

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

EDWARD MICHAEL OBRIEN  
and GOLF OBRIEN COMPANY,

Appellants

V.

WILLIAM HENRY GATES and MICROSOFT CORPORATION,  
the HONORABLE J. FREDERICK MOTZ and the UNITED STATES  
DISTRICT COURT (DISTRICT OF MARYLAND), and  
WAITE, SCHNEIDER, BAYLESS & CHESLEY CO., L.P.A.

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
(DISTRICT OF MARYLAND)

[ Multidistrict Litigation Panel (District of Columbia), Case No. 1332 ]

[ U.S. District Court - Central District of California, Case No. 00-01132 R ]

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NOTICE OF APPEAL, INTERLOCUTORY APPEAL  
AND/OR REQUEST FOR EXTRAORDINARY WRITS

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## I. OPENING STATEMENT

This *Interlocutory Appeal* supersedes Plaintiffs-Appellants', Edward Michael O'Brien and the Golf O'Brien Company ["P-A"] NOTICE OF APPEAL AND REQUEST TO PROCEED IN FORMA PAUPERIS FOR WRITS TO REVIEW AND COMPEL DEFAULT JUDGMENT AND/OR SUMMARY JUDGMENT filed in this court on April 17, 2001, and is taken pursuant to Title 28 of United States Codes, section 1292(b), Federal Rules of Appellate Procedure ["FRAP"], Rule 24 and Title 28 of United States Codes, section 1651(a). This appeal comes from civil actions in the United States District Court (District of Maryland) ["MDL"] re *Discovery Committee Report of March 28, 2001*, served to P-A by MDL appointed counsel Waite, Schneider, Bayless & Chesley Co., L.P.A. ["Laison Counsel"] on April 19, 2001. Report summarizes numerous on-going discovery actions at the MDL, and contains "controlling questions of law" from which immediate appeal by P-A can materially advance the ultimate termination of litigation in MDL, Case No. 1332. Controlling questions for review and answer (remedy) by the appellate court concern (1) whether or not, Laison Counsel was required by the Federal Rules of Civil Procedure ["FRCP"] to file *certificate of service* or *proof of service* proving service of motions filed by Defendants-Appellants, William Henry Gates and Microsoft Corporation ["D-A"] in the MDL, and did absence of *certificate of service* or *proof of service* cause Laison Counsel's untimely (mailed) service to P-A make D-A's motions invalid, (2) whether or not untimely service and/or absence of *certificate of service* or *proof of service* and/or absence of *Notice* of hearing (date) in Laison Counsel's mailed service to P-A negate Court's jurisdiction for judgment of P-A's complaint in light of D-A's motion to dismiss, (3) whether or not P-A should have been included in discovery proceedings conducted following issue of MDL's *Order* of February 15, 2001, (4) whether or not P-A's exclusion from discovery proceedings at MDL raises "equal protection of the laws" issues and civil rights issues, (5) whether or not D-A's liability for damages extends only to "direct purchasers" at MDL or are certain other plaintiffs entitled to damages (when proven) including plaintiffs alleging *competitor* claims inter (15 U.S.C., sec. 14) cause-of-action, even though not identified and entitled in MDL's *Opinion* of January 12, 2001, (6) whether or not MDL plaintiffs are entitled by the FRCP, Rules of the Panel on Multidistrict Litigation, and District Court local rules to adjudication of individual motions filed in the MDL, and if so (7) whether or not repeated denial of judgment re individual motions filed in the MDL constitutes unlawful denial of a disabled citizen's constitutional rights and/or privileges by federal court officers (judge, counsel, et al.) without due process of law.

The United States District Court (Central District of California) ["DC"], the Multidistrict Litigation Panel (District of Columbia) ["Panel"], MDL, and Laison Counsel joined with D-A in denying due process of law for plaintiffs in *Edward M. O'Brien and the Golf O'Brien Company v. William H. Gates and Microsoft Corp.* ["*O'Brien v. Microsoft*"], Civil Case No. 00-01132 R (RCx), and, thereby, breached not only the FRCP, Rules 5, 12, 54, 55 and 56, and Title 28, U.S.C., sec. 1407(b), but also violated P-A's Civil Rights, protected by the Fourteenth Amendment of the United States Constitution ["XIV"], the Civil Rights Act of 1964 [42 U.S.C. 2000e et seq.]["CRA"], the Rehabilitation Act of 1973 [29 U.S.C., sec. 701 et seq.]["RA"], the Civil Rights Act of 1991 [42 U.S.C., sec.

1981][*"CRA2"*], and the Americans With Disabilities Act of 1990 [42 U.S.C., sec. 12101 et seq.] [*"AWD"*].

DC, Panel and MDL erred and appeared to intentionally preclude due process of law re *O'Brien v. Microsoft* on a number of occasions and thereby improperly supported D-A's defenses by (1) approving and executing transfer of this case to MDL over formal and informal objections from P-A, (2) refusing to schedule for hearing, hear (or judge without argument), judge, issue order(s) or otherwise comment upon P-A's motions, and (3) MDL's refusal to adjudicate or acknowledge P-A's unique (at MDL 1332) claims for *competitor* antitrust standing and cause-of-action (15 U.S.C., sec. 14: *illegal tie*) prior to, at time of, or following grant of D-A's perfunctory motion to dismiss all "indirect purchaser" class action suits on *Illinois Brick v. Illinois*, 431 U.S. 720 (1977) [*"Illinois Brick"*] grounds. D-A and federal courts intentionally, and repeatedly abridged P-A's rights, privileges and immunities while precluding P-A's self-employment and business competition in certain interstate and international software markets, and denying Plaintiff-Appellant's right(s) to obtain sufficient property (acquired via payments of antitrust damages) to secure enjoyment of life, health, society and liberty.

Because *O'Brien v. Microsoft* proceeds with discovery at the MDL in a much publicized and very important District of Maryland proceeding, DC and MDL judges' refusal to adjudicate P-A's motions for default and/or summary judgment and refusal to include P-A in case-critical discovery matters in the MDL has had, and will have, extraordinary impact not only on parties directly interested in *O'Brien v. Microsoft* but on multitudes of businesses, groups and individuals, throughout the world, vitally concerned for the ministry of justice in the United States of America impacting the destiny of Microsoft Corporation [*"MS"*] its competitors and customers.

## II. STATEMENT OF THE CASE

On February 2, 2000 P-A, Edward Michael O'Brien and the Golf O'Brien Company, filed complaint against D-A, William H. Gates and Microsoft Corporation, in DC for damages trebled under the antitrust laws of the United States of America and the State of California. P-A alleged:

A. D-A intentionally broke certain federal and state laws by increasing and attempting to increase computer software monopolies and did, in fact, monopolize using numerous illegal methods, including tie-in sales and certain marketing and sales techniques designed to restrain competition in software markets where P-A was participant.

B. This action challenges illegal conduct by D-A calculated and intended to prevent and/or destroy competition in markets where P-A was D-A's competitor and a purchaser of D-A's products. As the United States Department of Justice [*"DOJ"*] alleged in [*United States v. Microsoft*, Civil No. 94-1564 (TPJ), filed July 15, 1994: and *United States v. Microsoft*, Civil No. 98-1232/1233 (TPJ)] D-A violated sections 1 and 2 of the

Sherman Act (Title 15 U.S.C., sec. 1, 2), Section 3 of the Robinson-Patman Act [ Title 15 U.S.C., sec. 13(a)(f), ] and Section 3 of the Clayton Act [Title 15 U.S.C., sec. 14], and thereby directly and proximately injured P-A and host of other companies manufacturing and/or selling software in relevant markets.

In process of damaging P-A and many other competitors in markets for Office Productivity Software ["OPS"], Graph-Chart-Wordpad Software ["GCWS"], and related markets, D-A also violated the antitrust laws of many states, including California's Cartwright Act [Cal. Bus. & Prof. Code, sec. 16720, 16726, 16727, et seq.] and the Unfair Competition Act [Cal. Bus. & Prof. Code, sec. 17200, et seq.]

C. As also averred by DOJ and concurring State Attorney General actions cited above, through various unfair and predatory acts {1}, D-A injured P-A and markets of interaction by willfully maintaining and increasing monopolies in (1) markets for personal computer ["PC"] operating systems ["OS"] and (2) OPS, GCWS and related software markets, and used these monopolies to intentionally preclude competition, via (1) requiring Original Equipment Manufacturers ["OEM"] to license and distribute *other* D-A software as a condition for licensing its' OS software, (2) agreements restricting OEM rights to modify or participate in certain screen functions and/or boot-up content inter licensed OS, (3) agreements requiring OEMs and other of D-A's customers not to license, distribute or promote non-Microsoft products, (4) restricting access to DOS/Windows and other of D-A's application(s) containing Applications Programming Interfaces ["API"], (5) precluding competitive software from operation in D-A's operating systems, (6) selling software products at less than cost, or freely giving products away, for the purpose of precluding and/or destroying competition, and (7) obstructing and/or destroying innovation and competition in multimedia, e\_commerce and other software markets. {2}

### III. RELATED CASES

A. *United States v. Microsoft*, Civil No. 98-1232/1233 (TPJ)

B. *Caldera Inc. v. Microsoft Corp.*, D. Utah, No. 2:96-CV-645 B. This case, commenced in 1998 and was settled in January, 2000 for \$275,000,000.00 shortly after the Honorable Bee Benson denied defendant's motion for dismissal ( on Rule 12(b) grounds ), and ordered official fact-finding (discovery). Case is very important in light of Microsoft's current appeal of convictions in *U.S. v. Microsoft*, CV 98-1232/1233 TPJ, pending at the United States Court of Appeals in the District of Columbia Circuit because it presented sufficient evidence in a federal proceeding to thwart Microsoft's WINDOWS and DOS "not two separate products" defense, used successfully in Microsoft's 1998 contempt conviction appeal re DOJ Consent Decree (1994). The "not two separate products" issue is now central to Microsoft's current appeal in the District of Columbia Circuit, which alleges WINDOWS and IE not sold as "two separate products" and, therefore, conviction for illegal tie of same not possible. Nevertheless, "not two separate

products" is nowhere alleged for WINDOWS and OFFICE or WORKS inter Microsoft's defenses in district or appellate courts. ( *United States of America v. Microsoft Corp.*, USCA - District of Columbia, No. 95-5037 : argued on April 24, 1995 and decided on June 16, 1995 ) [Exhibit A]

As a matter of fact, after extensive "fact finding", P-A possesses abundant, widely published information ( prima facie evidence) that IE was bundled, as a separate (albeit integral) software product, in OFFICE 97 and OFFICE 2000 (not in WINDOWS 3.1, 95, 98 or 2000). This evidence was mailed to Mr. Joel Klein, Assistant Secretary for Antitrust Matters in the Department of Justice in year 2000. [No reply]

C. *Deiter v. Microsoft Corp.*, D.D.C., No. 99-3275. This is one of the seventy or so actions consolidated by the MDL. The case alleges Microsoft improperly excluded competitors from the operating system market as far back as the development of MS-DOS and Windows 3.0. *Deiter* and unidentified but reported others among the consolidated federal actions are modeled on claims made by Caldera Inc. against Microsoft.

#### IV. DISTRICT COURT PROCEEDINGS

A. On February 4, 2000, DC Magistrate Judge issued (1) an order filing plaintiffs' complaint without prepayment of fees (*in forma pauperis*), and (2) issued D-A's *Summons*.

B. On March 3, 2000 P-A, pursuant to FRCP, Rule 4(e), used U.S. Priority Mail to properly serve D-A copies of *Summons* and *Complaint*. Service was confirmed in letter (and fax) from P-A to D-A on March 23, 2000 prior to filing their *ex parte* application.

C. On March 27, 2000 D-A untimely filed in DC and served P-A its EX PARTE APPLICATION TO EXTEND DEADLINE FOR RESPONSE TO COMPLAINT TO 30 DAYS AFTER MDL PANEL TRANSFER OR, IN THE ALTERNATIVE, TO MAY 16, 2000. Action did not contest P-A claims in the complaint; only sought to obtain DC's order setting "...deadline to respond to the plaintiffs' complaint to (1) 30 days after this case is transferred to the court chosen by the MDL Panel or 30 days after the MDL Panel determines not to transfer this action, or (2) in the alternative, May 16, 2000, to provide time for defendants to make, and the Court to decide, a motion to stay, if necessary."

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{1} After transfer of *O'Brien v Microsoft* to MDL on July 5, 2000, denial of due process continued. Evidence, quoted below, of MDL Court's proceedings "dovetailing" with D-A's defense tactics re P-A's complaint and motions (and all other complaints inter MDL) was provided by D-A itself on March 2, 2001.

" 3. At an October 13, 2000 hearing in this Court, plaintiffs' counsel represented that plaintiffs would be 'voluntarily dismissing' actions which were superseded by the Consolidated Class Complaint. (October 13 Transcript at 42. )" (*MICROSOFT'S NOTICE REGARDING SUPERSEDED AND DISMISSED COMPLAINTS*, Multidistrict Litigation Court, Case No. 1332, March 2, 2001)

{2} P-A's main product, the Golf O'Brien Company's software compilation *GOLF COACH*, was invented, copyrighted, produced and first sold in 1990. *GOLF COACH* was never intended to compete as a "Windows" program for a number of reasons including the fact that in 1990-1992, Mr. Gates, et al. at Microsoft modified source code in MS-Windows ["WINDOWS"]v. 1.0 - 3.0 such that operating system support for many competitive programs, including *PFS: FIRST GRAPHICS* once a very competitive charting-graphing program ( top seller in 1990 at \$149.00 @ ) which P-A licensed (in 1990 from Software Publishing Corp.["SPC"], Mountain View, CA) for use as the core program in *GOLF COACH*. Although the WINDOWS code modifications effectively destroyed *PFS: FIRST GRAPHICS* as a competitor against Microsoft's *MS-EXCEL* (bundled in *MS-OFFICE* and *MS-WORKS* and sold alone) the program was still very useful in *GOLF COACH* for graph-chart presentation of golf game statistics, acquired on the Golf O'Brien Company's "Golf-Data-Card" (valuable copyright), on WINDOWS 3.1 and 95 and any other OS exposing the DOS shell for command-line processing.

D. On March 28, 2000 P-A filed in DC and served to defendants OPPOSITION TO DEFENDANTS EX PARTE APPLICATION TO EXTEND DEADLINE FOR RESPONSE TO COMPLAINT TO 30 DAYS AFTER MDL PANEL TRANSFER OR, IN THE ALTERNATIVE, TO MAY 16, 2000; AND REQUEST FOR COURT'S ENTRY OF DEFAULT AND DEFAULT JUDGMENT PURSUANT TO F.R.C.P. 55(A)(B).

E. On March 30, 2000 MDL Panel met formally in Baltimore, Maryland to determine the propriety of transferring certain actions against D-A. This case under review was listed in D-A's "RELATED ACTIONS" filed with MDL on March 13, 2000, but not served to P-A by counsel representing D-A at the MDL, Sullivan & Cromwell. P-A discovered the document buried in a thick *ex parte* filing by D-A's counsel in DC long after the fact of MDL transfer.

F. On March 31, 2000 all pending motions in DC were submitted without oral argument, and presiding Judge Manuel L. Real issued an Order denying D-A's application to extend time for answer to complaint and for stay of all proceedings, but made no comment about the proposed MDL transfer.

G. On May 16, 2000, P-A filed in DC and served to D-A a second REQUEST FOR ENTRY OF DEFAULT AND DEFAULT JUDGMENT against D-A for failure to answer the complaint within time limits. [ Exhibit B ]

H. On April 21, 2000 D-A filed in DC and served to plaintiffs MOTION TO STAY ALL PROCEEDINGS, OR IN THE ALTERNATIVE, TO EXTEND DEFENDANTS' TIME TO RESPOND TO THE COMPLAINT.

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{2, cont.} GOLF COACH (PFS: FIRST GRAPHICS) was a quasi-viable software product until 1996-1997 when Microsoft eliminated exposure of the DOS shell in Windows 98 and in every OS thereafter. Although P-A could have adapted satellite programs in GOLF COACH to a "Windows" interface (at least theoretically supported on WINDOWS platforms), it was much too expensive and quite useless considering Microsoft's anticompetitive manipulation of OS code, to adapt *PFS: FIRST GRAPHICS* for graphical user interface ["GUI"] on WINDOWS 98, NT, 2000 and beyond.

Note: Apple Computer, Inc. sold its' (proprietary interest has always been questioned) GUI license to MS in 1985 (who then very happily created MS-WORD, MS-EXCEL and WINDOWS 1.0, etc.), and SPC (or associated interested party) surely would have purchased a license (had one been offered) for adaption of *PFS: FIRST GRAPHICS* to the Windows environment...had it not been for Microsoft's OS preclusion and use of its OS monopoly to leverage MS-WORKS, and MS-EXCEL inter MS-OFFICE (first released in 1992) or released autonomously into relevant market monopolies of their own.

*GOLF COACH* effectively went into hibernation as a software competitor in 1998...although the Golf O'Brien Company continues in business with e\_commerce development. *GOLF COACH* can and will be resurrected when Golf O'Brien Company is able to purchase a license to a WINDOWS (all version) supported core program like *PFS: FIRST GRAPHICS*.

I. On June 6, 2000, presiding judge ordered (approved) transfer of this case to MDL prior to MDL's *Conditional Order of Transfer*, dated June 20, 2000, and declared P-A's clerk-rejected, but in courtroom presented, request for *Entry of Default and Default Judgment* effectively dismissed in DC by saying from the bench for all in P-A's first courtroom of appearance to hear (not without a note of derision), "And you can take up your questions with the MDL in Baltimore."

## V. MDL PROCEEDINGS

A. On June 20, 2000 P-A received first communication from MDL noticing its *Conditional Order of Transfer* but tendering no copy of the signed order (not received to date). MDL's notice included NOTICE OF OPPOSITION DUE ON OR BEFORE July 5, 2000. It was at this point that P-A realized that jurisdiction would not change until MDL transfer was finalized on July 5, 2000.

B. Neither D-A nor P-A formally opposed MDL transfer although P-A did respond (direct to chambers) to letter from MDL Panel's appointee, the Honorable J. Frederick Motz. Letter to counsel authorized informal comment from newly transferred parties. In letter, P-A summarized its DC motions opposing transfer, but declared a resigned non-opposition to the transfer because P-A's opinion had been over ridden by two honorable, federal authorities, and Plaintiff-Appellant, Edward O'Brien, who was born and raised in the U.S. Airforce; had been a commissioned officer (Captain) in the U.S. Marine Corps, was founding president of a 501(c)3 - 509(a)2 public charity holding a valid federal Letter of Determination; and has been a *pro se* litigant in federal courts since 1996, respects federal judicial authorities.

C. P-A did not receive (and to date has not received) written confirmation of finalized transfer from MDL.

D. Although required to be served by one of two MDL designated "Chairs" (law firms designated for special duties in Case No. 1332), P-A did not receive service of (1) a copy of a signed copy of *Conditional Order of Transfer*, (2) a copy of the *Consolidated Complaint* (prior to D-A's motion for dismissal of that complaint), and (3) a copy of D-A's MOTION TO DISMISS THE CONSOLIDATED COMPLAINT within time limits for reply.

E. On August 10, 2000 P-A mailed D-A's counsel a letter stating:

"Dear Mr. Tulchin:

August 10, 2000

On May 27, 2000, I received a document from HELLER EHRMAN WHITE & McAULIFFE (Counsel for Microsoft in re *O'Brien v. Microsoft*, CV 00-01132 R) that had originated from your firm, entitled NOTICE OF RELATED ACTIONS [IN RE: MICROSOFT CORP. WINDOWS OPERATING SYSTEMS ANTITRUST LITIGATION] MDL Docket No. 1332. Under subheading, SCHEDULE OF RELATED ACTIONS..., our above noted case was listed as one which you specifically recommended for MDL transfer.

It was so transferred on June 6, 2000 from Central District of California to MDL Panel in Baltimore.

In a letter TO INVOLVED COUNSEL from the MDL Panel, dated June 20, 2000 and signed by Michael J. Beck, Clerk of the Panel, *O'Brien, et al. v. William H. Gates, et al.* MDL Docket No. 1332 was listed as one of nine (9) "Tag-Along" cases transferred to the MDL. The address found on this letterhead was recorded within the letter under NEW PARTIES COUNSEL LIST.

Why haven't we heard from you ?

If S&C has moved the MDL Panel since June 6, 2000, and does not possess a valid Proof of Service or record of NOTICE OF MOTION to this MDL litigant, William H. Gates, et al. is in violation of MDL Rule 5.2

Before making formal request to the MDL Panel for dismissal/denial of your motions filed in this MDL proceeding since June 6, 2000, I wanted to get your version of the story.

In the spirit of traditional courtesy, this letter is tendered to you and the MDL Panel, and a reply is expected before August 20, 2000.

Cordially, Edward M. O'Brien, *pro se* "

F. On August 22, 2000, P-A received a letter from Mr. Justin Daniels, professionally unidentified but writing on SULLIVAN & CROMWELL stationary. Mr. Daniels stated in one brief paragraph a few already known facts about the case and nothing more. Considering the fact that (1) D-A had not properly served its "Related Actions" document to P-A and (2) D-A filed its MOTION TO DISMISS on August 2, 2000 without proof of direct or indirect service of copy to P-A, unprofessional, "smoke screen" reply to P-A's inquiry was clearly discourteous and indicates intent to obstruct or deny due information and process. [ Exhibit C ]

G. On August 22, 2000, P-A filed and served MOTION FOR DENIAL AND/OR RESCISSION OF ALL DEFENDANTS' MOTIONS.

H. On September 10, 2000, P-A received (halleluia) a mailed copy of D-A's (1) DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF O'BRIEN'S MOTION FOR DENIAL AND /OR RESCISSION OF ALL DEFENDANTS' MOTIONS; and (2) DEFENDANTS' MOTION TO DISMISS FILED IN THE MDL ON AUGUST 2, 2000.

I. On September 21, 2000 P-A filed and served (1) REPLY TO DEFENDANTS MEMORANDUM IN OPPOSITION TO PLAINTIFF O'BRIEN'S MOTION FOR DENIAL AND/OR RESCISSION OF ALL DEFENDANTS' MOTIONS FILED AT THIS PANEL SINCE JULY 5, 2000, (2) MOTION IN OPPOSITION TO MICROSOFT'S MOTION TO DISMISS, and (3) MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT.

J. Neither MDL nor D-A communicated with P-A following actions recorded above and prior to P-A's filing and service on October 13, 2000 of DEMAND FOR ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST DEFENDANTS PURSUANT TO F.R.C.P. 54(b)(c), OR, IN THE ALTERNATIVE, GRANT OF SUMMARY JUDGMENT PURSUANT TO F.R.C.P. 56 AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FILED SEPTEMBER 21.

K. Also on October 13, 2000, P-A received from Liaison Counsel a copy of D-A's reply filed at the MDL on October 4, 2000 entitled MICROSOFTS REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT.

L. On October 14, 2000 P-A filed and served to defendants PLAINTIFF'S REPLY TO MICROSOFT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT.

M. On January 17, having received no communication from MDL or D-A following P-A's action at above, P-A (1) mailed a letter to the MDL Panel clerk stating:

" COURT [JUDICIAL PANEL] CLERK

One Columbus Circle, N.E.

Thurgood Marshall Federal Judiciary Building

Room G-255, North Lobby

Washington, D.C. 20002-8004

~

January 15, 2001

Dear Clerk of the MDL Panel (Court);

Please send me copies of any and all Orders and other documents filed by the MDL Panel ( Case No. 1332).

I have not received a communication from you re Case No. 1332 in over six months.

Is something wrong ? Please let me know if I can improve our communication in any way.

Most cordially,

Edward M. O'Brien"

and (2) filed at the MDL and served to D-A, ADDITIONAL MEMORANDUM IN SUPPORT OF PLAINTIFF'S DEMAND FOR ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST DEFENDANTS PURSUANT TO F.R.C.P. 54 (b)(c), 55(a)(b), OR, IN THE ALTERNATIVE, GRANT OF SUMMARY JUDGMENT PURSUANT TO F.R.C.P. 56 AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FILED SEPTEMBER 21, 2000.

N. On January 25, 2001 the Chief Deputy Clerk of the MDL, Ms Catherine D. Maida, answered P-A's inquiry with:

"Dear Mr. O'Brien:

We are in receipt of your papers in the above-referenced matter. In those papers, you inquired why you have not received any communication from the Panel in more than six months. In response, I must advise you that the Panel is responsible for preparing correspondence and orders for the purpose of Section 1407 transfer or remand of actions. Once an action such as yours has been transferred, in this instance to the District of Maryland, the Panel is not involved with the individual action again until remand becomes an issue. Since the transferee judge in the District of Maryland has appointed liaison counsel for MDL-1332, our Rule 5.2 only requires us to serve the parties in any action that is before the Panel for consideration, as well as liaison counsel in the litigation. Liaison counsel are responsible for distributing court orders. Enclosed for your information is a copy of the liaison counsel list for MDL-1332. Please feel free to contact them with any questions you have about MDL-1332.

Your remaining papers appear to be directed to the United States District Court for the District of Maryland, but the docket clerk in the District of Maryland informs me that she does not have the papers. I am therefore forwarding the papers to her today.

Sincerely, Catherine D. Maida"

O. On January 14, 2001, Liaison Counsel served P-A a copy of the MDL *Opinion*, issued on January 12, 2001, dismissing all *indirect purchaser* claims for antitrust damages in Case No 1332, but not dismissing any *competitor* claims and, effectively, upholding P-A's *competitor* cause-of-action based on both federal and California antitrust laws.

Observation: MDL *Opinion* apparently authorizes a 28 U.S.C., sec. 1292 , *Interlocutory Appeal* (interlocutory: located in on-going case) for all cases at the MDL prior to February 15, 2001 when MDL's *Order* was issued effectively terminating "indirect purchaser" claims. Thereafter, *interlocutory* appeal does not appear possible because dismissed cases (cases where only "indirect purchaser" claims comprise cause-of-action) were terminated by the order, and remand was required on date when pretrial proceedings were completed...February 15, 2001. [*Lexecon, Inc. v Milberg Weiss Bershad Hynes & Lerach*, 188 S.Ct. 956 (1998) ]

Supreme Court decision in *Lexecon* requires MDL to remand all completed cases to district courts of original jurisdiction for final judgment or other disposition. How can dismissed (completed) cases, having lost jurisdiction in the fourth circuit, appeal *interlocutory* from an MDL order to the fourth circuit ?

Same cases, after remand, had only thirty (30) days from February 15, 2001 to appeal via FRAP 3, 4, and/or 5. How many cases recently dismissed by MDL have been granted

*interlocutory* appeals to the Fourth Circuit ? How many dismissed cases have been remanded pursuant to *Lexecon* ? Is a "Catch 22" in operation at the MDL ?

P-A, although apparently undamaged by what appeared to be mass preclusion of appeal privileges was, nevertheless, apprehensive because *O'Brien v Microsoft* deserved separate adjudication like that accorded *Gravity, Inc., et al. v Microsoft*, and MDL's *Opinion* did not mention *O'Brien* as an individual, competitor or otherwise unique action uncontested by D-A's motion to dismiss exclusively on *Illinois Brick* grounds precluding "indirect purchaser" antitrust standing.

P. On February 6, 2001, Laison Counsel served to P-A a copy of MDL *Opinion* issued on January 12, 2001, and recommended Mr. Andrew Welkie at (410) 962-2600 for access to an unspecified website where the MDL *Order* and other information could be obtained. [Exhibit D]

Although MDL's *Opinion/Order* provided no cleared grounds for P-A to object or appeal, P-A was not assured (no mention of *O'Brien v Microsoft* in *Opinion* of January 12, 2001) of its continued antitrust standing until Laison Counsel mailed P-A copy of MDL's discovery report which implied P-A's presence on "Plaintiffs' Counsel Service List" : cases (counsel) that had survived MS dismissals and were proceeding with Discovery at MDL.

Remarkably, to date P-A has received no *Discovery Order* from MDL even though one had been due (via the 120 day rule) since MDL's *Order* of February 15, 2001 which was, itself, beyond time limits. [See FRCP 16(b) , and at VII.(B)4 below]

Q. On April 20, 2001, P-A received Laison Counsel's mailed service of the *Discovery Committee Report of March 28, 2001*. Although confirming P-A's standing at MDL, report provides information in seven categories that are very important to the on-going viability of P-A's case and yet P-A has not, heretofore, been made privy or even cognizant of discovery proceedings described in the report.

Every subheading in the report contains issues of keen interest to P-A. Denial of disabled *pro se* litigant's access to the discovery process is denial of an important right without due process of law. If P-A is not granted summary judgment following this appeal, P-A must become involved in the discovery process to preserve the integrity and power of its action. [Exhibit E]

Therefore, for reasons stated above, this appeal is adequately grounded on criteria found in 28 U.S.C., sec. 1292(a) and in MDL *Opinion* of January 12, 2001. [ Exhibit F ]

## VI. ISSUES FOR REVIEW

A. Whether or not MDL appointed Liaison Counsel was required by law to include *proof of service* or *certificate of service* and/or *notice of hearing* (date) in mailing of D-A's documents filed at the MDL and required served to P-A

B. Whether or not absence of *proof of service* and/or *certificate of service* and/or *notice* in Liaison Counsel's mailing to P-A negated jurisdiction and legal effect of motions filed by D-A

C. Whether or not P-A is required by law to be included in discovery proceedings conducted by group(s) of attorneys in Case No. 1332 following MDL *Order* of February 15, 2001 and, unless already issued, following future issue of a *Discovery Order* to P-A.

D. Whether or not P-A's exclusion from discovery process at MDL raises constitutional, "equal protection of the laws" issues and other "civil rights" issues re "denial of due process of law"

E. Whether or not D-A's liability for antitrust damages payment extends only to "direct purchasers" at MDL or are certain other plaintiffs, including those whose complaints assert *competitor* antitrust standing, entitled to payment of proven antitrust damages, even though entitlement was questionably circumvented in MDL's *Order* of February 15, 2001

F. Whether or not plaintiffs in consolidated MDL action are, by FRCP 5, 12, 54, 55, and/or 56 or other federal law(s), entitled to judgment of individual motions filed at MDL and served to D-A, and if so,

G. Whether or not repeated denial of judgment for P-A's individual motions by MDL constitutes illegal denial of right(s) and/or privilege(s) without due process of law.

H. Whether or not an oral request to DC, with prior notice given by plaintiff within time limits to both defendants and the court, can be considered a motion for FRCP 55(a)(b) purposes.

I. Whether or not failure of D-A to respond to P-A's motion (1) REPLY TO DEFENDANTS MEMORANDUM IN OPPOSITION TO PLAINTIFF O'BRIEN'S MOTION FOR DENIAL AND/OR RESCISSION OF ALL DEFENDANTS' MOTIONS FILED AT THIS PANEL SINCE JULY 5, 2000, (2) MOTION IN OPPOSITION TO MICROSOFT'S MOTION TO DISMISS, and (3) MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT within 15 days of its filing in MDL and service to D-A on September 21, 2000 should have been judged as D-A's "...acquiescence to the action requested in the motion." [Multidistrict Litigation Rules, Rule 7(b) ]

J. Whether or not failure of D-A to respond to P-A's motion DEMAND FOR ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST DEFENDANTS PURSUANT TO F.R.C.P. 54(b)(c), OR, IN THE ALTERNATIVE, GRANT OF SUMMARY JUDGMENT PURSUANT TO F.R.C.P. 56 AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FILED SEPTEMBER 21 within 15 days of its filing in MDL and service to D-A on October 13, 2000 should have been judged as D-A's "...acquiescence to the action requested in the motion." [Ibid.]

K. Whether or not presiding judge in DC Case No. CV 00-01132 R (RCx), the Honorable Manuel L. Real, erred by refusing to judge REQUEST FOR ENTRY OF DEFAULT AND DEFAULT JUDGMENT filed and served by P-A on May 16, 2000 (affirmed and/or repeated at hearing on June 5, 2000) prior to, at time of, or after issuing an Order on June 6, 2000 (granting D-A's application for MDL transfer but denying stay of all proceedings ) which was prior to finalized transfer of case following lapse of time limits to oppose transfer ( found in MDL's *Conditional Order of Transfer* dated June 20, 2000 ) automatically finalizing MDL transfer (changing federal jurisdiction) on July 5, 2000. And, if so determined, did transfer of this case to MDL require adjudication of same motion(s) so transferred from DC. And, if so determined, did MDL judge error by refusing to judge same motion transferred from DC.

L. Whether or not MDL's continuation of DC's refusal to judge *bona fide* motion(s) for Entry of Default and Default Judgment and/or refusal to judge P-A's motions filed in MDL provides sufficient evidence to prove MDL's intentional denial of P-A's Constitution guaranteed, Congress codified, and federal Executive and Judiciary protected Civil Rights.

M. Whether or not presiding judge in MDL Case No. 1332, the Honorable J. Frederick Motz, abused his discretion and/or denied Plaintiff, Edward Michael O'Brien's civil rights without due process of law by refusing to judge DEMAND FOR ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST DEFENDANTS PURSUANT TO F.R.C.P. 54 (b)(c), 55(a)(b), OR, IN THE ALTERNATIVE, GRANT OF SUMMARY JUDGMENT PURSUANT TO F.R.C.P. 56 AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FILED SEPTEMBER 21, 2000 filed by P-A in MDL on October 13, 2000 and served to D-A who expressly acknowledged P-A's motion(s) and formally opposed same (albeit without raising any issues of genuine debate) in MEMORANDUM IN OPPOSITION TO PLAINTIFF O'BRIEN'S MOTION FOR DENIAL ...

N. Whether or not presiding judge in MDL Case No. 1332, the Honorable J. Frederick Motz, abused his discretion and/or denied Plaintiff, Edward Michael O'Brien's civil rights without due process of law by refusing to judge P-A's (1) REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF O'BRIEN'S MOTION FOR DENIAL AND/OR RESCISSION OF ALL DEFENDANTS' MOTIONS FILED AT THIS PANEL SINCE JULY 5, 2000, (2) MOTION IN OPPOSITION TO MICROSOFT'S MOTION TO DISMISS, and (3) MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT filed

by P-A in MDL on September 21, 2000 and served to D-A. And, if MDL abuse of discretion and/or denial of civil rights is determined by USCA, can P-A use *Writ of Mandamus* to compel MDL's equitable judgment of motion(s) in question and, if MDL judgment affirms D-A's default and/or no contest of all, or a portion of, claims made by P-A in complaint, can P-A, empowered by same or similar writ, compel MDL's order of immediate payment by D-A of all damages specified and claimed in P-A's amended complaint.

O. Whether or not D-A's perfunctory motion to dismiss Consolidated Complaint cases exclusively on *Illinois Brick* grounds was, in fact, to "otherwise defend" against cause-of-action alleged in *O'Brien v. Microsoft*, pursuant to FRCP 55(a), and, if so, was it at least quasi-justified for MDL judge to refuse default judgment because such judgment was unnecessary for justice to obtain ?

P. Whether or not district courts' refusal to receive, hear and judge P-A's motions abridged and/or denied P-A's civil rights without due process of law.

Q. Whether or not *Writ of Error* and *Writ of Mandamus* are appropriate instruments for USCA review and compel of district court's judgment of P-A's motion(s) in question.

## VII. ARGUMENT (STANDARDS OF REVIEW)

A. Laison Counsel is required by law to include *proof of service* or *certificate of service* and *notice of hearing* (date) in service of D-A's motions filed in MDL and mailed to P-A within FRCP 6(b) time limits. Absence of *proof of service* or *certificate of service* in Laison's Counsel's mailings to P-A, or postmarks on envelopes beyond FRCP 6(b) time limits for motions, or absence of a noticed hearing date, negates court's jurisdiction over P-A for judgment on D-A's motion(s).

Laison Counsel has not, in any service to P-A, included a *Certificate of Service* or *Proof of Service* inter CONSOLIDATED COMPLAINT, MOTION TO DISMISS THE CONSOLIDATED COMPLAINT, or other documents served to P-A.

1. FRCP 5 (a): *Service When Required*. "Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties."

Has "every paper relating to discovery required to be served upon" P-A been so served ?  
Profoundly, no.

2. FRCP 5 (d): *Filing; Certificate of Service*. "All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service..."

3. FRCP 6 (d): "A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court."

When MS filed its MOTION TO DISMISS THE CONSOLIDATED COMPLAINT in MDL on August 2, 2000 the MDL did not issue an order fixing a special time period for plaintiffs' reply relative to a special hearing date. Therefore, failure of Liaison Counsel to serve a copy of MOTION TO DISMISS "not later than 5 days before" the conventional 20 day minimum time for motions filing breached FRCP because without specified *hearing date*, hearing of motion could have taken place on or any time after August 22, 2000, and P-A's reply was in jeopardy of negation at any time after August 22, 2000. Therefore, D-A's service of motion to dismiss was not constitutionally valid because it did not provide for adequate "due process of law". Secondly, D-A, Liaison Counsel and MDL did not provide P-A with a *notice* of hearing as required by FRCP. In short, every plaintiff at MDL who did not receive proven service of *Notice* of hearing (date) has cause for appellate petition to negate D-A's motion to dismiss the consolidated complaint.

4. Rules of the Panel on Multidistrict Litigation, Rule 7.2: "(c) Within twenty days after filing of a motion, all other parties shall file a response thereto. Failure of a party to respond to a motion shall be treated as that party's acquiescence to the action requested in the motion. (d) The movant may, within five days after the lapse of the time period for filing responsive briefs, file a single brief in reply to any opposition. (e) Motions, their accompaniments, responses, and replies shall also be governed by Rules 5.12, 5.2 and 7.1 of these Rules."

D-A did not respond to P-A's motion for default and/or summary Judgment filed on September 21, 2001.

5. Rules of the Panel on Multidistrict Litigation, Rule 25. "(a) Service and proof of service shall be made as provided in Rule 25 of the Federal Rules of Appellate Procedure. The proof of service shall state the name and address of each person served and shall indicate the party represented by each. If a party is not represented by counsel, the proof of service shall indicate the name of the party and his or her last known address. The original proof of service shall be submitted by the affected agency for filing with the Clerk of the Panel and copies thereof shall be sent by the affected agency to each person included within the proof of service."

Specification of D-A's liability in light of Rule 25 is unnecessary:

6. Local Rules (U.S. Court of Appeals - Fourth Circuit): "25(b)(3) *Certificate of Service*. All papers must be accompanied by a valid certificate of service....A certificate

of service can be prepared in advance of actual mailing or hand delivery of the paper served. If service is not actually accomplished in the manner and on the date stated in the certificate, an amended certificate of service is required."

"25(d): (d) *Proof of Service*. (1) A paper presented for filing must contain either of the following: (A) an acknowledgment of service by the person served; or (B) proof of service consisting of a statement by the person who made service certifying: (i) the date and manner of service; (ii) the names of the persons served; and (iii) their mailing addresses or the addresses of the places of delivery.

Specification of D-A's liability in light of Rule 25 is unnecessary:

7. Local Rules (District of Maryland): 102(c): "c. *Proof of Service* . All Court papers other than the original complaint must bear a certificate signed by counsel stating that the service required by Fed. R. Civ. P. 5(a) has been made."

Does MDL possess *certificate of service* from both D-A and Liaison Counsel for "All court papers other than the original complaint(s)" If not malpractice, and breach of XIV on "denial of due process of law":

8. "Courts have required strictest and most exacting compliance with Rule 5 when service is made by mail;" *Bowers v E.J. Rose Mfg. Co. (1945, CA9 Cal)*, 149 F2d 612" [FRCP 5, n 16.]

9. "In federal litigation challenge to jurisdiction of person is normally made by way of attack on service of process. *Japan Gas Lighter Assoc. v Ronson Corp. (1966, DC NJ)*, 257 F Supp 219 " [FRCP 12, n 108.]

P-A not in MDL jurisdiction re D-A's motions and/or D-A not in MDL jurisdiction with unproven mailed motions.

10. Argument on theory: Proven service to Plaintiff of Defendant's motion to dismiss within time limits augments Court's personal jurisdiction over the Plaintiff with special "motion to dismiss" jurisdiction. Court is able to judge Plaintiff's complaint in light of allegations in Defendant's motion to dismiss. Invalid service of motion invalidates Court's motion jurisdiction. "To issue a valid binding judgment this Court must establish both Federal jurisdiction over the subject matter and personal jurisdiction...Personal jurisdiction refers to the Court's ability to assert judicial power over the parties and bind them by its adjudication." *Japan Gas Lighter Assoc. v. Ronson Corp.* 257 F. Supp. 219 (1966)

**B. P-A IS REQUIRED BY LAW TO BE INCLUDED IN MDL DISCOVERY PROCEEDINGS (NOT MERELY SERVED REPORTS).**

1. Rules of the Panel on Multidistrict Litigation, Rule 1.2 "Parties to any action transferred under Section 1407 are not required to obtain local counsel in the district to which such action is transferred."

2. FRCP, Rule 26(a)

3. FRCP, Rule 26(f): "(f) Meeting of Parties; Planning for Discovery. Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan.

Because D-A's MOTION TO DISMISS CONSOLIDATED COMPLAINT was filed on August 2, 2000, it is P-A's guess that the CONSOLIDATED COMPLAINT was filed twenty days before that. However, if waiver of service was solicited and accepted, complaint could have been filed as late as June 2, 2000. In any event, according to Rule 16(b) the *Scheduling Order* (conference) for commencement of discovery was required 120 days or less after summons and complaint had been properly served on MS. Period between July 5, 2000 and February 15, 2000 is 225 days. "Speedy trial" resulting in payment of damages by convicted antitrust offender could have spared a lot of pain for a lot of plaintiffs in MDL and/or district court(s). When does a judge become liable for breach of federal and local rules especially when breach continues international preclusion of competition in markets dealing in billions of dollars of revenue...some of which critically needed for plaintiffs' survival.

4. FRCP, Rule 16(b): "(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time (1) to join other parties and to amend the pleadings; (2) to file motions; and (3) to complete discovery. The scheduling order may also include (4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted; (5) the date or dates for conferences before trial, a final pretrial conference, and trial; and (6) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or when authorized by local rule, by a magistrate judge."

5. District of Maryland, Local Rules 104(4)(b): "Actions in Which Fed. R. Civ. P.26(a)(1) Does Not Apply

In actions in which Fed. R. Civ. P.26(a)(1) does not apply, discovery shall not commence until a scheduling order has been entered unless otherwise ordered by the Court or agreed upon by the parties.

C. WRITTEN AND VERBAL MOTIONS FOR DEFAULT JUDGMENT IN DC (JUNE 5, 2000) WERE MOTIONS ?

1. "(b) Motions and Other Papers (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made ..." [FRCP, Rule 7(b)]

P-A's motion filed on May 16, 2000 and mailed to D-A on same day was reiterated in courtroom on June 5, 2000. Even though written motion was returned by clerk for reason stated above, verbal motion was valid motion for default judgment. Face-to-face refusal by Judge Real to judge the motion(s) in question was intentional (and perhaps malicious) denial of a disabled USA citizen's civil rights without due process of law. [Note: Complaint informed judge of Plaintiff-Appellant's disability.]

2. "Informal oral request to court, without prior notice to either court or opposing parties, cannot be considered motion. *Shipiro v Freeman (1965, SD NY)*, 28 FRD 308, 9 FR Serv 2d 30B.42, Case 1. " [FRCP, Rule 7, n 22]

"Prior notice" was given to the Court and Defendants by the Plaintiffs on May 16, 2000. Court's rejection of notice was improper and unlawful.

3. "Motion is made by causing it to be served. *Afran Transport Co. v S/T Maria Venizelos (1978, ED Pa)*, 450 F Supp 621" [FRCP 5, n 14.]

P-A has *Proof of Service* on file for service of this motion.

D. D-A DEFAULTED OPPOSITION TO P-A'S MOTIONS IN MDL.

1. Multidistrict Litigation Rule 7. "*Motion Practice*

(b) Within fifteen days after filing of a motion, all other parties shall file a response thereto. Failure of a party to respond to a motion shall be treated as that party's acquiescence to the action requested in the motion."

D-A has not responded to P-A's motion of September 21, 2000. D-A acquiesced to the actions of default judgment or summary judgment in favor of P-A.

E. DC REFUSAL TO RENDER DEFAULT JUDGMENT PRIOR TO TRANSFER CANNOT BE JUSTIFIED.

1. FRCP, Rule 54(b)(c)

2. FRCP, Rule 55(a)(b)

3. Rules of the Panel on Multidistrict Litigation, Rule 1.5. "Effect of the Pendency of an Action Before the Panel

The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel concerning transfer or remand of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court. A transfer or remand pursuant to 28 U.S.C. § 1407 shall be effective when the transfer or remand order is filed in the office of the clerk of the district court of the transferee district."

P-A's motion(s) in DC not adjudicated within reasonable time for same according to the Rules of the MDL Panel. DC had ample time and opportunity to perform its basic duty...the ministry of justice.

F. MDL'S CONTINUED REFUSAL TO RENDER DEFAULT JUDGMENT OF DC MOTION(S) CANNOT BE JUSTIFIED.

1. 28 U.S.C., sec. 1407(a): "(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."

D-A did not raise a single "question of fact" in *O'Brien v. Microsoft* prior to transfer of the case to MDL. P-A raised objection to transfer by formal motion in DC and informally in MDL. Judge Motz was informed in P-A's letter to chambers (solicited by the judge) of the absence of grounds for MDL transfer of *O'Brien v. Microsoft*. In light of that revelation, denial of default and/or summary judgment proceedings in MDL was especially offensive.

2. District of Maryland, Local Rules 101. "Counsel

1. Who May Appear as Counsel; Who May Appear *Pro se* a) Only individuals may represent themselves. Individuals representing themselves are responsible for performing all duties imposed upon counsel by these Rules and all other applicable federal rules of procedure."

If P-A must perform "all duties imposed upon" P-A so should MDL perform all its duties of judgment. P-A, as individual and sole proprietorship, is properly and lawfully represented, *pro se*, at the MDL and is entitled to all privileges accorded all plaintiffs and their attorneys, even if district court judges once needed to pass ABA review before getting their jobs and this fact often caused judicial bias in favor of attorneys opposing *pro se* litigants. President Bush put a stop to that inequity in March, via executive order.

3. FRCP, Rule 54(b)(c)

4. Rules of the Panel on Multidistrict Litigation, Rule 7.1 "(c) Within twenty days after filing of a motion, all other parties shall file a response thereto. Failure of a party to respond to a motion shall be treated as that party's acquiescence to the action requested in the motion."

5. District of Maryland, Local Rules 105.6 : Hearings

a) "Counsel may (but need not) file a request for hearing. Unless otherwise ordered by the Court, all motions shall be decided on the memoranda without a hearing." [Local Rule 105.6] [content in parenthesis added]

P-A's motions have not been "decided on the memoranda" (yet) because they have not been decided on any basis with or without a hearing. Fact that the case is so important makes this fact outrageous.

b) "In adhearing to Local Rule 105.6 and deciding many motions on the papers..." ["The Sad State of Motions Hearing in Federal Court", page 1: October 19, 2000, by the Hon. J. Federick Motz]

6. District of Maryland, Local Rules 105.9 : Responsibility to Serve Order

a) "The Clerk shall send a copy of any order postponing any proceeding or extending the time for filing any paper or the taking of any other required action to counsel for the moving party." [Local Rule 105.9]

Order(s) postponing or extending time for reply to any of P-A's motions have not been received by P-A.

7. "Transferee court, in cases transferred by Judicial Panel on Multidistrict Litigation under 28 USCS, sec. 1407, is not prevented from hearing and deciding questions raised in case transferred which will materially advance co-ordinated or consolidated discovery and other pretrial proceedings in several transferred cases... *Re Four Seasons Secur. Laws Litigation (1974, WD Okla)*, 370 F Supp 219." [ 28 U.S.C., sec 1407, n 67 ]

Judgment of P-A's motions has potential for making material advances in co-ordinated and consolidated discovery and other pretrial proceedings in MDL Case No. 1332 and will advance the time for the ultimate termination of pretrial proceedings because motions contain controlling issues of law concerning *competitor* plaintiff(s)' (1) entitlement to damages, (2) entitlement to individual motions judgment, and (3) access to discovery proceedings re 15 U.S.C., sec 14 cause-of-action and will thereby advance the time for settlement of at least one case in the MDL.

8. "In cases transferred under 28 U.S.C., sec. 1407(a) the substantive law of the transferor forum applies after transfer." [*In re Plumbing Fixtures Litigation*, 342 F. Supp. 756, 758 (Jud. Pan Mult. Lit. 1972) ]

DC requirements re federal laws apply equally in MDL.

9. "Transferee judge has broad discretion to design pretrial program that will ensure that needs of each party for any unique discovery or individual judicial attention can be accommodated concurrently with conduct of common pretrial matters. *Re Petroleum Products Antitrust Litigation (1976, Jud Pan Mult Lit )*, 407 F Supp 249. "[Supra, n 62]

Unique cause-of-action in *O'Brien* requires "unique discovery" of a factual record for trial. Disability of Plaintiff-Appellant, Edward O'Brien, was clearly alleged in complaint, and any reader of same would thereafter be aware of his disabled status. MDL judge not only refused to exercise broad discretion to "design pretrial program that will ensure that needs of each party for any unique discovery or individual judicial attention" are met, but actually refused even the basic courtesy of answer to a solicited letter while abridging more definite rights crystallized in statute and constitutional law.

#### G. MDL'S REFUSAL TO RENDER SUMMARY JUDGMENT CANNOT BE JUSTIFIED.

1. FRCP, Rule 56

2. 28 U.S.C., sec. 1407(c)

3. Rules of the Panel on Multidistrict Litigation, Rule 7.1 "(c) Within twenty days after filing of a motion, all other parties shall file a response thereto. Failure of a party to respond to a motion shall be treated as that party's acquiescence to the action requested in the motion."

D- Acquiesced to the actions requested in P-A's motions.

4. District of Maryland, Local Rules 105(2)(a): "All motions must be filed within deadlines set by the Court. Unless otherwise ordered by the Court, all memoranda in opposition to a motion shall be filed within fourteen days of the service of the motion and any reply memoranda within eleven days after service of the opposition memoranda."

Criteria not met by D-A.

#### H. D-A'S MOTION TO DISMISS CONSOLIDATED COMPLAINT DID NOT "OTHERWISE DEFEND" AGAINST P-A'S COMPLAINT.

1. FRCP 55(a)

2. " Filing of motion to dismiss constitutes defending action within meaning of FRCP 55(a). *Hudson v North Carolina (1994, ED NC Wis )*, 158 FRD 78 " [ FRCP, Rule 55, n 12 ]

Yes, if motion raises at least one issue of genuine debate...it didn't.

3. " Motion pursuant to Rule 55(c) to vacate grant of summary judgment to plaintiff on default will be denied where defendants' proffered substantive defenses are without merit. *Williams v Ward (1976, SD NY)*, 416 F Supp 1123 " [ Ibid. ]

D-A defaulted answer to complaint. P-A's motion for summary judgment cannot be vacated after grant by court because D-A's motions were neither (1) substantive defenses, nor (2) meritorious defenses.

On January 12, 2001 the United States District Court performed a reviewable act. DC issued an *Order* ( unrequested by P-A and D-A ) dismissing the complaint in CV 00-10781 R (AJWx) which had been, that day, ordered finalized in transfer to the MDL because MDL's *Order* finalizing transfer of the case had, allegedly, not yet been filed by MDL Clerk ( transferee court clerk ) pursuant to 28 U.S.C., sec. 1407 (c). MDL Panel, immediately following notice from DC of its dismissal, vacated its *Conditional Order of Transfer* issued on December 27, 2000, thus affirming claim for continued jurisdiction and appropriate dismissal of the case by the DC.

On February 20, 2001 District Court performed a second reviewable act when it denied Plaintiffs-Appellants motion to appeal lower court's dismissal of its complaint on grounds, the proposed appeal was not taken in good faith under 28 U.S.C. 1915(a) and was frivolous, without merit and did not present a substantial question within the meaning of 28 U.S.C. 753(f)." [District Court's Order (standard form), Judge Manuel L. Real, U.S.D.C., Feb. 20, 2001 ]

These acts and others cited in this appeal continue a series of similar acts committed by the Honorable Manuel L. Real which have prejudicially impacted four previous antitrust cases filed and adjudicated in the Central District of California by one or both of the Plaintiffs-Appellants in this case.

In this case under review, the complaint should not have been dismissed because it was not subverted in terms of its merit in proceedings subsequent to its filing and issue of summons and prior to an unrequested order of dismissal.

Plausible reason why DC did not notice intent to dismiss or grant leave to amend complaint prior to sua sponte dismissal was because DC did not have time. DC had only a small window between January 12, 2001 and January 16, 2001 wherein to prejudicially dismiss valid complaint.

Request to proceed *in forma pauperis* should not have been ordered denied without including presiding judge's reasoned opinion why denial under the catchall "frivolous" was appropriate, and because P-A did not request transcripts.

D-A's proffered defenses via (1) its MOTION TO DISMISS THE CONSOLIDATED COMPLAINT, (2) its motion in opposition to P-A's motion of September 21, 2000, were entirely without merit. Therefore, D-A has failed to "otherwise defend" against P-A's complaint and default or summary judgment is warranted.

4. " 'Meritorious defense' component of test for setting aside default judgment pursuant to Rule 55(c) does not go so far as to require that movant demonstrate likelihood of success on merits, but rather, party's averments need only plausibly suggest existence of facts which, if proven at trial, would constitute cognizable defense. *Coon v Grenier (1989, CA1 RI)*, 867 F2d 73 " [FRCP, Rule 55, n 5]

All of D-A's filings in MDL related to *O'Brien v Microsoft* lack even a plausible suggestion of the existence of facts which, if proven at trial, would constitute cognizable defense. This fact surprised P-A because it is not very difficult to suggest a "plausible" defense even if suggestions are substantially off point. It appeared to P-A that D-A was intentionally refusing to contest any issue and trust rather in what psychologists call "denial". Since P-A had D-A "dead-to-rights" on the MS-OFFICE tying claim only "denial" (and a miracle) could save them. If not a miracle, then certainly *leger de main* was attempted by MDL and Laison Counsel on behalf guilty D-A.

5. " To determine whether defaulting defendant has meritorious defense, likelihood of success is not measure; defendant's allegations are meritorious if they contain even hint of suggestion which, if proved at trial, would constitute complete defense. *Widmer-Baum v Chandler-Halford (1995, ND Iowa)*, 162 FRD 545 " [Ibid.]

Not a hint: not a whisper of suggestion: not defense

#### I. DC'S AND/OR MDL'S REFUSAL TO JUDGE P-A'S MOTIONS ABRIDGED P-A'S CIVIL RIGHTS WITHOUT DUE PROCESS OF LAW.

1. United States Constitution, Amendment XIV., Sections 1 and 5
2. 42 U.S.C., sec. 1981, 1983, 1985, and 1986
3. Civil Rights Act of 1964; Civil Rights Act of 1991;

"Sec. 1981. Equal rights under the law

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white [non-

disabled] citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other." [content in brackets added]

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." [42 USCS, sec 1981]

"Finding of discriminatory intent under Title VII of Civil Rights Act of 1964 (42 USCS, sec. 2000e et seq.) corresponds to form of discriminatory intent necessary for violation of 42 USCS, sec. 1981, and thus where previous prima facie determination of class-wide discrimination in violation of Title VII rested upon finding of discriminatory intent, plaintiff can bootstrap her Sec. 1981 claim to prima facie showing already made in Title VII proceeding without having to make independent showing of intent." *Taylor v Teletype Corp.* (1982, ED Ark), 550 F Supp 781

"[4] In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 91 S.Ct. 1999, 2005, 29 L.Ed.2d 619 (1971), the Supreme Court held that a plaintiff could state a cause of action and recover money damages against a federal official for constitutional violations occurring under the color of federal law." *Lee v Hughes*, 145 F.3d 1275 (11th Cir. 1998)

"We recognize that the Eighth Circuit recently held that a local (plan) is not a special factor counseling hesitation and therefore allowed plaintiff's *Bivens* claim to proceed." [Ibid., p.1276]

Hesitation is likewise not counseled for P-A's claim(s).

#### 4. Rehabilitation Act of 1973: Precedent for application

"Congress intended that Rehabilitation Act (29 USCS, sec. 701, et seq.) be exclusive remedy for handicapped discrimination by Federal employer. *Connoly v United States Postal Service* (1984, DC Mass), 579 F Supp 305 "

"Private right of action exists under 29 USCS, sec. 794 *Kling v County of Los Angeles* (1980, CA9 Cal), 633 F2d 876 "

"State is not immune by virtue of Eleventh Amendment from suit brought against it under Rehabilitation Act (29 USCS, sec. 794), since Act contains express waiver of Eleventh Amendment immunity, and by accepting federal funds, state has accepted waiver. *Clark v. California Dep't of Corrections* (1997, CA9 Cal), 123 F3d 1267 "

"Handicapped employee has standing to maintain action under 29 USCS, sec. 793 to compel Secretary to initiate action against government contractor who discharged him allegedly in violation of Rehabilitation Act (29 USCS, sec. 701, et seq.) *Moon v Donovan* (1982, ND Ga), 1 AD Cas 380, 29 NBA FEP Cas 1780, 31 CCH EPD, sec. 33402 " [29 USCS, sec. 793, n 6]

"29 USCS, sec. 794 codifies constitutional equal protection right of handicapped. *Association for Retarded Citizens v Olson (1982, DC ND)*, 561 F Supp 473 "

"Sec. 504 of Rehabilitation Act (29 USCS, sec. 794), like Title IX of Civil Rights Act (42 USCS, sec. 1981, et seq.) was modeled upon and closely tracks Title VI of Civil Rights Act (42 USCS, sec. 2000d, et seq.) *Medley v Ginsberg (1980, SD W Va)*, 492 F Supp 1294 "

5. Americans With Disabilities Act of 1990: Precedent for application

"Title I (42 USCS, sec. 12111-12117) and other provisions of ADA are to be interpreted consistently with Rehabilitation Act (29 USCS, sec. 701 et seq.)" *Vande v Wisconsin Dep't of Admin. (1994, WD Wis)*, 851 F Supp 353

"Under 42 USCS, sec. 12132, 'programs, services, and activities' include all of activities of public entity. *Johnson v City of Saline (1998, CA6 Mich)*, 151 F3d 564 " [42 USCS, sec. 12131, n 1]

6. Criminal Liability Laws: 18 USC, sec. 241 and 242; and 28 CFR, part 35, et al. Precedent for application

"Sec. 241. Conspiracy against rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise of enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; they shall be fined not more than \$10,000. or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

Judges and defense counsel indirectly but effectively threatened and almost killed P-A by denying P-A's rights to judgment of motions on the merits without due process of law. Insightful analysis of MDL records will show substantial denial of civil rights to plaintiffs in circumstances (*pro se, in forma pauperis* and/or disabled) similar to P-A's. MDL judges and attorneys conspired with Microsoft to deny due process of law to an entire class of litigants, including P-A, in MDL 1332, and it will not take overly skilled attorney(s) to prove it.

"I thought you might be interested in a report of a conference that was held in Chicago on October 24, 2000 concerning the Microsoft litigation. Thirteen judges and thirty-seven lawyers representing plaintiffs or Microsoft in twelve of the state cases and the federal MDL proceedings attended." [*Re: Microsoft Anti-trust Litigation*, Letter to Judges, from Hon. J. Federick Motz on November 3, 2000] [Exhibit G]

The conference was hosted by Microsoft Corporation in a city distant from Baltimore, Maryland. Airfare was expensive and so were hotels. P-A was shocked to receive the

entire letter quoted above from Liaison Counsel as if "boondoggle" had had no prejudicial impact on plaintiffs in MDL Case No. 1332. Whether or not Microsoft picked up airfare and hotel expenses for Judge Motz, et al. has yet to be determined. Prima facie evidence for collusion has been determined.

"We agreed to meet again in Chicago in May. I am canvassing the judges who participated in the October 24th conference to determine if they are available on May 15, 2001. Please let me know if you would be interested in attending and, if so, whether you would be available on May 15, 2001." [Ibid.]

Judge Motz solicits another side-trip to the Microsoft hosted and dominated meetings in Chicago. Does this fly in the face of ethical standards ...anyone ? Fact that P-A was not invited to the meeting(s) is perhaps worse than the meetings themselves. Exclusion of some plaintiffs and inclusion of others is prejudicial and another MDL breach of due process to aid D-A.

After all, Mr. Bill Gates' dad has been a big attorney in the Northwest for years...its just one big co-operative family, isn't it fellas ?

Chicago is, apparently a strong-hold for Microsoft. At commencement of MDL, Case No. 1332 the prestigious Sullivan & Cromwell tried to get venue assigned by the Panel to a district court in Chicago or Seattle. Code name for Microsoft's NT release was "Chicago". If venue could not be arranged to Chicago (too obvious) then the judges and co-operative attorneys could be brought to Chicago...for a "conference".

"Right to speedy trial was protected from interference by predecessor to 18 USCS, sec. 241. *United States v Logan (1891, CC Tex)*, 45 F 872 " [18 USCS, sec. 241, n 40]

"Right to testify at federal trial is secured by United States Constitution and, hence, is protected by 18 USCS, sec. 241. *United States v Pacelli (1974, CA2 NY)* 491 F2d 1108 " [Ibid., n 41]

"Federal civil rights statute (18 USCS, sec. 241), which makes conspiracy to interfere with citizen's free exercise or enjoyment of any right or privilege secured to him by Constitution or laws of United States criminal offense, includes rights or privileges protected by Fourteenth Amendment, and extends to conspiracies otherwise within scope of statute, participated in by officials alone or in collaboration with private persons. *United States v Price (1966)*, 383 US 787 " [Ibid., n 54]

"Mere acquiescence or silence or failure of officer to perform duty did not make one participant in conspiracy unless he acted or failed to act with knowledge of purpose of conspiracy and with view of protecting and aiding it. *Lutera v United States (1937, CA8 Mo)*, 93 F2d 395 "

"In prosecution under predecessor to 18 USCS, sec. 241, government was at liberty to prove its case by either direct or circumstantial evidence. *Anderson v United States* (1974), 417 US 211" [Ibid., n 70]

#### J. EXTRAORDINARY WRITS MAY BE USED TO REVIEW MDL PROCEEDINGS AND COMPEL JUDGMENT IN SAME.

" 28 U.S.C., sec. 1651 authorizes Court of Appeals to issue any writ necessary in aid of its appellate jurisdiction, including writs in aid of its prospective jurisdiction. *American Fidelity Fire Ins. Co. v. United States Dist. Court for Northern Dist.* (1976, CA9), 538 F2d 1371 " [ 28 U.S.C., sec. 1651, n 28 ]

" Authority of Court of Appeals under 28 USCS, sec. 1651 is not confined to issuance of writs in aid of jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. *Application of President & Directors of Georgetown College, Inc.* (1964) 118 App DC 80, 331 F2d 1000 " [Ibid.]

" All Writs Act (28 USCS, sec. 1651(a)) is meant to be used only in exceptional case where there is clear abuse of discretion or usurpation of judicial power. *La Buy v. Howes Leather Co.* (1957), 352 US 249 " [ Ibid., n 10 ]

" Under federal practice, extraordinary writs are reserved for really extraordinary causes, and then only to confine inferior court to lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Platt v. Minnesota Mining & Mfg. Co.* (1964), 376 US 240 " [ Ibid., n 10 ]

" Use of 28 USCS, sec. 1651 as means of reviewing interlocutory non-appealable order, especially in criminal cases, should be limited to exceptional cases amounting to judicial usurpation of power. *United States v. Grand Jury* (1970, CA5 Fla), 425 F2d 327 " [ Ibid., n 10 ]

" Supreme Court (appellate courts) has jurisdiction of petitions for certiorari and for leave to proceed in forma pauperis, filed by one whose petition for writ ...was heard by commissioner. *Holiday v. Johnson* (1941), 313 US 342 " [ Ibid., n 27 ]

" Plaintiffs and defendants in multidistrict antitrust lawsuits, consolidated and transferred for disposition, were enjoined under 28 USCS, sec. 1651(a)... *Guerra v. Texaco Exploration & Prod. (In re Lease Oil Antitrust Litig. (No.II))* (1998, SD Tex), 48 F Supp 2d 699 " [ Ibid., n 142 ]

1. *Writ of Error*, issued pursuant to 28 U.S.C., sec. 1651(a), appropriately open appellate court's door for review of DC and MDL matters of the type found in this request.

" ...every case has to be brought to it ( USCA ) either by appeal or writ of error, except petitions relating to bankruptcy proceedings. *Zell v. Judges of Circuit Court (1906, CA4)*, 149 F 86 " [ 28 U.S.C., sec. 1651(a): Writs; note 28. ]

" Petition for writ of mandamus under 28 U.S.C., sec 1651 is denied where, in group of actions involving aircraft accident litigations which were conditionally transferred from district of California to district of Illinois under 28 U.S.C., sec. 1407, petitioners sought writ of mandamus to prevent remand of actions to California state courts since mandamus jurisdiction of Court of Appeals extends to cases within its actual or potential appellate jurisdiction and not to district judge sitting in another circuit, mandamus jurisdiction is not conferred upon Court of Appeals where transfer to that circuit has not yet been completed, and pendency of motion to transfer before Judicial Panel on Multidistrict Litigation does not affect or suspend jurisdiction of transferor court. *General Electric Co. v. Byrne (1979, CA7)*, 611 F2d 670 "

Note: Above quote is offered merely to confirm the fact alleged by P-A that change of jurisdiction occurs only after MDL transfer is finalized and not when district court orders (approves) case transfer to MDL.

2. *Writ of Mandamus* will appropriately compel MDL performance of duty (judgment of motions and judgment of P-A's unique cause-of-action), considering the facts and circumstances of this case.

" If judge fails or refuses to enter judgment in particular case when circumstances require that judgment be entered, petition for mandamus under All Writs Statute, 28 U.S.C., sec. 1651(a), provides adequate remedy. *Re Charge of Judicial Misconduct (1979, CA9)*, 593 F2d 879 " [Supra., note 236 ]

" Where court declines to hear case or motion...mandamus is proper remedy. *Ex parte Russell (1872)*, 74 US 364 "

" Courts of appeals have power to issue writs of mandamus in exercise of their appellate jurisdiction, and writ would lie to direct subordinate federal court to render decision in case pending before it. *Petition of Henneman (1943, CA1 Puerto Rico)*, 137 F2d 627 " [Supra., note 28]

" Issuance of writ of mandamus under 28 USCS, sec. 1651 is limited to those exceptional cases where inferior court acted wholly without jurisdiction or so clearly abused its discretion as to constitute usurpation of power: review by mandamus is appropriate in present case where District Court... *Storage technologies Corp. v U.S. Dist. Court (1991, CA10 Colo)*, 934 F2d 244 "

### 3. Guidelines for *Writ of Mandamus*

" Guidelines for issuing writ of mandamus are: (1) petitioner has no other adequate means, such as direct appeal, to attain the desired relief; (2) petitioner will be damaged or

prejudiced in a way not correctable on appeal; (3) district court's order is clearly erroneous as a matter of law; (4) subject order is an oft-repeated error, or manifests a persistent disregard of the federal rules and (5) order raises new and important problems or issues of law of first impression. 28 U.S.C.A., sec. 1651 " [ *Holly W. Bauman, et al. v. United States District Court*, 557 F2d 650 (1977) ]

## VIII. CONCLUSION

### A. General Pleading

Because Liaison Counsel cannot prove service of D-A's (1) MOTION TO DISMISS CONSOLIDATED COMPLAINT, and (2) DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF O'BRIEN'S MOTION FOR DENIAL AND /OR RESCISSION OF ALL DEFENDANTS' MOTIONS to Plaintiffs-Appellants in this case, and cannot prove contest of even a minor issue regarding P-A's claims in complaint, motions were not meritorious defense against P-A's complaint and, therefore, P-A's motions for default judgment or summary judgment remain valid and worthy of adjudication on merits.

Even if the appellate court would consider absence of *certificate of service* in Liaison Counsel's mailings insufficient to annul Microsoft's motions, absence of *Notice* of hearing date(s) violates FRCP and Local Rules and federal precedent and unequivocally invalidates Microsoft's motions.

Considering the fact that MS did not allege facts or make claims (counter-claims) that meritoriously defended against P-A's action, and, therefore, did not answer the complaint within statute time limits (or within a reasonable time after limits were exceeded) violating FRCP and Local Rules in DC and MDL, P-A's motions for default judgment or summary judgment, although ignored (not rejected for cause) by MDL, must nevertheless be adjudicated in favor of the moving party.

Certainly P-A should be included in Discovery proceedings on-going at MDL. Federal laws and precedent cannot be found to support exclusion of *pro se* litigant(s) from any phase of MDL discovery.

Unlawful exclusion from Discovery and depressed financial condition, known to the MDL via *in forma pauperis* certification in case record, are grounds for civil rights prosecution.

Repeated denial of disabled veteran's constitutional rights and/or privileges by judicial officer(s) and appointees without due process of law violated Sec. 1 and 5 of XIV.

"Public officials, including judges, were not immune from suit for preventive relief under 42 USCS, sec. 2000a-5; " [ *United States v Clark (1965, SD Ala)*, 249 F Supp 720] {3}

## B. Special Pleading

Refusal to act is the only "due process" issue not excusable by valid claim for exercise of discretion. Sovereign requires all of us to do our job according to the rules of our systems.

P-A's verbal movement for default judgment in DC (June 5, 2000) was a legal motion even if same motion had been questionably rejected by DC clerk prior to hearing. Legal motion(s) always require some form of hearing and some form of cognizable adjudication while case in jurisdiction.

In MDL proceedings, Judge Motz, Appointees and Clerk(s) continued denial of due process of law. D-A, aided and abetted by MDL's denial of P-A's rights secured by the Constitution, legislative Acts and federal rules, persisted in defaulting answer to P-A's complaint, and D-A's unjudged response to P-A's motions for (1) denial of D-A's actions, (2) default judgment and (3) summary judgment were as perfunctory and off-point as was its motion to dismiss consolidated class actions re individual action *O'Brien v Microsoft*. Even by the most liberal construction, meritorious defense against P-A's claims has not obtained in DC and MDL.

Failure of D-A and/or MDL to prove service and include *Notice* of hearing date(s) in MOTION TO DISMISS THE CONSOLIDATED COMPLAINT filed on August 2, 2000, even when P-A specially requested service in letters to Judge Motz, D-A and MDL clerk, made D-A's motions (1) to dismiss consolidated complaint, and (2) for summary judgment of P-A's motion(s) of no effect re P-A's claims. Without meritorious defense(s) to aver, D-A was clearly subject to either default judgment or summary judgment and Judge Motz abused discretion by not exercising discretion, and denied P-A's rights (adjudication of complaint and motions on merits) and civil rights (unlawful denial or delay of damages which are "property" and the life, health, society and liberty sufficient property supports) without due process of law required by the federal rules of civil procedure.

Failure of D-A and/or MDL to prove service and include *Notice* of hearing date(s) in MICROSOFTS REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT filed in MDL on October 4, 2000 was not meritorious defense against P-A's complaint or motions for reasons (1) stated in P-A's motions filed in MDL, (2) stated above, (3) proof of service is required for jurisdiction, and (4) D-A's motion for summary judgment is not a meritorious defense. Again, Judge's refusal to schedule, notice, comment upon or otherwise expedite and judge P-A's motion(s) gives appearance of intentional denial of due process and proves, circumstantially but emphatically, a certain conspiracy with D-A for preclusion of P-A's action(s) and civil rights in MDL.

Therefore, if standard appellate order not sufficient or applicable to this case, *Writ of Error* and *Writ of Mandamus* must be used to review and compel judgment of P-A's motion(s) filed in the MDL. At the discretion of this court, MDL and/or D-A liability for

civil rights violations will be judged, affirmed, and recommended for judgment upon remand.

## X. PRAYER

Plaintiffs-Appellants, Edward Michael O'Brien and the Golf O'Brien Company, *pro se* and *in forma pauperis*, pray for and otherwise respectfully request *certiorari* for this case to the Fourth Circuit of the United States Court of Appeals.

If *interlocutory appeal* pursuant to 28 U.S.C., sec 1292 unable to secure same, Plaintiffs-Appellants pray and appeal for issue of *Writ of Error* to review actions and/or omissions alleged improper and/or unlawful and prejudicial in proceedings at the Multidistrict Litigation Panel (District of Columbia) and/or the United States District Court (District of Maryland) re Case No. 1332.

If *interlocutory appeal* pursuant to 28 U.S.C., sec 1292 unable to secure same, Plaintiffs-Appellants pray and appeal for issue of *Writ of Mandamus* or more appropriate instrument to lay useful in remedy of alleged errors committed by persons summoned herein. Remedies must include compel of motions judgment and judgment of Plaintiffs-Appellants cause-of-action following adequate discovery.

P-A prays for appellate court's determination that P-A's *competitor* claims (with right to receive payment of proven antitrust damages) should have been expressly validated in MDL's *Opinion* of January 12, 2001, and request correction of this oversight by USCA via compel of MDL's modification of its *Opinion*.

Plaintiffs-Appellants pray for and request determination by USCA of D-A, MDL, and/or Panel liability for civil rights violations alleged, and, if deemed appropriate and/or within jurisdiction, declare P-A entitled to cause-of-action in the District of Maryland or, upon remand, to another district court other than the District of California where P-A has experienced demonstrated *actual bias*.

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Respectfully submitted to the United States Court of Appeals for the Fourth Circuit this day of our Lord, May 1, 2001 at Santa Barbara, California

by \_\_\_\_\_

Edward Michael O'Brien , *pro se* and owner of the Golf O'Brien Company

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*{3} Qualification for standing re Sections 1. and 5. of XIV Amendment is based on federal clinical and administrative certification of plaintiff-appellant's disabilities ( VA: C-25-899-843 ).*

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