
**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

EDWARD MICHAEL OBRIEN

and SAVIORG corporation,

Plaintiffs-Appellants

v.

TIME WARNER, INC.,

WARNER MUSIC GROUP,

WARNER-ELECTRA-ATLANTIC CORPORATION,

WARNER BROS. RECORDS, INC.,

ATLANTIC RECORDING CORP.,

ELEKTRA ENTERTAINMENT GROUP, INC.,

RHINO ENTERTAINMENT COMPANY,

WAL-MART STORES, INC., K-MART CORPORATION,

BORDERS BOOKS, and MORNING GLORY MUSIC,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

[U.S. District Court Case No. CV 00-10781 R]

[U.S. Court of Appeals Docket No. 01-55413]

OPENING BRIEF FOR APPELLANTS

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I. PROLOGUE

This Opening brief for the Appellants is filed by Plaintiffs-Appellants, Edward Michael O'Brien and SAVIORG, ["P-A"] within time limits and supersedes a preliminary brief filed in this court on February 10, 2001.

This case, alleging violations of Section 1 and 2 of the Sherman Act, (15 U.S.C., sec. 1, 2) and Section 3 of the Clayton Act, (15 U.S.C., Section 14), was filed under, and jurisdiction was conferred upon, United States District Court in the Central District of California ["CDC"] by Section 4c of the Clayton Act, (15 U.S.C., sec. 15). Claims have been made for damages resulting from violations of 15 U.S.C., sec. 1, 2 and 14. P-A claim recovery from Defendants-Appellees ["D-A"] of damages in excess of \$75,000. trebled, payment of federal/state exemplary damages, costs and expenses of suit and reasonable attorneys' fees.

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

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

Venue is proper in the Central District of California under 28 U.S.C., sec. 1391 because defendants transact business and are found within this district.

Defendants' anticompetitive practices complained of in this case directly and proximately caused antitrust injury (1) to plaintiff's public charity, business and person,

(2) to numerous competitors in relevant markets, and (3) to the general welfare and economic status of large numbers of consumers in the United States and worldwide.

This appeal is from an order of dismissal issued on January 12, 2001 in CDC and is taken as of Right pursuant to the Federal Rules of Appellate Procedure ["FRCP"], Rules 3 and 4.

Notice of Appeal and Request to Proceed In Forma Pauperis was made within time limits on February 10, 2001.

II. OPENING STATEMENT

On January 12, 2001 the CDC issued an order *sua sponte* dismissing, without leave to amend, this case which had been, earlier on same day, finalized in transfer by the Panel on Multidistrict Litigation (District of Columbia) ["PML"] to the United States District Court (District of Maryland) ["DM"] exclusively on grounds (no other opinion or judge's reasons offered):

"A corporation can not appear pro se nor can it be represented by a pro se litigant. Moreover there are no facts alleged that make this a viable antitrust action for either plaintiff EDWARD MICHAEL O'BRIEN or SAVIORG." [U.S.D.C., *Order* issued Jan. 12, 2001, CV 00-10781 R]

CDC order caused PML's "order" finalizing its *Conditional Order of Transfer* issued on December 27, 2000, conditionally transferring this case to Case No. 1361 in DM, to be questionably vacated by PML on February 5, 2001. PML's "order" had, allegedly, not been *filed* by DM's court clerk (transferee court), pursuant to 28 U.S.C., sec. 1407 (c), until January 16, 2001, four days after automatic finalization of the conditional order on January 12, 2001. CDC's dismissal followed immediately on its heels.

P-A contend CDC, the Hon. Manuel L. Real presiding, alone and in cooperation with PML and DM presiding judge, the Hon. D. Brock Hornby, abused discretion by (1) sua sponte dismissal of the case on questionable grounds without motion(s) for dismissal from any defendant; without prior notice from the court regarding question of corporate plaintiff's representation; after CDC's approval of PML's conditional transfer of the case (and without subsequent proceedings in CDC justifying change of approval); without granting P-A opportunity to amend prior to sua sponte dismissal, and (2) conspiring and acting to deny and/or abridge disabled plaintiff's rights and privileges without due process of law.

P-A appeals to obtain remand of this case to CDC or DM with change of presiding judge(s) for continued and fair adjudication of this case on its merits, to include judgment of P-A's motion(s) for *Entry of Default* and *Default Judgment* against all summoned

defendants ["D-A"] who did not answer the complaint or otherwise defend within time limits, and heretofore.

III. STANDARDS OF REVIEW

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

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

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

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

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

IV. ISSUES RAISED ON APPEAL

1. Whether CDC abused its discretion by dismissing the complaint prior to (1) D-A's answer, motion for dismissal or other meritorious attempt to defend within time limits, (2) without providing adequate reason(s) for denial of requested federal marshal's service of process, (3) without judge's opinion and/or reasons specified in sua sponte order of dismissal, (4) without declaring the complaint to be frivolous, and (5) without prior notice or grant of opportunity for P-A to amend the complaint.

2. Whether CDC abused its discretion by dismissing entire case merely for *pro se* representation of public charity plaintiff, SAVIORG, before ascertaining whether or not

public charity was expressly incorporated for; granted federal *Letter of Determination* for; and/or operational primarily for charitable service to "poor" persons.

3. Whether CDC abused its discretion by dismissing entire case when private plaintiff merited standing, *pro se*, with or without corporate plaintiff's joinder, because private plaintiff alleged facts that make this case a viable antitrust action for EDWARD MICHAEL O'BRIEN, if not for SAVIORG.

4. Whether CDC abused its' discretion by denying requested service of process via Federal Marshal, pursuant to 28 U.S.C., section 1915, without "good cause" shown.

5. Whether CDC intentionally abused its discretion by dismissing P-A's case via coordinated action with PML, itself abusing discretion by vacating its *Conditional Order of Transfer* (Dec. 27, 2000) and its "order" finalizing transfer after CDC dismissed the case sua sponte later on same day before DM clerk physically filed PML's *Conditional Order of Transfer* (Dec. 27, 2000) made unconditional (*finalized*) at 00:01 (Eastern Standard Time) on January 12, 2001.

6. Whether CDC Judge, Hon. Manuel L. Real, and DM judge, Hon. D. Brock Hornby and/or members of PML conspired and took action to deny disabled plaintiff's rights and privileges without due process of law.

7. Whether CDC judge, Hon. Manuel L. Real should be recused for actual bias demonstrated against P-A.

V. STATEMENT OF THE CASE

On August 8, 2000, Attorneys General of thirty (30) States of the United States of America, under the leadership of Eliot Spitzer, Attorney General of New York, in sovereign capacity *parens patriae* on behalf of natural persons for whom the States are entitled to act, and *parens patriae* on behalf of each States' citizens, economy and general welfare, filed an action in the United States District Court very similar to this case. P-A has, nevertheless, found it necessary to file and prosecute separate civil action because California, P-A's state of incorporation, current business location, primary residence and state of citizenship, was not included among aforesaid States' actions on behalf of private and public plaintiffs complaining of antitrust injury, similar to that sustained by P-A, resulting from antitrust law violations committed by many of the same persons summoned as defendants in this case.

On October 10, 2000 P-A filed complaint containing provable allegations and demand for payment of treble damages caused by D-A. After review of the complaint by assigned Magistrate Judge, the Honorable Andrew J. Wistrich, who certified the complaint not frivolous, malicious or void of provable claims, Court's Clerk mailed P-A formal

Summons which was copied and served, within time limits, to each named D-A together with a copy of the complaint and *Request for Waiver of Service*.

VI. CAUSE-OF-ACTION

Action under review was brought in United States District Court (Central District of California) against D-A, Time Warner, Inc. ["TW"], Warner-Elektra-Atlantic Corporation ["WEA"], Warner Music Group ["WMG"], Warner Bros. Records, Inc. ["WBR"], Atlantic Recording Corp. ["ARC"], Elektra Entertainment Group, Inc. ["EEG"], and Rhino Entertainment Company ["REC"], WM, K-Mart Corporation ["KMC"], Morning Glory Music, Inc. ["MGM"], and Border's Books, Inc. ["BBS"] under the laws of the United States of America (Title 15, United States Codes, Sections 1, 2, 14, and 15) and of the State of California (Business & Professions Codes, Sections 16720, et seq. and 17200, et seq.) to recover damages incurred by the Plaintiff caused by illegal *tying* and *price-fixing* by defendants acting as distributor(s) of prerecorded music ["PRM"] including (1) compact discs ["CDs"], cassettes and albums, (2) PRM wholesalers, and (3) PRM retailers.

TW directly, indirectly and/or through other corporations, subsidiaries, divisions, agents or devices adopted, maintained enforced and threatened to enforce certain policies, plans and directives which made the receipt of (1) Continuing Distribution of PRM ["CDP"], (2) Cooperative Advertising ["CO"] and/or Promotional Funds ["PF"] tendered by TW and subsidiaries to associated retailers contingent upon the actual or suggested retail price at which PRM products were advertised, promoted, offered for sale or sold by traditional retailers ["TR"] or discount retailers ["DR"], including D-A.

WEA, WMG, WBR, ARC, EEG, REC, WALMART, KMC, MGM and BBS conspired with, and fully agreed to implement and maintain, TW's Minimum Advertised Pricing ["MAP"] policies, plans, directives and actions.

Note: When WEA is read henceforth herein WEA includes all named D-A not retailers of PRM. Although certain D-A other than TW and WEA did not always act in conspiracy over time of cause of action, for purposes of clarity and brevity herein, comprehensive conspiracy is averred.

TW, in conspiracy and in contractual agreement with other named Defendants to monopolize and/or attempt to monopolize and, thereby, to preclude competition in PRM markets (wholesale and retail) and to maximize retail prices for PRM, used (1) TW/WEA and contracts with TRs and DRs for CDP, and (2) CO and PF benefits tied to CDP contracts to compel TR's and DR's advertisement/sale of PRM at retail prices specified in Defendants' MAP directives.

TW and subsidiaries' monopolistic policies compelling fixed PRM prices coupled with ties of two separate values (CO and PF) to a third value (CDP), as alleged above,

constituted illegal price-fixing (15 U.S.C., sec. 1), monopolization and/or attempted monopolization (15 U.S.C., sec. 2) and illegal tying (15 U.S.C., sec. 2 and 14).

When TW/WEA distributed its' monopolized, tied and price-fixed PRM products to TRs and DRs, TW/WEA did *not* immediately increase wholesale prices to TRs and DRs. Rather, initial and/or primary targets for D-A's illegal actions were retail consumers in PRM markets. P-A was such a consumer(s)

Following MAP revision and promulgation in 1996, initial antitrust injury was only to retail consumers overcharged by Defendants for PRM. Initially, wholesalers and retailers were not overcharged by TW/WEA. Wholesale prices remained the same. The first overcharge issuing from revised MAP policies, targeted and executed by the TW/WEA-TR/DR conspiracy (collusion), directly and exclusively impacted only consumers including P-A.

D-A had not "passed on any monopoly overcharge to its' own customers, the wholesale purchasers..." [*IN RE BRAND NAME PRESCRIPTION DRUGS*, 123 F.3d 604-606 (7th Cir. 1997)]

Evidence note: A recent (Feb. 2001) "give away" of PRM (CDs) by Columbia House, Inc., a 50% owned affiliate of defendant-appellant, Time Warner, Inc., reveals the actual value of PRM (CDs) to be far below current average retail price(s), fixed by D-A nationwide. The "junkmail" sent by Columbia House to P-A expressly states \$15.48 per CD as the current average retail price. According to same solicitation, any consumer having any level of credit rating and a "friend" with same or different rating, can now obtain at least twenty-seven (27) new, first-rate CDs (15 for solicitee and 12 for her "friend") for a total cost of \$4.95 (shipping and handling).

Even factoring D-A's "free" offer as a loss leader program rationalized under promotional expense, actual production cost and/or wholesale cost of PRM (CDs) must be radically below retail prices fixed monopolistically and paid for injuriously by consumers.

Although consumers, including P-A, were technically indirect purchasers of PRM they were directly injured (financially) by Defendants' conspiratorial actions and the doctrine established by the United States Supreme Court in *Hanover Shoe* and *Illinois Brick* precluding antitrust standing for "indirect purchasers" does not apply to this case where (1) retail customers, including P-A, were first to be overcharged, (2) organizations other than the manufacturer, middlemen, are summoned as defendants, (3) operational control by manufacturer(s) over middlemen existed, (4) equity control over middlemen existed, (5) vertical and/or horizontal conspiracy to break antitrust laws obtained, and (6) virtual pre-existing, cost-plus contracts to purchase PRM existed between consumers (including P-A) and middlemen such that it is relatively simple to calculate exactly how much of a given retail price paid by consumers (including P-A) was due to manufacturer's "wholesale" price and if, in fact, calculated wholesale price was entirely passed-on in retailers' prices to consumers. [*Hanover Shoe, Inc. v. United Shoe Machinery Corp.* 392

U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977); *In re Coordinated Pretrial Proceedings In Western Liquid Asphalt Cases. State of Alaska et al., v. Standard Oil Company of California* 487 F.2d 191 (1973); *Jewish Hospital Ass'n v. Stewart Mechanical, etc.*, 628 F.2d 971 (1980); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1162 (5th Cir. 1979)]

It can be argued, tangentially, that D-A actions also injured recording artists and independent producers of PRM who contracted to receive from D-A certain percentages of PRM sales revenues as compensation, when D-A anticompetitive prices curtailed maximum wholesale/retail sales (revenues) of PRM in order to aggrandize D-A on a relatively long term basis.

P-A, including plaintiff-appellant O'Brien in corporate officer capacity and in private consumer capacity, purchased PRM products directly from TRs and DRs for corporate as well as sole-proprietorship and personal use from January 1996 to the present. Therefore, as a directly purchasing consumer of D-A products during the relevant time period, P-A has antitrust standing to assert claims and obtain Court's relief for business and personal damages (trebled) and statute specified exemplary damages (federal / state) because D-A anticompetitive acts directly injured P-A, other consumers, and commerce itself in PRM markets in a manner which federal and state antitrust laws were designed to prevent.

TW/WEA's illegal tying can be synopsized thusly,

a) TW/WEA offered three (3) separate products: (a) National/Regional Advertising Access (Product A), (b) Retail Promotional Benefits (Product B), and (c) PRM (Product C).

b) TW/WEA's new MAP policies (promulgated in 1996 and following) stated effectively, if TRs and DRs wanted to continue to acquire Products A and B they had to purchase Product C restricted by MAP policies which effectively price-fixed all PRM distributed by TW/WEA.

Five "major distributors" distribute and sell over 85% of all PRM in the United States. WEA, wholly owned by TW, is one of the five major distributors of PRM. Sony Music Entertainment, Inc., Universal Music and Video Distribution, Inc., EMI Music Distribution, and Bertelsmann Music Group, Inc. are the other major distributors. P-A cannot prove purchases from Sony, Universal, EMI and Bertelsmann at this time and has not included same in defendants summoned for that reason. (Note: P-A did not join the Golf O'Brien Company to P-A even though that company can prove purchases by same. P-A wanted to reduce the complexity of its action, and believed at the time of complaint's filing that the two (2) plaintiffs joined were adequate for antitrust standing and claim(s) for damages.)

Because P-A can prove distributors' oligopoly agreed, contracted and acted in functional unity to create, promulgate and integrate MAP policies (1996-2000) it is

alleged that Defendants' conduct constituted illegal *monopolization* where oligopoly acted progressively and unilaterally to monopolize and/or attempt to monopolize relevant markets via price-fixing and illegal tying, as proscribed under Title 15, sec. 1, 2 and 14.

Defendants agreed to, contracted for, and did fix prices and this fact alone is evidence of monopoly power.

"The presence of price discrimination in the economic sense is evidence of the presence of monopoly power--the power to raise price above cost without losing so many sales as to make the price rise unsustainable...Since monopoly power can be created by collusion among competing sellers, the existence of industry-wide price discrimination is some evidence of collusion." [Ibid., p.603]

D-A had sufficient monopoly power to control retail prices in relevant interstate markets and thereby increase collective regional and national monopolies in those markets. The purpose of D-A monopolistic policies and agreements was to arbitrarily raise and maintain all PRM retail prices and so reduce and/or eliminate retail price competition from discount retailers which had threatened the artificially high and stable profit margins enjoyed, long term, by TW/WEA and its' TRs.

D-A began to threaten and eventually preclude competition in relevant markets when numerous DRs (including also Target, Inc., Circuit City, Inc., and Best Buy, Inc.) found that they could legally and profitably undercut prevailing retail prices charged for PRM products by TRs. Customers in great numbers, including P-A, went to DRs who rapidly gained PRM market share at the expense of TRs.

TRs reacted by pressuring TW/WEA (and the other major distributors of PRM) to impose new MAP standards which would more effectively establish retail price levels for PRM, thereby reducing and/or eliminating retail price competition. Responding to that pressure, and desirous of eliminating retail competition for PRM which threatened its' own high profit margins, TW/WEA, agreed to impose stronger MAP policies. TRs immediately acknowledged TW/WEA's new MAP, and sought to strengthen the policies by, among other things, sending letters to TW, WEA and WMG thanking the corporations for implementing the new MAP policies.

TR's demand for TW/WEA's MAP policies backfired, however, when TW/WEA discovered that, due to a preclusion of competition (monopolization) phenomena inherent in MAP implementation, it became increasingly possible for TW/WEA to arbitrarily raise wholesale prices.

MAP policies applied so broadly and punished TRs and DRs violations so severely that they effectively precluded DRs from selling PRM below prices set by TW/WEA (and eventually set by all other PRM distributors). Since discounted sales are "bread & butter" for DRs, they protested vigorously but the severe financial penalties which TW/WEA imposed on noncomplying TRs and DRs created absolute solidarity of

compliance, and made resistance to MAP too dangerous, costly and/or otherwise prohibitive for even the largest DRs, like WALMART and KMC.

Primary effects of D-A anticompetitive agreements and actions have been twofold. First, retail PRM prices, which had been dropping in 1994-1996, were stabilized and raised industry-wide (1996-2000). Second, the PRM distributor oligopoly, in which TW/WEA was prominent, was able to maintain relatively high wholesale prices and margins for PRM products. As a result of both effects, (1) consumers, including P-A, have paid higher prices for PRM than they would have absent illegal conduct, (2) competitors of TRs and DRs have been precluded from competition, and (3) recording artists and other producers of PRM have been financially injured by curtailment of sales revenue based compensation.

VII. PARTIES

Edward Michael O'Brien is the founding president and chairman of SAVIORG corporation, a California public charity [FEIN: 77-0298874], and Golf O'Brien Company, a sole-proprietorship (Santa Barbara, CA software company), both established in 1990 at 3460 Constellation Road, Lompoc, California 93436.

TIME WARNER, INC. is a corporation organized and existing under the laws of the State of Delaware with its' principal place of business at 75 Rockefeller Plaza, New York, New York. TW owns subsidiaries that distribute PRM under names WARNER-ELEKTRA-ATLANTIC CORPORATION, WARNER MUSIC GROUP, INC., WARNER BROS. RECORDS, INC., ATLANTIC RECORDING CORPORATION and RHINO ENTERTAINMENT COMPANY.

WARNER-ELEKTRA-ATLANTIC CORPORATION is a corporation organized and existing under the laws of the State of New York with its principal place of business at 111 North Hollywood Way, Burbank, California.

WARNER MUSIC GROUP, INC. is organized and existing under the laws of the State of Delaware with its principal place of business at 75 Rockefeller Plaza, New York, New York.

WARNER BROS. RECORDS, INC. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 75 Rockefeller Plaza, New York, New York.

ATLANTIC RECORDING CORPORATION is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 75 Rockefeller Plaza, New York, New York.

RHINO ENTERTAINMENT COMPANY is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 10635 Santa Monica Blvd., Los Angeles, California.

ELEKTRA ENTERTAINMENT GROUP, INC. is a corporation organized and existing under the laws of the State of Florida with its principal place of business at 1413 Ryan Lane, Royal Palm Beach, Florida.

WAL-MART STORES, INC. is a corporation that makes retail sales of PRM on an interstate basis, and is organized and existing under the laws of the State of Delaware with principal place of business at 702 S.W. Eighth St., Bentonville, AR 72716.

KMART CORPORATION is a corporation that makes retail sales of PRM on an interstate basis, and is organized and existing under the laws of the State of Michigan with principal place of business at 3100 West Big Beaver Road, Troy, Michigan 48084.

BORDER'S BOOKS, INC. is a corporation that makes retail sales of PRM on an interstate basis, and is organized and existing under the laws of the State of California with principal place of business in Santa Barbara County at 7000 Marketplace Avenue, Goleta, CA 93117.

MORNING GLORY MUSIC, INC. is a company that makes retail sales of PRM on an intrastate basis, and is organized and existing under the laws of the State of California with principal place of business at 1014 State Street, Santa Barbara, CA 93190.

VIII. CO-CONSPIRATORS

Various firms, corporations and other persons, known and unknown, not named as defendants herein, including without limitation unnamed retailers, wholesalers, labels, one-stops and rack jobbers, have participated as co-conspirators with the D-A in the violations alleged in this complaint and have performed acts in furtherance thereof.

IX. TRADE AND COMMERCE

There are two relevant markets in this matter. First, the production, distribution and wholesale of PRM: second, retail sales of PRM. The geographic realm of the wholesale/retail markets is the United States of America.

PRM wholesale markets are characterized by high entry barriers that effectively preclude entry into competition by new distributors.

During the relevant period, defendant distributor, TW/WEA, sold PRM, including compact disks ["CDs"], to retailers located throughout the United States. These products were transported across state lines, were shipped in interstate commerce, and were sold in various States of the USA by numerous retailers.

The activities of each of the defendants, including receiving, distributing, and selling prerecorded music products, were in the regular, continuous and substantial flow of interstate commerce and have had, and do have, a substantial effect upon interstate and intrastate commerce.

X. PRODUCT AND GEOGRAPHIC MARKETS

The product markets in this case are wholesale and retail sales of prerecorded music, including markets and submarkets for CDs, cassettes, and albums. Such products are highly valued by consumers, and have no close substitutes.

The geographic markets in this case are the United States, for sales of PRM at wholesale, and national, local and regional markets and submarkets throughout the United States, for sales of PRM at retail.

XI. PRERECORDED MUSIC INDUSTRY

Each year, consumers pay billions of dollars at retail for PRM products, the vast majority of which are CDs. According to an industry trade association estimate, in 1999 the total U.S. market for PRM was estimated at \$14.6 billion.

After a multiplicity of mergers in the late 1980s and early 1990s, the PRM industry was dominated by six (6) major holding companies, BMG, EMI, SONY, UNIVERSAL, TIME WARNER, and POLYGRAM. This group was reduced to five (5) when UNIVERSAL's parent company acquired POLYGRAM in July 1998. Generally, these holding companies are both vertically and horizontally integrated, comprising both labels and distribution companies. Recording artists ["RA"] enter into contracts with labels, for a certain number of releases during the contract term. The label is responsible, working jointly with RA, for "content development" and for the actual manufacturing of PRM media. Each label also plays a role, with its' affiliated distribution company(s), in marketing the finished product. Distribution companies are responsible for wholesale contracting and distribution of PRM to retailers of new releases and catalogue ordered releases.

There is a group of relatively small "independent" music distributors, but high barriers to entry shield TW/WEA and other major distributors both from expansion by independents and from entry of new independents into wholesale markets for PRM.

Barriers to entry arise from certain monopoly powers (group monopolization) including advantages that accrue to owners of extensive catalogs and "back catalogs" of successful recordings and the enormous financial, logistical and networking resources available to major corporations as they dominate existent and would-be competitors seeking to acquire and maintain control of essential assets including portfolios of successful artists and their works.

For cited and other reasons, wholesale markets for PRM is dominated by major players having few other viable competitors. Major distributors' market shares tend to remain relatively stable over time and "majors" view each other as their only effective competitors.

TW/WEA and its' labels promote their products directly and pay retailers to promote them. Generally, promotional efforts are either media advertisements, or some form of in-store promotion. In-store promotions often involve eye-catching placement of a particular product, for example at an end-cap (the end of a merchandise aisle) or at the cash register. Promotional funding that TW/WEA and/or labels provide to TRs and fully compliant DRs are very substantial, running to many millions of dollars annually. Moreover, promotional payments often exceed the cost to the retailer of providing promotional services.

XII. THREAT OF COMPETITION

Entry into the retail PRM market by DRs (often paying the same wholesale prices as TRs but able to sell in bulk at lower prices) in the early 1990s introduced new and stronger competition into retail markets, and so threatened wholesale markets for prerecorded music. Dangers inherent in the new competition quickly became apparent to TRs. New entrants, including discount "superstore" retailers like Wal-Mart and K-Mart, aggressively offered highly competitive prices to consumers. According to the deposition of one TR, the average price of a CD went from \$15 to \$10 in a short period of time.

DRs' sales grew dramatically, and price competition among music retailers spread rapidly. Although TRs were forced to drop their prices to some extent, they nevertheless lost significant market share to DRs such as Best Buy Inc., Circuit City Inc., Target Inc., Wal-Mart Inc., and K-Mart Inc.

It was not only TRs who felt threatened. TW/WEA and other major distributors recognized that retail price competition was beginning to put pressure on wholesale margins as well, and this fact affected TW/WEA's ability to rationalize wholesale price maintenance and/or increases.

TW/WEA first instituted MAP policies in the early 1990s. According to the terms of the (1996-2000) policies, retailers could not obtain reimbursement for advertising expenditures for PRM advertised below prices listed on the MAP schedules. However,

MAP policies did not immediately push back the rising tide of price competition. As reported in the March 22, 1997 issue of *Billboard*, "When the price war began, the six majors each implemented their own MAP policies, but those early efforts were considered ineffective."

When oligopoly leader, TW/WEA, demanded MAP compliance, MAP proved highly effective curtailing competition and its corresponding effect on prices.

XIII. SCHEME TO STOP COMPETITION

TW/WEA and many other distributors, labels and retailers belong to the National Association of Recording Merchandisers ("NARM"), an industry trade association. Representatives of the distributors, labels and retailers regularly attended meetings of NARM. Distributors' officers and chief executives have served on the board of directors and various committees and groups of NARM, as have the retailers.

NARM provided a forum for private discussion between retailers, labels and distributors regarding MAP policies and MAP pricing levels.

In 1995, with price competition intensifying, and with traditional retailers in deepening financial difficulties, retailers began sending strong messages to TW/WEA and other major distributors that decisive steps were necessary. In February 1995, Jack Eugster, the CEO of Musicland, Inc., a large TR, delivered the keynote address at the NARM convention.

Eugster, who was also NARM's President, spoke to an audience of industry executives, including ranking representatives of TW/WEA and its' labels and retailers. He decried the devaluation of CDs, and called for a return to a "sane" marketplace.

In advocating joint action between TW/WEA and other distributors, labels and retailers in the form of strengthened MAP programs, Eugster said:

"This discussion brings us then to retailer, distributor and music company partnerships. More than ever, these partnerships need to be tightened."

XIV. RELATED CASES

A. *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, MDL Case No. 1361 (D. Me. Nov 1, 2000)

B. *Digital Distribution, Inc., d/b/a Compact Disc Warehouse v. CEMA Distribution*, Civil Case No. 95-3536, was filed in May 1995 in the United States District Court for the

Central District of California. The plaintiffs allege that the major United States distributors of compact discs, CEMA Distribution, Sony Music Entertainment, Inc., Warner Elektra Atlantic Corp., Uni Distribution Corp., Bertelsmann Music Group, Inc., and Polygram Group Distribution, Inc., have conspired to raise, fix and maintain artificially high prices on compact music discs in violation of the federal Sherman Antitrust Act as well as California Cartwright Act.

The complaint alleges, among other things, that each defendant charges virtually identical wholesale prices for new CDs, in most cases representing a mark-up of as much as two thousand percent (2,000%) over the manufacturing cost. Defendants denied these claims and filed a motion to dismiss. The complaint requests an award of treble damages to be distributed to all class members for the increased prices that the members of the class have been forced to pay for compact discs and for an injunction to prohibit this unlawful activity.

In January of 1996, Federal District Judge J. Spencer Letts dismissed the complaint. Plaintiffs appealed this order to the United States Court of Appeals for the Ninth Circuit, Case No. 96-55264, which reversed the district court. The Court of Appeals ruled that plaintiffs had sufficiently alleged facts to state a claim for price-fixing and had given defendants fair notice of the claims, supporting grounds, purpose, and motive of the alleged price-fixing conspiracy.

C. Thirty (30) State Attorney Generals and Attorney General Eliot Spitzer of the State of New York v. BMG MUSIC, et al.

Number of this case in the Southern District of New York not found. This case contains same and similar cause(s) of action as those in P-A's case reviewed herein. [\[http://www.oag.state.ny.us/press/2000/aug/aug08a_00.html\]](http://www.oag.state.ny.us/press/2000/aug/aug08a_00.html)

See the complaint on the website linked above.

D. On May 10, 2000, the Federal Trade Commission announced that it has reached settlement agreements with Universal Music and Video Distribution, Sony Corp. of America, Time-Warner Inc., EMI Music Distribution and Bertelsmann Music Group (BMG), the five largest distributors of recorded music who sell approximately 85 percent of all compact discs (CDs) purchased in the United States to end their allegedly illegal advertising policies that affected prices for CDs. "The FTC estimates that U.S. consumers may have paid as much as \$480 million more than they should have for CDs and other music because of these policies over the last three years," said FTC Chairman Robert Pitofsky.

According to the FTC's complaints, the companies required retailers to advertise CDs at or above the "Minimum Advertised Price" (MAP) set by the distribution company in exchange for substantial cooperative advertising payments. The restrictions applied to all advertising, including television, radio, newspaper and signs and banners within the retailers' own stores. The restrictions even applied to advertising funded entirely by the

retailer. Under the policies, large music retailers would lose millions of dollars a year if they failed to follow the MAP restrictions.

E. Other related cases:

In re Compact Disc Antitrust Litig., MDL Case No. 1216 (C.D. Cal. 1997): Court approved \$82 million settlement of this consolidated action.

Michaelson v. Capitol Records, Inc., CV 00-05398 (C.D. Cal. May 18, 2000)

Noll v. BMG Music, CV 00-2852 (E.D.N.Y., May 18, 2000)

Schwam v. BMG Music, CV 00-2851 (E.D.N.Y., May 18, 2000)

Third Street Jazz & Rock Holding Corp. v. EMI Music Distrib., CV 97-8864 (C.D. Cal. 1997)

Chandu Dani d/b/a Compact Disc Warehouse and Record Revolution v. EMI Music Distribution, Inc., Sony Music Entertainment, Inc., Warner Elektra Atlantic Corporation, Universal Music and Video Distribution, Bertelsmann Music Group, Inc. and PolyGram Group Distribution, Inc., No. 97-7226. (filed on October 16, 1997)

XV. ISSUES AND ARGUMENTS

1. CDC abused its discretion by dismissing the complaint prior to answer(s) or other meritorious attempt(s) to defend by any of D-A (with possible exception: application for transfer by Wal-Mart, Inc.) and (1) without providing adequate reason for denial of federal marshal's requested service of process, (2) without judge's prior notice, opinion and/or reasons specified in sua sponte order of dismissal, (3) without declaring the complaint to be frivolous and (4) without grant of opportunity for P-A to amend the complaint.

A. "District Court may dismiss *pro se* complaint sua sponte, without service of process and without providing plaintiffs opportunity to amend, only if complaint is frivolous; complaint may be dismissed as frivolous only if it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief. [*Brooks v. Seiter* (1985, CA6 Ohio), 779 F2d 1177.]

B. "frivolous *adj.* 1. characterized by lack of seriousness or sense: *frivolous conduct* 2. self-indulgently carefree; unconcerned about or lacking any serious purpose. 3. of little or no weight, worth, or importance; not worthy of serious notice: worthless, trifling. [*Random House Unabridged Dictionary*, Second Ed. (1987), p. 769]

C. By literal and legal standards, P-A complaint is not frivolous nor is it without merit. Therefore, complaint was viable in CDC, PML and DM. Can the appellate court see why some lower courts want to apply the prejudicial term "frivolous" to viable complaints filed *pro se* and/or *in forma pauperis* and, thereby, undermine the intent and sacred purpose of constitutional and congressional acts that provide for persons, without financial power, equal standing in federal court? It is easy to label a "poor" person "frivolous" because often his/her only compensation is a lighthearted spirit and attitude. To label P-A's long-term antitrust injury and complaint for same "of little or no weight, worth, or importance; not worthy of serious notice: worthless, trifling" is fight'n words.

D. "viable *adj.* 1. capable of living 2. vivid; real; stimulating, as to the intellect, imagination or senses: 3. practicable; workable: 4. having the ability to grow, expand, develop, etc. *a new and viable country* [Ibid.]

E. Whether or not federal courts wish to literally interpret the word "frivolous" (in this case use of the term was avoided in favor of not "viable"), P-A's allegations do not appear to reasonable reader "beyond doubt that plaintiff can prove no set of facts which would entitle him to relief". Few reasonably strung propositions are "beyond doubt". Even respecting certain symantical deviations from literal meanings that have characterized recent interpretations of "frivolous" in courts bent on dismissal, complaint on its face and for all to see, is an example of sufficient and *viable* antitrust pleading of facts entitling plaintiffs-appellants to relief. CDC did not specify why complaint was without merit, beyond the *pro se* representation issue, because it could not do so reasonably.

F. Because CDC denied P-A's request for Federal Marshal's service of the complaint, stating incorrect reason in order of denial, P-A, *in forma pauperis* made expensive, personal service of process to eleven defendants. Personal service did not result in answers, or any other communication, from nine of the defendants. This fact brings into question the effectiveness of P-A's service. Improperly denied federal service would have been more effective in summoning defendants, and their answers would have been in the realm of affirmative defense, thus foreclosing opportunity for CDC to suddenly and improperly dismiss sua sponte in favor of the non-frivolous, Wal-Mart, Inc.

CDC, cooperating with PML and DM, would not have done what it did if P-A had been represented by a reputable (powerful) law firm. This fact militates against constitutional and congressional spirit regarding *pro se* representation.

G. "When viable complaint is filed *in forma pauperis*, pauper must be treated like all other litigants in decision to dismiss, otherwise scales of justice would be tilted against those who by coincidence of life are poor; 28 USCS, sec. 1915 does not permit cursory treatment of meritorious complaint if claims are not found to be frivolous or malicious." [McTeague v. Sosnowski (1980, CA3 Pa), 617 F.2d 1916]

H. "If pro se pleading appears to have some merit, court would grant leave to proceed in forma pauperis; if warranted, it would dismiss at later point in light of subsequent proceedings." [*Yates v Wellman (1974, ED Ky)*, 373 F Supp 437]

Proceedings subsequent to magistrate's validation (one defendant (WM) respecting the complaint and successfully applying for PML transfer) did not bring to light facts sufficient to erode complaint's antitrust viability (nor were those facts found in court's order of dismissal), PML's conditional and unopposed transfer actually added so much viability to P-A's cause-of-action that a "panic cancellation" was ordered at the last minute (by WM), improperly and perhaps illegally terminating the case via conspiratorial action.

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

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

Once transferred to DM via PML, P-A instantly obtained the services of numerous well reputed and powerful law firms via inclusion in consolidated prosecution. If CDC had any doubts about P-A's ability to prove its claims, *pro se* and *in forma pauperis*, those doubts were not justified after PML's conditional and finalized transfer to MDL Case No. 1361.

J. "Granting of leave to proceed in forma pauperis is discretionary decision which should not be exercised where it appears that contemplated action is frivolous or malicious." [*Wagner v Holmes (19173, ED Ky)*, 361 F Supp 895]

The Magistrate Judge's order, including formal issue of Summons, on the "leave to proceed in forma pauperis" and "frivolous or malicious" questions was correct and not an abuse of discretion as presiding judge's unrationalized sua sponte dismissal of the case would attest. Absent subsequent proceedings of a prejudicial nature regarding P-A's complaint, Magistrate's judgment(s) must be upheld by CDC and reviewing court.

"Nature of cause of action is legitimate factor for consideration in court's discretion under 28 USCS, sec. 1915; in forma pauperis status should not be granted across board to poor litigants in civil actions seeking monetary recovery but should be sparingly granted in exceptional or extraordinary cases. [*Leverett v Bishop Furniture Co. (1978, DC SC)*, 451 F Supp 289]

P-A's case is "exceptional" and "extraordinary" and was properly granted by reviewing judge(s). Subsequent proceedings did not reveal facts to change formally ordered opinion(s).

K. "Pre-answer sua sponte dismissal of prison inmate's in forma pauperis action under 28 USCS, sec 1915 ... required trial court explicitly to state that statute was being invoked and complaint was being dismissed as frivolous; where court dismisses pro se complaint without service upon defendant, without notification to parties of intent to dismiss giving plaintiff chance to respond or amend complaint, or without giving defendant chance to respond or file answer or motions, and where no reasons are stated for dismissal, case will be remanded for clarification." [*Harris v Johnson (1986, CA6 Mich)*, 784 F.2d 222]

Per se remand

L. "Private nonprofit corporation operating as Community Action Agency (CAA) under Economic Opportunity Act was entitled to proceed in forma pauperis pursuant to 28 USCS sec. 1915(a) and to appeal in suit..." [*River Valley, Inc. v Dubuque County (1974, DC Iowa)*, 63 FRD 123]

The Community Action Agency does not qualify under some extraordinary, little populated category uniquely granting exemption for *pro se* representation. The "agency" is a non-profit corporation primarily serving poor people. So is SAVIORG.

M. "28 USCS sec. 1915 test for dismissal of action without merit is less stringent than that under FRCP 12(b)(6) dismissal standard, so fact that pro se in forma pauperis complaint fails to state claim upon which relief can be granted does not warrant sua sponte dismissal of case as frivolous under sec. 1915 if petitioner can make any rational argument in law or fact which would entitle him to relief. [*Williams v Faulkner (1988, CA7 Ind)*, 837 F.2d 304]

To state or affirm that P-A has not made "any rational argument in law or fact" is to confess ignorance of the complaint. Complaint is substantially similar to thirty (30) states actions referenced at IV. below, and clearly states at least some rational arguments in law or fact.

"Complaint filed in forma pauperis need not indisputably state cause of action to survive sua sponte dismissal; instead, if complaint has at least arguable basis in law and fact (i.e., if complaint is viable), it cannot be deemed frivolous." [*Brandon v District of Columbia Bd. of Parole (1984)*, 236 App DC 155, 734 F.2d 56]

N. CDC would negate the viability of P-A's complaint without rationale beyond objection to non-profit's representation, and then dismiss on that basis alone. Not "viable" is alot different than "frivolous". Frivolity is required for sua sponte dismissal. If P-A's complaint is not viable (highly doubtful) it is, nevertheless, serious and purposeful. If P-

A's complaint is not "capable of living" (highly doubtful) it will take more than a conspiracy among federal judges to kill it with an unwarranted claim of "frivolous".

Because transfer to WM's Case No. 1361 was finalized on January 12, 2001, P-A's case was, indeed, viable and validated as such by WM, PML and Judge Hornby at the District of Maine. P-A's motion for default judgment against all defendants other than WM, filed and served on all defendants prior to January 12, 2001, was also viably transferred to DM for required judgment in new jurisdiction (venue). On day PML was required by law to order transfer finalized (fifteen days after PML's conditional transfer order), CDC was ready to do the only act (prearranged) that could save defaulting defendants... terminate the case via administrative *leger de main* "over-the-head" of, or in actual cooperation with, PML and DM.

O. "District Court may dismiss pro se complaint sua sponte, without service of process and without providing plaintiffs opportunity to amend, only if complaint is frivolous;" [*Brooks v Seiter (1985, CA6 Ohio)*L, 779 F.2d 1177]

Order of dismissal did not state that complaint was frivolous, therefore no provision of opportunity to amend is abuse of discretion.

2. CDC erred and/or abused its discretion by dismissing entire case merely for *pro se* representation of public charity plaintiff, SAVIORG, before attempting to ascertain (from P-A or by other means) whether or not public charity was incorporated for; granted federal *Letter of Determination* for; and/or operational for charitable service to "poor" persons.

A. "Under appropriate circumstances, corporation may be considered 'person' for purposes of 28 USCS, sec. 1915." [*Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc. (1976, SD NY)*, 63 FRD 123.]

All corporations are persons, but not all are entitled to proceed *in forma pauperis* in federal litigation. The issue here is whether or not a "poor person", non-profit corporation should be denied *pro se* representation and/or sua sponte dismissal for same. Without a specific statement in the law to cite regarding *pro se* representation of a non-profit corporation like SAVIORG, P-A draws an assumption from the statement below.

" The corporation in this case, while engaged in a commercial enterprise, is a nonprofit corporation as was the plaintiff in *River Valley, Inc. v. Dubuque County*, supra. There is a public interest quality to the stated goal for which the corporation was formed, to wit, to provide quality food to low income persons at fair prices. It is clear to the Court that the individual members of this consumer co-op, unlike the backers of S.O.U.P., Inc., are unable to finance the costs of these appeals and that the corporation was not formed for the purpose of avoiding legal fees. Nor is this a situation in which individual shareholders of the corporation stand to reap substantial personal financial benefit should [**9] there be a recovery by the plaintiff in this action. See *Honolulu Lumber Co. v. American Factors, Ltd.*, supra, at 581. The Court notes additionally that there is a public interest

aspect to any private suit for treble damages under the antitrust laws since it is in part through such actions that the purposes of the antitrust laws are effectuated. See *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 130-31, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969). For all of these reasons, the Court concludes that the corporate plaintiff herein should be considered a "person" within the meaning of § 1915. " [*Ibid.*]

CDC incorrectly stated that a corporation cannot be represented *pro se* because *pro se* representation obtained in proceedings cited above. If you can afford to retain an attorney, you can pay filing fees.

B. "Corporations are not entitled to in forma pauperis treatment under sec. 1915, since corporations, if litigants, may be presumed to have sufficient assets to pay cost of litigation and, if not, the stockholders would have sufficient interest to furnish security." [*FDM Mfg. Co. v. Scottsdale Ins. Co. (1988, CA5 La)*, 855 F2d 213.]

SAVIORG, as a California non-profit corporation and a federally certified public charity, has neither readily liquifiable assets nor stock.

C. "Corporations composed of, and serving primarily, poor persons may be allowed to proceed in forma pauperis under 28 USCS, sec. 1915(a) in same manner as indigent individual under appropriate circumstances; private nonprofit corporation...was entitled to proceed in forma pauperis pursuant to 28 USCS, sec. 1915(a) and to appeal in suit to compel defendants to assist it in obtaining financial and technical assistance..." [*River Valley, Inc. v Dubuque County (1974, DC Iowa)*, 63 FRD 123.]

If corporation is certified by magistrate for *in forma pauperis* action, certification for *pro se* representation may be assumed absent requirement for court ordered representation.

D. The following material was recently prepared for another case but has direct bearing on this proceeding. Please let the court and appellees indulge its submission.

XVI. DISMISSAL OF PRIOR CASE NOT FINAL JUDGMENT ON MERITS

A. Prologue

The complaint in this case is tantamount to the amended complaint in CV 00-10781 R (AJWx) foreclosed by *sua sponte* dismissal.

Res judicata bar cannot be raised to preclude trial of plaintiff's present case because prior similar case was not declared frivolous or malicious, was dismissed before any defendant had moved for dismissal and did not contain delays, disobedience or contumacious conduct. Case was dismissed before complete adjudication on the merits

and/or judgment on the merits could be rendered and, therefore, claims preclusion not supported *res judicata*.

Dismissal of prior case, currently appealed and docketed under Case No. 01-55413 in the United States Court of Appeals in the Ninth Circuit, was rationalized by presiding district court judge, the Hon. Manuel L. Real, only with two brief and questionable sentences, "A corporation can not appear pro se nor can it be represented by a pro se litigant. Moreover there are no facts alleged that make this a viable antitrust action for either plaintiff EDWARD MICHAEL O'BRIEN or SAVIORG."

Complaint was declared viable by Magistrate Judge, the Hon. A. J. Wistrich. The vast majority of facts alleged by plaintiffs in complaint were substantially similar (often identical) to facts alleged in numerous other actions against defendants (see listing this section) which were/are viable in the Central District of California, in other federal districts and in many state courts.

Therefore, dismissing judge must be referring to personalized material allegations made by plaintiffs that were not sufficient to *restore* complaint's viability which had been negated in proceedings subsequent to Magistrate Judge's creation of viability by formal determination, complaint not frivolous or malicious on its face.

In court's pre-answer, *sua sponte* judgment or "[o]n defendant's motion for summary judgment under Rule 56(b), all plaintiffs' well-pleaded material allegations must be taken as true, and court should give plaintiffs benefit of all favorable inferences that might reasonably be drawn from evidence. [*Suchomajcz v Hummel Chemical Co. (1974, ED Pa)*, 385 F Supp 1387]". District court's brief order of dismissal shows that this was not accomplished.

What negated complaint's viability after Magistrate's approval Not absence of eleven (11) defendants affirmative defense (including absence of objection(s) to *pro se* representation) and Wal-Mart's application (case viability affirming) for transfer of the case for consolidated action: Not Judge Real's approval (case viability affirming) of the Multidistrict Litigation Panel's transfer of the case (*pro se* corporation included) to the District of Maine: Not proceedings in the District of Maine: all formal proceedings subsequent to Magistrate's approval only affirmed the viability, and non-frivolous quality, of the complaint.

The only explanations that plaintiff can offer for court's dismissal of the case are (1) district courts agreed to dismiss the complaint via MDL conditional transfer and circuitous negation via well timed dismissal/vacate rationalized as preventing a superfluous case from "clogging up" an already crowded MDL proceeding, and/or (2) punishment by Judge Real for plaintiff's prior dismissals in his courtroom at the Central District of California, using authority of FRCP 41(b).

Neither of these two explanations were stated or implied in court's dismissal. In fact, both were expressly avoided. Both plausible reasons were not stated because neither is

correct and neither can justify dismissal of the case. However, plausibility of court's reasons that were stated, would tend to uphold questionable *sua sponte* dismissal and circumvent reversal on appeal, absent adequate pleading by P-A. [ie., well pled, *pro se* case was an irritant, and had to be gotten rid of...]

"District Court may dismiss *pro se* complaint *sua sponte*, without service of process and without providing plaintiffs opportunity to amend, only if complaint is frivolous; complaint may be dismissed as frivolous only if it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief. [*Brooks v. Seiter (1985, CA6 Ohio)*, 779 F2d 1177.]

Judge Real denied plaintiffs request for federal marshal's service of process for an unintelligible reason, "Case was filed and dismissed prior". No complaint even remotely resembling the complaint in CV 00-10781 R (LGB) (AJWx) had been filed prior by plaintiff(s).

Judge Real did not provide opportunity for amendment in *sua sponte* dismissal, nor did he notice parties prior to dismissal.

"Failure to provide either notice or hearing to plaintiff before granting summary judgment to defendant improperly cuts off plaintiff's opportunity to develop a record, by submitting additional materials or moving for extension of time to develop such materials through discovery, on which court may fairly rule on merits of his complaint. *Kibort v Hampton (1976, CA5 Fla)*, 538 F2d 90" [FRCP, Rule 56, n 103]

Judge Real did not declare the complaint "frivolous" or appearing "beyond doubt that plaintiff can prove no set of facts which would entitle him to relief" because he could not reasonably do so. It did not appear beyond doubt that plaintiff could prove at least one set of facts which would entitle him to relief. Only the *viability* of the action was declared unsupported by plaintiffs allegations. *Pro se* representation of the corporate plaintiff was not only questionable in law and precedent, it was unopposed (accepted) by all defendants." [*Edward Michael O'Brien v Time Warner, Inc., et al.*, CV 01 -0383 GEB (PAN-PS)]

3. CDC erred and/or abused its discretion by dismissing entire case when private plaintiff merited antitrust standing with or without joinder of corporate plaintiff.

A. The United States Court of Appeals for the Second Circuit did not uphold dismissal of *Mercu-Ray Industries, Inc. v. Bristol-Meyers Company*, 392 F Supp 16, when corporate plaintiff-appellant, represented *pro se*, assigned its interest in the case to private plaintiff-appellant, represented *pro se*, because the assignment was not opposed by the defendants-appellees.

D-A did not oppose P-A's representation, *pro se*.

B. " F.R.C.P., Rule 41: *Dismissal of Actions*

(b) Involuntary Dismissal: Effect Thereof.

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. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." [Federal Rules of Civil Procedure ["FRCP"], Rule 41]

Involuntary dismissal under Rule 41 is specified only after defendants' motion for same.

C. " Rule 21: *Misjoinder and Non-Joinder of Parties*

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately." [FRCP, Rule 21]

If presence of SAVIORG among plaintiffs was "misjoinder of parties" (debatable) misjoinder was "not ground for dismissal" of action.

D. "F.R.C.P., Rule 55: *Denial of Entry of Default and/or Default Judgment*

(c) Setting Aside Default.

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b) ." [FRCP, Rule 55(c)]

P-A's motion on January 5, 2001 for default judgment was not properly ignored prior to sua sponte dismissal on January 12, 2001.

Dismissal of *pro se* private plaintiff-appellant can be rationalized only by arbitrary exercise of discretion. And yet, there is no basis in law or fact for same.

4. Denial of Federal Marshal's service without "good cause" shown (false cause stated) was abuse of discretion.

A. "28 U.S.C., 1915: *Proceedings in forma pauperis*

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases." [28 U.S.C., sec. 1915(c)]

B. "5.4 (4-5.3) SUMMONS - SERVICE OF PROCESS - UNITED STATES MARSHAL -CIVIL CASES - Except as otherwise provided by order of Court, or when required by the treaties or statutes of the United States, process shall not be presented to the United States Marshal for service." [Central District of California, Local Rule 5.4: SERVICE OF PAPERS AND PROCESS]

According to CDC's own local rules, process should have been presented pursuant to a "statute of the United States", 28 USCS, sec. 1915.

5. District Court intentionally abused its discretion by dismissing case via coordinated action with Multidistrict Litigation Panel itself abusing discretion by vacating *Conditional Order of Transfer of December 27, 2000*, and default of opposition to transfer within 15 days which automatically finalized transfer, after learning CDC dismissed case immediately (same day) following notice of finalized transfer. PML's claim rationalizing its vacation of *Conditional Order of Transfer* that DM clerk did not physically file the *Conditional Order of Transfer*, issued on December 27, 2000, until January 16, 2001 is highly questionable.

[Note: Ninth Circuit can formally recommend review of PML and/or DM actions via issue of an *Extraordinary Writ* from the U.S. Court of Appeals, Fourth Circuit, pursuant to 28 U.S.C., sections 1407(c) and 1651:]

6. CDC judge's actions, questioned in this appeal, warrant a change of presiding judge when case is remanded to CDC for continued adjudication on its merits.

A. 28 U.S.C., sec. 455: *Disqualification of justice, judge, or magistrate*

P-A reasonably questions the impartiality of CDC, PML and DM judges in this case.

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

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

B. 28 U.S.C., sec. 1407: *Multidistrict Litigation*

"This order does not become effective until it is filed in the office of the Clerk of the United States District Court for the District of Maryland. The transmittal of this order to said Clerk shall be stayed fifteen (15) days from the entry thereof and if any party files a notice of opposition with the Clerk of the Panel within this fifteen (15) day period, the stay will be continued until further order of the Panel." [*IN RE COMPACT DISC*

MINIMUM ADVERTISED PRICE ANTITRUST LITIGATION, O'Brien, et al. v. Time Warner, Inc., et al., C.D. California, C.A. No. 2:00 - 10781: CONDITIONAL TRANSFER ORDER (CTO-3), DOCKET NO. 1361]

Because a "Final Order" finalizing PML transfer is not provided for in 28 U.S.C., sec. 1407 or MDL Rules, and because litigation experience in *O'Brien v. Gates/Microsoft* (CV 00-01132 R) which was transferred to consolidated actions in Case No. 1332 on July 5, 2000 did not include receipt of a finalizing order, P-A believes "finalizing order" in Case no. 1361 was merely an informal device rather than a statute imperative.

Conditional order must be physically filed in transferee court before it becomes effective...after 15 days, unless opposed. "Finalizing order" is the Conditional Order made final by removal of the condition for stay (formal opposition within 15 days of issue) and is automatically established after run of the fifteen (15) days "condition"...to the second. Conditional order was properly filed in DM at a time reasonably after December 27, 2000, and was finalized before CDC dismissed the case. Claiming otherwise for purposes of achieving an illegal dismissal is a violation of civil rights by conspiracy.

"(d) Conditional transfer orders do not become effective unless and until they are filed *with* the clerk of the transferee court." (emphasis added) [Multidistrict Litigation Rules, Rule 9(d)]

No filing of a "finalizing order" with a PML appointed district court clerk is mentioned in PML or DM rules because finalizing order is an automatic and instantaneous default. Filing date/time of Conditional Order is at issue and controlling. If Conditional Order, issued on December 27, 2000 by PML in Washington, D.C. was not filed in the District of Maine by the morning of January 12, 2001 it was intentionally unfiled for purposes of creating an illegal option to dismiss.

C. Authority of transferor court

"It is settled that when action is transferred by Judicial Panel, until time it is remanded, transferor court is without authority to issue any orders or to entertain motions for transfer this being reflected in predecessor to Rule 11(b) which provides that transferred actions which have not been terminated in transferee court will be remanded to transferor district for trial unless ordered transferred by the transferee judge to the transferee or other district." [*Re Aircrash near Duarte (1973, DC Cal)*, 357 F Supp 1013.]

Because transfer was finalized at the stroke of midnight on January 12, 2001, and because the Conditional Order was (or should have been) filed by DM clerk prior, CDC was without authority to dismiss P-A's case.

XVII. ACTIONS FOLLOWING COMPLAINT

1. On November 22, 2000, P-A received a letter and return of its WAIVER OF SERVICE form, both dated November 21, 2000 and signed by Christina M. Corsac (MONTGOMERY, McCRACKEN, WALKER & RHODES, LLP) and Howard D. Scher, Esq., respectfully.

2. On December 7, 2000, P-A received from WM its *Ex Parte Application For Extension of Time To Answer* pending CDC and PML action on its application for transfer of its interests in this case (no mention was made of the other defendants nor did any appear in subsequent proceedings) to the PML, dated December 5, 2000. [See all case records.]

3. On December 30, 2000, P-A received from the PML its *Conditional Transfer Order (CTO-3)* dated December 27, 2000 which had also been served to defendants Border's Books, KMart Corporation and Morning Glory Music. WM is not found on the service list appended to the PML order. Service list also contained names and addresses for John Brautigam (representing unspecified client(s)), Alfred C. Frawley III, (representing unspecified client(s)), Joseph H. Groff III, (representing unspecified client(s)) and William J. Kayatta (representing unspecified client(s)).

Other than WM, who represented whom among D-A has yet to be specified by the PML or in CDC and DM proceedings. In fact, other than WM, none of the D-A have been declared joined to Multidistrict Litigation ["MDL"], Case No. 1361. Representation, answer and appearance anomalies in PML processing of the case alerted P-A to the possibility of orchestrated confusion, collusion and/or intent to deny P-A due process of law.

4. On January 14, 2001, P-A received from the PML its *Order* finalizing transfer of the case to the MDL, dated January 12, 2001.

5. On January 15, 2001, P-A received from the Central District of California its *Order* dismissing the case.

6. On February 8, 2001, P-A received from the PML its *Order Vacating Conditional Transfer Order*, dated February 5, 2001.

7. On February 10, 2001, P-A filed and served to WM and Border's Books its *Notice of Appeal and Request To Proceed In Forma Pauperis*.

Other defendants were not served because they had not appeared or otherwise been identified as defending their interests in the case.

XVIII. CONCLUSION

It is a matter of law and fact that a non-profit corporation can appear *pro se* and it can be represented by a *pro se* litigant (1) if opposing party does not object, and (2) if non-profit corporation qualifies for *in forma pauperis* standing. SAVIORG meets both conditions.

If P-A has not alleged facts that make its private civil action *viable*, how could thirty (30) States' Attorney Generals make viable their consolidated cases alleging same and very similar facts ?

P-A has alleged facts that make its case a viable private antitrust action, and CDC has not stated facts in its sua sponte order of dismissal to make the order viable.

The United States District Court in the Central District of California, Hon. Manuel L. Real presiding, abused discretion by dismissing the complaint in *O'Brien v Time Warner, Inc., et al.* prior to an answer by defendants or other meritorious attempt to defend and (1) without providing adequate reason for denial of requested federal marshal's service of process, (2) without judge's opinion and/or reasons specified in sua sponte order of dismissal, (3) without declaring the complaint to be frivolous and (4) without grant of opportunity for P-A to amend the complaint.

CDC erred and/or abused its discretion by dismissing entire case merely for *pro se* representation of public charity plaintiff, SAVIORG, before attempting to ascertain whether or not public charity was incorporated for; granted federal *Letter of Determination* for; and/or operational for charitable service to "poor" persons. Fact could have been learned without difficulty via inquiry into federal register of public charities and/or via notice of intent to dismiss on the *pro se* representation objection and grant of opportunity to amend.

CDC erred and/or abused its discretion by dismissing entire case when private plaintiff merited antitrust standing with or without corporate plaintiff.

CDC denial of Federal Marshal's Service without "good cause" shown (in fact, false cause stated) was abuse of discretion.

Because transfer to WM's MDL Case No. 1361 was finalized on January 12, 2001, P-A's case was, indeed, viable and validated as such by WM, PML and Judge Hornby at the District of Maine. P-A's motion for default judgment against all defendants other than WM, filed and served to all defendants on January 5, 2001, was included in transfer to DM as action pending and requiring judgment in new jurisdiction. On day PML was required by law to order transfer finalized (fifteen days after conditional transfer ordered by PML), CDC was ready to do the only act (prearranged with correspondent DM and PML) that could save defaulting defendants: terminate the case via administrative *leger de main* with DM and PML cooperating.

The United States District Court in the Central District of California committed "clear error of judgment in the conclusion it reached (dismissal of case) upon a weighing of the relevant factors" in this case. [*Valley Eng'rs, Inc. v. Electric Eng'g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998); *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994)]

District Court exercised discretion to an end not justified by the evidence, and rendered judgment (Order of January 12, 2001) that is clearly against the logic and effect of the facts as are found."*Wing v. Asarco Inc.*, 114 F.3d 986, 988 (9th Cir. 1997); [*International Jensen, Inc. v. Metrosonic U.S.A., Inc.*, 4F.3d 819, 822 (9th Cir. 1993)]

Therefore, under the abuse of discretion standard published by United States Court of Appeals in the Ninth Circuit, reviewing court can and should reverse lower court's decision because it has received a definite and firm conviction that the court below abused its discretion.

The Hon. Manuel L. Real's impartiality can and has been reasonably questioned, and it has been demonstrated that he displayed "personal bias or prejudice concerning" the plaintiffs-appellants in this case. [*United States v. Brown (1976, CA5 La)*, 539 F2d 467.]

Therefore, recusal of Judge Real will tend to allow more and sufficient equity to obtain in this proceeding whether in CDC or in DM.

XIX. PRAYER

Plaintiffs-Appellants, Edward Michael O'Brien and SAVIORG, pray for reversal of the United States District Court's dismissal of the complaint re *Edward Michael O'Brien and SAVIORG corporation v. Time Warner, Inc., et al.* and remand of the case for continued proceedings, including *Entry of Default and Default Judgment* against all Defendants-Appellees summoned in the case, other than Wal-Mart, Inc., and payment by all D-A of all damages required by applicable federal and state laws and/or specified in the complaint.

Upon decision for remand, P-A prays for recusal of the Honorable Manuel L. Real and appointment of a new presiding judge by means conventional in the United States District Court in the Central District of California.

Should the Court of Appeals consider appropriate return of this case to the Multidistrict Litigation Panel (District of Maine), inter MDL Case No. 1361, P-A prays for this court's assistance in obtaining *Extraordinary Writ(s)* from the United States Court of Appeals in the Fourth Circuit and for the effective ministry of the writ(s) for purposes of reinstatement and continued due process of law.

P-A prays for any and all other actions, judgments and/or remedies deemed necessary and appropriate by the United States Court of Appeals.

Executed this day of our Lord, May 29, 2001, at Santa Barbara, California

By _____

Edward M. O'Brien

pro se

TABLE OF AUTHORITIES

A. STATUTES AND REGULATIONS

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Title 15, United States Codes, Sections 1, 2, 14 and 15

Title 28, United States Codes, Section 455(a)(b)

Title 28, United States Codes, Section 753(f)

Title 28, United States Codes, Section 1407 (c)

Title 28, United States Codes, Section 1651

Title 28, United States Codes, Section 1915

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Federal Rules of Appellate Procedure, Rules 24(a)3, 24(a)4, 24(a)5

Federal Rules of Civil Procedure, Rules 16, 19, 21, 41, 55(c) and 60(b)

Federal Rules of Civil Procedure for Multidistrict Litigation, Rule 9 (d), 11(b), 11(f)(iv)

Local Rules of the Central District of California, Rules 5 and 12

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B. CASES

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Re Aircrash near Duarte (1973, DC Cal), 357 F Supp 1013

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