THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UDO BIRNBAUM	)	
	)	
Plaintiff	)	
VS.	)	
	)	
RICHARD L. RAY	)	
TOMMY W. WALLACE	)	
JAMES B. ZIMMERMANN	)	
RICHARD DAVIS	)	CIVIL ACTION NO: **3-99CV0696-R**
PAT McDOWELL	)	
LESLIE P. DIXON	)	
KERRY YOUNG	)	
BETTY DAVIS	)	
BECKY K. MALONE	)	
WILLIAM B. JONES	)	
John Doe / Mary Doe	)	
	)	
Defendants	)	

FIRST AMENDED COMPLAINT

Plaintiff, UDO BIRNBAUM, ("Birnbaum"), files this First Amended Complaint against Defendants Richard L. Ray, Tommy W. Wallace, James B. Zimmermann, Richard Davis, Pat McDowell, Leslie P. Dixon, Kerry Young, Betty Davis, Becky Malone, and William B. Jones alleging that:

NATURE OF THE ACTION

1. This action arises out of a scheme round and about the 294th District Court in Canton, Texas ("Wallace's Court") in which one or more of the Defendants attempted to "enrich" themselves by using their relationships in the Court to extort legal fees, moneys, and other valuable things, by the use of fraudulent documents, arguments, and corrupt Court process as weapons for

malicious prosecution. As used in this Complaint, the term "enrich" includes maintaining or securing employment, status, influence, personal power, and/or assurances of each other's present and future support.

2. When in 1995 Defendant Ray entered a totally fraudulent Cause against Birnbaum, he was well aware of the availability to him of others round and about Wallace's Court who he knew could and would participate with him to make Birnbaum pay.

3. Some of the named Defendants presented themselves as providers of fair and honest judicial service in Wallace's Court. These Defendants and their co-conspirators never provided fair and honest service to Birnbaum. In fact, the conspirators never intended to provide honest service. Rather, the conspirators intended to enrich themselves through their scheme.

4. When Birnbaum started complaining about Ray's fabrications, the whole Court process upon Birnbaum became a "must win" enterprise to send a message to Birnbaum and the community as to what happens when someone starts complaining in Wallace's Court and does not pay up front.

5. Through their conduct, as detailed below, the Defendants participated, directly or indirectly, in the affairs of an enterprise through a pattern of racketeering activity, and/or conspired to do so, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 *et seq.*

6. As a consequence of the Defendants' unlawful conduct, Plaintiff was injured by direct costs of defense, cloud upon the title of his property, loss of earnings, and mental anguish. Plaintiff now seeks relief, including actual, punitive, and treble damages, along with Plaintiff's costs in investigating and prosecuting this action.

PARTIES/PARTICIPANTS

7. Plaintiff **Udo Birnbaum** ("Birnbaum") is an individual residing on his farm in Van Zandt County, Texas. Birnbaum has a mailing address of Rt. 1, Box 295, Eustace, Texas 75124.

8. Defendant **Richard L. Ray** ("Ray") is an individual with a mailing address of 300 S. Hwy.19, Canton, Texas 75103. Ray is a lawyer and a former county judge of Van Zandt County, Texas.

9. Defendant **Tommy W. Wallace** ("Wallace") is an individual with a mailing address of 121 East Dallas Street, Canton, Texas 75103. Wallace is the Judge of the 294th District Court ("Wallace's Court") in Van Zandt County, Texas.

10. Defendant **James B. Zimmermann** ("Zimmermann") is an individual with a mailing address of 121 East Dallas Street, Canton, Texas 751103. Defendant Zimmermann is a Senior Texas Judge who frequently sits for Defendant Wallace.

11. Defendant **Richard Davis** ("R.Davis") is an individual with a mailing address of 301 South Main Street, Canton, Texas 75103. R. Davis is a lawyer, former District Attorney of Van Zandt County, and former District Judge of what is now Wallace's Court.

12. Defendant **Pat McDowell** ("McDowell") is an individual with a mailing address of 133 N. Industrial Blvd., LB 50, Dallas, Texas 75207. Defendant McDowell is the Presiding Judge of the First Administrative Judicial Region of Texas.

13. Defendant **Leslie P. Dixon** ("Dixon") is an individual with a mailing address of 202 North Capitol Street, Canton, Texas 75103. Defendant Dixon is the Van Zandt County District Attorney who prosecutes in Wallace's Court.

14. Defendant **Kerry Young** ("Young") is an individual with a mailing address of 133 N. Industrial Blvd. - LB-7, Dallas Texas 75207.

15. Defendant **Betty Davis** ("B.Davis") is an individual with a mailing address of 121 East Dallas street, Canton, Texas 75103. B.Davis is the Court Coordinator of Wallace's Court..

16. Defendant **Becky K. Malone** ("Malone") is an individual with a mailing address of 121 East Dallas street, Canton, Texas 75103. Malone is the Official Court Reporter of Wallace's Court.

17. Defendant **Van Zandt County**

18. Defendant **William B. Jones** ("Jones") is an individual with a mailing address of Rt. 1, Box 355, Eustace, Texas 75124.

19. Defendants may be served by delivering to them at the addresses indicated, by registered or certified mail, return receipt requested, a true and correct copy of the citation with a copy of the Complaint attached thereto.

20. At all times relevant to the allegations in the Complaint, each Defendant was the agent of the others and responsible by law for the others' conduct.

JURISDICTION AND VENUE

21. Pursuant to Title 28, United States Code, Section 1331, this Court has subject matter jurisdiction over the claims alleged in Counts One and Two because such claims arise under the laws of the United States, namely Title 18, United States Code, Sections 1962(c) and (d) and 1964. Pursuant to Title 28, United States Code, Section 1367, this Court has subject matter jurisdiction over the Fraud claim alleged in Count Three because of Pendant Jurisdiction.

22. Venue is proper in this District pursuant to Title 28, United States Code, Sections 1391 (b), in that one or more of the Defendants reside in this District, and that a substantial part of the events or omissions giving rise to the claims alleged herein occurred within this District.

INDEFENSIBILITY OF IMMUNITY DEFENSES BY THE PUBLIC SERVANT DEFENDANTS

23. Issues of facts underlying immunity depend on facts peculiarly within knowledge and control of the Defendants, and the Defendants know the untenable position of an absolute immunity defense under the circumstances.

24. Issues of immunity depend on facts peculiarly within knowledge and control of the Texas Attorney General's Office. There has been no adjudication upon Birnbaum. Dixon, the District Attorney of Van Zandt County, Texas did not act in any prosecutorial capacity upon Birnbaum. The acts or participation by all the Public Servant Defendants was possible because of the positions they held, whether administrative, executive, or whatever, and their individual participation with each other.

25. The Texas Attorney General's Office knows or should know that Zimmermann had never been assigned, R.Davis had never been assigned, and even McDowell was acting outside of jurisdiction because Zimmermann was not a proper judge to call him. All were secret agents in behalf of the enterprise and trespassers upon Birnbaum. As early as September 26, 1995 Birnbaum had sought the protection of the Texas Attorney General's Office. (Exhibits 76,77)

The words "due administration of justice" (18 U.S.C. 1503, Obstruction of Justice) import a free and fair opportunity to every litigant in a pending cause in a federal court to learn what he may learn concerning material facts, and to exercise his option as to introducing testimony as to such

facts. Wilder v. U.S. W. Va. 1906, 143 F. 433, 74 C.C.A. 567, certiorari denied 27 S.CT. 787, 204 U.S. 674, 51 L.Ed. 674.

26. Each such Defendant acted in violation of clear and specific constitutional or statutory provisions, for which they are properly liable. Regarding each predicate act or setting, each such Defendant participated as indicated there, **each in their individual capacity**, in behalf of the alleged enterprise, **by not acting in their judicial, prosecutorial, administrative, or executive capacity**, as would have been appropriate under the circumstances and in accordance with the oath of their Offices or duties of their positions.

27. These Public Servant Defendants participated in behalf of an enterprise, by among other acts, repeated violations of Title 18 U.S.C. § 1341 (mail fraud), by a scheme or artifice to deprive Plaintiff of the intangible right of honest services. (Title 18 U.S.C. § 1346. Definition of "scheme or artifice to defraud: "For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services").

FACTUAL BASIS FOR CLAIMS

Background

28. In the summer of 1994 Jones, on his property, killed beavers, blew up their dams, and bulldozed the area adjoining Birnbaum's land, all without informing or contacting Birnbaum in any way. In the Fall of 1994 Jones sought the removal of a certain small beaver terrace or dam on Birnbaum's property. Birnbaum met with Jones and told Jones that this was not causing any problems on either Jones' or Birnbaum's land. Without contacting Texas Parks and Wildlife or other appropriate State authorities Jones went directly to attorney Ray.

29. By document dated December 7, 1998, Ray complained of a twelve acre lake upon

1994

Jones' property, where there clearly was no water, supposedly caused by beavers (Exhibit 4). Ray next departed entirely from beavers, and created a cause of action (Exhibit 1) in Texas 294th District Court (Wallace's Court) under Section 11.086 of the Texas Water Code, for Birnbaum, as a person, having in 1994 constructed a dam henceforth referred to as **"The Dam"**.(Paragraph VI)

30. An investigator's report (Exhibit 5) shows that Birnbaum never built any kind of dam. A Sheriff's incident report (Exhibit 6) dated February 8, 1995, the date suit in Wallace's Court was served on the Plaintiff, shows that it was Jones, not Birnbaum, who had altered the land, and had done so by bulldozer, and that *"Mr. Jones land appeared to be natural wetlands at one time."*

✓ 31. Birnbaum complained to Dixon, the local District Attorney of Van Zandt County, Texas (Exhibit 65). Dixon did nothing to assist Birnbaum with the trespass and the problems Jones was creating on Birnbaum's land. Birnbaum also contacted the Texas Natural Resource Conservation Commission (TNRCC) (Exhibits 101, 102).

✓ 32. Attorney Ray demanded (Exhibit 103) that the TNRCC not pursue the matter, and that they *"immediately provide a letter to Mr. Jones closing the actions"* and urged them to *"view Mr. Birnbaum's property"*, and conveyed to them that: *"If you do not respond as requested, it is my intention to add your commission to the suit as defendants, and to contact David Cain, State Senator, and Dr. Bob Glaze, State Representative, for an investigation of your actions."*

33. Attorney Ray had a telephone conference with the TNRCC on February 5, 1996. Shortly thereafter, conforming to Ray's request, the TNRCC issued their response of February 14, 1996 (Exhibit 104). Attorney Ray entered this document as evidence at the trial in May of 1998. Ray never presented any evidence of **"The Dam"** in the Court at any time.

34. Upon information and belief, Jones never told attorney Ray that Birnbaum had built such a dam, and in fact told neighbors that he (Jones) never told any such thing to attorney Ray, and that

in fact Ray had *"screwed it all up"*, and that Ray had told him he (Ray) would take care of it.

Jones' and Attorney Ray's fraudulent pleadings

35. The "Original Petition" of February 3, 1995 (Exhibit 1) pleads in Paragraph VI : *"During 1994, Birnbaum wrongfully built and has at all times since then wrongfully maintained a dam* **("The Dam")** *on his land in the natural channel of the spring creek, ... etc.";* and a single solitary alleged wrong by Birnbaum in paragraph VII: *"By building and maintaining the above-described dam, Birnbaum altered the natural condition of the spring creek so as to change the natural course and flow thereof, and cause .....great and irreparable injury..... and (caused) sand, driftwood, and debris to wash onto Jones' land and to settle and remain thereon.*").

36. The "First Amended Original Petition"(Exhibit 2) of February 17, 1998, over three years later, and the "Second Amended Original Petition (Exhibit 3) of May 19, 1998, just one week before the May 26, 1998 trial, are almost identical except for an inserted and then again removed apostrophe upon "Jones" on page 4, item 4: (Jones), then (Jones'), then again (Jones), and a claim for attorney's fees no longer under Article 2226, but under Article 38.001 of the Code of Civil Remedies, when no claims for underlying attorney fees is pleaded. Ray never presented any evidence of **"The Dam"**.

37. Upon information and belief, Ray never intended to show **"The Dam"** to the Court and from the beginning intended to flap on other things in the Court, and used each of his three **"The Dam"** petitions as an artifice to deceive the Court and defraud Birnbaum.

The hearing of April 4, 1995

38. Birnbaum answered the Court and submitted "Request for Setting Form" (Exhibit 7). B.Davis sent "Notice of Setting" dated March 16, 1995 (Exhibit 8).

39. There now exists in the Clerk's File Ray's "Request for Setting Form" (Exhibit 9) dated March 16, 1995 for "default judgment". Ray never served this document on Birnbaum, did not file it until one month after the hearing, and this document does not designate Birnbaum as a party to be notified by the Court for Ray's requested hearing..

40. By March 16, 1995 Wallace's Court Administrator, B.Davis, had not acted upon Birnbaum's "Request for Setting Form" of February 15, 1995 (Exhibit 7) for a full month. On March 16, 1995, the date of Ray's "Request for Setting Form"; B.Davis sets a hearing for April 4, 1995 (Exhibit 8). B.Davis set neither "trial" as requested by Birnbaum, nor "default judgment" as requested by Ray, but set "pre trial', for which she had had no request.

41. If B.Davis had set a hearing exactly as requested by Ray (Exhibit 9), and notified only Ray as requested, Ray could expect to be before Wallace's Court with his "Default Judgment", without the presence of Birnbaum.

42. Upon information and belief, attorney Ray was before Wallace on this day getting Wallace's signature upon a default judgment document. Ray did not file such document in the Clerk's file, nor had he served such upon Birnbaum.

43. Upon information and belief B.Davis frequently assists Ray, and also assists Ray to conceal that she regularly assists Ray and others to present documents for signature in Wallace's Court, without proper notice to opposing party.

44.. The March 16, 1995 "Notice of Setting" (Exhibit 8) did not list Jones as a party to appear. Birnbaum approached B.Davis about this matter (Exhibit10), and was told Jones was automatically required to be present at the first hearing.

45. On April 4, 1995 Cause 95-63 was called within five minutes of the start of Wallace's Court. B.Davis was not in her usual seat besides Wallace. Birnbaum was still looking for Jones

to stand up when Ray is already up at the bench and proceeding before Wallace. Birnbaum stood up and objected and requested that a recording be made of the ongoing proceedings.

46. Wallace started scolding Birnbaum, and stated something like "Who are you?" and "What do you think she is for?" pointing to his Official Court Reporter, Malone. Wallace then started chastising Birnbaum. Wallace never asked Ray why he (Ray) was bringing default judgment documents. Instead Wallace said something like "proceed with discovery!", and went on to the next case. Wallace made no entry on the Docket sheet in the cause this day. (Exhibit 11). Despite repeated requests, Birnbaum has never been able to get the transcript of this hearing.

47. Upon information and belief, Ray and Wallace had somehow agreed to let Ray get Wallace's signature on documents that had not been filed and served on the opposing side. Upon information and belief, Ray and Wallace had previously agreed, because Wallace did not say something like "What is going on? I am going to get to the bottom of this!"

48. Birnbaum found in File 95-63 the previously referred to "Request for Setting Form" (Exhibit 9) for "Default Judgment" and went to B.Davis, Court Administrator, asking as to whether Birnbaum should have been notified of such a request, or whether it was even proper to even request "Default Judgment" under the circumstances. B.Davis told Birnbaum that "It is moot".

49. Upon information and belief, B.Davis regularly and routinely goes along with Ray and others in rigging the setting of process and hearings in Wallace's Court.

Failure to provide transcripts and destruction of Court Records

50. Birnbaum made requests for transcripts for hearings as indicated by documents dated April 10, 1995 and May 3, 1995 (Exhibit 12), and June 26, 1995 (Exhibit 13). Malone never provided transcripts of these hearings. When Zimmermann in 1998 got around to directing the production of transcripts (Exhibit 14), Malone then notified Birnbaum by letter dated Feb. 4, 1999

(Exhibit 15), that *"I have knowledge of" " no record exists".*

51. Upon information and belief, Wallace told B.Davis, Court Administrator, to do whatever is necessary so that Birnbaum will not obtain transcripts from Wallace's Court Reporter, even if it is necessary to lie to Birnbaum or to destroy records.

Complaints of fabrications

52. Birnbaum sought discovery by letter dated April 18, 1995 (Exhibit 16). Birnbaum received no reply.

53. On May 15, 1995 Birnbaum complained of fabrications (Exhibit 17),and requested a hearing (Exhibit 18). B.Davis issued "Notice of Hearing" (Exhibit 19) for June 12, 1995. Birnbaum contacted B.Davis complaining that Jones had never appeared in Court. (Exhibit 20).

54. At the June 12, 1995 hearing attorney Ray stated that he could not understand Birnbaum's April 18, 1995 request (Exhibit 16). Ray never got around to stating what he could not understand, and Wallace never "got around to" Birnbaum's complaint of fabrications (Exhibit 17), for which this hearing was set. Jones was not in Wallace's Court and had still never been there. Malone and B.Davis would never provide the transcript of this hearing.

55. Upon information and belief, Wallace regularly and routinely "goes along" with Ray in behalf of the enterprise even when parties in Wallace's Court complain of fabrications.

56. Birnbaum provided answers to Ray's interrogatories (Exhibit 21) and requests for admissions (Exhibit 22). Birnbaum states that he did not build **"The Dam"**. Ray never sought further discovery regarding **"The Dam"**.

57. Ray serves Jones' answers to Birnbaum's interrogatories (Exhibit 23). Noteworthy is the reply given to Interrogatory No. 28: ***"Are the complaints listed in the Plaintiff's Original Petition for Cause 95-63 an accurate representation of your (Jones') complaints? (In plain English: "Do***

you agree with what Ray has filed?"), to which the answer was ***"Objection. The question seeks speculative information and is unintelligible."***

58. Upon information and belief, Jones did not state that which is in Ray's Petition (Exhibit 1) and Jones had very little to do with "Jones' Answers to Interrogatories" (Exhibit 23).

Further Complaints to Wallace and B. Davis

59. On July 7, 1995 Birnbaum hands B.Davis a petition (Exhibit 24): ***"From the beginning I have complained to this Court about Richard Ray's fabrications, etc."***. This petition to Wallace complains of obstruction of Birnbaum's defense, violations of his Civil Rights, and petitions Wallace to refer these matters to the U.S. Justice Department, and requests a hearing upon this petition (Exhibit 25).

60. No such hearing was ever set by B.Davis. Instead B.Davis sets a hearing for "resolution / pretrial", as indicated by her "Notice of Setting" dated July 21, 1995 (Exhibit 26). On July 28, 1998 Birnbaum again petitions Wallace (Exhibit 27). No reply was received.

61. On August 15, 1995 Birnbaum submits "Motion for Resusal of Judge" (Exhibit 28). B.Davis and Wallace issue no Order of Recusal or Order of Referral upon the motion as required by the Civil Rules of Procedure, and do not reply in any manner to Birnbaum. Later Birnbaum finds a copy of his motion in File 95-63 with handwriting upon it: *"Granted 8-23-95"*. (Exhibit 29)

62. Upon information and belief, B.Davis and Wallace regularly do not respond to complaints to them and regularly and routinely go along with Ray and others in defrauding parties in Wallace's Court by a scheme to deprive them of honest service.

Complaints to the First Administrative Judicial Region since October 2, 1995

63. Birnbaum lodged complaints with Zimmermann and McDowell (Exhibits 30-36). Birnbaum never received a reply to any of these complaints:

- Oct. 2, 1995: Complaint to Judge Zimmermann ***of "machinations in a manipulated Court"*** in the 294th District Court (Exhibit 30)
- Oct. 25, 1995: Complaint to Judge Zimmermann ***of "racketeering under color of law"*** in the 294th District Court (Exhibit 31)
- Dec. 20, 1995: Presiding Judge, First Administrative Judicial Region, Judge Defendant McDowell re: ***"Petition for Court Order and Special Prosecutor"*** (Exhibit 32)
- Jan. 3, 1996: Petition to Presiding Judge, First Administrative Judicial Region, judge Defendant McDowell, re: for him to respond (Exhibit 33)
- Feb. 14, 1995: Complaint to Presiding Judge, First Administrative Judicial Region, judge Defendant McDowell, of a ***"an ongoing conspiracy of official oppression between Judge Wallace, Richard Ray, and Betty Davis, and others"***. (sworn complaint) (Exhibit 34)
- Apr. 11, 1996: Complaint to Court Administrator, First Administrative Judicial Region, of ***"Obstruction of Process" by violations of Title 18, USC Section 241 and 242 (Conspiracy)"***. (sworn complaint) (Exhibit 35)
- Mar. 11, 1997: ***"Notification of Conspiracy and Retaliation"*** with copies of all of the above documents, and other documents, attached (Exhibit 36)

64. The return receipts came back signed (Exhibit 37). Another mailing was opened (Exhibit 38) as indicated by the Postal Inspector's reply (Exhibit 39). Another mailing showed signs of obstruction (Exhibit 40).

65. Birnbaum never received any reply from Zimmermann or McDowell regarding these complaints. Neither judge would ever address very serious charges even when they were presented in sealed envelopes to be opened only at the bench. (Exhibits 51,52)

Complaints to Van Zandt County Officials

66. Birnbaum notified Van Zandt County on November 2, 1995 (Exhibit 41) and in detail on August 16, 1996 (Exhibit 42). Birnbaum also notified Van Zandt County in much more detail on March 11, 1997 (Exhibit 36).

First appearance of Zimmermann on March 4, 1996

67. Upon information and belief, Wallace issued no Order of Recusal, McDowell assigned no judge to replace Wallace, and Zimmermann just came down to sit for Wallace this day. B.Davis sent no notice that a judge had been assigned to replace Wallace, or that there was to be a hearing

upon Birnbaum's motion for recusal of Wallace, and Birnbaum was not present on this day.

68. Zimmermann came and noted "Referred to Hon. Richard Davis for Mediation" on the Docket sheet this day. But Zimmermann issued no Order of Assignment regarding R.Davis, and B. Davis sent no notice of any kind to Birnbaum, and R.Davis sent no notice of any kind either for over three months. The "Order for Mediation" (Exhibit 49) later produced by R.Davis is not completed, was never filed or served, and is a fraudulent document.

The fraudulent (BOGUS) Court Order of January 16, 1997

69. Attorney Ray mailed to Birnbaum a "Request for Setting Form" (Exhibit 43), dated October 23, 1996, to "Enforce Mediation or Enter Judgment ", with the Cause number on that document given as 95-93, and not 95-63, which is the correct number. B.Davis did not set a hearing as requested by this document.

70. Upon information and belief Ray never sent this request to B.Davis, but intended to threaten and defraud Birnbaum with this notice.

71. Upon information and belief, Ray did participate with R.Davis to issue such an Order (Exhibit 44), dated January 16, 1997, bearing the same 95-93 reference, demanding that Birnbaum pay $600.00 to R.Davis.

72. Upon information and belief said Court Order is indeed BOGUS, because there was no application for this Order, there was no hearing upon a request for such Order, Birnbaum was not served with any of the related documents, and there does not exist an ORIGINAL of such an Order, and the document bears the bogus 95-93 reference.

73. Birnbaum immediately complained to R.Davis (Exhibit 45), and Dixon (Exhibit 71), the local District Attorney, and later to Zimmermann (Exhibit 51) and McDowell (Exhibit 52), that this Court Order was indeed BOGUS. None of the above ever acted upon any of these complaints.

74. Upon information and belief Zimmermann, McDowell, and Dixon customarily and routinely do not respond to complaints about goings on in Wallace's Court, even if the complaint alleges forgery of a Court Order.

The Appearance and Disappearance of the Richard Davis

75. Birnbaum received a copy of a fax of a Court Order (Exhibit 44) inside a Davis& Price envelope, with no other document enclosed. Birnbaum immediately notifies R.Davis by letter dated January 27, 1997 (Exhibit 45) that the Court Order is BOGUS, and that the motions for recusal for both Wallace (Exhibit 28) and Zimmermann (Exhibit 46) have not yet been addressed, and that the 95-93 number is a fraudulent number. There was no reply of any kind from R.Davis to Birnbaum. R.Davis, although notified by the Court to appear on several occasions, never appeared even once at a hearing in Court.

76. Upon information and belief, neither Zimmermann, nor Wallace's Court Administrator, B. Davis, ever timely notified R.Davis that the Cause had been "Referred to Hon. Richard Davis for Mediation" on March 4, 1996, or ever issued any Order for Mediation.

77 . Letter dated January 28, 1997 from R.Davis to Zimmermann (Exhibit 47) withholds from Zimmermann the information Birnbaum had just provided to R.Davis, of the Bogus 95-93 number, and the matter of the unaddressed motions for recusal. This letter was found in the Clerk's files but does not bear a date/time stamp.

78. Upon information and belief R.Davis never sent this letter to Zimmermann, and R Davis created it at a later date for the sole purpose of obtaining cover for not having informed Zimmermann of the information he had received from Birnbaum on January 27, 1997 (Exhibit 45).

79. Attached to Affidavit of Richard Davis (Exhibit 48) is a document listed as Exhibit 1, "Order for Mediation" (Exhibit 49). R.Davis swears that this is a "true and correct copy of said

appointment". This document does not even bear a date, is otherwise not filled out, does not bear a time/date stamp, has the wrong cause number on it, and no original or copy exists in the District Clerk's files in Wallace's Court.

80. Upon information and belief this "Order for Mediation" is a fraudulent document recently produced by R.Davis.

81. Found loose in the Clerk's file in Wallace's Court about May 5, 1999 is a fax from R.Davis asking Zimmermann to request that *Jones vs. Birnbaum* be sent to the Texas Attorney General (Exhibit 50). This fax uses a false cause number 95-**93** instead of the correct 95-**63**. Although this copy indicates that a date/time stamped document was once filed, no such document with the original blue file stamp now exists in the file.

82. Upon information and belief this fax was never sent to Zimmermann as implied by the document. Both R.Davis and Zimmermann after three years of Birnbaum had been made thoroughly aware of the 95-63 vs. 95-93 goings on in Wallace's Court, and there simply would be no rationale for R.Davis continuing with the phony 95-93 towards Zimmermann.

83. Upon information and belief this document was created by R.Davis for the sole purpose of deceiving the Texas Attorney General into believing that he, R.Davis had indeed been properly called upon by Zimmermann.

84. Upon information and belief, R.Davis intentionally used the false 95-93 number so that a wrong file, namely 95-93, or perhaps no file, and **definitely not** 95-63 (Jones vs. Birnbaum), would be provided to the Attorney General, for file 95-63 would show that R.Davis had **not** been assigned to Jones vs. Birnbaum, and was a trespasser upon Birnbaum.

85. Upon information and belief, some documents were mailed on May 26, 1999 (Exhibit 50), and the Attorney General's Office found out about May 28, 1999 that R.Davis had never been

assigned to *Jones vs. Birnbaum*, and that there were lots of wrongs going on in Wallace's Court, and decided to no longer represent R.Davis, B.Davis, Malone, and Young.

The second appearance of Zimmermann, and the "cleansing" of his own and the First Administrative Judicial Region's files on April 21, 1997

86. Zimmermann appears on this day with no judge having appeared in over a year. Wallace's Court Administrator, B.Davis, has set a hearing for "to enforce mediation or enter judgment". No motion by that name was ever served on Birnbaum or ever existed in the files.

87. At the start of the hearing Zimmermann opens a sealed document (Exhibit 51) provided to him by Birnbaum through the Clerk of Court. This document complains that this very hearing is a conspiracy to obtain a judgment upon Birnbaum by the BOGUS (fraudulent) Court Order, and at the same time to conceal that the Court Order was indeed BOGUS.

88. Zimmermann, without acting on the complaint, passed over it as follows: "I'm going to ask the clerk to put a file stamp on that and file that of record. The two sheets of blank paper I'm going to dispose of."

89. Then Zimmermann refers to Birnbaum's March 11, 1997 "Notification of Conspiracy and Retaliation" (Exhibit 36) sent to Zimmermann on March 11, 1997. Zimmermann brought the large document including attachments with him into the court this day, and states: *"Now, in addition to all of that, Mr. Birnbaum, I have another envelope which was directed to me a couple of weeks ago, which contains a document entitled, "Notification of a Conspiracy and Retaliation"; in which you say, in part, " This ongoing" -- I'm quoting now -- "This ongoing caper is official oppression. I am forced to request, (1) An injunction against Richard Ray, Richard Davis, Tommy Wallace and Betty Davis, and an official referral of this matter to the U.S. Justice Department. This is racketeering under color of law."* (verbatim quote)

90. Zimmermann then again exercised conscious indifference to this, Birnbaum's complaint, by having the clerk of Court also put a stamp on it, and file it. Zimmermann then immediately switched the subject, without addressing the "Notification" (Exhibit 36), or the complaints of crimes he had received from Birnbaum starting way back in October of 1995 (Exhibits 30,31,36)

91. Upon information and belief, Zimmermann regularly and routinely goes along with Ray and Wallace by not asking questions upon complaints to him, even when these complaints are provided directly to him, in a sealed envelope to be opened specifically only by him.

92. Upon information and belief, Zimmermann's appearance in Wallace's Court without an Order of Assignment by a proper judge, is intentional trespassing upon Birnbaum, and particularly in light of the complaints Birnbaum made directly to him (Zimmermann) before he appeared as a judge.

The appearance of McDowell on July 22, 1997

(Hearing on Motion for Recusal of Judge Zimmermann)

93. Upon information and belief, Wallace had never issued an Order of Recusal nor an Order of Referral upon the motion for his recusal (Exhibit 28) but had simply scribbled something onto a copy of the motion (Exhibit 29), and Judge McDowell had never assigned a judge to replace Judge Wallace on the Cause.

94. Upon information and belief, Judge Zimmermann also issued neither an Order of Recusal nor an Order of Referral upon the motion for his recusal (Exhibit 46), but had apparently gotten Judge McDowell, Presiding Judge of the First Administrative Judicial Region, to come down to Wallace's Court anyway.

95. McDowell had received complaints from Birnbaum about Wallace's doings, and had never responded (Exhibits 32-35). Now belatedly Judge McDowell comes to hear Birnbaum's

motions for recusal. The August 16, 1995 Motion for recusal of Wallace (Exhibit 28) is nearly two years overdue. The June 10, 1996 Motion for recusal of Zimmermann (Exhibit 46) is over one year overdue.

96. For this July 22, 1997 hearing Birnbaum had provided "Objection to Diversionary Proceedings", dated July 21, 1997 (Exhibit 52) to McDowell through the Clerk of Court. It is in a sealed envelope as indicated in the document, and McDowell opens it. The hearing was "motion to recuse Honorable James Zimmermann." (Exhibit 53).

97. Ray knew that the motion for recusal of Wallace had never been addressed, as indicated by his phrase of *"I **think** Judge Wallace has recused - - he **wishes** to"* and *"Judge, **my recollection** is this is a case that Judge Wallace recused himself and Judge Zimmerman has been assigned"* and *"I **think** Richard Davis was appointed as mediator at that time"* and *"At least **that's the way Judge Zimmerman** -- and at that time, I didn't have a copy."* (Exhibit 54)

98. McDowell knew that the motion for recusal of Wallace had never been addressed, as indicated by his phrase of *"I'm trying to figure out **which judge** you are after frankly. I'm not laughing at you, I'm laughing --"*., and *"Why don't we hear **them both** at the same time?"* and ***"Judge Zimmerman?"*** (Exhibit 54)

100. Upon information and belief, McDowell regularly and routinely ignores complaints sent to him at the First Administrative Judicial Region and "goes along" with Wallace, Zimmermann, R.Davis, and Ray when there are matters that he is in a position to cover up.

101. Upon information and belief, McDowell's appearance in Wallace's Court without an Order of Referral by a judge of some kind, is intentional trespassing upon Birnbaum.

102. Thereupon Birnbaum changed his pleading before the Court to "Duress by Fraudulent Process" (Exhibit 55), which was Birnbaum's live pleading ever after. Neither Zimmermann, nor

McDowell, nor Dixon ever addressed the substance of this pleading.

The second appearance of McDowell on February 23, 1998

103. Attorney Ray had entered into Wallace's Court a petition, which claimed a cause of action of Birnbaum having built **"The Dam"** (Exhibits 1,2), and no other cause of action. Birnbaum had claimed Ray had fabricated his whole cause, and since July 22, 1997 Birnbaum had a live pleading of **"Duress by Fraudulent Process"** (Exhibit 55).

104. On January 21, 1998 Birnbaum submitted "Defendants Application for Court Order to Compel" Dixon to present his complaints of crimes to the Grand Jury. (Exhibits 56,57)

105. Upon information and belief, thereupon B.Davis backdated a notice of setting, and set trial (Exhibit 58) for the same date as a hearing to compel Dixon (Exhibit 59).

106. Thereupon Birnbaum submitted "Motion for Recusal of Zimmermann and McDowell" (Exhibit 60). No Notice of a hearing for this coming of McDowell was ever issued by B.Davis and Birnbaum was not present on February 23, 1998, as shown by the transcript of the proceedings. (Exhibit 61)

107. Upon information and belief, McDowell came to sit to hear a motion for his own recusal. Upon information and belief, the motion should have been heard by a superior judge (Exhibit 63)

108. On page 2 line 21 of the transcript (Exhibit 61), McDowell states: *"This is a hearing on a motion, what I'm hearing, is a Motion to Recuse Judge Zimmermann and me. And the motion is filed, and I have a copy of it in the court file."* Then again on page 3 line 4: *"The motion doesn't really advise me what Mr. Birnbaum's particular complaint is about Judge Zimmermann and me."*

109. The short five (5) page transcript shows that never once during the proceedings does McDowell address as to why it is proper for him to hear a motion for his own recusal, or why it

might not be proper for Birnbaum to recuse McDowell. Nor as to why Zimmermann issued no Order of Referral, as is indicated by McDowell's phrase of "*what I'm hearing*", and the absence of any such Order in File 95-63. And McDowell himself issued no Order of Referral, as indicated by his apparent just "coming down" to Wallace's Court.

110. Upon information and belief, everybody went on as they had before. McDowell issued no Order, and Zimmermann had a "hearing get-together" right after this right there in Wallace's Courtroom. Zimmermann, Dixon and Ray ignored the trial set for this day. There is no reference of any kind in the transcript to the trial that was set for this day but was not had.

111. Upon information and belief, B.Davis panicked when she found Birnbaum had complained to Supreme Court Justice Phillips (Exhibit 62), and about McDowell coming to sit on a motion for his own recusal (Exhibit 63). And McDowell panicked, and sent a personal letter to Birnbaum, on that very same day, explaining in fuzzy language his presence in Wallace's Court this morning (Exhibit 64).

112. Upon information and belief, McDowell not addressing the substance of Birnbaum's Motion for Recusal and prior complaints directly to him, and even responding not through the Court, but to Birnbaum directly by his February 23, 1998 letter (Exhibit 64) shows that McDowell regularly and routinely "goes along" with Zimmermann and other judges and does not act upon complaints pertaining to Wallace's Court.

The participation of the District Attorney by, among other acts, lying in Court on February 23, 1998 about her participation

113. Birnbaum provided Dixon, the local District Attorney with at least nine (9) complaints or requests for assistance over a period of over three (3) years, most by Certified U.S. Mail (Exhibit 74), among them sworn complaints:

Feb. 15, 1995	Trespass and destruction of property (Exhibit 65)
Aug. 25, 1995	Falsifications before the Court (Exhibit 66)

Aug. 30, 1995	Request to secure Court documents and records (Exhibit 67)
Sept. 6, 1995	Request to refer previous complaints (Exhibit 68)
Sept. 28, 1995	Notice of witness available for investigation (Exhibit 69)
Nov. 22, 1995	Notice of racketeering under color of law (Exhibit 70)
Jan. 29, 1997	Notice of Forgery of Court Order (Exhibit 71)
Mar 11, 1997	Notification of Conspiracy and Retaliation, w / attachments (Exhibit 72)
Feb. 23, 1998	Notice of Forgery of Affidavit (Exhibit 73)

114. **Dixon** lied before Judge Zimmermann on February 23, 1998, by portraying the above described sworn and/or certified notices duly registered at her Office, as:

"regularly and routinely receive(d) written communication from Mr. Birnbaum",

"Basically just copies of the documents that he apparently files in this cause"

"I .....have never been able to determine precisely what his claim is"

"And we have not been able to have any communication with him to clarify anything."

"We just get stuff in the mail. So we can't get any response back from him."

(Exhibit 75), transcript of hearing February 23, 1998)

115. Upon information and belief, **Zimmermann** knew she was lying, for he had on March 11, 1997 received copies of some of the same documents, including Birnbaum's "Notification of Conspiracy and Retaliation", sent to both Dixon and to him. Zimmermann apparently brought Dixon into the Court to cover up for Zimmermann not having addressed Birnbaum's notices to him of fraudulent documents and fraudulent process.

The trial of May 26 through May 29, 1998

Notes on the proceedings

116. At issue was whether Birnbaum had built **"The Dam"**(Exhibit 3), or whether Ray and Jones had brought a **"totally fraudulent petition"** and made the whole thing up (Exhibit 55).

117. Birnbaum kept bringing up the issue of fraud upon the Court: *"I want the Court to address the fraud upon the Court"*, upon which Zimmermann *replied "That's what we do; we call*

it a trial." But when the trial was finished and the jury determined ZERO damages, Zimmermann did not issue a judgment.

118. Zimmermann went to extremes to make it appear that everything was fair. At one point he stated that it is important "that the Court be fair", then "that the Court appear to be fair -- No -- That it's evident that the Court is fair." Birnbaum became concerned as to why Zimmermann was so concerned that it had to be that it had to be evident that the Court had been fair.

119. At one point, before the selection of the jury, Judge Zimmermann asked Birnbaum if there was anything else that should be addressed, to be sure that "everything before the Court has been addressed before we go to trial", or somewhat to that effect. This is in the pattern of Zimmermann. He would ask if there was anything else that had not been addressed. Then he would not act upon the new "anything else", and then ask again if there was anything else to address, and so forth. At one point he asked Birnbaum to put requests on paper (Exhibit 78).

120. The deep conspiracy between Zimmermann and Ray is evidenced by the transcript (Exhibit 79). Zimmermann even got Ray to tab the file, even to remove and insert records into the file (page 22, lines 17-23), then apparently tried to claim the tabs as his own (*"Let me tell you what I just finished doing"*, page 23, lines 7-8), then tried to to get Ray to help him some more only to have the whole File fly apart (page 89, line 13, etc), then having found what Ray wanted him to see (Page 90, line15), took Ray's cue to have him (Zimmermann) remove the tattle-tale tags (page 90, line 17,etc), then stood by bewildered as Birnbaum lit into Ray inquiring as to what the whole tagging between Ray and Zimmermann (page line 23 through page 24, line 24).

121. What Zimmermann had apparently done is to get Ray to assist him to find where Birnbaum had complained of Zimmermann as being a "secret agent", as indicated by Zimmermann's search. (p 81 line 3, line 16, p 92 line 10 and 12,). Birnbaum had thus complained

to McDowell at his recusal hearing by sealed envelope (Exhibit 52), only to have McDowell refuse to address it at that time. Now at the trial, Zimmermann, of all people, wants to address the matter and badger Birnbaum upon his complaint to McDowell.

122. Noteworthy is Zimmermann's misrepresentation of his knowledge of the unaddressed recusal motions. On page 24 line 15 etc he has full knowledge of McDowell's appearance on February 23, 1998, just three months ago. On page 45 line 22 etc he has lost all knowledge of McDowell's appearance on February 23, just three months ago: *"McDowell, as far as I can tell, ruled some time last summer on the last one -- the most recent one that was filed"*.

The Court's Charge and the Verdict

123. The Court's Charge (Exhibit 80) had only three (3) questions, NONE addressing whether Birnbaum had built **"The Dam"**, or whether Ray had fabricated it as Birnbaum claimed:

QUESTION NO. 1: Did Birnbaum allow dams upon his land to flood Jones' upstream property in October, 1994? We answer: YES

If you have answered "yes" to Question No. 1, then answer Question No. 2.
QUESTION NO. 2 : What sum of money, if paid now in cash, would fairly and reasonable compensate William B. Jones for his loss, if any, resulting from the occurrence in Question? We Answer: $ 0

If you have answered "Yes" to Question No. 1, then answer Question No. 3.
QUESTION NO. 3: What sum of money, if any, do you find from a preponderance of the evidence would be reasonable and necessary attorney's fees for the services, if any, performed by Plaintiff's attorney: We answer: $ 10,000

124. Upon information and belief, Zimmermann and Ray did everything it could do to keep from addressing the pleadings. And when the jury returned a verdict, Zimmermann and Ray got caught: **Zimmermann had no way to pronounce a judgement that would conform to Ray's pleadings that Birnbaum built "The Dam", Birnbaum's pleadings that Ray had made the whole thing up, and a verdict that did not decide this, the ONLY issue in the pleadings!**

125. No evidence of any kind that **"The Dam"** had ever existed was ever introduced. During the trial even Zimmermann was trying to find **"The Dam"**. When Jones testified that he had blown up a dam, Judge Zimmermann stated: *"Let me interrupt you for just a moment, Mr. Birnbaum. I want to get one thing clear --- so the jury doesn't get confused, because I'm right on the verge of it, myself. The dam that you (Jones) just testified about having blown up, that's not the same dam that we're -- -- down here to litigate about?"*, with Birnbaum telling him: *"No, sir. It sure isn't it."* And Zimmermann closing with: *"I understand. I just want to be sure that the jury didn't get too confused. Go ahead."*

126. It would have been proper for Zimmermann to state something like: "Whoa! Where is this dam, **"The Dam"**, we have been litigating about for four years? What is going on? I have seen no evidence of this **"The Dam"**, ever! Upon information and belief, Zimmermann regularly and routinely goes along with Ray in behalf of the enterprise.

127. Upon information and belief, Ray never intended to show **"The Dam"**, because he never entered any evidence of **"The Dam"**, yet kept **"The Dam"** in THREE petitions.

Young and McDowell

128. Birnbaum had issued Subpoena Duces Tecum upon McDowell. (Exhibit 81). McDowell did not appear, and Young, McDowell's attorney, did not appear either, but had arranged to have his "Motion to Quash Subpoena" (Exhibit 82) appear before Zimmermann and be "heard".

129. Young's Motion had no affidavit of any kind attached. Young's Motion was false as documented in Birnbaum's response (Exhibit 83). Birnbaum was present and Young was not.

130. Upon information and belief, Young intentionally misquoted the documents McDowell was subpoenaed to bring, and substituted specific language in its place. Upon information and belief, a normal careless mistake by Young could not have produced the carefully crafted document

Young provided to Zimmermann, without Young having participated in matters going on in Wallace's Court, or participating directly or indirectly with someone participating in such matters, or both.

131. Defendant Young obtained preferential access to the Court as shown in his "Facsimile Transmission Cover Page" (Exhibit 84). Young participated with B.Davis to get this document before Zimmermann without the presence of Young, to defraud Birnbaum of his right to examine Young upon his fraudulent document.

The hearing of July 24, 1998

132. On July 14, 1998 B.Davis sets hearing for "motion for entry of judgment" (Exhibit 85) for July 24, 1998. No such motion exists. What does exist is "Plaintiff's Motion for Judgment on Verdict", dated June 29, 1998 (Exhibit 86), with attached proposed Judgment (Exhibit 87) which contains a curious embedded injunction affirmatively "compelling" Birnbaum to make water flow uphill.

133. On July 13, 1998 Birnbaum replies with "Defendant's Response to Plaintiff's Motion for Judgment on Verdict: Defendant's Pleading to Examine Plaintiff's Claim of Award", and "Defendant's Pleading for Order to Cease and Desist Machination" (Exhibit 88), and requests a hearing upon it. B.Davis does not put it on the Docket.

134. On July 24, 1998 Birnbaum examines Ray in the witness box about exactly what ZERO damages means, whether this is zero (0), decimal zero (0.0), Zero, or Ze-e-e-ro, or Ze-e-e-e-e-e-ero. Ray hands Birnbaum "Plaintiff's Amended Motion for Judgment on Verdict (Exhibit 89), with another "Judgment" (Exhibit 90) attached, which unscrambles a few "nots" in its injunction "compelling" Birnbaum. Judge Zimmermann makes no ruling, does not get around to Birnbaum's Pleading for Court Order (Exhibit 88), does not sign either of Ray's proposed Orders, and makes no

entry of any kind on the docket sheet (Exhibit 91), and stops the hearing, and proceeds with Collins' case.

135. When the Court went off the record, a curious exchange between Zimmermann and Birnbaum occurred. With everybody milling about the Courtroom, Zimmermann asked Birnbaum from the bench to the effect *"Mr. Birnbaum, can I see you up here?"* Birnbaum approached the bench, and Zimmermann indicated to Birnbaum something to the effect that *"From your response at the trial, when the verdict was read, I believe that you may have misunderstood what the jury meant."* Birnbaum told Zimmermann something to the effect of that *"maybe the jury did not know what the questions meant"*. Whereupon Zimmermann stated emphatically that *"The jury knew exactly what they meant!"*, with emphatic vocalization of the "exactly", and terminated his dialog with Birnbaum.

136. Upon information and belief, Zimmermann knew exactly what the Verdict meant, and also knew that it did not matter exactly what the jury meant, or that each juror meant the same, and that the only thing that mattered was what the jury had said, and that they had answered **ZERO DAMAGES**.

137. Upon information and belief, Ray knew that he never had a cause to start with, and Zimmermann knew that Ray never had a cause, because Zimmermann had acquired knowledge from the circumstances he had personally observed in and about Wallace's Court for over for three years.

138. Upon information and belief, Zimmermann from the very bench badgered Bennett, Birnbaum's own lawyer, to talk Birnbaum into paying Ray $2500 to be released.

The hearing of October 6, 1998

139. On July 15, 1998 Birnbaum had submitted "Defendant's Pleading for Order to Cease

and Desist Machination (Exhibit 88) and "Request for Setting Form". On July 30, 1998 Birnbaum requests setting for "motion for entry of take nothing judgment" and gives notice (Exhibit 92) to B.Davis that she had failed to set a hearing for "Defendant's Pleading, etc".

140. On August 26, 1998 B.Davis sets a hearing (Exhibit 93) for October 6, 1998 for "motion for entry of judgment". No such motion exists, and B.Davis has again failed to set a hearing upon Birnbaum's Pleading of July 15, 1995 (Exhibit 88).

141. On September 4, 1994 Birnbaum sends "An Open Letter to this Court's Coordinator" (Exhibit 94) to B.Davis. Somehow Birnbaum obtains a hearing of some type before Zimmermann for September 28, 1998 and gets Zimmerman to direct preparation of statements of facts, as indicated by his handwritten instructions (Exhibit 95). Somehow B.Davis must have set "amended M-for entry of judgment & all other matters" (Exhibit 96) for October 6, 1998.

142. Birnbaum, previously Pro Se, retains attorney Martin Bennett. Bennett submits "Defendant's Brief on Entry of Judgment" (Exhibit 97), "Motion of Judgment Notwithstanding the Verdict" (Exhibit 98), and a take-nothing judgment, "Motion for Entry of Judgment" (Exhibit 99). Ray submits "William Jones' Brief in Support of Plaintiff's Objections to Defendant's Motion for Entry of Judgment and Defendant's Motion for Judgment Notwithstanding the Verdict" (Exhibit 100).

143. On October 6, 1998 Bennett and Ray spar for about 20 minutes in front of Zimmermann. The key question is whether Question 3 about attorney's fees had been proper, and if it were not, whether Birnbaum had waived his right to object to that issue now, since he had not done so at trial. Zimmermann's question to Ray probably sums it up best, something to the effect that "If the question was not proper when it was asked, why is it proper for us to concern ourselves now with what the jury's answer upon it should mean?" Birnbaum has been unable to obtain the

transcript of this hearing. Zimmermann made no entry on the docket sheet of having had this hearing on October 6, 1998.

144. Then at the end of the hearing a gathering occurs at the Bench, for about 40 minutes, between Zimmermann, Ray, and Bennett, Birnbaum's attorney. Birnbaum had provided Bennett with Ray's petition, his third, "Second Amended Original Petition" (Exhibit 3), submitted only one week before the trial, Birnbaum's live pleading at the trial (Exhibit 55), and the Verdict (Exhibit 80).

145. Zimmermann issued phrases to Bennett, such as *"I wanted to be sure you knew"*, and something about Birnbaum's opinion of *"the judicial system"*, whatever Zimmermann may have meant about that to Birnbaum's attorney, Bennett.

146. When the gathering at the bench is concluded, Birnbaum goes out into the Courtroom into the hall. Shortly afterwards Bennett comes into the hall, and tries to persuade Birnbaum that for maybe $2500 paid to Ray, the whole thing could be over. Birnbaum declined the $2500 proposal Martin had brought from the Courtroom.

147. Upon information and belief Zimmermann regularly and routinely goes along with Ray in behalf of the enterprise, as indicated by his not making further inquiry into Question 3 of the Verdict, or the meaning under the law of ZERO damages.

More documents, hearings, and arguments

148. Zimmermann participated with Ray, at subsequent hearings on December 16, 1998, and January 19, 1999. Again, Zimmermann made no more entries on the docket sheet.

149. Upon information and belief, Zimmermann in sitting had acquired knowledge that Ray's Cause in Wallace's Court had been totally fraudulent from the beginning.

Summary of Zimmermann's continuing Role as a Secret Agent of Wallace, R.Davis, and Ray

150. Zimmermann participated with Ray, at subsequent hearings on December 16, 1998, and January 19, 1999. Again, Zimmermann made no more entries on the docket sheet.

Summary

151. Defendants have knowingly conducted and/or participated, directly and indirectly, in the conduct of the affairs of the Enterprise through a "pattern of racketeering activity" as defined by Title 18, United States Code, Section 1961(5). Such racketeering activity consists of repeated violations of the federal mail fraud statue, Title 18, United States Code, Section 1341, based upon a scheme to defraud Birnbaum, which is described above. These predicate acts have the same or similar purposes, results, participants, victims or methods of commission and otherwise are interrelated by distinguishing characteristics and are not isolated events. Furthermore, the Defendants' pattern of racketeering activity amounts to or poses a threat of continued criminal activity.

INJURY TO BIRNBAUM

152. As a direct and proximate result of the Defendants' conduct, Birnbaum was injured by more that $100,000 by costs of defense, cloud upon the title of his property, loss of earnings, and mental anguish.

153. By reason of his injury, Birnbaum is entitled to recover treble damages, costs, and reasonable attorneys' fees pursuant to Title 18, United States Code, Section 1964(c).

COUNT ONE---RICO

154. Plaintiff repeats and realleges each of the allegations contained in paragraphs 1 through

153 as if fully set forth herein.

155. At all relevant times, Birnbaum was a "person" within the meaning of RICO, 18 U.S.C. §§ 1961(3) and 1964(c).

156. At all relevant times, the Defendants (Conspirators) were "persons" within the meaning of RICO, 18 U.S.C. §§ 1961(3) and 1962(c).

157. At all relevant times, the Defendants (Conspirators) formed an association-in-fact for the purpose of extorting legal fees. This association-in-fact was an "enterprise" within the meaning of RICO, 18 U.S.C. § 1961(4).

158. At all relevant times, this enterprise was engaged in, and its activities affected, interstate and foreign commerce, within the meaning of RICO, 18 U.S.C. § 1962(c).

159. At all relevant times the Defendants (Conspirators) associated with this enterprise conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs through a "pattern of racketeering activity" within the meaning of RICO, 18 U.S.C. § 1961(5), in violation of RICO, 18 U.S.C. § 1962(c).

160. Specifically, at all relevant times, the Defendants (Conspirators) engaged in "racketeering activity" within the meaning of 18 U.S.C. § 1961(1) by engaging in the acts set forth above. The acts set forth above constitute a violation of one or more of the following statutes: 18 U.S.C. § 1341 (mail fraud) ; 18 U.S.C. § 1503 (obstruction of justice). Each of the Defendants (Conspirators) committed and/or aided and abetted the commission of two or more of these acts of racketeering activity.

161. The acts of racketeering activity referred to in the previous paragraph constituted a "pattern of racketeering activity" within the meaning of 18 U.S.C. § 1961(5). The acts alleged were related to each other by virtue of common participants, a common victim (The Plaintiff), a common

method of commission, and the common purpose and common result of defrauding Birnbaum while enriching the Defendants (Conspirators) and concealing the Defendants' (Conspirators') fraudulent activities. The fraudulent scheme has continued for over four years and threatens to continue into the indefinite future.

162. As a result of the Defendants' (Conspirators') violation of 18 U.S.C. § 1962(c), Plaintiff was injured by direct costs of defense, cloud upon the title of his property, loss of earnings, and mental anguish.

163. As a result of their misconduct, the Defendants (Conspirators) are liable to Plaintiff for his injury in an amount to be determined at trial.

164. Pursuant to RICO, 18 U.S.C. § 1964(c), Plaintiff is entitled to recover threefold his damages plus costs and attorney's fees from Defendants (Conspirators).

COUNT TWO---RICO CONSPIRACY

165. Plaintiff repeats and realleges each of the allegations contained in paragraphs 1 through 111 as if fully set forth herein.

166. At all relevant times, Plaintiff was a "person" within the meaning of RICO, 18 U.S.C. §§ 1961(3) and 1964(c).

167. At all relevant times the Defendants (Conspirators) were "persons" within the meaning of RICO, 18 U.S.C. §§ 1961(3) and 1962(d).

168. At all relevant times, the Defendants (Conspirators) formed an association-in-fact for the purpose of extorting legal fees and defrauding Birnbaum. This association-in-fact was an "enterprise" within the meaning of RICO, 18 U.S.C. § 1961(4).

169. At all relevant times, this enterprise was engaged in, and its activities affected, interstate and foreign commerce, within the meaning of RICO, 18 U.S.C. § 1962(c).

170. As set forth in Count One, each of the Defendants (Conspirators) associated with this enterprise conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs through a "pattern of racketeering activity" within the meaning of RICO, 18 U.S.C. § 1961(5), in violation of RICO, 18 U.S.C. § 1962(c)

171. At all relevant times, each of the Defendants (Conspirators) were associated with the enterprise and agreed and conspired to violate 18 U.S.C. § 1962(c), that is, agreed to conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d).

172. Each of the Defendants (Conspirators) committed and caused to be committed a series of overt acts in furtherance of the Conspiracy and to affect the objects thereof, including but not limited to the acts set forth above.

173. As a result of the Defendants' (Conspirators') violation of 18 U.S.C. § 1962(d), Plaintiff was injured by direct costs of defense, cloud upon the title of his property, and mental anguish.

174. As a result of the Conspiracy, each Defendant (Conspirator) is liable to Plaintiff for his injury in an amount to be determined at trial.

175. Pursuant to RICO, 18 U.S.C. § 1964(c), Plaintiff is entitled to recover threefold its damages plus costs and attorney's fees from the Defendants (Conspirators)..

COUNT THREE-FRAUD

176. Birnbaum incorporates by reference paragraphs 1 through 161 as if fully repeated here.

177. Defendants made misrepresentations of material facts and failed to inform Plaintiff of material facts.

178. Defendants knew or should have known of the falsity of their representations to Plaintiff

or of the incompleteness of their statements to Plaintiff at the time that they were made.

179. Defendants' misrepresentations, omissions, and concealment of material facts were made intentionally or recklessly for the purpose of inducing Plaintiff to submit to their scheme, and were made with reckless and utter disregard as to their truthfulness ore completeness.

180. Plaintiff reasonably and justifiably relied to his detriment on the truthfulness of defendants' misrepresentations and on the completeness of defendants' disclosures of material facts. But for the defendants' misrepresentations, omissions, and concealment of material facts, Plaintiff would not have been subjected to the trials and tribulations he was forced to endure.

181. As a direct and proximate result of the defendants' intentional misrepresentations, omissions, and concealment of material facts, Plaintiff has been damaged by direct costs of defense, cloud upon the title of his property, loss of earnings, and mental anguish.

182. Defendants' conduct was knowing, intentional, with malice, demonstrated a complete lack of care, and was in conscious disregard for the rights of Plaintiff. Plaintiff is therefore entitled to an award of punitive damages.

PRAYER FOR RELIEF

183. **Wherefore**, Birnbaum respectfully requests that judgment be entered against Defendants Richard L. Ray, Tommy W. Wallace, James B. Zimmermann, Richard Davis, Pat McDowell, Leslie P. Dixon, Kerry Young, Betty Davis, Becky K. Malone, and William B. Jones each of them jointly and severally:

(a) In an amount not less than $100,000 upon the First claim for Relief, for violation of Title 18, United states Code, Section 1962(c), including prejudgment interest, and the sum trebled pursuant to Title 18, United States Code, Section 1964(c);

(b) In an amount not less than $100,000 upon the Second claim for Relief, for violation of Title 18, United states Code, Section 1962(d), including prejudgment interest, and the sum trebled pursuant to Title 18, United States Code, Section 1964(c);

(c) In an amount not less than $100,000 upon the Third claim for Relief, for Gross Negligence.

(d) For the costs of suit including reasonable attorneys' fees, if any, in accordance with Title 18, United states Code, Section 1964(c);

(e) Pre-judgment interest at the maximum rate allowed by law;

(f) Post-judgment interest at the maximum rate allowed by law;

(g) Punitive damages in such amount as the jury may award in its discretion;

(h) A permanent Injunction against all Defendants prohibiting further fraudulent activities as alleged in this Complaint; and

(i) All such other relief, legal and equitable, special or general, as the Court deems proper and just.

BIRNBAUM HEREBY DEMANDS A TRIAL BY JURY.

Respectfully submitted,

G. David Westfall
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714 Jackson Street
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(214) 741-4741
(214) 741-4746 Facsimile

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon all counsel of record via certified mail on this the 28th day of June, 1999.

G. David Westfall

Index
Appendix to Plaintiff's Amended Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UDO BIRNBAUM	)	
	)	
Plaintiff	)	
VS.	)	CIVIL ACTION NO. 3-99CV0696-R
	)	
RICHARD L. RAY, *et al*	)	
	)	
Defendants	)	

BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS RAY, WALLACE, ZIMMERMAN, R. DAVIS, MCDOWELL, DIXON, B. DAVIS, MALONE, AND JONES' MOTIONS TO DISMISS UNDER RULE12(b)(6),ALTERNATIVELY UNDER RULE 7(a) FRCP "SHULTEA" FOR ABATEMENT OF THIS ACTION

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ATTORNEY FOR PLAINTIFF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UDO BIRNBAUM	)	
	)	
Plaintiff	)	
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BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS RAY, WALLACE, ZIMMERMAN, R. DAVIS, MCDOWELL, DIXON, B. DAVIS, MALONE, AND JONES' MOTIONS TO DISMISS UNDER RULE12(b)(6),ALTERNATIVELY UNDER RULE 7(a) FRCP "SHULTEA" FOR ABATEMENT OF THIS ACTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff Udo Birnbaum, in response to the Defendants Ray, Wallace, Zimmerman, R. Davis, McDowell, Dixon, B. Davis, Malone and Jones' Motions and files his response.

Plaintiff's First Amended Complaint alleges RICO claims with painstaking specificity and detail. These allegations not only provide Defendants with sufficient notice of RICO claims, but also set out distinct RICO "persons" and "enterprises" and various RICO injuries. Defendants' Motions to Dismiss and Motions for Abatement should therefore be denied.

THE LEGAL STANDARD UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Motions to Dismiss "are not favored and should be granted sparingly and with caution." *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201, 215-26 (6th Cir. 1961). A Motion to Dismiss under Federal Rule Civil Procedure 12 (b)(6) must be denied "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claims which would entitle him to

relief." *United States v. Frank B. Killian Co.*, 269 F.2d 491, 493 (6th Cir. 1959)(quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In making this determination, the Court should not look beyond the face of the complaint and any matter incorporated by reference. See *Dann*, 288 F.2d at 215. "The District Court must construe the complaint in a light most favorable to the Plaintiff, [and] accept all of the factual allegations as true....When an allegation is capable of more than one inference, it must be construed in the Plaintiff' favor." *Colombia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995).

REQUIREMENTS OF CIVIL RICO

A. Plaintiff's First Amended Complaint alleges racketeering activity with particularity

Plaintiff's First Amended Complaint and Appendix contain numerous pages of particularized pleadings specifically setting forth details of Defendants' racketeering activities and their pattern of conduct. The 6th Circuit has held that the particularity requirements of Rule 9(b) is satisfied for RICO claims when the complaint "provided adequate notice [to Defendants] of why they are being sued" such that Defendants are "capable of preparing a responsive pleading." *Michaels Bldg. Co. v. Ameritrust Co., N. A.*, 848 F.2d 674, 681 (6th Cir. 1988)(reversing the trial court's dismissal of a RICO complaint under Rule 9(b)).

The pleadings requirements of Rule 9(b) must be read in conjunction with the liberal pleading policy of Rule 8, which requires only "a short and plain statement of the claim". *Id* at 679. In applying these rules in a RICO case, this court has noted: "Therefore, if the pleadings place Defendant on notice of the precise misconduct or fraudulent acts claimed, as an alternative to pleading the time, date and places of the wire and fraud violations, Rule 9(b) is satisfied." *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 656 F.Supp. 49, 76 (S.D. Ohio 1986).

Plaintiff has described with sufficient particularity the facts and circumstances surrounding the racketeering activity and pattern of conduct by Defendnats and the enterprise in his First Amended Complaint, p. 28-151, and Plaintiff hereby incorporates by reference his First Amended Complaint as if fully set forth herein.

B. **Plaintiff's allegation of the existence of a RICO Enterprise is pled with sufficient particularity**

Plaintiff's allegation of the existence of a RICO Enterprise is pled with sufficient particularity in Plaintiff's First Amended Complaint, which includes an Appendix containing 104 exhibits.

C. **Plaintiff has alleged a cognizable RICO injury**

Plaintiff was the direct target, along with others, of the pattern of racketeering activity perpetrated by Defendants. This racketeering activity was the proximate cause of damage to Plaintiff as alleged in the First Amended Complaint, and as the evidence adduced and to be adduced will substantiate at trial.

DEFENDANTS ARE NOT ENTITLED TO THE DEFENSES OF IMMUNITY ALLEGED

Each Defendant claiming immunity acted in violation of clear and specific constitutional and statutory provisions, for which they are properly liable. Regarding each predicate act or setting, each such Defendant participated as indicated there, each in their individual capacity, in behalf of the alleged enterprise, by not acting in their proper judicial, prosecutorial, administrative, or executive capacity, as would have been appropriate under the circumstances and in accordance with the oath of their offices or duties of their positions. (Par. 26, First Amended Complaint.)

These public servant defendants participated on behalf of an enterprise, through repeated violations of Title 18 U.S.C. § 1341 (mail fraud), by a scheme or artifice to deprive Plaintiff of his constitutional right of due process and against obstruction of justice, and the intangible right of honest services. (Title 18 U.S.C. § 1346. The term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services").(Par. 27, First Amended Complaint)

A. **Judicial Immunity**

The United States Supreme Court has held that officials who seek exemption from personal liability have the burden of showing that such as exemption is justified by overriding considerations of public policy. *Forrester v. White,* 484 U.S. 219, 108 S.Ct. 538, 545 (1988). When judges tortiously injure other citizens by acting in violation of clear and specific constitutional or statutory provisions, they are properly held liable, and courts have indicated that they then lack jurisdiction. *Jacobson v. Schaefer,* 441 F.2d 127 (7th Cir. 1971); *Barksdale v. Ryan,* 398 F.Supp. 700, 702 (N.D. Ill. 1974); *McVea v. Walker*, 11 Tex. Civ. App.46, 31 S.W.839 (1895).

It was not a judicial act for a judge to participate in a conspiracy to deprive a person of his civil rights, and for such conduct, liability properly attaches. *Crowe v. Lucas,* 595 F.2d 985 (5th Cir. 1979). It is clear that the courts have readily found acts away from the court or judicial chambers to be non-judicial acts. *Thomas v. Sams*, 734 F.2d 185 (5th Cir. 1984); *Brewer v. Blackwell*, 692 F.2d 387 (5th Cir. 1982); *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984); *Lopez v. Vanderwater,* 620 F.2d 1229 (7th Cir.), *cert. dismissed*, 449 U.S. 1028 (1980); *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979); *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974); *Cronovich v. Dunn*, 573 F. Supp. 1330 (E.D. Mich. 1983).

Judges have been held liable in tort for all damages arising from every illegal act committed in the exercise of their ministerial powers or in the discharge of their ministerial duties. *Supreme Court v. Consumers Union*, 446 U.S. 719 (1980); *Duffin v. Summerville*, 9 Ala. App. 573, 63 So. 816 (1913), *cert. denied*, 187 Ala. 403, 65 So. 779 (1914); *Roerig v. Houghton*, 144 Minn. 231, 175 N.W. 542 (1919); *Bannister v. Wakeman*, 64 Vt. 203,, 23 A.585 (1871); *Green and the Hundred of Buccles-Churches case*, 74, Eng. Rep. 294 (C.P. 1589). **Moreover, when the law assigns to judicial officers certain ministerial duties, they are liable for refusing or neglecting to perform them.** *Grider v. Tally*, 77 Ala. 422 (1884); *Poole v. Clase*, 455 N.E.2d 953 (Ind. Ct. App. 1983); *Pruitt v. Turner*, 336 S.W.2d 440 (Tex. Ct. App. 1960).

Even though a judge's act is performed within his courtroom or chambers, if it is utterly unrelated to the performance of any official judicial duty, he is not immune from tort liability and his act is judged for the purposes of civil liability, just like the act of any other private individual. (Footnote 258 p.167 –for citation)

Remarking that "it is not a judicial function for a judge to commit an intentional tort even though the tort occurs in the courthouse," a federal court denied a judge's motion to dismiss when the Plaintiff alleged the judge had denied him an opportunity to consult with counsel, used abusive language to him, subjected him to public disgrace and humiliation, and unlawfully compelled him to post a bond to secure his release. *Yates v. Village of Hoffman Estates*, 209 F. Supp. 757 (N.D. Ill. 1962).

Equally unrelated to proper performance of any judicial function is indulgence by judges in threats of physical abuse to persons in their courtrooms and they were deemed not deserving of any judicial immunity and were subject to the customary rules governing tort liability of private citizens. *Ammons v. Baldwin*, 705 F.2d 1443 (5th Cir. 1983).

Judges are liable for their torts committed before judicial proceedings have commenced. Thus, when they enter into conspiracies to subvert justice or deprive citizens of their constitutional rights, such acts entered into prior to the judicial proceedings have often resulted in civil liability for the judge's torts. In a representative case, when a judge and others had met together and maliciously and without cause actually entered into an agreement and conspiracy to prosecute the Plaintiff, the Minnesota Supreme Court stated:

> It cannot be doubted that such a conspiracy, previously formed, and carried out by such a gross perversion and abuse of legal process and proceedings would subject all the parties engaged in it to liability to the party injured and aggrieved. The act of entering into such an agreement was not done in the courts of any judicial proceeding, or in the discharge of any judicial function or duty.

Stewart v. Cooley, 23 Minn. 347 (1877).

Recognizing that conspiracies by judges with other persons to abuse process, to subvert the judicial process, to falsely arrest and imprison citizens, and to defame persons are utterly unrelated to essential judicial functions, the courts have been willing to deny judicial immunity who have so conspired and to subject them to the customary norms of tort liability governing private individuals. *Kalb v. Luce*, 234 Wis. 509, 291 N.W. 841 (1940). When a judge conspired with others with the malicious and wrongful purpose of depriving Plaintiff of his property, an Oregon court held the judge civilly liable to the injured party. *Shaw v. Moon*, 117 Or. 558, 245 P. 318 (1926).

There are a number of well-reasoned cases under the federal civil rights statutes recognizing civil liability for judges guilty of conspiracies. The Fifth Circuit recognized that a Plaintiff stated a cause of action when a judge allegedly conspired non-judicially with others to prevent a citizen from securing a business license. *Slavin v. Curry*, 574 F.2d 1256 (5th Cir 1978). A judge is not immune if his actions are deemed "non-judicial." If the allegations are true, the

judge's actions in engaging in the conspiracy would not be a part of a function normally performed by a judge.

Judge Richard Posner, an outstanding jurist on the Court of Appeals for the 7th Circuit, wrote in 1986:

> In a society that prides itself on subjecting even its highest officials to the restraints of law...the grant of absolute immunity from civil liability-immunity that is to say, from such liability even from deliberate wrong doing-must be confined to situations where such immunity is not merely convenient but essential.

Forrester v. White, 792 F.2d 647, 659 (7th Cir. 1986)(dissent). The Seventh Circuit's majority position was repudiated by the United States Supreme Court in *Forrester v. White*, 484 U.S. 219 (1988) (finding that judges are not absolutely immune when acting in an administrative capacity).

When judges tortiously injure other citizens by acting in violation of clear and specific constitutional or statutory provisions, they are properly held liable, and some courts have indicated that they then lack jurisdiction. *Jacobson v. Shaefer*, 441 F.2d 127 (7th Cir. 1971) ***It is "the nature of the function performed, not the identity of the actor who performed it, that inform[s] our immunity analysis."*** *Forrester v. White*, 484 U.S. at 225-29, S. Ct. at 453-55.

The words "due administration of justice" (18 U.S.C. 1503, Obstruction of Justice) import a free and fair opportunity to every litigant in a pending cause in a federal court to learn what he may learn concerning material facts, and to exercise his option as to introducing testimony as to such facts. Wilder v. U.S. W. Va. 1906, 143 F. 433, 74 C.C.A. 567, certiorari denied 27 S.CT. 787, 204 U.S. 674, 51 L.Ed. 674.

In *Mireles v. Waco*, 502 U.S. at 11, 112 Ct. at 288, the United States Supreme Court reiterated the longstanding rule that absolute judicial immunity is overcome in only two rather

narrow sets of circumstances. A judge is not immune from liability for nonjudicial actions, meaning actions not taken in the judge's judicial capacity. As an example of this nonjudicial actions exception, the Supreme Court cited to its opinion in *Forrester v. White*, 484 U.S. at 225-29, S. Ct. at 453-55, in which it held that a judge was not immune from liability for allegedly having engaged in illegal discrimination when firing an employee:

As Forrester instructs, it is "the nature of the function performed, not the identity of the actor who performed it, that inform[s] our immunity analysis."

> Because the threat of personal liability for damages can inhibit government officials in the proper performance of their duties, various forms of official immunity from suit have been created. Aware, however, that the threat of such liability may also have the salutary effect of encouraging officials to perform their duties in a lawful and appropriate manner, this Court has been cautious in recognizing absolute claims other than those decided by constitutional or statutory enactment. Accordingly, the Court has applied a 'functional' approach under which the nature of the functions entrusted to particular officials is examined in order to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.

Forrester v. White at 542-543.

> Judges have long enjoyed absolute immunity from liability in damages for their judicial or adjudicatory acts, primarily in order to protect judicial independence by insulating judges from vexatious actions by disgruntled litigants. Truly judicial acts, however, must be distinguished from the administrative, legislative, or executive functions that judges may occasionally be assigned by law to perm. It is the nature of the function performed -- adjudication -- rather than the identity of the actor who performed it -- a judge -- that determines whether absolute immunity attaches to the act.

Forrester v. White at 543-545.

And the Court went on to say, " Such considerations have led to the creation of various forms of immunity from suit for certain government officials. Aware of the salutary effect the threat of liability can have, however, as well as the undeniable tension between official immunities and the ideal of the rule of law, this Court has been cautious in recognizing claims

that government officials should be free of the obligation to answer for their acts in court. Running through our cases, with fair consistency, is a "functional" approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the function with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. **Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of "qualified" immunity that avoids unnecessarily extending the scope of the traditional concept of absolute immunity."**

There has been absolutely no adjudication of any kind upon Birnbaum's claims and causes of action, and the judges could not have conceivably been acting in a judicial capacity upon Birnbaum. All of the illegal acts and/or participation in the conspiracy and RICO scheme by all of the judges was possible because of the positions they held and their personal participation with each other and the other defendants in this cause.

Issues of facts underlying immunity depend on facts peculiarly within knowledge and control of the defendants, (*Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995)(en banc)), and the defendants are in a much better position than the Plaintiff to know the untenable position of an absolute immunity defense.

> ...[W]hen it is beyond reasonable dispute that a judge acted out of personal motivation and has used his judicial office as an offensive weapon to vindicate personal objectives, and it further appears that no party has invoked the judicial machinery for any purpose at all, then the judge's actions do not amount to 'judicial acts.' These

> nonjudicial acts...are not cloaked with judicial immunity from suit under [42 U.S.C.A.] § 1983.

Harper v. Merckle, 638 F.2d 848, 859 (5th Cir. 1981).

Where judicial immunity is not available to the judge, it cannot then be extended to his court coordinator who actively participated in the conspiracy in furtherance of the RICO scheme where she too knowingly committed intentional torts. An intentional tort cannot be considered a normal function of the delegating judge.

B. **Prosecutorial Immunity**

Plaintiff does not dispute Defendants' proposition that a prosecutor enjoys absolute immunity from civil suit from initiating and pursuing a criminal prosecution. *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). However, a prosecutor does not enjoy absolute immunity for acts of investigation or administration. *Hart v. O'Brien*, 127 F.3d 424, 439 (5th Cir. 1997)(*citing Buckley v. Fitzsimmons,* 509 U.S. 259, 273, 113 S.Ct. 2606, 2615, 125 L.Ed.2d 209 (1993)).

Furthermore whoever engages in prohibited patterns of racketeering activities comes within the purview of this chapter, including public officials. U.S. v. Mandel, 415 F.Supp. 997, supplemented 415 F.Supp. 1025 (D.C.Md 1976.)

Plaintiff's allegations concerning Dixon never assert a cause of action for her initiation or prosecution of criminal complaints. In fact, Plaintiff's cause of action is for Dixon's perjurious testimony in a civil suit against Plaintiff as part of her participation in the scheme and conspiracy to deprive Plaintiff of his constitutional rights of due process and against obstruction of justice. Dixon has never initiated or prosecuted a criminal complaint against Plaintiff since the matter in

which she testified was a civil matter, she was not and could not have been acting in her prosecutorial capacity. (See Plaintiff's First Amended Complaint, p. 113-115.)

Plaintiff asserts that Dixon does not enjoy absolute prosecutorial immunity for her acts and omission concerning her testimony. As such Dixon is not entitled to the defense of prosecutorial immunity.

PLAINTIFF'S CLAIMS ARE NOT TIME BARRED

Defendants argue that the racketeering actions dating back to 1994, alleged in Plaintiff's original complaint, are outside the four-year statute of limitations since Plaintiff filed his complaint on March 30, 1999. Plaintiff does not dispute the well-established rule that civil RICO claims are subject to a four-year statute of limitations. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987).

The United States Supreme Court acknowledged a split among the circuits regarding whether a RICO cause of action accrues upon discovery of the injury alone or upon the discovery of both the injury and the pattern of racketeering activity. *Klehr v. A.O. Smith Corp.*, ___ U.S. ___, 117 S. Ct. 1984, 1989, 138 L.Ed.2d 373, 384 (1997). The Fifth Circuit then expressly established that a RICO cause of action accrues upon the discovery of the injury in question. *Rotella v. Wood,* 147 F.3d 438, 440 (5th Cir. 1998).

At issue is when Plaintiff discovered the injury he sustained, *not* when the racketeering activity began. The beginning of Plaintiff's discovery was on or about July 22, 1997 when McDowell appeared in the case. Furthermore the pattern of racketeering activity is ongoing and to date Plaintifff has not received a judgment in his underlying civil matter. Applying the four year statute of limitations for civil RICO claims, Plaintiff's complaint was timely filed on March 30, 1999. Plaintiff's civil RICO claims are not barred by the statute of limitations.

Having filed his complaint on March 30, 1999, Plaintiff timely and properly filed his complaint within the four year statute of limitations.

CONCLUSION

For the foregoing reasons Plaintiff Udo Birnbaum respectfully requests that Defendants' Motions be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon all counsel of record via:

_____ Certified Mail/Return Receipt Requested
_____ Facsimile Transfer
_____ First Class Mail
_____ Federal Express
_____ Courier
_____ Hand-Delivery

on this the _____ day of July, 1999.

G. David Westfall