

No. _____

IN THE
SUPREME COURT OF TEXAS
AUSTIN, TEXAS

UDO BIRNBAUM,
Petitioner

vs.

THE LAW OFFICES OF G. DAVID WESTFALL, P.C., ET AL.,
Respondents

On appeal from the 5th Court of Appeals, Dallas

APPENDIX TO PETITION FOR REVIEW

Question presented:

Whether the precedent of a Texas court actually assessing a FINE of \$62,000 (or ANY fine), merely because the evidence did NOT prove a person's claim under 18 U.S.C. § 1964(c) "civil RICO", defeats the stated purpose of the [civil RICO] statute, and offends the Constitution

"[a] Congressional objective [in enacting civil RICO with treble damages] of encouraging civil litigation not merely to compensate victims but also to turn them into **private attorneys general**, supplementing Government efforts by **undertaking litigation in the public good.**" *Rotella v. Wood et al.*, 528 U.S. 549 (2000),

"clearly established that filing a lawsuit was constitutionally protected conduct." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73, 76 n.8 (1990).

Udo-Birnbaum, Pro Se
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Review
Appendix to Petition for ~~Rehearing En Banc~~

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

UDO BIRNBAUM, Appellant

No. 05-02-01683-CV V.

THE LAW OFFICES OF G. DAVID
WESTFALL, P.C., G. DAVID WESTFALL,
CHRISTINA WESTFALL, and STEFANI
PODVIN, Appellees

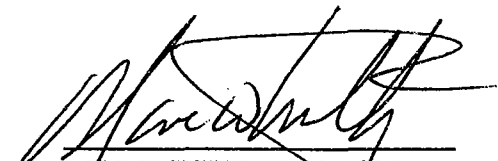
Appeal from the 294th Judicial District
Court of Van Zandt County, Texas.

(Tr. Ct. No. 00-00619).

Opinion delivered by Justice Whittington,
Justices Wright and Bridges participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**. It is **ORDERED** that appellees THE LAW OFFICES OF G. DAVID WESTFALL, P.C., G. DAVID WESTFALL, CHRISTINA WESTFALL, and STEFANI PODVIN recover their costs of this appeal from appellant UDO BIRNBAUM.

Judgment entered October 23, 2003.



MARK WHITTINGTON
JUSTICE

Petition ~~En Bano~~
Appendix
/

AFFIRMED; Opinion issued October 23, 2003



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-02-01683-CV

UDO BIRNBAUM, Appellant

V.

**THE LAW OFFICES OF G. DAVID WESTFALL, P.C., G. DAVID WESTFALL,
CHRISTINA WESTFALL, AND STEFANI PODVIN, Appellees**

**On Appeal from the 294th Judicial District Court
Van Zandt County, Texas
Trial Court Cause No. 00-00619**

OPINION

**Before Justices Whittington, Wright, and Bridges
Opinion By Justice Whittington**

Appellant Udo Birnbaum appeals a jury verdict and judgment in favor of appellee The Law Offices of G. David Westfall, P.C. ("Law Office"). Birnbaum also appeals orders on motions for summary judgment, for sanctions, and to recuse the trial judge, and complains of the trial judge's failure to appoint an auditor. We affirm.

Background

Law Office filed a suit on a sworn account against Birnbaum for legal fees allegedly owed. Birnbaum filed an answer and affidavit denying the claim. Birnbaum also filed a counterclaim against Law Office and added G. David Westfall, Christina Westfall, and Stefani Podvin as parties

Petition En Banc

Appendix

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to the lawsuit (“Third Party Defendants”). He alleged violations of the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* (2000 and Supp. 2003) (“RICO”) against Third Party Defendants. Law Office and Third Party Defendants moved for summary judgment on the claims against them. Third Party Defendants’ motions were granted. Birnbaum filed motions to appoint an auditor and to recuse the trial judge. There is no order on Birnbaum’s motion to appoint an auditor in the clerk’s record. At trial, a jury made affirmative findings on Law Office’s claim against Birnbaum for breach of contract and negative findings on Birnbaum’s claim against Law Office for violations of the Texas Deceptive Trade Practices Act. TEX. BUS. & COM. CODE ANN. §§ 17.41 *et seq.* (Vernon 2002) (“DTPA”). The trial judge entered judgment for Law Office which included an award of attorneys’ fees as found by the jury. Third Party Defendants filed a motion for sanctions under Rule 13 of the Texas Rules of Civil Procedure, which was granted in part and denied in part. The partial reporter’s record submitted with this appeal is the closing argument from the jury trial and a portion of the sanctions hearing. Birnbaum has appeared *pro se* throughout all proceedings.

Judgment

In his first issue, Birnbaum asserts the trial court’s judgment on the jury’s verdict was “unlawful” because (1) the trial judge erred in refusing to submit jury issues on whether Birnbaum was excused from performing the attorney’s fees contract and whether Law Office’s services were of no worth; and (2) the judgment does not conform to the pleadings because the jury was questioned regarding a breach of contract but Law Office pleaded a suit on sworn account. Because Birnbaum filed only a partial reporter’s record limited to closing argument and a portion of the sanctions hearing, we are unable to review these complaints. *See Nicholes v. Tex. Employers Ins. Ass’n*, 692 S.W.2d 57, 58 (Tex. 1985) (per curiam) (with only partial reporter’s record, court could not

determine whether giving improper jury instruction was harmful error); *A.V.A. Servs., Inc. v. Parts Indus. Corp.*, 949 S.W.2d 852, 854 (Tex. App.–Beaumont 1997, no pet.) (nothing preserved for review on issue whether judgment conformed to pleadings, because complaint could not be raised for first time on appeal, and without reporter’s record, no showing made that appellant received trial court determination on issue). We overrule appellant’s first issue.

Appointment of Auditor

In his second issue, Birnbaum urges the trial court erred in failing to appoint an auditor pursuant to Rule 172 of the Texas Rules of Civil Procedure. While Birnbaum did file a motion to appoint an auditor with the trial court, he did not receive a ruling on the motion. Therefore, he did not preserve this complaint for appeal. See TEX. R. APP. P. 33.1; *Reyna v. First Nat’l Bank*, 55 S.W.3d 58, 67 (Tex. App.–Corpus Christi 2001, no pet.). We overrule appellant’s second issue.

Summary Judgment

Birnbaum next complains of the trial court’s no-evidence summary judgment on his RICO claims. We review a no-evidence summary judgment under the same legal sufficiency standard used to review a directed verdict, to determine whether the nonmovant produced more than a scintilla of probative evidence to raise a fact issue on the material questions presented. *Gen. Mills Rests., Inc. v. Tex. Wings, Inc.*, 12 S.W.3d 827, 832-33 (Tex. App.–Dallas 2000, no pet.).

Birnbaum asserted claims under sections 1962(a) and (c) of RICO. Under subsection (a), a person who has received income from a pattern of racketeering cannot invest that income in an enterprise, and under subsection (c), a person who is employed by or associated with an enterprise cannot conduct the enterprise’s affairs through a pattern of racketeering. See *Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 231 n.2 (5th Cir. 2003). Elements common to all subsections of RICO are:

(1) a person who engages in (2) a pattern of racketeering activity (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *Whelan*, 319 F.3d at 229.

“Racketeering activity” is defined in section 1961(1) in terms of a list of state and federal crimes. *See* 18 U.S.C. § 1961(1); *Bonton v. Archer Chrysler Plymouth, Inc.*, 889 F. Supp. 995, 1001 (S.D. Tex. 1995). It includes acts indictable under 18 U.S.C. § 1341, relating to mail fraud. *See* 18 U.S.C. § 1961(1)(B); *Whelan*, 319 F.2d at 231. The individual acts of “racketeering activity” are usually described as the “predicate offenses.” *Bonton*, 889 F. Supp. at 1001. Any act that does not fall within RICO’s definition of predicate offenses is not “racketeering activity.” *See Heden v. Hill*, 937 F. Supp. 1230, 1242 (S.D. Tex. 1996).

A “pattern of racketeering activity” requires at least two acts of racketeering activity. *See Whelan*, 319 F.3d 231 n.4. Although at least two acts of racketeering are necessary to constitute a pattern, two acts may not be sufficient. *Bonton*, 889 F. Supp. at 1003. To establish a pattern of racketeering activity, a plaintiff must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996) (citing *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989)). To establish continuity, plaintiffs must prove continuity of racketeering activity, or its threat. *Word of Faith*, 90 F.3d at 122.

Birnbaum asserts Law Office is a RICO enterprise through which Third Party Defendants conducted a pattern of racketeering. He alleges Third Party Defendants conducted a scheme whereby Law Office’s clients were encouraged to file RICO suits against public officials, but failed to receive “honest service” or regular billing. Birnbaum asserts Third Party Defendants engaged in mail fraud in furtherance of this scheme because “almost every document on file in this case” was mailed at one

time, including the fraudulent bill on which Law Office's claim was premised. Thus, he alleges the predicate act for purposes of RICO was mail fraud.

Mail fraud under 18 U.S.C. section 1341 "requires that (1) the defendant participate in a scheme or artifice to defraud, (2) the mails be used to execute the scheme, and (3) the use of the mails was 'caused by' the defendant or someone else associated with the scheme." *Bonton*, 889 F. Supp. at 1002. As noted in *Bonton*, "[a] RICO claim asserting mail fraud as a predicate act must allege how each specific act of mail fraud actually furthered the fraudulent scheme, who caused what to be mailed when, and how the mailing furthered the fraudulent scheme." *Bonton*, 889 F. Supp. at 1002. The mail fraud statute "does not reach every business practice that fails to fulfill expectations, every breach of contract, or every breach of fiduciary duty." *Bonton*, 889 F. Supp. at 1002-1003. A plaintiff may not convert state law claims into a federal treble damage action simply by alleging that wrongful acts are a pattern of racketeering related to an enterprise. *Heden*, 937 F. Supp. at 1242.

As summary judgment evidence, Birnbaum filed affidavits of several unhappy clients of Law Office. Although Birnbaum also referred to deposition testimony and pleadings from other lawsuits in his summary judgment response, this evidence was not submitted to the trial court. See *Quanaim v. Frasco Rest. & Catering*, 17 S.W.3d 30, 42 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (verified summary judgment response was not summary judgment proof).

Birnbaum's summary judgment evidence establishes that several Law Office clients were encouraged to file RICO suits and did not receive regular billings from Law Office. Birnbaum alleges a scheme to defraud himself and others through these suits, and he offers his affidavit testimony to establish the bill mailed to him by Law Office was fraudulent. He does not, however, offer summary judgment evidence regarding how mailing this fraudulent bill constitutes a pattern of racketeering activity, or furthers a "recognizable scheme formed with specific intent to defraud,"

or presents a continued threat of criminal activity. *See Bonton*, 889 F. Supp. at 1003; *see also Word of Faith*, 90 F.3d at 122-24 (no continuity where alleged predicate acts are part of a single, lawful endeavor). Further, Birnbaum did not offer summary judgment evidence that Third Party Defendants invested income from a pattern of racketeering activity in the alleged RICO enterprise or that his injury flowed directly from the use or investment of that income. Without such evidence, Birnbaum did not raise a genuine issue of material fact on his claim under RICO § 1962(a). *See Nolen v. Nucentrix Broadband Networks, Inc.*, 293 F.3d 926, 929 (5th Cir.), *cert. denied*, 537 U.S. 1047 (2002) (for section 1962(a) claim, alleging injury from predicate racketeering acts themselves insufficient; injury must flow from use or investment of racketeering income). Summary judgment on Birnbaum's RICO claims was proper. We overrule Birnbaum's third issue.

Sanctions Order

In his fourth issue, Birnbaum complains of the order imposing sanctions against him in favor of Christina Westfall and Podvin. He argues the sanction order is unlawful because it is a criminal sanction "imposed without full due criminal process," and does not state the basis for the sanctions award as required by rule 13 of the Texas Rules of Civil Procedure. We agree with Birnbaum that the trial court's order awards sanctions without stating the basis for the award, and therefore does not meet the requirements of rule 13. *See Murphy v. Friendswood Dev. Co.*, 965 S.W.2d 708, 709-10 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("Rule 13 is clear: the particulars of good cause 'must be stated in the sanction order.' . . . [T]he order here did not recite the particular reasons supporting good cause to issue the sanctions and did not include findings of fact and conclusions of law supporting good cause . . . we hold that the sanction order does not comply with Rule 13."). This error, however, may be waived. *See McCain v. NME Hospitals, Inc.*, 856 S.W.2d 751, 756 (Tex. App.—Dallas 1993, no writ).

Birnbaum did not bring either of his complaints about the sanctions order to the attention of the trial judge. To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. *See* TEX. R. APP. P. 33.1. An objection must not only identify the subject of the objection, but it also must state specific grounds for the ruling desired. Without a proper presentation of the alleged error to the trial court, a party does not afford the trial court the opportunity to correct the error. *See McCain*, 856 S.W.2d at 755. While Birnbaum filed a motion to reconsider the sanctions, he did not object to the specificity of the order or to the criminal nature of the sanctions. Birnbaum's only complaint about the specificity of the order was made in an untimely request for findings of fact and conclusions of law filed more than twenty days after the date of the sanctions order. *See* TEX. R. CIV. P. 296 (request for findings of fact and conclusions of law shall be filed within twenty days after judgment is signed). Therefore, the trial judge did not have the opportunity to correct the erroneous order, and error was not preserved. *See McCain*, 856 S.W.2d at 755. Appellees have since filed a motion to allow filing of findings of fact and conclusions of law by the trial judge regarding the sanctions order, which was opposed by Birnbaum. We need not reach the question of whether the findings and conclusions may be filed at this time, as Birnbaum did not preserve his complaints about the sanctions order. We overrule appellant's fourth point of error.

Recusal of Trial Judge

Birnbaum complains the trial judge should have been recused. An evidentiary hearing was held before Judge Ron Chapman on Birnbaum's motion to recuse Judge Paul Banner, and Judge Chapman denied the motion. No reporter's record of this hearing is included in our record. Without a record of the proceedings, we cannot review Judge Chapman's order for abuse of discretion, and

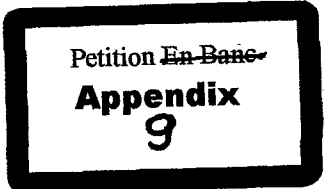
nothing is presented for review. *See Ceballos v. El Paso Health Care Sys.*, 881 S.W.2d 439, 445 (Tex. App.—El Paso 1994, writ denied); *In re M.C.M.*, 57 S.W.3d 27, 33 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); TEX. R. CIV. P. 18a (f). Appellant’s fifth point of error is overruled.

Fraud

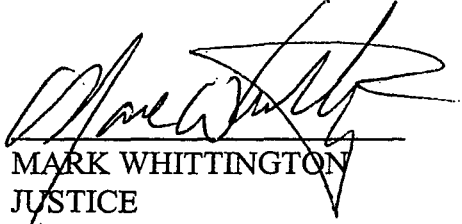
In his sixth issue, Birnbaum complains of “fraud, fraud, and more fraud.” In his argument in support of this issue, he contends he made no agreements with Law Office regarding attorneys’ fees and never accepted the terms of the retainer agreement. The issue regarding any contractual relationship between Birnbaum and Law Office was resolved by the jury. We have no record of the testimony relevant to Birnbaum’s acceptance of the contract. Therefore, we presume the omitted portions of the record support the trial court’s judgment. *See Schafer v. Conner*, 813 S.W.2d 154, 155 (Tex. 1991) (per curiam) (in absence of a complete statement of facts, it is presumed that omitted evidence supports trial court’s judgment). Birnbaum’s sixth issue is overruled.

Due Process

In his seventh issue, Birnbaum contends “due process demands a new trial.” The argument presented does not contain citation to authority and complains of the same rulings addressed in other parts of his brief. This issue presents nothing for our review. *See* TEX. R. APP. P. 38.1 (h) (brief must contain clear and concise argument for contentions made, with appropriate citations to authorities and to the record). In his reply brief, Birnbaum also complains of incurable jury argument, and includes a reporter’s record of the closing argument from trial in the appellate record. However, the record reveals Birnbaum did not object to the argument at the time it was made, and so has failed to preserve error. *See Barras v. Monsanto Co.*, 831 S.W.2d 859, 865 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (complaint of error in closing argument waived by failure to object). Birnbaum’s seventh issue is overruled.



Having overruled Birnbaum's issues, we affirm the judgment and orders of the trial court.


MARK WHITTINGTON
JUSTICE

021683F.P05

QUESTION NO. 1

What sum of money, if paid now in cash, would fairly and reasonably compensate the Law Offices of G. David Westfall, P.C., for its damages, if any, that resulted from Defendant, Udo Birnbaum's, failure to comply with the agreement between the Plaintiff and the Defendant?

INSTRUCTION:

You are instructed that after the attorney-client relationship is terminated, a client or an attorney can have post termination obligations to each other, such as, the client is still obligated financially for the lawyer's time in wrapping up the relationship and the lawyer is still obligated to perform tasks for the client to prevent harm to the client during the termination process.

ANSWER:

Answer in dollars and cents:

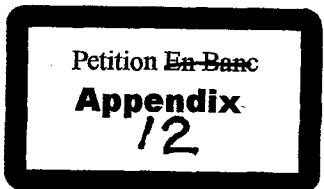
ANSWER: \$15,817.60

QUESTION NO. 2

What is a reasonable fee for the necessary services of the Plaintiff's attorneys in this case, stated in dollars and cents?

Answer in dollars and cents for each of the following:

- | | |
|--|-------------|
| A. For preparation and trial in this matter: | \$41,306.91 |
| B. For an appeal to the Court of Appeals, if necessary: | \$20,000.00 |
| C. For making or responding to a petition for review to the Supreme Court of Texas | \$5,000.00 |
| D. If petition for review is granted by the Supreme Court of Texas | \$10,000.00 |



QUESTION NO. 3
(Finding of DTPA Violation)

Did The Law Offices of G. David Westfall, P.C. engage in any false, misleading, or deceptive act or practice that Udo Birnbaum relied on to his detriment and that was a producing cause of damages to Udo Birnbaum?

“Producing cause” means an efficient, exciting, or contributing cause that, in a natural sequence, produced the damages, if any. There may be more than one producing cause.

“False, misleading, or deceptive act” means any of the following:

Failing to disclose information about services that was known at the time of the transaction with the intention to induce Udo Birnbaum into a transaction he otherwise would not have entered into if the information had been disclosed; or

Answer: NO

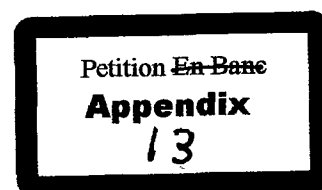
QUESTION NO. 4
(Finding of DTPA Violation)

Did The Law Offices of G. David Westfall, P.C. engage in any unconscionable action or course of action that was a producing cause of damages to Udo Birnbaum?

“Producing cause” means an efficient, exciting, or contributing cause that, in a natural sequence, produced the damages, if any. There may be more than one producing cause.

An unconscionable course of action is an act or practice that, to a consumer’s detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.

Answer: NO



If your answer to Question 3 or Question 4 is "Yes", then answer Question 5. Otherwise do not answer Question 5.

QUESTION NO. 5
(Finding of "knowingly")

Did The Law Offices of G. David Westfall, P.C. engage in any such conduct knowingly?

"Knowingly" means actual awareness, at the time of the conduct, of the falsity, deception, or unfairness of the conduct in question or actual awareness of the conduct constituting a failure to comply with a warranty. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

In answering this question, consider only the conduct that you have found *was a producing cause of damages* to Udo Birnbaum.

Answer: [Not answered by reason of submission]

If your answer to Question 3 or Question 4 is "Yes", then answer Question 6. Otherwise do not answer Question 6.

QUESTION NO. 6
(Finding of "intentionally")

Did The Law Offices of G. David Westfall, P.C. engage in any such conduct intentionally?

"Intentionally" means actual awareness of the falsity, deception, or unfairness of the conduct in question or actual awareness of the conduct constituting a failure to comply with a warranty, coupled with the specific intent that the consumer act in detrimental reliance on the falsity or deception. Specific intent may be inferred from facts showing that the person acted with such flagrant disregard of prudent and fair business practices that the person should be treated as having acted intentionally.

In answering this question, consider only the conduct that you have found *was a producing cause of damages* to Udo Birnbaum.

Answer: [Not answered by reason of submission]

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EXHIBIT A

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If your answer to Question 3 or Question 4 is "Yes", then answer Question 7. Otherwise do not answer Question 7.

QUESTION NO. 7
(“Compensatory” damages)

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Udo Birnbaum for his damages, if any, that resulted from such conduct?

Consider the following elements of damages, if any, and none other.

Answer separately in dollars and cents, if any, for each of the following:

The difference, if any, in the value of the services as received and the price Udo Birnbaum paid for them. The difference, if any, shall be determined at the time and place the services were done.

Answer: [Not answered by reason of submission]

Expense costs to Udo Birnbaum, if any, produced by the conduct of The Law Offices of G. David Westfall, P.C.

Answer: [Not answered by reason of submission]

The reasonable value of Udo Birnbaum’s lost time, if any, produced by the conduct of The Law Offices of G. David Westfall, P.C.

Answer: [Not answered by reason of submission]

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what a party’s ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

If your answer to Question 5 "Yes", then answer Question 8. Otherwise do not answer Question 8.

QUESTION NO. 8
(“Compensatory” damages)

What sum of money, if any, in addition to actual damages, should be awarded to Udo Birnbaum against The Law Offices of G. David Westfall, P.C. because The Law Offices of G. David Westfall, P.C.’s conduct was committed knowingly?

Answer in dollars and cents, if any.

Answer: [Not answered by reason of submission]

If your answer to Question 6 "Yes", then answer Question 9. Otherwise do not answer Question 9.

QUESTION NO. 9
(Additional damages)

What sum of money, if any, in addition to actual damages, should be awarded to Udo Birnbaum against The Law Offices of G. David Westfall, P.C. because The Law Offices of G. David Westfall, P.C.’s conduct was committed intentionally?

Answer in dollars and cents, if any.

Answer: [Not answered by reason of submission]

The charge of the Court and the verdict of the jury are incorporated for all purposes by reference. Because it appears to the Court that the verdict of the jury was for the Plaintiff and against the Defendant, judgment should be rendered on the verdict in favor of the Plaintiff and against the Defendant.

It is therefore, **ORDERED, ADJUDGED and DECREED** that Plaintiff, G. David Westfall, P.C., be awarded damages as follows:

A. Actual damages in the amount of \$15,817.60 plus pre-judgment interest up through the date of this Order which the Court finds to be \$2,156.15.

B. Attorney's fees in the amount of \$41,306.91.

C. An additional award of attorney's fees as follows:

1. \$20,000.00 in the event of an appeal to the Court of Appeals.
2. \$5,000.00 in the event of an application for writ of error is filed with the Supreme Court of Texas.
3. \$10,000.00 in the event of an application for writ of error is filed with the Supreme Court of Texas and the writ is granted.

D. Taxable Court costs in the amount of \$926.80.

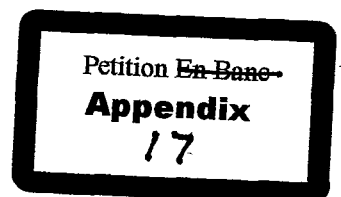
IT IS FURTHER ORDERED THAT the judgment here rendered shall bear interest at the rate of ten percent (10%) from April 11, 2002 until paid.

All costs of court expended or incurred in this cause are adjudged against Udo Birnbaum, Defendant/ Counter-Plaintiff. All writs and process for the enforcement and collection of this judgment or the costs of court may issue as necessary. All other relief not expressly granted in this order is hereby denied.

THIS JUDGMENT RENDERED ON APRIL 11, 2002, AND SIGNED THIS 30
day of July, 2002.



JUDGE PRESIDING





I certify this to be a true and exact copy of the original on file in the District Clerk's Office, Van Zandt County, Texas
Candi Scott

No. 00-00619

**THE LAW OFFICES OF
G. DAVID WESTFALL, P.C.**

IN THE DISTRICT COURT

Plaintiff

v.

294th JUDICIAL DISTRICT

UDO BIRNBAUM

Defendant/Counter-Plaintiff

**G. David Westfall, Christina Westfall, and
Stefani Podvin,**

Counter-Defendants

VAN ZANDT COUNTY, TEXAS

ORDER ON MOTIONS FOR SANCTIONS

On July 30, 2002, came on to be heard, Motions for Sanctions filed by G. David Westfall, Christina Westfall, and Stefani Podvin, as well as to be heard Motions for Sanctions filed by Udo Birnbaum. The plaintiff, The Law Office of G. David Westfall, P.C. (the "Plaintiff"), appeared in person by representative and by attorney of record. The defendant, Udo Birnbaum, appeared in person, pro se. The counter-defendant, G. David Westfall, appeared by representative and by attorney of record. The counter-defendants, Christina Westfall and Stefani Podvin appeared in person and by attorney of record. All parties announced ready for a hearing on all the pending motions for sanctions currently on file in this matter at the time of the hearing.

Based upon the pleadings of the parties, the evidence presented at trial and the evidence presented at the sanctions hearing, and the arguments of counsel and by the pro se defendant, the Court is of the opinion that the Movants, Christina Westfall and Stefani Westfall are entitled to prevail on their claim for sanctions against the Defendant, Udo Birnbaum.

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It is therefore, **ORDERED, ADJUDGED and DECREED** that the Counter-Defendants, Christina Westfall and Stefani Podvin are awarded damages as a sanction against and to be paid by defendant, Udo Birnbaum, to Christina Westfall and Stefani Podvin as follows:

A. Christina Westfall and Stefani Podvin are awarded jointly and severally the amount of \$50,085.00 as reimbursement for their joint attorney's fees.

B. Christina Westfall is awarded actual damages for her personal inconvenience in the amount of \$1,000.00, and she is further awarded punitive damages for the harassment caused to her in the amount of \$5,000.00.

C. Stefani Podvin is awarded actual damages for her personal inconvenience in the amount of \$1,800.00, and she is further awarded punitive damages for the harassment caused to her in the amount of \$5,000.00.

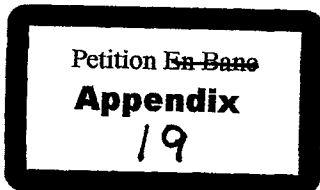
D. The Court denies the request for a finding of any sanctions to be awarded in favor of G. David Westfall, individually.

E. The Court denies the request for a finding of any sanctions to be awarded in favor of Udo Birnbaum.

IT IS FURTHER ORDERED THAT the judgment here rendered shall bear interest at the rate of ten percent (10%) from July 30, 2002, until paid.

All other relief regarding any motions for sanctions on file in this matter not expressly granted in this order is hereby denied.

THIS JUDGMENT RENDERED ON JULY 30, 2002, AND SIGNED THIS 9 day
of August, 2002.



Paul [Signature]
JUDGE PRESIDING

756/835

FILED FOR RECORDED
02 AUG 21 09 05 AM
CLERK OF COURT

1 damages, \$5,000.00 in punitive and the joint and several
2 \$50,085.00 in attorneys' fees. Mr. Birnbaum's sanctions as
3 against Mr. Fleming or against the P.C. is denied and nothing
4 is ordered.

5 In assessing the sanctions, the Court has
6 taken into consideration that although Mr. Birnbaum may be
7 well-intentioned and may believe that he had some kind of
8 real claim as far as RICO there was nothing presented to the
9 court in any of the proceedings since I've been involved that
10 suggest he had any basis in law or in fact to support his
11 suits against the individuals, and I think -- can find that
12 such sanctions as I've determined are appropriate. And if
13 you will provide me with an appropriate sanctions order, I
14 will reflect it.

15 Now, as far as relief for sanctions on behalf
16 of Mr. Westfall, individually, that is specifically denied.

17 Any relief sought by any party by way of
18 sanctions which have not been specifically addressed either
19 by the granting or the denial of same -- such is denied.

20 Okay. How soon can I expect an order because
21 I gather this matter will go up to whatever appropriate
22 appeals court for review?

23 MR. FLEMING: I will give Mr. Birnbaum the
24 statutory three days. I'll submit it to him. And if I don't
25 hear back from him, I'll submit it to you after.

*\$62,000 punishment for well-intentioned?
unconditional - makes it criminal/punishment!*

3

1 THE COURT: Now, I am told that this Court
 2 should not engage in the discussion of why the Court did or
 3 didn't do something. The testimony, as I recall before the
 4 jury, absolutely was that Mr. Birnbaum entered into a
 5 contract, which the signature is referred to, agreed that he
 6 would owe some money that -- for attorneys' fees.
 7 Mr. Westfall, on behalf of the P.C., testified to the same.
 8 There was no dispute as to the contract or its terms. What
 9 was in dispute is whether or not Mr. Westfall's P.C. would
 10 have been entitled to any residual amount. That's what was
 11 submitted to the jury. The jury resolved that issue and
 12 found a figure. And therefore, I think what was submitted to
 13 the jury is appropriate and subject to review. And that's
 14 it. This Court stands in recess.

15 MR. FLEMING: Thank you, Your Honor.

16
 17 No! Was not submitted to the jury!
 18 Jury questions sounded in breach of
 19 contract.
 20
 21 (Not pleaded, Not proved)
 22 Judge did not allow my "excused" time
 23 ~~in case I had filed with~~

Petition En Banc
 Appendix
 21

4

19

expenses.

Furthermore, the letter agreement gave the remedy available to the Law Office if I did not pay, namely that the lawyer had the right to withdraw and quit working ("*We reserve the right to terminate for ... 1) Your non-payment of fees or costs*"). That is the remedy, the only remedy. "*Expressio unius est exclusio alterius*". (expression of one thing is the exclusion of another)

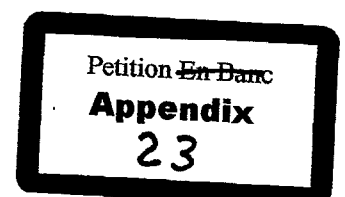
On top of that, the Law Office had admitted that it was not a person, i.e. not capable of holding a property interest, but only an entity. It therefore has no more right to sue or be awarded judgment than a can of Coca Cola or a potted plant!

And a jury "adjusting" a sworn account down by five thousand dollars is absurd. Something stinks about the "systematic records maintained" claim.

Furthermore, the Law Office P.C. had only one participating attorney, who was the only officer, and the only shareholder, and he is now dead. Poof, Law Office is no more! And just whom, if anyone, opposing "counsel" is representing under these truly bizarre circumstances is beyond me!

With this said, I am ready to argue the motions. The provided binder has the motions and supporting documents.

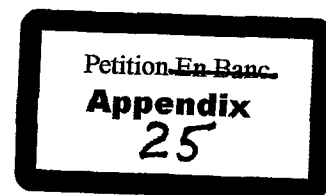
UDO BIRNBAUM
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929



It is now clear to me that the entire matters I have been subjected to in this Court is retaliation by official oppression for having spoken out on an issue of great public importance, namely rampant corruption and lawlessness in Judge Tommy C. Wallace's 294th District Court.

UDO BIRNBAUM
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929

Official court documents indicating such perversion of the judicial process are available at Van Zandt E-Forum, www.vzinet.com/vzeforum.





I certify this to be a true and exact copy of the original on file in the District Clerk's Office, Van Zandt County, Texas.
Candi Scott

No. 00-00619

THE LAW OFFICES OF	§	IN THE DISTRICT COURT
G. DAVID WESTFALL, P.C.	§	
Plaintiff/Counter-Defendant	§	
v.	§	
UDO BIRNBAUM	§	294 th JUDICIAL DISTRICT
Defendant/Counter-Plaintiff and	§	
Third Party Plaintiff	§	
v.	§	
G. David Westfall, Christina Westfall,	§	
and Stefani Podvin	§	
Third Party Defendants	§	VAN ZANDT COUNTY, TEXAS

NOTICE OF OFFICIAL OPPRESSION AND UNLAWFUL JUDGMENTS AGAINST ME

TO WHOSOEVER: I hereby provide Notice of attached "Exhibit A" titled:

Re: Retaliation, official oppression, jury tampering, tampering with government records, and racketeering in the 294th District Court of Van Zandt County by Betty Davis, Tommy Wallace, and others.

SUCH COMPLAINT having been noted as received on September 19, 2002 by the District Attorney, Van Zandt County, Texas via Certified Mail Number 7002 0510 0001 5190 0586.

I HEREBY GIVE NOTICE, TO WHOSOEVER, THAT ANY AND ALL JUDGMENTS AGAINST ME IN THIS CASE WERE UNLAWFULLY OBTAINED BY OFFICIAL OPPRESSION.

Filed for the record,

Udo Birnbaum
UDO BIRNBAUM, *Pro Se*
540 VZ CR 2916
Eustace, TX 75124
(903) 479-3929

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail and FAX on this the 8 day of October, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

Udo Birnbaum
UDO BIRNBAUM

Petition ~~En Banc~~
Appendix
26

FILED FOR RECORD
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THE LAW OFFICES OF
G. DAVID WESTFALL, P.C.

IN THE DISTRICT COURT

Plaintiff/Counter-Defendant

v.
UDO BIRNBAUM

294th JUDICIAL DISTRICT

Defendant/Counter-Plaintiff and
Third Party Plaintiff

v.
G. David Westfall, Christina Westfall,
and Stefani Podvin

Third Party Defendants

VAN ZANDT COUNTY, TEXAS

FILED / 02 SEP 02
DIST. CLERK VAN ZANDT CO. TX

BY _____ DEP

REQUEST FOR FINDINGS OF FACTS AND CONCLUSIONS OF LAW

**REGARDING THE \$62,885 "FRIVOLOUS LAWSUIT SANCTION" JUDGMENT
"signed" on Aug. 9, 2002, but the judge did not give it to the Clerk
until Aug. 21, 9:59 am (see stamp on bottom of second page),
not mailed out to me till Aug. 22 (postmark date).**

COMES NOW Udo Birnbaum under RCP Rule 296, "*Requests for Findings of Facts and Conclusions of Law*", requesting that this Court reduce to writing its findings and conclusions as to exactly what the Court found that he did that was so wrong as to incur a **\$62,885.00 "frivolous lawsuit" sanction, when he did not even bring this suit!**

My request for this reduction to writing is not for the purpose of harassment of this Honorable Court or the Westfalls, but to facilitate an intelligent review at the Appeals Court level of the basis of this Honorable Court's decision and ruling.

I specifically request findings and conclusions regarding the divergent versions of the truth ("frivolous" vs. "racketeering") as alleged to this Court in the Westfalls' *Motion for Sanctions* and in my *Response* thereto, i.e. a finding and conclusion regarding:

Petition En Banc
**Appendix
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The central Issue regarding this Judgment:

Regarding my civil RICO claim and cross-claim, and absent a finding of fact by a jury (that I had indeed not been damaged by reason of a RICO violation), what conclusions of law, if any, and what findings of fact, if any, this Court made to adjudicate the sanction issue of fact, i.e. whether there was a bona fide "*pattern of racketeering activity*" by the Westfalls, just as I was trying to show, or whether my claims were indeed "*frivolous*".

(plain English: How did Your Honor arrive at a finding on this central issue, an issue I had asked to be resolved by jury?)

For the convenience of the Court I am providing copies of the above referenced two documents with this request. Also, this request will try to stay with the flow of each fact issue in these two documents as much as possible. I am also attaching a copy of the *civil RICO pattern jury instructions* used in our U.S. Fifth Circuit.

I also request findings and conclusions regarding the underlying issues in dispute in the above referenced *Motion* and in my *Response*:

The Westfalls' "sanctionable facts" issue 1:

"This lawsuit was brought by Plaintiff to collect on overdue legal fees for legal services rendered to the Defendant at Defendant's request". (Movants starting page 1 paragraph I)

Fact issue: Were the legal services at issue (the \$18,121.10) actually rendered, or did they have no worth?

Fact issue: Were these \$18,121.10 legal services actually "at Defendant's request"?

Fact issue: Did Plaintiff (or sanction movants) obtain a jury finding upon these issues?

Fact issue: Had Plaintiff previously breached his agreement by not openly billing monthly?

(The Westfalls' "sanctionable facts" issue 2)

"Instead of a mounting a normal defense to a rather simple lawsuit such as this and raising the normal objections to a suit on a sworn account, the Defendant/Third Party Plaintiff chose instead to make this lawsuit into his own public forum to make a mockery of all lawyers and the entire legal system".

Law issue: Does denying the account under oath and calling for an appointment of an auditor under RCP Rule 172 qualify as a "normal defense" and "normal objection"?

Fact issue: Is that exactly what Birnbaum did, and if so, why is it "sanctionable"?

Fact issue: Was this really a "rather simple lawsuit" or part of a "pattern of racketeering activity" by the Westfalls?

Law issue: Does an allegation of a "pattern of racketeering activity" constitute a sanctionable pleading as a matter of law?

Law issue: Does a cross-defense of damage by a RICO "pattern of racketeering activity" constitute a sanctionable defense as a matter of law?

Law issue: Does a third party claim upon the same RICO "pattern of racketeering activity" constitute a sanctionable claim as a matter of law?

The Westfalls' "sanctionable facts" issue 3:

"Defendant/Third Party Plaintiff tried unsuccessfully to intimidate and harass the Plaintiff into dropping this lawsuit by attempting to implicate the owner of the Plaintiff, G. David Westfall, as well as his wife and daughter in a totally frivolous claim of running an organized crime syndicate in the form of a law office".

Fact Issue: Was G. David Westfall, as well as his wife and daughter, actually "running an organized crime syndicate in the form of a law office"?

Law Issue: Does a claim of "running an organized crime syndicate in the form of a law office" constitute a sanctionable act as a matter of law?

Fact Issue: Did Birnbaum actually make such "claim of running an organized crime syndicate in the form of a law office" as the Westfalls claim, or was he more specific and used the language of civil RICO?

Law Issue: Is it a sanctionable act as a matter of law to bring before the court a claim that one has been "injured in his business or property by reason of a violation of section 1962 of this chapter"? (18 U.S.C. § 1964(c), "civil RICO")

Fact Issue: Was Birnbaum trying "to intimidate and harass the Plaintiff into dropping this lawsuit", or were the Westfalls running a "pattern of racketeering activity" on him?

Law Issue: Is it a sanctionable act to try to "attempt to implicate the owner", if the owner is indeed implicated?

The Westfalls' "sanctionable facts" issue 4:

"The Defendant/Third Party Plaintiff has attempted to use the forum of this lawsuit to launch a full scale attack on the integrity and character of G. David Westfall, Christina Westfall, and Stephanie Podvin".

Law Issue: Does an "attack on the integrity and character" of the party who has brought suit constitute a sanctionable act as a matter of law?

Fact Issue: Was Birnbaum's attacking "integrity and character", or was his language more in the nature of "pattern of racketeering activity" under civil RICO?

The Westfalls' "sanctionable facts" issue 5:

"If those attacks were not enough, the Defendant/Third Party Plaintiff broadened his attack in his pleadings and so called "Open Letters" to include casting aspersions at this Court, the visiting Judge, the Hon. Paul Banner, the Coordinator of the Court, the Court Reporter for the Court, and the Court of Appeals".

Law Issue: Is it a sanctionable act to speak out, under the First Amendment, or in a court of law, on corruption as one has personally experienced it?

Further Westfalls' "sanctionable facts" issues:

(Movants starting page 2 paragraph II)

"Specifically, Movants file this request for sanctions against the Defendant/Third Party Plaintiff for the following actions of the Defendant/Third Party Plaintiff:"

See Birnbaum *Response to Motion for Sanctions*.

Summary

WHEREFORE, Udo Birnbaum requests the Court to **file findings of fact and conclusions of law** as to exactly what the Court found that he did that was so wrong as to incur a \$62,885.00 **"frivolous lawsuit" sanction, when he did not even bring this suit**, and specifically upon the central issue regarding this Judgment ("racketeering" vs. "frivolous") as alleged to this Court in the Westfalls' *Motion for Sanctions* and in my *Response* thereto, i.e. whether:

The central Issue regarding this Judgment:

Regarding my civil RICO claim and cross-claim, and **absent a finding of fact by a jury** (that I had indeed **not** been damaged by reason of a RICO violation), **what conclusions of law**, if any, and what **findings of fact**, if any, this Court made to **adjudicate the sanction issue of fact**, i.e. whether there was a bona fide **"pattern of racketeering activity"** by the *Westfalls*, just as I was trying to show, or whether my claims were indeed **"frivolous"**.

(plain English: How did Your Honor arrive at a finding on this central issue, an issue I had asked to be resolved by jury?)

This is the second suit in which I have been run over by lawyers and judges in this Court, and I have come to recognize the retaliation by Official Oppression that has come upon me for having spoken out on corruption in Tommy Wallace's 294th District Court, as I pleaded at the sanction hearing "trial" of July 30, 2002.

I did not bring this suit! I did not bring the other one either!

Respectfully submitted

Udo Birnbaum

UDO BIRNBAUM, *Pro Se*

540 VZ CR 2916

Eustace, TX 75124

(903) 479-3929

att: The "frivolous lawsuit" judgment
Motion for Sanctions (by the Westfalls)
Birnbaum Response to Motion for Sanctions
Civil RICO pattern jury instructions

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail and ~~EAX~~ on this the 3 day of September, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

*fax not
receiving*

Udo Birnbaum
UDO BIRNBAUM

Details in:

Request for Findings of Facts and Conclusions of Law

Motion to Reconsider the \$59,280.66 Judgment

Motion to Reconsider the \$62,885.00 "Frivolous Lawsuit" Sanction Against Me

Motion for New Trial

Supplement to Motion for New Trial

First Amended Notice of Appeal.

Respectfully submitted

Udo Birnbaum

UDO BIRNBAUM, *Pro Se*

540 VZ CR 2916

Eustace, TX 75124

(903) 479-3929

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail and FAX on this the 1 day of October, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

Udo Birnbaum

UDO BIRNBAUM

Petition ~~En Banc~~

Appendix

33

No. 05-02-01683-CV

§

**In the Court of Appeals
Fifth District of Texas at Dallas**

UDO BIRNBAUM

Defendant, Counter/Cross-claimant, Third Party Plaintiff - Appellant

v.

THE LAW OFFICES OF G. DAVID WESTFALL, P.C.

Plaintiff, Counter Defendant - Appellee

G. DAVID WESTFALL

Cross/Third Party Defendant, Sanction Movant - Appellee

CHRISTINA WESTFALL

Cross/Third Party Defendant, Sanction Movant - Appellee

STEFANI PODVIN

Cross/Third Party Defendant, Sanction Movant - Appellee

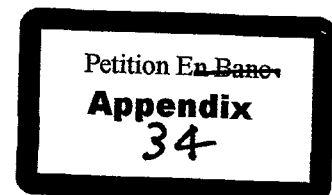
**Appeal from the 294th Judicial
District Court of Van Zandt County, Texas
The Honorable Paul Banner, "visiting judge"
Trial cause no. 00-00619**

**APPELLANT'S MOTION TO HAVE THE TRIAL JUDGE
PRODUCE FINDINGS AND CONCLUSIONS
And permit Appellant to respond thereto, including oral presentation**

**UDO BIRNBAUM
PRO SE
540 VZ CR 2916
Eustace, TX 75124
(903) 479-3929**

*Aug 5, 2003
cover sheet only*

*Appellant's motion to have the trial judge produce findings and conclusions
page 1 of 8 pages*





I certify this to be a true and exact copy of the original on file in the District Clerk's Office, Van Zandt County, Texas.
Candi Scott

No. 00-00619

FILED FOR RECORD

THE LAW OFFICES OF
G. DAVID WESTFALL, P.C.

vs.

UDO BIRNBAUM

)
)
)
)
)
)
)

IN THE DISTRICT COURT
HAIYU YOUNG
DIST. CLERK VAN ZANDT CO. TX.
294th JUDICIAL DISTRICT
BY _____ DEP.
VAN ZANDT COUNTY, TEXAS

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, THE LAW OFFICES OF G. DAVID WESTFALL, P.C., Plaintiff, complaining of UDO BIRNBAUM, hereinafter referred to as Defendant, and for cause of action would respectfully show the court the following:

I.

Plaintiff is a professional corporation with its principle office and place of business in Dallas, Dallas County, Texas.

Defendant is an individual whose residence is in Eustace, Van Zandt County, Texas and who has been previously served with process and has appeared by filing a written answer herein.

II.

On or about May 5, 1999, Defendant retained Plaintiff to perform legal services in a civil matter in Cause No. 3:99-CV-0696-R in the United District Court for the Northern District of Texas in Dallas, Dallas County, Texas.

III.

The legal and/or personal services were provided at the special instance and requested of Defendant and in the regular course of business. In consideration of such services, on which systematic records were maintained, Defendant promised and became bound and liable to pay Plaintiff the prices charged for such services and expenses in the amount of \$18,121.10, being a reasonable charge for such services. A true and accurate photostatic copy of the accounts for services rendered are attached hereto by reference for all purposes as Exhibit "A". Despite Plaintiff's demands upon Defendant for payment, Defendant has refused and failed to pay the

Petition En Banc
Appendix
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229

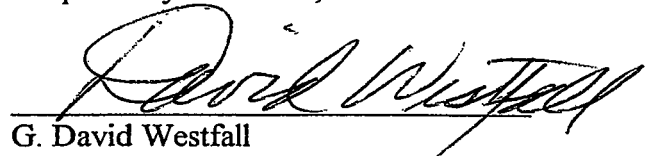
account to Plaintiff's damage in the total amount of \$18,121.10. All just and lawful offsets, payments and credits have been allowed.

IV.

Plaintiff is entitled to recover reasonable attorney's fees incurred in the filing of this suit. Demand for payment from Defendant has been made. Plaintiff requests reasonable attorney's fees as determined by the trier of fact.

WHEREFORE PREMISES CONSIDERED, Plaintiff prays that Defendant be cited to appear and answer and upon final hearing, Plaintiff have judgment against Defendant for \$18,121.10 plus prejudgment and postjudgment interest at the highest rate allowed by law, attorney's fees, costs of court and for such other and further relief, both at law and equity, to which Plaintiff may show himself to be justly entitled.

Respectfully submitted,



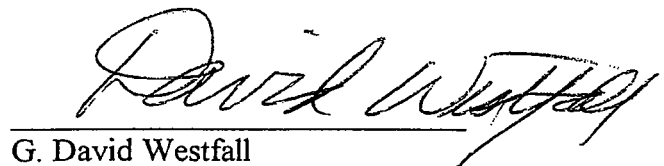
G. David Westfall
5646 Milton, Suite 520
Dallas, Texas 75206
(214) 741-4741
State Bar No. 21224000

CERTIFICATE OF SERVICE

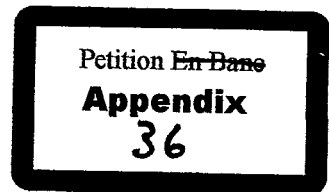
I hereby certify that a true and correct copy of the foregoing instrument has been served upon all counsel of record:

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

on this the 4th day of Sept, 2001.


G. David Westfall

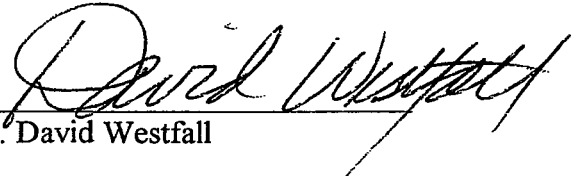
VERIFICATION



VERIFICATION

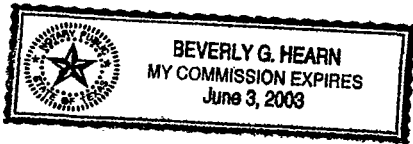
STATE OF TEXAS)(

Before me, the undersigned Notary Public in and for the State of Texas, on this day personally appeared G. David Westfall, who being by me duly sworn stated on oath that the foregoing and annexed account in favor of Plaintiff and against Udo Birnbaum for the sum stated above is within the knowledge of affiant, just and true, that it is due and unpaid, and that all just and lawful offsets, payments and credits have been allowed.


G. David Westfall

SUBSCRIBED AND SWORN to before me on this the 4th day of Sept, 2001, to certify which witness my hand and seal of office.


Notary Public, State of Texas



Petition ~~En Bane~~
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I certify this to be a true and exact copy of the original on file in the District Clerk's Office, Van Zandt County, Texas.

Candi Scott
DIST. CLERK

02 APR 2000 PM 3:26

DIST. CLERK J. YOUNG
VAN ZANDT CO. TX.
BY _____ DEP.

No. 00-00619

THE LAW OFFICES OF
G. DAVID WESTFALL, P.C.

Vs.

UDO BIRNBAUM

)
)
)
)
)
)
)

IN THE DISTRICT COURT
294TH JUDICIAL DISTRICT
VAN ZANDT COUNTY, TEXAS

**DEFENDANT BIRNBAUM'S OBJECTIONS TO
PLAINTIFF'S REQUESTED JURY QUESTIONS**
(Case Filed Sept. 20, 2000. Trial set for Apr. 8, 2002)

To this Honorable Court:

1. Defendant Udo Birnbaum provides the following question to be answered by the jury **immediately after Plaintiff's Question 1** ("failure to comply"). A finding of "Yes" of course precludes the jury from ever reaching Plaintiff's Question 2 ("damages") and Question 3 ("attorney fees"), and **excuses Udo Birnbaum from any and all off Plaintiff's claims.**

2. Defendant Birnbaum also objects to Plaintiff's Question 3 being submitted upon an Affirmative finding to **Question 1**. Plaintiff's Question 3 should be contingent to an answer of "Yes" to Plaintiff's **Question 2**.

3. Birnbaum's requested **Question** is as follows:

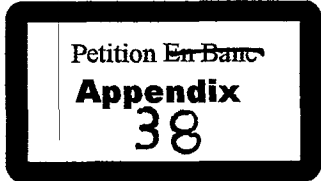
INSTRUCTION

If your answer to [Plaintiff's] Question 1 is "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION

Was Udo Birnbaum's failure to comply excused?

a. Failure to comply by *Udo Birnbaum* is excused by *The Law Offices of G. David Westfall, P.C.*'s previous failure to comply with a material obligation of the same agreement.



b. Failure to comply by *Udo Birnbaum* is excused if all the following circumstances occurred:

1. *The Law Offices of G. David Westfall, P.C.*

- a. by words or conduct made a false representation or concealed material facts,
- b. with knowledge of the facts or with knowledge or information that would lead a reasonable person to discover the facts, and
- c. with the intention that *Udo Birnbaum* would rely on the false representation or concealment in acting or deciding not to act; and

2. *Udo Birnbaum*

- a. did not know and had no means of knowing the real facts and
- b. relied to *his* detriment on the false representation or concealment of material facts

c. Failure to comply by *Udo Birnbaum* is excused if the agreement was made as the result of undue influence by *The Law Offices of G. David Westfall, P.C.*

"Undue influence" means that there was such dominion and control exercised over the mind of the person executing the agreement, under the facts and circumstances then existing, as to overcome his free will. In effect, the will of the party exerting undue influence was substituted for that of the party entering the agreement, preventing him from exercising his own discretion and causing him to do what he would not have done but for such dominion and control.

Answer "Yes" or "No"

ANSWER: _____

Respectfully submitted

Udo Birnbaum
UDO BIRNBAUM, Pro Se
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929

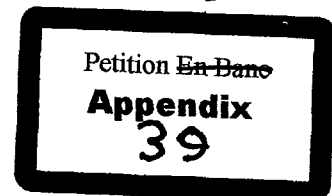
Note: Unable to send to Fleming's
214-373-3232 fax number.
Has not worked in months.
Having trouble sending to Westfall
only receives 1 page

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has today been delivered to G. David Westfall and Frank C. Fleming, by facsimile transmission on this the 4th day of April, 2002.

Udo Birnbaum
UDO BIRNBAUM

Sent pages separately.
Talked to a "Bobby"
at Westfall's Law Office.



No 00-619



I certify this to be a true and exact copy of the original on file in the District Clerk's Office, Van Zandt County, Texas.

Law Office

Law Office
284th Over CV
Candi Scott

Birnbauer

Van Zandt

Birnbauer's Objections to
Today's Plaintiff's
Court change.

FILED FOR RECORD

APR 11 AM 9:18

MARICIA YOUNG
CLERK VAN ZANDT CO. TX.

DEP.

1. ~~PL's~~ Elimination of PL's intertwined question 1 with current phraseology does not allow for Defendant's question as to whether he is excused by Plaintiff's prior failure to abide by a material issue in the same contract (FAILURE TO BILL MONTHLY), Not get HIS APPROVAL BEFORE LARGE EXPENSE)

Petition En Banc
Appendix
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Served today, 4-11-02
Fleming &

by hand to

Cleo Birnbauer
341



I certify this to be a true and exact copy of the original on file in the District Clerk's Office, Van Zandt County, Texas.

Candi Scott

No. 00-00619

THE LAW OFFICES OF
G. DAVID WESTFALL, P.C.

§
§
§
§
§
§

IN THE DISTRICT COURT

v.

294th JUDICIAL DISTRICT

UDO BIRNBAUM

VAN ZANDT COUNTY, TEXAS

COURT'S CHARGE

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.
2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.
3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.
4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

BY _____
DIST. CLERK VAN ZANDT CO. TX.
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Petition Es Banc
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5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence *unless otherwise instructed*. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence *unless otherwise instructed*.

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INSTRUCTION

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

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QUESTION NO. 1

What sum of money, if paid now in cash, would fairly and reasonably compensate The Law Offices of G. David Westfall, P.C., for its damages, if any, that resulted from the Defendant, Udo Birnbaum's, failure to comply with the agreement between the Plaintiff and the Defendant?

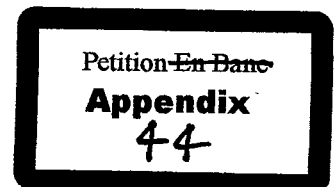
INSTRUCTION:

You are instructed that after the attorney-client relationship is terminated, a client or an attorney can have post termination obligations to each other, such as, the client is still obligated financially for the lawyer's time in wrapping up the relationship and the lawyer is still obligated to perform tasks for the client to prevent harm to the client during the termination process.

ANSWER:

Answer in dollars and cents:

ANSWER: \$ 15,817.60



QUESTION NO. 2

What is a reasonable fee for the necessary services of the Plaintiff's attorneys in this case, stated in dollars and cents?

Answer in dollars and cents for each of the following:

- | | |
|--|-----------------------|
| A. For preparation and trial in this matter: | \$ <u>\$41,306.91</u> |
| B. For an appeal to the Court of Appeals, if necessary: | \$ <u>20,000.00</u> |
| C. For making or responding to a petition for review to the Supreme Court of Texas | \$ <u>5,000.00</u> |
| D. If petition for review is granted by the Supreme Court of Texas | \$ <u>10,000.00</u> |

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Candi Scott

No. 00-00619

THE LAW OFFICES OF
G. DAVID WESTFALL, P.C.

Vs.

UDO BIRNBAUM

Vs.

G. DAVID WESTFALL
STEFANI PODVIN
CHRISTINA WESTFALL

) IN THE DISTRICT COURT
)
) 294TH JUDICIAL DISTRICT
)
) VAN ZANDT COUNTY, TEXAS
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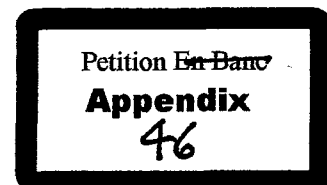
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02 AUG 19 PM 2:19
NANCY YOUNG
DIST. CLERK VAN ZANDT CO. TX
BY _____ DEP

RULE 276 REQUEST FOR ENDORSEMENT BY THE COURT OF "REFUSALS" AND "MODIFICATIONS"
(of the "refusals" and "modifications" made by the Court to Birnbaum's requested jury instructions, questions, and definitions)

TO THIS HONORABLE COURT:

COMES NOW Udo Birnbaum, under RCP Rule 276, requesting the Court to provide endorsement, per Rule 276, of such refusals and modifications as the Court made on his requested submissions to the jury. RCP Rule 276, "Refusal or Modification", requires as follows:

When an instruction, question, or definition is requested and the provisions of the law have been complied with and the trial judge refuses the same, the judge shall endorse thereon "Refused", and sign the same officially. If the trial judge modifies the same the judge shall endorse thereon "Modified as follows: (stating in what particular the judge has modified the same) and given, and exception allowed" and sign the same officially. Such refused or modified instruction, question, or definition, when so endorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial judge thereon reviewed without preparing a formal bill of exceptions. (RCP Rule 276. REFUSAL OR MODIFICATION, emphasis added)



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The requested jury submissions of both of the parties, as well as the actual submissions in the Court's Charge, are contained in documents titled as follows:

- *Udo Birnbaum's Affirmative Defense of Fraud requested definitions, questions, and special instructions to be given to the jury. (Cert. of Service April 1, 2002)*
- *Udo Birnbaum's Texas Deceptive Trade Practices Act (DTPA) Counterclaim requested definitions, questions, and special instructions to be given to the jury. (COS April 1, 2002)*
- *Plaintiff's Requested Jury Instructions (3 questions, Cert. of Service April 3, 2002)*
- *Defendant Birnbaum's Objections to Plaintiff's Requested Jury Instructions [4/3/02] (contains submission of Birnbaum's "excused" issue) Cert. of Service April 4, 2002*
- *Plaintiff's submissions on the third day of the trial, the day of submission to the jury (2 question format (as was incorporated into the Court's Charge questions 1 and 2)*
- *Birnbaum's Objections to today's Plaintiff's Court charge. (handwritten, filemarked April 11, 2002, 9:18 AM)*
- *Court's Charge (April 11, 2002)*

Summary

COMES NOW Udo Birnbaum, requesting the Court to provide endorsement, per Rule 276, of such refusals and modifications as the Court made on his requested submissions to the jury. Udo Birnbaum makes such request so that the action of the trial judge on such matters may be reviewed without preparing a formal bill of exceptions.

Respectfully Submitted,

Udo Birnbaum
 UDO BIRNBAUM
 540 VZ 2916
 Eustace, Texas 75124
 (903) 479-3929

ref: Above indicated documents as provided to the Court

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail and FAX on this the 19 day of August, 2002, on Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

Udo Birnbaum
 UDO BIRNBAUM

Request for Endorsement per RCP Rule 276
 Page 2 of 2 pages

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I certify this to be a true and exact copy of the original on file in the District Clerk's Office, Van Zandt County, Texas.

Candi Scott

No. 00-00619

THE LAW OFFICES OF
G. DAVID WESTFALL, P.C.

vs.

UDO BIRNBAUM

)
)
)
)
)
)

IN THE DISTRICT COURT

294th JUDICIAL DISTRICT

VAN ZANDT COUNTY, TEXAS

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**COUNTER DEFENDANT LAW OFFICE OF G. DAVID WESTFALL, P.C.
AND G. DAVID WESTFALL'S MOTION FOR SUMMARY JUDGMENT**

COME NOW, The Law Offices of G. David Westfall, P.C. and G. David Westfall, Counter-Defendant and Third Party Defendant, in the above-styled and numbered cause and makes and files this their Motion for Summary Judgment pursuant to the provisions of Texas Rules of Civil Procedure 166a, and in support thereof would thereby show the Court the following:

I.

This Motion for Summary Judgment is based on the pleadings on file with the Court, all discovery requests and responses or lack of responses thereto. The foregoing shows as a matter of law that with regard to the issues raised there is no genuine issue as to any material fact, and that the Law Office of G. David Westfall, P.C. and G. David Westfall are entitled to judgment as a matter of law.

II.

The Texas "no-evidence motion" requires, like the federal standard, that if the issue is one on which the movant does not bare the burden of proof and after an adequate time for discovery has passed, summary judgment is mandated if the respondent fails to make a showing sufficient to establish the existence of each element essential to its case. *Celotex v. Catrett*, 477 U.S. 317 (1986), see Clay M. White, "A New Rule For Texas Summary Judgments," INSURANCE DEFENSE LEGAL UPDATE December 1997.

Moreover, simply showing the existence of a fact issue will not suffice to defeat a "no evidence" summary judgment; there must be a "genuine issue" regarding a "material fact." There is no genuine issue where the record, taken as a whole, could not lead a rational trier of fact to find for the respondent. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574,

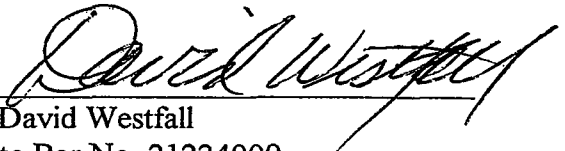
587 (1986). In the present situation, after reviewing the record as a whole, a rational trier of fact could not find for Udo Birnbaum on any of his claims against The Law Office of G. David Westfall, P.C. and G. David Westfall.

III.

There is no sustainable cause of action against The Law Office of G. David Westfall, P.C. and/or G. David Westfall as a matter of law, and there being no question in law or in fact which prohibits the granting of this Motion for Summary Judgment, The Law Office of G. David Westfall, P.C. and G. David Westfall are entitled the same.

WHEREFORE PREMISES CONSIDERED, Counter Defendant The Law Office of G. David Westfall, P.C. and Third Party Defendant G. David Westfall pray that this court grant their No-Evidence Motion for Summary Judgment dismissing Udo Birnbaum's claims against them with prejudice to its being refiled, and award such other relief, at law or equity, as to which they may be justly entitled.

Respectfully submitted,



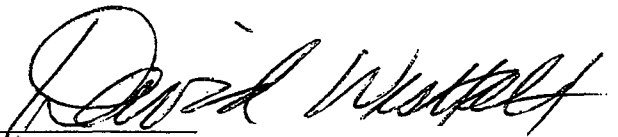
G. David Westfall
State Bar No. 21224000
Law Offices of G. David Westfall, P.C.
5646 Milton, Suite 520
Dallas, Texas 75206
(214) 741-4741
Facsimile (214) 741-4746

CERTIFICATE OF SERVICE

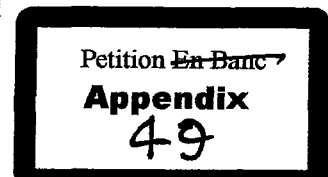
I hereby certify that a true and correct copy of the foregoing instrument has been served upon all counsel of record via:

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

on this the 17th day of August, 2001.



G. David Westfall



damages sustained by plaintiffs." *Wilcox Development Co. v. First Interstate Bank of Oregon, N.A., D.C.Or.1983, 97 F.R.D. 440.*

The party moving for summary judgment is either hopelessly confused or willfully trying to confuse the Court. Summary judgment is not available under the circumstances:

"Congress did not limit scope of this chapter to those persons involved in what traditionally has been thought of as "organized crime," but, rather, **any "person"** as term is broadly defined in this chapter, **whether associated with organized crime or not**, can commit violation, and **any person injured** in his business or property by such violation may then sue violator for damages in federal court." *Lode v. Leonardo, D.C.Ill.1982, 557 F.Supp. 675.*

"**Material issues of genuine fact** existed with respect to existence of an enterprise as defined by this chapter, association of defendant printing company with such enterprise, association of the alleged enterprise with organized criminal activity, the intent and knowledge of defendant concerning the underlying predicate acts and the existence of injury caused by alleged violation of this chapter, **precluding summary judgment** in favor of defendant in action alleging the kickback scheme. *Estee Lauder, Inc. v. Harco Graphics, Inc., D.C.N.Y.1983, 558 F.Supp.83.*

Birnbaum's *Summary of Evidence to Civil RICO "elements"* designates his summary judgment evidence. Other evidence is in the witnesses named and their affidavits as already provided or in the *Appendix* to this response.

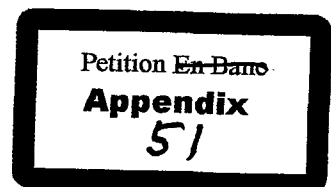
Birnbaum petitions this Court to require G. David Westfall to argue his Motion for summary judgment in light of this response and the evidence hereby presented and designated. Full argument will show that summary judgment is not available under the circumstances of this case.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, UDO BIRNBAUM, ("Birnbaum"), Defendant and Counter-claimant against The Law Offices of G. David Westfall, P.C. ("Law Office"), and Cross-claimant and Third Party Plaintiff against G. David Westfall, and in response to G. David Westfall's Motion for Summary Judgment, would show the Court as follows:

I.

PROCEDURAL HISTORY



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1. Plaintiff, The Law Offices of G. David Westfall, P.C., filed this action on September 21, 2000 against Udo Birnbaum for "legal fees" of \$18,121.10 beyond the \$20,000 Birnbaum had paid up front on May 5, 1999.

2. On October 3, 2000 Birnbaum filed *Defendant's Answer, Counterclaim, and Cross-complaint*, as amended on July 6, 2001 by *Defendant's Amended Answer, Counterclaim, and Cross-complaint*, counter-claiming of the "Law Office" under the Texas Deceptive Trade Practices Act (DTPA), and cross-complaining of G. David Westfall, Christina Westfall, and Stefani Podvin.

3. On December 26, 2000 Birnbaum filed *Motion for Appointment of Auditor Pursuant to Rule 172 RCP to Make Finding of State of the Accounts between the Parties*. On January 8, 2001 Birnbaum filed *Supplement to Motion for Appointment of Auditor, etc*. The Law Office never responded to this motion, and this motion is currently still pending before the Court.

4. On April 20, 2001 Birnbaum filed *Udo Birnbaum's Motion Under Rule 193.4 for Hearing and Ruling on Objections and Assertions of Privilege*. The Law Office as well as the other individual parties never responded to this motion, and this motion is currently still pending before the Court.

5. On April 30, 2001 Birnbaum filed *Udo Birnbaum's Third Party Plaintiff Civil RICO Claim Against G. David Westfall, Christina Westfall, and Stefani Podvin*. This pleading, as amended on July 11, 2001 by *Udo Birnbaum's Amended Third Party Plaintiff Civil RICO Claim against G. David Westfall, Christina Westfall, and Stefani Podvin*, complains of violations of 18 U.S.C. § 1961 et seq. ("RICO"), by the three named individuals and also of fraud by G. David Westfall. The "Law Office" is not named as a RICO defendant, but is instead designated as the "enterprise" associated with the above individual "persons".

6. At various times various parties moved to quash the taking of depositions. However the Court, on June 20, 2001 ordered dates for the taking of depositions of the respective parties.

7. On July 3, 2001, Udo Birnbaum gave his deposition in this matter. On this date G. David Westfall also gave his deposition, although time ran out and Westfall refused to produce any documents whatsoever as required by the notice duces tecum.

8. On July 20, 2001 Stefani Podvin and Christina Westfall gave their deposition. Both refused to produce any documents whatsoever as required by the notices duces tecum.

9. The Law Office, however, refused to allow the taking of their deposition as shown by *Udo Birnbaum's Motion to Compel Deposition of the Law Offices of G. David Westfall, P.C.*,

filed July 16, 2001. The Law Office has not responded to this motion, and this motion is currently still **pending before the Court**.

10. On August 17, 2001 all four (4) opposing parties mailed motions seeking summary judgment, although they were **not actually filed with the Clerk** by this designated deadline.

11. This matter is currently set for trial on the Court's docket for November 13, 2001.

II.

G. DAVID WESTFALL'S NO-EVIDENCE MOTION

1. G. David Westfall is seeking summary judgment under Rule 166a(i) ("No-Evidence Motion"). Rule 166a(i) states:

After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact. (emphasis added)

2. G. David Westfall's motion fails to state the elements as to which there is no evidence. G. David Westfall's motion is so computer-canned that it utterly fails to even name or refer to Birnbaum's **cross-cause or third party plaintiff cause** against him under 18 U.S.C. § 1964(c) ("Civil RICO"), much less even refer to the essential elements to state as to which element or elements there is no evidence. G. David Westfall merely states that "*[t]he foregoing shows as a matter of law that with regard to the issues raised there is no genuine issue as to any material fact, etc.*", when there is nothing "*foregoing*" in its motion.

3. G. David Westfall is abusing the summary judgment process. Birnbaum comes to show that G. David Westfall, in the very bringing of this suit, is abusing the judicial process itself to collect upon a fraudulent "bill".

4. Birnbaum challenges Movant to disprove, at the hearing now set for September 7, 2001, any element of Birnbaum's cross and third party cause of action against him. **However, the only way to prove or disprove anything upon the pile of evidence before the Court is under cross-examination before a jury.**

III.

The RICO ISSUES OF FACT "ELEMENTS"

Petition En Banc

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1. **RICO** is statutory law. Its "**elements**", more properly its "**genuine issues of material fact**", are the issues of fact raised by the language of the statute itself, all of which are of course "material" and to be proved to the jury:

As to materiality, **substantive law will identify** which facts are **material**. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant will not be counted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)

"**Any person injured in his business or property** by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *18 U.S.C. § 1964(c)*

Again in *Adickes v. S.H. Kress & Co.*, 398 U.S. 177 (1970), the Court emphasized that the availability of summary judgment turned on whether a **proper jury question was presented**. There, one of the issues was whether there was a conspiracy between private persons and law enforcement officers. The District Court granted summary judgment for the defendants, stating that there was no evidence from which reasonably minded jurors might draw an inference of conspiracy. We reversed, pointing out that the moving parties' submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury ... to infer from the circumstances" that there had been a meeting of the minds. *Id.*, at 158-159. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)

"**Material issues of genuine fact** existed with respect to existence of an enterprise as defined by this chapter, association of defendant printing company with such enterprise, association of the alleged enterprise with organized criminal activity, the intent and knowledge of defendant concerning the underlying predicate acts and the existence of injury caused by alleged violation of this chapter, **precluding summary judgment** in favor of defendant in action alleging the kickback scheme. *Estee Lauder, Inc. v. Harco Graphics, Inc.*, D.C.N.Y.1983, 558 F.Supp.83.

2. Movant, in his motion, has not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury ... to infer from the circumstances" that Plaintiff had engaged in "*false, misleading, or deceptive acts, failures to disclose, or an unconscionable course of action.*"

3. Movant, in his motion, did not designate as to which element there is no evidence, other than to conclusorily allege that the evidence does not show a violation of the RICO. The **ultimate issue** of the violation of the RICO, however, is the prerogative of the jury and not subject to summary judgment disposition.

4. The "**material issues of fact**" can be clearly found in the "**Fifth Circuit Civil RICO pattern jury instructions**" hereby made a part of this response. The **material issues**, and Birnbaum's evidence thereto, are developed in the context of these instruction. Since these instructions are sufficient for the jury to make a finding upon the evidence, then this document may as well serve as the framework for directing Birnbaum's evidence toward these individual issues of fact, and Birnbaum will do so.

IV.

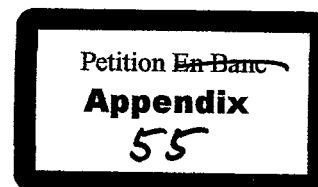
BIRNBAUM'S DESIGNATED EVIDENCE

1. *Udo Birnbaum's Amended Answer, Counterclaim, and Cross-complaint*, and *Udo Birnbaum's Amended Third Party Plaintiff Civil RICO Claim against G. David Westfall, Christina Westfall, and Stefani Podvin* clearly indicates the evidentiary underpinnings of his claim. The following is directly out of paragraphs 12 through 14 of the latter:

The "**pattern of racketeering activity**" is evident from the transcript of the September 20, 2000 bankruptcy proceedings against G. David Westfall on September 20, 2000 (Exhibit 8):

- Mr. Alderson, the accountant for everybody, including "The Law Office", "Westfall Farms", Mr. Westfall, Mrs. Westfall for ten (10) years claiming not to "know" if Mr. Westfall is a shareholder of "The Law Office of G. Westfall, P.C." page 33 line 9.
- Mr. Alderson's testimony that funds are co-mingled across the board. page 40 starting line 12 and going on for pages.
- The Court reprimanding Mr. Alderson: "*I don't understand how you can put your name on a tax return if you haven't looked to at least spot check checks.*" And "*Aren't you sticking your neck out when you put your name on a return like that?*" page 52 starting line 15.
- David Westfall funding the whole bunch out of a single account. Starting page 64.
- Neither David Westfall nor Christina Westfall have personal checking accounts. Everything comes out of a "Law Office" slush fund account. Starting at page 77
- David Westfall hiding that his daughter Stefani Podvin is the real owner of "The Law Offices of G. David Westfall". page 87 line 16.
- When Westfall shuffled assets and the old Westfall Farms became a "dormant corporation".
- David Westfall trying to make himself bullet proof from a pending \$500,000 King Ranch judgment.

The "**pattern of racketeering activity**" is also evident from the following acts of "**racketeering activity**":



- The documents filed by or in behalf of David Westfall in his recent bankruptcy proceeding in which he claimed he had more than twelve (12) creditors against him
- The series of documents between David Westfall and his daughter Stefani Podvin designating him as director of the Law Office each year
- The retainer agreement between David Westfall and Udo Birnbaum
- The retainer agreement between David Westfall and Jerry Michael Collins
- The document in this cause which David Westfall calls his "bill"
- The fraudulent pleading David Westfall used to bring this suit.

Further evidence is to be found in all the exhibits previously provided in this cause, the persons named, their affidavits, together with whatever they may have." (end of quote)

2. The "**pattern of racketeering activity**" is also clearly visible in the *Videotaped Deposition of David Westfall* as taken by Udo Birnbaum on July 3, 2001, starting page 18 line 19. It shows G. David Westfall had no intent of ever abiding by the terms of the retainer contract he signed with Udo Birnbaum.

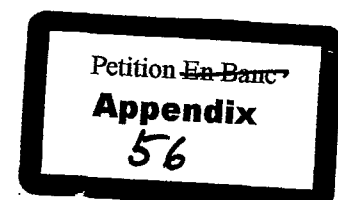
3. **Further evidence** is in the documents named by Birnbaum on pages 80 line 23 through page 82 line 12 in the *Videotaped Deposition of Udo Birnbaum* as taken of him on July 3, 2001:

Q (By Mr. Fleming) Can you point out to me any documents - - any and all documents under your custody or control that refer to or evidence any fraud or misrepresentation that you are alleging occurred in your dealings with Mr. Westfall, the P.C., Ms. Podvin or Christina Westfall?

A. Yes. As to you questions as to the documents that I designate constituting fraud, racketeering and deceptive trade practices, I hereby designate whatever documents Mr. Westfall filed in his recent bankruptcy proceedings claiming that he had more than twelve creditors against him, the series of documents between him and his daughter designating him as the director of the law office.

I designate Mr. Westfall's tax return using that fraudulent representation. I designate the retainer agreement which you put in here previously in cause 399-CV-696 [in] the Dallas federal court from which Mr. Westfall was my lawyer. I designate that as a fraudulent - - a document stating my cause. I designate the retainer agreement in the Jerry Michael Collins case. 3:99-CV-641. I designate the document that Mr. Westfall calls his, quote, bill, which I allege to be a fraudulent pleading for him to try to get more money out of me. That is this suit.

And I specifically designate these documents as constituting racketeering activity, and I designate them as - - also as constituting a specific pattern of racketeering activity by Mr. Westfall and others and designate all the evidence I have provided, all the persons I have named in the affidavits together with the bills they have as showing this pattern of racketeering activity.



The fraud is that Mr. Westfall did not tell me he was running a racketeering enterprise. It has - - it goes through all the motions. Looks like a perfectly harmless document. (page 82 line 12, end of quote)

4. And again, on page 132 line 12 through page 133 line 6 of the *Videotaped Deposition of Udo Birnbaum* as taken of him on July 3, 2001. The tone and tenor of the proceedings again does not fully come through on the transcript, as does the scheming throughout the deposition as caught by the video camera:

Q (By Mr. Fleming) I'm asking you right now for the fourth time, Mr. Birnbaum. This is your pleading. You came to the courthouse and filed it.

And I'm asking you the totality of the factual basis for this pleading.

A The totality of the factual basis for this pleading is those items that I specifically designated. One was the retainer agreement. Two was the fraudulent - - or whatever it is, bill. Three is the suit. Four, all the evidence that comes out of the bankruptcy things, okay. The swapping of legal fees for all kinds of stuff and w[h]ere looked at in totality of this - - this shows, and the transfer of income, the one big slush fund out of which everything comes in, the flow of money from one thing to another.

And all that evidence shows the RICO violation between all of them. And I close my answer on that, and that's the end of my answer on that issue. If you can't understand, I don't know what to do. (page 132 line 6, end of quote)

V.

EVIDENCE IN WESTFALL'S OWN DOCUMENTS

1. There is plenty of evidence around, and Birnbaum designates all of it as his summary judgment evidence. There have been three deep reaching depositions, each reaching into the exhibits made a part of such depositions. There are discovery documents. Then there is the transcript of the bankruptcy proceedings against G. David Westfall as referred to in the pleadings and as filed in this Court. Then there is the entire record in the Dallas Federal Court made a part of Birnbaum's cause of action by reference. Then of course there is the "bill" with the supposed demands for payment. There clearly is no lack of evidence.

2. The question before the Court is what does all of this stuff mean. Birnbaum claims that, as far as what David Westfall and Stefani Podvin did, it shows a violation of RICO by a **pattern of racketeering activity**.

a. **Westfall's Deposition Exhibit 1: Agreement of retainership:**

Birnbaum claims that the "Law Office" through G. David Westfall was **deceiving** him with this document by **concealing** that the "Law Office" never intended to bill monthly. If the "Law Office" would have billed him monthly, such would have precluded G. David Westfall from coming up with whatever giant "bill" he wished to come up with at whatever time he chose, and to try to enforce such fraudulent "bill" with a fraudulent collection suit in the name of the "Law Office".

In depositions of David Westfall he claims he **never promised anyone** that he would bill them monthly, but this document clearly shows that he did. The scheme is clearly shown in the *Videotaped Deposition of David Westfall*, taken July 3, 2001, starting page 18 line 19 through line 8. It makes very interesting reading. (Attached)

The evidence also shows that G. David Westfall has a pattern of coming up with such fraudulent giant summary "bills". Rather than go into detail here, the matter is clearly documented in the *Videotaped Deposition of David Westfall*, taken July 3, 2001, and particularly how a charge for 7/31/00 could be reflected on a complete "billing statement" dated July 31, 2000. (Page 41 line 23 through page 42 line 22).

The videotape of the parties before the camera of course shows the continuing scheme much better than the mere "objection form" that appears on the transcribed document.

b. Westfall's Deposition Exhibit 2: Letter from Westfall to Birnbaum:

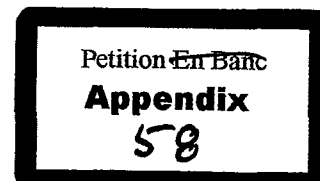
Birnbaum claims this is a letter to get G. David Westfall out of the mess he had painted himself in the Dallas Federal Court, i.e. to conceal that he had been fired long ago and should have stopped meddling in the courts and stopped charging. It is obstruction in the administration of justice because it involves an attorney as an officer of the court.

c. Westfall's Deposition Exhibit 3: Motion to withdraw as attorney:

Birnbaum claims this is a fraudulent "CYA" document. Client had not *"disregarded the advice of counsel ... making it impossible for his attorney to properly handle the matter ..."*, as Westfall tells the Court, but had **fired him three months ago**.

d. Westfall's Deposition Exhibit 4: Original order sent for approval:

Birnbaum claims this document was fraudulently submitted by Westfall to the Court. Deposition testimony shows that Westfall did not "deliver a copy of this Motion to Plaintiff" as he



claims in the above document. Furthermore Westfall did not need my signature as he claimed in Exhibit 2 above. It was all a "CYA" scheme, and getting Birnbaum's signature was the name of the game.

e. Westfall's Deposition Exhibit 5: 9/15/00 Affidavit of Udo Birnbaum:

David Westfall's conduct is **unconscionable**. Birnbaum gives evidence upon the following matters:

- David Westfall's Solicitation and Concealment of Solicitation shows collusion
- David Westfall's delay in making a formal appearance shows collusion
- Westfall's attempt to release Judges Zimmermann and McDowell as defendants shows collusion
- Westfall's fraudulent motion to withdraw shows collusion
- Westfall not doing anything about the strange "Judgment" and "de novo determination" in my Cause shows collusion

f. Deposition Exhibit 6: "Billing" statement with handwriting on it:

Birnbaum testified that the **whole document is a fraud**, as is the handwriting on it.

g. Deposition Exhibit 7: Diagram by Birnbaum:

Birnbaum is diagramming the RICO violative scheme involving the Law Office. Birnbaum is testifying under examination upon the **unconscionable** scheme of the Westfall Bunch running a full blown racketeering scheme right there out of the Law Office. The Law Office, in soliciting and inducing Birnbaum to take G. David Westfall as attorney, was clearly concealing that it was an enterprise controlled by the Westfalls for perpetrating their scheme.

VI.

EVIDENCE IN OTHER DOCUMENTS

1. Other evidence of the pattern of racketeering activity is to be found in the exhibits to the *Videotaped Deposition of Stefani Podvin* of July 20, 2000:

a. Deposition Exhibits 2 through 9: "Written consent of shareholders":

What these documents show is G. David's scheme to make himself "bullet proof", i.e. not owning the Law Office checking account. G. David Westfall, in depositions (page 52, line 17) claims he is the owner of the Law Office, yet gets himself appointed ten (10) years in a row by straw person Stefani Podvin participating in his scheme to get himself "appointed" director by fraudulently "appointing" him director, claiming she is the owner of the Law Office (page 12 line 20). Being director permits him to do the pattern of racketeering activity. Not owning any assets makes him "bullet proof" to judgment and allows him to risk acts of "**racketeering activity**" that one would not take if one were not "bullet proof" to judgment.

b. Deposition Exhibit 10: Election to S corporation:

This document shows G. David Westfall's **scheme** to maintain control of the profits of "Stefani Podvin's" Law Office by funneling them back to Christina and David Westfall, to be ultimately funneled back to "Westfall Farms", of which David Westfall, Christina Westfall, and Stefani Podvin are "limited partners" as Stefani Podvin testified in depositions.

Not owning any assets makes him "bullet proof" to judgment and allows him to risk acts of "**racketeering activity**" that one would not take if one were not "bullet proof" to judgment.

c. Deposition Exhibit 11: Department of Treasury Document:

G. David Westfall and Christina Westfall succeeded in **fooling** the Internal Revenue Service with the above document.

d. Deposition Exhibit 13: Bankruptcy Transcript:

This transcript, together with the bankruptcy exhibits, shows the RICO scheme between G. David Westfall, Christina Westfall, and Stefani Podvin in **setting up** and **controlling** the "Law Office" and "Westfall Farms" to do the "**pattern of racketeering activity**".

e. Deposition Exhibit 14: Bankruptcy Transcript pages 29 and 30:

Showing how, through their long time accountant, they have been **operating** their "enterprise".

f. Deposition Exhibit 15: Bankruptcy Transcript pages 31:

Evidence the **profits** from "Stefani Podvin's" Law Office **wind up** at "Westfall Farms".

g. Deposition Exhibit 18: Bankruptcy Transcript pages 44 and 45:

Everyone is funded out of one giant slush fund account made possible by the RICO scheme.

h. Deposition Exhibit 19: 9/22/2000 Bankruptcy Transcript pages:

Everyone has agreed to release everyone. Problem is the release needs to be signed by the parties, one of them being STEFANI PODVIN as supposed "owner" of the "Law Office". **The scheme slips out:**

Mr. Pronske (Westfall's lawyer): *" We have agreed that there will be mutual releases between the parties . . . [list] . . . Are there any others that we need? And the professional corporation."*

Mr. Westfall: *"I hadn't thought about it. I don't want her to have to execute anything."*

i. Deposition Exhibit 21: Copies of checks:

Proving the **transfer of income** from the "Law Office" to G. David Westfall personally, then to "G. David Westfall Family LP" ("Westfall Farms"). G. David Westfall, Christina Westfall, and Stefani, as partners of Westfall Farms derived each derived income from the "pattern of racketeering activity".

2. Evidence of the **knowledge** of the **pattern of racketeering activity** is to be found throughout the *Videotaped Depositions* of G. David Westfall, Stefani Podvin, and Christina Westfall, as indicated by all their *"I do not know"* answers, when the evidence in the documents and each others testimony clearly conflicts with theirs.

VII.

SUMMARY OF EVIDENCE TO THIRD PARTY PLAINTIFF RICO "ELEMENTS"

(upon the damage they caused through the "Law Office")

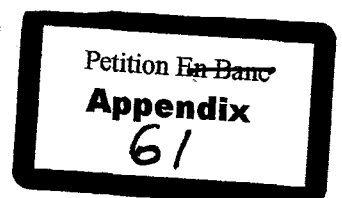
(In the format of the "issues of fact" in the Fifth Circuit
Civil RICO pattern jury instructions)

COUNT ONE -- RICO

For violation of 18 U.S.C. §1962(c)

(participating through a pattern of racketeering activity)

Defendants: G. David Westfall, Stefani Podvin



Evidence to 18 U.S.C. §1962(c) cause of action "elements":

A. *"To establish that the defendant [G. DAVID WESTFALL] has violated Section 1962(c), the plaintiff must prove each of the following five elements by a preponderance of the evidence:"*

1. *That an enterprise existed.*

Evidence: The "Law Office" is the alleged "enterprise". It is an "enterprise" by the definitions under RICO.

2. *That the enterprise engaged in, or had some effect upon, interstate or foreign commerce.*

Evidence: The "Law Office" pays for equipment made in other states. It loads up the United States mail with legal documents. David Westfall takes trips out of the state and spends money there.

3. *That the defendant was employed by or associated with the enterprise.*

Evidence: G. David Westfall claims he is the president of "The Law Office of G. David Westfall, P.C. and also contracts through that "enterprise".

4. *That the defendant knowingly and willfully conducted or participated, directly or indirectly, in the conduct of the affairs of the enterprise.*

Evidence: To be determined by the jury upon evidence per the instructions below.

5. *That the defendant did so knowingly and willfully through a pattern of racketeering activity.*

Evidence: To be determined by the jury upon the evidence per the instructions below.

B. *"The fourth and fifth elements require that the plaintiff prove by a preponderance of the evidence that the defendant knowingly and willfully conducted or participated in the conducting of the affairs of the alleged enterprise through a pattern of racketeering activity. The plaintiff must prove by a preponderance of the evidence a sufficient connection between the enterprise,*

the defendant, and the alleged pattern of racketeering activity. To prove a sufficient connection between the "enterprise", the defendant, and the "alleged pattern of racketeering activity":

- 1. That the defendant participated in the operation or management of the enterprise itself in such a way, directly or indirectly, as to have played some part in directing the affairs of the enterprise.*

Evidence: G. David Westfall is the "director" who runs the "Law Office". See exhibits above and the surrounding circumstances for more detail.

- 2. That the defendant in fact engaged in the pattern of racketeering activity as the plaintiff claims*

Evidence: All the exhibits referred to above and the surrounding circumstances for more detail.

- 3. That the defendant's association with or employment by the enterprise facilitated his commission of the racketeering acts*

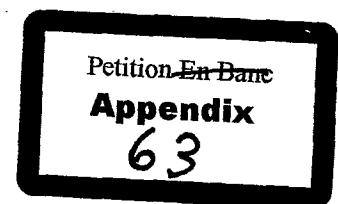
Evidence: He is able to do "racketeering acts" by making them appear as legal documents in the name of the "Law Office". See the exhibits above and the surrounding circumstances for more detail.

- 4. That the commission of these predicate acts had some direct or indirect effect on the alleged enterprise.*

Evidence: That is how he separated me from my money and others of their money. My \$20,000 loss is evidenced by my check and in the "bill".

C. "To establish that mail fraud has been committed, the plaintiff must prove each of the following with a preponderance of the evidence as to each defendant so charged:"

- 1. Some person or persons willfully and knowingly devised a scheme or artifice to defraud, or a scheme for obtaining money or property by means of false pretenses, representations or promises, and*



Evidence: All the exhibits above. They show the scheme to contract through the "Law Office" while at the same time making himself bullet proof to do his acts of "racketeering activity" as shown by the documents above.

2. *Some person or persons used the United States Postal Service by mailing, or by causing to be mailed, some matter or thing for the purpose of executing the scheme to defraud.*

Evidence: There is evidence of "mailing" on almost every document on file in this case.

Damages by reason of 18 U.S.C. §1962(c) violation

D. *"Finally, for the plaintiff to prevail under RICO, he must prove by a preponderance of the evidence that the defendant's RICO violations were the "proximate cause" of injury to the plaintiff's business or property". (emphasis added)*

E. *"A finding that the plaintiff was injured in his business or property because of the defendant's violation of RICO requires only that you find the plaintiff was harmed by the predicate acts." (emphasis added)*

Evidence: The \$20,000 G. David Westfall stripped from Udo Birnbaum by the "retainer contract". Also the additional \$18,1231.10 G. David Westfall and Stefani Podvin is trying to strip through their "Law Office" suit (This amount for cross-claims upon G. David Westfall, Christina Westfall, and Stefani Podvin upon the claims of the Law Office upon Udo Birnbaum. See Cause 00-619 Original Petition, this suit)

F. *"However, to find that injury to the plaintiff's business or property was caused by reason of the defendant's violation of RICO, you must find that the injury to the plaintiff was caused by, and was a direct result of the defendants' violation of either Section 1962(a) or (b) or (c). (emphasis added)*

G. *"Therefore, you must find that the commission of the acts of racketeering, or the pattern of racketeering activity, or the conduct of the affairs of the enterprise through the pattern of racketeering activity directly resulted in the injury or played a substantial part in producing the injury." (emphasis added)*

Evidence: Birnbaum's injuries also flow from the "pattern of racketeering activity" that

had been around for some time before it came upon Birnbaum. Birnbaum became one in a long string of victims. Evidence of the "pattern of racketeering activity" predate the appearance of Birnbaum on the scene, or more correctly the appearance of G. David Westfall upon Udo Birnbaum.

COUNT TWO - - RICO

For violation of 18 U.S.C. §1962(a)

(acquiring interest in enterprise with income derived from a pattern of racketeering activity)

Defendants: G. David Westfall, Christina Westfall, and Stefani Podvin

Evidence to 18 U.S.C. §1962(a) cause of action "elements":

H. "To establish that a defendant violated Section 1962(a), the plaintiff must prove by a preponderance of the evidence each of the following four elements:"

1. That there was an "enterprise".

Evidence: The G. David Westfall Family Limited Partnership ("Westfall Farms") is the alleged "enterprise". It is an "enterprise" by definitions under RICO.

2. That the enterprise engaged in, or had some effect "on interstate commerce".

Evidence: "Westfall Farms" buys equipment made in other states.

3. That the defendant derived income, directly or indirectly or indirectly, from a "pattern of racketeering activity". (NOTE: "a pattern", not "her pattern", i.e. David Westfall's and/or Stefani Podvin's pattern)

Evidence: Deposition exhibit to the Videotaped Deposition of Stefani Podvin of July 20, 2000. It shows the transfer of income from the "Law Office" to G. David Westfall personally, than to "G. David Westfall Family LP ("Westfall Farms)". G. David Westfall, Christina Westfall, and Stefani, as partners in "Westfall Farms" each derived income from their "pattern of racketeering activity" involving the Law Office.

4. That some part of that income was used in acquiring an interest in or operating the enterprise (NOTE: interest in Westfall Farms)

Evidence: G. David Westfall, Christina Westfall, and Stefani Podvin used the money that came from the "pattern of racketeering activity" involving the Law Office to fund the operation of "Westfall Farms".

J. "You should note that the pattern must be one in which the defendant has participated as a "principal". Thus in order to satisfy the second element, the plaintiff must prove the defendant was a "principal" by showing by a preponderance of the evidence:"

- 1. That the defendant knowingly and willfully committed, or knowingly and willfully aided and abetted in the commission of two or more alleged predicate offenses that constitute the alleged pattern of racketeering activity. (NOTE: i.e. aided and abetted David Westfall and/or Stefani Podvin) (emphasis added)*

Evidence: The agreement of retainership, the "billing" statement with handwriting on it, the "written consent of shareholders" documents, the "election to S corporation" 9/20/2000 bankruptcy transcript, copies of checks.

- 2. That the defendant knowingly and willfully received income derived directly or indirectly, from that alleged pattern of racketeering activity.*

Evidence: Copies of checks, testimony of being a partner in "Westfall Farms".

Damages by reason of 18 U.S.C. §1962(a) violation

K. "Finally, for the plaintiff to prevail under RICO, he must prove by a preponderance of the evidence that the defendant's RICO violations were the "proximate cause" of injury to the plaintiff's business or property". (emphasis added)

L. "A finding that the plaintiff was injured in his business or property because of the defendant's violation of RICO requires only that you find the plaintiff was harmed by the predicate acts." (emphasis added)

Evidence: The \$20,000 G. David Westfall stripped from Udo Birnbaum by the "retainer contract". Also the additional \$18,123.10 G. David Westfall is trying to strip with this suit (This amount for cross-claims upon G. David Westfall upon the claims of the Law Office.

upon Udo Birnbaum. See Cause 00-619 Original Petition, this suit)

M. "However, to find that injury to the plaintiff's business or property was caused by reason of the defendant's violation of RICO, you must find that the injury to the plaintiff was caused by, and was a direct result of the defendants' violation of either Section 1962(a) or (b) or (c).

(emphasis added)

Evidence: Income diverted, in violation of 18 U.S.C. § 1962(a), to "Westfall Farms" was part of the scheme to make G. David Westfall "bullet proof" from creditors. It made the "pattern of racketeering" through the "Law Office" possible. The "pattern of racketeering activity" was around long before Birnbaum came on the scene.

Birnbaum was just one of the victims of G. David Westfall's "pattern of racketeering activity" made possible by the RICO violation.

N. "Therefore, you must find that the commission of the acts of racketeering, or the pattern of racketeering activity, or the conduct of the affairs of the enterprise through the pattern of racketeering activity directly resulted in the injury or played a substantial part in producing the injury." (emphasis added)

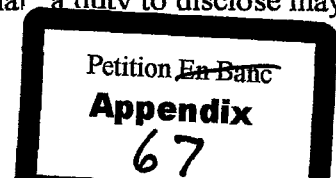
Evidence: G. David Westfall's act of "racketeering activity" of the "retainer contract" directly resulted in the \$20,000 injury to Birnbaum. G. David Westfall's act of "racketeering activity" of the "bill" and this suit may cause an additional \$18,121.10 in injury.

COUNT THREE - - FRAUD
Defendants: G. David Westfall

O. Evidence to FRAUD cause of action "elements":

"Under Texas law, a plaintiff establishes a fraudulent inducement claim by showing the elements of a simple fraud claim. See Balogh v. Ramos, 978 S.W.2d 696, 701 (Tex. App.-- Corpus Christi 1998, pet. denied) ("The supreme court has defined fraudulent inducement as a simple fraud claim."). "The elements of fraud and fraudulent inducement applicable here, are (1) a material representation, (2) which was false, and (3) which was either known to be false when made or was asserted without knowledge of the truth, (4) which was intended to be acted upon, (5) which was relied upon, and (6) which caused injury." Id.

Whether such a duty to disclose exists in this case is "entirely a question of law." See Bradford, 997 S.W.2d at 725 (quoting Hoggett v. Brown, 971 S.W.2d 472, 487-88 (Tex. App.-Houston [14th Dist.] 1997, no writ)). Texas courts have found that "a duty to disclose may



arise in four situations: (1) when there is a fiduciary relationship; (2) when one voluntarily discloses information, the whole truth must be disclosed; (3) when one makes a representation, new information must be disclosed when that new information makes the earlier representation misleading or untrue ; (4) when one makes a partial disclosure and conveys a false impression." Id. " *Randall v. Segue Software, Inc.*, 5th Cir No. 00-10501 Nov. 20, 2000 (emphasis added)

Evidence to FRAUD cause of action "elements":

(1) a material representation,

Evidence: The "retainer agreement" to entice Birnbaum

(2) which was false, and

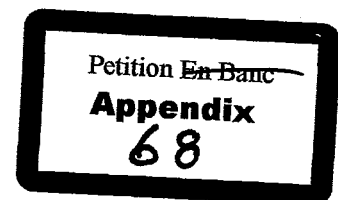
Evidence:

- G. David Westfall misrepresented himself and the "Law Office" as honest providers of legal services. He had all his honor certificates plastered all over the walls but was concealing that he was running a racketeering ring right there out of the "Law Office".
- Frank C. Fleming's questions at the *Videotaped Deposition of Udo Birnbaum* of July 3, 2001 show that the Westfalls (David, Christina, and Stefani) were engaged in a racket of hiding behind the "Law Office".
- G. David Westfall's subsequent actions as shown by the documents to the *Videotaped Deposition of David Westfall* of July 3, 2001 show that he never intended to live up to the terms of the agreement

(3) which was either known to be false when made or was asserted without knowledge of the truth ,

Evidence:

- G. David Westfall's own testimony in the *Videotaped Deposition of David Westfall* of July 3, 2001 shows that he never intended to live up to the terms of the agreement.
- G. David Westfall's questions at the *Videotaped Deposition of Udo Birnbaum* of July 3, 2001 show that he never intended to live up to the terms of the agreement



(4) which was intended to be acted upon,

Evidence: G. David Westfall intended Udo Birnbaum to be suckered in by the "retainer agreement" contract.

(5) which was relied upon, and

Evidence: Udo Birnbaum was suckered in by the "retainer agreement" as evidenced by the \$20,000 payment.

(6) which caused injury.

Evidence: Udo Birnbaum was injured to the tune of \$20,000 up front, mental anguish, loss of time and earnings.

VIII.

SUMMARY OF EVIDENCE TO CROSS-COMPLAINT RICO "ELEMENTS"

(upon the \$18,121.10 + the "Law Office" is seeking)

(Same evidence upon the same "elements" as above, different liability)

COUNT ONE - - RICO

For violation of 18 U.S.C. §1962(c)
(participating through a pattern of racketeering activity)
Defendants: **G. David Westfall, Stefani Podvin**

COUNT TWO - - RICO

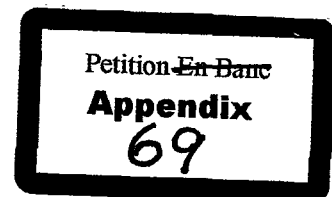
For violation of 18 U.S.C. §1962(a)
(acquiring interest in enterprise with income derived from a pattern of racketeering activity)
Defendants: **G. David Westfall, Christina Westfall, and Stefani Podvin**

COUNT THREE - - FRAUD

Defendants: **G. David Westfall**

IX.

RE: DAVID WESTFALL'S REPRESENTATIONS TO THIS COURT



1. Par I: "The foregoing shows as a matter of law that with regard to the issues raised there is no genuine issue as to any material fact, and that the Law Office of G. David Westfall, P.C. and G. David Westfall are entitled to judgment as a matter of law."

Response: There is nothing "foregoing". Failure to identify the "issues" or their author. Failure to even identify the cause of action.

2. Par II: "In the present situation, after reviewing the record as a whole, a rational trier of fact could not find for Udo Birnbaum on any of his claims against The Law Office of G. David Westfall, P.C. and G. David Westfall."

Response: Conclusory wishful thinking.

X.

SUMMARY

G. David Westfall's motion fails to designate as to which element there is no evidence, other than to conclusorily allege that the evidence does not show a violation of the RICO. The **ultimate issue** of the violation of the RICO, however, is the prerogative of the jury and not subject to summary judgment disposition.

G. David Westfall is abusing the summary judgment process. Birnbaum comes to show that G. David Westfall, in the very bringing of this suit, is not only abusing the judicial process to collect upon a fraudulent "bill" but is continuing in his "pattern of racketeering activity".

Attached to this response by reference, and filed separately, are the following"

- Transcript of July 3, 2001 *Videotaped Deposition of Udo Birnbaum* and exhibits thereto.
- Transcript of July 3, 2001 *Videotaped Deposition of David Westfall* and exhibits thereto.
- Transcript of July 20, 2001 *Videotaped Deposition of Stefani Podvin* and exhibits thereto.
- Transcript of July 20, 2001 *Videotaped Deposition of Christina Westfall* and exhibits thereto.

Attached to this response by reference, and already previously filed, are the following:

- **Transcript** of September 20, 2000 trial of G. David Westfall in the Dallas Bankruptcy Court.

PRAYER

WHEREFORE, Premises considered, UDO BIRNBAUM prays that G. David Westfall be required to argue his motion in light of this response and the evidence hereby presented and designated, and that his motion for summary judgment be in all things denied.

Respectfully submitted,

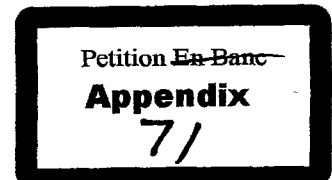


Udo Birnbaum, Pro Se
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via CMRR on this the 31 day of August, 2001 upon G. David Westfall, 5646 Milton, Suite 520, Dallas, Texas 75206 and Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.


UDO BIRNBAUM



NOTICE OF INTENT PURSUANT TO RULE 166a(d)
to use discovery products to oppose the summary judgment

NOTICE is hereby given of Udo Birnbaum's intent to use the volumes and exhibits named above to oppose summary judgment. Notice is also given of intent to oppose summary judgment by reference to all other discovery documents, whether requests, answers or failure to provide such, or pending motions relating thereto.

Udo Birnbaum
UDO BIRNBAUM, *Pro Se*
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Regular Mail and Fax on this the 31 day of August, 2001 upon G. David Westfall, 5646 Milton, Suite 520, Dallas, Texas 75206 and Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301. Only ~~Volumes 1, 8, and 9~~ is provided with this mailing. The other material has either been previously provided to the above, or was provided by the court reporter at the same time the copy was provided to Birnbaum.

Exhibit 9, 16, 17 *Udo Birnbaum*
UDO BIRNBAUM

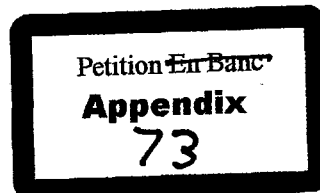


EXHIBIT 9

REGARDING G. DAVID WESTFALL CONDUCT

Exh.

- 9-A Account Work Sheet. Analysis of Westfall "bill" shows it to be a fraud**
- 9-B Affidavit of Michael Collins (8/29/2001) regarding Westfall soliciting suits against public officials and regarding fraudulent Westfall "bill"**
- 9-C Affidavit of Kathy Young (8/30/00) regarding Westfall soliciting suits against public officials and regarding Westfall backdating the "bill"**
- 9-D Affidavit of Marjorie Phelps (8/30/00) of Westfall soliciting suits against public officials**
- 9-E Affidavit of Kathy Young (8/23/2000) of Westfall soliciting Birnbaum**
- 9-F Finding of Westfall abusing the legal process**
- 9-G Finding of Westfall violating Bar rules by soliciting clients**
- 9-H Order re: Westfall community supervision for cruelty to animals**
- 9-J Investigator's report re: Westfall cruelty to animals**
- 9-K Affidavit of Westfall's ranch manager re: Westfall instruction to hide evidence**
- 9-L Affidavit of Christina Westfall (3/20/1998) showing she is intimately involved**
- 9-M Deposition of Beverly Hearn showing Christina Westfall is intimately involved**
- 9-N Westfall fraud in Bankruptcy Court claiming he had more than 12 valid creditors**
- 9-O Fifth Circuit Pattern Civil RICO jury instructions**

Petition ~~En Banc~~
Appendix
74

Birnbaum's MSJ Response
EXH. 9

Account Work Sheet

Note: This work sheet tracks the supposed "account", starting at the original \$200 per hour, then going to \$100 per hour after the first 100 hours of legal time. The "bill" **does not provide** contemporaneous expenses for paralegal and copies. The \$5131.00 on the "bill" for expenses was applied at \$3000 at the peak of the "First Amended Complaint", and then another approximate additional \$2000 (\$5000 total at this time) about the time of the "Objection to the magistrate's finding".

The supposed "account", if one goes by the "bill", went in the hole in less than two (2) months! Yet there was no request for more money at that time to be put into the "account"!

Something is **gross wrong**. Birnbaum's pleadings give the details.

Date	Hours	Amount Legal fees	Account (running)	Notes	Real
Page 1					
5/3/99	0.1	20	-20	\$200/hour	
5/5/99			20000	Retainer paid	
5/5/99	6.1	1220	18760		
5/6/99	3.1	620	18140		
5/7/99	4.9	980	17160		
5/8/99	4.3	860	16300		
5/10/99	2.4	480	15820		
5/11/99	3.7	740	15080		
5/13/99	7.1	1420	13660		
5/14/99	0.2	40	13620		
5/17/99	2.9	580	13040		
5/18/99	0.6	120	12920		
Page 2					
5/19/99	0.2	40	12880		
5/21/99	2.9	580	12300		
5/22/99	3.3	660	11640		
5/24/99	2.7	540	11100		
5/25/99	2.3	460	10640		
5/26/99	2.9	580	10060		
5/27/99	4.5	900	9160		
5/28/99	3.1	620	8540		
6/1/99	0.3	60	8480		
6/2/99	1.4	280	8200		
6/4/99	1.6	320	7880		
6/5/99	3.8	760	7120		
6/8/99	2.6	520	6600		
6/9/99	3.1	620	5980		
6/11/99	3.8	760	5220		
6/12/99	1.8	360	4860		

Petition ~~En Banc~~
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Birnbaum's MSJ Response
EXHIBIT 9-A

6/15/99	0.1	20	4840
6/21/99	1.9	380	4480
6/24/99	3.9	780	3700
6/25/99	3.5	700	3000
6/29/99	2.3	460	2540

Page 3

6/30/99	1.7	340	2200
7/1/99	1.3	260	1940
7/2/99	6.4	1280	660
7/5/99	1.8	360	300
7/9/99	3.5	700	-200
7/10/99	4.6	460	-660
7/13/99	2.9	290	-950
7/14/99	1.6	160	-1110
7/16/99	0.8	80	-1190
7/17/99	3.2	320	-1510
7/18/99	4.6	460	-1970
7/19/99	3.9	390	-2360
7/23/99	0.3	30	-2390
7/28/99	2.1	210	-2600
8/2/99	1.2	120	-2720
8/4/99	1.9	190	-2910
8/5/99	0.4	40	-2950
8/6/99	0.4	40	-2990
8/18/99	0.2	20	-3010
8/25/99	0.5	50	-3060

NEGATIVE balance about here

now \$100/hour

-3000 **-4510** In the hole

Yet no request for more money

Page 4

9/1/99	0.4	40	-3100
9/3/99	0.6	60	-3160
9/9/99	1.6	160	-3320
9/10/99	1.6	160	-3480
9/13/99	5.1	510	-3990
9/14/99	5.7	570	-4560
9/15/99	5.3	530	-5090
9/17/99	5.5	550	-5640
9/20/99	0.9	90	-5730
9/24/99	0.7	70	-5800
9/25/99	2.3	230	-6030
9/28/99	1.2	120	-6150
9/29/99	0.7	70	-6250
9/29/99	1.7	170	-6390
9/30/99	4.8	480	-6870
10/1/99	1.9	190	-7060
10/2/99	2.3	230	-7290

-5000 **-10640** in the hole

Yet no request for more money

Petition-En Banc
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10/4/99.	0.4	40	-7330
10/6/99	4.3	430	-7760

Page 5

10/7/99	2.8	280	-8040
10/9/99	3.4	340	-8380
10/11/99	1.3	130	-8510
10/13/99	1.6	160	-8670
10/14/99	0.6	60	-8730
10/15/99	3.1	310	-9040
10/16/99	2.6	260	-9300
10/18/99	0.6	60	-9360
10/19/99	1.9	190	-9550
10/22/99	2.2	220	-9770
10/23/99	5.1	510	-10280
10/26/99	0.6	60	-10340
10/27/99	0.4	40	-10380
10/27/99	0.6	60	-10440
10/28/99	0.3	30	-10470
10/29/99	0.1	10	-10480
10/30/99	2.4	240	-10720
11/1/99	0.2	20	-10740
11/2/99	5.8	580	-11320
11/4/99	0.3	30	-11350
11/5/99	0.3	30	-11380
11/6/99	2.6	260	-11640
11/8/99	2.3	230	-11870
11/9/99	3.9	390	-12260

Page 6

11/13/99	0.6	60	-12320
11/16/99	0.6	60	-12380
11/17/99	0.2	20	-12400
11/23/99	0.2	20	-12420
12/1/99	0.3	30	-12450
12/6/99	0.5	50	-12500
12/8/99	0.3	30	-12530
12/9/99	0.4	40	-12570
12/10/99	0.9	90	-12660
12/11/99	1.2	120	-12780
12/13/99	0.3	30	-12810
12/14/99	0.6	60	-12870
12/20/99	0.2	20	-12890
12/21/99	0.9	90	-12980

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AFFIDAVIT OF JERRY MICHAEL COLLINS

My name is Jerry Michael Collins. I am over the age of 21 and have never been convicted of a felony or misdemeanor in this State or any other state, or in the United States and am competent to make this affidavit. I have personal knowledge of the facts stated herein.

I am the Michael Collins named in the Affidavit of Udo Birnbaum dated August 16, 2000 and October 3, 2000 and in the Affidavit of Kathy Young dated August 23, 2000. I am intimately familiar with the facts as they relate to The Law Offices of G. David Westfall, P.C. v. Udo Birnbaum, Cause 00-619 in the 294th District Court of Van Zandt County.

Following the matter of the three beheaded calves described in the above affidavits, G. David Westfall solicited both Udo Birnbaum and me in December 1998, as described in named affidavits and referred Birnbaum and me to the Civil RICO statute. G. David Westfall touted the statute as a "SOB to defend against" and encouraged both of us to file Civil RICO suits against public officials including judges.

I have since come to know that G. David Westfall has a pattern of encouraging parties to file suits against public officials. G. David Westfall was my lawyer in *Jerry Michael Collins v. Richard Lawrence, et al*, Cause 3:99cv0641 in the Dallas Federal Court, but never billed me monthly as he promised, and to the this date never sent me a bill. After Federal Judge Solis dismissed my suit, G. David Westfall quietly removed himself as my lawyer, by instructing me to file a notice of appeal to the 5th Circuit, pro se.

Under his inherent power, Judge Solis fined me and ordered me to pay \$2500 to the clerk of the Court and \$189.87 to the Comptroller for the State of Texas. G. David Westfall was ordered by Judge Solis to pay like amounts to his Court and the State of Texas. Judge Solis stated in his final order that G. David Westfall and I deserved a special place in the cornucopia of evil plaguing his judicial system.

I paid those fines in full from the sale of my non-fiction book titled – "Cornucopia of Evil" ©. Federal court records show G. David Westfall never filed any objection to the Order of Judge Solis and never paid any of the fines.

I know that G. David Westfall represented Udo Birnbaum in *Udo Birnbaum v. Richard Ray, et al*, cause 3:99cv0696 in Dallas Federal Court, likewise promised to bill Udo Birnbaum monthly, but never did. Furthermore, I know G. David Westfall never sent any bill to Udo Birnbaum other than the one he sent on or about July 31, 2000.

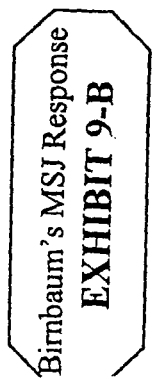
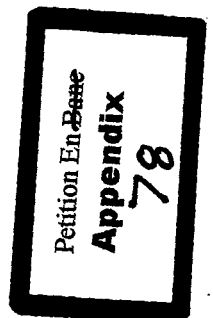
Coincidentally, on the same date, G. David Westfall sent me a bill for \$9,957.50 on the *Jerry Michael Collins v. Wal-Mart, Inc.* even though there was never a retainer contract of any kind.

I know G. David Westfall sent a bill of about \$13,861.90 to Jeryl Cockerham, another of his clients who he also solicited through Kathy Young. I have come to know that G. David Westfall had a pattern of coming up with such giant surprise bills.

In early 2000 G. David Westfall invited me to live in his downtown law office after the third time my homes had been invaded by east Texas law enforcement officers, without a warrant to seize my property.

While living in that office for over a week, I visited with Christina Westfall on several occasions, in her private office. Yet Christina Westfall stated in her July 20, 2001 deposition, page 9, line 8, "I'm not associated with the PC". Mrs. Westfall also stated, on page 35, line 20, "I don't know of the accounting records at the law office."

In depositions (page 26 line 9) G. David Westfall stated that he first met me "with Kathy Young". The truth is G. David Westfall had Kathy Young initiate a meeting with



me on or about December 20, 1998. On that cold December night G. David Westfall drove nearly 70 miles from Dallas to meet with me.

On page 27, line 5 of the deposition G. David Westfall was asked what I wanted. Westfall said, "Food, he had not eaten for three days". That is simply a lie.

That meeting I had with G. David Westfall and Kathy Young lasted over 2 hours with questions being asked of me about the problems I had with east Texas public officials. When that meeting was over I saw G. David Westfall and Kathy Young sitting in the Suburban vehicle he came there in.

On page 30, line 5 of the deposition G. David Westfall he stated that he "sent me a bill "at the end of the year, the same as we sent [Birnbaum]. That is another lie. G. David Westfall did not send Udo Birnbaum a bill until July 31, 2000 for another \$18,121.

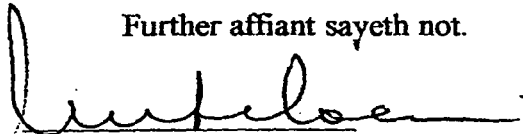
G. David Westfall stated in his deposition, page 36, line 4, that there was an agreement between him and me to trade feed and cattle medication for legal fees. That was not the case. Westfall did get those items from me, then pressured me to allow him to offset it for "legal fees", but I did not agree. Then, he refused to pay me for those items and pressured me to move to and work at Westfall Farms to offset "legal fees". He first talked about me just being around the place to watch things, then he came up with all sorts of things he wanted me to do. I did not do those things.

The "bill" G. David Westfall sent me on July 31, 2000 is just as fraudulent as the one he sent Udo Birnbaum. G. David Westfall claims "systematic billing" but his "bills" are just that, "paper bills".

I now know that the matters Birnbaum is complaining about are not isolated garden-variety wrongs. They constitute a "pattern of racketeering activity" prohibited by RICO. Mr. Birnbaum became the victim of not only the pattern, but of the "act of racketeering activity" of soliciting him and me.

I also know that Mr. Birnbaum is now the victim of the further act of G. David Westfall to extort \$18,121.10 from Mr. Birnbaum by filing a fraudulent suit in the 294th District Court.

Further affiant sayeth not.

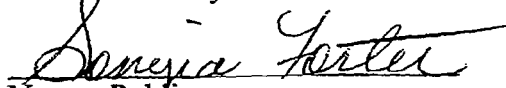

Jerry Michael Collins

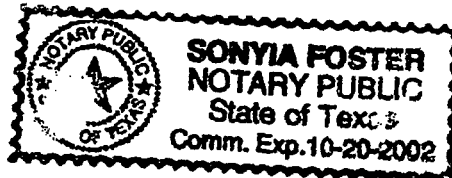
STATE OF TEXAS
COUNTY OF HENDERSON

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Before me, a notary public, on this day personally appeared Jerry Michael Collins, known to me to be the person whose name is subscribed to the foregoing document, and being by me duly sworn, declared that the statements therein contained are true and correct.

Given under my hand and seal of office this 29 day of August 2001.


Notary Public



AFFIDAVIT OF KATHY YOUNG

My name is Kathy Young. I am over the age of 21 and have never been convicted of a crime in this State or any other State and am competent to make this affidavit. I have personal knowledge of the facts stated herein.

I was in the Law Office of G. David Westfall located at 714 Jackson Street, Suite 200, Renaissance Place in Dallas, TX on July 12, 2000. While sitting in front of Mr. Westfall's desk I noticed a billing statement for Udo Birnbaum in draft form with several subtotals ultimately showing a total in the amount of just over \$18,000.00. The draft of the bill did not show a date, only the marking "DRAFT" across the top of the page. I asked Mr. Westfall about the bill and he said, "I am in the process of completing Mr. Birnbaum's bill. It is unfortunate that Brother Birnbaum refused to pay me another \$20,000.00 for the appeal. His case died as a result of that decision."

I left shortly after the meeting and returned to Westfall Family Farms where I lived and worked for Mr. Westfall. I contacted Udo Birnbaum about what I had seen on Westfall's desk and Udo became very upset. He said he had never received a bill from David Westfall, including an accounting of the first \$20,000.00 he had already paid him to handle the "Civil Rico" case styled Udo Birnbaum vs. Richard Ray et al.

David Westfall had encouraged both Mr. Birnbaum and Mr. Collins' to file the "Civil Rico" cases, knowing that Judges and Public Officials would be Defendant's and had even assisted them by answering legal questions, giving legal advice and providing them a book on "Civil Rico". Michael Collins' gave that book to me and asked that I return it to David Westfall and thank him for his assistance. Westfall had told me that he was one of the few Lawyers that really understood "RICO" and was competent to litigate a "Federal Racketeering Suit". He said he was the only Lawyer he knew with the knowledge and integrity to litigate that type of suit. Westfall has told me on many occasions that he is one of the best lawyers in the State and is "The Lawyer another Lawyer comes to when they get into trouble".

I talked with Westfall about the fact that Judge Zimmerman was his proclaimed "Friend" yet he encouraged Birnbaum and Collins to sue him under the "Rico Statute". Westfall responded with, "He is my friend and I like him very much. He's an old German like me but the facts show that he screwed up and he, like the rest of us, should be held accountable for his actions. Now the truth is, because he's a Judge he will be able to wiggle loose eventually, but that doesn't mean he shouldn't be sued." The whole situation was very perplexing but David spoke with absolute certainty and confidence. I believed what he had told me and admired him for having the courage to stand up for truth and justice or so I thought at the time.

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Birnbaum's MSJ Response
EXHIBIT 9-C

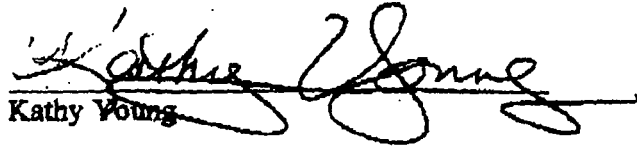
Several weeks after I had seen the draft of Udo Birnbaum's bill for unpaid legal services, Udo Birnbaum receives the bill back-dated to December 31, 1999 with several had written notes on the top of the page indicating that Westfall had sent several notices previously requesting payment. How is this possible when I saw the **unfinished bill** in **"DRAFT FORM"** sitting on Mr. Westfall's desk on **July 12, 2000**? Additionally, **Westfall admitted he was currently working on the bill**. This is only one of many instances in which I have personal knowledge of Mr. Westfall intentionally lying to the court. Does Mr. Westfall think he is so big and powerful that the court will allow this type of conduct to continue? Or in the alternative, was **Westfall absolutely correct when he stated, "The Legal System like the State Bar of Texas works as a well-oiled machine to protect its members and peers and takes only token disciplinary actions when it feels necessary. The truth is not now nor has it ever been the issue in the courtroom?"** Perhaps I'm naïve, but I have been of the opinion that Lawyers and the Legal System maintained some degree of integrity.

I later discovered that at the time Westfall made the decision to enter an appearance for Birnbaum and Collins was immediately after one of his large legal fees was subject to a garnishment action around May of 1999. Westfall was pretty excited about a case he had settled which entitled him to a \$135,000.00 legal fee. He had been pushing for a trial by jury and the other side settled. In a meeting with me during the first week of May Westfall said, "Remember the case I told you I had just settled that entitled me to a \$135,000.00 legal fee. I just received notice the defendant's Lawyers have appealed the settlement. Contact Birnbaum and Collins, tell them I will represent them for a \$20,000.00 retainer." I didn't find out until nearly a year later that settlements don't get appealed, just verdicts. Thru the Internet I discovered that on June 30, 2000 Westfall was forced into Involuntary Bankruptcy over unpaid Judgments at which time his assets were frozen. Is it just a coincidence that shortly after Westfall loses control of his assets he is suddenly inspired to create a bill for services rendered for nearly the same dollar amount as he had previously requested of Mr. Birnbaum to secure counsel on the appeal.

In addition to all this, Westfall had encouraged me to gather information and continue investigating to the best of my ability because he would be filing a "Civil Rico" and "Civil Rights Violation" case on my behalf against Van Zandt County, Leslie Pointer Dixon, C.B. Wiley, the Van Zandt County Sheriff's Dept., my husband and numerous others. Westfall told me that it was common knowledge in the legal profession that East Texas is a bunch of "Corrupt Ignorant Yahoo's" that behave as loose cannons with no regard for "Right, Truth, Justice or anything that resembles Integrity or Morality". I have to admit any evidence to the contrary, so far, has been minimal. He said the suit needed to be filed within 5 years preferably, but we had 10 years on the outside. He also said he would be able to recover enough money from those "Yahoo's" to retire on.

I might also mention that at no time over the two years that Westfall was my attorney of record did I ever receive a bill despite several oral and written requests. He also failed to provide me with a copy of our contract, once again, despite numerous oral and written requests.

Further affiant sayeth not.


Kathy Young

STATE OF TEXAS
COUNTY OF NAVARRO

Before me, a notary public, on this day personally appeared Kathy Young, known to me to be the person whose name is subscribed to the foregoing document, and being by me first duly sworn, declared that the statements therein contained are true and correct.

Given under my hand and seal of office this 30th day of August 2001.




Notary in and for The State of Texas

AFFIDAVIT OF MARJORIE PHELPS

My name is Marjorie Phelps, I am over the age of 21 and have never been convicted of a felony or misdemeanor in this State of any other State and am competent to make this affidavit. I have personal knowledge of the facts stated herein.

I am a former client of Attorney G. David Westfall. I first contacted Mr. Westfall after hearing he had been arrested for animal cruelty. I was interested in the details of the allegations and made an appointment to see him at his office in Dallas, TX. I discovered much later that he had been convicted of "Cruelty to Animals" for starving a large herd of cattle, many of which died due to starvation prior to his arrest. There were also statements by his own employee of Mr. Westfall's efforts to destroy evidence and impede the investigations being conducted by the Ellis County Sheriff's Department and the SPCA of Texas.

During that meeting, Mr. Westfall became aware that I had been terminated from my job at Cooper's Lybrand and asked if I wished to pursue them for wrongful termination. I told him, "No, I was there to discuss the animal raid issue." Shortly after that meeting he sent me a pleading he had prepared against my former employer with a note asking me to come see him. I contacted him to discuss the issue at which time he convinced me that we should move forward with that lawsuit. I reluctantly agreed. Over the course of the next two years the following happened:

- 1) Mr. Westfall asked for all the research I had done about the animal raid victims including the names, addresses and phone numbers of the victims.
- 2) He also wanted a book I had on Civil Rico. He was interested in the Statute and said he didn't know much about it but would be interested in learning more. He also stated he did very little litigation in Federal Court. Most of his cases were filed in State Court.
- 3) He asked me to do additional research for my case and others and bring everything to him promptly.
- 4) He asked me to solicit clients for him.
- 5) He encouraged me to file a Civil Rico Suit against Local Judges and Public Officials and had several meetings with Attorney Barbara Moore about this lawsuit. Mr. Westfall had agreed to represent me on this matter yet never entered an appearance on my behalf. He helped Attorney Barbara Moore prepare the pleadings and had me file them Pro Se' saying he would come on the scene at the appropriate time. Some time later, Barbara Moore entered an appearance in the case but later told me that David Westfall has tricked her into doing so.

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Birnbaum's MSJ Response
EXHIBIT 9-D

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- 6) David Westfall agreed to represent several other animal raid victims and accepted money from them after agreeing to file "Civil Rico" and Civil Rights Violation Cases" on their behalf but never filed any of those cases. Additionally, he never returned their money and files despite several requests from his clients and further refused to accept or return their phone calls.
- 7) The "Wrongful Termination" case he filed against Cooper's Lybrand suddenly died after I refused his advances for sex.
- 8) Mr. Westfall never returned my file, property or research after I refused his sexual advances.
- 9) I never received a bill, billing statement or interim monthly billing statements from the Law Offices of G. David Westfall.

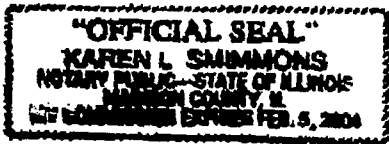
Further affiant sayeth not.

Marjorie Phelps
Marjorie Phelps

STATE OF ILLINOIS
COUNTY OF MADISON

Before me, a notary public, on this day personally appeared Marjorie Phelps, known to me to be the person whose name is subscribed to the foregoing document, and being by me duly sworn, declared that the statements therein contained are true and correct.

Given under my hand and seal of office this 30th day of August 2001.



Karen L. Simmons
Notary in and for The State of Texas Illinois

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EXHIBIT
1-B

AFFIDAVIT OF KATHY YOUNG

My name is Kathy Young. I am over the age of 21 and have never been convicted of a felony or misdemeanor in this State or any other State, or in the United States, and am competent to make this affidavit. I have personal knowledge of the facts stated herein.

I am Kathy Young named in the Affidavit of Udo Birnbaum dated August 16, 2000. I am the person that David Westfall got to ask Udo Birnbaum to see him about employing him as his lawyer.

On or about May 25, 1999, a few weeks after David Westfall had become Udo Birnbaum's attorney on his Civil RICO case in Dallas, David Westfall told me get a message to Udo, which I did. David Westfall told me to tell Udo if he were to just mail his judgment to Judge James B. Zimmerman's Office in Dallas, marked attention "Sandy", that it would be signed. Getting it signed was not a big deal.

About a week later David Westfall told me to again give Udo this same message, which I did. And a few days to a week later David Westfall again told me to give this same message to Udo, which I did.

From my association with David Westfall and Udo Birnbaum I know the judgment David Westfall was referring to was a take nothing judgment Udo Birnbaum had been trying since shortly after his trial in May 1998 to get Judge Zimmerman to sign in Jones vs. Birnbaum in the Texas 294th District Court of Van Zandt County in Canton, Texas. I also learned that Judge Pat McDowell is the presiding judge of the first Administrative Judicial Region.

David Westfall had told me of an incident involving Judge McDowell as follows. David had a case before District Judge Glen Ashworth. He needed Judge Ashworth to not be the presiding judge at a hearing. He discussed this with Judge Ashworth and Judge Ashworth asked if Mr. Westfall was asking him to recuse himself. Mr. Westfall said, "No, I'm just asking you to be on vacation or fishing or something, just don't be available. David Westfall said Judge Ashworth wasn't available as requested and he pulled Judge McDowell. I didn't understand what it was he wanted from Judge McDowell. But I do remember that Mr. Westfall got the ruling he wanted and was very excited about it. This took place in Kaufman, Texas. David Westfall told me that Judge McDowell was a defendant in Udo Birnbaum's case and he had recently had a favorable ruling by Judge McDowell and it would be a feather in his hat if could get Udo to release him from the Federal Lawsuit.

Further affiant sayeth not.

Kathy Young

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LOUISE BONNER
Notary Public, State of Texas
My Commission Expires 10-20-01

Birnbaum's MSJ Response
EXHIBIT 9-E

Udo Birnbaum 9-10-00

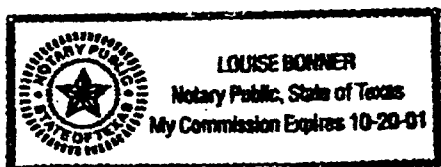
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Kathy Young
Kathy Young

STATE OF TEXAS
COUNTY OF NAVARRO

Before me, a notary public, on this day personally appeared Kathy Young, known to me to be the person whose name is subscribed to the foregoing document, and being by me first duly sworn, declared that the statements therein contained are true and correct.

Given under my hand and seal of office this 23rd day of August 2000.



Louise Bonner
Notary in and for The State of Texas

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Affidavit of Jan Marie First
Regarding David Westfall

My name is Jan Marie First. I am over the age of twenty-one and have never been convicted of a felony or misdemeanor in this state or any other state and am competent to make this affidavit. I have personal knowledge of the facts stated herein.

I met David Westfall in 1997 through another woman who had some similar legal issues to mine. At the time I contacted him I was facing several legal issues which required attention quickly due to limitation deadlines. The crimes that had been committed against me needed to be reported to law enforcement, administrative agencies and to be handled in the civil courts. Mr. Westfall told me that he felt that I had a good case for RICO and civil violations. He wanted to see that evidence and legal research that I had done.

After several telephone conversations with Mr. Westfall I met with him for the purpose of giving him this paperwork, which he was suppose to look over and return to me. I also gave him some pieces of personal property such as a tape recorder to facilitate further communication and I gave him some money.

The legal research that I lent to Mr. Westfall was the result of several thousand hours of work on the statutory and case law on the issues in my case. Mr. Westfall had a case in federal court similar to mine.

After I handed this work to him, he never got in touch with me again. I called his office several times and he would not return my phone calls. Eventually he returned my evidence, but he kept everything else.

Mr. Westfall never sent me a bill for his services or a statement accounting for the funds.

Further affiant sayeth not.

Jan Marie First

Jan Marie First
August 31, 2001

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I certify this to be a true and exact copy of the original on file in the District Clerk's Office, Van Zandt County, Texas
Candi Scott

CAUSE NO. 00-00619

**THE LAW OFFICES OF
G. DAVID WESTFALL, P.C.**

Plaintiff.

v.

UDO BIRNBAUM,

Defendant.

§
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IN THE DISTRICT COURT

7/27/94
DIST. CLERK VAN ZANDT CO. TX.

294th JUDICIAL DISTRICT

DEP.

VAN ZANDT COUNTY, TEXAS

**G. DAVID WESTFALL'S
OBJECTIONS TO THE SUMMARY JUDGMENT EVIDENCE
OF RESPONDENT, UDO BIRNBAUM**

COMES NOW, G. David Westfall, (hereinafter referred to as "Movant"), Plaintiff in the above-styled and numbered cause and files this his objections to the summary judgment evidence offered by Udo Birnbaum ("Respondent") in response to the Motion for Summary Judgment filed by Movant and would hereby show the Court as follows:

I.

1. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph IV: Birnbaum's Designated Evidence, subparagraph 1, for the reason that the same is a pleading and as such does not constitute proper summary judgment evidence. Further, Movant objects because the same is not attached to the response, and also for the reason that the evidence is a mere conclusion on the part of the Respondent and constitutes unsubstantiated factual and legal conclusions.

2. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph IV: Birnbaum's Designated Evidence, subparagraph 2, for the reason that

Petition ~~En Banc~~
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the same refers to a deposition which is not properly authenticated and is not attached to the response, further, it contains unsubstantiated factual and legal conclusions.

3. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph IV: Birnbaum's Designated Evidence, subparagraph 3, for the reason that he refers to a deposition excerpt which is not attached to the response, not properly authenticated, and as such is not proper summary judgment evidence.

4. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph IV: Birnbaum's Designated Evidence, subparagraph 4, for the reason that he refers to a deposition excerpt which is not attached to the response, not properly authenticated, and as such is not proper summary judgment evidence.

5. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph V: Evidence in Westfall's Own Documents, subparagraph 1, for the reason that the allegation of evidence is overly broad and not specific, thus not allowing the Movant an adequate opportunity to respond or object. Also, none of the referred to evidence has been attached to the response, or properly authenticated.

6. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph V: Evidence in Plaintiff's Own Documents, subparagraph 2 (a), (b), (c), (d), (e), (f), and (g), for the reason that the allegation of evidence has not been attached to the response, or properly authenticated, further it contains unsubstantiated factual and legal conclusions.

7. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph V: Evidence in Plaintiff's Own Documents, subparagraph 3 (a), (b), (c),

(d), (e), (f), and (g), for the reasons that: the exhibits are not properly authenticated, are not attached to the response, and constitutes unsubstantiated factual and legal conclusions.

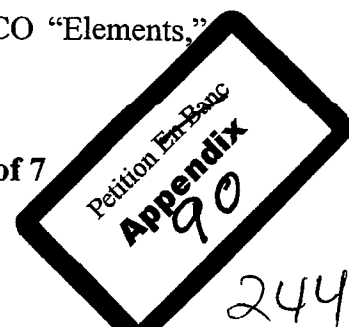
8. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VI: Evidence in Other Documents, subparagraph 1, (a), (b), (c), (d), (e), (f), (g), (h), and (i), for the reason that: the exhibits are not properly authenticated, are not attached to the response, and constitutes unsubstantiated factual and legal conclusions.

9. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VI: Evidence in Other Documents, subparagraph 2 for the reason that: the depositions referred to are not properly authenticated, are not attached to the response, and the statement is simply an unsubstantiated factual and legal conclusions.

10. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs A, sub (1), (2), (3), (4), and (5) for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

11. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs B, sub (1), (2), (3), and (4), for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

12. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements."



subparagraphs C, sub (1), and (2) for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

13. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs D, E, F, and G for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

14. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs H, sub (1), (2), and (4), for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

15. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs H, sub (3) for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence and additionally the deposition and exhibit referred to has not been properly authenticated or attached to the response and as such does not constitute proper summary judgment evidence.

16. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements,"

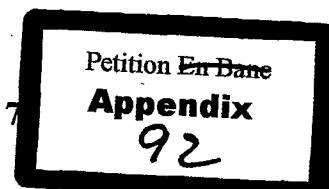
subparagraphs J, sub (1) and (2) for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence and the evidence referred to has not been properly authenticated or attached to the response and as such does not constitute proper summary judgment evidence.

17. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs K for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

18. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs L for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence and the evidence referred to has not been properly authenticated or attached to the response and as such does not constitute proper summary judgment evidence.

19. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs M and N for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

20. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements,"



subparagraphs O, subparts (1), (4), (5), (6) for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

21. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VII: Summary of Evidence to Third Party Plaintiff RICO "Elements," subparagraphs O, subparts (2) and (3) for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence and that the depositions referred to have not been properly authenticated or attached to the response and as such does not constitute proper summary judgment evidence.

22. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph VIII: Summary of Evidence to Cross-Complaint RICO "Elements," in its entirety for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence and that the evidence referred to has not been properly authenticated or attached to the response and as such does not constitute proper summary judgment evidence.

23. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph IX: RE: David Westfall's Representations to this Court subparagraphs 1 and 2 for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper summary judgment evidence.

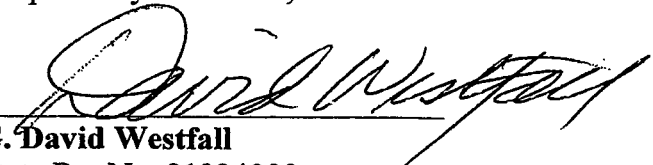
24. Movant objects to the summary judgment evidence referred to by Respondent in his response in paragraph X: Summary in its entirety for the reason that: the allegations of evidence are nothing more than unsubstantiated factual and legal conclusions and do not constitute proper

summary judgment evidence and that the evidence referred to has not been properly authenticated or attached to the response and as such does not constitute proper summary judgment evidence.

Prayer For Relief:

WHEREFORE, PREMISES CONSIDERED, Movant request that the above objections be in all things sustained, and for such other and further relief, both at law and in equity, to which this Movant may show himself justly entitled.

Respectfully submitted,


G. David Westfall
State Bar No. 21224000
5646 Milton Street, Suite 520
Dallas, Texas 75206
(214) 741-4741
(214) 741-4746 fax

ATTORNEY FOR MOVANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Objection to Summary Judgment Evidence has this day been served upon all parties by hand delivery.

SIGNED this 7th day of September, 2001.


G. DAVID WESTFALL

Petition En Banc

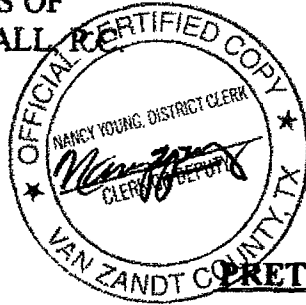
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THE LAW OFFICES OF
G. DAVID WESTFALL, P.C.

vs.

UDO BIRNBAUM



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IN THE DISTRICT COURT

294th JUDICIAL DISTRICT

VAN ZANDT COUNTY, TEXAS

FILED
18 SEP 11 09:50
DIST. CLERK
NANCY YOUNG
VAN ZANDT CO. TX.
CLERK DEPT.

PRETRIAL ORDER

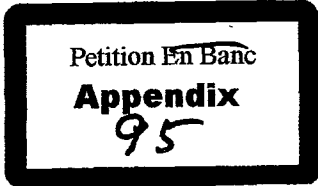
On the 7th day of September 2001 came on to be heard the above-styled and numbered cause for various matters and motions pending for pretrial. All parties appeared either in person or by and through their attorney of record and announced ready to proceed.

The court proceeded to first hear the objections of The Law Offices of G. David Westfall, P.C., G. David Westfall, Christina Westfall and Stefani Podvin's to the summary judgment evidence of Udo Birnbaum. The court was of the opinion that the objections were well founded and should be in all things sustained.

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that:

- (1) objections 1-10 of the Law Offices of G. David Westfall, P.C. objections to summary judgment evidence of Udo Birnbaum be sustained;
- (2) objections 1-24 of G. David Westfall's objections to summary judgment evidence of Udo Birnbaum be in all things sustained;
- (3) objections 1-23 of Christina Westfall's objections to summary judgment evidence of Udo Birnbaum be in all things sustained; and
- (4) objections 1-23 of Stefani Podvin's objections to summary judgment evidence of Udo Birnbaum be in all things sustained.

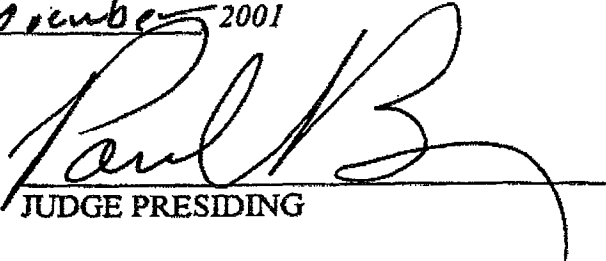
IT IS FURTHER ORDERED, ADJUDGED and DECREED that Udo Birnbaum's Motion to Compel Depositions be in all things denied.



IT IS FURTHER ORDERED, ADJUDGED and DECREED that Udo Birnbaum's Motion for Appointment of Auditor is in all things denied.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that G. David Westfall's Objections to Defendant's First Set of Interrogatories Nos. 5, 6, and 7 be in all things sustained and that the objection to Interrogatory No. 14 be in all things overruled.

SIGNED this the 13 day of November 2001


JUDGE PRESIDING

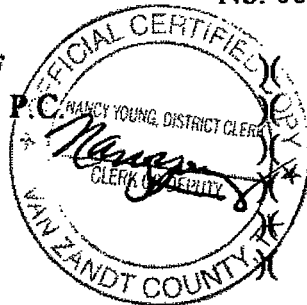
PAUL BANNER
SENIOR JUDGE
198TH DISTRICT COURT
SITTING BY ASSIGNMENT

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THE LAW OFFICES OF
G. DAVID WESTFALL, P.C.

vs.

UDO BIRNBAUM



IN THE DISTRICT COURT

294th JUDICIAL DISTRICT

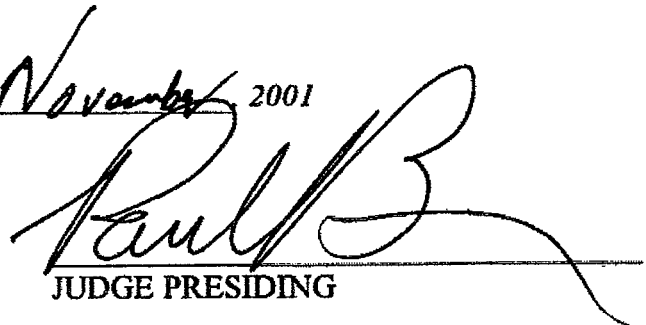
VAN ZANDT COUNTY, TEXAS

ORDER SUSTAINING MOTIONS FOR SUMMARY JUDGMENT

On the 7th day of September 2001 came on to be heard the Motions for Summary Judgment of The Law Offices of G. David Westfall, P.C., G. David Westfall, Christina Westfall and Stefani Podvin in the above-styled and numbered cause. The court having read the Motions together with the responses thereto, having ruled on the objections to the summary judgment evidence and having heard the argument of counsel and of the pro se parties is of the opinion that the Motions are well taken and should be in all things granted.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Motions for Summary Judgment of The Law Offices of G. David Westfall, P.C. be sustained as to RICO claims and that the Motion for Summary judgment of G. David Westfall be in all things sustained and that the Motions for Summary Judgment of Christina Westfall and Stefani Podvin be in all things sustained.

SIGNED this the 13 day of November 2001


JUDGE PRESIDING

PAUL BANNER
SENIOR JUDGE
196TH DISTRICT COURT
SITTING BY ASSIGNMENT

VERIFICATION

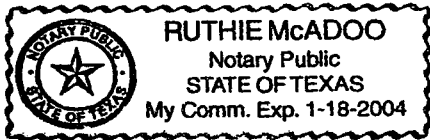
STATE OF TEXAS

COUNTY OF VAN ZANDT

Before me, a notary public, on this day personally appeared Udo Birnbaum, known to me to be the person whose name is subscribed to above, and being by me first duly sworn, declared that the matters in his Motion for Recusal of Hon. Paul Banner are true and correct.

Udo Birnbaum
Udo Birnbaum

Given under my hand and seal of office this 10 day of September, 2001

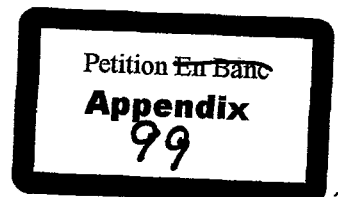


Ruthie McAdoo
Notary in and for The State of Texas

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via CMRR and FAX on this the 10 day of September, 2001 upon G. David Westfall, 5646 Milton, Suite 520, Dallas, Texas 75206 and Frank C. Fleming, Law Office of Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

Udo Birnbaum
UDO BIRNBAUM



IN THE
TWELFTH COURT OF APPEALS

In re UDO BIRNBAUM

Relator

v.

THE HONORABLE PAUL BANNER, JUDGE

Respondent

THE LAW OFFICES OF G. DAVID WESTFALL, P.C.
G. DAVID WESTFALL
CHRISTINA WESTFALL
STEFANI PODVIN

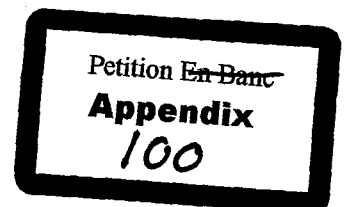
Real parties in interest

PETITION FOR WRIT OF MANDAMUS
AND MOTION FOR TEMPORARY RELIEF

(underlying proceeding is in 294th District Court
of Van Zandt County, No. 00-619)

Udo Birnbaum, *Pro Se*
540 VZ 2916
Eustace, TX 75124
(903) 479-3929
phone and fax

Nov. 7, 2002
pages 1-4 only



IDENTITY OF PARTIES AND COUNSEL

The Honorable Paul Banner
Senior Texas District Judge,
Sitting by assignment

c/o Betty Davis, Court Admin.
294th Judicial District Court
121 East Dallas St., Room 301
Canton, Texas
Phone (903) 567-4422
Fax (903) 567-5652

The Law Offices of G. David Westfall, P.C.
Plaintiff / Counter defendant

G. David Westfall
5646 Milton, Suite 520
Dallas, Texas 75206
Phone (214) 741-4741
Fax (214) 741-4746

G. David Westfall
Cross and third party defendant

G. David Westfall
(as above)

Christina Westfall
Cross and third party defendant

Frank C. Fleming
6611 Hillcrest, Suit 305
Dallas, Texas 75205-1301
Phone (214) 373-1234
Fax (214) 373-3232

Stefani Podvin
Cross and third party defendant

Frank C. Fleming
(as above)

Udo Birnbaum
Defendant, cross and third party plaintiff

Udo Birnbaum, *Pro Se*
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929 (phone and fax)

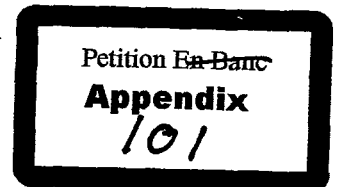


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ISSUE 1: Whether failure to appoint an auditor per Rule 172 RCP is a violation of duty imposed by law that cannot be remedied by appeal (contention on page 15)

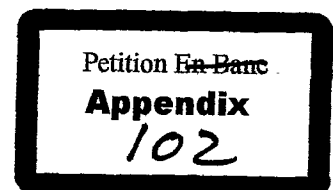
ISSUE 2: Whether not following summary judgment rules is a violation of duty imposed by law that cannot be remedied by appeal (contention on page 18)

ISSUE 3: Whether the judge weighing the summary judgment evidence is a violation of duty imposed by law that cannot be remedied by appeal (contention on page 28)

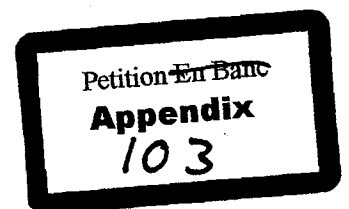
ISSUE 4: Whether the judge granting "RICO Relief" is a violation of duty that precludes defendant Birnbaum from presenting the jury with a viable and timely alternative to Plaintiff's arguments as to what the evidence really means (contention on page 32)

ISSUE 5: Whether the judge not providing due process is a violation of duty imposed by law that cannot be remedied by appeal (contention on page 35)

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PART B	pages 159 through 320	separate document



September 30, 2003

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The Hon. Paul Banner
Senior Judge, 196th District Court
Sitting for 294th District Court
c/o 294th District Court
Canton, Texas 75103

cc. Fleming

Re: Cause No. 00-00619
294th District Court
The Law Offices of G. David Westfall, P.C. v. Udo Birnbaum v. etc

Honorable Judge Banner:

This letter is in response to a copy of a letter I received from opposing attorney in this matter. According to Fleming he mailed the same letter¹ to you, with an enclosed eight (8) page proposed *Findings* for you to make².

This matter has been in the Dallas Fifth Appeals Court for nearly a year. Over three (3) months ago, June 10, 2003, Attorney Fleming told the Appeals Court³ that he was having you make *Findings*. As you see by his current letter he obviously was not successful in having you do so, or else he never asked you. Your *Findings* is the subject of my Reply Brief, i.e. that Fleming is simply blowing smoke⁴ to the Appeals Court.

Attorney Fleming is now blaming me for you not having previously made *Findings*. Correct me if I'm misunderstanding Fleming, but Fleming is saying⁵ I did not submit proposed *Findings* to you as to the reasons you sanctioned me \$62,000 !

¹[Fleming] Letter Sept. 24, 2003. (attached) .

² [Fleming Proposed] Findings Of Fact And Conclusions Of Law (attached)

³ [Fleming Appeals Court Response Brief]: "While a jury trial verdict did not require finding of facts and conclusions of law to be filed in order to support the verdict on appeal, the Court's ruling on the sanctions motions should be accompanied by findings of facts and conclusions of law. This point has been recognized by the Appellees and late findings of fact and conclusions of law are now being requested from the trial judge. The trial court can file findings of fact after the deadline to file them has expired. (Jefferson Cty. Drainage Sist. V. Lower Neches Valley Auty. Etc)" (emphasis added) Fleming Appeals Reply Brief, June 10, 2003, Footnote 4, page 25.

⁴ "NO SUCH REQUEST BY APPELLEES HAS BEEN FILED OR SERVED". Appellant's Reply Brief, on my web site OpenJustice.US , as are most of the documents in the case.

⁵ [Fleming Sept 24, 2003 Letter]: "I [attorney Fleming] was also under the impression that the requesting party was supposed to submit the first draft for your consideration which Mr. Birnbaum never submitted". Sept. 24, 2003 Letter, first paragraph.

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Frankly, Your Honor, I have no idea how anyone could prepare a document for you to sign that stated what was on your mind. In your first hearing, two years and two months ago, you did state that you simply "did not like civil RICO claims". And you went on to say, "I have never seen one [civil RICO claim] that had any merit."

And equally as frank, I have no idea how anyone could prepare a document for you to sign that stated all of the reasons you sanctioned me, especially considering the fact that never once did you order me to do or not do anything. I was never disobedient and you never warned me about disobedience or anything. In fact, it was you who ordered me to take the depositions of the Westfalls. For that and other issues, you unconditionally punished me three months after you had signed final judgment!

Again, I have no idea how attorney Fleming intends to put all those thoughts into your mind, when he heard you say no more than what I heard you say, that "Mr. Birnbaum may be well-intentioned"⁶. Nowhere did you ever say anything about "bad faith"⁷.

Again and again, Fleming is obfuscating the real issue in the Appeals Court, and keeps on trying to paint me as some sort of monster for making a civil RICO claim in state court, when all I was doing is representing myself under the civil RICO law when I was sued. The real issue in the Appeals Court, however, is upon what you did, as I stated to you in my *Notice Of Past Due Findings Of Fact And Conclusions Of Law*⁸ :

"Your Honor, please let the record know what **findings of fact**, and **conclusions of law** you made to come up with the two judgments you awarded against me in this case:

1. How, upon a pleading of an unpaid open account, and absent a finding to you by an Auditor under RCP Rule 172 regarding such claimed unpaid open account, and absent a finding by a jury as to the state of the account, what **findings of fact**, and what **conclusions of law** did you make to award a judgment totaling **\$59,280.66** against me upon such pleading, an issue I had asked to be resolved by jury?
2. How upon my cross and counter claim under 18 U.S.C. § 1961, et seq. ("civil RICO"), against three (3) persons, and having dismissed such three (3) persons on November 13, 2001, what **findings of fact** and what **conclusions of law** did you now make, on August 21, 2002, so as to entitle these dismissed parties to a **\$62,885.00 second judgment** against me, in the same case, on an issue I had asked to be resolved by jury?

⁶ "[A]lthough Mr. Birnbaum may be well-intentioned and may believe that he had some kind of real claim as far as RICO there was nothing presented to the court in any of the proceedings since I've been involved that suggest he had any basis in law or in fact to support his suits against the individuals, and I think -- can find that such sanctions as I've determined are appropriate." Close of hearing on Motion for Sanctions, July 30, 2002. (attached)

⁷ Fleming uses the term xxx times in his proposed finding. You never used the word even once in the entire proceedings.

⁸ Appendix 93, Record 492

I am providing you the referenced documents by attaching *Appellee's Response To Appellant's Motion To Have Trial Judge Produce Findings And Conclusions*, another document sent to me by Fleming.

It is noteworthy that the Appeals Court long ago already denied my *Motion* [to have you make findings]. Also when I contacted them they informed me that no such *Response* [by Fleming] had been filed in the Appeals Court, and also that you, at this point, do not have jurisdiction over this case.

Then on careful reading of Fleming's *Response*, I note that he [Fleming] is now asking them to allow⁹ you [Judge Banner] to make Findings. The problem I am having is that **Fleming** is already flashing his [Fleming's] "findings" in the Appeals Court, without your signature, as if he [Fleming] is asking them [Appeals Court] permission for you to affix your signature to it. Sort of like you not filing *Findings* was like a clerical oversight, like you just did not "get around to" filing this document.

But the issue in the Appeals Court is how you came up with the two judgments you made, NOT my conduct. You already made a finding upon that:

"[A]lthough Mr. Birnbaum may be well-intentioned and may believe that he had some kind of real claim as far as RICO there was nothing presented to the court in any of the proceedings since I've been involved that suggest he had any basis in law or in fact to support his suits against the individuals, and I think -- can find that such sanctions as I've determined are appropriate."

Close of hearing on Motion for Sanctions, July 30, 2002. (attached)

Sincerely,

Udo Birnbaum

UDO BIRNBAUM
540 VZ CR 2916
Eustace, Texas 75124
(903) 479-3929 phone
(903) 479-3929 fax

⁹ Now in his belated Response to the Appeals Court, Mr. Fleming is asking that "the Court allow Judge Banner to file his *Findings of Fact and Conclusions of Law in this matter*". *Appellees' Response*, page 3, last paragraph.

No. 05-02-01683-CV

**IN THE COURT OF APPEALS
OF THE
FIFTH DISTRICT OF TEXAS**

UDO BIRNBAUM

Appellant,

v.

THE LAW OFFICES OF G. DAVID WESTFALL, P.C.,
G. DAVID WESTFALL,
CHRISTINA WESTFALL AND STEFANI PODVIN,
Appellees.

**APPELLEES' MOTION TO ALLOW THE FILING OF THE
TRIAL JUDGE'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

Law office of Frank C. Fleming
Frank C. Fleming
State Bar No.00784057
6611 Hillcrest Avenue, #305
Dallas, Texas 75205-1301
(214) 373-1234
(214) 373-3232 Fax
Attorney for Appellees

Petition ~~En Bane~~

Appendix

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1. Identities of Parties and Counsel

The identities of parties and their respective counsel, pursuant to Tex. R. App.

P. 52.3(a), are as follows:

Appellant : Udo Birnbaum, Defendant/Counter-Plaintiff
in Cause No. 00-00619, Van Zandt County.

Appellant is represented pro se by:

Udo Birnbaum
540 VZ 2916
Eustace, TX 75124
903/479-3929
903/479-3929 fax

Appellees: The Law Offices of G. David Westfall, P.C.
Plaintiff/Counter-Defendant in Cause No. 00-00619, Van Zandt
County.

G. David Westfall, Stefani Podvin, and Christina Westfall,
Third-Party defendants in Cause No. 00-00619, Van Zandt
County.

Appellees are all represented by:

Frank C. Fleming, 6611 Hillcrest Ave., #305, Dallas, TX 75205,
214/373-1234, (fax) 214/373-3232.

**Appellees' Motion to Allow the Filing of the
Trial Judge's Findings of Fact and Conclusions of Law
Page 2 of 4**

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**APPELLEE'S MOTION TO ALLOW THE FILING OF THE TRIAL JUDGE'S
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Appellees file this Motion seeking leave to file in the appellate record in this matter the Findings of Fact and Conclusions of Law signed on September 30, 2003 by the trial judge, Judge Paul Banner.

I.

Attached to this Motion as Exhibit A and made a part of this motion by reference as if fully set forth at length, is a copy of the Findings of Facts and Conclusions of Law signed by the trial judge in this matter, Judge Paul Banner. The original of this document has been sent to the clerk of the trial court for entry into the record in this matter.

II.

While the Findings of Facts and Conclusions of Law have been filed late, the law allows late filed findings and conclusions to be considered by the Court of Appeals in determining the outcome of a case on appeal. . *Jefferson Cty. Drainage Dist. v. Lower Neches Valley Auth.*, 876 S.W. 2d 940, 959 (Tex.App. – Beaumont 1994, writ denied); *Morrison v. Morrison*, 713 S.W. 2d 377, 380 (Tex.App. – Dallas 1986, writ dism'd).

Wherefore, premises considered, Respondent prays this Court grant this motion and allow the Findings of Fact and Conclusions of Law signed by Judge Banner on September 30, 2003, to be included in the record when this matter is considered by the Court of Appeals for its final determination and, and for such other

and further relief for which Respondent may show himself entitled either at law or at equity.

Respectfully submitted,
LAW OFFICE OF FRANK C. FLEMING



FRANK C. FLEMING
State Bar No. 00784057
6611 Hillcrest Ave., #305
Dallas, Texas 75205-1301
(214) 373-1234
(fax) 373-3232

ATTORNEY FOR APPELLEES

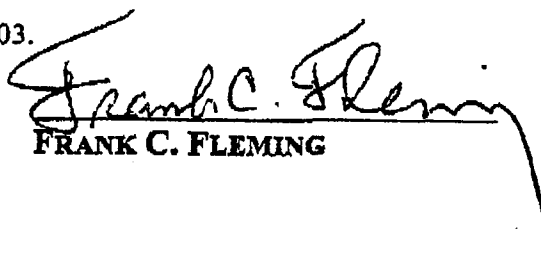
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Motion has this day been delivered to Udo Birnbaum, Pro Se, by facsimile transmission in accordance with TRCP as follows:

Udo Birnbaum
540 Van Zandt CR 2916
Eustace, TX 75124

VIA FAX No. : 903/479-3929

SIGNED this 6th day of October, 2003.



FRANK C. FLEMING

**Appellees' Motion to Allow the Filing of the
Trial Judge's Findings of Fact and Conclusions of Law
Page 4 of 4**

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No. 05-02-01683-CV
In the Court of Appeals
Fifth District of Texas at Dallas

UDO BIRNBAUM
Defendant, Counter-claimant, Third Party Plaintiff - Appellant

vs.

THE LAW OFFICES OF G. DAVID WESTFALL, P.C.
Plaintiff, Counter Defendant - Appellee

G. DAVID WESTFALL
Third Party Defendant, Sanction Movant - Appellee

CHRISTINA WESTFALL
Third Party Defendant, Sanction Movant - Appellee

STEFANI PODVIN
Third Party Defendant, Sanction Movant - Appellee

Appeal from the 294th Judicial
District Court of Van Zandt County, Texas
The Honorable Paul Banner, by assignment
Trial cause no. 00-00619

**Appellant's [RCP Rule 298] Response and Objection to
Appellees' Motion to Allow the Filing of the Trial Judge's
Findings of Facts and Conclusions of Law**

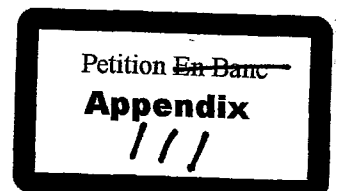
These *Findings* of "bad faith", just made, have no support in the trial court record,
and are in direct conflict with a prior determination of "well-intentioned"

Because of the harm and prejudice that could be caused by Judge Banner's belated *Findings and Conclusions*, I PETITION THAT THIS ENTIRE DOCUMENT BE PRESENTED TO THE ENTIRE PANEL IN THEIR CONSIDERATION UPON THE ENTIRE APPEAL. (One original and SIX copies are being provided)

I petition for such regardless of this Court's ruling on *Appellees' Motion*, as their *Motion*, and this *Response* relates directly to the matters on Appeal. (lawlessness)

UDO BIRNBAUM, *Pro Se*
540 VZ CR 2916
Eustace, TX 75124
(903) 479-3929

Appellant's Response and Objection
page 1 of 10 pages



IDENTITY OF PARTIES AND COUNSEL

The Law Offices of G. David Westfall, P.C.¹
Plaintiff, Counter-defendant

Frank C. Fleming²
PMB 305, 6611 Hillcrest Ave.
Dallas, Texas 75205-1301
(214) 373-1234
(214) 373-3232 (fax)

Udo Birnbaum³
Defendant, Counter-claimant,
Third party plaintiff

Udo Birnbaum, *pro se*
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929
(903) 479-3929 fax

G. David Westfall⁴
Third party defendant

Frank C. Fleming

Stefani Podvin⁵
Third party defendant

Frank C. Fleming

Christina Westfall⁶
Third party defendant

Frank C. Fleming

Hon. Paul Banner⁷, trial judge

¹ Suit initially brought by attorney G. David Westfall in behalf of the "Law Office", claiming an unpaid OPEN ACCOUNT for LEGAL FEES. There of course never was an open account, not with a \$20,000 NON-REFUNDABLE prepayment "for the purpose of insuring our [lawyer's] availability", and the lawyer reserving the "right to terminate" for "your [Birnbaum] non-payment of fees or costs".

² Somehow appeared as "co-counsel" for the "Law Office" shortly before trial. Then the only lawyer. But no document "of record" of his appearance for the "Law Office".

³ Nincompoop for having let G. David Westfall talk him into paying non-refundable \$20,000 UP FRONT money for a civil racketeering suit against state judges and other state officials. (suit had no worth)

⁴ Told me I had "a very good case" in suing 294th District Judge Tommy Wallace, and others under civil RICO, for what they had done to me with their "BEAVER DAM" scheme on me.

⁵ Attorney daughter of G. David Westfall, and OWNER of the "Law Office" (at least on paper).

⁶ Wife of G. David Westfall and long time BOOKKEEPER at the "Law Office"

⁷ "Visiting judge", literally. Did not go through regular court-coordinator Betty Davis, nor had clerk or bailiff present during trial. Did it all by himself. See Appeals issues.

Listed as a participant because of Appeals Issue 5 (denied motion for recusal). Also because of unlawful (punitive, not coercive) \$62,255 "frivolous lawsuit" sanction (Issue 4)

**Appellant's [RCP Rule 298] Response and Objection to
Appellees' Motion to Allow the Filing of the Trial Judge's
Findings of Facts and Conclusions of Law**

These *Findings* of "bad faith", just made, have no support in the trial court record,
and are in direct conflict with a prior determination of "well-intentioned"

To this Honorable Appeals Court:

Please forgive my trying to address this matter at a little higher and concise level. Details can be found on your computer docket sheet and my previous briefs and motions.

Introduction and summary

1. The essence of this *Response and Objection* is that Appellees' motion to allow the trial judge to now make *findings* is a continuation of their lawlessness in the trial court:

- These new *Findings* were belatedly crafted to paint me as some sort of monster.
- These new *Findings* are not supported by the trial court record.
- These new *Findings* are not supported by the rules and law that apply to sanctions.
- These new *Findings* are in conflict with the trial record⁸ of "well-intentioned"
- These new *Findings* come as a surprise, and may cause harm to Appellant, lest this *[RCP Rule 298] Response and Objection* be presented in its entirety to the entire panel for consideration of this entire Appeal. (SIX copies provided)

Background

2. The essence of my *Appeal Brief* (April 23, 2003) was that I was not given due process in the trial court. Judge Paul Banner had a jury sitting there, but he did not use it⁹. Also that the two (2) judgments against me were each unlawful.

3. The essence of my *Reply Brief* (July 17, 2003) was that Appellees' contentions in their *Response Brief* (June 20, 2003) do not "fit", i.e. they were quoting something out of a law book

⁸ "[A]lthough Mr. Birnbaum may be well-intentioned and may believe that he had some kind of real claim as far as RICO there was nothing presented to the court in any of the proceedings since I've been involved that suggest he had any basis in law or in fact to support his suits against the individuals, and I think -- can find that such sanctions as I've determined are appropriate." Close of hearing on Motion for Sanctions, July 30, 2002. (attached).

⁹ Wrong jury questions, would not let me show my best case, evidence, etc. Also the judge himself decided the civil RICO issue, i.e. whether my claim was "frivolous" as Appellees TWO YEARS LATER claimed (but NOT in their pleadings!), or bona fide RACKETEERING as I was trying to show. (I had asked that the civil RICO issue be tried by JURY).

that sounds good, but that their answers do not "fit" the appeals issues. Also that they were lying¹⁰ when they told this Appeals Court that they were at that time (June 20, 2003) in the process of having Judge Banner make *Findings*. (as indicated by their now bringing "findings")

4. I submitted *Appellant's Motion to Have the Trial Judge Produce Findings and Conclusions* (Aug. 5, 2003) as to how Judge Banner came up with his two judgments¹¹ totaling \$122,000. My motion was denied. Appellees had not responded.

5. Next the Appellees come into this Appeals Court with *Appellees' Response to Appellant's [DENIED] Motion to have Trial Judge Produce Findings and Conclusions* (Sept. 24, 2003), asking that "the Court allow¹² Judge Banner to file his Findings of Fact and Conclusions of Law in this matter, etc.", with their letter¹³ to Judge Banner and a proposed¹⁴ eight (8) page vituperation¹⁵ ("finding", Exhibit "A") they have concocted out of thin air to paint me as some sort of monster to the judicial system. My response letter¹⁶ to Judge Banner gives details. (attached)

¹⁰ Their footnote 4, page 25, reads: "While a jury trial verdict did not require finding of facts and conclusions of law to be filed in order to support the verdict on appeal, the Court's ruling on the sanctions motions should be accompanied by findings of facts and conclusions of law. This point has been recognized by the Appellees and late findings of fact and conclusions of law are NOW BEING REQUESTED from the trial judge. The trial court can file findings of fact after the deadline to file them has expired. (*Jefferson Cty. Drainage Sist. V. Lower Neches Valley Auty. Etc*)" (emphasis added)

¹¹ Regarding the first judgment, over my objections, Judge Banner did not ask the right questions to the jury. In the second judgment, whether there was indeed a violation of RICO as I claimed, and whether I was "injured in my property or business by reason [thereof]", Judge Banner did not allow me to take this to the jury, and Judge Banner himself decided that the evidence showed that there had been no RICO violation, and unconditionally punished me. But I had asked for determination by jury.

¹² "Wherefore, premises considered, Respondent prays this Court deny the relief sought by the Movant [to make Judge Banner to make Findings!!!!] in delaying the Court's consideration of this matter except to the extent that the Court allow Judge Banner to file his Findings of Fact and Conclusions of Law in this matter, and for such other and further relief ... etc. (Their *Response*, page 3, last paragraph).

¹³ Attached to this Response

¹⁴ Attached to this Rresponse

¹⁵ **Vituperation** (Webster's Dictionary): "sustained and bitter railing and condemnation", an act or instance of vituperating, i.e. to abuse or censure severely or abusively : BERATE: syn ABUSE: to use harsh condemnatory language syn SCOLD

¹⁶ And also the rapid faxes passing between Frank Fleming and Judge Banner, made an attachment to this document.

6. On September 30, 2003 I filed *Motion for Recusal of Judge Banner*¹⁷ to put an end to the sudden backstage maneuvering. (My motion summarizes the events).

7. Now (October 6, 2003) Appellees come into this Appeals Court with *Appellees' Motion to Allow The Filing of the Trial Judge's Findings of Facts and Conclusions of Law*, accompanied by an Exhibit "A", a seven (7) page¹⁸ signed *Finding and Conclusions*.

8. Attached to this *Response and Objections* are copies of the rapid-fire documents being put before Judge Banner, with my handwritten notations thereto. I am also providing a copy of Judge Banner's prior determination regarding my conduct during the entire proceeding: "well-intentioned". (Judge Banner's last words, just after he sanctioned me \$62,000 for having made a civil RICO claim)

Regarding Judge Banner's latest Findings

9. This groundless *Finding* now being flashed by Appellees has no particularity or specificity or detail whatsoever, only a general condemnation for my having made a "*RICO civil conspiracy claim*". (their phrase for "civil RICO", I presume). The real issue in this Appeals Court, however, is how Judge Banner arrived at the TWO (2) judgments.

10. In his *Finding*, again and again Judge Banner now finds violations of "*§ 9.000 et seq. Civ. Prac. Rem. Code, § 10.000 et seq. Civ. Prac. Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas*".

As shown below, NONE of this law applies to the facts in this case. Also note that §9.000 et seq. Civ. Prac. Rem. Code is the only statutory provision that allows attorney fees for an entire proceeding (Judge Banner's sanction of \$62,000).

11. Regarding § 9.000 et seq. Civ. Prac. Rem. Code:

- Section §9.000 et seq. of course only applies to "injury, property damage, or death", under any cause of action, and to TORT causes of action (my pleading was civil RICO, statutory law).

¹⁷ Attached

¹⁸ Judge Banner apparently communicated with them, but not me, and got them to remove some of their hyper-ridiculous words.

Appellant's Response and Objection
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- Section §9.000 also specifically excludes Texas DTPA claims (a mini-RICO). Also it has a 90-day "safe-harbor" provision, and applies only after a determination of "frivolous pleadings", which Judge Banner never made, except now in this *Finding*, after everything is finished! I had of course asked for appointment of an auditor, to show that the "collection" suit against me was frivolous.
- Also it specifically states that section §9.000 does not apply if Rule 13 is involved.
- (This section is also the only one that allows attorney fees for the entire proceeding, after a "frivolous lawsuit" determination, which there was not, and opportunity to withdraw an supposedly offending pleading).
- So much for monetary sanctions under §9.000 et seq.

12. Regarding §10.000 et seq. Civ. Prac. Rem. Code:

- Section §10.000 et seq. only applies to attorney fees in obtaining a §10.000 sanctions
- Sanctions under §10.000 require the naming of the conduct which violated §10.000, which the Sanctions Order did not. (It gave NO REASON WHATSOEVER)
- So much for monetary sanctions under §10.000 et seq.

13. Regarding T.R.C.P. Rule 13:

- This Rule states that "No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanctions order".
- No "particulars" were stated in the Sanction Order of \$62,000 (nor in this *Finding*)
- The "appropriate sanctions available" are those under Rule 215-2b, which only include the court issuing Orders (of which there were none), and payment for damages caused for violation of an ORDER (of which there was none)
- So much for monetary sanctions under T.R.C.P. Rule 13.

14. Regarding "and/or the common law":

- The "common law" does not provide for the imposition of sanctions.

Regarding the trial court record

15. The trial record, however, gives the true reason Judge Banner PUNISHED¹⁹ me \$62,000, namely for making a civil RICO pleading when I was sued:

"[A]lthough Mr. Birnbaum may be well-intentioned and may believe that he had some kind of real claim as far as RICO there was nothing presented to the court in any of the proceedings since I've been involved that suggest he had any basis in law or in fact to support his suits against the individuals, and I think -- can find that such sanctions as I've determined are appropriate." Close of hearing on Motion for Sanctions, July 30, 2002. (attached)

Note:

- My civil RICO claim was against "the individuals", i.e. that "The [three] Westfalls" were using their Law office as a RICO "enterprise". (More precise language in my *Brief*). This was the only claim I made against "the individuals"
- Again note, that I was found "well-intentioned".

¹⁹ It is also a CRIMINAL type sanction (UNCONDITIONAL, not "coercive"), imposed without due CRIMINAL process, including a finding of "beyond a reasonable doubt". See my Appeal Brief.
Appellant's Response and Objection
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- Also note, there is no record of anything other than "well-intentioned" in the entire proceeding, except this newest Finding which Judge Banner is trying to now bring to this Appeals Court.

Regarding the Appeals Issue
(and the Finding I was trying to have Judge Banner make)

16. The core of the issues in my *Appeal* is how Judge Banner arrived at the two (2) judgments against me. As I asked in my *Notice of Past Due Findings and Conclusions*":

"Your Honor, please let the record know what ***findings of fact***, and ***conclusions of law*** you made to come up with the **two** judgments you awarded against me in this case:

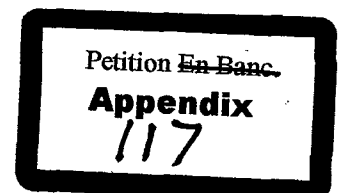
- How, upon a pleading of an unpaid open account, and absent a finding to you by an Auditor under RCP Rule 172 regarding such claimed unpaid open account, and absent a finding by a jury as to the state of the account, what ***findings of fact***, and what ***conclusions of law*** did you make to award a judgment totaling **\$59,280.66** against me upon such pleading, **an issue I had asked to be resolved by jury?**
- How upon my cross and counter claim under 18 U.S.C. § 1961, et seq. ("civil RICO"), against three (3) persons, and having **dismissed such three (3) persons** on November 13, 2001, what ***findings of fact*** and what ***conclusions of law*** did you **now make**, on August 21, 2002, so as to entitle these **dismissed parties** to a **\$62,885.00 second judgment** against me, in the same case, on **an issue I had asked to be resolved by jury?**

17. My *Appellant's Brief* shows in detail why the \$62,000 Sanction Judgment is not only UNLAWFUL, but is a punitive (criminal, not "coercive") sanction, imposed on me without full due criminal process.²⁰

Conclusion

18. My briefs and motions detail a flagrant abuse of the judicial system against me. This is really a very simple case once one recognizes the pattern of FRAUD from start to finish, intrinsic and extrinsic, turning into retaliation by official oppression and unlawful judgments against pro

²⁰ See my briefs for case law and details
Appellant's Response and Objection
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se Birnbaum for having made a civil racketeering ("civil RICO") defense against a fraudulent suit by lawyers.

19. It is clear what Appellees and their lawyer are up to now, namely trying to "undo" the finding of "**well-intentioned**", and blaming me for their sins of the whole proceedings. Please recognize that the evil is on their side of the telescope.

20. This whole matter on me started with a fraudulent "beaver dam" case against me in 1995 (still in the 294th EIGHT (8) years later). Then this fraudulent case against me claiming an unpaid "**open account**" for legal fees.

21. There is no underlying damage. There is no underlying OPEN ACCOUNT. All fraudulent "legal fees" and more "legal fees" for "collecting" on fraudulent legal fees. It is past time to call on the U.S. Justice Department.

PRAYER

WHEREFORE, Respondant/Appellant Birnbaum prays that this court deny Appellees' Motion and disallow the making by Judge Banner of *Findings* so contrary to the trial court record.

I have provided, for this Court's consideration, *Birnbaum's [RCP Rule 298] Response to Judge Banner's Findings*. I provide such since I would under normal circumstances have a right and opportunity under RCP Rule 298 to request additional or amended findings of fact and conclusions of law. Please forgive the somewhat rough and incomplete nature of that document.

Because of the harm and prejudice that could be caused by Judge Banner's belated *Findings and Conclusions*, I PETITION THAT THIS ENTIRE DOCUMENT BE PRESENTED TO THE ENTIRE PANEL IN THEIR CONSIDERATION UPON THE ENTIRE APPEAL. (One original and SIX copies are being provided)

I petition for such regardless of this Court's ruling on *Appellees' Motion*, as their *Motion*, and this *Response* relates directly to the matters on Appeal. (lawlessness)

UDO BIRNBAUM
540 VZ CR 2916
Eustace, Texas 75124
(903) 479-3929 phone
(903) 479-3929 fax

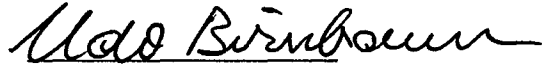
Attachments:

1. Trial court record of "well-intentioned" - caught by the court reporter
2. *Order on Motion for Sanctions* - \$62,000 sanctions without ANY particularity
3. Fleming's Sept. 24, 2003 fax to Judge Banner - with proposed Findings (really wild)
4. Fleming's Sept. 29, 2003 fax to Judge Banner - with somewhat toned-down proposed Findings
5. My (Birnbaum) Sept. 30, 2003 *Motion for Recusal of Judge Banner* - filed 7:56 a.m. Oct. 1, 2003, and immediately also presented to the court-coordinator
6. My (Birnbaum) Sept. 30, 2003 letter to Judge Banner - filed 8:27 a.m. and also immediately presented to the court-coordinator

7. Judge Banner's Sept 30, 2003 8:52 a.m. fax to Fleming and Birnbaum. (He could have simply mailed or faxed his signed *Findings* to the Clerk of Court)
8. Fleming's Oct. 6, 2003 fax to this Appeals Court - with fax of signed Findings (**This is the first time that I got semi-official notice of what Judge Banner had actually signed**)
9. Fleming's Oct 6, 2003 letter to the 294th Clerk - with *Findings* - did not actually get filed ("signed with the clerk") until Oct. 8, 2003 12:14 p.m.

Certificate of Service

This is to certify that on this the ¹⁴~~13~~ day of October, 2003 a copy of this document was sent by Regular Mail to attorney Frank C. Fleming at PMB 305, 6611 Hillcrest Ave., Dallas Texas 75205-1301. A copy of this document has also been provided to Judge Paul Banner through Pam Kelly, Court Coordinator for the 294th District Court in Canton, Texas.


Udo Birnbaum

No. 00-00619

THE LAW OFFICES OF
G. DAVID WESTFALL, P.C.

Plaintiff

v.

UDO BIRNBAUM

Defendant/Counter-Plaintiff

G. David Westfall, Christina Westfall, and
Stefani Podvin,

Counter-Defendants

IN THE DISTRICT COURT

294th JUDICIAL DISTRICT

VAN ZANDT COUNTY, TEXAS

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BY _____
KAREN WILSON
DIST. CLERK VAN ZANDT CO. TX

FILED FOR RECORD
03 OCT - 8 PM 12: 14

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-captioned cause came on for trial to a jury on April 8, 2002. At the conclusion of the evidence, the Court submitted questions of fact in the case to the jury.

In addition to the matters tried to the jury the Court took under consideration the Motion filed by David Westfall, the Plaintiff (the "Plaintiff"), and Christina Westfall, and Stefani Podvin (Christina Westfall and Stefani Podvin collectively referred to herein as the "Counter-Defendants") concerning the filing of a frivolous lawsuit and Rule 13 Sanctions. The combined issues of the counter-claim on frivolous lawsuit and the Rule 13 Motion were tried together to the Court on July 30, 2002. At the proceedings on July 30, 2002, the Plaintiff appeared by counsel, the Counter-Defendants appeared in person and were also represented by their attorney. At the proceedings on July 30, 2002, Udo Birnbaum (the "Defendant/Counter-Plaintiff"), the Defendant/Counter-Plaintiff, appeared pro se.

After considering the pleadings, the evidence presented at the trial to the jury as well as the evidence presented at the summary judgment hearings and the sanctions hearing before the Court,

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in response to a request from the Defendant/Counter-Plaintiff, the Court makes its findings of fact and conclusions of law as follows:

Findings of Fact

1. The Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy claims against Christina Westfall and Stefani Podvin (the wife and daughter of the Defendant/Counter-Plaintiff's former attorney, David Westfall) were groundless and totally unsupported by any credible evidence whatsoever.
2. The Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy claims against Christina Westfall and Stefani Podvin were without merit and brought for the purpose of harassment, delay, and to seek advantage in a collateral matter by attempting to cause the original Plaintiff, David Westfall to drop his claim for un-reimbursed legal services provided to the Defendant.
3. The Defendant/Counter-Plaintiff was afforded numerous opportunities to marshal his evidence and present any facts to support his allegations concerning RICO civil conspiracy claims against the wife and daughter of the Defendant/Counter-Plaintiff's attorney, David Westfall. The Defendant/Counter-Plaintiff wholly failed to provide any such credible evidence at either the summary judgment phase of the lawsuit or at the hearing on the motion for sanctions.
4. The attempt to provide testimony by the Defendant/Counter-Plaintiff concerning RICO civil conspiracy claims were his own opinions and totally uncorroborated by any other evidence.
5. The Defendant/Counter-Plaintiff never established that he had suffered any economic damages as a result of an alleged conspiracy. The Defendant/Counter-Plaintiff was sued by his former counsel to collect money for legal work which had been performed for the Defendant/Counter-Plaintiff for which the Defendant/Counter-Plaintiff had not paid his attorney in

full. The jury found that the work had been performed by the attorney, the amount charged to the client was reasonable, and that there was an amount owed by the Defendant/Counter-Plaintiff to the Plaintiff. The Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy claims had no bearing on whether or not the Defendant/Counter-Plaintiff received the legal services and owed the balance of the outstanding attorney's fees.

6. The filing of the Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy was a blatant and obvious attempt to influence the outcome of the Plaintiff's legitimate lawsuit against the Defendant/Counter-Plaintiff and to cause harassment to the Plaintiff and his family members.

7. The behavior of the Defendant/Counter-Plaintiff in filing claims concerning RICO civil conspiracy in this lawsuit have been totally without substantiation on any cause of action pled.

8. The conduct of the Defendant/Counter-Plaintiff giving rise to the award of punitive damages was engaged in willfully and maliciously by the Defendant/Counter-Plaintiff with the intent to harm the Plaintiff and the Counter-Defendants.

9. The amount of actual damages, attorney's fees, suffered by the Counter-Defendant was proven to be reasonable and necessary by a preponderance of the evidence and not challenged by the Defendant/Counter-Plaintiff at the hearing on sanctions. The amount of actual damages awarded was in an amount that was proven at the hearing.

10. The amount of damages for inconvenience awarded by the court was proven at the hearing by a preponderance of the evidence and not challenged by the Defendant/Counter-Plaintiff at the hearing on sanctions. The court awarded damages for inconvenience in an amount the Court found to be reasonable and necessary, supported by evidence, and appropriate considering the circumstances.

11. The amount of punitive damages awarded by the Court were found to be supported by the evidence and necessary under the circumstances to attempt to prevent similar future action on the part of the Defendant/Counter-Plaintiff.
12. The sanctions award is directly related to the harm done.
13. The sanctions award is not excessive in relation to the harm done and the net worth of the Defendant/Counter-Plaintiff.
14. The sanctions award is an appropriate amount in order to gain the relief which the Court seeks, which is to stop the Defendant/Counter-Plaintiff and others similarly situated from filing frivolous lawsuits.
15. The amount of the punitive damage award is an amount narrowly tailored to the amount of harm caused by the offensive conduct to be punished.
16. The Counter-Defendants suffered both economic and emotional damages as a result of the Defendant/Counter-Plaintiff's lawsuit and specifically the frivolous nature of the lawsuit caused damages which included expenses (in addition to taxable court costs), attorney's fees, harassment, inconvenience, intimidation, and threats.
17. The Counter-Defendants established a prima facie case that this lawsuit was filed by the Defendant/Counter-Plaintiff without merit and for the purpose of harassment. The prima facie case was made by the testimony and documents introduced as evidence by the Counter-Defendants at the summary judgment proceedings as well as at the hearing on sanctions on July 30, 2002.
18. After the Counter-Defendants established their prima facie case, the Defendant/Counter-Plaintiff failed wholly to provide any credible evidence to support the legal theories of the Defendant/Counter-Plaintiff.

Conclusions of Law


1. The Defendant/Counter-Plaintiff wholly failed to provide any credible evidence to substantiate any of his claims concerning a RICO civil conspiracy claim.
2. An essential element of each of Defendant/Counter-Plaintiff's claim was damages.
3. The Defendant/Counter-Plaintiff failed to prove any damage as a direct result of any action or inaction caused by the Plaintiff or the Counter-Defendants.
4. All of Defendant/Counter-Plaintiff's claims were as a matter of law unproved and untenable on the evidence presented to the Court.
5. Based upon the facts presented to support Defendant/Counter-Plaintiff's claim concerning RICO civil conspiracy charges, the Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy were completely untenable.
6. The Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy charges were not based upon the law, were not a good faith extension of existing law, and were brought and continued to be urged for the purpose of harassment.
7. The court concludes as a matter of law that Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy were brought for the purpose of harassment.
8. The Defendant/Counter-Plaintiff's behavior in bringing and prosecuting this frivolous lawsuit was a violation of one or more of the following: §9.000 et seq. Civ. Prac. & Rem. Code, §10.000 et seq. Civ. Prac. & Rem. Code, and/or Rule 13, T.R.C.P.
9. The Court has the power to award both actual and punitive damages against the Defendant/Counter-Plaintiff for the filing and prosecution of a frivolous lawsuit. This authority stems from one or more of the following: §9.000 et seq. Civ. Prac. & Rem. Code, §10.000 et seq. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.

10. The behavior and attitude of the Defendant/Counter-Plaintiff in filing and prosecuting this claim against the Counter-Defendants calls out for the award of both actual and punitive damages to be assessed against the Defendant/Counter-Plaintiff.
11. The Counter-Defendants were successful in presenting a prima facie case to the Court on the issue of sanctions. After the prima facie case was made, the burden of proof shifted to the Defendant/Counter-Plaintiff and the Defendant/Counter-Plaintiff failed in its effort to prove good faith in the filing of the RICO civil conspiracy claims.
12. The appropriate award for actual damages as a result of the filing and full prosecution of this frivolous lawsuit is an award of \$50,085.00 in attorney's fees. The Court makes this award under power granted to the Court by §9.000 et seq. Civ. Prac. & Rem. Code, §10.000 et seq. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.
13. The appropriate sanction for the inconvenience suffered by the Counter-Defendants for the filing and full prosecution of this frivolous lawsuit is an award of \$1,000.00 to Christina Westfall and \$1,800.00 to Stefani Podvin, to be paid by the Defendant/Counter-Plaintiff to the Counter-Defendants.
14. The appropriate punitive sanction for the filing and full prosecution of this frivolous lawsuit is an award of \$5,000.00 to Christina Westfall and an award of \$5,000.00 to Stefani Podvin, to be paid by the Defendant/Counter-Plaintiff to the Counter-Defendants.
15. The award of punitive damages is directly related to the harm done.
16. The award of punitive damages is not excessive.
17. The award of punitive damages is an appropriate amount to seek to gain the relief sought which is to stop this Defendant/Counter-Plaintiff, and others like him, from filing similar frivolous lawsuits.

- 18. The amount of the punitive damage award is narrowly tailored to the harm done.
- 19. Authority for the punitive damage award is derived from §10.000 et seq. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.

Any finding of fact herein which is later determined to be a conclusion of law, is to be deemed a conclusion of law regardless of its designation in this document as a finding of fact. Any conclusion of law herein which is later determined to be a finding of fact, is to be deemed a finding of fact regardless of its designation in this document as a conclusion of law.

SIGNED THIS 30 day of September, 2003.



JUDGE PRESIDING

Petition En Banc
Appendix
127

The Law Offices of G. David Westfall, P.C
v. Udo Birnbaum
v. The Three Westfalls

)
)
)

In the 294th District Court
Of Van Zandt County

Udo Birnbaum's RCP Rule 298 Request for Clarification and Amendment regarding Judge Banner's Findings of Fact and Conclusions of Law

These *Findings* of "bad faith", just made, have no support in the trial court record, and are in direct conflict with a prior determination of "well-intentioned"

Note: I have repeated each and every sentence of Judge Banner's *Findings of Fact and Conclusions of Law*. (There was no emphasis in the original Findings and Conclusions) For details as to my responses below, please refer to my briefs

Introduction and summation

In his *Finding*, again and again Judge Banner now finds violations of "§ 9.000 et seq. Civ. Prac. Rem. Code; § 10.000 et seq. Civ. Prac. Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas".

As shown below, **NONE** of this law applies to the facts in this case. Also note that §9.000 et seq. Civ. Prac. Rem. Code is the only statutory provision that allows attorney fees for the damage in an entire proceeding (but only after a finding of "frivolous", and after a 90-day "safe-harbor" period!)

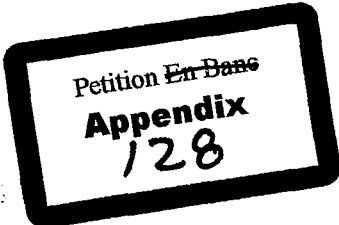
Also that punishment, for a completed act, unconditionally imposed, is a criminal sanction, requiring full due **CRIMINAL** process, including a finding of "beyond a reasonable doubt".

Regarding § 9.000 et seq. Civ. Prac. Rem. Code:

- Section §9.000 et seq. of course only applies to "injury, property damage, or death", under any cause of action, and to TORT causes of action (my pleading was civil RICO, statutory law).
- Section §9.000 also specifically excludes Texas DTPA claims (a mini-RICO). Also it has a 90-day "safe-harbor" provision, and applies only after a determination of "frivolous pleadings", which Judge Banner never made, except now in this *Finding*, after everything is finished! I had of course asked for appointment of an auditor, to show that the "collection" suit against me was frivolous.
- Also it specifically states that section §9.000 does not apply if Rule 13 is involved.
- (This section is also the only one that allows attorney fees for the entire proceeding, after a "frivolous lawsuit" determination, which there was not, and opportunity to withdraw an supposedly offending pleading).
- So much for monetary sanctions under §9.000 et seq.

Regarding §10.000 et seq. Civ. Prac. Rem. Code:

- Section §10.000 et seq. only applies to attorney fees in obtaining a §10.000 sanctions
- Sanctions under §10.000 require the naming of the conduct which violated §10.000, which the Sanctions Order did not (It gave NO REASON WHATSOEVER)
- So much for monetary sanctions under §10.000 et seq.



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Regarding T.R.C.P. Rule 13:

- This Rule states that "No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanctions order".
- No "particulars" were stated in the Sanction Order of \$62,000 (nor in this *Finding*)
- The "appropriate sanctions available" are those under Rule 215-2b, which only include the court issuing Orders (of which there were none), and payment for damages caused for violation of an ORDER (of which there was none)
- So much for monetary sanctions under T.R.C.P. Rule 13.

Regarding "and/or the common law":

- The "common law" does NOT provide for the imposition of sanctions.

* * * * *

**Udo Birnbaum's RCP Rule 298 Request for Clarification and Amendment
regarding Judge Banner's *Findings of Fact and Conclusions of Law***

These *Findings* of "bad faith", just made, have no support in the trial court record,
and are in direct conflict with a prior determination of "well-intentioned"

"The above-captioned cause came on for trial to a jury on April 8, 2002. At the conclusion of the evidence, the Court submitted questions of fact in the case to the jury."

- Yes, Judge Banner had a jury sitting there, but he did not use it. Wrong jury questions, missing jury questions, missing instructions, etc. Also my civil RICO claim and evidence was not allowed to go to the jury. ("The [three] Westfalls" were dismissed by summary judgment seven (7) months earlier)

"In addition to the matters tried to the jury the Court took under consideration the Motion filed by David Westfall, the Plaintiff (the "Plaintiff"), and Christina Westfall, and Stefani Podvin (Christina Westfall and Stefani Podvin collectively referred herein as the "Counter-Defendants") concerning the filing of a frivolous lawsuit and Rule 13 Sanctions."

- David Westfall was NOT the Plaintiff. "Plaintiff" was "The Law Offices of G. David Westfall, P.C.". David Westfall was one of "The Westfalls", as he was in *Westfall v. King Ranch*, Texas Fifth Circuit No. 05-92-00262-CV (1993) "**King Ranch alleges that for almost eighteen months the Westfalls engaged in a campaign of delay, deceit, and disobedience to prevent King Ranch from getting the requested discovery**". Same in this cause.
- In responding to the use of the word "Counter-Defendants", I will use "The [three] Westfalls" (G. David Westfall, wife Christina, and his daughter Stefani Podvin). Again, please note that David Westfall was NOT the Plaintiff, and that the "The [three] Westfalls" were cross and third-party defendants under my civil RICO claim against them.

The combined issues of the counter-claim on frivolous lawsuit and the Rule 13 Motion were tried together to the Court on July 30, 2002.

- No. The [three] Westfalls made NO counterclaim in any of their pleading. Their pleadings were a GENERAL DENIAL. Besides that, they had already been removed from the case by SUMMARY JUDGMENT over ten (10) months earlier (Sept. 20, 2001).

At the proceedings on July 30, 2002, the Plaintiff appeared by counsel, the Counter-Defendants appeared in person and were also represented by their attorney. At the proceedings on July 30, 2002, Udo Birnbaum (the "Defendant/Counter-Plaintiff"), the Defendant/Counter-Plaintiff, appeared pro se.

- G. David Westfall was deceased at this time, as was the "Law Office". Westfall had claimed he was the ONLY shareholder of "The Law Office", was its ONLY officer ("director"), and the ONLY attorney associated with "The Law Office". **THE LAW OFFICE was DEAD.** Westfall died May 2002, shortly after the April 2002 trial.

After considering the pleadings, the evidence presented at the trial to the jury as well as the evidence presented at the summary judgment hearings and the sanctions hearing before the Court, in response to a request from the Defendant/Counter-Plaintiff, the Court makes its findings of fact and conclusions of law as follows:

- These findings are not in response to my Motion. My Motion had been long ago denied. Also my request was upon how Judge Banner came up with the TWO JUDGMENTS against me, not a finding as to my conduct. He had already made such at the close of the Sanctions Hearing :

"[A]lthough Mr. Birnbaum may be well-intentioned and may believe that he had some kind of real claim as far as RICO there was nothing presented to the court in any of the proceedings since I've been involved that suggest he had any basis in law or in fact to support his suits against the individuals, and I think -- can find that such sanctions as I've determined are appropriate."

(Note: My civil RICO suit was upon "the individuals", i.e. "The [three] Westfalls", and "The Westfalls" only. No civil RICO claim was made against the "Law Office" plaintiff.

Findings of Fact

1. *The Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy claims against Christina Westfall and Stefani Podvin (the wife and daughter of the Defendant/Counter-Plaintiff's former attorney, David Westfall) were groundless and totally unsupported by any credible evidence whatsoever.*
 - "Credibility " determinations are of course the prerogative of the JURY, whether as to witnesses, documents, or whatsoever.
 - Also I did not make "**RICO civil conspiracy claims**". My claim was for "injury to property or business by reason of a violation" [of RICO], i.e. stemming or flowing from a "pattern of racketeering activity", i.e. "produced by", etc. (no proximate cause required). See my Brief
 - Also my civil RICO claim was against all three "The Westfalls". Cross-claims upon what they were now trying to get from me through their Law Office "enterprise" (fraudulent "collection suit"), plus third-party claims for what they had already done to me previously (\$20,000 retainer paid for a no-worth suit against Texas district judges). Same "enterprise" (Law Office), same "pattern of racketeering activity", same scheme.
 - Also Christina Westfall and Stefani Podvin were far more than only "wife and daughter". Christina (wife) was long-time book-keeper at the Law Office, and Stefani Podvin (daughter) the only shareholder "owner" of the Law Office, at least on paper. (So G. David Westfall could be "bullet-proof"

from judgment, and engage in his unlawful "pattern of racketeering activity". (Evidence in my huge summary judgment Appendix)

2. *The Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy claims against Christina Westfall and Stefani Podvin were without merit and brought for the purpose of harassment, delay, and to seek advantage in a collateral matter by attempting to cause the original Plaintiff, David Westfall to drop his claim for un-reimbursed legal services provided to the Defendant.*

- The "Plaintiff" was not David Westfall, but "The Law Office"
- "un-reimbursed legal services"? Plaintiff (The Law Office P.C.) were claiming an unpaid OPEN ACCOUNT! There was no OPEN ACCOUNT, and the JURY certainly made no finding of an OPEN ACCOUNT, and how much money was OWED. See my Appeal Brief.

3. *The Defendant/Counter-Plaintiff was afforded numerous opportunities to marshal his evidence and present any facts to support his allegations concerning RICO civil conspiracy claims against the wife and daughter of the Defendant/Counter-Plaintiff's attorney, David Westfall.*

- NO. Judge Banner did not allow me to show my VOLUMES of Evidence to the Jury, particularly the HISTORY OF FRAUD by David Westfall as shown by document in the INVOLUNTARY BANKRUPTCY proceedings against him, the findings of BAD FAITH by Federal Judge Jorge Solis, and numerous sanctions for FRAUD and suspensions of his law license.

The Defendant/Counter-Plaintiff wholly failed to provide any such credible evidence at either the summary judgment phase of the lawsuit or at the hearing on the motion for sanctions.

- I had asked that my evidence to my civil RICO claim be weighed by a JURY, not by Judge Banner.

4. *The attempt to provide testimony by the Defendant/Counter-Plaintiff concerning RICO civil conspiracy claims were his own opinions and totally uncorroborated by any other evidence.*

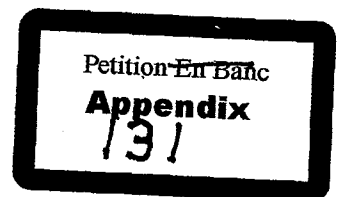
- What about the findings by Federal Judge Jorge Solis, Federal Bankruptcy Judge Harold C. Abramson, other findings of fraud, the AFFIDAVITS I presented? All this, and my civil RICO claim, Judge Banner would NOT ALLOW ME TO SHOW TO THE JURY!
- "*The attempt were his own opinions*"???

5. *The Defendant/Counter-Plaintiff never established that he had suffered any economic damages as a result of an alleged conspiracy.*

- "economic damages" is of course a matter to be determined by the JURY. I had claimed the \$20,000 non-refundable retainer I had been tricked into paying, and other moneys.
- Also I was not alleging damages "*as a result of a conspiracy*", but as a result of G. David Westfall's RICO violative conduct, i. e. "by reason of the RICO violation", i.e. flowing from the alleged "pattern of racketeering activity".

The Defendant/Counter-Plaintiff was sued by his former counsel to collect money for legal work which had been performed for the Defendant/Counter-Plaintiff for which the Defendant/Counter-Plaintiff had not paid his attorney in full.

- "*not paid his attorney*"? I was sued by a "Law Office".
- I was not sued for "*money I had not paid to my attorney*", but for money supposedly OWED on an OPEN ACCOUNT at a "Law Office". All FRAUD! ("open account" requires sale and delivery).



What had existed was a \$20,000 pre-paid, non-refundable attorney retainer agreement "to ensure our availability", and the attorney had "reserved the right to terminate for non-payment". That was his only remedy. No open account, no contract either.

The jury found that the work had been performed by the attorney, the amount charged to the client was reasonable, and that there was an amount owed by the Defendant/Counter-Plaintiff to the Plaintiff.

- NO. The jury was NOT asked how much money was OWED. They certainly received NO INSTRUCTIONS as to what constitutes an OPEN ACCOUNT. (sale and delivery, systematic records, etc. See my Appeal Brief.

The Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy claims had no bearing on whether or not the Defendant/Counter-Plaintiff received the legal services and owed the balance of the outstanding attorney's fees.

- My civil RICO claim HAD a bearing. In a civil RICO suit the JURY can reach back TEN (10) years into Westfall's past CONDUCT, to establish whether his CONDUCT was VIOLATIVE OF RICO, to reveal the scheme and the pattern of racketeering activity, to show that my injury flowed from his RICO violative conduct (i.e. his "pattern of racketeering activity"), and that this fraudulent "collection suit" was in the "pattern" of his "pattern of racketeering activity".

6. *The filing of the Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy was a blatant and obvious attempt to influence the outcome of the Plaintiff's legitimate lawsuit against the Defendant/Counter-Plaintiff and to cause harassment to the Plaintiff and his family members.*

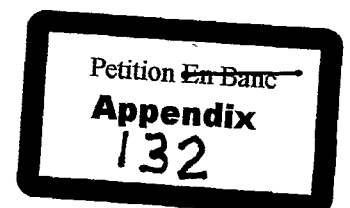
- My civil RICO claim was to show that the lawsuit against me was a "predicate act" in a "pattern of racketeering activity" that could only be seen by reaching back into David Westfalls CONDUCT of a "pattern of racketeering activity", to show the SCHEMES he was using, and that this suit was part of his pattern.
- My civil RICO claim was not to "cause harassment", but to hold "The [three] Westfalls" accountable for what they were doing through their RACKET of using the LAW OFFICE in perpetrating this fraudulent suit on me. Their RACKET of course can only be seen by allowing me to show ALL of my evidence to the JURY, in the form of my civil RICO claim.

7. *The behavior of the Defendant/Counter-Plaintiff in filing claims concerning RICO civil conspiracy in this lawsuit have been totally without substantiation on any cause of action pled.*

- "**Behavior have been without substantiation**" What sort of MUMBO-JUMBO did attorney Fleming put down for Judge Banner to sign? Besides I asked for "substantiation" by JURY, not by JUDGE.
- **As if a civil RICO claim has to have "substantiation" on another cause of action???**

8. *The conduct of the Defendant/Counter-defendant giving rise to the award of punitive damages was engaged in willfully and maliciously by the Defendant/Counter-Plaintiff with the intent to harm the Plaintiff and the Counter-Defendants.*

- Emphatic statement, but no SPECIFICITY or PARTICULARITY as required by Rule 13. Not in this statement, nor in anything in any of the previous statements. Also Judge Banner, at the close of the Sanction Hearing, found me to be "well-intentioned".



9. *The amount of actual damages, attorney's fees, suffered by the Counter-Defendant was proven to be reasonable and necessary by a preponderance of the evidence and not challenged by the Defendant/Counter-Plaintiff at the hearing on sanctions. The amount of actual damages awarded was in an amount that was proven at the hearing.*

- The amount of sanctions are to be reasonable and necessary to be sufficiently "COERCIVE" to prevent a repetition of conduct, NOT to punish for any "damages" or "attorney's fees" that may have been "suffered" by The [three] Westfalls".
- The U.S. Supreme Court has of course ruled that the purpose of civil sanctions is to COERCE, not to PUNISH. And that any sanction, when unconditionally imposed to PUNISH, not to COERCE into compliance, is a CRIMINAL sanction, requiring full due CRIMINAL process, including a finding BEYOND A REASONABLE DOUBT. See my Brief.

10. *The amount of damages for inconvenience awarded by the court was proven at the hearing by a preponderance of the evidence and not challenged by the Defendant/Counter-Plaintiff at the hearing on sanctions. The court awarded damages for inconvenience in an amount the Court found to be reasonable and necessary, supported by evidence, and appropriate considering the circumstances.*

- Not much specificity or particularity as to what is "reasonable and necessary" "considering the circumstances". Also not much specificity and particularity as to the exact "circumstances", i. e. WHAT WAS IT I WAS SUPPOSED TO HAVE DONE WRONG, WHICH ORDER, IF ANY, I WAS SUPPOSED TO HAVE VIOLATED, etc.
- "Not challenged"? See my *Oral Pleading in Writing*, and my *Closing Pleading in Writing*, in which I pleaded retaliation by official oppression.

11. *The amount of punitive damages awarded by the Court were found to be supported by the evidence and necessary under the circumstances to attempt to prevent similar future action on the part of the Defendant/Counter-Plaintiff.*

- Not much specificity or particularity as to "under the circumstances" or "similar future action"
- Also, these were not awards based on The Westfalls' pleadings, but PUNITIVE SANCTIONS imposed as a result of a MOTION FOR SANCTIONS, intended to "CHILL" my First Amendment and statutory right to access to the courts.

12. *The sanction award is directly related to the harm done.*

- A civil sanction is to COERCE compliance. This is a sanction for supposed "harm done", making it a CRIMINAL sanction, imposed without full CRIMINAL due process.

13. *The sanctions award is not excessive in relation to the harm done and the net worth of the Defendant/Counter-Plaintiff.*

- "Net worth" was never raised in any of the pleadings or proceedings. And again "harm done".
- And of course the trial judge is there so that there is no "harm done" in a civil proceeding. At least not to the tune of \$62,000. Without Judge Banner ever WARNING or REPRIMANDING or ORDERING me to do or not do anything, and in fact finding me to be "well-intentioned", while at the same time pronouncing a \$62,000 sanction against me for having made a civil RICO pleading TWO years before!

14. *The sanctions award is an appropriate amount in order to gain the relief which the Court seeks, which is to stop the Defendant/Counter-Plaintiff and others similarly situated from filing frivolous lawsuits.*

- A civil sanction is to coerce compliance in the PROCEEDINGS. A criminal sanction is to PUNISH and set an EXAMPLE for "others similarly situated". This is a CRIMINAL sanction!
- What is the "message" the Court is trying to send? **DO NOT MAKE CIVIL RICO CLAIMS**, even if you have a First Amendment and statutory right to do so!

15. *The amount of the punitive damage award is an amount narrowly tailored to the amount of harm caused by the offensive conduct to be punished.*

- "conduct to be punished"? "tailored to the harm caused"? "punitive damage"?
- Is not a civil sanction to be tailored to coerce someone into compliance with a judge's order, and to be the least amount necessary to accomplish such compliance?
- And a court cannot impose severe civil sanctions without having tried (and actually imposed!) lesser sanctions to see if they will accomplish such compliance?
- And an unconditional punishment or for a completed act is a criminal sanction, requiring full CRIMINAL process, including a finding of "beyond a reasonable doubt".

Does not Judge Banner know anything about Due Process, and the right of access to the courts, free from fear of unlawful punishment? Or is this whole "Finding" just "stuff" put down by attorney Frank C. Fleming, on a piece of paper, and Judge Banner just signed it.

16. *The Counter-Defendants suffered both economic and emotional damages as a result of the Defendant/Counter-Plaintiff's lawsuit and specifically the frivolous nature of the lawsuit caused damages which included expenses in addition to taxable court costs, attorney's fees, harassment, inconvenience, intimidation, and threats.*

- "*specifically the frivolous nature of the lawsuit caused intimidation, and threats?"*
- Not much specificity and particularity in this finding, as required by RCP Rule 13, particularly regarding such "intimidation" and "threats".

17. *The Counter-Defendants established a prima facie case that this lawsuit was filed by the Defendant/Counter-Plaintiff without merit and for the purpose of harassment. The prima facie case was made by the testimony and documents introduced as evidence by the Counter-Defendants at the summary judgment proceedings as well as at the hearing on sanctions on July 30, 23002.*

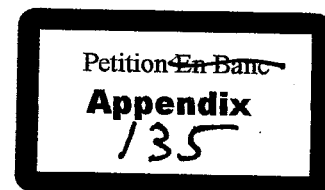
- The only "prima-facie" case is the one I am making by this response.
- That I was punished for engaging in "protected activity", i.e. for filing my civil RICO claim
- And that such punishment is **RETALIATION** as a matter of law.

18. *After the Counter-Defendants established their prima facie case, the Defendant/Counter-Plaintiff failed wholly to provide any credible evidence to support the legal theories of the Defendant/Counter-Plaintiff.*

- Credibility determinations are of course the prerogative of the JURY, whether about witnesses or documents, or whatsoever
- Also civil RICO is not a "legal theory", but STATUTORY LAW, clearly established by the U.S. Supreme Court.

Conclusions of Law

1. *The Defendant/Counter-Plaintiff wholly failed to provide any credible evidence to substantiate any of his claims concerning a RICO civil conspiracy claim.*
 - Credibility determinations are of course the prerogative of the JURY
 - Whether there was a violation of RICO, and whether I was injured "by reason of" such violation was of course an issue I asked to be made by the JURY
2. An essential element of each of Defendant/Counter-Plaintiff's claim was damages.
3. *The Defendant/Counter-Plaintiff failed to prove any damage as a direct result of any action or inaction caused by the Plaintiff or the Counter-Defendants.*
 - I did not make a civil RICO claim against the Plaintiff [Law Office]
 - "damage" is of course a JURY issue, as is "direct result" (proximate cause)
 - Also, civil RICO does not require "damage as a direct result of any action or inaction", but "injury by reason of" the RICO violative conduct, i.e. flowing from the "pattern of racketeering activity", i.e. more like producing cause.
4. *All of Defendant/Counter-Plaintiff's claims were as a matter of law unproved and untenable on the evidence presented to the Court*
 - "as a matter of law unproved"? What sort of MUMBO-JUMBO is this that Fleming put down for Judge Banner to sign?
 - And had I not asked for determination by JURY?
5. *Based upon the facts presented to support Defendant/Counter-Plaintiff's claim concerning RICO civil conspiracy charges, the Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy were completely untenable.*
 - Is this a conclusion of law (as to my civil RICO claim) made by Judge Banner, "upon the facts presented"?
 - But I had asked for a finding of fact (as to my civil RICO claim) to be made by a JURY, "upon the facts presented"
6. *The Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy charges were not based upon the law, were not a good faith extension of existing law, and were brought and continued to be urged for the purpose of harassment.*
 - **Not based on the law???** Civil RICO IS the law! 18 U.S.C. § 1964(c)
7. *The court concludes as a matter of law that Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy were brought for the purpose of harassment.*
 - Since when has the filing of a civil RICO claim become "harassment" "as a matter of law"???
8. *The Defendant/Counter-Plaintiff's behavior in bringing and prosecuting this frivolous lawsuit was a violation of one or more of the following: \$9,000 et seq. Civ. Prac. & Rem. Code, \$10,000 et seq. Civ. Prac. & Rem. Code, and/or Rule 13, T.R.C.P.*



- \$9,000 et seq. does not apply to my civil RICO nor my DTPA cause of action pleaded (in essence because it is not a tort but a statutory law claim). Also the court has to first give me a warning under \$9,000, and a 90 day opportunity to withdraw any pleading.
- "behavior" does not have much specificity or particularity.
- Even if it were a "violation", Judge Banner cannot **unconditionally punish** me for a completed act.
- Such unconditional punishment, without full criminal process, is outlawed as a matter of law.]

9. *The Court has the power to award both actual and punitive damages against the Defendant/Counter-Plaintiff for the filing and prosecution of a frivolous lawsuit. This authority stems from one or more of the following \$9.00 et seq. Civ. Prac. & Rem. Code, \$10,000 et seq. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.*

- **YES, but only to COERCE, not to unconditionally punish or for a completed act, without full due CRIMINAL process.**
- **So says the U.S. Constitution and U.S. Supreme Court!**

10. *The behavior and attitude of the Defendant/Counter-Plaintiff in filing and prosecuting this claim against the Counter-Defendants calls out for the award of both actual and punitive damages to be assessed against the Defendant/Counter-Plaintiff.*

- Judge Banner found me "well-intentioned".
- Also, I did not get to "prosecute" this claim. Judge Banner granted summary judgment.

11. *The Counter-Defendants were successful in presenting a prima facie case to the Court on the issue of sanctions. After the prima facie case was made, the burden of proof shifted to the Defendant/Counter-Plaintiff and the Defendant/Counter-Plaintiff failed in its effort to prove good faith in the filing of the RICO civil conspiracy claims.*

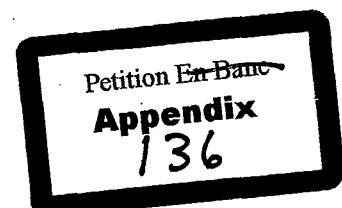
- There is no "burden-shifting" upon a motion for sanctions!
- It is not up to me to prove good faith. Good faith is "presumed". Judge Banner even found "well-intentioned"!

12. *The appropriate award for actual damages as a result of the filing and full prosecution of this frivolous lawsuit is an award of \$50,085.00 in attorney's fees. The Court makes this award under power granted to the Court by \$9,000 et seq. Civ. Prac. & Rem. Code, \$10,000 et seq. civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.*

- Damages only come into play under \$9,000. This section however does not apply, as there was no finding of bad faith under the "safe-harbor" provision of this section. The other sections do not allow for assessing attorney's fees for "damages", ONLY to "coerce"
- Under the "common law"?????

13. *The appropriate sanction for the inconvenience suffered by the Counter-Defendants for the filing and full prosecution of this frivolous lawsuit is an award of \$1,000.00 to Christina Westfall and \$1,800.00 to Stefani Podvin, to be paid by the Defendant/Counter-Plaintiff to the Counter-Defendants.*

- See above



14. *The appropriate punitive sanction for the filing and full prosecution of this frivolous lawsuit is an award of \$5,000.00 to Christina Westfall and an award of \$5,000.00 to Stefani Podvin, to be paid by the Defendant/Counter-Plaintiff to the Counter-Defendants.*

- "Full prosecution"? Judge Banner granted summary judgment.

15. *The award of punitive damages is directly related to the harm done.*

- The only legal sanctions are of course those to "coerce", and they do NOT relate to the harm done, but to what is necessary to "coerce" into compliance. I never disobeyed NOTHING!

16. *The award of punitive damages is not excessive.*

- See above

17. *The award of punitive damages is an appropriate amount to seek to gain the relief sought which is to stop this Defendant/Counter-Plaintiff, and others like him, from filing similar frivolous lawsuits.*

- Judge Banner had found me "well-intentioned"
- Are there special sanctions for filing "similar" frivolous suits, i.e. civil RICO?

18. *The amount of the punitive damage award is narrowly tailored to the harm done.*

- Does not the law say it should be tailored to "coerce", and that a sanction for "harm done", i.e. a "completed act", is by law a CRIMINAL sanction?

19. *Authority for the punitive damage award is derived from \$10,000 et seq. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.*

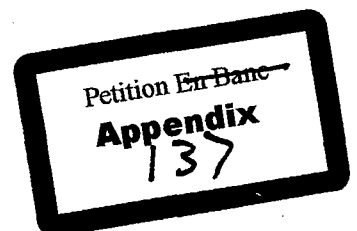
- No specificity and particularity as to just exactly what I was supposed to have done.
- No "authority" of course over-rides the Constitution and the Supreme Court, i.e. that a punitive (as opposed to "coercive") sanction cannot be imposed except by full CRIMINAL process.

Any finding of fact herein which is later determined to be a conclusion of law, is to be deemed a conclusion of law regardless of its designation in this document as a finding of fact. Any conclusion of law herein which is later determined to be a finding of fact, is to be deemed a finding of fact regardless of its designation in this document as a conclusion of law.

SIGNED THIS _____ day of September, 2003

JUDGE PRESIDING

See next page for signature
and Certificate of Service.



Udo Birnbaum

UDO BIRNBAUM

540 VZ CR 2916

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Certificate of Service

This is to certify that on this the ¹⁴/~~13~~ day of October, 2003 a copy of this document was sent by Regular Mail to attorney Frank C. Fleming at PMB 305, 6611 Hillcrest Ave., Dallas Texas 75205-1301. A copy of this document has also been provided to Judge Paul Banner through Pam Kelly, Court Coordinator for the 294th District Court in Canton, Texas.

Udo Birnbaum

Udo Birnbaum

