form containing brief, pat sentences to order dismiss/deny he did not "measure by objective standards", ie. reasonably and objectively explain why, this appeal was not taken in "good faith". Therefore, absent objective explanation(s), USCA9 should not accept implied subjective and/or discretionary validation for judge's decision(s).

2. P-A's appeal is not frivolous.

"In order to satisfy test of frivolousness under 28 USCS, sec. 1915(d), it is essential for court to find beyond doubt and under any arguable construction, both in law and in fact, of substance of claim, that plaintiff would not be entitled to relief. [*Boyce v Alizaduh (1979, CA4 Md)*, 595 F2d 948 ]

Reasonable reading of P-A's complaint and Notice of Appeal will satisfy reader that it is surely not beyond doubt and/or entirely inarguable that P-A was entitled to relief from antitrust damages directly caused by D-A and/or questionable clerical action(s) and/or dismissal of case on unspecified grounds, and/or improper imposition of sanctions.

3. P-A's appeal is not without merit.

"Test for determining whether action has merit is whether plaintiff can make rational argument of fact or law to support his claim. [*Dolence v Flynn (1980, CA10 Wyo)*, 628 F2d 1280, 30 FR Serv 2d 614 ]

It would be irrational to state that P-A has not made rational argument in support of claims. Complaint is well written. Notice of Appeal is not...but is adequate for notice, if not for comprehensive communication of substance. If CDC questioned the substance of the appeal, would it not be reasonable to dismiss with opportunity to amend ? Judge Real's curt standard form dismissal smacks of prejudice. His grant of \$17,000. "damages" to giant IBM to be paid by P-A, *pro se* and *in forma pauperis* was not only unlawful but actually prejudiced.

4. P-A's appeal did not need to present a substantial question within the meaning of 28 U.S.C. 753(f) as claimed in order of denial because P-A did not order transcripts.

"(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court. Fees for transcripts furnished in criminal proceedings to persons proceeding under the Criminal Justice Act (18 USC 3006A), or in habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis shall be paid by the United States out of moneys appropriated for those purposes. Fees for transcripts furnished in proceedings brought under section 2255 of this title [28 USCS, sec. 2255] to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcripts is needed to decide the issue

presented by the suit or appeal. Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question). The reporter may require any party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States. "

Does this look like an area of law we need to be concerned with ? Why Judge Real included "Catch - 22" proviso in his order of denial/dismissal is not quite clear. P-A was not vulnerable to the "no appeal because can't afford transcripts" loop because non-existent transcripts were not requested when formally solicited by appellate court via Transcript Designation and Ordering Form included with *pro se* packet. [See documents appended]

However, notice the "...(but presents a substantial question) " in quote of law above. This is how federal courts legally define "frivolous". If a complaint presents a *substantial question* concerning alleged cause-of-action and defendant's liability derived there from it is not legally frivolous. Any reasonable reader of P-A's complaint and notice of appeal following can ascertain that they contain "substantial questions". District Court used a "frivolous" strategy to dismiss complaint with prejudice because judge was prejudiced...by his adjudication of prior similar case.

P-A eventually came to believe the 28 USCS 753 (f) issue is not relevant to this case but was simply overlooked and mistakenly not crossed out on form, officially signed by Judge Real.

5. Absence of P-A's "improper motive" declared in CDC judgments, P-A's reasonable allegations in Notice of Appeal and Proposed Opening Brief equate with "good faith" pleading.

Orders of dismissal/denial did not specify or imply P-A's improper motive or conduct.

"Only statutory requirement for allowance of indigent's appeal is applicant's "good faith" and in absence of some evident improper motive, appellant's good faith is established by presentation of any issue that is not plainly frivolous; however, good faith test must not be converted into requirement of preliminary showing of any particular degree of merit and unless issues raised are so frivolous that appeal would be dismissed in case of non-indigent litigant request of indigent for leave to appeal in forma pauperis must be allowed.

[*Ellis v United States (1958)*, 356 US 674, 2 L Ed 2d 1060, 78 S Ct 974 ]

## V. DISCUSSION OF QUESTIONS

### A. VENUE QUESTION

"...dismissal rendered moot defendant's motion to have case transferred to Ohio, 28 U.S.C.A., sec. 1404(a), 1406 " [*Uniroyal, Inc. v Sperberg*, 63 F.R.D. 55 (1973)]

Because prior similar case, CV 00 - 2166 R (AIJx), was dismissed by the Hon. Manuel L. Real, presiding in the Central District of California on July 6, 2001, how could present case be found lawfully in the same district and before same judge ? Especially considering the way case was taken-over from assigned judge, the Hon. Margaret M. Morrow by Judge Real without opportunity for parties to stipulate or object, case currently under appeal should not have been decided by same judge using exact same order of dismissal (excluding order for sanctions section) written by same attorneys. (See documents appended)

Because Judge Real's decision can be reasonably characterized as prejudiced by a prior decision, this case should not be made subject to appellate court's summary dismissal.

### B. ESTOPPEL QUESTION

Defendants raised no issues of genuine debate in prior similar case or in this case. Dismissal order in prior similar case was identical to order in present case and contained no specified opinion or reasons relative to any contested issue(s) or claim(s).

"Where determination of what issues were actually litigated and necessarily decided therein cannot be made, dismissal of complaint on the ground of res judicata is not proper." [*Abramson v. Grady (1967, Dist. Col. App.)*, 234 A2d 174.]

Where dismissal "with prejudice" is declared only via judge's signature on defendant's proposed order of dismissal containing no specification for the prejudice, actual *prejudice* is sufficiently questionable to make identical dismissal in subsequent case inappropriate on res judicata grounds. (cite the other TWI appealed ruling)

### C. REASONS QUESTION

Why District Court's dismissal on Rule 12 (b) 6 grounds should have included opinion and/or reasons:

#### 1. BACKGROUND

A new industry starts with monopoly. PC and SERVER computers invented, developed and sold by IBM, are operated with software purchased, developed and sold by Microsoft. These two companies started the PC and SERVER industries (early 1980's) as two interrelated monopolies.

It is axiomatic. Company A invents (or buys an invention); and then develops; manufactures and sells a new product in a new market(s) where buyers immediately display sufficient demand such that sufficient revenues are generated for seller to justify continuation. At first, Company A enjoys perfect (or near perfect) monopoly (marketshare) but then, if market and other conditions that sustained demand levels for the product, continue and/or increase, unless Company A illegally restrains competitors from entering the new market(s) with similar (competitive) products (not violating copyright/patent) for sale, competitors will force Company A to yield certain percentages of marketshare.

Competitive market dynamics will cause monopolists to yield marketshare (if not revenue levels) so that buyers can obtain same or better products, in terms of *function* and/or *quality* and/or *price*, via competitors' creativity (innovation) in global interactions within new market(s).

From 1992-2001, Microsoft maintained its' monopoly marketshare in operating systems ["OS"] with Microsoft Windows 95/98 ["WINDOWS"] and increased its monopoly in office productivity software ["OPS"] with Microsoft Office 97/2000 ["OFFICE"]. Although IBM did permit (or was compelled to permit) competition in PC markets (not necessarily SERVER and MAINFRAME markets), and did lose large percentages of its once perfect PC marketshare (footnote 1.) , IBM used Microsoft's NT and OFFICE software to increase its' monopoly in SERVER and MAINFRAME markets. This fact also injured plaintiff because GOLF COACH, and many of plaintiff's newer products, run on SERVER and MAINFRAME systems.

## 2. UNIQUE LIABILITY

Unlike other Original Equipment Manufacturers ["OEM"] including Compaq Corporation ["COMPAQ"], Hewlett Packard, Inc. ["HP"], Dell Corporation ["DELL"], IBM had (has) its own OS ["OS/2"] and OPS ["SMARTSUITE"] software (footnote 2.) to sell (trade), and did not absolutely need to tie OFFICE and WINDOWS to PC sales in order to survive competitively, as other OEMs can allege.

Therefore, after 1997 when IBM began and progressively increased PC installations (ties) of OFFICE, IBM incurred unique antitrust liability for (1) conspiracy to monopolize (15 U.S.C., sec. 1) and (2) monopolization (15 U.S.C., sec. 2 and 14) of OPS markets.

IBM has been summoned as sole defendant in this case because IBM, as one of many OEM conspirators with Microsoft, is qualitatively and legally more responsible for P-A's antitrust injury than other OEMs committing similar acts. IBM's OFFICE sales in PC, SERVER, and MAINFRAME computers, and in other OFFICE distribution/sales media, including IBM's e-commerce website(s) (footnote 3.), increased Microsoft's illegal monopolization of OPS markets, as clearly proven in *United States v. Microsoft*, CV 98 - 1232/1233 TPJ and (surprisingly) not appealed in Case Nos. 00-5212, 00-5213 at the United States Court of Appeals for the District of Columbia.

### 3. TRUE COMPETITOR

In defendant's MOTION TO DISMISS, IBM demonstrated belief that intentionally incorrect (fraudulent?) negation of the very existence of plaintiff's allegations in complaint directly pertaining to *competitor status* for antitrust standing purposes would, even if objected to, nevertheless find sympathy and/or validation of intended effect in district court (and beyond?) because, in truth, *no* software seller was (is) able to compete against Microsoft in OPS markets, post 1997, due to 90% + OPS marketshare enjoyed by Microsoft.

Even IBM, the strongest OPS competitor against Microsoft, via SMARTSUITE, chose to curtail ("neutralize") OPS competition after 1997 rather than lose substantially more revenue/profit from grant of favorable WINDOWS licensing rates conditioned on IBM's progressive reduction of OPS competition.

So how can plaintiff allege antitrust standing (on-going *competitor status*) in OPS markets, post 1995-1997, such that federal courts may consider same neither frivolous nor malicious and reasonably capable of proof at trial/judgment when relief, conceivably, can be granted ? Nothing but Corel Corporation's *Word Perfect* can compete with MS Office and Microsoft is, reportedly, trying to buy Corel even as we write!

Plaintiff's competition against Microsoft, IBM and other competitors in OPS, and related, markets which commenced in 1990 and progressed through 1995, was not destroyed in 1995-1997 nor was it eliminated thereafter. It was necessarily held in abeyance until anticompetitive forces could be overcome, one way or another.

Plaintiff's competition, substantial in (1990-1995), became relatively insubstantial in (1996-2000) due to Microsoft's then unproven illegal monopolization in OPS, and related, markets. In year 2001, with Microsoft under a federal conviction as yet unappealed, plaintiff can allege adequate competitor standing for purposes of this prosecution of defendant under 15 U.S.C., sec. 15 because it can prove (1) history of competition against defendant, (2) present ability to compete with defendant, and (3) intent to immediately resume competition with defendant, given grant of relief sought by this action [ie. when IBM is enjoined from illegally tying "sales" of OFFICE to PC, SERVER and/or MAINFRAME sales, and is compelled to resume OPS competition against Microsoft.]

\_\_\_\_\_Begin Footnotes\_\_\_\_\_

1. Although IBM experiences PC competition from numerous OEMs, it has recently (1999-2001) patented hundreds of computer components many of which were invented many years ago and sold (unpatented but monopolistically) to every PC, SERVER and MAINFRAME computer "competitor". Article is presented to underscore the importance of this case.

## "WELDING A MASSIVE ARSENAL OF PATENTS, BIG BLUE SHAKES UP THE HIGH-TECH INDUSTRY

By Lisa Dicarlo

The deals have clicked with regularity since March: Dell Computer Corp., EMC Corp., Acer Group, 3Com Corp. and Cisco Systems Inc. With more than \$30 billion committed to its coffers from these and other contracts, the IBM Technology Group is just getting started.

Not even a year old, this new division has an ambitious goal: Become the arms dealer to the IT industry. To reach that pinnacle, IBM is leveraging the industry's broadest patent portfolio--along with the specter of enforcing those patents.

Now, as IBM continues a transition that will significantly impact technology vendors and their customers well into the next decade, the company finds itself walking an increasingly fine line between supplier and competitor to its partners.

To propagate its technology throughout the industry, IBM has had to open up its closely held intellectual property--the crown jewels spawned from years of R&D.

In the past six years alone, IBM has registered more than 10,000 patents, covering security, cryptography, software, storage, networking, PC and server architectures, and semiconductor design and manufacturing.

That diverse portfolio of technology often languished in IBM's labs as the company's hardware and software divisions failed to build and market successful products around it.

"We used to keep wraps on our technology, designing and building something without knowing if there was a market for it," said Jim Vanderslice, senior vice president and group executive of ITG, based in Somers, N.Y. "Now it's completely different. We're offering more access to our technology for a better return."

A better return is just what it's getting. For the first six months of this year, ITG has taken in \$7.7 billion in revenues, with \$5.8 billion of those sales coming externally (the rest of the revenues are derived from component sales to other IBM divisions). Its goal: \$19 billion in outside sales by 2002.

"Of all the computer companies, IBM's inability to capitalize on its wealth of technology was probably the most baffling," said Marcia Brooks, contributing editor of the Inside the New Computer Industry newsletter, in Carmel, Calif. "ITG may be dismissed as a move to make IBM a mere supplier of parts, but the fact is, the company is going where the margins are."

R&B gauntlet

The charge has been led by IBM Chairman and CEO Lou Gerstner, who early last year challenged three senior executives--Vanderslice, Bob Stephenson and Mike Attardo--to find a way to offset the company's R&D costs. At more than \$5 billion annually, IBM's R&D expenditures are nearly as much as the R&D budgets of Intel Corp. and Microsoft Corp. combined.

At the time, IBM's OEM initiatives consisted mainly of selling mass storage. After months of research, the three executives concluded that the best way for IBM to leverage its R&D investments was to become a full-fledged component supplier and integration partner to third parties.

Such a move, the executives reasoned, would also buttress IBM's hardware revenues, which have slowly but steadily declined. More important, it would give IBM a way to enforce its patents without chasing down vendors for royalty payments.

In August 1998, the trio presented its findings to IBM's board of directors in the report "IBM's OEM strategy for the 21st century." The board signed off on the plan, and two months later, ITG was born, combining IBM's storage systems, microelectronics, printing and network hardware divisions.

Less than a year later, the deals are piling up with alarming speed. One main reason: Many vendors want to repel the threat of a patent infringement battle. IBM's patents are so extensive and cover such fundamentals of computing that it would be virtually impossible to find a company that has not infringed upon one of its patents at one time or another. "We needed to get the royalty issues off the table," said Michael Lambert, senior vice president of Dell's enterprise computer group, in Round Rock, Texas.

Dell had been paying tens of millions of dollars annually to IBM as part of a 1993 royalty agreement that expired in late 1998. Eager to drop the fees and apply the cash to its bottom line, Dell began negotiating its component deal with IBM in early 1998 and finally consummated the landmark \$16 billion component pact in March of this year.

"Patent infringement is always an issue with IBM, given their extensive portfolio," said a Dell executive, who requested anonymity.

The same scenario played out between IBM and EMC, whose existing royalty agreement also expired late last year. After months of negotiation, EMC in March agreed to purchase \$3 billion in IBM disk drives in a cross-licensing deal that resolved the patent issues.

"There was a very strong potential" for a legal dispute had the two sides not reached a new agreement, said Paul Noble, executive vice president of products and offerings at EMC, in Hopkinton, Mass.

"Both [companies] were of the opinion that, rather than litigate ownership of particular technologies and licenses to technologies, we'd have a partnership," Noble said, adding

that EMC wanted to design next-generation storage systems without fear of patent infringement. Now, he said, "we have what we wanted: design freedom."

Similarly, Cisco and IBM for years disputed patents and threatened lawsuits. Earlier this year, the two signed a cross-licensing deal to settle some of those disputes. The deal was a precursor to the \$2 billion pact announced earlier this month.

"IBM uses intellectual property to their advantage to strike a deal in some other manner," said Selby Wellman, senior vice president of Cisco's Interworks Business Division, in Raleigh, N.C. Wellman, who negotiated the IBM deal for Cisco, added that such methods are standard strategy for many high-tech vendors, not just IBM.

[Unlike other vendors, however, IBM has mainframe and mini-mainframe monopolies.]  
[comment added]

Tony Baker, ITG's director of business development, acknowledged that protecting intellectual property plays an important role in ITG's licensing deals. "Getting a return on that [intellectual property] is a very active program at IBM," Baker said. "You can sometimes run into areas of disagreement [over royalties], and we want to remove a potential inhibitor to a relationship. We want to take away any contention."

Beyond the patent issues, ITG's partnerships are having a major impact both inside and outside IBM. The company effectively exited the networking hardware business by selling its routing and switching patents to Cisco. The strategy shift raises questions about the future of other IBM divisions as well.

However, the deals also help IBM keep revenues flowing into other divisions. As part of Cisco's pact with IBM, for example, the networking giant agreed to purchase IBM storage and PCs. "They get you to [agree to] buy more products from them, [so] they'll issue a cross license," Wellman said.

Externally, the partners could help bring to market more quickly such IBM advancements as copper-based semiconductors, remote management software, high-capacity storage products in small form factors and silicon-on-insulator technology.

Nintendo of America, Inc. for example, will use custom-made "system-on-chip" semiconductors from IBM in game devices due to hit the market during next year's holiday season.

"This is not a simple buy/sell arrangement anymore," Baker said. "We will work with partners to 'forward integrate' our technologies into their products."

That "forward integration" strategy provides perhaps the point of greatest potential conflict between IBM and its partners. For IBM to develop or customize components for partners' future products, it must be privy to those partners' long-term product plans.

Companies such as Dell and EMC are wary of sharing such confidential information with IBM, fearing their road maps will fall into the hands of rival IBM product divisions.

"Rest assured we have no intention of broadly communicating our plans to IBM," said the Dell executive who requested anonymity, even though Dell will likely have IBM build custom ASIC (application-specific integrated circuit) chips for future devices.

EMC and IBM, No. 1 and No. 2, respectively, in enterprise storage, will continue to walk a tightrope of sharing technology while competing in the storage market. IBM's latest storage system, Enterprise Storage Server, which the company calls its "EMC killer", is not covered by the technology sharing agreement. EMC executives say they're not concerned about IBM cloning EMC products, even though the deal gives IBM access to patents for EMC's flagship Symmetrix line.

"Having a clipboard and a basketball doesn't make you Michael Jordan," Noble said, adding that it's unlikely the two will actually co-develop products.

"It is a delicate balance in adhering to confidentiality," ITG's Baker said of the cross-licensing deals. "The reality of the matter is that your credibility and reputation are on the line. If you violate the agreement, it's over."

Baker says ITG signs nondisclosure agreements with partners to ensure that confidential information stays within the technology division.

The benefits of the agreements--particularly partners' abilities to cut down on their own R&D expenditures by leveraging IBM's labs--should outweigh any risks, IBM officials maintain.

"Lots of companies are becoming just distributors of technology, so they'll need us to offload their R&D cost in this commodity market," Vanderslice said.

IBM's moves, as a result, could have a chilling impact on other component companies, which already are struggling with declining storage prices.

Last week, mass-storage maker Seagate Technology Inc. said it would cut 8,000 jobs and post a loss for its current quarter. Likewise, Western Digital Corp. and Quantum Corp. have cut jobs recently in an effort to offset poor financial performance.

"IBM provides incentives for Acer to buy as much as possible, such as price discounts," said Stan Shih, chairman of Taiwan-based Acer Group, which signed an \$8 billion deal with ITG in June.

IBM could have bigger fish to fry than component vendors. Its OEM efforts position Big Blue as a much worthier competitor to Intel. Both companies, for example, are entering what's expected to be a lucrative market for programmable communications processors.

An Intel executive last week criticized IBM for building too many functions into its forthcoming network processors, resulting in a bloated chip.

"Their die is bigger than Merced," Intel's forthcoming 64-bit processor, said Mark Christensen, vice president and general manager of Intel's Network Communications Group, in Hillsboro, Ore. "They can't scale down, but we can scale up."

The risks and competition have yet to hamper ITG's progress. As the division forges new alliances almost monthly, one thing is clear: IBM's building blocks of components, software and services, and not its mainstay hardware, are the backbone of the company's 21st-century growth strategy.

"Gerstner changed their culture, and that's not an easy thing to do," said Cisco's Wellman, who spent 15 years at IBM. "It's a different IBM today."

Added Baker, a 30-year veteran: "We have to be more open because we're not just a hardware supplier. We used to be paranoid about hearing our own children, but today, there's not so much paranoia about giving away our secrets. If we don't do this, someone else will."

[PC WEEK, September 20, 1999, vol. 16, no. 38] "

2. Subsequent exhaustive analysis of internet, conventional and judicial publications shows that, in early 1998 and thereafter, IBM, in all probability, did not immediately yield to Microsoft's anticompetitive demands after paying a (well known) \$16, 000,000. royalty-arrears settlement to Microsoft, and, consequently, receiving thereafter competitive Microsoft Windows 95/98 and Microsoft Office 97/2000 licensing terms.

3. In exchange for (1) gradual curtailment of SMARTSUITE competition and (2) selling OFFICE on IBM website(s), and via other sales media, IBM obtained more competitively favorable Microsoft Windows 95/98 and Microsoft Office 97/2000 terms than those noted above which had been granted following payment of said royalty arrears.

4. (Microsoft is "'going to fight this [the threat from Navigator] with both arms,' the OS arm and the applications arm") (JA 14029); FF 345 (using "the importance of Mac Office to Apple's survival," to cause Apple to take steps to protect Microsoft's OS monopoly) (JA 2333); RX 1 (using control over Office and applications so that they work only with Microsoft's operating system for PDAs rather than with Palm operating system), RX 2 (JA 14987, 14988); Harris 102-13 (JA 3088-93). Microsoft took these actions passing up profit opportunities for its applications because of its powerful incentive to protect the OS monopoly. FF 355 (JA 2335).

\_\_\_\_\_ End Footnotes \_\_\_\_\_

## VI. SPECIFICITY FOR DEPTH

### I. INTRODUCTION

In 1994 through 1997, the Microsoft Corporation was offended that its' Microsoft Office monopoly was encroached upon by IBM's Lotus Smartsuite competition, and repeatedly jeopardized IBM's licensing of Microsoft Operating Systems in an effort to curtail that competition.

"In sum, from 1994 to 1997, Microsoft consistently pressured IBM to reduce its support for software products that competed with Microsoft's offerings, and it used its monopoly power in the market for Intel-compatible PC operating systems to punish IBM for its refusal to cooperate." [84 F.Supp. 2d, 112 (D.D.C. 1999), *Findings of Fact*, issued by First District Court - Hon. Thomas P. Jackson, presiding]

In late 1997, however, IBM yielded to Microsoft's pressure tactics and joined the OFFICE and Microsoft Internet Explorer ["IE"] monopoly conspiracies that included Compaq Corporation, Dell Corporation, and Hewlett Packard Inc., by terminating (Microsoft/IBM used the term "neutralizing") SMARTSUITE installations in IBM PCs and installing (tying) OFFICE instead. This capitulation to Microsoft tactics by IBM injured the Golf O'Brien Company ["GOB"] and a host of other competitors in Office Productivity Suite ["OPS"] markets.

Plaintiff, Edward Michael O'Brien (CEO of GOB), brought suit against IBM for treble damages under Title 15 of United States Codes in February, 1999. That suit *Edward Michael O'Brien and the Golf O'Brien Company v. Louis V. Gerstner and IBM* (Case No. CV 00-2166 R [AIJx]), ["OBRIEN I"], was dismissed by this Court on July 6, 2000 and affirmed dismissed on September 5, 2000 when Court disallowed Plaintiff's filing of a Second Amended Complaint ["SAC"] that Plaintiff alleged would have satisfied defects in Plaintiff's First Amended Complaint ["FAC"] and by Court's Order filed on July 6, 2000.

On October 13, 2000, Plaintiff, convinced that the SAC would have been adequate pleadings had it been accepted in dismissed case, filed Original Complaint in this case which is a near duplicate of referenced SAC, minus the inclusion of Mr. Louis V. Gerstner as Defendant.

Defendant answered Original Complaint with (1) INTERNATIONAL BUSINESS MACHINES CORPORATION'S NOTICE OF MOTION AND MOTION FOR SANCTIONS PURSUANT TO RULE 11 AND 28 U.S.C. SECTION 1927 ["MFS"], filed on December 8, 2000 and (2) REQUEST FOR JUDICIAL NOTICE SUBMITTED IN SUPPORT OF INTERNATIONAL BUSINESS MACHINES CORPORATION'S MOTIONS TO DISMISS, TO DESIGNATE PLAINTIFF A VEXATIOUS LITIGANT, AND FOR SANCTIONS ["NOTICE"], filed also on December 8, 2000.

## VI. NO CONTEST OF COMPLAINT

To date, Defendant has not specifically opposed; nor alleged the least objection to any of the particularized claims found in Original Complaint.

## VII. *RES JUDICATA* INAPPROPRIATE

Clear from a reading of Original Complaint, Plaintiff states claims that are neither frivolous nor to be reasonably deemed incapable of proof at trial. Jurisdictional analysis also must validate the existence of facts/circumstances supporting claims alleged in complaint upon which relief can be granted by the Court. Antitrust injury and, therefore, antitrust standing are well pled in Original Complaint as signified by complete absence of Defendant's objections to specified allegations.

Issue central to IBM's MFS defense, indeed the only issue raised in defense, apart from a ludicrous request for monetary sanctions from Plaintiff, *in forma pauperis*, to pay the legal expenses of a \$50 billion company, is the applicability of *res judicata* doctrine to this proceeding supported by defendant's claim that the SAC in OBRIEN I is identical to both the FAC in OBRIEN I and Original Complaint in *Edward Michael O'Brien and Golf O'Brien Company v. International Business Machines* (Case No. CV 00-10778 MMM [AIJx]), ["OBRIEN II"].

As stated above, SAC was not accepted for adjudication by the OBRIEN I Court for reason, "The Second Amended Complaint...does not withstand scrutiny." No other reason was given at hearing on September 5, 2000. [Hon. Manuel L. Real inter *OBRIEN I* hearing on September 5, 2000 in U.S. District Court, Central District of California][See EXHIBIT B]

Original Complaint, nearly identical to SAC and quite different from FAC, is, therefore, original to these proceedings and not part of the complaint structure adjudicated and dismissed in OBRIEN I. Original Complaint is substantially, qualitatively and adequately different from FAC in OBRIEN I, and, therefore, OBRIEN II is not barred from proceeding to discovery and trial by *res judicata* doctrine.

## VIII. FAC VERSUS ORIGINAL COMPLAINT

Defense counsel does an admirable job of summarizing Cause of Action in OBRIEN I at page 2. of MFS. Summary of alleged violations of antitrust law is likewise applicable to OBRIEN II. However, when counsel writes, "The legal claims plaintiff asserts in the present case are identical to those asserted in O'Brien I" [MFS at page 1. lines 8-9] they error, and predicate the remainder of their argument on a false premise. Analyses, and requirements of evidence and proof, re "legal claims" in OBRIEN II are substantially, qualitatively and profoundly different from those in OBRIEN I.

Although the complaint in OBRIEN II has similar cause of action as alleged in OBRIEN I, it (1) has a qualitatively different Legal Theory, (2) has a major change in Defendant(s) summoned, and (3) has substantially different allegations re evidence and proof of claims.

A. New Legal Theory: *Rule of Reason* v. *Per Se* Analysis

OBRIEN I contained allegations of defendants antitrust violations and plaintiffs' injuries sustained necessarily analyzed under a *Rule of Reason* legal theory re Discovery, Trial and Judgment. Complaint in OBRIEN II alleges *Per Se* violations of 15 U.S.C., sections 1, 2 and 14.

Microsoft's OFFICE monopolization conviction (sec. 1) in *United States v. Microsoft* (CV 98-1232/1233 TPJ) as specified in Court's *Order of Judgment* is strangely uncontested (nor even mentioned) in Microsoft's recent appeal to the United States Court of Appeals, District of Columbia (Case Nos. 00-5212/00-5213), and this fact was recently made part of the rationale for Plaintiff's Motion for Summary Judgment at the MDL Panel (District Court of Maryland), Case No. 1332.

IBM's 1997 agreement with Microsoft (proven with email copies of the agreement Plaintiff obtained from the United States Department of Justice) to install OFFICE in PCs instead of SMARTSUITE can, in year 2000, be considered conspiracy to commit proven antitrust crime(s) not appealed by IBM's alleged conspirator.

When IBM decided in 1997 to stop its competition in OPS and OS markets in exchange for favorable terms re OS licenses, it eliminated the only window open for Golf O'Brien Company to compete in OPS and Graphing/Charting/WordPad ["GCW"] software markets. GOB's *Golf Coach* was superior in certain respects to SMARTSUITE and could be purchased and installed beneficially by an IBM PC owner at nominal cost. However, OFFICE encompassed all the features found in *Golf Coach* therefore PCs with OFFICE installed did not need *Golf Coach*. Once OFFICE was able to consume the market share of SMARTSUITE, Microsoft was able to, comprehensively, preclude competition by GOB and a host of related competitors in OPS markets...illegally.

SMARTSUITE was, relative to Microsoft Works, inter OFFICE, a new technology that was suppressed and eventually destroyed by a software monopolist in conspiracy with the owner of the technology who had obtained same via merger under questionable circumstances. Before Microsoft was convicted in *U.S. v. Microsoft* of OFFICE monopolization it was very difficult to presume the illegality of IBM's decision to "neutralize" SMARTSUITE because IBM's decision to install OFFICE in new PCs was easily rationalized as a wise business decision that contributed to IBM's overall competitive advantages and profitability. On February 2, 1999, when OBRIEN I was initiated, monopolization (and second party contributions to same) of OFFICE was not *per se* illegal. After July 21, 2000, when Plaintiff requested leave to file SAC in OBRIEN I, and October 13, 2000 when Original Complaint was filed in OBRIEN II, monopolization, and agreements to monopolize, OFFICE were clearly and *per se* illegal.

With incredible disregard for law and its enforcement, IBM and Microsoft continue to this day to advance monopolization of OFFICE while IBM's Consent Degree, that expressly restricts software tying of the type in question, remains in force through 2001, and remedies in *U.S. v. Microsoft* remain stayed while Microsoft's appeal is heard and decided.

With plausible business rationale no longer possible, necessarily complex *Rule of Reason* analysis (not adequately prepared for in FAC of OBRIEN I) can now be replaced by *Per Se* analysis (adequately pled in SAC of OBRIEN I and Original Complaint of OBRIEN II).

"Per se rules of illegality ought to be considered as evidentiary presumptions of varying levels of rebuttability, ranging from the nearly conclusive to the mildly presumptive subject of justification, depending on the circumstances. In contrast, rule of reason analysis should involve no presumption of illegality." [John J. Flynn, *Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos*,<sup>49</sup> ANTITRUST L.J. 1593 (1980)]

#### B. DEFENDANT(S) SUBSTANTIALLY CHANGED

As stated above, complaint in OBRIEN II exempts human person, Mr. Louis V. Gerstner, from list of defendants. Exclusive presence of only one defendant, non-human person IBM, substantially changes the character and ramifications of OBRIEN II from those that obtained in OBRIEN I. This fact adds merit to Plaintiff's claim for inapplicability of Defendant's only defense, *res judicata* bar.

#### C. ORIGINAL COMPLAINT DESERVES SCRUTINY

What does, "The Second Amended Complaint... in any event, does not withstand scrutiny" actually mean ? Plaintiff interprets this somewhat confusing verbal statement, made by presiding judge at hearing, to mean SAC in question was scrutinized by the Court prior to dismissal of the FAC, but leave to amend FAC with SAC was not granted for reasons not otherwise specified. Denial of request for second amendment was clearly *not* for cause specified -- FAC identical to SAC.

Defendant relies heavily on quote above to prove that Original Complaint in OBRIEN II does not merit further adjudication in this court just as SAC was declared unworthy of adjudication in OBRIEN I.

It does because SAC is yet to be adjudicated on its merits in any court.

Let concerned parties, herewith, acknowledge the fact that Original Complaint in this case was reviewed by a competent Magistrate Judge of the Central District immediately following its filing in federal court and prior to Court's formal issue of Summons. Complaint was found, on its face, neither frivolous, malicious nor unreasonable and was authoritatively considered adequate pleading according to Court's rules for *pro se*

litigants including Rule 11. Summons was issued to IBM as a direct result of magistrate's affirmation of the complaint in question.

#### IX. SAC REJECTED NOT DISMISSED

Defendant attempts to override fact that "legal claims" in Original Complaint were not formally dismissed in OBRIEN I.

"The legal claims plaintiff asserts in the present case are identical to those asserted in *O'Brien I*. After reviewing plaintiff's identical claims in *O'Brien I* on Motion to Dismiss, the Honorable Manuel L. Real dismissed *O'Brien I* for failure to state a claim on July 6, 2000."

Let Court notice twisted, and potentially misleading use, of the word "identical" by Defendant in quote above. Lawyer's device is framed and intended to blend the concept of "identical" with the concept of "legal claims" in reader's mind.

With finesse Defendant would have the Court accept setup of misconception such that legal claims in the SAC, not accepted for adjudication in OBRIEN I, were, therefore, not only previously "rejected" by the Court, but also previously adjudicated on merits, and included in Order of dismissal. In fact, legal claims put forth in SAC on July 21, 2000 and, likewise, in Original Complaint have not been adjudicated on merits, heretofore, nor have they been ordered dismissed in federal court on July 6, 2000. And to prove this point, Order re FAC's dismissal in OBRIEN I was merely Defendant's Proposed Order signed by the presiding judge without a single line of Court's opinion included.

#### X. *Res Judicata* INAPPLICABLE

Defendant predicates its claim for *res judicata* bar of these proceedings squarely on the premise, "The complaint alleges claims that are identical to those this Court dismissed with prejudice on July 6, 2000 in OBRIEN I. Indeed, the current complaint is a verbatim reproduction of the proposed Second Amended Complaint in OBRIEN II, which this Court rejected and found did not withstand scrutiny on September 5, 2000."

Notice the interchange between "dismissed" and "rejected". SAC was rejected; its contents were not adjudicated and ordered dismissed.

If FAC, the only complaint adjudicated in OBRIEN I, is identical to SAC (and Original Complaint), as claimed by Defendant, then Defendant makes its point. However, reasonable reader will attest FAC is substantially, qualitatively, and profoundly not identical to SAC. *Res judicata* preclusion of this proceeding is, therefore, inapplicable.

Rejected pleadings, never the controlling complaint, cannot be later considered to have been adjudicated and formally dismissed on their merits. Perhaps Defendant's twisting of logic and inference in this matter is, itself, worthy of consideration for sanctions on grounds - misleading the Court.

## XI. CONCLUSION

The quality and veracity of IBM's motion for sanctions and collateral estoppel is symbolized by Defendant's consistent misname of the Plaintiff. Plaintiffs in this case are Edward Michael O'Brien and Golf O'Brien Company, a private person and a private business currently held by a 501(c)3 - 509(a)2 California public charity. [SAVIORG: C-1675399, FEIN: 77-0298874]

IBM's continuing attempt to devalue and obstruct Plaintiffs' efforts to obtain a fair trial of allegations in a complaint clearly validated by this Court's magistrate review, is also evidenced in counsel's letter to Plaintiff dated December 8, 2000 which demands, and seeks to compel pre-hearing judgment of this case even to the extent of threatening severe (monetary) sanctions unless Plaintiffs comply with demands, expressed in a manner that presumes the authority and power of the federal judiciary itself. (See documents appended)

"For there is no power but of God: the powers that be are ordained of God." -Romans 13:1

IBM, as big and blue as it is, is not yet ordained to exercise unusual (pre-hearing) power in federal court proceedings.

The Original Complaint in this case does not qualify for sanctions, breach of Rule 11 or collateral estoppel, and Defendant's clever but transparent attempt to discredit an important, private "little attorney general" action in the long-standing series of similar antitrust actions against IBM must be denied effect.

## XII. RES JUDICATA CRITERIA NOT MET

A. The doctrine of res judicata has been stated by the Supreme Court to be as follows:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains

unmodified." *Southern Pacific Railroad Company v. United States*, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27, 42 L.Ed. 355.

Although this case contains almost all of the same rights, questions and facts alleged in prior similar case, those rights, questions and facts were not "distinctly put in issue and directly determined" in district court's dismissal. Therefore, same questions and facts can be disputed in a subsequent suit between same or similar parties.

B. "Affirmative defense of res judicata may be raised directly by motion for summary judgment either before or after answer under Rule 56, but where record did not reveal any evidentiary matter as basis for dismissal or that court considered motion as under Rule 56, it was error to dismiss action on ground of res judicata. *Miller v. Shell Oil Co. (1965, CA10 NM)*, 345 F2d 891" [ FRCP 56, n 347]

Defendants motion to dismiss does not contain any evidentiary matter used by the district court as a basis for dismissal of prior similar complaint. Therefore, dismissal on res judicata grounds is not proper.

C. "Court's judicial notice of previously filed complaint converts Rule 12(b)(6) motion into Rule 56 motion. *Colonial Bank & Trust Co. v American Bankshares Corp. (1977, ED Wis)*, 442 F Supp 234.

Defendants motion to dismiss on res judicata and Rule 12 (b) 6 grounds supplies for *judicial notice* a complete copy of plaintiffs' complaint in prior case. Therefore, dismissal was under Rule 56 not Rule 12 and evidentiary matter from outside complaint and/or absence of Statement of Uncontroverted Facts undermined validity of dismissal of this case.

D. "Where determination of what issues were actually litigated and necessarily decided therein cannot be made, dismissal of complaint on the ground of res judicata is not proper. *Abramson v. Grady (1967, Dist Col App)*, 234 A2d 174" [*Ibid.*]

District court's brief, unrationalized dismissal does not determine what issues were actually litigated and necessarily decided. Therefore, dismissal on res judicata and/or Rule 12 grounds not well taken.

E. On January 10, 2001 Plaintiff, Edward Michael O'Brien, filed and served MOTION FOR DENIAL OF DEFENDANT'S MOTION FOR SANCTIONS AND COLLATERAL ESTOPPEL, AND FOR SUMMARY JUDGMENT PURSUANT TO RULE 56

On February 6, 2001 Court's Clerk returned documents to Plaintiff with NOTICE OF DOCUMENT DISCREPANCIES containing two discrepancies noted under Local Rules 7.4 and 7.14.1. [See documents appended]

"L.R. 7.4 *Written notice of motion lacking or timeliness of notice incorrect*" did not make sense to Plaintiff because Court's current calendar for motions hearings was (is) on the first and third Mondays of every month and Defendant's noticed date(s) agreed with Plaintiff's date(s) that February 5, 2001 was an appropriate date of hearing. Defendant's motion papers contained MMM as presiding judge's initials, and Plaintiff, respecting IBM's law firm's access to current case information, thought the current presiding judge was the initially assigned judge, Hon. Judge Morrow.

"L.R. 7.14.1 *Statement of uncontroverted facts and/or proposed judgment lacking*" also did not make sense to Plaintiff because Plaintiff's motion stated on page 2., section II. "*NO CONTEST OF COMPLAINT : To date, Defendant has not specifically opposed; asked for dismissal of; nor alleged the least objection to any of the claims found in Original Complaint.*" Plaintiff included a satisfactory Proposed Order in its motion as required by L.R. 7.14.1, and believed above quoted statement was adequate pleading, *pro se*, to satisfy intent of L.R. 7.14.1. re statement of uncontroverted facts.

Clerk's belated and obscure rejection of Plaintiff's motion abridged Plaintiff's right to due process of law. Clerk's action thwarted Plaintiff's effort to oppose Defendant's motion to dismiss with communication of important and controlling allegations of fact and law.

Plaintiff's motion in question is well constructed and correctly purposed. It deserves careful reading by district and appellate courts of jurisdiction. The issue of *res judicata* preclusion is treated in a manner supporting Plaintiff's opposition to IBM's reliance on a misconception that dismissal of a case on Rule 12(b)6 (jurisdictional grounds) generally stops subsequent and similar proceedings before discovery. The supreme court decision used to validate this thinking has been taken out of context, and used by attorneys and judges alike to dismiss valid causes of action without true adjudication on the merits . Although Plaintiff narrowed the issue to claims for overcome of *res judicata* preclusion based on summoned parties and legal theory changes, the entire issue of *res judicata* doctrine used to augment Rule 12(b)6 defenses deserves in depth appellate review.

In precluded motion Plaintiff alleged Defendant's untimely filing of initial (December 5, 2000) and secondary (January 2, 2001) motions for dismissal. Failure to waive service within twenty (20) days of tender of request for waiver requires answer within twenty (20) day limit. Waiver of service requires answer within sixty (60) day limit. IBM exceeded both limits which negated its answer and motion to dismiss. Judges refusal to address this issue was an abuse of discretion.

Plaintiff alleged a new legal theory that clearly meets federal standards for overcome of collateral estoppel.

Defendant made intentionally false, and clearly misleading allegations regarding Plaintiff's alleged time of cause of action. IBM's false statements in question were an exact duplicate of IBM's defense used in the prior case ( O'BRIEN v. Gerstner/IBM ) under analysis.

Plaintiff's motion was, as stated, critically important to the security of its cause of action, itself critically important to national and international security, economy and competition. Title 15, Section 15 prosecution authority has not been crafted by the Congress of the United States and upheld by Supreme and Appellate Courts without good reason and critical need for same.

Let preclusion of due process of law and undermine of Title 15, Section 15 prosecution at the Central District of California be the subject of abridgement this time.

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When Plaintiff noticed the absence of his motion on Court's calendar posted on the door of Courtroom No. 8 in the Central District of California on February 5, 2001, Plaintiff, when his case was heard, and he was addressed from the bench regarding "anything else to add", stated need for and request for continuance of the hearing in order to (1) figure out (or get instruction on) the exact meaning of Clerk's Notice of Document Discrepancies, and (2) write, file and serve corrected motion(s). Presiding judge curtly and emotionally stated that Motion For Summary Judgment did not require hearing prior to Defendant's Motion For Dismissal.

Seconds later, presiding judge ordered dismissal of the case with prejudice and payment of unspecified monetary charges (sanctions) by Plaintiff at a later date.

Plaintiff appeals district judge's actions because they indicate an abuse of discretion. Judge Manuel L. Real made no mention of the portion of Plaintiff's motion that was properly filed and that did require hearing prior to dismissal of the case.

Plaintiff contends its' Motion filed/served on January 10, 2001 and containing (1) Motion For Denial of Defendant's Motion for Sanctions and Collateral Estoppel and (2) Motion for Summary Judgment was properly filed in the first part, and therefore should have been honored as such and accepted for adjudication on the merits of properly filed part even though Motion for Summary Judgment may or may not have been flawed and rightly excluded by absence of a formal Statement of Uncontroverted Facts pursuant to L.R. 7.14.1

Plaintiff also contends that its claim for denial of Defendant's motion on time limits grounds should have been honored and adjudged prior to adjudication on Defendant's motion for dismissal.

Finally, Plaintiff contends that district court's Order of Dismissal is merely a signing of Defendant's proposed order, and does not specify a single cause for the dismissal. This fact, again, constitutes an abridgement of due process of law in that an effective appeal from an Order of Dismissal is difficult, if not practically impossible, absent judge's specified causes for dismissal (rationale) clearly stated.

### XIII. DENIAL OF DUE PROCESS

A. On January 10, 2001 Plaintiff, Edward Michael O'Brien, filed and served MOTION FOR DENIAL OF DEFENDANT'S MOTION FOR SANCTIONS AND COLLATERAL ESTOPPEL, AND FOR SUMMARY JUDGMENT PURSUANT TO RULE 56

Certain docketing anomalies indicate judicial abuse of discretion regarding this case. Please refer to the copy of CDC's docketing record contained in documents appended herein.

a. Even though P-A's motion was stamped filed on January 12, 2001 (see documents appended) it was not entered into court's docket as would normally be the case. Also notice that a second stamping has been whited-out. Held before a bright light anyone can see beneath the whiteout the date "January 17, 2001". This date would have been appropriate for return of P-A's motion so that it could be corrected and refiled prior to hearing on February 5, 2001. Instead NOTICE OF DISCREPANCIES was held by Judge Real until after the hearing it was designed for.

b. On January 29, 2001 entry on docket (entry no. 24) reads, "NOTICE OF DISCREPANCY AND ORDER by Judge Manuel L. Real that the document, motion to dismiss not to be filed, but instead rejected, and is ordered returned to cnsl. (bp) [Entry date 02/01/01]" Does this message stating "motion to dismiss" refer to P-A's MOTION FOR DENIAL ? It cannot refer to D-A's Motion To Dismiss because no correction was served to P-A and rejection on 01/29/01 of D-A's Motion To Dismiss would not have permitted the court to grant same motion at hearing on February 5, 2001.

c. On February 6, 2001 entry on docket (entry no. 27) reads, NOTICE OF DISCREPANCY AND ORDER by Judge Manuel L. Real that plaintiff's notice of motion for denial rcd 1/12/01 is not to be filed but instead rejected & order returned to counsel because statement of U/F lacking [Entry date 02/08/01]" Note that this first entry on the docket rejects P-A's motion in opposition to D-A's motion to dismiss the day after the hearing granting D-A's motion !

d. P-A's NOTICE OF APPEAL AND REQUEST TO PROCEED IN FORMA PAUPERIS filed and served on February 15, 2001 is not entered in the docket nor is court's order of denial of same. When P-A personally surveyed district court's records of this case on June 4, 2001 no records were found for the NOTICE or the order of its denial. Please let the court of appeals confirm this fact.

On February 6, 2001 Court's Clerk returned documents to Plaintiff with NOTICE OF DOCUMENT DISCREPANCIES containing two discrepancies noted under Local Rules 7.4 and 7.14.1. [See documents appended]

Clerk's belated and obscure rejection of Plaintiff's motion abridged Plaintiff's right to due process of law. Clerk's action thwarted Plaintiff's effort to oppose Defendant's motion to dismiss with communication of important and controlling allegations of fact and law and may have adversely effected finality of judgment.

Why did not the clerk return P-A's motion prior to hearing date ? Why did Judge Real hold P-A motion for rejection after the critical hearing on Feb. 5, 2001.

At the hearing, P-A verbally requested a continuance after learning, prior to hearing, that Motion To Deny had not been placed on court's calendar for hearing and having that fact confirmed by Judge Real personally. Reasonable request for continuance was denied for stated reason (paraphrased), "I am going to dismiss the case today so your motion for summary judgment is not relevant." And yet the motion to deny contained more than a motion for summary judgment. It contained argumentation in opposition to claims made by D-A in support of motion to dismiss. Judge's signature on NOTICE OF DISCREPANCIES, dated February 6, 2001 and returned to P-A on that date does not make sense unless judge wanted to guarantee that P-A's opposition and/or motion for summary judgment was not personally and successfully demanded in courtroom (in front of numerous attorneys and clients in gallery).

#### B. ISSUE OF FRIVOLITY

1. "To determine whether a complaint is frivolous under 28 U.S.C., sec. 1915(d), the court must inquire whether there is an 'arguable' 'factual and legal' basis, of constitutional dimension, for the asserted wrong. [ *Watson v. Ault*, 525 F.2d 892 ]

[6] In assessing complaints under this standard...

a *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" [ *Estelle v. Gamble*, 429 U.S. at 106, 97 S.Ct. at 292, quoted in *Williams v. Rhoden*, 629 F.2d 1099, 1101 (5th Cir. 1980) (reversing district court's purported sec. 1915(d) determination) ]

It is obvious from reading P-A's Original Complaint, motion, and this work that it is not "beyond doubt" that *pro se* P-A can prove no set of facts in support of claim(s) which would entitle him to relief.

#### XIV. NO RES JUDICATA BAR WITH GENUINE ISSUES

When Judge Real stated in courtroom on February 5, 2001, "In any event SAC does not withstand scrutiny..." he indicated that contents of the SAC were not made the basis

for res judicata dismissal because contents had not withstood judge's scrutiny. IBM's affirmative defense alleges SAC identical to FAC in *O'Brien I*. Not true.

What in the more artfully constructed, grounded and supported SAC was inferior to FAC, and did not withstand scrutiny while contents in the FAC withstood same ? Nothing was specified from within or without the Original Complaint (*O'Brien II*) to rationalize dismissal on *res judicata* grounds except that SAC was identical to FAC. And yet the SAC, as any reader can ascertain, is quite different from the FAC. They are profoundly not identical. SAC is virtually identical to the Original Complaint . Affirmative defense did not specify "evidentiary matter" in the SAC relative to prior similar case for the court to consider in judging *res judicata* qualification. Therefore, according to *Miller*, it was error to dismiss on *res judicata* grounds. It was also error to dismiss for failure to state a claim upon which relief could be granted because the defense did not appear "plainly on the face of the controlling complaint itself".

"Under Rule 12 (b) , F.R. Civ.P., a defendant may raise an affirmative defense by a motion to dismiss for the failure to state a claim. If the defense appears plainly on the face of the complaint itself, the motion may be disposed of under this rule." [*Ibid.*]

If it is argued that the SAC had been effectively rejected by the court and the FAC was the controlling complaint at time of dismissal, the fact that defendant's Rule 12 (b) 6 and/or *res judicata* defense did not allege absence of any genuine issues as to the affirmative defense negates validity of the dismissal.

"But, if the affirmative defense is based upon matters outside the complaint, and is raised by a motion under Rule 12(b) 6, then the court must consider the motion as one for summary judgment under Rule 56 in order to consider evidentiary matters outside the complaint. And, then, only if there is no genuine issue of fact as to the affirmative defense, can the court sustain the motion to dismiss." [*Ibid.*]

Because IBM did not allege absence of genuine issues in its affirmative defense, case was improperly dismissed. Especially improper under Rule 56 in light of district court's unspecified order stating grounds for dismissal merely as, "...contents of defendant's papers":

This court should conclude as did Tenth Circuit in *Miller* that, "The order...dismissing the action is reversed, and the case is remanded for further proceedings." [*Ibid.*]

## XV. PRO SE NOT SANCTIONABLE

On March 13, 2001 the Hon. Manuel L. Real granted Defendant-Appellee's motion for sanctions pursuant to Rule 11 and 28 U.S.C. section 1927. Plaintiff-Appellant was ordered to pay the sum of \$17,731.16 to IBM on or before April 2, 2001. Because this

appeal was pending at time of order sanctions have not been paid until appeal is decided. Nevertheless, order for sanctions was clearly in error.

Apparently both IBM and Judge Real did not reference notes relative to *pro se* litigants under 28 USCS, sec. 1927.

"Notwithstanding defendant's motion for award of reasonable attorneys' fee under provisions of 28 USCS, sec. 1927, that statute has no application where plaintiff is not represented by lawyer." [*Hill v United States (1984, MD Tenn)*, 599 F Supp 118, 85-1 USTC, sec. 9148, 55 AFTR 2d 85-963 ]

"Since financial sanctions available to courts under Rule 11 of Federal Rules of Civil Procedure and 28 USCS, sec. 1927 are unavailing to deal with *pro se* litigant's continuous filing of duplicative causes of action..." [*Colorado v Carter (1986, DC Colo)*, 678 F Supp 1484 ]

"28 USCS, sec. 1927 does not authorize order of recovery of costs from party but only from attorney or otherwise admitted representative." [*1507 Corp. v Henderson (1971, CA7 Wis)*, 447 F2d 540 ]

"28 USCS, sec. 1927 is penal in nature and should be strictly construed, 'costs' should be limited to taxable costs, and should not include expenses of calling jury in federal court; sanction under 28 USCS, sec. 1927 should not be imposed for unintended inconvenience to court no matter how annoying it might be, but personal responsibility should flow only from intentional departure from proper conduct, or, at minimum, from reckless disregard of duty owed by counsel to court. [*United States v Ross (1976, CA6 Ohio)*, 535 F2d 346 ]

Even if P-A had not appeared *pro se* and *in forma pauperis* there has been no mention of intentional departure from proper conduct, or, at minimum, from reckless disregard of duty owed by P-A to court. Even as he writes, plaintiff's adrenelin attests to the actual prejudice and flagrant abuse inherent in district court's cooperation with IBM to levy sanctions illegally against P-A, *pro se* and *in forma pauperis* and yet hopeful for adequate compensation.

Notes under 28 USCS, sec. 1927 are so abundant in precedent of the type quoted above that it is not reasonable to conclude that IBM mistakingly sought fees totaling \$17,731.16 from *pro se* litigant, and Judge Real mistakenly ordered same. Sanctions would seem more apropos in the other direction.

## XVI. CONCLUSION

District Court for the Central District of California, judge Manuel L. Real presiding, abused discretion and committed clear errors of judgment by dismissing this case, ordering sanctions and denying appeal *in forma pauperis*.

Error and abuse were intentional and constituted actually biased acts against Plaintiffs-Appellants.

"Words 'in good faith' mean that points on which appeal is taken are reasonably arguable." [*Sejeck v Singer Mfg. Co. (1952, DC NJ)*, 113 F Supp 281.]

"Good faith" is not subjective determination under 28 USCS, sec. 1915; rather, good faith must be measured by objective standards." [*Schweitzer v Scott (1979, CD Cal)*, 469 F Supp 1017, 4 Fed Rules Evid Serv 964.]

Ordering denial of appeal *in forma pauperis*, Judge Real used a standard order form containing brief, pat sentences and, therefore, did not "measure by objective standards". Judgment did not *measure* (cite and explain) why the appeal was not taken in "good faith".

Ordering dismissal of this case, Judge Real used IBM's brief, proposed order (merely signing and crossing out 'proposed') containing no rationale and, therefore, did not "measure by objective standards". Judging without justifying, judge did not *measure* (cite and explain) why (1) two very different complaints (Original Complaint in CV 00- 10778 R and First Amended Complaint in CV 00 - 2166 R were successfully declared by defendant to be "identical" and not otherwise analyzed (no Statement of Uncontroverted Facts in IBM's "papers" violated Local Rule 7.14.1) for res judicata bar purposes, (2) well pled Original Complaint did not state claims upon which relief could be granted, and (3) cause-of-action clearly specifying cause(s) within four (4) years of complaint did not meet time limits criteria. D-A's mistakes were part of judge's only "...reasons set forth in IBM's papers". [USDC, Central District of Cal, Order of February 6, 2001]

Therefore, with objective measures conspicuous by absence in orders of dismissal and denial, reviewing court should not accept subjective and/or discretionary validation for termination of case.

## XVII. PRAYER

"If from face of papers filed in Federal Court of Appeals by defendant convicted of crime in Federal District Court who seeks leave to appeal from his conviction in forma pauperis, following denial of such relief by District Court, which certified that appeal was not taken in good faith, it is apparent that applicant will present issues for review not clearly frivolous, Court of Appeals should grant leave to appeal in forma pauperis,

appoint counsel to represent appellant, and proceed to consideration of appeal on merits in same manner that it considers paid appeals; but if claims made or issues sought to be raised by applicant are such that their substance cannot adequately be ascertained from face of defendant's application, Court of Appeals must provide applicant with assistance of counsel and record of sufficient completeness to enable him to attempt to make showing that District Court's certificate of lack of good faith is in error and that leave to proceed with appeal in forma pauperis should be allowed, and should grant leave to proceed in forma pauperis if applicant, with aid afforded him, presents for court's determination any issue that is not clearly frivolous." [*Coppedge v United States (1962)*, 369 US 438, 8 L Ed 2d 21, 82 S Ct 917 ]

I. Plaintiffs-Appellants pray for Court of Appeals to stay or otherwise abate summary affirmation of District Court's order of dismissal.

II. Because it is apparent to the court from its analysis of Proposed Opening Brief that P-A's OPENING BRIEF presents issues from review not clearly frivolous, P-A prays for Court of Appeals to

A. Grant leave to appeal in forma pauperis, or approve request to make installment payments for filing and docketing fees.

B. Appoint counsel to represent appellant,

C. Approve OPENING BRIEF for reply by Defendant-Appellee and further consideration of on merits.

III. If issues sought to be raised by P-A are such that their substance *cannot* adequately be ascertained from face of Proposed Opening Brief, P-A prays for Court of Appeals to

A. Provide P-A with assistance of counsel and record of sufficient completeness to enable him to show District Court's certificate of lack of good faith is in error and that leave to proceed with appeal in forma pauperis should be allowed, and

B. Grant leave to proceed on appeal in forma pauperis, or approve request to make installment payments for filing and docketing fees.

C. Appoint counsel to represent appellant, and

D. Approve OPENING BRIEF for reply by Defendant-Appellee and further consideration of appeal on merits.

IV. Plaintiff-Appellant prays for Court of Appeals to reverse District Court's order on March 13, 2001 granting sanctions against Plaintiffs-Appellants.

V. Upon acceptance of OPENING BRIEF and due process of law, Plaintiff-Appellant prays for reversal of District Court's order of dismissal and remand of the case for further proceedings.

VI. Upon remand of this case Plaintiff-Appellant prays for recusal of the Hon. Judge Manuel L. Real and replacement of presiding judge with one selected by conventional means.

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EXECUTED this day, June 5, 2001 in Santa Barbara, California

by \_\_\_\_\_

Edward Michael O'Brien

*pro se*