

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Docket Number: 04-55081

EDWARD MICHAEL O'BRIEN,

Appellant,

v.

VISA INTERNATIONAL, INC.;
MASTERCARD CORPORATION;
CHASE MANHATTAN BANK;
CITIBANK, INC;
FIRST PREMIER BANK;
RB EXPRESS, INC.

Appellees.

BRIEF OF THE APPELLANT

Appeal from The United States District Court
Central District of California

Civil Action No. 03-05020 MLR (MANx)

The Honorable
Manuel L. Real
Presiding

INTEREST

APPEAL by Edward Michael O'Brien, pro se and in forma pauperis, is taken from district orders issued on November 5 and 18, 2003; December 2, 2003; December 16, 2003; December 17, 2003; January 15 and 26, 2004 at the United States District Court in the Central District of California dismissing all claims in plaintiff/appellant's complaint. Timely notice of appeal was filed on January 2, 2004, pursuant to Fed. R. App. P. 4(a)(4)(A)(iv). Appeal commenced and docket number and time schedule order issued by the Clerk of the United States Court of Appeals for the Ninth Circuit on January 15, 2004. [Excerpts of Record ("ER") A.]

Appellant asks the United States Court of Appeals for the Ninth Circuit to review presiding judge's conduct for (a) abuse of discretion, (b) plain error, (c) breach of judicial ethics, and (d) actual bias.

JURISDICTION

1. Complaint was brought to the United States District Court in the Central District of California under authority of Title 15, Section 1, et seq. of the United States Codes on July 15, 2003.
2. District Court had jurisdiction pursuant to 28 U.S.C., sections 1331, 1337, and 1391 (c). At time of cause of action, each corporation named as a defendant transacted business, did business, was found, or resided in the Central District of California.
3. Appellate Court jurisdiction is predicated on 28 U.S.C., sec. 1291; courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

CAUSE FOR APPEAL

1. Only two(2) of six(6) final orders granting all appellees' motions to dismiss the complaint contained cites to relevant law, all orders were very brief and devoid of opinion, rationale or statement of deficiencies in complaint.
2. All orders granting motions to dismiss expressly denied appellant opportunity to amend complaint.

3. Because district court did not explain cites to federal laws; state deficiencies in the complaint; or otherwise rationalize grant of appellees' motions to dismiss grants were an abuse of discretion.
4. Because district court's orders of dismissal expressly denied pro se appellant opportunity to amend the complaint, orders were abuse of discretion.
5. Because district court's orders to dismiss clearly contravened principles in Title 15, United States Codes, section 1 et seq., certain Supreme Court decisions and the CAN SPAM ACT of 2003, grants were an abuse of discretion and/or clear error in the interpretation of federal law.
6. Even though dismissed, appellant's claims remain viable and timely in light of recent legislation and pending litigation and abbreviated, unrationalized orders of dismissal should not be considered adjudication on merits sufficient to preclude default judgment for bad faith default of answer within time limits by appellee(s).
7. Because grants of appellees motions to dismiss went contrary to or misinterpreted United States Supreme Court rulings in *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477 (1977) and/or *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), and/or *Neitzke v. Williams*, 490 U.S. 319, 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989) grants were abuse of discretion and/or clear error in the interpretation of federal law.
8. Pro se Clerk for the Central District of California, Ms Rosalind Lockett, was questionably "slapped down" by the Honorable Manuel L. Real, presiding in prior (not related) case, CV 03-0036 MLR, for entering default of answer against monopolist Microsoft Corporation pursuant to Appellant O'Brien's request. Same clerk feared and followed same judge favoring monopolists Visa International, Inc. ["VISA"] and Mastercard International, Inc. ["MC"] by denying appellant due process of law re FRCP 55 motions for entry of default and default judgment.
9. Due process abridgment opened door for presiding judge's abuse of discretion granting VISA and/or MC motion(s) to dismiss filed more than one-hundred (100) days beyond time limits for answer.
10. Order(s) granting Citibank, Inc. ["CB"], VISA and/or MC motion(s) to dismiss the complaint should be vacated and case remanded for appellees' default judgment.
11. Orders granting all other appellees motions to dismiss should be vacated and case remanded for further proceedings.
12. Judge Real should be recused for clearly demonstrated bias and breach of the Code of Judicial Ethics.

ISSUES

1. Whether or not the Honorable Manuel L. Real abused judicial discretion by issuing orders granting all appellees' motions to dismiss the complaint when orders were devoid of opinion, rationale or reference to complaint's deficiencies and expressly denied appellant opportunity to amend the complaint:
2. Whether or not grants of all motions to dismiss were an abuse of discretion because pre-discovery termination of well-pled complaint circumvented, by less than thirty days, appellant's standing under the CAN SPAM ACT of 2003 (standing claimed prior in appellant's motion for continuance) passed by Congress on October 22, 2003 and signed into law December 16, 2003.
3. Whether or not Judge Real clearly abused discretion and/or denied due process of law by causing court clerk to repeatedly obstruct and effectively preclude appellant's filing of an Entry of Default against Citibank, VISA and/or MC thereby effectively denying court's default judgment requested in good faith by appellant, pro se.
4. Whether or not grants of all appellees motions to dismiss went contrary to decisions by the United States Supreme Court and were, therefore, an abuse of discretion and/or clear error in the interpretation of federal law.
5. Whether or not presiding judge abused discretion when he granted Citibank's ex parte application for extension of time on insufficient service of process grounds. And, if judge's decision to extend time was in error, should not Citibank have been entered into default of answer?
6. Whether or not Judge Real's ORDER TO SHOW CAUSE RE DISMISSAL FOR LACK OF PROSECUTION issued on January 15, 2004, following appellant's Notice of Appeal necessarily filed on January 2, 2004 to meet time limits from date of final orders about thirty days prior, and district court's sua sponte order of dismissal on January 26, 2004 abused judicial discretion.
7. Whether or not Judge Real, who was not assigned (randomly) the case but had taken it from the Honorable J. Spencer Letts for unspecified reasons, breached the Code of Judicial Conduct and/or abused discretion by not recusing himself in light of judge's financial indebtedness to one or more defendant(s) and its potential for conflict of interest, prejudice and/or actual bias:
8. Whether or not long record of Judge Real's denial of pro se litigant rights (liberal construction, procedural leniency, etc.) and judge's arbitrary (unrationalized and/or marginally rationalized) dismissals of complaint(s) in this and other of cases, coupled

with (a) judge's conduct complained of by appellant and other litigant(s) under same/similar circumstances, (b) judge's seizure of case authority while in questionable financial position, (c) judge's grant of defendant's untimely (improperly noticed) ex parte application followed by rejection of appellant's lawfully constructed/noticed ex parte application, (d) judge/clerk denial of due process of law re Rule 55 grounded request(s), and (e) judge's suspicious denial of leave to amend the complaint following appellant's prior expressed reason(s) for amendment (CAN SPAM ACT standing), displayed one or more instance of abuse of discretion and/or clear error and/or actual bias.

STANDARD OF REVIEW

1. "We review de novo a dismissal for failure to state a claim, as it is a ruling on a question of law. *Everest & Jennings, Inc. v American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). All allegations of fact must be taken as true and construed in the light most favorable to [appellant]. We will not affirm such a dismissal unless it appears beyond doubt that the [appellant] can prove no set of facts in support of his claim that would entitle him to relief." [*Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995)]

2. "...we review his claims for plain error. *United States v. Nordby*, 225 F.3d 1053, 1060 (9th Cir. 2000). To obtain a reversal under this standard, Pacheco-Zepeda must prove that there was "error," the error was "plain," and the error affected 'substantial rights.' *United States v. Olano*, 507 U.S. 725, 732(1993). If such conditions are satisfied, we may exercise our discretion to notice the forfeited error only if such error 'seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings.'" [*United States v. Gabriel Pacheco-Zepeda*, Case No. 99-50720, U.S. Court of Appeals for the Ninth Circuit]

3. "We do not lightly conclude that a bias claim has been made out. See *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1221-23 (D.C. Cir. 1989). But both the recusal statute, 28 U.S.C. § 455(a) (1988), and our general supervisory power to 'require such further proceedings to be had as may be just under the circumstances,' 28 U.S.C. § 2106 (1988), allow us to reassign this case to a different judge on remand. See *Liteky v. United States*, 114 S. Ct. 1147, 1156-57 (1994). To do so, we need not find actual bias or prejudice, but only that the facts 'might reasonably cause an objective observer to question [the judge's] impartiality.' *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988).[FNR12]" [*U.S. v. Microsoft*, 56 F.3d 1148]

4. "ABUSE OF DISCRETION - When a court does not apply the correct law or if it rests its decision on a clearly erroneous finding of a material fact." [U.S. v. Rahm, 993 F.2d 1405, 1410 (9th Cir.'93)] "A court may also abuse its discretion when the record contains no evidence to support its decision." [MGIC v. Moore, 952 F.2d 1120, 1122 (9th Cir.'91)]

5. "The Code of Judicial Conduct expressly prohibits judges from receiving loans from persons whose interests come or are likely to come before them." [Code of Judicial Ethics, sec. 4D(5)(h)(1990)]

6. "We will not disturb the court's determination without a clear showing that it was based on a clearly erroneous factual finding or an erroneous legal conclusion or that it manifests a clear error of judgment." [Cartier v. Jackson, 59 F.3d 1046, 1048 (10th Cir. 1995)]

ARGUMENT

A. Presiding Judge's Conduct Was Highly Questionable:

1. Case record contains no evidence to support Judge Real's decisions which went contrary to established federal law and precedent.

2. Judge Real was in debt to one or more defendant/appellee when he took the case from Judge Letts without reason(s) stated. Judge Real has a history of dismissing Appellant O'Brien's reasonably well-pled complaints expressly and/or effectively denying amendment of complaint and/or opportunity for introduction of evidence.

3. The facts of this case, and certain facts in other cases, "might reasonably cause an objective observer to question [the judge's] impartiality".

B. Issues Raised on Appeal

Issue 1: Unrationalized Dismissals Denying Opportunity To Amend Abused Discretion:

1. "The district court may grant a motion to dismiss for failure to state a claim only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations." [Cervantes v. City of San Diego, 5 F.3d 1273,1274 (9th Cir. 1993)]

2. "On the posture of the pleadings before us, we must accept the interpretation of the plaintiff's complaint most favorable to him. In determining whether a motion to dismiss pursuant to Rule 12(b)(6) should be granted, the accepted rule is 'that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

3. "Courts may not dismiss complaint for insufficiency unless it clearly appears that by no stretch of imagination is plaintiff entitled to any relief for claim asserted in his complaint. Kozlowski v Ferrara (1954, DC NY) 117 F Supp 650." [FRCP, Rule 12, n 161]

4. Even without stretching the imagination, reasonable reader must affirm existence of one or more sets of facts (claims) alleged in complaint, relative to the cause of action alleged, that clearly would enable impartial judge to grant relief if/when further proceedings proved appellant's claims (sets of facts). Therefore, appellees' motions to dismiss pro se complaint should not have been granted by orders devoid of opinion, explained precedent and/or other reasons why complaint was so malicious, frivolous and/or facially inadequate that it was impossible for judge to grant relief.

5. "In considering motion to dismiss pro se complaint is held to less stringent standards than pleadings drafted by lawyer...Wilson v Civil Town of Clayton (1988, CA7 Ind) 839 F2d 375." [FRCP, Rule 12, n 164]

6. "District Court should not have dismissed plaintiff's pro se complaint for failure to state claim upon which relief can be granted without giving plaintiff statement of complaint's deficiencies and chance to amend complaint to cure deficiencies. Karim-Panahi v Los Angeles Police Dep't (1988, CA9 Cal) 839 F2d 621, 46 BNA FEP Cas 287, 10 FR Serv 3d 791, request den (1997, CA9 Cal) 1997 US App LEXIS 33706" [Ibid.]

7. Opportunity to amend complaint before it is entirely and finally dismissed is an established right of pro se litigants. So is the application of less stringent standards.

8. "Where complaint is dismissed for failing to state claim upon which relief can be granted under FRCP 12(b)(6), it is usual practice to allow leave to replead; although leave to replead is within discretion of district court, refusal to grant it without any justifying reason is abuse of discretion. Old Republic INs. Co. v Hansa World Cargo Serv., Inc. (1997, SD NY) 170 FRD 361, RICO Bus Disp Guide (CCH), sec. 9245." [Ibid.]

9. "No matter how unlikely it may seem that plaintiff will prove its entitlement to relief Federal policy favors dispositions on proofs rather than on pleadings; plaintiff should be granted every opportunity to cure defects in its pleadings by amendment no matter how unpromising the initial attempt. Sixth Camden Corp. v Evesham (1976, DC NJ) 420 F Supp 709" [Ibid.]

10. Dismissals denying right to amend was an abuse of discretion because it did not favor dispositions on proofs rather than pleadings.

Issue 2: CAN SPAM ACT of 2003 Circumvented:

1. Appellant O'Brien quoted the following law in motion for continuance filed on October 27, 2003.

"ACTION AUTHORIZED- A provider of Internet access service adversely affected by a violation of section 5(a)(1), 5(b), or 5(d), or a pattern or practice that violates paragraph (2), (3), (4), or (5) of section 5(a), may bring a civil action in any district court of the United States with jurisdiction over the defendant--
(A) to enjoin further violation by the defendant; or

(B) to recover damages in an amount equal to the greater of--
(i) actual monetary loss incurred by the provider of Internet access service as a result of such violation; or
(ii) the amount determined under paragraph (3)". [CAN SPAM ACT of 2003, sec. 7(g)(1)]

2. CAN SPAM ACT of 2003 specifies, "INTERNET ACCESS SERVICE- The term 'Internet access service' has the meaning given that term in section 231(e)(4) of the Communications Act of 1934 (47 U.S.C. 231(e)(4))" [CAN SPAM ACT of 2003, Sec. 3(11)]

3. "The term 'Internet access service' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services." [47 U.S.C., sec. 231(e)(4)]

4. Appellant has been an IAS since year 2000. He had (has) cause of action under the CAN SPAM ACT of 2003, and, even though complaint did not claim damages under the Act, appellant stated in court that Act had recently passed Congress (October 22, 2003) and was soon to be signed by the president (December 16, 2003) and amendment of complaint to include appellant's qualifications (standing) under the CAN SPAM ACT would rightly and more effectively expand appellant's cause of action.

Issue 3: Certain Appellees Should Have Been Entered/Judged in Default:

1. Judge Real abused discretion when he (1) granted Citibank, Inc. its ex parte application for extension of time to file answer on September 4, 2003 and (2) issued ORDER TO SHOW CAUSE RE DISMISSAL FOR LACK OF PROSECUTION on January 15, 2004 because appellees waived their objection to insufficient service of process or any other defect in personal jurisdiction by failing to make timely objection and had thus consented to litigate action in the United States District Court, Central District of California. Judicial discretion was abused when judge grounded grant of Citibank, and VISA motions on "insufficient service of process".

2. "Ex Parte Applications.

Think twice. The Court strongly discourages ex parte applications. See Mission Power Eng. Co. v. Continental Casualty Co., 883 F.Supp. 488 (C.D.Calif. 1995). Strict adherence to Local Rule 7-19 is necessary. Consequences of Non-Compliance. If counsel fail to file the required Pre-Trial documents or fail to appear at the Pre-Trial Conference and such failure is not otherwise satisfactorily explained to the Court, (a) the cause shall stand dismissed for failure to prosecute, if such failure occurs on the part of the plaintiff, (b) default judgment shall be entered if such failure occurs on the part of the defendant; or (c) the Court may take such action as it deems appropriate." [Scheduling and Case Management Order, CV AHM (x), United States District Court - Central District of California]

3. "When defendant has waived his objection to insufficient service of process or any other defect in personal jurisdiction by failing to make timely objection and has thus consented to litigate action in that court, court may not, either upon defendant's motion or its own initiative, dismiss suit for lack of personal jurisdiction or for insufficient service of process. *Pardazi v Cullman Medical Center* (1990, CA11 Ala) 896 F2d 1313, 52 BNA FEP Cas 685, 53 CCH EPD, sec. 39757, 16 FR Serv 3d 988." [FRCP, Rule 12, n 461]

4. Defendants failed to object to service of process within time limits for answer to complaint.

5. ORDER TO SHOW CAUSE RE DISMISSAL FOR LACK OF PROSECUTION specified question of insufficient service of process to VISA. Appellant's excusable absence at hearing on questionable order was not "lack of prosecution" or failure to prosecute.

6. In *Neitzke v. Williams*, 490 U.S. 319, 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989), a state prisoner commenced a federal action by filing a motion to proceed in forma pauperis and a complaint under 42 U.S.C. s 1983 charging prison officials with violating his constitutional rights. The in forma pauperis statute, 28 U.S.C. s 1915(d), authorizes courts to dismiss an in forma pauperis claim if, inter alia, the action is "frivolous." The district court dismissed the complaint sua sponte as frivolous under s 1915(d) on the ground that it failed to state a claim upon which relief could be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Seventh Circuit reversed. The Supreme Court affirmed the court of appeals. It held that "a complaint filed in forma pauperis is not automatically frivolous within the meaning of s 1915(d) because it fails to state a claim."

7. Is not Judge Real's dismissal of the complaint against VISA, based on sua sponte Order To Show Cause, sua sponte dismissal? True to form, presiding judge did not cite to any rules or precedent in support of decision. Therefore, it must be presumed that FRCP 41(b) was controlling. VISA did not move for dismissal on failure to prosecute grounds. "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant." [FRCP 41(b)]

8. "While court may dismiss case sua sponte with prejudice for failure to prosecute under Rule 41(b), such dismissal is extreme sanction which amounts to abuse of discretion where there is no record of willful contempt or contumacious conduct. *Hildebrand v Honeywell, Inc.* (1980, CA5 Tex) 622 F2d 179." [FRCP, Rule 41, n 127]

9. There was no record of willful contempt or contumacious conduct in this case. Therefore, Judge Real abused discretion when he dismissed case sua sponte.

10. The Court in *Neitzke* contrasted the judicial screening process available under the in forma pauperis statute with cases where the plaintiff pays the filing fees. Section 1915(d) screening reflects, the Court stated, congressional recognition "that a litigant whose filing

fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits." A complaint filed by a fee-paying litigant subject to economic incentives can be dismissed under Rule 12(b)(6), but in such a case, the Court stated, Rule 12(b)(6) "does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations. District judges looking to dismiss claims on such grounds must look elsewhere for legal support." [*Neitzke v. Williams*, 490 U.S. 319, 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989)]

11. Judge's sua sponte dismissal was abuse of discretion.

12. Citibank should not have been granted extension of time on insufficient service of process grounds, and, therefore, should have been entered in default of answer within time limits pursuant to appellant's request.

13. "Default judgment was properly entered by clerk of court pursuant to Rule 55(b)(1) against corporation for failure to appear, though such rule applies only to parties who have never appeared in action and court will normally attempt to find appearance by defendant, since corporation not only did not answer complaint but did not demonstrate any clear purpose to defend suit... *Direct Mail Specialists, Inc. v Eclat Computerized Technologies, Inc.* (1988, CA9 Cal) 840 F2d 685, 10 FR Serv 3d 802." [FRCP, Rule 55, n 19]

14. VISA did not appear prior to its much belated motion to dismiss. VISA also "...did not demonstrate any clear purpose to defend suit" prior to appellant's motions for entry of default and, in fact, VISA refused to defend suit in a letter to the appellant exhibited in said motion(s). (See Letter)

15. "Denial of the motion for default judgment is interlocutory and is not an appealable order. *McNutt v Cardox Corp.* (1964, CA6 Ky) 329 F2d 107, 8 FR Serv 2d 55B,27, Case 1." [FRCP, Rule 55, n 27]

16. District court did not deny appellant's motion! Judge Real refused to deny the motion (adjudicate) and pro se clerk refused to lodge motion(s) that were properly filed with her and served to appellees, pursuant to Rule 5 and 55. Refusal to adjudicate and/or lodge motion(s) was an abuse of discretion.

Issue 4: Dismissals Were Granted Contrary to Supreme Court Decisions:

1. District court accepted (did not reject) and effectively affirmed Mastercard's argument at page 4 of DEFENDANT MASTERCARD INTERNATIONAL INCORPORATED'S NOTICE OF MOTION AND MOTION TO DISMISS THE COMPLAINT, citing *Brunswick Corp. v Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477, 489 (1977), "...Plaintiff fails to allege antitrust injury to himself, which, alone, is fatal to his antitrust claims."

2. Court's tacit acceptance of argument was plain error for two reasons. First, Supreme Court decision in *Brunswick* concerned only a 15 U.S.C., sec. 18 violation, "We therefore hold that for plaintiffs to recover treble damages on account of sec. 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiff must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." And second, Appellant O'Brien clearly and frequently alleged in complaint (and implied ability to prove) antitrust injury "...of the type the antitrust laws were intended to prevent and that flows from that which makes defendants [appellees] acts unlawful."
3. MC defense at point noted above was grasping-at-straws if not entirely ludicrous. It presumed Judge Real had not read the complaint. Therefore, grant of Mastercard's motion to dismiss on Rule 12(b)6 grounds supported by MC's *Brunswick* claim was plain error in the interpretation (overlook?) of a Supreme Court decision.
4. VISA, Mastercard and/or Citibank can be judged for default of answer even though claims against other appellees have been dismissed because court's misinterpretation of Supreme Court rulings negates preclusion of default judgment in multi-defendant cases via adjudication on the merits.
5. "An application for a writ of habeas corpus on behalf of a person in custody shall not be granted with respect to any claim that was adjudicated on the merits unless the adjudication of the claim -- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision what was based on an unreasonable determination of the facts in light of the evidence presented..."
6. Adjudication in this case resulted in decisions that were contrary to, or involved unreasonable application of, clearly established Federal law as determined by the Supreme Court. Therefore, without adjudication on the merits, default judgment can be prayer for by the appellant.
7. "The Court also upheld the principle that a state court decision 'involve[s] an unreasonable application of clearly established Federal law, as determined by the Supreme Court when the state court 'identifies the correct governing legal principle from th[e] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Williams*, 120 S.Ct. at 1523." [*Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000)]
8. Judge Real's decisions to dismiss must be considered unreasonable because he did not offer reasons why facts in well-pled complaint were incapable of proof at trial.
9. Although not yet in the Supreme Court related case proves point. VISA publicly admits on the internet its conviction on charge alleged in appellant's complaint. "Judge Jones ruled against MasterCard and Visa on the second count brought by the DOJ targeting MasterCard's Competitive Programs Policy and Visa's rule 2.10e. The policy

and rule prohibit proprietary card rivals American Express and Discover from gaining access to the network of banks the associations each spent more than 30 years building."

[MasterCard International Litigation Website (Official):

http://www.mastercardintl.com/newsroom/doj_lawsuit.html]

10. "Although I dissent from the majority's holding, I agree that the dismissal in the present case must be reversed. This is because plaintiff was not given an opportunity to amend his complaint to cure its defects, as required by *Neitzke v. Williams*, 490 U.S. 319, 109 S.Ct. 1827, 1834, 104 L.Ed.2d 338 (1989), and *Colburn v. Upper Darby Tp.*, 838 F.2d 663, 666 (3d Cir. 1988), *cert denied*, ---U.S.---, 109 S.Ct. 1338, 103 L.Ed.2d 808 (1989)." [*Oatess v. Sobolevitch*, 914 F.2d 428 (3rd Cir. 1990)]

11. How could judge dismiss appellant's sec. 1 claims with evidence at (7.) above flying?

Issue 5: Breach of the California Code of Judicial Ethics:

1. Judge Real showed bias and abused discretion by permitting, considering and granting Appellant Citibank's ex parte application without stipulation from or timely notice to opposing counsel.

2. "(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status, or (2) sexual harassment.(Canon 3B (5) amended effective December 22, 2003.) (7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows: (a) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. (b) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges. (c) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge. (d) A judge may initiate ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided: (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

This Canon does not prohibit a judge from initiating or considering an ex parte communication when authorized to do so by stipulation of the parties." [California Code of Judicial Ethics, Division II., Canon 3 (B)(5)]

3. Judge Real's frequent credit card transactions with one or more appellee created the appearance of exploitation and/or favoritism and did not minimize potential for disqualification.

"(1) A judge shall not engage in financial and business dealings that (a) may reasonably be perceived to exploit the judge's judicial position, or (b) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to appear before the court on which the judge serves.

ADVISORY COMMITTEE COMMENTARY

The Time for Compliance provision of this Code (Canon 6F) postpones the time for compliance with certain provisions of this Canon in some cases. A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to appear either before the judge personally or before other judges on the judge's court. A judge shall discourage members of the judge's family from engaging in Canon 4 dealings that would reasonably appear to exploit the judge's judicial position or that involve family members in frequent transactions or continuing business relationships with persons likely to appear before the judge. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification. Participation by a judge in financial and business dealings is subject to the general prohibitions in Canon 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Canon 2B against the misuse of the prestige of judicial office." [Ibid., sec. 4(D)]

4. "A significant majority of states require disclosure of loans under the Code of Judicial Conduct, but the Code is very murky on its reporting requirements for loans, leading to murky and inconsistent interpretations among the states. Loans are not mentioned in the general disclosure provisions. [See Model Code, Sec. 4H(2) (1990) (emphasis added). Model Code Canon 5(C)(4)(c)(1972) (same effect) Rather, a separate section addresses disclosure of loans, stating first that certain loans are generally permitted, and then that a judge may accept any other gift, bequest, favor, or loan only if: the donor is not a party or other person who has come or whose interests have come or are likely to come before the judge; and, if its value exceeds \$150., the judge reports it in the same manner as the judge reports compensation in Section 4H. Model Code, Section 4(D)(5)(h) (1990); 5(C)(4)(c) (1972)."] [Judicial Code of Ethics: Financial Disclosure: sec. 8.09]

5. Obviously, credit card indebtedness and/or on-going credit card transactions involving one or more party to a case, especially where credit limits/rates are variable, is tabu for presiding judge.

Issue 6: Appellant Did Not Fail To Prosecute:

1. "Counsel for the moving party and the opposing party shall be present on the hearing date and shall have such familiarity with the case as to permit informed discussion and argument of the motion. Failure of any counsel to appear, unless excused by the Court in advance pursuant to L.R. 7-15 or otherwise, may be deemed consent to a ruling upon the motion adverse to that counsel's position." Local Rules of the Central District of California, L.R. 7-14 :Appearances at Hearing]

2. Appellant had excuse and good reason for not attending hearings on December 16, 2003 and January 26, 2004. Appellee VISA did not offer an excuse for failure to attend hearing on January 26, 2004.

3. Court was informed well before the hearing on VISA's motion to dismiss that Plaintiff O'Brien was not able to arrive at the Court at 10:00am. Difficulty in appearing at hearing scheduled at 10:00am on (date) was compounded by fact hearing was on a Saturday when plaintiff was not able to arrange transportation. Short notice of hearing on Saturday contributed to plaintiff's inability to appear.

4. Plaintiff's prior bad experience with Judge Real's clerk over the issue of continuance (Nov. 3, 2003) caused plaintiff to consider futile call to clerk seeking to be excused from appearance at the VISA hearing on December (?).

5. Pro se, in forma pauperis appellant contends absence from hearings, where he had no further statements to make, did not constitute willful or negligent "lack of prosecution" and was excused, de facto, under the facts and circumstances of the case.

6. "Counsel for the moving party and the opposing party shall be present on the hearing date and shall have such familiarity with the case as to permit informed discussion and argument of the motion. Failure of any counsel to appear, unless excused by the Court in advance pursuant to Local Rule 7.11 or otherwise, may be deemed consent to a ruling upon the motion adverse to that counsel's position." [Local Rules of the Central District of California: Rule 7.10 (7-7.10) APPEARANCES AT HEARING]

7. VISA's unexcused absence (no excuse served) at the January 26, 2004 hearing could be interpreted as implied consent to appellant's reply in opposition even more justly than appellant's "excused" absence was consent to VISA's motion. (See Order with VISA absence proven)

8. Therefore, issue of Final Order granting VISA's motion exclusively grounded on appellant's "lack of prosecution" was an abuse of discretion.

Issue 7: Presiding Judge Displayed Actual Bias:

1. "The Code of Judicial Conduct expressly prohibits judges from receiving loans from persons whose interests come or are likely to come before them." [Code of Judicial Ethics, sec. 4D(5)(h)(1990)]

2. Judge Real carried a negative balance on one or more credit card(s) issued by a member of VISA or MASTERCARD over time period of proceedings in case at bar. Judge, as debtor of defendant VISA, was, very apparently, biased in favor of defendant(s) as evidenced by (a) clerk's repeated obstruction of plaintiff's Entry of Default (precluding default judgment), (b) judge's refusal to acknowledge plaintiff's ex parte application (filed shortly after defendant Citibank's application was filed and approved - pro se litigants often follow tactics of reputable adversaries), (c) judge's short (nine day) notice of special, otherwise unnoticed hearing (on Saturday) when, from information available to the judge, it was probable/possible that plaintiff would be unable to attend, (d) dismissal of complaint against VISA exclusively on "failure to prosecute", and, finally, (e) dismissal of the complaint against all other defendants without stating rhyme or reason and specifying denial of leave to amend.

3. Breach of Code of Ethics, and other conduct stated above, shows, unmistakably, that actual bias against the plaintiff was harbored in the heart of the presiding judge.

Issue 8: Judge/Clerk Abused Discretion:

On March 11, 2003, Clerk of the Court (Ms Rosalind Lockett) filed and served to plaintiff and defendant, DEFAULT BY CLERK F.R.Civ.P.55(a). Document declares fact defendant Microsoft Corp., after receiving Summons served by Plaintiff O'Brien, "...failed to plead or otherwise defend..." as directed in Summons and provided in the Federal Rules of Civil Procedure.

2. "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." [FRCP, Rule 55(a)]

3. "Although under this rule default should be entered by clerk without application to court, rule is not limitation and court, having power, will grant motion and enter default. United States use of Federal Housing Administration v Jackson (1938, DC Or) 25 F Supp 79" [FRCP, Rule 55, n 20]

COMMENT ON 28 U.S.C., sec. 455(a) and FRCP 41(b)

Even should the Court of Appeals determine that Judge Real's behavior fell short of actual bias, there exists sufficient evidence in case record(s) to support a decision for recusal.

"The requirement that Microsoft show actual bias [] was inconsistent with the language of 28 U.S.C. s 455(a). Under that provision, "what matters is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548 (1994). In holding that, absent a showing of actual bias, disqualification was not effective until eight months after the earliest known ethical violation committed by the district judge, the *U.S. v. Microsoft* Court's decision conflicted with the Supreme Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), as well as the Tenth Circuit's decision in *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993), and the Ninth Circuit's decision in *Preston v. United States*, 923 F.2d 731 (9th Cir. 1991)." [SC decision: quote]

Judge Real appeared biased and/or prejudiced in the case.

"The question of whether a showing of actual bias is required before disqualification is available to remedy flagrant and concealed violations of 28 U.S.C. s 455(a) is a substantial one for purposes of Rule 41(d)(2)(A). The Supreme Court found the issue of remedies for violations of 28 U.S.C. s 455(a) deserving of its attention in *Liljeberg*, and Microsoft respectfully submits that this Court's decision conflicts with *Liljeberg*. There also can be no doubt that requiring a showing of actual bias creates a conflict with both the Tenth Circuit's decision in *Cooley* and the Ninth Circuit's decision in *Preston*. The question presented thus falls within the first class of cases suitable for review on certiorari. See Sup. Ct. R. 10(a); see also *United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993) ("A conflict among the circuits is an accepted basis for the granting of the writ of certiorari.").

The Court found that the district judge committed clear and repeated violations of the Code of Conduct for United States Judges. See Op. at 113-17. The Court also found that the district judge's "conduct destroyed the appearance of impartiality" in violation of 28 U.S.C. s 455(a), which required that he disqualify himself at the time the violations began to occur. See Op. at 122.

Judge Real may have owned Microsoft stock during the pendency of *O'Brien v. Microsoft* only expensive investigation will confirm that fact. Judge Real was in debt to VISA during appellant's first action against the monopolist. (cite) Judge Real continued to increase indebtedness to VISA/MC during the case presently under review.

The Tenth Circuit in *Cooley* held that a reasonable person would question the district judge's impartiality. To remedy violation of 28 U.S.C. s 455(a), the Tenth Circuit vacated not only each defendant's sentence, but each defendant's conviction as well, and remanded the case for a new trial before a different district judge.

"We are also concerned by the district judge's acceptance of ex parte submissions. 'Ex parte communications generally are disfavored because they conflict with a fundamental precept of our system of justice: a fair hearing requires a reasonable opportunity to know the claims of the opposing party and to meet them.'"

"In re Paradyne Corp., 803 F.2d 604, 612 (11th Cir. 1986) (quoting *Morgan v. United States*, 304 U.S. 1, 18 (1938)). See also Code of Judicial Conduct for United States Judges, Canon 3(A)(4) (a judge "should ... neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding"). Although the district judge stated that he did not consider the ex parte submissions of the Doe Companies or Apple Computer, Inc., see Opinion, 159 F.R.D. at 327-28, he allowed the latter to be filed, and with respect to the former, he suggested that the government should consider the redacted material 'and if it believes such information is pertinent to this case, on notice to defendant, it may request the Court to reopen these proceedings so the information appropriately may be considered.' Id. at 327-28 n.16. We think the appropriate course would have been simply to refuse to accept any ex parte communications." [Case no known]

"The combined effect of the foregoing is to cause a reasonable observer to question whether Judge Sporkin 'would have difficulty putting his previous views and findings aside' on remand. *United States v. Torkington*, 874 F.2d 1441, 1447 (11th Cir. 1989). Accordingly, we will remand the case to the chief judge of the district court, with instructions that it be assigned to another district court judge. [*U.S. v. Microsoft*, Ibid.]

Rule 41(b); Dismissal:

"In *Dimon v. Mansy*, 198 W.Va. 40, 479 S.E.2d 339 (1996), this Court discussed motions to dismiss for failure to prosecute. We held that due process of law requires that specific procedures be followed by a trial court before it can dismiss a plaintiff's action for failure to prosecute. 'Before a court may dismiss an action under Rule 41(b), notice and an opportunity to be heard must be given to all parties of record. To the extent that *Brent v. Board of Trustees of Davis & Elkins College*, 173 W.Va. 36, 311 S.E.2d 153 (1983), and any of our previous holdings differ with this ruling, they are expressly overruled.' Syllabus Point 2, *Dimon v. Mansy*, 198 W.Va. 40, 479 S.E.2d 339 (1996). In Syllabus Point 3 of *Dimon*, this Court listed the requirements that must be met before a case can be dismissed under Rule 41(b) for failure to prosecute. In carrying out the notice and opportunity to be heard requirements, before a case may be dismissed under Rule 41(b), the following guidelines should be followed: First, when a circuit court is contemplating dismissing an action under Rule 41(b), the court must first send a notice of its intent to do so to all counsel of record and to any parties who have appeared and do not have counsel of record. . . . Second, any party opposing such motion shall serve upon the court and the opposing counsel a response to such motion within fifteen days. . . . Third, if no motion is made opposing dismissal, . . . the court may decide the issue upon the existing record. . . . Fourth, the plaintiff bears the burden of going forward with evidence as to good cause for not dismissing the action; if the plaintiff does come forward with good cause, the burden then shifts to the defendant to show substantial prejudice to it in allowing the case to

proceed; if the defendant does show substantial prejudice, then the burden of production shifts to the plaintiff to establish that the proffered good cause outweighs the prejudice to the defendant. Fifth, the court, in weighing the evidence of good cause and substantial prejudice, should also consider (1) the actual amount of time involved in the dormancy of the case, (2) whether the plaintiff made any inquiries to his or her counsel about the status of the case during the period of dormancy, and (3) other relevant factors bearing on good cause and substantial prejudice. Sixth, if a motion opposing dismissal has been served, the court shall make written findings, and issue a written order . . . appealable to this Court as a final order. . . . Seventh, if the plaintiff does not prosecute an appeal of an adverse decision to this Court within the period of time provided by our rules and statutes, the plaintiff may proceed under Rule 41(b)'s three-term rule to seek reinstatement of the case by the circuit court[.] . . . Eighth, should a plaintiff seek reinstatement under Rule 41(b), the burden of going forward with the evidence and the burden of persuasion shall be the same as if the plaintiff had responded to the court's initial notice, and a ruling on reinstatement shall be appealable as previously provided by our rule. Syllabus Point 3, in part, *Dimon v. Mansy*, 198 W.Va. 40, 479 S.E.2d 339 (1996). We stressed in *Dimon* that dismissing a claim for failure to prosecute carries serious implications for a plaintiff, in that it can result in the dismissal of his action with prejudice. See also *Hartman v. Morningstar Bldg. Co., Inc.*, 206 W.Va. 616, 621, 527 S.E.2d 160, 165 (1999).² In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record.' 'Although courts should not set aside default judgments or dismissals without good cause, it is the policy of the law to favor the trial of all cases on their merits.' Syllabus Point 2, *McDaniel v. Romano*, 155 W.Va. 875, 190 S.E.2d 8 (1972)."

Appellant's non-appearance at the two hearings on VISA's belated answer were not flagrant failure(s) to prosecute.

"Because dismissing an action for failure to prosecute is such a harsh sanction, dismissal with prejudice is appropriate only in 'flagrant' cases. *Dimon v. Mansy*, 198 W.Va. at 45, 479 S.E.2d at 344. In this case, although the appellant's counsel was less than diligent, the outright dismissal of the appellant's action carries serious implications and is unwarranted in this instance. When dismissing a case under Rule 41(b), in order to preserve the integrity of the judicial process, various interests must be weighed including the interest in judicial efficiency, the rights of plaintiffs to have their day in court, any prejudice that might be suffered by defendants, and the value of deciding cases on their merits. Considering all of '[A] court's authority to issue dismissals as a sanction must be limited by the circumstances and necessity giving rise to its exercise.' *Dimon v. Mansy*, 198 W.Va. 40, 45, 479 S.E.2d 339, 344 (W.Va. 1996). 'The sanction of dismissal with prejudice for the lack of prosecution is most severe to the private litigant and could, if used excessively, dissuade the dignitary purpose for which it is invoked. It remains constant in our jurisprudence that the dignity of a court derives from the respect accorded its judgment.' *Dimon v. Mansy*, 198 W.Va. at 45, 479 S.E.2d at 344. 'The power to resort to the dismissal of an action is in the interest of orderly administration of justice because the general control of the judicial business is essential to the trial court if it is to function.'

Dimon v. Mansy, 198 W.Va. at 45, 479 S.E.2d at 344. See also Brent v. Board of Trustees of Davis and Elkins College, 173 W.Va. 36, 39, 311 S.E.2d 153, 157 (1983) (Rule 41(b) functions 'as a docket-clearing mechanism which enables trial courts to purge themselves of stale cases, while prodding dilatory plaintiffs to proceed to trial.)

This Court finds that, in this case, the appellant's interest in moving forward with his claim outweighs concerns of judicial efficiency and any prejudice that the defendant may have suffered. The circuit court erred in refusing to reinstate the appellant's case.

CONCLUSION

1. Judge Real knew from appellant's MOTION FOR CONTINUANCE OF HEARING DATE FROM NOV. 3, 2003 TO NOV. 17, 2003 (filed on October 27, 2003) which noticed Congressional passage (Oct. 22) and appellant's standing (qualifications) re the CAN SPAM ACT of 2003 that appellant would surely modify cause of action to include claims grounded on the Act if/when leave to amend were granted. Improper preclusion of amendment in dismissal orders was clear abuse of discretion.
 2. Because decisions to dismiss the case made no reference to evidence in support of those decisions, presiding judge abused discretion.
 3. Because Judge Real received loans from one or more appellee whose interests came before him in case under review, in form or extension(s) of credit where charges were amortized on a periodic basis or in other form, judge breached the Code of Judicial Ethics at sec. 4D(5)(h).
 4. Because presiding judge's decisions were in plain error which affected substantial rights of the appellant, reviewing court should notice forfeited error(s) because they seriously affected the fairness, integrity, and public reputation of the judicial proceedings under review.
 5. The United States Court of Appeals for the Ninth Circuit should disturb lower court's determinations specified in this appeal because they reveal erroneous legal conclusions and manifest clear error of judgment.
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Respectfully submitted on _____, 2003 by

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B).

This brief uses a mono-spaced face and contains 826 lines of text.

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Rev.: 1/03

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2003, I mailed, via US Priority Mail, four (4) copies of BRIEF OF THE APPELLANT and APPELLANT'S EXCERPTS OF RECORD to the United States Court of Appeals for the Eleventh Circuit and one (1) copy of same documents to the below listed persons;

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United States Court of Appeals

for the Eleventh Circuit

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I further certify that the above documents were filed and served, pursuant to Fed. R. App. P. 25 and Rule 32-4(3) of 11th Cir. Rules.

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